A TREATISE

ON THE

COMMON AND STATUTE LAW OF THE STATE OF NEW YORK

RELATING TO

INSOLVENT DEBTORS,

INCLUDING

ARTICLE FIRST, SECOND AND THIRD OF TITLE 1, CHAPTER XVII OF THE CODE OF CIVIL PROCEDURE,

AND THE

LAW OF VOLUNTARY ASSIGNMENTS

FOR THE BENEFIT OF CREDITORS,

INCLUDING THE

General Assignment Act of 1877, as amended;

TOGETHER WITH A CHAPTER ON

COMPOSITIONS AND COMPOSITION DEEDS,

AND AN

APPENDIX OF FORMS.

By JAMES L. BISHOP,

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THIRD EDITION.

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PREFACE TO THE THIRD EDITION.

Another edition of this book having been called for, the previous editions have been carefully revised, and such additions have been made as the changes of the statutes and the progress of the decisions have rendered necessary.

The amendment of the General Assignment Act, attempting to restrict the right of preference to one-third of the estate of the debtor, has provoked extensive litigation, which has resulted in the demonstration of the insuperable difficulty of preventing preference by failing debtors in the absence of a National Bankrupt Law.

The zeal of creditors to secure priorities by attacking general assignments on the ground of fraud has added extensively to the reported cases relating to the procedure, as well as to the substantive law upon that subject. The chapters bearing upon this branch of the law will be found to have increased in volume proportionally more than those devoted to other headings.

In the preparation of the chapter relating to foreign and domestic assignments, the author is greatly indebted to the learning and industry of Mr. Robert P. Harlow.

New York, February, 1895.

PREFACE TO SECOND EDITION.

In this edition the statutory proceedings for the discharge of an insolvent from his debts, and for his exemption from arrest, and for the discharge of an imprisoned judgment-debtor from imprisonment, as they now appear in the Code of Civil Procedure, are given, together with notes and forms. The decisions of the courts of this State relating to general assignments, and to the construction and effect of the General Assignment Act, have been brought down as nearly to date as possible. The General Assignment Act as amended and the Rules of the Court of Common Pleas of the city of New York, relating to general assignments, are printed entire in the Addenda for convenience of reference, although the various sections of the statute and the rules are cited under their appropriate topics in the body of the work.

The Forms have been revised, and the editor is indebted to Mr. William S. Kieley of the clerk's office of the Court of Common Pleas, and Mr. Thomas H. York of the clerk's office of the County Court of Kings County, for valuable suggestions which add to their fullness and accuracy.

The kind reception accorded by the profession to the previous edition of this work encourages the editor to hope that a similar indulgence will be extended to the present effort.

New York, November, 1884.

PREFACE TO FIRST EDITION.

THE purpose of this work is to present, in a convenient and harmonious form, the statutes and decisions of the State of New York, constituting what may be called the Insolvency System of the State.

This plan includes a review of the various articles of the first title, of the sixth chapter, of the second part of the Revised Statutes, relating to insolvent debtors, among which are embraced the important statute for the discharge of Insolvent Debtors from their debts, known as the "Two-thirds Act," and also the statutes for the exoneration of insolvents from arrest and their discharge from imprisonment on execution in civil actions, the latter of which is sometimes called the "Fourteen-day Act."

The scope of the work also covers a consideration of the law of general assignments for the benefit of creditors. This subject has of late been regulated to some extent by "The General Assignment Act of 1877." The attempt is here made to present the law of assignments as expounded by our courts with a special view to that statute, and also to state and illustrate, as fully as the adjudged cases warrant, the practice under that act.

The statute, however, has not materially altered the common law in reference to the validity and effect of such instruments, and the rules of law established by the courts in an extremely numerous class of cases have necessarily fallen under review.

In conclusion, a brief chapter on the law of Compositions and Composition Deeds has been added.

These various topics, although independent of each other, constitute together an important subdivision of the law of debtor and creditor, and through them must be worked out in the main, the problems which arise in cases of insolvency. Indeed, no other distinctive system of bankruptcy or insolvency has ever existed under the laws of this State.

The repeal of the Federal Bankrupt Law, has again brought into full operation this system of law—if system it may be called —and it now remains to be seen how fully it will meet the requirements of the present conditions of business.

Some changes are doubtless desirable and are to be expected, but while the law continues as it is, and even after any legislation which may reasonably be anticipated, the distinctive branches of the law here discussed must continue to form an important part of professional study.

The author is conscious, as every one must be who undertakes the investigation of any extended branch of jurisprudence, of the wide difference between that which he has accomplished and that which remains to be done. He submits the results of his labor, with no pretension to having done more than to render somewhat less difficult of access the scattered declarations of the law contained in the statutes and reports.

New York, November, 1878.

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INSOLVENT DEBTORS.

CHAPTER I.

INTRODUCTORY.

INSOLVENCY AND INSOLVENT LAWS.

§ 1. **Definitions.**—Insolvency is the inability to pay one's debts. Inability to pay, however, is frequently qualified by circumstances of time and manner.[1] Hence the exigencies which will establish insolvency in one class of cases may fail to do so in another. The word consequently often varies in signification according to the several occasions of inquiring into it. Cowen, J., in *Herrick* v. *Borst*, 4 Hill, 650, 654. As the term is used in insolvent and bankrupt laws, especially as applied to traders, it means the condition of a person unable to pay his debts as they fall due, in the usual course of trade or business. Ellenborough, C. J., in *Bayly* v. *Schofield*, 1 M. & S. 338, 350; Field, J., in *Toof* v. *Martin*, 13 Wall. 40; *Buchanan* v. *Smith*, 16 Wall. 277; *In re Randall & Sunderland*, 3 N. B. R. 18; *Brouwer* v. *Harbeck*, 9 N. Y. 589; *Thompson* v. *Thompson*, 4 Cush. (Mass.) 127; *Lee* v. *Kilburn*, 3 Gray (Mass.), 594; 2 Bell's Com. 162. In this restricted sense a person may be insolvent although he may be able to pay all his debts at some future time, upon a settlement and winding-up of his affairs. *Thompson* v. *Thompson*, 4 Cush. (Mass.) 127; *Ferry* v. *Bank*

[1] "It is true that 'insolvency' and 'inability to pay' are synonymous, but solvency does not mean ability to pay at all times, under all circumstances, and everywhere on demand, nor does it require that a person should have in his possession the amount of money necessary to pay all claims against him." Robertson, Ch. J., in *Walkenshaw* v. *Perzel*, 4 Robt. 426, 433; s. c. 32 How. Pr. 233. A collection of cases bearing on the definition of insolvency will be found in note to *First Nat. Bank* v. *Walton*, 5 L. R. A. 765.

of Cent. New York, 15 How. Pr. 445 ; *Bell* v. *Ellis*, 33 Cal. 620. In its popular and general sense insolvency is used to denote the insufficiency of the entire property and assets of an individual to pay his debts.[1] *Toof* v. *Martin*, 13 Wall. 40 ; *Van Riper* v. *Poppenhausen*, 43 N. Y. 68, 75 ; *Curtis* v. *Leavitt*, 15 N. Y. 9, 141 ; *Walkenshaw* v. *Perzel*, 4 Robt. 426 ; s. c. 32 How. Pr. 233 ; *Churchill* v. *Wells*, 7 Cold. (Tenn.) 364. And it is in this sense that the word seems to have been used in the statute of this State (1 R. S. 591, § 9, Repealed L. 1882, c. 402), prohibiting assignments and conveyances by corporation when insolvent or in contemplation of insolvency, with intent to give a preference. *Curtis* v. *Leavitt*, *supra*, 138, 139 ; see *Dutcher* v. *Importers' & Traders' Nat. Bank*, 59 N. Y. 5 ; *Paulding* v. *Chrome Steel Co.* 94 N.Y. 334.

What constitutes insolvency and what proof is sufficient to establish the fact are questions of importance in a variety of actions,[2] in which the rights of individual creditors are concerned.

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[1] In the case of *Queen* v. *Saddlers' Co.* (10 H. L. Cas. 404), much discussion was had upon the signification of the term insolvency. In that case a chartered company had enacted a by-law which provided "that no person who has become a bankrupt, or otherwise insolvent, shall hereafter be admitted a member of the court of assistants of this company." The relator was elected a member of that court, but was at the time not possessed of sufficient means to pay his liabilities, although continuing business without default. A short time after he was declared bankrupt. The judges were nearly equally divided in opinion as to whether the relator was to be regarded as insolvent within the meaning of the by-law at the date of his election. The Lords, however, were of the opinion that the by-law pointed to some overt act of insolvency, such as taking the benefit of the insolvent law, or stopping payment, or compounding.

[2] Thus, a surety who has requested the creditor to sue the principal at a time when he was solvent may be discharged on proof that the principal has subsequently become insolvent. In such a case insolvency is said to mean that the debtor is in such a condition that the demand cannot be collected out of his property by due process of law (Nelson, J., in *Huffman* v. *Hulbert*, 13 Wend. 377), though Cowen, J., in *Herrick* v. *Borst* (4 Hill, 650, 657), thought the test should be whether the debtor was able to pay his debts according to the ordinary usage of trade. See *Marsh* v. *Dunckel*, 25 Hun, 167. A vendor can only exercise the right of stoppage *in transitu* against an insolvent or bankrupt buyer, and, in that connection, by insolvency is meant a general inability to pay one's debts, and of this inability to pay one just and admitted debt would probably be sufficient evidence. Benjamin on Sales (Bennett's Ed.), § 837, and cases cited. So a vendor in possession of property on

But these are instances of what may be termed simple insolvency as distinguished from notorious or legal insolvency.[1]

Such notorious or legal insolvency, which is the principal topic of the present treatise, is the situation of a person who has done some notorious act to divest himself of all his property, as making an assignment,[2] or applying for relief, or having been proceeded against *in invitum* under bankrupt or insolvent laws.

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the insolvency of the vendee may exercise his right to retain the goods as security for the price, and in that case the fact that the vendee's commercial paper has been dishonored, and his property taken under attachment in an action in which judgment is subsequently recovered by default if unexplained, is proof of insolvency. *Tuthill* v. *Skidmore*, 124 N. Y. 148. So in cases where a creditor is permitted to proceed against the estate of deceased partner, upon proof of the insolvency of the survivors, the inability to collect the debt against the survivors by process of law, as evidenced by the return of an execution unsatisfied, will lay the foundation for such an action, although the survivor may have had property out of which the execution might have been satisfied, which was not discovered by the sheriff. *Pope* v. *Cole*, 55 N. Y. 124; see *Wheelock* v. *Kost*, 77 Ill. 296; *Hope Mutual Ins. Co.* v. *Perkins*, 2 Abb. Dec. 383. The non-payment of a check drawn by a commercial house upon its bankers is evidence of insolvency. *Brown* v. *Montgomery*, 20 N. Y. 287. In *Sterrett* v. *Third Nat. Bank*, 53 Supm. Ct. (46 Hun), 22, where the question litigated was whether one of the members of a firm had an attachable interest in the firm assets, and this was conceded to depend upon the solvency of the firm at the time of the attachment, it appeared that the firm assets consisted largely of oil certificates, which were hypothecated to pay the firm debts, and which fluctuated in value from day to day. Upon the day of the attachment the market value of the oil certificates was sufficient to have furnished a small surplus, but subsequently would have been insufficient. The court, Bradley, J., said (p. 27): "When the property is of such character that it has constantly a fluctuating market price, the financial condition of the firm owning it is not necessarily established by the fact that the price for an hour or a day would produce an excess of its liabilities, so as to furnish an interest in the individual partners and subject the firm property to the process of their respective creditors, especially if it is so situated that the firm cannot make such transitory market available, because the interest of the partners severally is only in the surplus which may remain after the winding-up its business and the payment of the partnership debts, and is dependent upon the result, which requires an opportunity to do it."

[1] The fact of insolvency is often important upon the question of fraudulent intent. In such cases the character of the debtor's business is an element to be taken into consideration. The evidence which would justify a finding of insolvency in the case of a banker or merchant might be insufficient in the case of a farmer. *First Nat. Bank* v. *Walton*, 5 L. R. A. 765, and see cases collected in note.

[2] *Cunningham* v. *Norton*, 125 U. S. 77.

This is the sense of the word as employed in the statutes of the United States, giving a priority to the United States in cases of insolvency. R. S. U. S. § 3466 ; *Prince* v. *Bartlett*, 8 Cranch, 431 ; s. c. *sub. nom. Bartlet* v. *Prince*, 9 Mass. 431 ; *Thelusson* v. *Smith*, 2 Wheat. 396. And such acts are, as against the debtor, conclusive evidence of insolvency. *Morewood* v. *Hollister*, 6 N. Y. 309.

§ 2. **Bankruptcy and insolvency distinguished.**—Using the words now as indicating a legal status, bankruptcy is the position in which a man becomes placed when he has committed an act of bankruptcy and is thereupon adjudged a bankrupt ; insolvency is a man's position when he becomes subject to the laws relating to insolvents, and is brought within the jurisdiction of the insolvent laws. Cockburn, Ld. Ch. J., in *Queen* v. *Saddlers' Co.* 10 H. L. Cas. 404, 453. This brings into distinction two systems of laws which were formerly much more widely distinguished than at present. The English bankruptcy system, as established by the earlier statutes, applied to traders only ; it did not provide any method by which a debtor could voluntarily bring himself within the operation of the bankrupt laws, nor did it discharge the bankrupt from his debts. Down to 4 and 5 Anne, the bankrupt continued liable for his debts, and the dividends under the commission were only considered a payment *pro tanto*. Kent, Ch. J., in *Murray* v. *De Rottenham*, 6 Johns. Ch. 52, 64.

But the benefits of a discharge were available only to traders, and to such traders only as were proceeded against *in invitum*. There remained, therefore, a large class of insolvent debtors liable, so long as imprisonment for debt was an ordinary remedy, not only to be stripped of their property, but also to be deprived of their liberty, without relief from the bankrupt law or from any other source.[1] It was to meet the necessities of this

[1] "If a man be taken in execution, and lie in prison for debt, neither the plaintiff, at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink, or clothes ; but he must live on his own, or on the charity of others ; and if no man will relieve him, let him die in the name of God, says the law ; and so say I." Hyde, Justice, in *Manby* v. *Scott*, 1 Mod. 32 (A.D. 1663).

class of debtors that insolvent laws were first enacted, and the relief afforded consisted not in discharging the insolvent from his debts, but simply in exonerating his person from imprisonment. These laws resembled bankrupt laws only in so far as they both contemplated an equal division of the debtor's present effects among his creditors *pro rata*. As we shall presently see, the English insolvent laws were gradually extended to include the discharge of the debtor from his debts as well as from imprisonment, while the bankruptcy laws were also extended to include all classes of debtors, and thus the two systems were brought into assimilation.

In this country the term bankrupt law has been, for the most part, confined to such enactments as have been made by Congress, under its constitutional power to establish uniform laws upon the subject of bankruptcies throughout the United States, while the laws passed by the various States, whether properly insolvent or bankrupt laws, have been designated as insolvent laws. "No distinction," says Justice Story, "was ever practically or even theoretically attempted to be made between bankruptcies and insolvencies, and a historical review of the colonial and State legislation will abundantly show that a bankrupt law may contain those regulations which are generally found in insolvent laws, and that an insolvent law may contain those which are common to bankrupt laws. Story on Cons. § 1111. See Ch. J. Marshall, in *Sturges* v. *Crowninshield*, 4 Wheat. 122, 195.

§ 3. **English insolvent legislation.**—The first English act for the relief of insolvent debtors was enacted in 1670 (22 & 23 Chas. II, c. 20). Bronson, J., in *Sackett* v. *Andross*, 5 Hill, 327, 349. This act was confined to such debtors as were in prison upon a day specified in the act. The debtor was discharged from imprisonment, but the debt could still be enforced against his property, and the creditor might, if he chose, still retain him in custody by paying a small stipend for his support. This act was followed by many others of a similar character, passed for the purpose of relieving the crowded condition of the jails, and at such intervals as the caprice of parliament dictated.[1]

[1] Among them are the following: 6 Geo. I, c. 22; 11 Geo. I, c. 21; 2 Geo

At the time of our revolution it is said that there were not less than thirty British statutes on the subject. Bronson, J., in *Sackett* v. *Andross*, 5 Hill, 327, 349.

In 1697 the experiment appears to have been tried of discharging the debtor by means of a composition upon consent of two-thirds in number and value of his creditors (8 & 9 Wm. III, c. 18), but the result seems to have been unsatisfactory, and the act was repealed the next year (9 & 10 Wm. III, c. 29).

The first general and permanent statute was that of 32 Geo. II, c. 28, commonly called the Lord's Act, from the circumstance of its having originated in the House of Lords. Relief was limited to prisoners actually in custody upon executions for debts under £100 (afterward extended to £200, 33 Geo. III, c. 5). It was upon this act that our statute for the relief of debtors, with respect to the imprisonment of their persons, was modelled. McCoun, V. C., in *Van Wezel* v. *Van Wezel*, 3 Paige, 37, 41.

In all insolvent acts, down to 1774, a power was given to take in execution for any former debt the future effects of the insolvent, but this clause was omitted in 14, 16 & 18 Geo. III, where it was provided, that only real estate or money in the funds acquired after such discharge should be liable for former debts. *Mason* v. *Vere*, 2 Wm. Bl. 1310, Blackstone, J. In 1813 (53 Geo. III, c. 102), "The Court for Relief of Insolvent Debtors," was originally constituted, and a general system was provided for the discharge of all imprisoned debtors who had been in actual custody for three months, upon a full surrender of their property, and the court for the relief of insolvent debtors was established. Under this act a contingent discharge was granted as to the insolvent's debts. The court was authorized to enter up a judgment against the insolvent in favor of all his creditors, and that judgment could be enforced on application to the court, showing that the debtor had subsequently become

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II, c. 20; 2 Id. c. 22; 3 Id. c. 27; 10 Id. c. 26; 11 Id. c. 9; 16 Id. c. 17; 21 Id. c. 31; 28 Id. c. 13; 29 Id. c. 18; 1 Geo. III, c. 17; 2 Id. c. 2; 5 Id. c. 41; 9 Id. c. 26; 14 Id. c. 77; 18 Id. c. 52; 21 Id. c. 63; 41 Id. c. 70; 44 Id. c. 108; 45 Id. c. 3; 46 Id. c. 108; 51 Id. c. 125; 53 Id. c. 102; 1 Geo. IV, c. 119; 7 Id. c. 57; 11 Geo. IV & 1 Wm. IV, c. 38.

able to pay; the object being not only to obtain an equal distribution of the debtor's present estate, but also of his future acquisitions. *Baker* v. *Sydee*, 7 Taunt. 179; see *Carpenter* v. *White*, 3 J. B. Moore, 231. In the year 1826, the various pre-existing acts were abolished, and a new statute, 7 Geo. IV, c. 57, became law. This act consolidated the provisions of previous acts, and added others. In 1838 (1 & 2 Vict. c. 110), arrest upon *mesne* process for debts exceeding £20 was abolished, except in cases where proof was made of the intention of the defendant to leave England. Provision was also made for discharge from liability to imprisonment on final process upon the surrender by the debtor of all his property. By subsequent statutes (5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96), this legislation was still further extended. In 1861 (24 & 25 Vict. c. 134), the court for the relief of insolvent debtors was abolished; the bankrupt law was extended to non-traders as well as traders, and the original distinction between the insolvent and bankrupt systems became substantially obliterated.

§ 4. **Insolvent legislation in the State of New York.**—Except for a brief interval (from 1770 to 1784), insolvent acts have uniformly existed in the State of New York ever since it was an independent government. *Mather* v. *Bush*, 16 Johns. 233, 234. These acts have been both bankrupt and insolvent laws. They have discharged the debtor from his debts, and have also relieved his person from imprisonment. A general act for the relief of insolvent debtors, permitting the debtor, in conjunction with three-fourths of his creditors, to petition for his discharge from his debts, existed in the colony of New York, from 1761 to 1770. Livingston & Smith's Ed. of Laws, vol. II, pp. 62, 216; Van Schaick's Ed. vol. I, pp. 348, 392; Jones & Varick's Ed. vol. I, p. 131; Id. vol. II. p. 408.

A similar act was passed by the State Legislature in April, 1784, which was at various times amended, and on March 21, 1788 (2 Greenl. 204), was passed the act commonly called the three-fourths act, which was revised April 3, 1801 (1 K. & R. 428), and continued in force until the act of April 3, 1811 (6 Web. & Sk. 200), by which a debtor was discharged from his debts on his own petition merely, and on the surrender of his prop-

erty without the concurrence or consent of any of his creditors.[1] This act did not continue for a year, but was repealed by the act of February 14, 1812 (6 Web. & Sk. 349), and the act of 1801 thereupon revived and continued in force until the revision of the laws in 1813, when the act of April 12, 1813 (1 R. L. 460), was passed, allowing an insolvent debtor, in conjunction with two-thirds of his creditors, to petition for a discharge. This act was amended from time to time, and by the act of February 28, 1817 (Laws of 1817, c. 55), provisions were inserted for proceedings by creditors to compel assignments by debtors imprisoned on execution. This act was fully revised and incorporated into the Revised Statutes of 1830; that portion of it relating to the discharge of a debtor on his petition, in conjunction with two-thirds in amount of his creditors, forming the third article of chapter six, of title one, of part two, and the portion relating to compulsory proceedings on the part of creditors, forming the fourth article of the same chapter.

Each of these articles has now been repealed. The provisions relating to the discharge of an insolvent from his debts, have been incorporated into the Code of Civil Procedure, under article first, of title one, of chapter xvii. This article is considered in detail hereafter. The provisions relating to proceedings to compel assignments by debtors imprisoned on execution, have not been revived.

The other class of statutes, more strictly denominated insolvent laws, which furnished relief to debtors with respect to the imprisonment of their persons, have also existed in this State from an early time. The act of February 13, 1789 (2 Greenl.

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[1] It was this act which was declared unconstitutional as to debts contracted before its passage in the famous case of *Sturges* v. *Crowninshield* (4 Wheat. 122). Of this act Chan. Kent says (*Hicks* v. *Hotchkiss*, 7 Johns. Ch. 297, 304): "There never was a law that held out more alluring and more dangerous temptations to debtors to forget what they owed to good faith, and to disregard the moral obligation of contracts. Its effects upon the community were rapid and deplorable. The evils of it were contagious, and spread like a pestilence. The public became alarmed, and wise and good men, and men of property, were deeply excited. Petitions for the repeal of the act flowed in from every quarter to the next Legislature, and it was one of the first acts of the session of 1812 (Sess. 35, c. 8) to abolish the law of the preceding year, without waiting to prepare another and better system in its stead."

231), as amended March 10, 1791 (2 Greenl. 355), usually called the £1,000 Act, was framed upon the basis of the English statute of 32 Geo. II, c. 28. It provided a system for the discharge of debtors imprisoned on execution for an amount not exceeding £1,000, upon their executing an assignment of their property for the benefit of the creditors who have charged them in execution. This act remained in force until the revision of 1813, when the act of April 9, 1813 (1 Laws of 1813, c. 81), was passed. By this act debtors charged in execution for a sum less than $500, and such as were held on execution for an amount exceeding that sum, who had been imprisoned for three months, became entitled to a discharge upon terms similar to those prescribed in the previous act.

In 1819 (Laws of 1819, c. 101), was passed what was entitled "An Act to abolish imprisonment for debt in certain cases." That act provided for the exoneration of insolvent debtors from arrest or imprisonment on debts arising *ex contractu*, upon a surrender of all their property for the benefit of all their creditors. The Revised Statutes retained the substance of each of these enactments. The act of 1819 was incorporated in the provisions of article five, of title one, of chapter five, of part two, providing for voluntary assignments by an insolvent, for the purpose of exonerating his person from imprisonment; while the sixth article of the same title contained the substantial requirements of the act of April 9, 1813, and provided for voluntary assignments by a debtor imprisoned in execution in civil causes.

Each of these articles has been repealed and substantially reenacted by the Code of Civil Procedure. The provisions for exoneration from arrest, comprise article second, of title one, of chapter xvii, and the provision for the discharge of an imprisoned judgment-debtor from imprisonment, constitute article third of the same title. Each of these articles form a portion of the subject-matter of the present work.

§ 5. The right of the State to legislate on the subject of bankruptcy and insolvency.—The Constitution of the United States provides that Congress shall have power to establish uniform laws upon the subject of bankruptcies throughout the United States. It was contended for the first time, in the case

of *Sturges* v. *Crowninshield* (4 Wheat. 122 [A.D. 1819]), that this grant of power to Congress was exclusive, and that no State had authority to pass a bankrupt law. This position was not sustained; on the contrary, the law was declared to be (p. 208) "that, since the adoption of the Constitution of the United States, a State has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, within the meaning of the Constitution, and provided there be no act of Congress in force to establish a uniform system of bankruptcy, conflicting with such law." And this position has ever since remained unquestioned. *Ogden* v. *Saunders*, 12 Wheat. 213; *Boyle* v. *Zacharie*, 6 Pet. 635; Cooley's Cons. Lim. p. 294 (6th ed. p. 356).

Some conflict of opinion has existed as to the extent and limit of the proviso to the rule, when Congress has exercised its constitutional power and established a bankrupt law. This question came before Mr. Justice Story, in *Ex parte Eames* (2 Story, 322), after the passage of the bankrupt act of 1841, and he there held that the insolvent laws of a State, as to persons and cases within the provisions of the bankrupt act, were completely suspended. In that case, however, the insolvent had filed his petition in bankruptcy. *Griswold* v. *Pratt* (9 Metc. [Mass.] 16) went further. It was there held that when a United States bankrupt act was in force, if the debtor and his property were subject to the operation of that act, proceedings against him under the State insolvent laws were unauthorized and void, and that the actual institution of proceedings in bankruptcy was not necessary to produce that result. And this opinion is supported by abundant authority. *Tua* v. *Carriere*, 117 U. S. 201; *In re Reynolds*, 9 N. B. R. 50; S. C. 8 R. I. 485; *Shears* v. *Solhinger*, 10 Abb. Pr. N. S. 287; *Blanchard* v. *Russell*, 13 Mass. 1; *Day* v. *Bardwell*, 97 Mass. 246; *Lothrop* v. *Highland Foundry Co.*, 128 Id. 120; *Van Nostrand* v. *Barr*, 2 N. B. R. 485; *Larrabee* v. *Talbott*, 5 Gill (Md.), 426; *Chamberlain* v. *Perkins*, 51 N. H. 336; *Rowe* v. *Page*, 54 Id. 190, 194. In *Meekins* v. *Creditors* (19 La. Ann. 497), it is stated broadly that the legal effect of the exercise by Congress of the power vested in it by the Constitution is to repeal the insolvent laws of each particular State.

In opposition to these views, it has been declared by the courts

of several of the States that the effect of the enactment of a Federal bankrupt law is not to annul or to wholly suspend the insolvent laws of the several States, but to limit their operation to such cases as were not actually brought within the operation of the National act. *Reed* v. *Taylor*, 32 Iowa, 209 ; *Geery's Appeal*, 43 Conn. 289 ; *Ex parte Ziegenfuss*, 2 Ired. L. (N. C.) 463 ; *Shryock* v. *Bashore*, 13 N. B. R. 481 ; *Shepardson's Appeal*, 36 Conn. 23 ; *Hawkins' Appeal*, 34 Conn., 548 ; *Beck* v. *Parker*, 65 Penn. St. 262 ; *Barber* v. *Rodgers*, 71 Penn. St. 362 ; see *Boese* v. *King*, 108 U. S. 379, s. c. 78 N. Y. 471 ; rev'g s. c. 17 Hun, 270.

The conflict of opinion, however, extends only to such State insolvent laws as discharge the debt, and are therefore strictly bankrupt laws. Laws which relieve the debtor from imprisonment merely, leaving the creditor at liberty to pursue his property, are not inconsistent with the exercise by Congress of its constitutional authority over the subject of bankruptcies. *Sturges* v. *Crowninshield*, 4 Wheat. 122 ; *Mason* v. *Haile*, 12 Id. 370 ; *In re Jacobs*, 12 Abb. Pr. N. S. 273 ; *Shears* v. *Solhinger*, 10 Id. 287 ; *Donnelly* v. *Corbett*, 7 N. Y. 500 ; *Woodhull* v. *Wagner*, Bald. 296.

§ 6. When State insolvent laws impair the obligation of the contract.—A further objection has been taken to the enactment of State insolvent laws, upon the ground that such laws impair the obligation of contracts, and are, consequently, repugnant to that provision of the Constitution of the United States which prohibits a State from passing such laws. This question was elaborately argued in the Supreme Court of the United States, in *Sturges* v. *Crowninshield* (4 Wheat. 122), and in *Ogden* v. *Saunders* (12 Wheat. 213). The decision of that court, which has ever since been regarded as final, was, that such laws were valid as to contracts made subsequently to the enactment of the law, because, being made after the law, the parties were presumed to have had reference to the law, and impliedly to have made it part of the contract ; but as to contracts entered into before the passage of the act, a discharge under a State insolvent law was wholly inoperative. Whatever may be said of the grounds upon which the decision was placed (see remarks of

Gardner, J., in *Donnelly* v. *Corbett*, 7 N. Y. 500, 505; and see *Olyphant* v. *Atwood*, 4 Bosw. 459, 470; *In re Reiman & Friedlander*, 11 N. B. R. 21), the rule is now so well settled as to be beyond question. *Sturges* v. *Crowninshield*, *supra*; *Ogden* v. *Saunders*, *supra*; *Cook* v. *Moffat*, 5 How. 295, 309; *Boyle* v. *Zacharie*, 6 Pet. 348; *Wyman* v. *Mitchell*, 1 Cow. 316, 321; *Mather* v. *Bush*, 16 Johns. 233; *Roosevelt* v. *Cebra*, 17 Id. 108; *Baldwin* v. *Hale*, 1 Wall. 223; *Gilman* v. *Lockwood*, 4 Wall. 409; *Pratt* v. *Chase*, 44 N. Y. 597.

The consideration of the extent and qualifications of the general rule here stated will be reserved for discussion when we shall consider the effect of the insolvent's discharge. (See Chap. IV.)

Insolvent laws which merely release the debtor from imprisonment or from liability to arrest, affect the remedy only, and are open to no constitutional objection. "Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation." *Sturges* v. *Crowninshield*, 4 Wheat. 122, 200. And it is quite immaterial whether the debt was contracted before or after the law was passed. *Mason* v. *Haile*, 12 Wheat. 370; *Beers* v. *Haughton*, 9 Pet. 329; *In re Jacobs*, 12 Abb. Pr. N. S. 273.

§ 7. **General assignments for creditors.**—Apart from the statutory proceedings which have been mentioned, by which a debtor may seek relief from the burden of his debts, or free himself from the extreme enforcement of them against his person, the common law permits a failing debtor to place his property beyond the direct pursuit of creditors by a conveyance of it to an assignee in trust for his creditors. Such conveyance may be made to furnish a speedy and economical method for the distribution of a debtor's estate among those who are justly entitled to it. They do not, however, afford any direct relief to the debtor. The dividends paid to creditors amount only to a payment *pro tanto*, and the debtor is still liable to legal process as before. *Butler* v. *Thompson*, 4 Abb. N. C. 290; *Waterman* v. *Sprague Mfg. Co.* 14 R. I. 43. Under the well-established rules of common law they do, however, furnish a method by which an insolvent debtor may make payment of such debts

as he may choose to prefer, to the exclusion of those who might otherwise obtain a priority (see Chap. XI, Preferences). They afford an opportunity also for creditors, if they are so disposed, to make an amicable settlement with their debtor, while his property is protected from seizure by any individual creditor. Beyond these advantages an honest general assignment can work no benefit to a debtor.

Under the insolvent laws, as we shall see, the debtor's property remains in him until after an assignment is ordered. The preliminaries to obtaining such an order, if the requisite number of creditors is obtained, may necessarily occupy so long a time that, before the property is divested from the debtor, diligent creditors may have exhausted the estate.

A failing debtor, therefore, who desires an equal distribution of his estate among his creditors, has, in the absence of a National bankrupt law, as a general rule, no choice but to execute a general assignment, and such conveyances have been the usual resort of failing debtors in this State for many years. The method of making such assignments and of administering the trusts created by them was first regulated by statute in 1860 (Laws of 1860, c. 348). That act was several times amended, and finally repealed and replaced by the general assignment act of 1877 (Laws of 1877, c. 466, amended by Laws of 1878, c. 318; Laws of 1884, c. 328; Laws of 1885, c. 380; Id. c. 464; Laws of 1886, c. 283; Laws of 1887, c. 503; Laws of 1888, c. 294). Both the statute and common law relating to these instruments, and the rights and duties created by them, are discussed in the following pages.

§ 8. Division of the subject.—The subject of the present work is divided in the following manner: Part I treats of the proceedings for the discharge of an insolvent from his debts, commonly called the "Two-thirds Act," being article one, of title one, of chapter xvii, of the Code of Civil Procedure. Part II presents the proceedings for exemption from arrest or discharge from imprisonment of an insolvent debtor, and also the proceedings for discharge of an imprisoned judgment-debtor from imprisonment, commonly known as the Fourteen Days Act, being articles second and third of the same title. Part III

treats of the execution and validity of general assignments and the provisions of the general assignment law of 1877. Part IV deals with the administration of the insolvent's estate, assigned under either of the previous proceedings. This includes a consideration of the provisions of article eight, of title one, of chapter five, of part two, of the Revised Statutes which remains unrepealed. Part V discusses the rules of common law in reference to composition deeds and compositions between a debtor and his creditors, and releases by creditors.

PART I.

DISCHARGE OF AN INSOLVENT FROM HIS DEBTS.

ARTICLE FIRST, TITLE I, CHAPTER XVII, CODE OF CIVIL PROCEDURE.

"THE TWO-THIRDS ACT."

CHAPTER II.

COMMENCEMENT OF PROCEEDINGS. — PETITION. — SCHEDULE AND AFFIDAVITS.

§ 9. **In general.**—All the sections of this article apply to proceedings commenced on or after the first day of September, 1880. (§ 3347, subd. 11, Code of Civ. Pro.) Sections 2181 to 2187, both inclusive, apply also to a case where a discharge is thereafter granted. (§ 3347, subd. 11, Code of Civ. Pro.) The proceeding is a special proceeding instituted without writ. It originates in a petition and terminates in an order. The judicial authority to entertain this class of proceedings is conferred upon the county courts, and in the city of New York upon the Court of Common Pleas, and the jurisdiction which these courts acquire is a special and limited jurisdiction determined by the statute. Hence the general rule which commands that a special authority conferred by statute must be strictly pursued, is applicable at every stage of the proceeding. If the court acts without authority, or in excess of its power, its acts are void. It cannot acquire jurisdiction by deciding that it has it. When the right to act depends upon the existence of a prescribed fact, the

fact must exist or the power is wanting. *Morrow* v. *Freeman*, 61 N. Y. 515; *Nat. Bk. of Chemung* v. *City of Elmira*, 53 N. Y. 49, 53; *People* v. *Stryker*, 24 Barb. 649; *Merry* v. *Sweet*, 43 Barb. 475; s. c. as *Hale* v. *Sweet*, 40 N. Y. 97; *Stanton* v. *Ellis*, 12 N. Y. 575.

Want of jurisdiction, if it exists, is a radical defect. It is available at all times and in all places, either in the proceeding itself, or in any collateral proceeding. *Small* v. *Wheaton*, 2 Abb. Pr. 175, 178.

As a rule of construction, it is said by Chan. Walworth (*Salters* v. *Tobias*, 3 Paige, 338, 345), that statutes of this description, which are intended to deprive the creditor of all remedy for the recovery of an honest debt, must be construed strictly, and should not be extended by implication beyond the fair and legitimate meaning of the terms used by the Legislature.

§ 10. **Who may be discharged.**—(Code C. P. § 2149.) An insolvent debtor, who is a resident of the State at the time of presenting his petition, may be discharged from his debts, as prescribed in this article.

This section does not in effect vary the law as it stood before. See 2 R. S. 16, § 1; 3 R. S. 6th ed. 13, § 1; 2 Edm. St. 17, and 2 R. S. 35, § 2; 3 R. S. 6th ed. 28, § 2; 2 Edm. 36. A foreigner who has abandoned his residence in this State and removed to his home, cannot, by a return of a temporary character merely, acquire the right to a discharge under this article. *Matter of Wrigley*, 4 Wend. 602; affi'd, 8 Id. 134. The residence intended by the statute does not, however, require that a person should have a legal domicile in the State. It is enough if he have a fixed and permanent abode here, as distinguished from a mere temporary locality of existence. *Matter of Wrigley*, *supra*; see *Roosevelt* v. *Kellogg*, 20 Johns. 208, 210.

The fact of residence is one that must exist, and be shown in order to confer jurisdiction. *Otis* v. *Hitchcock*, 6 Wend. 433; *Jenks* v. *Stebbins*, 11 Johns. 224; *People ex rel. Pacific Mut. Ins. Co.* v. *Machado*, 16 Abb. Pr. 460; *Morewood* v. *Hollister*, 6 N. Y. 309, 316.

§ 11. **To what court application to be made.**—(Code C. P. § 2150.) Application for such a discharge must be made, by the petition of the insolvent, addressed to the county court of the county in which he resides; or, if he resides in the city of New York, to the Court of Common Pleas for that city and county.

This section is new. Formerly the proceedings were had before certain specified officers. 2 R. S. 17, § 6; 3 R. S. 6th ed. 14, § 9; 2 Edm. St. 18, and 2 R. S. 34, § 1; 3 R. S. 6th ed. 28, § 1; 2 Edm. St. 35.

Under the sections of the Revised Statutes the application might formerly be made anywhere throughout the State to a judge of the Supreme Court, or to a county judge. In the city of New York the application might also be made to one of the justices of the Superior Court (Laws of 1847, c. 255, p. 281, § 7; *Renard* v. *Hargous*, 13 N. Y. 259; Laws of 1873, c. 239, § 1); or of the Court of Common Pleas (Laws of 1847, c. 255, § 7; Code of Civ. Pro. § 286); or to the city judge (*Avery's Case*, 6 Abb. Pr. 144) or recorder. In the city of Buffalo applications might also be made to the judges of the Superior Court of that city. Laws of 1854, c. 96, § 25, as amended by Laws of 1857, c. 361, § 6; see Code of Civ. Pro. § 293. In the city of Brooklyn to the judges of the City Court of that city (Laws of 1873, c. 239, § 1); and in the city of Schenectady to the mayor. 2 R. S. 34, § 1.

The proceeding is now had before the court.

§ 12. **Contents of Petition.**—(Code C. P. § 2151.) The petition must be in writing; it must be signed by the insolvent, and specify his residence; it must set forth, in substance, that he is unable to pay all his debts in full; that he is willing to assign his property for the benefit of all his creditors, and, in all other respects, to comply with the provisions of this article, for the purpose of being discharged from his debts; and it must pray that, upon his so doing, he may be discharged accordingly.

It must be verified by the affidavit of the insolvent, annexed thereto, taken on the day of the presentation thereof, to the effect, that the petition is in all respects true, in matter of fact.

This section is new. The statute formerly provided that the petition should be signed by the debtor and the requisite number of creditors. It was silent as to the contents of the petition. 2 R. S. 16, § 2; 3 R. S. 6th ed. 13, § 2; 2 Edm. St. 17.

The Revised Statutes required that proof of residence or imprisonment within the county where the officer to whom the petition was presented resided, should be made at the time of presenting the petition. 2 R. S. 35, § 2; 3 R. S. 6th ed. 28, § 2; 2 Edm. St. 36; and it was held that this preliminary proof of residence within the county was a jurisdictional fact. *People ex rel. Pacific Mut. Ins. Co.* v. *Machado*, 16 Abb. Pr. 460 (Gen. Term, Supm. Ct. N. Y. Co.); *Matter of Wrigley*, 8 Wend. 134; s. c. 4 Id. 602; *Rusher* v. *Sherman*, 28 Barb. 416; *Jenks* v. *Stebbins*, 11 Johns. 224; *Otis* v. *Hitchcock*, 6 Wend. 433. In the first case cited, where the petition of the insolvent recited that he was of the city, county and State of New York, and annexed to the petition was an affidavit of a person who swore that he knew the insolvent, and that he was a resident and inhabitant of the State of New York, it was held that a discharge granted on these papers was inoperative, for the reason that it did not appear that the insolvent was a resident of, or was imprisoned within, the county in which the officer resided to whom the petition was presented. But it seems that under the Revised Statutes, if there were a positive averment of the fact of residence in the petition, no other proof would be necessary. *Russell & Erwin Mfg. Co.* v. *Armstrong*, 12 Abb. Pr. 472; affi'g 10 Id. 258, note. Compare *Morewood* v. *Hollister*, 6 N. Y. 309, 316; *Develin* v. *Cooper*, 84 N. Y. 410; affi'g 27 N. Y. Supm. Ct. R. (20 Hun), 188. The Code of Civil Procedure requires no other proof of residence except a statement contained in the petition.

If the petition is fatally defective all the proceedings including the assignment are void, at least against one who is not a *bona*

fide purchaser for value without notice. *Rockwell* v. *McGovern*, 69 N. Y. 294; distinguishing *Rockwell* v. *Brown*, 54 N. Y. 210.

§ 13. Consent of the creditors to be annexed.—(Code C. P. § 2152.) The petitioner must annex to his petition one or more written instruments, executed by one or more of his creditors, residing in the United States, having debts owing to him or them in good faith, then due or thereafter to become due, which amount to not less than two-thirds of all the debts, owing by the petitioner to creditors residing within the United States. Each instrument must be to the effect, that the person or corporation, executing it, consents to the discharge of the petitioner from his debts, upon his complying with the provisions of this article.

This section is new.

The consent of the creditors to the discharge was formerly indicated by their signatures to the petition.

The consenting creditors must constitute at least two-thirds in amount of the creditors residing within the United States. This is a jurisdictional fact. In the case of *Morrow* v. *Freeman* (61 N. Y. 515), where the authorities were fully reviewed by Commissioner Dwight, it was held that where it appeared on the face of the proceedings that less than two-thirds of the creditors had joined in the petition, the officer before whom the proceeding was had was without jurisdiction, and the discharge granted to the debtor was void. See *Frary* v. *Dakin*, 7 Johns. 75. In several cases previously decided, it had been thought that the question of whether the requisite number had joined was one to be determined solely upon the hearing, and if then found in favor of the debtor, it was conclusive in the absence of fraud. *Matter of Bradstreet*, 13 Johns. 385; *Emberson's Case*, 16 Abb. Pr. 457; *Small* v. *Graves*, 7 Barb. 576; *Ayres* v. *Scribner*, 17 Wend. 407; *Betts* v. *Bagley*, 12 Pick. 572.

In the case of *Rusher* v. *Sherman* (28 Barb. 416), names were

signed to the petition, without any amount set opposite to them, but these persons were not named in the schedule as creditors, it was held that they were not to be regarded as creditors.

Under the act of 1813 (1 R. L. 460) it was necessary, as under the present statute, that two-thirds of the creditors residing in the United States should join in the petition. *Salters* v. *Tobias*, 3 Paige, 338. The act of February 28, 1817 (Laws of 1817, c. 55, § 10), permitted foreign as well as domestic creditors to petition, and to be taken into the estimate in computing the requisite two-thirds. The Revised Statutes restored the act of 1813, in this respect, by inserting the last clause of this section. (See 2 R. S. 16, § 2.) The revisers, in their note to that section, said: "The whole current of authorities on these laws settles beyond dispute, that foreign creditors cannot be affected by a discharge, without their consent. It is therefore proposed to omit the provisions respecting them; and as their debts cannot be taken into the account, in respect to the effect of the discharge, they ought not to be regarded in determining the number of petitioning creditors." (See 5 Edm. St. 614.)

The trustee may be nominated in the consent (§ 2176).

§ 14. Consent of Executor, Administrator, Receiver, &c. —(Code C. P. § 2153.) An executor or administrator may become a consenting creditor, under the order of the Surrogate's Court from which his letters issued. A trustee, official assignee, or receiver of the property of a creditor of the petitioner, whether created by operation of law or by the act of parties, may become a consenting creditor, under the order of a justice of the Supreme Court. A person who becomes a consenting creditor, as prescribed in this section, is chargeable only for the sum which he actually receives, as a dividend of the insolvent's property.

See 2 R. S. 16, § 3, as modified by Laws of 1847, c. 280, § 16; 3 R. S. 6th ed. 13, § 3; 2 Edm. St. 17; also Laws of 1850, c. 210; 3 R. S. 6th ed. 14, § 5; 4 Edm. St. 482.

Previous to the act of 1850, it was held that a mere naked trustee without interest could not become a petitioning creditor without the consent of his *cestui que trust*. *Matter of Sherryd*, 2 Paige, 602.

§ 15. **Consent of Corporation.**—(Code C. P. § 2154.) Where a corporation or joint stock association becomes a consenting creditor, its consent must be executed under its common seal, and may be attested by any director or other officer thereof, duly authorized for that purpose; who may make any affidavit, required of a creditor in the proceedings.

2 R. S. 36, § 7; 3 R. S. 6th ed. 29, § 7; 2 Edm. St. 37; amended by inserting "or joint stock association."

§ 16. **Consent of Partnership.**—(Code C. P. § 2155.) Where a partnership becomes a consenting creditor, the consent may be executed in its behalf, and any affidavit, required of a creditor in the proceedings, may be made, by either of the partners.

2 R. S. 36, § 8; 3 R. S. 6th ed. 29, § 8; 2 Edm. St. 37; amended by omitting the words "or joint companies," which omission is supplied by the previous section.

§ 17. **Effect of consent where petitioner is a joint debtor.**—(Code C. P. § 2156.) A creditor's consent does not affect his remedy against any person or persons indebted jointly with the petitioner; and the petitioner's discharge has the effect, as between the creditor and the other joint debtors, of a composition between the petitioner and the creditor, made as prescribed in article third of title fifth of chapter fifteenth of this act.

Laws of 1849, c. 176; 3 R. S. 6th ed. 13, § 4; 4 Edm. St.

451; amended by inserting the words "as between the creditor and the other joint debtors."

The sections of the Code of Civil Procedure referred to are 1942-1944.

Mr. Throop says that the object of the addition to this section is to settle the effect of the last clause of § 1944.

See *post*, note to § 2184, as to the effect of a discharge of joint debtors as to creditors who have not expressly consented.

§ 18. **Consent of purchaser of debt.**—(Code C. P. § 2157.) Where a consenting creditor is the purchaser or assignee of a debt against the petitioner, or the executor, administrator, trustee or receiver of such a purchaser or assignee, he is deemed, for all the purposes of this article, except as to the declaration and receipt of dividends, a creditor only to the amount, actually and in good faith paid for the debt by him, or by the decedent or other person, from whom he derives title, and remaining uncollected. This section is not affected by the recovery of a judgment for the debt, after the purchase or assignment; but in that case, the consenting creditor may include the uncollected costs, as if they were part of the sum paid for the debt.

2 R. S. 36, § 10; 3 R. S. 6th ed. 29, § 10; 2 Edm. St. 37; amended by adding the words "except as to the declaration and receipt of dividends," and also the last sentence in reference to the effect of recovery of judgment, which incorporates into the statute the ruling in *Emberson's Case*, 16 Abb. Pr. 457, where it was held that one who became a creditor of an insolvent, knowing him to be such, by buying a demand against him for less than the nominal amount of such demand and then obtained judgment for the whole amount, was to be deemed a creditor within the meaning of this section only to the amount actually paid.

Where the insolvent procured his clerk to purchase from one of the creditors a judgment for a large sum upon a nominal con-

sideration, which was, in fact, never paid, and the clerk became a petitioning creditor for the full amount of the judgment, it was held that this fact was sufficient to avoid the discharge without proof of actual fraud. *Slidell* v. *McCrea*, 1 Wend. 156.

But where the petitioning creditor had purchased the claim several years before the insolvent proceedings were instituted, and there was no evidence that the debtor procured the creditor to prove the claim for an amount larger than the amount actually due, it was not regarded as a ground to avoid the discharge that the creditor proved the claim at its face, and not for the amount which he had paid. *Small* v. *Graves*, 7 Barb. 576.

§ 19. **Consenting creditor must relinquish security.**— (Code C. P. § 2158.) A creditor who has, in his own name, or in trust for him, a mortgage, judgment, or other security, for the payment of a sum of money, which is a lien upon, or otherwise affects, real or personal property belonging to the petitioner, or transferred by him since the lien was created, cannot become a consenting creditor, with respect to the debt so secured, unless he adds to or includes in his consent, a written declaration, under his hand, to the effect, that he relinquishes the mortgage, judgment, or other security, so far as it affects that property, to the trustee to be appointed pursuant to the petition, for the benefit of all the creditors. Such a declaration operates, to that extent, as an assignment to the trustee, of the mortgage, judgment, or other security; and vests in him accordingly all the right and interest of the consenting creditor therein.

2 R. S. 36, § 11; 3 R. S. 6th ed. 30, § 11; 2 Edm. St. 37; amended by adding in the first sentence the words "transferred by him since the lien was created." Mr. Throop says, that "literally the original enabled a creditor, secured by a lien upon property originally belonging to the debtor, but owned by a third person at the time of the petition, to join in the application for the discharge of the debtor, without giving up his secu-

rity, and to the prejudice of less fortunate creditors. This was not only unjust, and contrary to the supposed intention of the legislature, but a source of grave difficulties, as, for instance, where the insolvent had given a bond and mortgage, and had afterwards conveyed the mortgaged property, subject to the mortgage, and the original mortgagee became a petitioning creditor, in respect to the money due to him upon the bond. The object of the first amendment is to remove this anomaly. The qualification of the effect of the transfer rests upon the same principle."

The form in which the release to the assignee should be made is not prescribed by the statute. A substantial compliance with the statute is all that is required. In *Augsbury* v. *Crossman*, 17 Supm. Ct. (10 Hun), 389, 396, where the declaration attached to the creditor's signature was as follows: "For value received I hereby release to the assignee to be appointed, all claims on the estate of C. C., that I have by reason of the judgment against him assigned to me;" this was regarded as a sufficient compliance with the statute.

A compliance with this section appears to be essential whenever the secured claim is necessary to make up the required two-thirds. In *Morewood* v. *Hollister* (6 N. Y. 309), it was determined that when the petitioning creditors, who held collateral securities for any part of the debts due them, neglected to sign a declaration of relinquishment of such securities, they could not be regarded as petitioning creditors on account of the debts so secured, and when, after rejecting such debts, less than two-thirds in amount of the creditors of the insolvent, as shown by the petition, had joined in signing and presenting it, the officer to whom it was presented obtained no jurisdiction to grant a discharge. See opinion of James, J., in *Hale* v. *Sweet*, 40 N. Y. 97, 102 (dissenting on another ground) and see *Augsbury* v. *Crossman*, 17 Supm. Ct. (10 Hun), 389.

But in the *Matter of Philips* (43 Barb. 108; s. c. 19 Abb. Pr. 281), it was held that where certain of the petitioning creditors were judgment debtors and did not, at the time of signing the petition, add to their signatures, a declaration that they relinquished such judgment to the assignees to be appointed, though such relinquishment was subsequently, and before any further proceedings by the judge, obtained and attached to the

petition, the omission was a mere irregularity, and was cured. And see *Russell & Erwin Mfg. Co.* v. *Armstrong* (12 Abb. Pr. 472 ; affi'g, 10 Id. 258, note), and remarks of Hunt, Ch. J., in *Soule* v. *Chase* (39 N. Y. 342, 345 ; s. c. 1 Abb. Pr. N. S. 48).

The creditor is required to surrender only such liens and securities as he has upon the estate and property of the debtor, and when the creditor has obtained a joint judgment against the insolvent and another, the release of the judgment to the assignee of the insolvent does not affect the claim of the creditor against the other judgment debtor. *Elsworth* v. *Caldwell*, 48 N. Y. 680 ; affi'g 18 Abb. Pr. 20 ; s. c. 27 How. Pr. 188.

A creditor who has the body of his debtor in execution, cannot be a petitioning creditor. *Beaty* v. *Beaty*, 2 Johns. Ch. 430 ; citing *Burnaby's Case*, Str. 653 ; *Cohen* v. *Cunningham*, 8 Term R. 123 ; *Ex parte Cundall*, 6 Ves. 446 ; *Ex parte Arundel*, 18 Ves. 231. A sufficient reason for this rule is, that the imprisonment of the judgment debtor on execution, is in law a satisfaction of the judgment as long as the imprisonment continues. *Koenig* v. *Steckel*, 58 N. Y. 475.

§ 20. **Penalty if a creditor swears falsely.** (Code C. P. § 2159.) If a creditor knowingly swears, in any proceedings authorized by this article, that the petitioner is, or will become, indebted to him, in a sum of money, which is not really due, or thereafter to become due ; or in more than the true amount ; or that more was paid for a debt, which was purchased or assigned, than the sum, actually and in good faith paid therefor ; he forfeits to the trustee, to be recovered in an action, twice the sum, so falsely sworn to.

2 R. S. 37, § 12 ; 3 R. S. 6th ed. 30, § 12 ; 2 Edm. St. 38 ; amended by extending the provision to a case where a debt was purchased.

§ 21. **Affidavit of consenting creditor.**—(Code C. P. § 2160.) The consent of a creditor must be accompanied with his affidavit, stating as follows:

1. That the petitioner is justly indebted to him, or will become indebted to him, at a future day specified therein, in a sum therein specified; and, if he, or the person from whom he derives title, is or was the purchaser or assignee of the debt, he must also specify the sum, actually and in good faith paid for the debt, as prescribed in section 2157 of this Act.

2. The nature of the demand, and whether it arose upon written security, or otherwise, with the general ground or consideration of the indebtedness.

3. That neither he, nor any person to his use, has received from the petitioner, or from any other person, payment of a demand, or any part thereof, in money or in any other way, or any gift or reward of any kind, upon an express or implied trust, confidence, or understanding, that he should consent to the discharge of the petitioner.

Where a consenting creditor is an executor, administrator, trustee, receiver, or assignee, he may state the necessary facts, in his affidavit, upon information and belief, setting forth therein the grounds of his belief; but in that case, the consent must also be accompanied with the affidavit of the insolvent, to the effect, that all the matters of fact stated in the affidavit of the consenting creditor, are true.

2 R. S. 16, § 4; 3 R. S. 6th ed. 14, § 7; 2 Edm. St. 17. The last paragraph supplies the place of Laws of 1850, c. 210, § 2; 3 R. S. 6th ed. 14, § 6; 4 Edm. St. 428. The last clause of subdivision 1 is added in accordance with § 2157, *ante*, and the provision of the original section in reference to the officers before whom the affidavit should be taken is rendered unnecessary by § 842 Code of Civil Procedure.

When a corporation is a creditor, the affidavit required by the statute may be made and signed by a director or other duly authorized officer. (See *supra*, § 2154.)

And if partners or joint companies are creditors, the petition

may be made and signed by either of the partners or any one of such company. (See *supra*, § 2155.)

Creditors residing out of this State may make affidavit as provided by § 844 Code of Civil Procedure.

In *Rusher* v. *Sherman* (28 Barb. 416), the affidavits of three of the petitioning creditors were sworn to before a New York commissioner residing in Connecticut. No certificate of the Secretary of State, as required by Laws of 1850, c. 270, was annexed to the affidavit to prove that the person administering the oath was, in fact, a commissioner for this State. The court held that the want of such certificate was not a jurisdictional defect, but one that was cured by the discharge, and it seems that the jurisdiction of the officer may be shown upon the hearing by parol proof.

The affidavit should state :

(1.) The sum due the petitioner (and if he is the assignee of the debt the sum actually paid for it, as prescribed by § 2157).

(2.) That said sum is justly due to him, or that it will become due at a specified date.

(3.) The nature of the demand, and whether arising on any written security or otherwise.

(4.) The general ground and consideration of the indebtedness.

(5.) That neither the petitioner nor any person to his use has received, from such insolvent or any other person, payment of any demand or any part thereof, in money or in any other way, or any gift or reward of any kind, upon an express or implied trust or confidence or understanding that he should consent to the discharge of the petitioner.

It is important that the affidavit should comply with the requirements of the statute, otherwise the claim of the petitioner may be disregarded, and if his claim is necessary to make up the requisite two-thirds, the officer will acquire no jurisdiction. *Gillies* v. *Crawford*, 2 Hilt. 338. Thus, in the case last cited, the affidavit of one of the petitioning creditors stated simply that the sum annexed to his name was justly due to him from the insolvent, for two promissory notes, one of $2,000 and one of $2,550.91. This was held to be fatally defective, as not stating the nature of the demand with the general ground and consideration of the indebtedness. So when the affidavit was in

the following words: "That the sum of $223 subscribed to the petition of E. C., an insolvent debtor, hereto annexed, is justly due to this deponent from the said insolvent, on a note of hand, given by the said E. C. to this deponent, on a settlement of accounts," &c., it was held that the nature of the account, or the general ground of the indebtedness, ought to be set forth in the affidavit. *Matter of Cook*, 15 Johns. 183. So, in another case, where the affidavit of one creditor specified the indebtedness to be "on account of judgment entered against said insolvent, justly due to him from said insolvent," and another creditor specified his indebtedness to be on account of a judgment entered against said insolvent upon a promissory note, it was held that in neither of these cases did the affidavits comply with the requirements of the statute. *Merry* v. *Sweet*, 43 Barb. 475; affi'd, *Hale* v. *Sweet*, 40 N. Y. 97; and see also *Slidell* v. *McCrea*, 1 Wend. 156; *McNair* v. *Gilbert*, 3 Wend. 344; *Stanton* v. *Ellis*, 12 N. Y. 575; *Taylor* v. *Williams*, 20 Johns. 21; *Rusher* v. *Sherman*, 28 Barb. 416.

§ 22. **When non-resident creditor to annex accounts.**—(Code C. P. § 2161.) A consenting creditor, residing without the State, and within the United States, must annex to his consent the original accounts, or sworn copies thereof, and the original specialties or other written securities, if any, upon which his demand arose or depends. Provided, however, that when such original specialties, or other written securities, are lost, such fact must be stated as a reason for not annexing thereto the consent, and the fact of the loss, and the manner of the loss thereof must be stated in the affidavit of the creditor to the best of his knowledge, or must be otherwise proved by affidavit to the satisfaction of the court; and the court may thereupon, in such case or proceeding, by its order, dispense with the annexing to such consent of the original specialties or other written securities. (As amended by Laws of 1889, c. 502.)

2 R. S. 36, § 9; 3 R. S. 6th ed. 29, § 9; 2 Edm. St. 37.

Where a partnership is a creditor, its place of business being within the State, and its business being controlled and managed by the partners who reside here, it seems that the partnership may be a petitioning creditor, although one of the members of the firm resides out of the United States. *Renard* v. *Hargous*, 2 Duer, 540; affi'd, 13 N. Y. 259.

In *Warrin's Case* (16 Abb. Pr. 457, note), where the only petitioning creditor was a non-resident who held notes of the debtor given for the purchase-money of merchandise, and neither the original notes nor sworn copies of the notes or accounts were annexed to the petition, it was held that the annexing of the originals or sworn copies was essential to confer jurisdiction, and that the omission could not be supplied so as to give validity to the proceedings.

§ 23. Petitioner's schedule.—(Code C. P. § 2162). The petitioner must annex to his petition a schedule, containing:

1. A full and true account of all his creditors.

2. A statement of the place of residence of each creditor, if it is known; or, if it is not known, a statement of that fact.

3. A statement of the sum which he owes to each creditor, and the nature of each debt or demand, whether arising on written security, on account, or otherwise.

4. A statement of the true cause and consideration of his indebtedness to each creditor, and the place where the indebtedness accrued.

5. A statement of any existing judgment, mortgage, or collateral or other security, for the payment of the debt.

6. A full and true inventory of all his property, in law or in equity, of the encumbrances existing thereon, and of all the books, vouchers, and securities, relating thereto.

2 R. S. 17, § 5; 3 R. S. 6th ed. 14, § 8; 2 Edm. St. 18.

The schedule should specify the debts with certainty. *Stanton* v. *Ellis*, 12 N. Y. 575. And where the name of the cred-

itor was stated in the schedule, and the ground of the indebtedness set forth, but the amount of the debt was left blank, it was held that the defect was fatal and the officer failed to acquire jurisdiction, for the reason that it was impossible to know that two-thirds in amount of the insolvent's creditors had subscribed his petition. *Stanton* v. *Ellis*, *supra*; see *Forman* v. *Drew*, 4 Barn. & Cress. 15; *Reeves* v. *Lambert*, Id. 214; *Levy* v. *Dolbell*, 1 Moody & M. 202; *Booth* v. *Coldman*, 1 El. & El. 414; *Franklin* v. *Beesley*, 1 Id. 425.

In *Matter of Cohen*, 16 Daly, 69; 18 Civ. Pro. 156, where the schedule gave the street number of the residence of the creditors, but the name of the city or town was omitted, it was held that the schedules were fatally defective and could not be amended.

Where the name of a creditor recently deceased was inserted in the list of creditors, whereas the name of the administrator of the deceased should have been entered, and it did not appear that the debtor had knowledge of the death, it was held that this did not invalidate the discharge. *Wheeler* v. *Emmeluth*, 65 Supm. Ct. 58 Hun, 369; affi'd, 125 N. Y. 750.

The schedule should also set forth the true cause and consideration of the indebtedness in each case. The Act of 1817 (Laws of 1817, c. 55, § 11), provided that a failure to give a true account of the consideration of the debt, should prevent a discharge, and should render fraudulent and void a discharge granted in such a case. Under that act it was held that a failure to state the consideration rendered the discharge absolutely void. *McNair* v. *Gilbert*, 3 Wend. 344. Such was the effect, also, of a defective statement of the consideration, as, for instance, that the debt was due on a note. *Slidell* v. *McCrea*, 1 Wend. 156; and see *Taylor* v. *Williams*, 20 Johns. 21.

The statute, as it was incorporated into the Revised Statutes and as it now reads, is materially changed. The requirement is simply that the schedule shall state the true cause and consideration of the indebtedness in each case. Emott, J., in *People* v. *Stryker*, 24 Barb. 649, 651. It is believed that, under this language, it would be necessary to show a fraudulent intent in order to invalidate a discharge on the ground of a defective or insufficient statement of the consideration of the indebtedness.

This construction has been adopted under the subsequent article, where the same schedule is required (*post*, Art. II). *Am. Flask & Cap Co.* v. *Son*, 7 Robt. 233 ; s. c. 3 Abb. Pr. N. S. 333, 337 ; see *Matter of Rosenberg*, 10 Abb. Pr. N. S. 450, 454 ; *Devlin* v. *Cooper*, 27 N. Y. Supm. Ct. R. (20 Hun), 188 ; affi'd, 84 N. Y. 410.

And such has been the ruling, under this statute, when the question of the validity of the discharge arises in a collateral proceeding. *Schaeffer* v. *Soule*, 30 N. Y. Supm. Ct. (23 Hun), 583 ; *People* v. *Stryker*, 24 Barb. 649 ; *Small* v. *Graves*, 7 Barb. 577 ; *Ayres* v. *Scribner*, 17 Wend. 407 ; *Soule* v. *Chase*, 1 Abb. Pr. N. S. 48, 60 ; but see remarks of Morgan, J., in *Merry* v. *Sweet*, 43 Barb. 476, 478.

The mere omission to insert the name of a creditor in the schedule, without any evidence of fraudulent intent, will not be sufficient to invalidate the discharge. *Am. Flask & Cap Co.* v. *Son*, 7 Robt. 233 ; s. c. 3 Abb. Pr. N. S. 333 ; *Clinton* v. *Hart*, 1 Johns. 375 ; *Lester* v. *Thompson*, 1 Id. 300 ; *Small* v. *Graves*, 7 Barb. 577 ; *Hall* v. *Robbins*, 61 Barb. 33 ; *Ayres* v. *Scribner*, 17 Wend. 407.

But where the debtor intentionally omitted the name of a debtor, claiming to have done so under the advice of counsel, this was held to be a palpable fraud which defeated the discharge. *Starr* v. *Patterson*, 27 Abb. N. C. 19. In the case last cited it was also held that the subsequent insertion of the name did not cure the defect.

The same rule seems to apply to statements of assets. Thus, where the defendant omitted to state certain debts due to him, from the conviction that no part of them could be collected, the persons indebted to him being insolvent, it was held that he should not be prejudiced by having omitted them, since the omission did not appear to the court to proceed from a fraudulent intent. *Brodie* v. *Stephens*, 2 Johns. 289. But when the omission was fraudulent, then the discharge was declared void. *Duncan* v. *Duboys*, 3 Johns. Cas. 125.

The reversionary interest which a person has in property which he has assigned for the payment of debts, or of which a receiver has been appointed, must be included in the schedule. *Billing's Case*, 10 Abb. Pr. 258.

So, also, the remaining surplus and reversionary interest in property assigned to an assignee in bankruptcy. *Bullymore* v. *Cooper*, 46 N. Y. 236 ; see *Roswog* v. *Seymour*, 7 Robt. 427.

If the debtor does not know the name of the holder of a note or bill of exchange on which he is liable, he is then at liberty to give the best description he can of it. He may put in his schedule the name of the original drawer (or payee), and so be discharged from the bill as to all other parties. If he knows the name of the holder of the bill, that is the name he is to insert. *Boydell* v. *Champneys*, 2 M. & W. 433 ; see *Beck* v. *Beverly*, 11 M. & W. 845 ; *Romellio* v. *Halaghan*, 1 Best & S. 279, under 7 Geo. IV, c. 57.

Where an agreement was entered into between an insolvent and one of his creditors, that the creditor's debt should be omitted from the schedule, and should be paid immediately after the discharge, this was held to be a fraud upon the other creditors and upon the court. *Tabram* v. *Freeman*, 2 Cr. & M. 451 ; see *Howard* v. *Bartolozzi*, 4 B. & Ad. 555.

The insertion of the name of a creditor in the schedule with a memorandum that his claim is barred by the statute of limitations, is not an admission that he is still a creditor. *Avery's Case*, 6 Abb. Pr. 144.

Defects in the schedules may be remedied by amendment on the return day of the order to show cause. *Matter of Hurst*, 7 Wend. 239 ; *Matter of Rosenberg*, 10 Abb. Pr. N. S. 450 ; *Brodie* v. *Stephens*, 2 Johns. 289.

§ 24. **Petitioner's affidavit.**—(Code C. P. § 2163.) An affidavit, in the following form, subscribed and taken by the petitioner before the county judge, or, in the city of New York, before the judge holding the term of the court, at which the order specified in the next section is made, must be annexed to the schedule :

" I, ——, do swear" (or " affirm," as the case may be), " that the matters of fact, stated in the schedule hereto annexed, are, in all respects, just and true ; that I have not, at any time or in any manner whatsoever, disposed

of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property, in order to defraud any of my creditors; that I have not, in any instance, created or acknowledged a debt for a greater sum than I honestly and truly owed; and that I have not paid, secured to be paid, or in any way compounded with, any of my creditors, with a view fraudulently to obtain the prayer of my petition."

2 R. S. 17, § 7; 3 R. S. 6th ed. 15, § 10; 2 Edm. St. 18. Amended by inserting the words "matters of fact stated in the schedule" in the place of "account of my creditors, and the inventory of my estate," and by inserting the clause in reference to exempt property.

A compliance with the requirements of this section is requisite in order to give the officer jurisdiction. Where the affidavit was not sworn to before the judge, nor subscribed by him before granting the order for the creditors to appear and show cause, this was held to be a fatal defect which could not be cured by a subsequent verification. *Ely* v. *Cooke*, 28 N. Y. 365; s. c. 2 Abb. Dec. 14; affi'g in part 9 Abb. Pr. 366; *Small* v. *Wheaton*, 4 E. D. Smith, 427; 2 Abb. Pr. 316.

So, under the fourteen days act (*post*, Chap. VI), a similar requirement has been held to be mandatory. *Bullymore* v. *Cooper*, 46 N. Y. 236; *Browne* v. *Bradley*, 5 Abb. Pr. 141.

The language of the affidavit should comply strictly with the statute. Thus, where the affidavit was in these words, "I have not at any time or in any manner whatever disposed of or made over any part of my estate for the future benefit of myself *and* family," instead of using the words of the statute, "for the benefit of myself *or* family," this affidavit was held fatally defective, and the discharge granted in the proceedings was adjudged void. *Hale* v. *Sweet*, 40 N. Y. 97; affi'g *Merry* v. *Sweet*, 43 Barb. 475.

CHAPTER III.

THE ORDER TO SHOW CAUSE, NOTICE AND HEARING.

§ 25. The order to show cause.—(Code C. P. § 2164.) The petition and other papers, specified in the foregoing sections of this article, must be presented to the court, and filed with the clerk. The court must thereupon make an order, requiring all the creditors of the petitioner to show cause before it, at a time and place therein specified, why an assignment of the insolvent's property should not be made, and he be thereupon discharged from his debts, as prescribed in this article; and directing that the order be published and served, as prescribed in the next section.

2 R. S. 18, § 8, and part of § 10; 3 R. S. 6th ed. 15, §§ 11, 13; 2 Edm. St. 18, 19.

§ 26. How order published and served.—(Code C. P. § 2165.) The order must be published and served in the following manner:

1. The petitioner must cause a copy thereof to be published in a newspaper, designated in the order, published in the county; and also, if one-fourth part of the insolvent's debts accrued, or are due, to creditors residing in the city of New York, in a newspaper published in that city, designated in the order. The publication must be made, at least once in each of the ten weeks, immediately preceding the day on which cause is to be shown, unless all the creditors reside within one hundred miles of the place where cause is to be shown; in which

case, the publication must be made, at least once in each of the six weeks, immediately preceding that day.

2. The petitioner must also serve upon each creditor, residing within the United States, whose place of residence is known to him, a copy of the order to show cause, either personally, at least twenty days before the day when cause is to be shown, or by depositing it, at least forty days before that day, in the post office, inclosed in a post-paid wrapper, addressed to the creditor at his usual place of residence.

Where the State is a creditor of the petitioner, a copy of the order must be served upon the Attorney-General, who must represent the State in the subsequent proceedings.

2 R. S. 18, § 10 in part, § 11 ; 39, § 30 in part ; 3 R. S. 6th ed. 15, § 13 in part, § 14 ; also 32, § 30 in part ; 2 Edm. St. 19, 40 ; also Laws of 1847, c. 366, § 1 ; 4 Edm. St. 481. Amended Laws of 1890, c. 231.

The statute formerly provided that a "notice of the contents of the order" should be published. 2 R. S. 648, § 44 ; 3 R. S. 6th ed. 920, § 55. This section now requires the publication of "a copy of the order."

The time between the first publication and the day appointed to show cause, should be at least the full number of weeks named in the order. Thus where the publication was ordered to be made for ten successive weeks, but there were in fact but sixty-eight days between the first publication and the hearing, the notice was deemed insufficient. *People ex rel. Demarest* v. *Gray*, 10 Abb. Pr. 468 ; s. c. 19 How. Pr. 238 ; *Anon.* 1 Wend. 90. In *Soule* v. *Chase*, 1 Robt. 222 ; s. c. 1 Abb. Pr. N. S. 48 (rev'd in Court of Appeals on another ground, 39 N. Y. 342), it was held that if there be ten publications, it is not necessary that there be ten full weeks before the hearing. See *Dieckerhoff* v. *Ahlborn*, 2 Abb. N. C. 372, 377 ; *Olcott* v. *Robinson*, 21 N. Y. 150 ; *Wood* v. *Morehouse*, 45 N. Y. 368. But the publication must be made once in every week. It is

not enough that there be ten publications in all. The officer has no jurisdiction, if there be any of the ten weeks in which there was no publication. *Dieckerhoff* v. *Ahlborn*, 2 Abb. N. C. 372. The period of publication must be computed so as to exclude the first day of publication and include the last. Code of Civ. Pro. § 787; see *Brod* v. *Heymann*, 3 Abb. Pr. N. S. 396; *Steinle* v. *Bell*, 12 Abb. Pr. N. S. 171; *Bunce* v. *Reed*, 16 Barb. 347.

The order must be published correctly. Thus where notice was directed to be given for the 6th of June, 1874, and the notice published was of an application to be made on the 3d of June, 1874, it was held that, until the publication of the notice was made as directed, and proof of such publication was before the officer, he was without jurisdiction. *People ex rel. Lewis* v. *Daly*, 11 N. Y. Supm. (4 Hun), 641; s. c. 67 Barb. 325.

The publication and service of the order as required by the statute is essential to the jurisdiction of the officer; of course not necessary to give him jurisdiction to make the order to show cause, but to give him jurisdiction to proceed to a discharge. *Matter of Underwood*, 3 Cow. 59; *Lewis* v. *Page*, 8 Abb. Pr. N. S. 200; *Small* v. *Wheaton*, 4 E. D. Smith, 427; *Stanton* v. *Ellis*, 16 Barb. 319; *Van Slyke* v. *Shelden*, 9 Barb. 278; *People ex rel. Lewis* v. *Daly*, 11 N. Y. Supm. Ct. (4 Hun), 641. But whether the sufficiency of the proof presented to and passed upon by the officer, can be inquired into in a collateral proceeding, was doubted in *Soule* v. *Chase*, 1 Abb. Pr. N. S. 48, 58; s. c. 1 Robt. 222; 39 N. Y. 342; and see opinion of Denio, J., in *Stanton* v. *Ellis*, 12 N. Y. 575, 580.

Under the previous statute the names of the creditors were not required to be inserted in the notice; all that was necessary was to direct the notice "To the creditors of ———, an insolvent debtor." *Am. Flask & Cap Co.* v. *Son*, 7 Robt. 233, 238; s. c. 3 Abb. Pr. N. S. 333; see *O'Connell* v. *Sutherland*, 16 Abb. Pr. 460, note.

Service by mail by depositing the notice in the post office in the same town where the creditor resides, is sufficient. *O'Connell* v. *Sutherland*, 16 Abb. Pr. 460, note.

Where some of the creditors were stated in the affidavit to have their residence in New York city, no street being specified

as the place of residence, and the envelopes containing the notices were directed to these creditors to New York city generally, and there was nothing to show that these notices were not addressed to the best knowledge of the insolvent, it was held that this was a sufficient mailing. *People ex rel. Kenyon* v. *Sutherland*, 81 N. Y. 1; rev'g 16 Hun, 192. Where the name of a creditor Storrs appeared spelled Stores this was held to be a case of *idem sonans*, and the notice was deemed sufficient. Ibid. The general rule is that a debtor in insolvency proceedings will not lose his right to a discharge by an accidental omission to give the required notice to one or more creditors. *Weeks* v. *Buderus*, 39 N. J. L. 448; s. c. 1 Am. Insol. R. 38.

In *Billinge* v. *Pickert*, 46 Supm. Ct. (39 Hun), 504; s. c. 1 State R. 70, the order to show cause directed service, personally or by mail, to the creditor, "at his place of business," instead of "at his usual place of residence," and the record showed that service was made by mailing the order to the creditor at his place of business, it was held that the court did not acquire jurisdiction to grant a discharge. It was further held (although the decision on this point appears to be open to doubt) that upon a trial where the discharge was pleaded as a defense, it was not competent to sustain the discharge by proof that personal service of the order was in fact made. See § 43.

§ 27. **Proceedings on return of order.**—(Code C. P. § 2166.) On the day specified in the order, and before any other proceedings are taken in the matter, the petitioner must present to the court, and file with the clerk, proof, to the satisfaction of the court, that the order has been published and served, as prescribed in the last section; and thereupon, on the same day, or upon the day to which the hearing is adjourned, the court must hear the allegations and proofs of the parties appearing. Proof of personal service of a copy of the order upon any person, must be made, in like manner as proof of personal service of a summons, in an action brought in the Supreme Court.

2 R. S. 18, § 12; Laws of 1847, c. 366, § 2, amended by adding last sentence; 3 R. S. 6th ed. 16, §§ 16, 17; 2 Edm. St. 19; 4 Edm. St. 481.

When the time for the hearing has arrived, the officer may at once proceed to hear the proofs and allegations of the parties. He is not bound in strictness to wait beyond the arrival of the precise time appointed, though in the exercise of his discretion he may wait longer. Where a creditor who wished to oppose the discharge appeared after the hour of the return, and the officer refused to hear him, it was held to be a matter of discretion which could not be reviewed on *certiorari*. *Ex parte Hagaman*, 2 Hill, 415; *Matter of Pulver*, 6 Wend. 632. But if, through any artifice, parties have been misled as to the time appointed, or have been prevented from appearing at such time, the judge has the power to vacate an order of assignment and let in the parties to oppose the discharge. *Matter of Bradstreet*, 13 Johns. 385. The first step, and one required to be taken before the judge proceeds to hear the proofs and allegations of the parties, is to produce proof to the satisfaction of the judge or officer of the service of the order, either personally or by mail, as required by the sections cited; and before any proceedings, other than the hearing of the proofs and allegations, are had, the officer is directed to require proof of the publication of the order.

Some proof of the service and publication of the notice upon which the officer can pass as to its sufficiency, is indispensable, and without it he acquires no jurisdiction to proceed further. See cases cited above; also, *Lewis* v. *Page*, 8 Abb. Pr. N. S. 200, 204, Brady, J.; *Stanton* v. *Ellis*, 16 Barb. 319, 322; but see s. c. 12 N. Y. 575, 580. But whether, after proofs of service and publication have been submitted to the officer, and he has found that the statute has been complied with, the sufficiency of such proof can be questioned in a collateral proceeding, has been doubted. *Soule* v. *Chase*, 1 Abb. Pr. N. S. 48, 58; *Stanton* v. *Ellis*, 12 N. Y. 575, 580; *O'Connell* v. *Sutherland*, 16 Abb. Pr. 460, note. Though it can undoubtedly be raised on *certiorari*. *People ex rel. Demarest* v. *Gray*, 10 Abb. Pr. 468; s. c. 19 How. Pr. 238; *Anon.* 1 Wend. 90. The omission in an affidavit of service of the notice to creditors to insert

the deponent's name in the commencement or caption, is not a defect for which the discharge can be avoided collaterally. *O'Connell* v. *Sutherland*, 16 Abb. Pr. 460, note; *People ex rel. Kenyon* v. *Sutherland*, 81 N. Y. 1.

Where the affidavit averred that the printed notice was served "on each of the following named persons on the days and in the manner next herein specified, that is to say;" then immediately followed a list of names of persons under the heading of "Names of Creditors," and in a column parallel with the list, and on the same line with each name, a statement of the city or town of residence, save in one instance where the word "unknown" appeared and immediately following was the averment: "By depositing, 1860, April 9, in the post office in the city of Brooklyn, a letter envelope directed to each of the foregoing creditors at the place of residence hereinbefore designated, and in each envelope was a printed notice, of which the following is a true copy, and on each envelope, so directed, was placed a post office stamp to pay the legal postage of each letter to its place of destination." This was held to be substantially an averment of a mailing of a notice to each creditor, and also held that the affidavit would be deemed to mean that a stamp of value enough to pay the legal postage on each letter according to its address was placed thereon. *People ex rel. Kenyon* v. *Sutherland*, 81 N. Y. 1.

§ 28. **Trial where discharge is opposed.**—(Code C. P. § 2167.) Where the insolvent's discharge is opposed, the court may direct the special proceeding to be placed upon the calendar for trial. In that case, the parties must appear, and the proceedings are the same, as in an action, except as otherwise prescribed in this article; and costs, as in an action, except for proceedings before notice of trial, may be awarded to either party, in the discretion of the court.

This section is new.

§ 29. **Filing specifications. Jury trial.**—(Code C. P. § 2168.) In order to entitle a creditor to oppose the discharge of

the insolvent, he must, on the day fixed to show cause, or at such other time as the court directs, file with the clerk a specification of his objections; and he may then, but not afterwards, demand a trial, by a jury, of the questions of fact arising thereupon. If a trial by a jury is not then demanded, the questions of fact must be tried by the court, without a jury. Where one of two or more opposing creditors demands a trial by a jury, all the material questions of fact, arising upon the objections of all the creditors, must be tried in like manner, and at the same time. The court may, in its discretion, direct the questions to be settled, and plainly stated, in an order, as where an order is made by the supreme court, in an action pending therein, for the trial of questions of fact by a jury.

2 R. S. 18, § 13; 3 R. S. 6th ed. 16, § 18; 2 Edm. St. 19.

If the creditors neglect to appear and raise objections they are concluded, if the officer had the requisite jurisdiction, except as to the matters which the statute declares shall avoid the assignment. *People* v. *Stryker*, 24 Barb. 649; *Soule* v. *Chase*, 39 N. Y. 342, 345, Hunt, Ch. J., dissenting on other grounds; *Matter of Bradstreet*, 13 Johns. 385. Appearing and participating in proceedings over which a court or officer has no jurisdiction does not prevent a party from assailing them for want of it. *Grocers' Nat. Bank* v. *Clark*, 31 How. Pr. 115; *Garcie* v. *Sheldon*, 3 Barb. 232. But where a judgment-creditor appeared by attorney upon the proceedings for a discharge of the debtor, and relinquished all opposition and consented to a discharge, but subsequently issued an execution on the judgment, it was held that the conduct of the attorney was equivalent to an abandonment of the suit, and that a perpetual stay of execution on the judgment ought to be granted. *Lee* v. *Curtiss*, 17 Johns. 86.

The opposing creditors may, of course, object to the granting of the order upon any of the grounds which would avoid the discharge, if granted; but they may also controvert the facts which the officer or court is required to find before granting the

order. They may oppose upon the ground that the insolvent is not justly and truly indebted to the petitioning creditors in the sums by them respectively mentioned in their affidavits (*Cohen's Case*, 10 Abb. Pr. 257); that such sums do not amount in the aggregate to two-thirds of all the debts that were owing by such insolvent, at the time of presenting his petition, to creditors residing in the United States; that such insolvent has not honestly and fairly given a true account of his estate, and has not in all things conformed to the matters required of him by the statute. Under the objection that the debtor has not given a true account of his estate, a creditor will have an opportunity to examine into all dispositions of the debtor's property. *Cohen's Case*, 10 Abb. Pr. 257.

In the *Matter of Hurst* (7 Wend. 239), where a debtor had confessed a judgment which amounted to a general assignment for the benefit of all his creditors *pro rata*, it was held that this was such a fraud upon the insolvent laws as ought to defeat his discharge. The judgment in that case was confessed on the very day the petition was presented, and under suspicious circumstances. The same month in which that case was decided, Chan. Walworth, in *Corning* v. *White* (2 Paige, 567), expressed the opinion that a creditor might assign his property without giving preferences, without depriving himself of the privilege of applying for a discharge. Such is also the opinion expressed by Jones, J., in *Roswog* v. *Seymour* (7 Robt. 427, 430). See cases cited in note to § 2208, *post*.

§ 30. Opposing creditor to file proof if not named in schedule.—(Code C. P. § 2169.) Where the name of an opposing creditor does not appear in the schedule, he must file, with the specification of his objections, proof, by affidavit, that he is a creditor; and, if his debt is not set forth in the schedule, he must also file his affidavit, to the effect specified in subdivisions first and second of section 2160 of this act.

This section is new.

It seems that every creditor, distinctly recognized as such in the schedule, may appear and oppose the discharge. All others,

when they come in to oppose the discharge, must first prove their claims, otherwise they are not authorized to appear and oppose. *Avery's Case*, 6 Abb. Pr. 144. A person named in the schedule as a creditor with a memorandum that his claim is barred by the statute of limitations, cannot, without further proof of his claim, oppose the discharge. *Avery's Case, supra.*

§ 31. **Proceedings if jury do not agree.**—(Code C. P. § 2170.) There shall be but one trial by jury. If the jurors cannot agree, after being kept together for such a time as the court deems reasonable, the court must discharge them, and determine the questions of fact, or those questions as to which the jurors have not agreed, upon the evidence taken before the jury, as if a jury had not been demanded.

2 R. S. 19, § 19 ; 3 R. S. 6th ed. 16, § 24 ; 2 Edm. St. 20.

§ 32. **Production of petitioner's non-resident wife.**—(Code C. P. § 2171.) Where the petitioner's wife resides without the State, the court, or a judge thereof out of court, may, upon the application of any creditor, make an order, requiring the petitioner to bring his wife before the court, at the hearing or trial, to the end that she may be examined as a witness. A copy of the order must be personally served upon the petitioner, at least three weeks before the hearing. If it appears, upon the hearing, that service could not, with due diligence, be so made, in consequence of the petitioner's sickness or absence, the court may, in its discretion, adjourn the hearing or trial, and prescribe the time and manner of service of the order for the adjourned day. If, after due service, the petitioner's wife does not attend at the time and place appointed, the petitioner is not entitled to his discharge, unless he proves, to the satisfaction of the court, by his affidavit, or upon his oral examination, or

otherwise, that he was unable to procure her attendance.

2 R. S. 19, §§ 20, 21 ; 3 R. S. 6th ed. 16, 17, §§ 25, 26 ; 2 Edm. St. 20. Mr. Throop says, that the provisions revised in this section were framed with reference to the former rule of law excluding the wife as a witness ; but they have been retained because there are some cases where the truth can be more satisfactorily ascertained by her oral examination, and she must be presumed to be under the control of her husband.

§ 33. **Examination of insolvent.**—(Code C. P. § 2172.) At the hearing or trial, the petitioner must be examined under oath, at the instance of any creditor, touching his property or debts, or any other matter stated in his schedule, or any changes that have occurred in the situation of his property, since the making of the schedule ; and particularly whether he has collected any debts or demands, or made any transfers of, or otherwise affected, his real or personal property. Any creditor may contradict or impeach, by other competent evidence, the testimony of the insolvent, or of his wife.

2 R. S. 20, § 22 ; 3 R. S. 6th ed. 17, § 27 ; 2 Edm. St. 20, "must" substituted for "may."

§ 34. **What prevents discharge.**—(Code C. P. § 2173.) In either of the following cases, the petitioner is not entitled to a discharge :

1. Where it appears, upon the hearing or trial, that, after making the schedule annexed to his petition, he has collected a debt or demand, or transferred, absolutely, conditionally, or otherwise, any of his property, not exempt by law from levy and sale by virtue of an execution, and he neglects or refuses forthwith to pay over to the clerk, the full amount of all debts and demands so

collected, and the full value of all property so transferred, except so much of the money, and of the value of the property, as appears to have been necessarily expended by him for the support of himself or his family.

2. Where it appears, in like manner, that the petitioner, within two years before presenting the petition, has, in contemplation of his becoming insolvent, or of his petitioning for his discharge, or knowing of his insolvency, made an assignment, sale, or transfer, either absolute or conditional, of any of his property, or of any interest therein, or confessed a judgment, or given any security, with a view of giving a preference to a creditor for an antecedent debt.

2 R. S. 20, §§ 23, 24, as amended by Laws of 1854, c. 147; 3 R. S. 6th ed. 17, §§ 28, 29; 2 Edm. St. 21. The Revised Statutes allowed the insolvent to give security for the payment of the sum collected within thirty days.

The creditors acquire no lien upon the property by the fact that the debtor has presented his petition. The property is still under the control of the insolvent. He may sell it, and though it may be improper for him to do so, the purchaser acquires a valid title. The title to the inventoried property cannot be effected until it is assigned according to the statute. *Bailey* v. *Burton*, 8 Wend. 339; see *McNeilly* v. *Richardson*, 4 Cow. 607.

This seems to have been the occasion for the first subdivision of this section. The revisers of the statutes (A.D. 1830) say: "It is supposed that the assignment passes only the property which the insolvent had at the time of its execution and delivery; as no retroactive effect seems to be given by the act. The consequence would appear to be, that he would not be required to account for property sold or debts collected since the presentation of his petition. The above section has been drawn to prevent such conduct, and to remove any doubt that might exist, whilst a suitable provision has been made for the support of the debtor and his family." 5 Edm. St. 615.

The object of the second subdivision of this section was to prevent the execution of preferential assignments by depriving such

assignors of the benefit of the insolvent laws. "Preferences," say the same revisers in their note to this section, "may still be made either with the assent of creditors or at the hazard of losing the benefit of the insolvent laws. The doctrine evidently deducible from the statute, is that a debtor who creates a trust of all his property on behalf of creditors, giving preferences, can never claim a discharge from any debt existing when the trust was constituted. It is a legal bar created by this statute to the relief claimed by the insolvent."

Where the insolvent, within two years before presenting his petition, executed a general assignment giving preferences, it was held that the execution of the assignment was itself evidence of the insolvency of the assignor, and the statute operated as a bar to his discharge. *Morewood* v. *Hollister*, 6 N. Y. 309.

An objection to a discharge upon this ground, must be taken at the hearing. A preference does not *per se* render the discharge void. *Hayden* v. *Palmer*, 24 Wend. 364.

A debtor cannot set up as a defense to a note which he has transferred with the intent to give a preference, that the transfer was illegal. *Hatch* v. *Brewster*, 53 Barb. 276.

The bankrupt law of 1867 (U. S. R. S. § 5110), provided that no discharge should be granted, or if granted, should be valid, in case the bankrupt had given any fraudulent preference contrary to the provisions of the act.

That section referred to such preferences as were made by one who was insolvent or in contemplation of insolvency or bankruptcy, and with the intent and purpose that the creditor receiving it should have an advantage over the others. *In re Brent*, 8 N. B. R. 444; *In re Jones*, 13 Id. 286; *Matter of Pierson*, 10 Id. 107; *In re Batchelder*, 3 Id. 150.

It did not, and such seems to be a reasonable construction of this section of our statute, refuse a discharge to an insolvent who, in ignorance of his condition, makes a payment in good faith although in fact insolvent. *In re Brent, supra; In re Jones, supra; Matter of Pierson, supra;* see Blumenstiel's Bankruptcy, p. 515.

CHAPTER IV.

ASSIGNMENT, DISCHARGE AND SUBSEQUENT PROCEEDINGS.

§ 35. **When assignment to be directed.**—(Code C. P. § 2174.) An order, directing the execution of an assignment, must be made by the court, where it appears, by the verdict of the jury; or, if a jury has not been demanded, or the jurors have been discharged by reason of their inability to agree, where it satisfactorily appears to the court; as follows:

1. That the petitioner is justly and truly indebted to the consenting creditors, in sums which amount, in the aggregate, to two-thirds of all the debts, which the petitioner owed, at the time of presenting his petition, to creditors residing within the United States.

2. That he has honestly and fairly given a true account of his property.

3. That he has, in all things, conformed to the matters required of him by this article.

2 R. S. 20, § 25, in part, the remainder being incorporated into the following section; also § 26; 3 R. S. 6th ed. 17, 18, §§ 30, 31; 2 Edm. St. 21, 22.

When an order of assignment has been made, the officer granting the order cannot afterwards vacate it, unless there has been surprise on the opposing creditors, or they have been misled by the opposite party. *Matter of Bradstreet*, 13 Johns. 385.

§ 36. **When court to direct assignment.**—(Code C. P. § 2175.) The order must designate one or more trustees, residents of the State; and must direct the petitioner to execute, to him or them, an assignment of all his proper-

ty, at law or in equity, in possession, reversion, or remainder, excepting only so much thereof, as is exempt by law from levy and sale, by virtue of an execution. The assignment must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, and must be recorded in the clerk's office of the county. Where it appears, from the schedule or otherwise, that real property will pass thereby, it must be also recorded as a deed, in the proper office for recording deeds, of each county where the real property is situated.

2 R. S. 20, § 25 ; 38, § 20 ; 2 R. S. 6th ed. 17, § 30 ; 31, § 20 ; 2 Edm. St. 21, 39.

A deed showing upon its face that it is an assignment made by an insolvent in proceedings to obtain his discharge under the statute concerning voluntary assignments, is sufficient to support an action of ejectment by the assignee where there is no affirmative evidence of any invalidity in the insolvent proceedings. *Rockwell* v. *Brown*, 54 N. Y. 210 ; rev'g 33 N. Y. Super. Ct. R. 380 ; 11 Abb. Pr. N. S. 400 ; 42 How. Pr. 226. But when it appears that the proceedings in which the assignment is made are void for want of jurisdiction in the officer before whom they are had, an assignment made in the cause of such proceedings is likewise void, and vests no legal title in the assignee. The mention of a nominal pecuniary consideration in the assignment is not material. The assignment creates a statutory trust, and conveys no other estate or interest than that required for that purpose, and the assignee is invested with no other trust or interest than that described by the statute, merely by the insertion of a nominal consideration. *Rockwell* v. *McGovern*, 69 N. Y. 294 ; affi'g 40 Super. Ct. R. 118.

§ 37. **Trustees, how chosen.**—(Code C. P. § 2176.) The trustee or trustees may be nominated by a majority in amount of the consenting creditors. If no person is so nominated, one or more persons must be appointed by the

court for the purpose. The nomination may be included in the consent, or made in a separate paper, or orally upon the hearing or trial, and entered in the minutes.

2 R. S. 21, § 27 ; 3 R. S. 6th ed. 18, § 32 ; 2 Edm. St. 22.

§ 38. **What passes by assignment.**—(Code C. P. § 2177.) The assignment vests in the trustee or trustees all the petitioner's interest, legal or equitable, at the time of its execution, in any real or personal property, not exempt by law from levy and sale by virtue of an execution ; and any contingent interest which may vest within three years thereafter. When a contingent interest so vests, it passes to the trustee, in the same manner as it would have vested in the petitioner, if he had not made an assignment.

2 R. S. 21, § 28 ; 3 R. S. 6th ed. 18, § 33 ; 2 Edm. St. 22.

An assignment by the insolvent of all his estate, real and personal, passes the title to all the lands which he owns, without further description, and whether specified in the inventory or not. *Roseboom* v. *Mosher*, 2 Den. 61. Property conveyed by the debtor in fraud of the rights of creditors, passes to the assignees. Law of 1858, c. 314 ; 3 R. S. 6th ed. 146 ; and see *Ward* v. *Van Bokkelen*, 2 Paige, 289.

Property held in trust does not pass by the assignment, and if such property remains in specie or in goods, or notes or other choses in action, the *cestui que trust* is entitled to the property, and not the general creditors of the insolvent. *Kip* v. *Bank of New York*, 10 Johns. 63 ; see *Kennedy* v. *Strong*, Id. 289.

The title of the property of the insolvent is not affected by his proceedings in insolvency until actual assignment under the statute. *Bailey* v. *Burton*, 8 Wend. 339.

§ 39. **When discharge to be granted.**—(Code C. P. § 2178.) Upon the production by the petitioner of a certificate of the trustee or trustees, duly acknowledged or proved, and certified, in like manner as a deed to be recorded in

the county, to the effect, that the insolvent has assigned, for the benefit of all his creditors, all his property so directed to be assigned, and all the books, vouchers, and papers relating thereto, and that he has delivered so much thereof as is capable of delivery; and also of a certificate of the county clerk, that the assignment has been duly recorded in his office; the court must grant to the insolvent a discharge from his debts, which has the effect declared in the following sections of this article.

2 R. S. 21, § 29; 3 R. S. 6th ed. 18, § 34; 2 Edm. St. 22.

§ 40. **Proceedings where trustee refuses to give certificate.**—(Code C. P. § 2179.) If a trustee refuses or neglects, upon payment or tender by the petitioner of the expense of so doing, to execute or acknowledge a certificate, as prescribed in the last section, or to cause the assignment to be recorded, as therein prescribed, the court, upon proof by affidavit of the facts, must make an order, requiring the trustee to show cause, at a time and place therein specified, why the petitioner should not be discharged, notwithstanding his neglect or refusal; and why the trustee's appointment should not be revoked.

2 R. S. 38, § 23; 3 R. S. 6th ed. 31, § 23; 2 Edm. St. 39.

§ 41. **The same.**—(Code C. P. § 2180.) If, upon the return of the order, it appears that the assignment has been duly executed, and that the petitioner has duly delivered all his property directed to be assigned, and all the books, vouchers, and papers relating thereto, which are capable of delivery, the court may, either

1. Grant a discharge of the petitioner, notwithstanding the neglect or refusal of the trustee; or

2. Make an order, revoking the appointment of the trustee. Upon the entry of such an order, the powers of

the trustee, and his interest in the assigned property, cease. If there is no other trustee, the court must, by the same or another order, appoint one or more new trustees. Such an appointment has the same effect, as if the person or persons so appointed were named as trustees in the original assignment.

2 R. S. 38, 39, §§ 24, 25, 26 ; 3 R. S. 6th ed. 31, §§ 24, 25, 26 ; 2 Edm. St. 39, 40.

§ 42. **Recording of papers upon discharge.**—(Code C. P. § 2181.) The discharge, and the petition, affidavits, orders, schedule, and other papers, upon which the discharge is granted, exclusive of the minutes of testimony, must be recorded in the clerk's office of the county, within three months after the discharge is granted. In default thereof, the discharge becomes inoperative, from and after that time. The original discharge, the record thereof, or a transcript of the record, duly authenticated, is conclusive evidence of the proceedings and facts therein contained. The other papers specified in this section, the record thereof, or a transcript of the record, duly authenticated, are presumptive evidence of the proceedings and facts therein contained.

2 R. S. 38, § 19 ; amended Laws of 1866, c. 116 ; 3 R. S. 6th ed. 31, § 19 ; 6 Edm. St. 701. The statute, as it formerly read, rendered the discharge inoperative *until* the papers were filed. See *Barnes* v. *Gill*, 13 Abb. Pr. N. S. 169, 172.

§ 43. **Form of the discharge.**—The discharge should be drawn with care. Its recitals are conclusive evidence of the statutory proceedings and facts, except those which are necessary to confer jurisdiction. *Stanton* v. *Ellis*, 12 N. Y. 575. If it contains a recital of all the facts, showing that the officer had general and special jurisdiction of the case, it is of itself sufficient evidence of the proceedings, without producing the

record. *O' Connell* v. *Sutherland*, 16 Abb. Pr. 460, note; *Barber* v. *Winslow*, 12 Wend. 102; *Carpenter* v. *White*, 3 J. B. Moore, 231; *Jenks* v. *Stebbins*, 11 Johns. 224; *Lester* v. *Thompson*, 1 Johns. 300. And when it contains such recitals, it furnishes protection to an officer who acts under it, as, for instance, a sheriff who discharges a prisoner. *Bullymore* v. *Cooper*, 46 N. Y. 236; *Develin* v. *Cooper*, 84 N. Y. 410. But the recitals in the discharge are not the only evidence of the regularity of the proceedings. *Bullymore* v. *Cooper*, *supra*, 246; *Richmond* v. *Praim*, 31 Supm. Ct. (24 Hun), 578. Nor does an omission in the discharge to state the performance of an act which is required by the statute to be done, raise a legal presumption that it was not done. *Salters* v. *Tobias*, 3 Paige, 338.

It is merely *prima facie* evidence of the facts necessary to confer jurisdiction, and it may be avoided in a collateral action by proof of the non-existence of such facts. *Morrow* v. *Freeman*, 61 N. Y. 515; *Hale* v. *Sweet*, 40 N. Y. 97; *Stanton* v. *Ellis*, 12 N. Y. 575.

When the discharge stated that the officer was satisfied that the debtor had conformed in all things to those matters required of him, according to the true intent and meaning of the act, before he directed an assignment, this was held to be a sufficient averment of the facts. *Roosevelt* v. *Kellogg*, 20 Johns. 208, 211. So, if it states that the insolvent has assigned "all his estate, both in law and in equity, in possession, reversion, and remainder," it is enough. *Roosevelt* v. *Kellogg*, *supra*. And if it does not except foreign creditors, that does not affect its validity as against creditors of the United States. Ibid.

For form of discharge, see *Soule* v. *Chase*, 1 Abb. Pr. N. S. 48, 49.

§ 44. **Effect of discharge.**—(Code C. P. § 2182.) Except as prescribed in the next two sections, a discharge, granted as prescribed in this article, exonerates and discharges the petitioner from every debt due at the time when he executed his assignment, including a debt contracted before that time, though payable afterwards, and from every liability incurred by him, by making or indorsing a pro-

missory note, or by accepting, drawing, or indorsing a bill of exchange, before the execution of his assignment, or incurred by him in consequence of the payment, by any party to such a note or bill, of the whole or any part of the money secured thereby, whether the payment is made before or after the execution of the assignment. At any time after one year has elapsed, since the recording of the discharge, and the petition, affidavits, orders, schedule, and other papers upon which the discharge was granted, as prescribed in section twenty-one hundred and eighty-one of this act, the petitioner may apply, upon proof of his discharge, to the court in which a judgment shall have been rendered against him, for an order directing the judgment to be cancelled and discharged of record. If it appears that he has been discharged from the payment of that judgment, an order must be made accordingly, and thereupon the clerk must cancel and discharge the docket thereof, as if the proper satisfaction piece of the judgment was filed. Notice of the application, accompanied with copies of the papers upon which it is made, must be given to the judgment creditor, unless his written consent to the granting of the order, with satisfactory proof of the execution thereof, and if he is not the party in whose favor the judgment was rendered, that he is the owner thereof, is presented to the court upon the application.

This and the next section are in place of 2 R. S. 22, §§ 30, 31; 3 R. S. 6th ed. 18, §§ 35, 36; 2 Edm. St. 22, 23. See notes to § 2183. Amended by Laws of 1883, c. 402.

§ 45. What debts may be discharged.—It seems to be a general and well-settled rule, that if the creditor at the time of the assignment by the insolvent debtor has not a certain debt due and owing, to which he can attest by oath so as to entitle him to a dividend of the insolvent's effects, he will not be barred

by the discharge. *Mechanics' & Farmers' Bank* v. *Capron*, 15 Johns. 467; *Gardner* v. *Lay*, 2 Daly, 113; *Andrus* v. *Waring*, 20 Johns. 153; *Ransom* v. *Keyes*, 9 Cow. 128; *Buel* v. *Gordon*, 6 Johns. 126; *Frost* v. *Carter*, 1 Johns. Cas. 73; see *Matter of Adams*, 15 Abb. N. C. 61, and note. But debts existing, though payable in the future, are within the act. *Workman* v. *Leake*, Cowp. 22; *Jennings* v. *Jennings*, Lofft, 433. And where a bond has become forfeited prior to the assignment, and the sum due is capable of liquidation, the demand upon the bond is barred by the discharge. *Clinton* v. *Hart*, 1 Johns. 375; *Sammon* v. *Miller*, 3 Barn. & Adol. 596.

So an implied warranty of title of genuineness by one who transfers negotiable paper, if it turns out to be false, is broken the instant of the transfer, and the liability is therefore discharged by a subsequent discharge in insolvency, though the defect be not discovered until after the discharge. *Murray* v. *Judah*, 6 Cow. 484.

The act does not apply to liability for torts, such as libel, trespass, and the like. *Zinn* v. *Ritterman*, 2 Abb. Pr. N. S. 261; *Crouch* v. *Gridley*, 6 Hill, 250; *Strong* v. *White*, 9 Johns. 161; *Owen* v. *Routh*, 14 Com. Ben. 327; *Lloyd* v. *Neele*, 2 Chitty, 222; *Lloyd* v. *Peell*, 3 Bar. & Ald. 407. So under the bankrupt law of 1867. *In re Hennocksburgh*, 7 N. B. R. 37; *In re Sutherland*, 3 Id. 314.

In the case of an action against carriers for a breach of their duty, the cause of action is founded upon a contract, and the plaintiff cannot elude the effect of a discharge by bringing an action sounding in tort. So held under the bankrupt act of 1841. *Campbell* v. *Perkins*, 8 N. Y. 430.

But when the claim for damages has become a debt by being converted into judgment before the assignment, it is within the statute. *Luther* v. *Deyo*, 19 Wend. 629; *Deyo* v. *Van Valkenburgh*, 5 Hill, 242; *Stewart* v. *Killmar*, 19 Wend. 630, note; *Ex parte Thayer*, 4 Cow. 66; *People* v. *Marine Court*, 3 Cow. 366; see *Smith* v. *Bennett*, 17 Wend. 479; *Ex parte Smith*, 5 Cow. 276. So under the late bankrupt law. *In re Hennocksburgh*, 7 N. B. R. 37; *In re Sidle*, 2 N. B. R. 220; *In re Sheehan*, 8 N. B. R. 345.

The report of a referee, or the verdict of a jury, does not

change the nature of the demand. *Kellogg* v. *Schuyler*, 2 Den. 73; *Crouch* v. *Gridley*, 6 Hill, 250; *Black* v. *McClelland*, 12 N. B. R. 481; *In re Maybin*, 15 Id. 468; *Wilmer* v. *White*, 6 Bing. 291.

The discharge does not bar a claim against the insolvent as a factor or trustee for goods delivered to him to be sold for account of the owner or consignor. *Kennedy* v. *Strong*, 10 Johns. 289; approved, s. c. 14 Johns. 128.

Under the bankrupt law, debts created while acting in any fiduciary character were not discharged. See *In re Seymour*, 1 N. B. R. 29; *In re Kimball*, 2 Id. 204; *Lenke* v. *Booth*, 5 Id. 351; *Treadwell* v. *Holloway*, 12 Id. 61; *Meador* v. *Sharpe*, 14 Id. 492; *Johnson* v. *Worden*, 13 Id. 335; *Grover* v. *Clinton*, 8 Id. 312; *Owsley* v. *Cobin*, 15 Id. 489; *Cronan* v. *Cotting*, 104 Mass. 245.

A discharge in bankruptcy does not affect a fine for contempt, and if one is discharged from imprisonment on that ground, he may be re-arrested. *Spalding* v. *The People*, 7 Hill, 301; affi'g 10 Paige, 284; affi'd, 4 How. U. S. 21. See Chap. VI.

The burden of proof is on the party who seeks to show that a discharge of the debtor does not operate upon a certain claim because not provable at the time of the discharge. *Harrison* v. *Lourie*, 49 How. Pr. 124.

When it is impossible to determine from the pleadings in a suit whether the plaintiff's claim is on contract or tort, the creditor must establish by other evidence that it is in tort. *Harrison* v. *Lourie*, *supra*, Monnell, Ch. J. See *post*, Chap. V.

A discharge does not operate on continuing contracts so as to permit the bankrupt or insolvent to enjoy the benefits, and exempt him from the liabilities of his contracts. *Stinemets* v. *Ainslie*, 4 Den. 573; *Robinson* v. *Pesant*, 53 N. Y. 419. Thus a discharge is no bar to an action on an express covenant to pay rent, accruing subsequent to the insolvent's discharge. *Lansing* v. *Prendergast*, 9 Johns. 127; *Frost* v. *Carter*, 1 Johns. Cas. 73; see *Hendricks* v. *Judah*, 2 Caines, 25; *Stinemets* v. *Ainslie*, *supra*; *Newton* v. *Scott*, 9 M. & W. 434; s. c. 10 Id. 471. Nor is it a bar to an action brought by the assignee of a policy of insurance against the defendant for not paying the annual premium to keep the insurance on foot. *La Coste* v.

Gillman, 1 Price, 315; *Bennett* v. *Burton*, 4 Per. & Dav. 313.

§ 46. Discharge of sureties—Bail.—The discharge of the principal debtor under the insolvent law, does not, as a general principle, discharge the surety. *Buel* v. *Gordon*, 6 Johns. 126; *Hall* v. *Fowler*, 6 Hill, 630; *Bowery Sav. Bank* v. *Clinton*, 2 Sandf. 113; *Storms* v. *Waddell*, 2 Sandf. Ch. 494; *Page* v. *Bussell*, 2 M. & S. 551; *Welsh* v. *Welsh*, 4 M. & S. 333; *Soutten* v. *Soutten*, 5 B. & Ald. 852; but see *Moore* v. *Paine*, 12 Wend. 123. Such is the express provision of the bankrupt act. U. S. R. S. § 5118.

And bail are not discharged by the discharge of the principal after they have become fixed. *Hall* v. *Fowler*, 6 Hill, 630.

But before the liability of the bail has become fixed, the discharge of the principal operates as an *exoneratur*. *Kane* v. *Ingraham*, 2 Johns. Cas. 403; *Merchants' Bank* v. *Moore*, 2 Johns. 294. But if the defendant fail to plead his discharge through neglect, the bail cannot be discharged on motion after judgment. *Post* v. *Riley*, 18 Johns. 54.

If the surety pay the debt after the principal is discharged, it is not altogether free from doubt whether he can recover against the discharged principal. It has been held that a discharge under the bankrupt law of 1841 was a bar to an action for contribution brought by a surety against his discharged co-surety. *Tobias* v. *Rogers* (13 N. Y. 59), and in *Mace* v. *Wells* (7 How. U. S. 272), under the same act, it was held that where a surety on a note had paid it after the maker had been discharged in bankruptcy, the surety had lost his recourse against the maker. See *Morse* v. *Hovey*, 1 Sandf. Ch. 187, and, under the bankrupt law of 1867, see *Reitz* v. *The People*, 16 N. B. R. 96. The principle of these decisions is, that the surety might have proved his debt in bankruptcy, but under our statute the surety could not prove his claim until after payment, and when the payment is not made until after the discharge is granted his claim against the principal is not barred. *Buel* v. *Gordon*, 6 Johns. 126; and see *Powell* v. *Eason*, 8 Bing. 23; *Hocken* v. *Browne*, 4 Bing. N. C. 400; *Abbott* v. *Bruere*, 5 Bing. N. C. 598; *Emery* v. *Clark*, 2 C. B. N. S. 582, 591; *Litten* v. *Dalton*, 17 C. B. N. S. 178.

§ 47. **Discharge of joint debtors.**—Where one of two joint debtors is discharged from all his debts, that is a discharge from his joint as well as his separate debts. *Willson* v. *Gomparts*, 11 Johns. 193; see *Robertson* v. *Smith*, 18 Johns. 459. But the discharge of one joint debtor does not discharge the others. *Tooker* v. *Bennett*, 3 Cai. 4; *Moore* v. *Paine*, 12 Wend. 123, 125. See *Alger* v. *Raymond*, 7 Bosw. 418. So under the bankrupt law of 1867. See U. S. R. S. § 5118.

If, after the discharge of one, the other joint debtor pays the debt, he may then have his action over against the discharged debtor. *Ford* v. *Andrews*, 9 Wend. 312; *Frost* v. *Carter*, 1 Johns. Cas. 73; see *Elsworth* v. *Caldwell*, 18 Abb. Pr. 20; s. c. 27 How. Pr. 188; 48 N. Y. 680. But not so of joint sureties. *Tobias* v. *Rogers*, 13 N. Y. 59; *Waggoner* v. *Walrath*, 31 Supm. Ct. (24 Hun), 443, 447.

§ 48. **Judgments.**—A discharge extinguishes a previous judgment, and where the judgment-creditor proceeded to enforce such a judgment by arresting the judgment-debtor, both he and the attorney who issued the execution were held liable in an action for false imprisonment. *Deyo* v. *Van Valkenburgh*, 5 Hill, 242. This, of course, will not prevent the judgment-creditor from bringing an action upon the judgment in which the validity of the discharge can be tried.

Under the insolvent laws, a case rarely happens where a judgment is recovered intermediate the assignment and the discharge. Under the bankrupt laws the question has frequently arisen, whether such a judgment merges the original claim and becomes a new debt arising subsequent to the filing of the petition.

In this State it is now settled that where the judgment is obtained after the filing of the petition, but before the discharge upon a debt provable in bankruptcy, the judgment is not a new debt. *McDonald* v. *Davis*, 105 N. Y. 509; *Monroe* v. *Upton*, 50 N. Y. 593, 597; *Clark* v. *Rowling*, 3 N. Y. 216; *Dresser* v. *Brooks*, 3 Barb. 429; *Fox* v. *Woodruff*, 9 Barb. 498. But where the judgment is entered after the discharge upon a debt provable in bankruptcy, the judgment is not affected by the discharge. *Revere Copper Co.* v. *Dimock*, 90 N. Y. 33; affi'd 117 U. S. 559; *McDonald* v. *Davis*, 105 N. Y. 509.

Where a judgment for costs is given against a party who has obtained a discharge while the action is pending, the discharge does not bar a recovery on the judgment. *Stebbins* v. *Willson*, 14 Johns. 403; *Gardner* v. *Lay*, 2 Daly, 113; see *Wilkens* v. *Warren*, 27 Me. 438. It was held otherwise in the case of a discharge under the bankrupt act of 1841. *Leavitt* v. *Baldwin*, 4 Edw. Ch. 289.

Where a bankrupt recovers costs, after his discharge, against a creditor, the creditor cannot have such costs offset against the amount which was due to him before the discharge. *Mickles* v. *Brayton*, 10 Paige, 138.

Where a judgment is given against an insolvent for costs, before the discharge, it is immaterial whether the costs are or are not taxed before the discharge. They are capable of liquidation, and the judgment is discharged. *Warne* v. *Constant*, 5 Johns. 135; *Thomas* v. *Striker*, 3 Johns. Cas. 90; s. c. 5 Johns. 136, note.

In *Cone* v. *Whitaker* (2 Johns. Cas. 280), the judgment of nonsuit was entered prior to the discharge, but the costs were not taxed until after the discharge, it was held that the costs were not a debt until taxation, and, of course, were not affected by the discharge. In the case of *Warne* v. *Constant* (5 Johns. 135), this rule seems to be shaken. It was there held, that where the judgment of nonsuit is before the discharge, although the roll may be signed, and costs taxed afterwards, still the costs are barred by the discharge.

Where the plaintiff, in an action commenced before he obtains a discharge, is nonsuited in such action, after the discharge, the costs of the action are not affected by the discharge. *Stebbins* v. *Willson*, 14 Johns. 403.

Where an action was brought on a judgment obtained after the passage of the act, upon debts contracted prior to the act, it was held that the plaintiff might go behind the judgment to show the date of the contract for the purpose of evading a subsequent discharge under the insolvent laws. *Wyman* v. *Mitchell*, 1 Cow. 316.

And in *Lester* v. *Christalar* (1 Daly, 29), where the action was upon a judgment obtained in this State by a non-resident, it was held that the judgment did not constitute a new debt, so

as to render it a contract made within this State. See *Raymond* v. *Merchant*, 3 Cow. 147.

Where an order was made cancelling a judgment under this section, and notice of the application had not been given to the judgment-creditor, it was held that the order was irregular and unauthorized. *Wheeler* v. *Emmeluth*, 121 N. Y. 241 ; rev'g 7 N. Y. Supp. 807. Upon a new application for the same relief, it appeared that the name of a creditor, recently deceased, had been inserted in the list of creditors, whereas the name of the administrator of the deceased should have been entered. It did not appear that the debtor had knowledge of the death ; it was held that this error did not invalidate the discharge, and that the judgment should be cancelled. *Wheeler* v. *Emmeluth*, 65 Supm. Ct. (58 Hun), 369 ; affi'd 125 N. Y. 750.

§ 49. Discharge of liability as indorser or maker of note. —The insolvent act of 1813 extended the discharge only to such debts as were due at the time of the assignment of the insolvent's estate, and debts contracted before that time, though payable afterwards. Therefore, if an indorser of a promissory note paid it after the maker had been discharged under the insolvent act, he could still recover the amount from the maker, whose discharge would be no bar to the action. *Frost* v. *Carter*, 1 Johns. Cas. 73 ; s. c. 2 Cai. Cas. 311 ; *Mechanics' & Farmers' Bank* v. *Capron*, 15 Johns. 467 ; *Ainslie* v. *Wilson*, 7 Cow. 662. The act of 1819 (Laws of 1819, c. 101, p. 118, § 11) went so far in changing the law, so pronounced, as to exonerate, by the discharge, the indorser of a promissory note, though the note had not become due at the time of the discharge, and permitted the holder to come in for a dividend in the same manner as if the bill was due. The Revised Statutes (1830) extended the protection of the discharge to the maker as well as the indorser of a promissory note. *Ford* v. *Andrews*, 9 Wend. 312.

Section 2182 has amplified, without materially changing, the Revised Statutes. Mr. Throop says, in note to Section 2183 : " It would seem, upon principle, that a discharge ought also to be a defense to every action for money paid to the use of the insolvent, or for contribution, where the contract, upon which the cause of action arises, was made before the discharge, although

the money is paid afterwards. But the original statute limited the effect of the discharge, to cases between parties to promissory notes and bills of exchange; and an amendment, extending the principle to all cases of joint contracts, and of principal and surety, would have opened the door to new questions, and probably to some doubt and confusion."

Where the holder of a dishonored note joined in a petition for a discharge of the maker, a prior indorser who subsequently took up the note was held to have done so in his own wrong when under no legal obligation to do so, and therefore he had no remedy over against the discharged maker. *Lynch* v. *Reynolds*, 16 Johns. 41.

The effect of a discharge upon negotiable paper is to destroy its negotiability. It discharges the debt for which the note is given; the note becomes *functus officio*, and the person to whom it is transferred after the discharge, acquires no right to maintain an action upon it. *Depuy* v. *Swart*, 3 Wend. 135; *Moore* v. *Viele*, 4 Id. 420.

§ 50. **Debts not affected by discharge.**—(Code C. P. § 2183.) In either of the following cases, such a discharge does not affect a debt or liability, founded upon a contract, unless it was owing, when the petition was presented, to a resident of the State; or the creditor has executed a consent to the discharge; or has appeared in the proceedings; or has received a dividend from the trustee:

1. Where the contract was made with a person, not a resident of the State.

2. Where it was made and to be performed without the State.

3. Where the creditor was not, at the time of the discharge, a resident of the State.

See 2 R. S. 22, §§ 30, 31; 3 R. S. 6th ed. 18, §§ 35, 36; 2 Edm. St. 22, 23.

§ 51. **Constitutionality.**—How far the State Legislature may discharge an insolvent debtor from his contracts is a question

which has been extensively litigated. Objection was at a very early date raised to every attempt on the part of the State to grant discharges under insolvent laws, on the ground, first, that Congress, under its constitutional authority to establish uniform laws on the subject of bankruptcies throughout the United States, had exclusive power to legislate upon the subject; and, secondly, upon the ground that such laws impair the obligation of contracts and are consequently repugnant to that provision of the Constitution of the United States, which prohibits a State from passing such laws. The first of these objections was met and overcome in the case of *Sturges* v. *Crowninshield*, 4 Wheat. 122, in which case the law was declared to be "that since the adoption of the Constitution of the United States, a State has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, within the meaning of the Constitution, and provided there be no act of Congress in force to establish a uniform system of bankruptcy, conflicting with such law," and this position has ever since remained unquestioned. *Ogden* v. *Saunders*, 12 Wheat. 213; *Boyle* v. *Zacharie*, 6 Pet. 635, 638; *Cooley's Cons. Lim.* 294 (6th ed., 356).

The second objection to the constitutionality of State insolvent laws was passed upon by the Supreme Court of the United States in the cases of *Sturges* v. *Crowninshield*, 4 Wheat. 122, and *Ogden* v. *Saunders*, 12 Wheat. 213. The decision of that court was, that, as to contracts made before the passage of the insolvent law, the insolvent law was inoperative and void, but as to contracts made after the passage of the law, the law was valid as to persons and contracts falling legitimately within its operation, because the parties to such contracts were presumed to have had reference to the law in forming their contracts, and impliedly to have made the law a part of their contracts. Whatever may be said of the grounds upon which these decisions were placed (see remarks of Gardiner, J., in *Donnelly* v. *Corbett*, 7 N. Y. 500, 505; and see *Olyphant* v. *Atwood*, 4 Bosw. 459, 470; *In re Reiman & Friedlander*, 11 N. B. R. 21), the rule is now so well settled as to be beyond question. *Sturges* v. *Crowninshield*, *supra*; *Ogden* v. *Saunders*, *supra*; *Cook* v. *Moffat*, 5 How. U. S. 295, 309; *Boyle* v. *Zacharie*, 6 Pet. 348; *Wyman* v. *Mitchell*, 1 Cow. 316, 321; *Mather* v. *Bush*,

16 Johns. 233; *Roosevelt* v. *Cebra*, 17 Id. 108; *Baldwin* v. *Hale*, 1 Wall. 223; *Gilman* v. *Lockwood*, 4 Wall. 409; *Pratt* v. *Chase*, 44 N. Y. 597; *Murphy* v. *Philbrook*, 57 Supr. Ct. 204.

The inhibition of the Constitution is wholly prospective. The States may legislate as to contracts thereafter made as they may see fit. It is only those in existence where the hostile law is passed that are protected from its effect. *Edwards* v. *Kearzey*, 96 U. S. 595; *Denny* v. *Bennett*, 128 U. S. 489.

§ 52. Debts due non-resident creditors not discharged.— It is settled law that a discharge under our insolvent acts operates upon all contracts made within this State between citizens of this State subsequent to the passage of the act. The discharge, as we have seen, is in such a case held not to impair the obligation of a contract, because, being made after the law, the parties are presumed to have had reference to the law, and impliedly to have made it a part of the contract. Sutherland, J., in *Wyman* v. *Mitchell*, 1 Cow. 316, 321; *Mather* v. *Bush*, 16 Johns. 233; *Roosevelt* v. *Cebra*, 17 Id. 108; *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Ogden* v. *Saunders*, 12 Wheat. 213; *Boyle* v. *Zacharie*, 6 Pet. 348; *Hicks* v. *Hotchkiss*, 7 Johns. Ch. 297; *Jaques* v. *Marquand*, 6 Cow. 497; *Donnelly* v. *Corbett*, 7 N. Y. 500.

In the *Matter of Wendell* (19 Johns. 153), where the debt was contracted in 1812, after the repeal of the act of 1811, and while the act of 1801 was in force, which authorized a discharge on the petition of three-fourths in amount of all the creditors, and the debtor subsequently obtained a discharge under the act of 1813, which permitted a discharge on the petition of two-thirds in amount of the creditors, it was held that the greater facilities afforded by the latter act so materially changed the law in force at the time of making the contract, as to render the discharge ineffectual as to that debt.

Debts due to non-resident creditors are governed by different rules. Such debts cannot be discharged without the express or implied consent of the non-resident creditor.

It appears to have been formerly supposed that whatever effect might be given to a discharge granted by the courts of this State, when brought in question in a foreign tribunal, that such a dis-

charge was a bar to all suits brought here upon antecedent contracts wherever made. *Penniman* v. *Meigs*, 9 Johns. 325 (1812). But this doctrine was overruled in the Supreme Court of the United States, in *McMillan* v. *McNeill* (4 Wheat. 209); *Ogden* v. *Saunders* (12 Wheat. 213). See remarks of Kent, Chan., in *Hicks* v. *Hotchkiss* (7 Johns. c. 297). It was still supposed that when the contract was made here, although by non-residents of the State, or where, by its terms, it was to be executed here, a discharge under our insolvent laws would be a bar to an action here. *Parkinson* v. *Scoville*, 19 Wend. 150; *Matter of Wendell*, 19 Johns. 153; *Sherrill* v. *Hopkins*, 1 Cow. 103; *Blanchard* v. *Russell*, 13 Mass. 1, 16; *Scribner* v. *Fisher*, 2 Gray, 43. But these cases were overruled in the Supreme Court of the United States, in *Baldwin* v. *Hale* (1 Wall. 223; s. c. 3 Am. L. Reg. N. S. 462, and note). See Daly, F. J., in *Lester* v. *Christalar* (1 Daly, 29, 30). *Pratt* v. *Chase*, 44 N. Y. 597.

And in the case of *Donnelly* v. *Corbett* (7 N. Y. 500), it was held that a debt contracted by a citizen of South Carolina, to a citizen of this State, was not discharged by a subsequent discharge under the insolvent laws of South Carolina, and that the discharge was no bar to an action here. See *Van Hook* v. *Whitlock*, 26 Wend. 43.

It is now settled by the decisions of the Supreme Court of the United States, as well as by the decisions of our own State, that insolvent laws have no extra-territorial efficacy, and are wholly ineffectual against non-residents of the State, even though the contract was by its terms to be performed in the State granting the discharge, unless indeed such non-resident creditor voluntarily becomes a party to the insolvent proceedings or claims, or accepts a dividend thereunder. *Ogden* v. *Saunders*, 12 Wheat. 213; *Cook* v. *Moffat*, 5 How. (U. S.) 295, 309; *Boyle* v. *Zacharie*, 6 Pet. 348; *Baldwin* v. *Hale*, 1 Wall. 223; *Gilman* v. *Lockwood*, 4 Wall. 409; *Kelley* v. *Drury*, 9 Allen (Mass.), 27; *Regina Flour Mills Co.* v. *Holmes*, 156 Mass. 11; *Bean* v. *Loryea*, 81 Cal. 151; *Satterthwaite* v. *Abercrombie*, 24 Fed. R. 543; *Pullen* v. *Hillman*, 84 Me. 129; *Soule* v. *Chase*, 39 N. Y. 342; rev'g s. c. 1 Robt. 222; *Pratt* v. *Chase*, 44 N. Y. 597; rev'g 29 How. Pr. 296; s. c. 19 Abb. Pr. 150; *Donnelly* v. *Corbett*, 7 N. Y. 500; *Smith* v. *Gardner*, 4 Bosw. 54; *Bal-*

lard v. *Webster*, 9 Abb. Pr. 404; *Stirn* v. *McQuade* (N. H. Supm. Ct.), 22 Atl. R. 451; *Denny* v. *Bennett*, 128 U. S. 489. The cases of *Olyphant* v. *Atwood* (4 Bosw. 459) and *Ritchie* v. *Garrison* (10 Abb. Pr. 246), must be regarded as overruled in the later cases cited, although no allusion appears to have been made to them.

Residence within the meaning of the insolvent laws is not equivalent to citizenship. A creditor resident and domiciled in the State at the time the debt was contracted and the discharge obtained is bound by the proceedings, although he be an alien. *Von Glahn* v. *Varrenne*, 1 Dill. 515.

On the effect of a discharge in insolvency upon non-residents see an article in 6 Harvard Law Review, 349, where the reported cases in the several States are collected.

When a judgment is recovered by a trustee under a will, a subsequent discharge of the judgment-debtor will discharge the judgment if the trustee is subject to the jurisdiction of the court, although the beneficiaries of the trust are non-residents. *Wade* v. *Sewell*, 56 Fed. R. 129.

§ 53. Debts made and to be performed without the State, not discharged.—Mr. Throop, in his preface to this article, says that it seems to be settled that a discharge does not extinguish a debt founded upon a contract made and to be performed without the State, and the second subdivision of § 2183 was inserted as an enactment of what the codifiers regarded as the existing law in that respect. The cases cited in support of the statement are *Suydam* v. *Broadnax*, 14 Peters, 67; *Clark's Exrs.* v. *Van Riemsdyk*, 9 Cranch, 153; *Towne* v. *Smith*, 1 Woodb. & M. 115; and *Byrd* v. *Badger*, 1 McAll, 263. In each of these cases it will be observed upon examination that, apart from the question of the place either of the making or of the performance of the contract, the creditor was in each instance a non-resident of the State granting the discharge. Hence, under the authorities above cited, the debt could not be discharged.

The tendency of the decisions has been to base the power of the State to grant a discharge on its jurisdiction over its own citizens. "Whenever the question," says Clifford, J., in *Bald-*

win v. *Hale*, 1 Wall. 223, 232, "has been presented to this court (U. S. Supreme Court) since that opinion was pronounced (*Ogden* v. *Saunders*, *supra*), the answer has uniformly been that the question depended upon citizenship." Commissioner Leonard, in *Pratt* v. *Chase*, 44 N. Y. 597, 599, says, "All the cases agree that the insolvent laws of a State are obligatory upon all citizens of the same State. As to creditors of the insolvent who are not citizens of the same State where the discharge is granted, the want of binding force to defeat the obligation of a contract is founded upon the want of jurisdiction over such creditors."

The logical sequence of this reasoning is that citizens of this State, being subject to its laws, although they enter into a contract elsewhere, remain none the less citizens and none the less subject to our law. In the case of *Pratt* v. *Chase*, *supra*, it was decided that a debt contracted by a citizen of this State to a non-resident, was not extinguished by a subsequent discharge, although by its terms the contract was to be performed in this State. *Baldwin* v. *Hale*, 1 Wall. 223. To go further than this, and to provide that contracts made between citizens of our own State, when made elsewhere and to be performed elsewhere, must be excluded from the operation of our insolvent laws, is to exclude such contracts from the possibility of discharge anywhere, and to extend the doctrine of comity further than any controlling authority has thus far required that it should be extended. The provision of the section of course limits the effect of this discharge, and it appears to be in harmony with *Witt* v. *Follett*, 2 Wend. 457; *Lowenberg* v. *Levine*, 93 Cal. 215.

§ 54. When the creditor is not at the time of the discharge a resident of the State, the debt not discharged.— The third subdivision of section 2183 excludes from the operation of the discharge debts due to creditors who are not, at the time of the discharge, residents of the State; so that, under the present statute, if the debt be contracted between residents of this State, and the creditor afterwards removes, a discharge from the debt cannot be obtained by the debtor under our insolvent laws. Mr. Throop, in his preliminary note to this article, affirms that this was the existing law under the decisions before the enactment of the code. In support of that opinion

he cites the following cases : *Sturges* v. *Crowninshield*, 4 Wheat. 122 ; *Baldwin* v. *Hale*, 1 Wall. 223 ; *Baldwin* v. *Bank of Newbury*, Id. 234 ; *Gilman* v. *Lockwood*, 4 Id. 409. In the first of these cases this precise question was not raised or passed upon. In each of the other cases cited, the creditor, *at the time of making the contract* as well as at the time of the discharge, was a non-resident. In the case of *Stoddard* v. *Harrington*, 100 Mass. 87, where the contract was made between citizens of Massachusetts, and the creditor shortly afterwards removed his residence to South Carolina, while the debtor, remaining in Massachusetts, obtained his discharge under the insolvent laws of that State, the discharge was held to be operative as against the non-resident creditor. The court (Hoar, J.) rested its decision upon *Brigham* v. *Henderson*, 1 Cush. 430, and *Converse* v. *Bradley*, Id. 434, note, and declared that nothing inconsistent with these decisions has been decided by the Supreme Court of the United States.

The statute of this State has now declared the law to be the reverse of that stated in *Stoddard* v. *Harrington*, *supra*, and in accordance with *Pullen* v. *Hillman*, 84 Me. 129 ; *Norris* v. *Atkinson*, 64 N. H. 87 ; *Roberts* v. *Atherton*, 60 Vt. 563.

§ 55. Creditors who consent, appear or accept dividend. —Non-resident creditors who have executed a consent to the discharge, or who have appeared in the proceedings, or who have received a dividend from the trustee, are bound by the discharge. The authorities are uniform, that the discharge in such cases is as binding upon non-resident as upon resident creditors. *Clay* v. *Smith*, 3 Pet. 411 ; *Baldwin* v. *Hale*, 1 Wall. 223 ; *Gilman* v. *Lockwood*, 4 Wall. 409 ; *Van Hook* v. *Whitlock*, 7 Paige, 373 ; affi'g 26 Wend. 43 ; *Soule* v. *Chase*, 39 N. Y. 342.

The fact that the foreign creditor resorts to the courts of this State, and obtains a judgment, is not such a submission or assent to the jurisdiction of this State as to entitle it to release, by a discharge under its insolvent laws, the debt or obligation created by the judgment. *Donnelly* v. *Corbett*, 7 N. Y. 500 ; *Soule* v. *Chase*, 39 N. Y. 342, 344 ; *Lester* v. *Christalar*, 1 Daly, 29, 31 ; *Worthington* v. *Jerome*, 5 Blatch. 279 ; *Watson* v. *Bourne*,

10 Mass. 337. See this principle questioned, and the case last cited criticised, in *Ogden* v. *Saunders*, 12 Wheat. 213, 364, Johnson, J.

In *Third Nat. Bank* v. *Hastings*, 134 N. Y. 501, affi'g 65 Supm. Ct. (58 Hun) 531, the accommodation maker of a promissory note resided in this State, the endorser, the real principal, a resident of the State of Massachusetts, procured the note to be discounted by the plaintiff, a corporation domiciled in Massachusetts; the endorser afterwards became insolvent and obtained a discharge by composition proceedings under the Massachusetts statute; the plaintiff proved the note in that proceeding and accepted a dividend. It was held that this did not discharge the maker, for the reason that the obligation as between the resident of the State of Massachusetts was discharged, whether the debt was or was not proved, and therefore the principal debtor had taken no step to the prejudice of the surety.

A State law discharging the person of a debtor from arrest for debt is valid, and not within the prohibition of the Constitution, whether the debt was contracted before or after the law. *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Ogden* v. *Saunders*, 12 Wheat. 213; *Mason* v. *Haile*, 12 Wheat. 370; *Beers* v. *Haughton*, 9 Pet. 329; *Woodhull* v. *Wagner*, Baldw. 296; *Lee* v. *Gamble*, 3 Cranch's C. C. 374; *In re Jacobs*, 12 Abb. Pr. N. S. 273; *Shears* v. *Solhinger*, 10 Abb. Pr. N. S. 287.

For the reason that the right to arrest is a part of the remedy only, for the same reason such a law can have no effect out of the jurisdiction of the State granting it. A debtor who has been thus discharged, if the debt has not been barred, may be sued here, and, in a proper case under our law, may be arrested and held to bail, notwithstanding the discharge. *Wright* v. *Paton*, 10 Johns. 300; *Smith* v. *Spinolla*, 2 Id. 198; *White* v. *Canfield*, 7 Id. 117; *Sicard* v. *Whale*, 11 Id. 194; *Peck* v. *Hozier*, 14 Id. 346.

§ 56. **Debts due the United States.**—(Code C. P. § 2184.) Such a discharge does not affect:

1. A debt or duty to the United States; or

2. A debt or duty to the State, for taxes or for money received or collected by any person as a public officer,

or in a fiduciary capacity, or a cause of action specified in section 1969 of this act, or a judgment recovered upon such a cause of action. Except as prescribed in this section, the discharge exonerates the petitioner from a debt or other liability to the State, in like manner and to the same extent, as from a debt or liability to an individual.

2 R. S. 39, §§ 29, 30, as amended by Laws of 1859, c. 2 ; 3 R. S. 6th ed. 32, §§ 29, 30 ; 2 Edm. St. 40.

§ 57. Insolvent to be released from imprisonment.—(Code C. P. § 2185.) If, at the time when the discharge is granted, the petitioner is under arrest, by virtue of an execution against his person issued, or an order of arrest made, in an action or special proceeding, founded upon a debt or liability from which he is discharged, as prescribed in the foregoing sections of this article, he must be released from the arrest, upon producing to the officer his discharge, or a certified copy of the record thereof. If the adverse party wishes to test the validity of the discharge, he may procure a new order of arrest, or cause a new execution to be issued, as the case requires.

2 R. S. 22, § 33 ; 3 R. S. 6th ed. 19, § 38 ; 2 Edm. St. 23 ; amended by adding the last sentence.

§ 58. When the discharge must be pleaded.—When the discharge is obtained before an action is brought, or while it is pending, the debtor must plead the discharge. It will be of no avail unless pleaded. *Cornell* v. *Dakin*, 38 N. Y. 253. And when the discharge is obtained after the action is commenced, it is not a matter of course to permit the defendant to plead it by supplemental answer. Where the defendant has been guilty of laches or fraud, or a strong case of injustice would arise by permitting the defense, the application to plead the discharge will be denied. *Holyoke* v. *Adams*, 59 N. Y. 233 ; affi'g 8 N. Y. Supm. (1 Hun), 223. Thus, in the case of *Medbury* v. *Swan*

(46 N. Y. 200), a delay of fifteen months was fatal; and in *Barstow* v. *Hansen* (9 N. Y. Supm. Ct. R. [2 Hun], 333), the court denied an application to plead a discharge in bankruptcy when a long time had elapsed and the laches were unexplained. See *Mechanics' Bank* v. *Hazard*, 9 Johns. 392; *Scott* v. *Grant*, 10 Paige, 485; *Carter* v. *Goodrich*, 1 How. Pr. 239; *Stewart* v. *Isidor*, 5 Abb. Pr. N. S. 68.

If the defendant neglects to plead the discharge, having had an opportunity to do so, the court will not, as a rule, afterwards relieve him against the judgment on motion. *Rudge* v. *Rundle*, 1 T. & C. 649; *Price* v. *Peters*, 15 Abb. Pr. 197; *Valkenburgh* v. *Dederick*, 1 Johns. Cas. 134; *Palmer* v. *Hutchins*, 1 Cow. 42; *Mechanics' Bank* v. *Hazard*, 9 Johns. 392; *Desobry* v. *Morange*, 18 Id. 336; *Parkinson* v. *Scoville*, 19 Wend. 150; *Steward* v. *Green*, 11 Paige, 535. And where the defendant obtained his discharge after the testimony was closed, it was held that he should have applied for leave to plead in the action, and could not be relieved on motion after judgment. *Price* v. *Peters*, *supra*. But where the debtor was arrested on a judgment rendered upon the same day upon which he obtained his discharge under the insolvent act, it was held that he was entitled to relief by motion. *Baker* v. *Judges of Ulster Com. Pleas*, 4 Johns. 191. And this is the rule when the discharge comes too late to be pleaded, or where the defendant, for any reason, has no opportunity of interposing it as a defense. *Baker* v. *Taylor*, 1 Cow. 165; *Palmer* v. *Hutchins*, 1 Cow. 42; *Monroe* v. *Upton*, 50 N. Y. 593; *Dresser* v. *Brooks*, 3 Barb. 429; *Cornell* v. *Dakin*, 38 N. Y. 253. And it has been held that where the plaintiff, in such a case, disputes the validity of the discharge, the judgment will be opened to permit the determination of that question. *Mabbott* v. *Van Beuren*, 1 Cow. 44, note; *Baker* v. *Taylor*, 1 Cow. 165; *Hall* v. *Gordon*, 1 How. Pr. 99. But where the debtor might have availed himself of the discharge as a defense to the action, or has been guilty of gross laches in making the motion, relief will be denied him. *Valkenburgh* v. *Dederick*, 1 Johns. Cas. 133; *Cross* v. *Hobson*, 2 Caines, 102.

§ 59. **Manner of pleading discharge.**—Under the old prac-

tice it was necessary that the plea should state facts sufficient to show that the officer had acquired jurisdiction. *Service* v. *Heermance*, 1 Johns. 91; *Roosevelt* v. *Kellogg*, 20 Johns. 208; *Hines* v. *Ballard*, 11 Johns. 491; *Frary* v. *Dakin*, 7 Johns. 75; *Sackett* v. *Andross*, 5 Hill, 327; *Spencer* v. *Beebe*, 17 Wend. 557; *Turner* v. *Beale*, 2 Salk. 521; *Ladbroke* v. *James*, Willes, 199. But it is no longer necessary to state the facts conferring jurisdiction. It is sufficient to state that the determination of the officer has been duly given or made. *Livingston* v. *Oaksmith*, 13 Abb. Pr. 183; *Hunt* v. *Dutcher*, 13 How. Pr. 538. See Code of Civ. Pro. § 532.

But since the statute is in terms restricted to certain prescribed debts, it is necessary that the debtor should show that the debt to which he seeks to have the discharge applied was within the prescribed clauses. Thus the pleading must show that the debt was owing to a person resident within this State at the time when the petition for the discharge was presented, or owing to persons not residing within the State, who united in the petition for the discharge, or who accepted a dividend from the estate. *Smith* v. *Bennett*, 17 Wend. 479.

When a defendant relies upon a discharge in bankruptcy in another country as a bar to the action, he must set forth in his answer the statute under which the alleged proceedings were had, and certificate granted, and also such prior proceedings as warranted the granting of the certificate. *Philipe* v. *James*, 1 Abb. Pr. N. S. 311.

§ 60. Discharge, how available after judgment.—If the discharge is obtained after judgment, the proper course for the judgment-debtor, is to apply for a perpetual stay of execution, on motion. *Clark* v. *Rowling*, 3 N. Y. 216, 227; *Mather* v. *Bush*, 16 Johns. 233; *Dresser* v. *Shufeldt*, 7 How. Pr. 85; *Russell & Erwin Mfg. Co.* v. *Armstrong*, 10 Abb. Pr. 258, n.; *Boyd* v. *Vanderkemp*, 1 Barb. Ch. 273; *Alcott* v. *Avery*, Id. 347. Formerly the relief in such cases was by *audita querela*. *Clark* v. *Rawlings*, *supra*.

§ 61. Impeaching the discharge in an action.—The certificate of discharge, when it contains recitals of all the jurisdic-

tional matters, is evidence of the regularity of the proceedings, and furnishes *prima facie* proof of a valid discharge (see note to § 2181, Code C. P., *ante*, p. 50), but whenever the discharge is proved in an action, either by the certificate or by the record of the proceedings, it is open to attack upon any of the grounds mentioned in the succeeding section (see § 2186), or for any defect in the jurisdiction of the officer granting it. *Morrow* v. *Freeman*, 61 N. Y. 515, 517; *Stanton* v. *Ellis*, 12 N. Y. 575; *Hale* v. *Sweet*, 40 N. Y. 97; *Small* v. *Wheaton*, 2 Abb. Pr. 175, 178.

But no objection touching the regularity of the proceeding merely, and not relating to the jurisdiction of the officer, can be raised in a collateral proceeding. The proper remedy in such cases is by a direct review of the proceedings on *certiorari* or by appeal. *People* v. *Stryker*, 24 Barb. 649; *Rusher* v. *Sherman*, 28 Id. 416; *Soule* v. *Chase*, 39 N. Y. 342; *Schaeffer* v. *Soule*, 30 N. Y. Supm. (23 Hun), 583.

§ **62. Impeaching the discharge, on motion.**—On a motion to set aside an execution, or for a perpetual stay, on the ground that the judgment has been discharged, the validity of the discharge will not be tested upon affidavits. *Noble* v. *Johnson*, 9 Johns. 259; *Manhattan Oil Co.* v. *Thorn*, 14 Abb. Pr. 291, note; *Wall* v. *Thorn*, Id. 292, note; *Russell & Erwin Mfg. Co.* v. *Armstrong*, 10 Abb. Pr. 258, note; *Dresser* v. *Shufeldt*, 7 How. Pr. 85; *Deyo* v. *Van Valkenburgh*, 5 Hill, 242; *Russell* v. *Packard*, 9 Wend. 431; *Rich* v. *Salinger*, 11 Abb. Pr. 344; s. c. 14 Id. 294, note; see *Am. Flask & Cap Co.* v. *Son*, 7 Robt. 233; s. c. 3 Abb. Pr. N. S. 333; *Gardner* v. *Lay*, 2 Daly, 113. In a proper case the court will retain the levy, and direct a reference or an issue to test the validity of the discharge. *Stuart* v. *Salhinger*, 14 Abb. Pr. 291; *Cramer* v. ———, 3 Sandf. 700 (where the proper form of the order is specified), or the court may open the judgment and permit the validity of the discharge to be tried in the action. *Baker* v. *Taylor*, 1 Cow. 165; *Mobbatt* v. *Van Beuren*, 1 Cow. 44, note; *Palmer* v. *Hutchins*, 1 Cow. 42; *Bangs* v. *Strong*, 1 How. Pr. 181. See this case commented on in *Dresser* v. *Shufeldt*, 7 How. Pr. 85.

In *Robens* v. *Sweet*, 55 N. Y. Supm. (48 Hun), 436, the de-

fendant sought to have an order for his examination in proceedings supplementary to execution set aside for the reason that he had obtained a discharge under the Act. In reply, plaintiff proposed to show by affidavits that the discharge had been fraudulently obtained. It was held that the validity of the discharge could not be tried collaterally on affidavits.

§ 63. Plaintiff may discontinue without costs where defendant is discharged.—A plaintiff will be permitted to discontinue without costs upon showing that the defendant has been discharged under the insolvent act after suit brought. *Case* v. *Belknap*, 5 Cow. 422; *Merritt* v. *Arden*, 1 Wend. 91; *Ludlow* v. *Hackett*, 18 Johns. 252; *Hellman* v. *Licher*, 9 Abb. Pr. N. S. 288. But mere insolvency of the defendant will not furnish a ground for discontinuance without costs; there must be an actual discharge under the act. *Collins* v. *Evans*, 6 Johns. 333.

§ 64. A new promise takes the debt out of the operation of the discharge.—While it is true that the legal obligation to pay a debt discharged by the insolvent or bankrupt laws is terminated, and the remedy of the creditor is barred, yet the debt is not paid by the discharge, and the moral obligation to pay it remains, and this moral obligation is sufficient consideration to support a promise, on the part of the debtor, to pay the discharged debt. *McNair* v. *Gilbert*, 3 Wend. 344; *Scouton* v. *Eislord*, 7 Johns. 36; *Trueman* v. *Fenton*, Cowp. 544; *Erwin* v. *Saunders*, 1 Cow. 249.

A new promise to revive such a debt must be distinct, unambiguous, and certain (*Stern* v. *Nussbaum*, 47 How. Pr. 489; see *Geery* v. *Bucknor*, 4 N. Y. Leg. Obs. 344), and it must be made after the discharge and not merely after the presentation of the petition. *Stebbins* v. *Sherman*, 1 Sandf. 510; see *Stilwell* v. *Coope*, 4 Den. 225.

It is proper for the plaintiff, after a new promise to pay a discharged debt, to bring his action upon the original claim and not upon the new promise. *Dusenbury* v. *Hoyt*, 53 N. Y. 521; affi'g 45 How. Pr. 147; *Graham* v. *O'Hern*, 31 Supm.

(24 Hun), 221; *McNair* v. *Gilbert*, 3 Wend. 344; *Wait* v. *Morris*, 6 Id. 394; *Fitzgerald* v. *Alexander*, 19 Id. 402.

§ 65. **Discharge, when void.**—(Code C. P. § 2186.) A discharge, granted as prescribed in this article, is void, in either of the following cases:

1. Where the petitioner wilfully swears falsely, in the affidavit annexed to his petition or schedule, or upon his examination, in relation to any material fact, concerning his property or his debts, or to any other material fact.

2. Where, after presenting his petition, he sells, or in any way transfers or assigns, any of his property, or collects any debt or demand owing to him, and does not give a just and true account thereof, upon the hearing or trial, and does not pay the money so collected, or the value of the property so sold, transferred, or assigned, as prescribed in this article.

3. Where he secretes any part of his property, or a book, voucher, or paper relating thereto, with intent to defraud his creditors.

4. Where he fraudulently conceals the name of any creditor, or the sum owing to any creditor, or fraudulently misstates such a sum.

5. Where, in order to obtain his discharge, he procures any person to become a consenting creditor, wilfully, intentionally, and knowingly, for a sum not due from him to that person in good faith, or for a sum greater than that for which the holder of a demand, purchased or assigned, is deemed a creditor, as prescribed in this article.

6. Where he pays, or consents to the payment of, any portion of the debt or demand of a creditor, or grants or consents to the granting of any gift or reward to a creditor, upon an express or implied contract, trust, or understanding, that the creditor so paid or rewarded should

be a consenting creditor, or should abstain or desist from opposing the discharge.

7. Where he is guilty of any fraud whatsoever, contrary to the true intent of this article.

2 R. S. 23, § 35 ; 3 R. S. 6th ed. 19, § 40 ; 2 Edm. St. 24. Subd. 5 as amended by c. 231 of Laws of 1890.

All other objections to the discharge, except those named in this section, and such as go to the jurisdiction of the officer granting the discharge, must be taken at the hearing, and were formerly available only on *certiorari* (*People* v. *Stryker*, 24 Barb. 649 ; *Rusher* v. *Sherman*, 28 Barb. 416), and now on appeal.

Under this section the acts which vitiate the discharge, are such as are connected with a fraudulent intent on the part of the debtor. "All the specific acts," says Emott, J., in *People* v. *Stryker* (24 Barb. 649, 652), "enumerated in section 35" (now § 2186), "either of which will vitiate the proceedings, absolutely, are acts which are necessarily and irresistibly proofs of a fraudulent design ; which are, in short, of themselves, and by their necessary consequences, frauds upon the law itself."

So it is remarked by Allen, J., in *Small* v. *Graves* (7 Barb. 576, 580), "the act which will vitiate the discharge must be an act of the insolvent." See also *Hall* v. *Robbins*, 61 Barb. 33 ; s. c. 4 Lans. 463.

The Court of Appeals, in the case of *Develin* v. *Cooper*, 84 N. Y. 410, 418, have placed a construction upon the 7th subdivision of this section. They say (Folger, Ch. J.), "Our opinion is, that the fraud that renders a discharge void under the statutory provisions referred to, is one done in the proceedings under the statute to obtain a discharge, and not a fraud that has gone before and in which the making of the debt was involved."

A neglect on the part of the assignee, to take the oath prescribed, cannot prejudice the insolvent or affect his discharge. *People* v. *Stryker*, 24 Barb. 649.

A failure on the part of the creditors, to appear and raise objections on the return day of the order to show cause, will amount to a waiver of all irregularities in the proceedings, if the officer possesses the requisite jurisdiction, except as to those matters which the statute declares sufficient to avoid the discharge.

People v. *Stryker*, 24 Barb. 649 ; *Rusher* v. *Sherman*, 28 Id. 416 ; *Soule* v. *Chase*, 1 Robt. 222 ; s. c. 1 Abb. Pr. N. S. 48 ; *Stanton* v. *Ellis*, 16 Barb. 319 ; aff'd 12 N. Y. 575 ; *Taylor* v. *Williams*, 20 Johns. 21.

§ 66. **Impeaching discharge on motion.**—(Code C. P. § 2187.) Where a person, who has been discharged as prescribed in this article, is afterwards arrested by virtue of an order of arrest made, or an execution issued, in an action founded upon a debt or liability from which he is so discharged, the adverse party may oppose his application to be released from the arrest, by proof, by affidavit, of any cause for avoiding the discharge, for want of jurisdiction, or as specified in the last section. If such a cause is established, the application must be denied.

2 R. S. 38, §§ 21, 22 ; 3 R. S. 6th ed. 31, §§ 21, 22 ; 2 Edm. St. 39.

Previous to the enactment of this section the authorities appeared to sustain the position that the discharge could be impeached upon a motion to vacate an arrest on *mesne* process, but not upon execution. *Am. Flask & Cap Co.* v. *Son*, 7 Robt. 233 ; s. c. 3 Abb. Pr. N. S. 333 ; *Dresser* v. *Shufeldt*, 7 How. Pr. 85, 89 ; *Reed* v. *Gordon*, 1 Cow. 50 ; *Noble* v. *Johnson*, 9 Johns. 259 ; *O'Connor* v. *Debraine*, 3 Edw. Ch. 230 ; *Russell* v. *Packard*, 9 Wend. 431.

But it seems that under this statute, if the discharge is ineffectual as to the debt, it is equally so as to the remedy against the person. *Witt* v. *Follett*, 4 Wend. 501. In that case the defendant had obtained his discharge under the act of 1813, which he interposed as a defense to a note made in New Hampshire while both parties were resident of that State ; the discharge was held ineffectual. The defendant then sought to have the discharge declared effectual to exempt him from arrest on the debt, on the ground that to that extent the discharge operated on the remedy only, and was not open to the objection made to the discharge of the contract. The court held that the object of the act was to discharge the debt, and the discharge of the

person was only an incident which accompanied an actual discharge of the debt.

§ 67. Amendment of proceedings.—If, on the return of the order to show cause, the creditors appear and object on the ground of a mere irregularity, not going to the jurisdiction of the officer, an amendment may be allowed. Thus the insolvent has been permitted, on the hearing, to amend the schedules by inserting the consideration of debts named therein. *Matter of Hurst*, 7 Wend. 239 ; *Brodie* v. *Stephens*, 2 Johns. 289 ; *Morewood* v. *Hollister*, 6 N. Y. 309 ; *Matter of Rosenberg*, 10 Abb. Pr. N. S. 450.

"It has been the practice of the judges of this court," says Daly, First Judge of the Court of Common Pleas (*Matter of Andriot*, 2 Daly, 28, 30), "when proceedings of this kind have been instituted before them individually, and of other judges in this city, upon the authority of *Brodie* v. *Stephens* (2 Johns. 289), to allow the schedules to be amended, unless (whenever ?) they were satisfied that the omission was unintentional or rose from a misconception of the requirements of the statute." See *Matter of Rosenberg*, 10 Abb. Pr. N. S. 450 ; *Matter of Thomas*, Id. 114.

But when the defect or irregularity relates to the jurisdiction of the officer, no amendment can be allowed. Thus, where the affidavit required to be made by the debtor, was not verified before the officer to whom the petition was presented, it was held that the omission could not be cured subsequently at the hearing. *Small* v. *Wheaton*, 4 E. D. Smith, 306 ; s. c. 2 Abb. Pr. 175.

§ 68. Review of proceedings.—Under the Revised Statutes proceedings under the two-thirds act were reviewable by *certiorari*. 2 R. S. 49, § 47 ; 3 R. S. 6th ed. 43, § 52 ; *People ex rel. Lewis* v. *Daly*, 11 N. Y. Supm. (4 Hun), 641. They are now reviewable only by appeal. Code, § 2121. § 1356 of the Code of Civil Procedure provides, that "an appeal may be taken, to the general term of the Supreme Court, or of a superior city court, from an order, affecting a substantial right, made in a special proceeding, at a special term or a trial term of the same court,

or, in the Supreme Court, at a term of circuit court; or made by a judge of the same court, in a special proceeding instituted before him, pursuant to a special statutory provision; or instituted before another judge, and transferred to, or continued before him." The effect of which is to provide for an appeal in special proceedings commenced before a judge or in court. By § 1357 of the Code of Civil Procedure, appeals may also be taken to the Supreme Court, from an order affecting a substantial right made by a court of record possessing original jurisdiction, or a judge, in a special proceeding instituted in that court, or before a judge thereof, pursuant to a special statutory provision.

If the determination be adverse to the debtor upon the merits, and he does not succeed on appeal, he will be bound by the adjudication and cannot renew the proceedings before another tribunal. The doctrine of *res adjudicata* applies to these proceedings. *Matter of Roberts*, 17 Supm. Ct. (10 Hun), 253; s. c. rev'd on other grounds, 70 N. Y. 5; *Demarest* v. *Darg*, 32 N. Y. 281; *People ex rel. Lodowick* v. *Akin*, 4 Hill, 606; *White* v. *Coatsworth*, 6 N. Y. 137; *Yonkers & N. Y. Fire Ins. Co.* v. *Bishop*, 1 Daly, 449; *Powers* v. *Witty*, 42 How. Pr. 352; and see *Matter of Rosenberg*, 10 Abb. Pr. N. S. 450; *Matter of Thomas*, Id. 114, and *post*, Chap. VI.

PART II.

OF PROCEEDINGS BY AND AGAINST INSOLVENT DEBTORS IMPRISONED OR LIABLE TO ARREST IN CIVIL ACTIONS.

CHAPTER V.

EXEMPTION FROM ARREST OR DISCHARGE FROM IMPRISONMENT OF AN INSOLVENT DEBTOR.

ARTICLE SECOND, TITLE I, CHAPTER XVII, CODE OF CIVIL PROCEDURE.

§ 69. Preliminary Note.—The act, the substance of which is incorporated into this article, was originally enacted in 1819 (Laws of 1819, c. 101), and was entitled "An Act to abolish imprisonment for debt in certain cases." That act, as revised, was inserted in the Revised Statutes as article five, of title one, of chapter five, of part two.

The proceeding considered in this article relates to applications to relieve a debtor from liability to imprisonment by reason of any debt arising upon contract, and if in prison by reason of any such debt that he may be discharged from his imprisonment.

A valid discharge granted under the provisions of this article, operates so that if a person in whose favor the discharge has been granted, should thereafter be sued in an action *ex contractu* for a debt due or contracted at the time of the application for a discharge, and should be arrested on the ground that the debt was fraudulently contracted, such person would be entitled to be discharged from arrest. Jones, J., in *Am. Flask & Cap Co.* v. *Son*, 7 Robt. 233 ; s. c. 3 Abb. Pr. N. S. 333 ; *Wright* v. *Ritterman*, 1 Abb. Pr. N. S. 428.

So when, in an action on contract, an order of arrest has been granted on the ground that the defendant was guilty of fraud in contracting the debt, and he has thereafter been arrested upon an execution issued upon the judgment, an application for his discharge may be made under this article as well as under the succeeding article. *Devlin* v. *Cooper*, 27 Supm. Ct. R. (20 Hun), 188; affi'd, 84 N. Y. 410.

This article was not repealed by implication by the act to abolish imprisonment for debt (Laws of 1831, c. 300); nor by the sections of the Code providing for arrest on mesne process. *Devlin* v. *Cooper*, 84 N. Y. 410.

The provisions of this article were not suspended by the passage of the bankrupt law. *Matter of Jacobs*, 12 Abb. Pr. N. S. 273.

§ 70. Who may be exempted from arrest, and by what court.—(Code C. P. § 2188.) An insolvent debtor may be exempted from arrest, or discharged from imprisonment, as prescribed in this article. For that purpose, he must apply, by petition, to the county court of the county in which he resides, or is imprisoned; or, if he resides or is imprisoned in the city of New York, to the Court of Common Pleas for that city and county. A person, who has been admitted to the jail liberties, is deemed to be imprisoned, within the meaning of this article.

2 R. S. 28, § 1; 3 R. S. 6th ed. 23, § 1; 2 Edm. St. 29.

Amended by requiring the application to be made to the county court or the Court of Common Pleas, thus abrogating the rulings in *Matter of Roberts*, 70 N. Y. 5.

The last clause of the section establishes the practice as it was formerly understood to exist, both under this and the succeeding article. See note to § 2200, Code C. P., *post*, p. 87.

§ 71.—Contents of petition.—(Code C. P. § 2189.) The petition must be in writing; it must be signed by the insolvent, and specify his residence, and also, if he is in

prison, the county in which he is imprisoned, and the cause of his imprisonment. It must set forth, in substance, that he is unable to pay all his debts in full; that he is willing to assign his property for the benefit of all his creditors, and in all other respects to comply with the provisions of this article, for the purpose of being exempted from arrest and imprisonment, as prescribed therein; and it must pray, that, upon his so doing, he may thereafter be exempted from arrest, by reason of a debt, arising upon a contract previously made; and also, if he is imprisoned, that he may be discharged from his imprisonment. It must be verified by the affidavit of the insolvent, annexed thereto, taken on the day of the presentation thereof, to the effect, that the petition is in all respects true in matter of fact.

2 R. S. 28, § 1; 3 R. S. 6th ed. 23, § 1; 2 Edm. St. 29.

Under the Revised Statutes the application was to be made to certain judicial officers. It is now a proceeding in court and the ruling in *Matter of Roberts*, 70 N. Y. 5; s. c. 53 How. Pr. 199, is abrogated.

§ 72. Petitioner's schedule.—(Code C. P. § 2190.) The petitioner must annex to his petition, a schedule, in all respects similar to that required of an insolvent, as prescribed in section 2162 of this act.

A portion of 2 R. S. 28, § 2; 3 R. S. 6th ed. 23, § 2; 2 Edm. St. 29.

As to the form and requisites of the schedule, see § 2162, Code C. P., *ante*, p. 29; also *Devlin* v. *Cooper*, 84 N. Y. 410; affi'g 27 Supm. Ct. (20 Hun), 188.

§ 73. Petitioner's affidavit.—(Code C. P. § 2191.) An affidavit, in the following form, subscribed and taken by the petitioner, before the county judge, or, in the city of New York, before the judge holding the term of the

court at which the order specified in the next section is made, must be annexed to the schedule:

"I, ———, do swear" (or "affirm" as the case may be), "that the matters of fact, stated in the schedule hereto annexed, are, in all respects, just and true; that I have not, at any time, or in any manner whatsoever, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property, in order to defraud any of my creditors; and that I have not paid, secured to be paid, or in any way compounded with, any of my creditors, with a view that they or any of them should abstain from opposing my discharge.

A portion of 2 R. S. 28, § 2; 3 R. S. 6th ed. 23, § 2; 2 Edm. St. 29. See notes to § 2163, Code C. P., *ante*, p. 33, and § 2204, *post*, p. 92.

§ 74. Order to show cause.—(Code C. P. § 2192.) The petition, and the papers annexed thereto, must be presented to the court, and filed with the clerk. The court must thereupon make an order, requiring all the creditors of the petitioner to show cause before it, at a time and place therein specified, why the prayer of the petitioner should not be granted; and directing that the order be published and served, in the manner prescribed in section 2165 of this act, for the publication and service of an order made as therein prescribed.

2 R. S. 29, §§ 3, 4; 3 R. S. 6th ed. 23, §§ 3, 4; 2 Edm. St. 29.

In the *Matter of Jacobs* (12 Abb. Pr. N. S. 273), where the order was made returnable before F. L., one of the judges of the Court of Common Pleas, this was held to be a sufficient specification of the place of return, and to be a compliance with

the statute. In that case it was also stated that the officer acquired jurisdiction by the presentation of the petition and schedules, and that the order to show cause was an incident of, but not essential to, such jurisdiction.

For decisions as to the proper service of notice and publication, see § 2165, Code C. P., *ante*, p. 34.

§ 75. Application of previous sections.—(Code C. P. § 2193.) The provisions of sections 2166, 2167, 2168, 2169, 2170, 2172, and 2173 of this act, apply to a special proceeding, taken as prescribed in this article.

2 R. S. 29, §§ 5, 6, 7; 3 R. S. 6th ed. 24, §§ 5, 6, 7; 2 Edm. St. 30, 31. See *ante*, pp. 37 to 45.

A debtor who has given a preference contrary to the provisions of § 2173, cannot obtain a discharge under this article. *Matter of Mower*, 1 Law Bul. 39; *People* v. *O'Brien*, 3 Abb. Dec. 552; s. c. 6 Abb. Pr. N. S. 63; s. c. 54 Barb. 38; affi'g 5 Abb. Pr. N. S. 223.

§ 76. Order for assignment—when and how made.—(Code C. P. § 2194.) An order, directing the execution of an assignment, must be made by the court, where it appears, by the verdict of the jury, or, if a jury has not been demanded, or the jurors have been discharged by reason of their inability to agree, where it satisfactorily appears to the court as follows:

1. That the petitioner is unable to pay his debts.

2. That the schedule annexed to his petition is true.

3. That he has not been guilty of any fraud or concealment, in violation of the provisions of this article.

4. That he has, in all things, conformed to the matters required of him by this article.

The provisions of sections 2175, 2176 and 2177 of this act apply to the order prescribed in this section, and to the assignment made in pursuance thereof, except that

the trustee or trustees must be nominated, as well as appointed, by the court.

2 R. S. 29, 30, §§ 8, 9 ; 3 R. S. 6th ed. 24, §§ 8, 9 ; 2 Edm. St. 30.

§ 77. **The discharge.**—(Code C. P. § 2195.) Upon the production by the petitioner, of the certificates of the trustee or trustees, and the county clerk, to the effect prescribed in section 2178 of this act, the court must grant to the petitioner a discharge, declaring that the petitioner is forever thereafter exempted from arrest or imprisonment, by reason of any debt due at the time of making the assignment, or contracted before that time, though payable afterwards; or by reason of any liability incurred by him, by making or indorsing a promissory note, or by accepting, drawing, or indorsing a bill of exchange, before the execution of the assignment; or in consequence of the payment, by any party to such a note or bill, of the whole or any part of the money secured thereby, whether the payment is made before or after the execution of the assignment, with the exceptions specified in section 2218 of this act. The discharge shall have the effect therein declared, as prescribed in this section.

2 R. S. 30, § 10 ; 3 R. S. 6th ed. 24, § 10 ; 2 Edm. St. 30.

As to the certificate of the trustees, see § 2178, Code C. P., *ante*, p. 48, and § 2212, *post*, p. 102.

The discharge of a debtor under this article applies only to claims arising on contract. *Grocers' Nat. Bank* v. *Clark*, 31 How. Pr. 115. Thus an insolvent is not entitled to a discharge from an indebtedness which arose from his embezzlement of money, and evidences of debt which came into his possession as a clerk, in the course of his employment. *Matter of Pie*, 10 Abb. Pr. 409. But a creditor may waive the claim for tort, and then it seems the insolvent will be discharged. *Matter of Pie*, *supra*. To ascertain whether the creditor's claim is one in

tort or on a contract, the whole of the complaint must be considered, and not particular words which may be contained in it. *Grocers' Nat. Bank* v. *Clark*, *supra*; *Harrison* v. *Lourie*, 49 How. Pr. 124.

But after a claim for tort has been reduced to judgment, it becomes a *quasi* contract, and the debtor may be exonerated from arrest on such judgments. *People* v. *Marine Court*, 3 Cow. 366; *Ex parte Thayer*, 4 Cow. 66; *Hayden* v. *Palmer*, 24 Wend. 364; *Luther* v. *Deyo*, 19 Id. 629.

When a defendant has been discharged under this article, the plaintiff cannot, by discontinuing the action and bringing a new action based on the same state of facts, but sounding in tort and not in contract, procure a second arrest of the defendant. *People ex rel. Ritterman* v. *Kelly*, 1 Abb. Pr. N. S. 432. And a defendant so arrested will be discharged on *habeas corpus*. Ibid.; see *Dieckerhoff* v. *Ahlborn*, 2 Abb. N. C. 372.

§ 78. Recording of papers on discharge.—(Code C. P. § 2196.) The provisions of section 2181 of this act apply to the discharge, and to the petition and other papers upon which it was granted.

2 R. S. 39, § 27; 38, §§ 19, 20; 3 R. S. 6th ed. 32, § 27; 31, §§ 19, 20; 2 Edm. St. 39, 40.

§ 79. Discharged debtor released from custody.—(Code C. P. § 2197.) If, at the time when the discharge is granted, the petitioner is imprisoned, by virture of an execution against his person issued, or of an order of arrest made, in an action or special proceeding founded upon a debt, liability, or judgment, as to which he is exempted from arrest or imprisonment, as prescribed in the last section but one, the officer must forthwith release him, on production of the discharge or a certified copy of the record thereof.

2 R. S. 30, § 11; 3 R. S. 6th ed. 25, § 11; 2 Edm. St. 31.

A prisoner on the jail liberties is imprisoned within the meaning of this section. § 2188, Code C. P., *ante*, p. 78.

§ 80. **Debts not affected, etc.**—(Code C. P. § 2198.) A debt, demand, judgment, or decree, against an insolvent, discharged as prescribed in this article, is not affected or impaired by the discharge; but it remains valid and effectual, against all his property, acquired after the execution of the assignment.

The lien, acquired by or under a judgment or decree, upon any property of the insolvent, is not affected by the discharge.

2 R. S. 30, § 12; 3 R. S. 6th ed. 25, § 12; 2 Edm. St. 31.

§ 81. **Discharge, when void.**—(Code C. P. § 2199.) A discharge, granted to an insolvent as prescribed in this article, is void, in the same cases, so far as they are applicable, in which a discharge, granted as prescribed in article first of this title, is therein declared to be void; and the validity of such a discharge may be tested in the same manner.

2 R. S. 30, § 13; 3 R. S. 6th ed. 25, § 13; 2 Edm. St. 31.

CHAPTER VI.

DISCHARGE OF AN IMPRISONED JUDGMENT DEBTOR FROM IMPRISONMENT.

ARTICLE THIRD, TITLE I, CHAPTER XVII, CODE OF CIVIL PROCEDURE.

"THE FOURTEEN DAYS' ACT."

§ 82. In general.—The proceedings discussed in the present article, commonly known as the "Fourteen Days' Act," are intended to enable debtors imprisoned on execution in civil actions to obtain a discharge from imprisonment upon making a full surrender of their property for the benefit of the creditors upon whose judgments and executions they are imprisoned. The following sections of the Code of Civil Procedure are compiled with important changes, from article sixth, of title one, of chapter five, of part two, of the Revised Statutes. And the provisions of the Revised Statutes were taken largely from the act of April 9, 1813, entitled, "An act for the relief of debtors, with respect to the imprisonment of their persons." 1 R. L. 348.[1]

[1] Proceedings under this article have been rendered to a large extent unnecessary by amendments and additions to the Code of Civil Procedure.

By Laws of 1886, c. 672, section 111 of the Code of Civil Procedure was amended so as to read as follows:

"No person shall be imprisoned within the prison walls of any jail for a longer period than three months under an execution or any other mandate against the person to enforce the recovery of a sum of money less than five hundred dollars in amount or under a commitment upon a fine for contempt of court in the non-payment of alimony or counsel fees in a divorce case where the amount so to be paid is less than the sum of five hundred dollars; and where the amount in either of said cases is five hundred dollars or over, such imprisonment shall not continue for a longer period than six months. It

§ 83. **Who may be discharged.**—(Code C. P. § 2200.) A person, imprisoned by virtue of an execution to collect a sum of money, issued in a civil action or special proceeding, may be discharged from the imprisonment, as pre-

shall be the duty of the sheriff in whose custody any such person is held to discharge such person at the expiration of said respective periods without any formal application being made therefor. No person shall be imprisoned within the jail liberties of any jail for a longer period than six months upon any execution or other mandate against the person, and no action shall be commenced against the sheriff upon a bond given for the jail liberties by such person to secure the benefit of such liberties, as provided in articles fourth and fifth of this title for an escape made after the expiration of six months' imprisonment as aforesaid. Notwithstanding such a discharge in either of the above cases, the judgment creditor in the execution, or the person at whose instance the said mandate was issued, has the same remedy against the property of the person imprisoned which he had before such execution or mandate was issued; but the prisoner shall not be again imprisoned upon a like process issued in the same action or arrested in any action upon any judgment under which the same may have been granted. Except in a case hereinbefore specified nothing in this section shall effect a commitment for contempt of court."

It has been decided that this section, as thus amended, relates only to a prisoner held on final process or mandate after the sum due from him has been adjudged. If he is confined within the walls, the amount he is adjudged to pay determines whether the imprisonment shall end in three months or in six months. If he is on the jail liberties, the six months' period applies. *Levy* v. *Salomon*, 105 N. Y. 529. This case settles conflict in the lower courts. See *Warshauer* v. *Webb*, 10 Civ. Pro. 169; s. c. 18 Abb. N. C. 232; *People ex rel. Rodding* v. *Grant*, 10 Civ. Pro. 174, n.; *People ex rel. Lust* v. *Grant*, 10 Civ. Pro. 158; *People ex rel. Cohen* v. *Grant*, 18 Abb. N. C. 231; s. c. 11 Civ. Pro. 55; *Dalon* v. *Kapp*, 11 Civ. Pro. 58.

There is a further provision of the Code of Civil Procedure applicable to arrests under an order of arrest or execution in the City Court of New York, as follows:

§ 3163, Code of Civ. Pro. "Where it satisfactorily appears that a party, who is actually confined in jail, by virtue of an order of arrest, or an execution against the person, issued in an action brought in the court, is physically unable to endure the confinement, and that he cannot procure bail, or the necessary sureties in a bond for the jail liberties, as the case requires, the court, or a justice thereof, may, in its or his discretion, by order, direct the sheriff to release him from custody. The sheriff must obey such an order. After such a release from an execution against the person, another execution, against the person of the judgment debtor, cannot be issued upon the judgment; but the judgment creditor may enforce the judgment against property, as if the execution, from which the judgment debtor was released, had been returned without his being taken."

scribed in this article. A person who has been admitted to the jail liberties, is deemed to be imprisoned, within the meaning of this article.

2 R. S. 31, § 1 ; 3 R. S. 6th ed. 25, § 1 ; 2 Edm. St. 31 ; Laws of 1847, c. 390.

The statute is very beneficial in its provisions and very general in its terms. It includes every person. An infant, therefore, who is imprisoned on an execution, is entitled to the benefit of the act, notwithstanding his nonage. *People ex rel. Smith* v. *Mullin*, 25 Wend. 698. And, for a similar reason, it has been held that interest on the judgment will not be added, so as to enhance the amount above the sum named in the statute, and so impede the discharge. *Ex parte Caskaden*, 1 Cai. 346 (this decision was under the act of 1789).

Before the enactment of the last clause of the above section, it had been held that a person charged by execution in a civil cause, whether in close custody or on the limits, whilst held in custody by virtue of such execution, was entitled to apply for his discharge. *Coman* v. *Storm*, 26 How. Pr. 84 ; s. c. 1 Robt. 705 (Super. Ct. Gen. Term) ; disapproving *Bylandt* v. *Comstock*, 25 How. Pr. 429 ; s. c. as *Comstock's Case*, 16 Abb. Pr. 233 (Super. Ct. Sp. Term). Jails are to be considered as enlarged from the four walls of the ancient law to the assigned limits, and as long as the prisoner is within those limits, so long he is to be considered, in judgment of law, as in prison. *Holmes* v. *Lansing*, 3 Johns. Cas. 73, 75, 76 ; *Peters* v. *Henry*, 6 Johns. 121, 124.

It is immaterial whether the judgment upon which the execution is issued, under which the prisoner is held, was obtained in an action for tort or upon contract. In either case the debtor will be entitled to his discharge, upon compliance with the statute, if it be found that his proceedings are "just and fair." See § 2208, Code C. P., *post*, p. 90. *The People* v. *The Marine Court*, 3 Cow. 366 ; *Ex parte Thayer*, 4 Cow. 66 ; *Hayden* v. *Palmer*, 24 Wend. 364 ; *Luther* v. *Deyo*, 19 Id. 629 ; *Grocers' Nat. Bk.* v. *Clark*, 31 How. Pr. 115, 127.

A person committed by precept for contempt in not paying moneys ordered to be paid for temporary alimony, is a person

imprisoned by virtue of an execution in a civil cause within the meaning of this section, and may apply for a discharge. *Van Wezel* v. *Van Wezel*, 3 Paige, 38 ; *People* v. *Cowles*, 4 Keyes, 38 ; s. c. 3 Abb. Dec. 507 ; see *People* v. *Campbell*, 40 N. Y. 133 ; see *In re Lachemeyer*, 18 N. B. R. 270.

But the statute does not extend to the case of commitment for a fine imposed upon a party for a contempt of court ; or where the party is imprisoned for the non-performance of some act or duty which is in the power of the defendant to perform. *Van Wezel* v. *Van Wezel*, *supra*. See *Spalding* v. *The People*, 7 Hill, 301 ; affi'g 10 Paige, 284. In such cases the prisoner may seek release under Laws of 1843, c. 9, or § 2286 Code of Civ. Pro. See *Matter of Steinert*, 36 Supm. Ct. (29 Hun), 301.

And where a person is in charge of the sheriff, under an attachment to bring him into court to answer interrogatories in a proceeding for a contempt, an order discharging the person from imprisonment cannot operate to discharge the prisoner. Such a discharge is premature until after conviction. *Jackson* v. *Smith*, 5 Johns. 115 ; *Bissell* v. *Kip*, 5 Johns. 89.

Whether a person imprisoned for costs of a proceeding, as for a contempt to enforce a civil remedy, is entitled to a discharge, was questioned in *Patrick* v. *Warner* (4 Paige, 397), by Walworth, Chan. See Laws of 1847, c. 390.

So a person imprisoned under an execution, issued in a "marine cause," in the Marine Court of the city of New York, may be discharged under this article. *Parker* v. *Hesseltein*, Daily Reg., July 31, 1880.

§ 84. To what court application to be made.—(Code C. P. § 2201.) Application for such a discharge must be made by petition, addressed to the court from which the execution issued ; or to the county court of the county in which he is imprisoned ; or, if he is imprisoned in the city of New York, to the Court of Common Pleas for that city and county.

2 R. S. 31, § 1 ; 3 R. S. 6th ed. 25, § 1 ; 2 Edm. St. 31.

The application for a discharge under this article must be

made to the court. A judge at chambers has no authority to grant a discharge in such a proceeding. *Mather's Case*, 14 Abb. Pr. 45; *Matter of Walker*, 2 Duer, 655. And the application should be made at a special, and not at a general term. *Matter of Walker*, *supra*.

When a petition for a discharge was, after due notice, presented to and acted upon by the County Court at one of its terms, the fact that the petition was addressed to the judge by whom the court was held, and not to the court itself, was held not to invalidate a discharge. *Borthwick* v. *Howe*, 34 Supm. Ct. (27 Hun), 505.

The County Court has jurisdiction of the subject-matter of this article. *Bullymore* v. *Cooper*, 46 N. Y. 236, 241; *Hart* v. *Dubois*, 20 Wend. 236; Laws of 1847, c. 280, p. 328, § 29.

The Court of Oyer and Terminer has power to deliver the jails, according to law, of all the prisoners therein; but this refers only to cases of crimes. That court has no power upon *habeas corpus* to order the discharge of a prisoner held upon execution in a civil action. *People* v. *Brennan*, 61 Barb. 540.

There is no authority to release a prisoner held under an execution against the person, in a civil action, because of his inability to endure his imprisonment (*Moore* v. *McMahon*, 27 Supm. Ct. [20 Hun], 44), except that conferred upon the Marine Court by § 3163 of Code of Civ. Pro. § 302 of the Code of Procedure referred specifically to contempts in proceedings supplementary to execution (*Moore* v. *McMahon*, *supra*), and § 2286 of the Code of Civ. Pro. refers to persons imprisoned for a contempt other than criminal contempt.

§ 85. When petition may be presented.—(Code C. P. § 2202.) A person so imprisoned may apply for such a discharge, at any time; unless the sum, or, where he is imprisoned by virtue of two or more executions, the aggregate of the sums, for which he is imprisoned, exceeds five hundred dollars; in which case he cannot present such a petition until he has been imprisoned, by virtue of the execution or executions, for at least three months.

2 R. S. 31, §§ 1, 2; 3 R. S. 6th ed. 25, §§ 1, 2; 2 Edm. St. 31, 32.

When the defendant is charged on an execution for less than $500, he is entitled to a discharge at once, upon giving fourteen days' notice. But when the execution is for more than $500, the defendant must have been charged in execution for three months. It is not enough that his imprisonment under the execution and order of arrest has continued for three months. *Dusart* v. *Delacroix*, 1 Abb. Pr. N. S. 409, note; *Moran* v. *Secord*, U. S. Cir. Ct. 15 Fed. R. 509. And where the papers on which the discharge is granted show that the judgment on which the debtor was taken in execution exceeded $500, but fail to show that he has been imprisoned for three months, the discharge is void. *Browne* v. *Bradley*, 5 Abb. Pr. 141; *Matter of Rosenberg*, 10 Abb. Pr. N. S. 450. Interest on the judgment will not be added so as to increase the amount to prevent the discharge. *Ex parte Caskaden*, 1 Cai. 346.

§ 86. Petition and schedules.—(Code C. P. § 2203.) The petition must be in writing; it must be signed by the petitioner; and it must state the cause of his imprisonment, by setting forth a copy, or the substance, of the execution, or, if there are two or more executions, of each of them. The petitioner must annex thereto, and present therewith, a schedule, containing a just and true account of all his property, and of all charges affecting the same; as the property and charges existed at the time when he was first imprisoned, and also as they exist at the time when the petition is prepared; together with a just and true account of all deeds, securities, books, vouchers, and papers, relating to the property, and to the charges thereupon.

2 R. S. 31, § 4; 3 R. S. 6th ed. 25, § 4; 2 Edm. St. 32.

The form of the petition is not prescribed by the statute except as above stated, but sufficient should appear on the face of it to give the court jurisdiction. It should be addressed to the court from which the execution issued, or the county court of the county in which the petitioner is imprisoned; or, if he is imprisoned in the city of New York, to the Court of Common

Pleas for that city and county. Code C. P. § 2201. It should set forth the fact of the imprisonment of the petitioner, and the amount due upon the execution or executions for which he is held, and, if the amount exceeds the sum of five hundred dollars, that he has been imprisoned for three months (*Browne* v. *Bradley*, 5 Abb. Pr. 141 ; *Matter of Rosenberg*, 10 Abb. Pr. N. S. 450), the cause of the imprisonment, by setting forth the execution or executions or the substance of them. In the *Matter of Moore*, 1 Am. Insol. R. 95, it was held that the mere statement that the petitioner was imprisoned on an execution against his person was not sufficient, but that he must also disclose the cause upon which he became liable to arrest. In the *Matter of Chappell*, 30 Supm. Ct. R. (23 Hun), 179, however, it was held, by the general term of the second department, that a petition showing simply that the petitioner was imprisoned upon an execution issued upon a judgment in a civil action was enough. And when the petition, in describing the judgment upon which the execution was issued, gave the names of but one of two plaintiffs, and but one (the petitioner) of two defendants, and it appeared that the prisoner was held under but one execution, it was held that the omission to name all the parties in the petition was not a fatal defect. *Goodwin* v. *Griffis*, 88 N. Y. 629.

To the petition must be annexed a schedule containing a just and true account of all the prisoner's property, both as it existed at the time of the imprisonment, and at the time of preparing the petition.

The statute is imperative, and the papers presented to the court must conform with exactness to its provisions. It is matter necessary to the jurisdiction of the court, not only that a petition and account should be presented to it, but that they shall be the very petition and account specified. *Bullymore* v. *Cooper*, 46 N. Y. 236, 246 (affi'g 2 Lans. 71), Folger, J.; *People* v. *Bancker*, 5 N. Y. 106 ; *People* v. *Brooks*, 40 How. Pr. 165. The statute requires that the petition shall contain an account of the debtor's estate, both as it existed at the time of the imprisonment and at the time of preparing the petition. The reason for this duplicate account is given by Mullett, J., in *People* v. *Bancker*, 5 N. Y. 106, 123, and note. Its object is to prevent payments and transfers of property to other creditors than the

execution creditor during the period of imprisonment, when the debtor would be likely to make terms with his more lenient creditors who had not proceeded to extremes with him, and then demand his liberty from the others on tendering the remaining fragments of his property.

The fact that the debtor has filed a voluntary petition in bankruptcy, and that the assignee in bankruptcy has become clothed with the estate which he had at the time of the imprisonment, does not avoid the requirements of the statute that the petition must contain a just and true account of his estate as it existed at the time of his imprisonment. *Bullymore* v. *Cooper*, 46 N. Y. 236; *People* v. *Brooks*, 40 How. Pr. 165. A mere statement in the petition of the proceedings in bankruptcy is not enough. *Bullymore* v. *Cooper*, *supra*.

No account of creditors is required by this article, for the reason that no creditors are interested in the proceeding, except such as have the debtor on execution. See *Hall* v. *Kellogg*, 12 N. Y. 325, 333.

§ 87. **Affidavit of petitioner.**—(Code C. P. § 2204.) An affidavit, in the following form, subscribed and taken by the petitioner, on the day of the presentation of the petition, must be annexed to the petition and schedule:

"I, ———, do swear" (or "affirm," as the case may be) "that the matters of fact, stated in the petition and schedule hereto annexed, are, in all respects, just and true; and that I have not, at any time or in any manner whatsoever, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property, with intent to injure or defraud any of my creditors."

2 R. S. 32, § 5; 3 R. S. 6th ed. 26, § 5; 2 Edm. St. 32.

The statute formerly required that the affidavit should be made at the time of presenting the petition. A question arose

whether the applicant was required to literally take the oath at that time, in which event some difficulty would arise from the fact that when the prisoner was in close confinement, there was no provision of the statute for producing the prisoner before the court at the time of presenting the petition. The general term of the Supreme Court, in the case of *Richmond* v. *Praim*, 31 Supm. Ct. (24 Hun), 578, held that if the affidavit accompanied the petition, although not sworn to in the presence of the court at the time of the presentation of the petition, the statute was complied with. *Borthwick* v. *Howe*, 34 Supm. Ct. (27 Hun), 505 ; *Matter of Finch*, 2 Mon. L. B. 69 ; see *Bullymore* v. *Cooper*, 2 Lans. 71 ; affi'd 46 N. Y. 236 ; *Browne* v. *Bradley*, 5 Abb. Pr. 141 ; *Hillyer* v. *Rosenberg*, 11 Abb. Pr. N. S. 402.

The amendment to this section settles the law in accordance with *Richmond* v. *Praim*, *supra*. The affidavit may be made before any officer competent to take an affidavit, and must be made on the day of the presentation of the petition, though not necessarily at the time and place of presentation.

The affidavit is a prerequisite to jurisdiction of the case, and without it the court cannot proceed to grant a discharge. *Bullymore* v. *Cooper*, *supra* ; *Browne* v. *Bradley*, *supra*.

Where the judgment creditor appears generally in the proceeding, and raises no objection to the ground that the affidavit was not verified on the day of the presentation of the petition, he cannot successfully contest the sufficiency of the discharge in an action brought against the sheriff for an alleged escape. *Shaffer* v. *Riseley*, 114 N. Y. 23 ; rev'g 51 Supm. Ct. (44 Hun) 6.

§ 88. **Notice to creditors.**—(Code C. P. § 2205.) At least fourteen days before the petition is presented, the petitioner must serve, upon the creditor in each execution, by virtue of which he is imprisoned, a copy of the petition, and of the schedule ; together with a written notice of the time when, and place where, they will be presented. If, by reason of changes occurring after the service, it is necessary, before presenting the petition and schedule, to correct any statement contained in the schedule, the

correction may be made by a supplemental schedule, a copy of which need not be served, unless the court so directs.

2 R. S. 31, § 3, in part; 3 R. S. 6th ed. 25, § 3; 2 Edm. St. 32.

§ 89. **Mode of service—Publication.**—(Code C. P. § 2206.) The papers, specified in the last section, may be served, either upon the creditor or his representative, or upon the attorney whose name is subscribed to the execution; and, in either case, in the manner prescribed in this act for the service of a paper upon an attorney, in an action in the Supreme Court. Where it is made to appear, by affidavit, to the satisfaction of the court, that service cannot, with due diligence, be so made within the State, upon either, the court may make an order, prescribing the mode of service, or directing the publication of a notice in lieu of service, in such manner and for such a length of time, as it thinks proper; and thereupon, it may direct an adjournment of the hearing to such a time as it thinks proper.

2 R. S. 31, § 3, in part; 3 R. S. 6th ed. 25, § 3; 2 Edm. St. 32.

The notice required under this article is entirely different from that required by the previous articles. In the former articles notice was required to be given to all the creditors; here the proceeding is wholly between the debtor and the execution creditors. Service of the notice on the attorney, when the plaintiff resided out of the State, was sufficient, before the statute. *Bates* v. *Williams*, 1 Johns. Cas. 30. And, since the notice is entirely for the plaintiff's benefit, he may waive it, or take short notice, by consent. *Hart* v. *Dubois*, 20 Wend. 236.

§ 90. **Service when the State is a creditor.**—(Code C. P. § 2207.) Where the State is a creditor, the papers must be

served upon the attorney general, who must represent the State in the proceedings.

2 R. S. 39, § 30 ; 3 R. S. 6th ed. 32, § 30 ; 2 Edm. St. 40.

§ 91. **Proceedings on return of petition.**—(Code C. P. § 2208.) Upon the presentation of the petition, schedule, and affidavit, with due proof of service or publication, as prescribed in the last three sections, the court must make an order, directing the petitioner to be brought before it, on a day designated therein; and on that day, or on such other days as it appoints, the court must, in a summary way, hear the allegations and proofs of the parties. If the court is satisfied that the petition and schedule are correct, and that the petitioner's proceedings are just and fair, it must make an order, directing the petitioner to execute, to one or more trustees, designated in the order, an assignment of all his property, not expressly exempt by law from levy and sale by virtue of an execution ; or of so much thereof as is sufficient to satisfy the execution or executions, by virtue of which he is imprisoned.

2 R. S. 32, § 6 ; 3 R. S. 26, § 6 ; 2 Edm. St. 32.

§ 92. **Proceedings, when "just and fair."**—Before the court can order an assignment it must be satisfied of two things : first, that the petition and schedule of the applicant are correct, and second, that his proceedings are "just and fair." Considerable discussion has arisen as to the proper construction to be placed upon the words of the statute.

The affidavit which the petitioner is required to make by § 2204 is a part of the proceedings, and unless that is true his proceedings cannot be said to be just and fair. By that affidavit he is required to show not only that his petition and schedule are correct, but also that he has not at any time or in any manner disposed of or made over any part of his property with a

view to the future benefit of himself or family, or with the intent to injure or defraud any of his creditors. Hence, wherever it appears that a debtor has disposed of his property with the intent to defraud existing creditors, he cannot obtain a discharge. *Matter of Brady*, 69 N. Y. 215 ; affi'g 15 Supm. Ct. (8 Hun), 437 ; *Coffin* v. *Gourlay*, 27 Supm. Ct. (20 Hun), 308. In the cases just cited, the fraudulent disposition of property, which was held to bar the discharge, furnished likewise the ground of arrest upon which the debtor was held in execution. But any disposition of the defendant's property which is intended to defraud existing creditors, whether made before or after the action in which the arrest is made, will also bar a discharge. *Matter of Watson*, 2 E. D. Smith, 429 ; *Gaul* v. *Clark*, 1 Wkly. Dig. 209 ; *People* v. *White*, 14 How. Pr. 498 ; *Matter of Finck*, 59 How. Pr. 145 ; *Hughes* v. *Taylor*, 1 Mon. L. B. 23 ; *Barck* v. *Senn*, Daily Reg., May 31, 1883, p. 1028. That such a disposition of property should operate to bar a discharge, there must have been an intent to defraud existing creditors, of whom the creditor contesting the discharge must have been one. A fraud committed years before upon a class of creditors whose claims have been paid or have ceased to exist, will not prevent a discharge, and a creditor cannot contest the discharge, on the ground of a fraudulent disposition of property, who is in no way injured or defrauded. *Matter of Pearce*, 38 Supm. Ct. (29 Hun), 270.

It is clear, therefore, that a debtor who has made any disposition of his property with the intent to injure and defraud his creditors, and which has that effect, will prevent a discharge.

There are, however, other frauds, which may be practised by debtors, working great injury to creditors, though not effected by means of fraudulent conveyances, and the question has arisen how far these frauds will prevent a discharge. Thus, where the debtor has fraudulently obtained the property of his creditor and has wasted or spent it so that he is unable to account for it, can it be said that his proceedings are "just and fair" ? This question was answered in the negative in the *Matter of Roberts*, 59 How. Pr. 136 (Sp. T. Com. Pleas, J. F. Daly, J.) ; s. c. 8 Daly, 95, and in *Matter of Finck*, 59 How. Pr. 145 (Sp. T. Sup. Ct., Van Vorst, J.) ; *Matter of Tomkins*, 3 Law Bul. 8 ; but in the case of *Suydam* v. *Belknap*, 27 Supm. Ct. (20 Hun),

87, where judgment was obtained against the defendant for the conversion of property in a fiduciary capacity, on an application for a discharge under this article, the Supreme Court at general term said: "This case is distinguishable from that of *In re Brady*, (69 N. Y. 215) because the charge is that the defendant received money in a fiduciary capacity for which he has not accounted. The defendant, Brady (*In re Brady, supra*), was charged with a disposition of his property with the intention of defrauding his creditors, and for that reason it was held that his proceedings were not just and fair. This case does not show any appropriation of this kind, and therefore that he has property attainable by recourse to his grantee, or otherwise. The money received was disposed of by him, and though improperly used does not subject him to the rule established by the case referred to." And in the *Matter of Fowler*, 59 How. Pr. 148; s. c. 8 Daly, 548 (General Term of the Common Pleas), in a carefully written opinion of Daly, Ch. J., the construction of the statute by that court is declared to be "that what is required is, that the proceedings of the debtor have been just and fair in respect to the matters that he is required to swear to in the affidavit upon presenting his petition; that they relate to the inquiry whether he has made any such disposition of his property as in the affidavit he is obliged to swear that he has not; . . . and that any disposition by the debtor of his property made with the intent to defraud existing creditors, was what the affidavit meant." (8 Daly, 556, 557.)

The cases of *Suydam* v. *Belknap*, *supra*, and *Matter of Fowler*, *supra*, must be regarded as overruling *Matter of Roberts* and *Matter of Finck*, *supra*, and as establishing the doctrine that the court will be satisfied that the debtor's proceedings are just and fair when it appears that the matters required to be sworn to in § 2204 are in fact true, and that consequently if his petition and account are just and true, and he has not disposed of or made over any of his property not exempt, for the future benefit of himself and family, and has not disposed of or made over any part of his property with intent to injure or defraud any of his creditors, he will be entitled to his discharge, no matter how great or injurious to creditors may have been the frauds of which the debtor may have been guilty. *Sparks* v.

Andrews, 7 Weekly Dig. 276 ; s. c. 1 City Ct. R. 76 (Marine Ct., McAdam, J.).

A judgment that a firm of which the petitioner is a member has been guilty of a fraudulent disposition of property does not preclude the discharge of the petitioner when the evidence fails to show that he participated in the fraud. *Matter of Benson*, 60 How. Pr. 314 ; s. c. 10 Daly, 166 ; see s. c. at Special Term, 1 Am. Insol. R. 301. When the debtor is arrested in an action, the complaint in which alleges fraudulent representations which are proved upon the trial, the judgment furnishes evidence that the defendant's proceedings have not been just and fair. *Price* v. *Orcutt*, Daily Reg., May 26, 1884, p. 1012. See *In re Zeitz*, 12 Civ. Pro. 423. In the *Matter of Watson*, 2 E. D. Smith, 429, it was held, by a majority of the judges at general term, that the debtors had disposed of their property with the intent to injure and defraud their creditors within the meaning of the statute, when, being insolvent, they converted their property into cash and removed it from the State and wasted it in profuse expenses, gambling and adventures.

Where the defendant was under arrest on execution on judgment obtained in an action for slander, and after the cause of action arose he conveyed his house and lot to his son in the absence of evidence that the defendant knew that he was to be sued, it was held that the conveyance so made could not be said to have been made with a view to the future benefit of the defendant or his family, or with the intent to injure or defraud any of his creditors. *Hughes* v. *Taylor*, 1 Law Bul. 23.

In the *Matter of Watson*, *supra*, it was contended that the fraudulent disposition of property contemplated by the act is a disposition made by the debtor between his arrest and his examination, and that if he disposed of his property fraudulently before any proceedings were instituted against him, that would be no bar to his discharge ; but this view of the statute was not then, and has not been at any time, accepted by the courts. *Matter of Roberts*, 59 How. Pr. 136, 139 ; *In re Brady*, 69 N. Y. 215 ; 15 Supm. Ct. (8 Hun), 437 ; *Matter of Brown*, 46 Supm. Ct. (39 Hun) 27.

In the *Matter of Haight*, 11 Civ. Pro. R. 227, it was held that only existing creditors could object to a discharge on the

ground of a fraudulent disposition of property. It was also held that where a debtor had received a sum of money which he had expended in paying expenses of travel and living, incurred in attempts to keep beyond the jurisdiction of the court, that was such a wrongful disposition of his property as would prevent a discharge.

In the *Matter of Lowell*, 8 Civ. Pro. R. 5 ; s. c. 13 Daly, 306, it was held that a judgment debtor who had fraudulently obtained property, and used it in the support of himself and family, knowing that the creditor must be the loser, had disposed of the property with intent to delay and defraud that creditor, and must be refused a discharge. It was also held in that case, that when the debtor, after incurring the liability which was the ground of his assignment, had invested a large sum in real estate in his wife's name, claiming that the investment was made in satisfaction of a prior indebtedness to her, that such investment was made "for the future benefit of himself and his family."

When the petitioner, just before executing a general assignment, withdrew a sum of money and applied it to his own use, with the design that it should not come to the assignee under the assignment, it was held that his conduct was such as to show that his proceedings were not just and fair within the meaning of this Act. *In re Howes*, 9 Civ. Pro. R. 17.

In the *Matter of Donoghue*, 17 Abb. N. C. 277 (N. Y. Com. Pleas), it is said that the question how far a debtor on the limits, who earns a comfortable salary, is bound in justice and fairness to apply it to the payment of the execution debt on which he is imprisoned, depends upon the claims of his family upon him for support, and it seems that if he spends more than in the judgment of the court is proper for that purpose, that will be an unlawful disposition of his property which will defeat an application for discharge.

In the *Matter of Brown*, 46 Supm. Ct. (39 Hun), 27, 29, it is said : "In order to prevent a discharge, it is necessary that the transaction alleged to be fraudulent should have injured or defrauded the creditor contesting the discharge (*Matter of Brady*, 69 N. Y. 215) ; but if that be the case, we conceive it is immaterial whether such transaction preceded or followed the recovery

of judgment by such creditor, or even the inception of the cause of action on which such judgment was obtained.

In the *Matter of Caamano*, 8 Civ. Pro. R. 29 ; s. c. 2 How. Pr. N. S. 240, where the debtor converted to his own use a large sum of money which had been intrusted to him, and afterward, under a power of attorney, obtained other moneys of his creditor which he also converted, it was held that under the authority of *Suydam* v. *Belknap*, 27 Supm. Ct. (20 Hun), 87, the debtor was entitled to his discharge.

It seems that the burden of proof to show that the petitioner's proceedings have not been just and fair is on the objecting creditor. *Matter of Brown*, 46 Supm. Ct. (39 Hun), 27 ; *In re Caamano*, 8 Civ. Pro. R. 29 ; s. c. 2 How. Pr. N. S. 240.

In re Boyce, 19 Civ. Pro. 23, where it appeared that the debtor had no property not exempt from execution, and that his petition and schedules were correct, it was nevertheless held that his proceedings were not just and fair under the particular circumstances. It appeared that the debtor's wife was the owner of two farms upon which he worked, and that he had made no efforts to obtain any compensation for his services, or to pay the judgment, which was for a small sum. It was there said (p. 26) : " A court ought not to say that a judgment-debtor's proceedings for his discharge are just and fair towards the judgment-creditor so long as he refuses to make use of his credit or other resources within his influence or control to liberate himself from jail or from the jail limits."

The disposition of property contemplated by the act does not include an assignment made in bankruptcy proceedings taken by the debtor before the recovery of judgment upon which he was arrested. *Matter of Fowler*, 59 How. Pr. 148 ; *Roswog* v. *Seymour*, 7 Robt. 427. Such an assignment is not a disposition of property for the future benefit of himself or family, or to defraud creditors, for whatever property he possesses under such a proceeding goes to his creditors. Daly, Ch. J., in *Matter of Fowler*, *supra*, p. 154. For the same reason, the fact that the judgment-debtor has made a general assignment of all his property for the benefit of creditors, is no bar to his discharge under this article. *Matter of King*, 1 Am. Insol. R. 351. But in the case of *People* v. *Brooks*, 40 How. Pr. 165, where the debtor

after imprisonment filed a voluntary petition in bankruptcy, and by virtue thereof assigned all his property to an assignee in bankruptcy, and then filed his petition for a discharge under this act, it was held that such a disposition of his property was a fraud upon the act, and was a ground for refusing a discharge. See also *Spear* v. *Wardell*, 1 N. Y. 144; *Hall* v. *Kellogg*, 12 N. Y. 325. And a similar ruling was made in the *Matter of Fitzgerald* (Sp. T. Com. Pleas), 5 Abb. N. C. 357. See also *Corning* v. *White*, 2 Paige, 567. In *Dieckerhoff* v. *Ahlborn*, 2 Abb. N. C. 372, 377, where after imprisonment, at the suit of the judgment-creditor, the debtor was thrown into bankruptcy by the other creditors, the adjudication in bankruptcy was voluntarily annulled to allow the debtor to apply for his discharge under this act.

§ 93. **Adjournments.**—(Code C. P. § 2209.) Upon sufficient cause being shown by a creditor, the court may, from time to time, adjourn the hearing; but not to a day later than three months after the presentation of the petition.

2 R. S. 32, § 7; 3 R. S. 6th ed. 26, § 7; 2 Edm. St. 33; amended. The Revised Statutes provided that no adjournment should be made extending beyond the next term.

When the defendant failed to appear upon the adjourned day, and the proceedings were dismissed with leave to come in on terms, and a motion was made to open the default, it was held that the failure to have a day assigned at the adjourned day, discontinued the proceedings, and the court ceased to have jurisdiction. *Bylandt* v. *Comstock*, 25 How. Pr. 429.

So, when the proceedings were not adjourned to the next term, the adjournment of the court without day put an end to them. *People* v. *Brooks*, 40 How. Pr. 165.

§ 94. **Proceedings on adjourned days.**—(Code C. P. § 2210.) An objection to a matter of form shall not be received upon an adjourned day; and, unless the opposing creditor satisfies the court that the proceedings on the part of the petitioner are not just and fair, the court must

direct an assignment, as prescribed in the last section but one, and must grant a discharge, as prescribed in the following sections of this article.

2 R. S. 32, § 8 ; 3 R. S. 6th ed. 26, § 8 ; 2 Edm. St. 33.

§ 95. **Assignment, effect thereof.**—(Code C. P. § 2211.) The assignment must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, and must be recorded in the clerk's office of the county where the petitioner is imprisoned. Where it appears, from the schedule or otherwise, that real property will pass thereby, the assignment must also be recorded as a deed, in the proper office for recording deeds, of each county where the real property is situated. The assignment vests in the trustee or trustees, for the benefit of the judgment-creditors in the executions, by virtue of which the petitioner is imprisoned, all the estate, right, title, and interest of the petitioner in and to the property, so directed to be assigned.

2 R. S. 32, § 9 ; 3 R. S. 6th ed. 26, § 9 ; 2 Edm. St. 33.

By § 2208 the assignment, ordered to be, must be of all the petitioner's property not expressly exempt by law from levy and sale by virtue of an execution, or of so much thereof as is sufficient to satisfy the execution or executions by virtue of which he is imprisoned.

The assignment ordered and made must include all property which the debtor has at the time when the same is ordered and made, and not merely such as he had at the time of signing his petition. *Borthwick* v. *Howe*, 34 Supm. Ct. (27 Hun), 505.

§ 96. **Discharge, when to be granted.**—(Code C. P. § 2212.) Upon the production, by the petitioner, of satisfactory evidence, that the petitioner has actually delivered to the trustee or trustees all the property so directed to be assigned, which is capable of delivery; or upon the peti-

tioner's giving security, approved by the court, for the future delivery thereof; the court must make an order, discharging the petitioner from imprisonment, by virtue of each execution, specified in his petition. The sheriff, upon being served with a certified copy of the order, must discharge the petitioner as directed therein, without any detention on account of fees.

2 R. S. 32, §§ 10, 11 ; 3 R. S. 6th ed. 26, §§ 10, 11 ; 3 Edm. St. 33.

Some evidence must be furnished to the court of the actual delivery of the property directed to be assigned, before the order for discharge can be made. *Borthwick* v. *Howe*, 34 Supm. Ct. (27 Hun), 505.

The affidavit of the assignee, that the property of the debtor has been delivered to him, amounts to a certificate of that fact, and is sufficient. *In re Von Schoening*, 1 Mon. L. B. 4.

The design of this section is to leave it to the sound discretion of the court whether to require any security, and if any, then to fix the form of the security, and the amount, according to the circumstances of each particular case. *Roswog* v. *Seymour*, 7 Robt. 427.

No recitals are necessary to the validity of the order. It is valid if the facts exist which make it so, notwithstanding they are not recited in it. But that the order of itself should constitute a protection to the sheriff in discharging the prisoner, and that it should be *prima facie* evidence of the regularity of the proceedings upon which the discharge is granted, it should contain recitals of the facts, giving general and special jurisdiction. *Bullymore* v. *Cooper*, 46 N. Y. 236 ; affi'g 2 Lans. 71 ; *Develin* v. *Cooper*, 84 N. Y. 410. If the order is relied upon without proof *aliunde* of the facts needful to jurisdiction, there must be in it ample allegations thereof. *Bullymore* v. *Cooper*, *supra* ; see *Bennett* v. *Burch*, 1 Denio, 141. See *ante*, p. 49.

The sheriff sued in action for an escape may set up that the action was not one in which a body execution could lawfully be issued. *Goodwin* v. *Griffis*, 88 N. Y. 629.

The sheriff is not liable to an action for false imprisonment

for refusing to discharge from his custody an imprisoned debtor upon an order for such discharge, which upon its face does not appear to be an order made by the court. *Hayes* v. *Bowe*, 12 Daly, 193.

In *Shaffer* v. *Riseley*, 114 N. Y. 23; rev'g 51 Supm. Ct. (44 Hun), 6, where the proceeding was irregular for the reason that the petitioner's affidavit was not verified on the day the petition was presented, it was held in an action against the sheriff for an escape, that the irregularity was waived by the general appearance of the judgment-creditor.

§ 97. **Petitioner's property still liable.**—(Code C. P. § 2213.) Notwithstanding such a discharge, the judgment-creditor in the execution has the same remedies, against the property of the petitioner, for any sum due upon his judgment, which he had before the execution was issued; but the petitioner shall not, except as is otherwise specially prescribed in the next section, be again imprisoned by virtue of an execution upon the same judgment, or arrested in an action thereupon.

2 R. S. 33, § 12; 3 R. S. 6th ed. 26, § 12; 2 Edm. St. 33.

§ 98. **When a creditor may issue new execution against person.**—(Code C. P. § 2214.) If the petitioner is convicted of perjury, committed in any of the proceedings upon his petition, any judgment-creditor, by virtue of whose execution he was imprisoned, may issue a new execution against his person.

2 R. S. 33, § 13; 3 R. S. 6th ed. 27, § 13; 2 Edm. St. 33.

§ 99. **Powers and duties of trustee.**—(Code C. P. § 2215.) The trustee must collect the demands, and sell the other property assigned to him. He must apply the proceeds thereof, after deducting his commissions and expenses allowed by law, as follows:

1. To the payment of the jail fees, upon the imprisonment and discharge of the petitioner.

2. If any surplus remains, to the payment of the creditors, by virtue of whose executions the petitioner was imprisoned, when he presented his petition; or, if there is not enough to pay them in full, to the payment, to each, of a proportionate part of the sum due upon his execution.

3. If any surplus remains, he must pay it over to the petitioner, or his executor or administrator.

Personal service upon a creditor, or his attorney, of written notice of the time and place of making a distribution, as prescribed in subdivision second of this section, has the same effect as publishing a notice thereof, in a case prescribed by law.

2. R. S. 33, § 15 ; 3 R. S. 6th ed. 27, § 15 ; 2 Edm. St. 34.

§ 100. Creditor may notify debtor to apply for discharge. —(Code C. P. § 2216.) Where a person has been imprisoned, by virtue of an execution, for the space of three months after he was entitled, by the provisions of this article, to apply for a discharge; and has neither made such an application, nor applied for his discharge under the provisions of article first of this title; the judgment creditor, by virtue of whose execution he is imprisoned, may serve upon the prisoner a written notice, requiring him to apply for his discharge, according to the provisions of this article.

2 R. S. 33, § 16 ; 3 R. S. 6th ed. 27, § 16 ; 2 Edm. St. 34.

§ 101. Effect of failure so to apply.—(Code C. P. § 2217.) If the prisoner does not, within thirty days after personal service, of such a notice, either present a petition to the proper court, as prescribed in article first of this title, or

serve, upon the creditor giving the notice, a copy of a petition and schedule, with a notice of his intention to apply for his discharge, as prescribed in this article; or if, after such a presentation or service, he does not diligently proceed thereupon to a decision, he shall be forever barred from obtaining his discharge under the provisions of this article, or of article first of this title.

2 R. S. 34, § 17; 3 R. S. 6th ed. 27, § 17; 2 Edm. St. 34, as it stood prior to Laws of 1857, c. 427.

§ 102. **Debtors to United States, etc., not to be discharged.** —(Code C. P. § 2218.) Neither of the following named persons shall be discharged from imprisonment, under the provisions of this article:

1. A person owing a debt or duty to the United States.

2. A person owing a debt or duty to the State, for taxes or for money received or collected by any person, as a public officer or in a fiduciary capacity, or a cause of action specified in section 1969 of this act or a judgment recovered upon such a cause of action.

2 R. S. 39, §§ 29, 30; 3 R. S. 6th ed. 32, §§ 29, 30; 2 Edm. St. 40, as amended by Laws of 1859, c. 2.

§ 103. **Appeal.**—The review of the proceedings, under this article, is by appeal under §§ 1356 and 1357. *In re Brady*, 69 N. Y. 215. An adjudication upon the merits, that the petitioner is not entitled to a discharge under this article, is a bar to any subsequent application for a discharge. *Matter of Thomas*, 10 Abb. Pr. N. S. 114; *Matter of Roberts*, 17 Supm. Ct. (10 Hun), 253; reversed on other grounds, 70 N. Y. 5; *Matter of Rosenberg*, 10 Abb. Pr. N. S. 450. See *ante*, p. 72.

The intent with which the petitioner disposed of his property, is an inference of fact to be drawn from the evidence by the court below, and the Court of Appeals has no jurisdiction

to interfere with such determination. *Matter of Sedgwick*, 12 Weekly Dig. 270, s. c. *sub. nom. Matter of S.*, 85 N. Y. 630.

In the *Matter of Roberts*, 59 How. Pr. 136, where the debtor had applied for exoneration from arrest under what is now article two of this title, and his application was denied upon the ground that he had made conveyances of his property with the intent to defraud his creditors, it was held that that adjudication was a bar to a subsequent application for a discharge under this article.

PART III.

GENERAL ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

CHAPTER VII.

DEFINED AND DISTINGUISHED.—THE ASSIGNMENT LAWS.

§ 104. In general.—The instruments which we are about to consider differ from the assignments referred to in the various statutory proceedings heretofore considered. They are not the creature of the statute.[1] *Thompson* v. *Rainwater*, 49 Fed. R. 406. They come into being not by operation of law, nor by force of any previous proceeding either by or against the debtor.

[1] In *Mills* v. *Parkhurst*, 126 N. Y. 89, 94, where the question was whether a creditor who attacked an assignment had made such an election of rights as would preclude him from afterward coming in to share under the assignment, Gray, J., said: "The assignment is not like a gift of property upon conditions, open to the acceptance or rejection of the donee. It is a payment by the assignor of his debts upon his own plan. The deed of assignment is in no sense a contract between the debtor and his creditors and it does not depend for its validity in law upon their assent. It is a means or mode which the statute permits to be adopted by an insolvent debtor, for the distribution of his estate among his creditors, and so long as he has acted without fraud, in fact or in law, and has complied with the prescriptions of the act, his conveyance to an assignee for the purposes stated therein, will stand and be effective."

An assignment, whether it may properly be termed a contract between the debtor and his creditors or not, is a grant by the debtor to his assignee resting on contractual obligations. The law imposes no duty upon a failing debtor to make a general assignment. It is a matter of his own volition. *Sanger* v. *Flow*, 48 Fed. R. 152, 156; *Baer* v. *Rooks*, 50 Fed. R. 898, 901. Nor, on the other hand, does the statute "permit" the making of an assignment. The effect of the statute is to prohibit the making of an assignment in a mode different from that which the statute makes mandatory, but the right to assign is not derived from the statute. See *post*, § 108.

They are purely the voluntary act of the debtor. It is true that the manner of executing such instruments is now regulated by statute in this State, and to a certain extent a method for administering the trust created by them, apart from the ordinary processes of a court of equity, has been created; but the right to make an assignment for creditors is derived in no sense from the statute, nor does the statute restrict or limit the operation or effect of such instruments when made. The statute "recognizes the existence of the power in the citizen to make an assignment of his property to trustees, for the benefit of his creditors, and does no more than prescribe the mode in which the power shall be used, and furnish some safeguards against abuse." *Thrasher* v. *Bentley*, 1 Abb. N. C. 39, 44, Folger, J. Its object and purpose was to render more efficient and certain the execution of the design for which the common law permitted such assignments to be made. *People* v. *Chalmers*, 8 Supm. Ct. (1 Hun), 683, 686, Daniels, J.; affi'd 60 N. Y. 154.

"The policy of this legislation," says Abbott, referee in *Ludington's Petition*, 5 Abb. N. C. 307, 313, "has been, not to embarrass the right of making such assignments, but to secure publicity, by acknowledgment and record, and to subject the assignors and their estates, from the time of the making of the assignment, to the summary jurisdiction of the court; to require the assignee to give security promptly, as a condition of his power to convert and apply assets under it; to authorize the assignee to gain possession of all the assets, by compelling the debtors to make discovery, if they fail to make a schedule of assets; and to authorize the assignee to ascertain who claim as creditors, by advertising for claims and requiring verified vouchers; lastly, to provide a simple and direct method of accounting, modeled upon that provided for executors and administrators."

§ 105. **Definition of assignment.**—A general assignment for the benefit of creditors is a transfer by a debtor of his general property to a person, in trust to pay his creditors. The essential elements of such instruments are: (1) a voluntary conveyance of the debtor's property, (2) in trust, (3) to sell the assigned property, and (4) to distribute the proceeds among the creditors. See *Ginther* v. *Richmond*, 25 Supm. Ct. (18 Hun), 232. The instrument is, therefore, simply a deed of trust, and differs from

other deeds of the same general character in the peculiarities of the trust created. These peculiarities are as stated.

(1) There must be an actual transfer of the title to the property. A mere power of attorney to collect debts, and apply the proceeds to the payment of the claims of creditors does not amount to an assignment for the benefit of creditors. *Beans* v. *Bullitt*, 57 Penn. St. 221; *Henderson's Appeal*, 31 Id. 502; *Griffin* v. *Rogers*, 38 Id. 382; *Banning* v. *Sibley*, 3 Minn. 389.

To come within the definition of a general assignment, the conveyance must be voluntary. Where a valuable consideration is shown for the transfer, the conveyance is not a general assignment. *Lewis* v. *Miller*, 23 Wkly. Dig. 495.

The conveyance, especially as now regulated by statute in this State, must be of the body of the debtor's property. A specific conveyance of a part of the debtor's property for the benefit of specified creditors is not within the contemplation of the statute regulating general assignments.

In *Tiemeyer* v. *Turnquist*, 85 N. Y. 516, an action was brought by the plaintiff as assignee to recover from the defendant for goods sold by the assignor; the assignment under which the plaintiff claimed purported to transfer all the assignor's books, debts, and book accounts to the plaintiff, who was to apply the proceeds to the payment of two small debts, the balance to go to the assignor's wife. The defendant contended that the assignment was void because not executed with the formalities required by the general assignment act. This contention was not sustained. The court said, speaking of the assignment (p. 523): "It does not profess to transfer all the assignor's property, nor to provide for all his debts, but only to transfer a part for a specified purpose. While certainly not good as a general assignment, it is nevertheless operative as between the parties, no rights of creditors intervening, to transfer the claim against the defendant to the plaintiff." In *Knapp* v. *McGowan*, 96 N. Y. 75, it was said that the general assignment acts have reference only to general assignments made by insolvent debtors for the benefit of all their creditors, and it was remarked that the various provisions of those statutes are entirely inapplicable to the case of a partial assignment of a portion of the debtor's property for the benefit of specified creditors. So in *Royer Wheel Co.* v.

Fielding, 101 N. Y. 504, it was held that the general assignment act does not relate to a specific assignment for the benefit of one or a limited number of creditors. And to the same effect is *Royer Wheel Co.* v. *Frost*, 13 Daly, 233; *Matter of Gordon*, 56 Supm. Ct. (49 Hun), 370. On the subject of special assignments see *post*, §§ 140, 141, and 142 and §§ 160*a*, 160*b*.

(2) There must be a trust and a trustee and creditors, *cestuis que trust*, who can compel an enforcement of the trust. *Dickson* v. *Rawson*, 5 Ohio St. 218; *Lucas* v. *The Sunbury & Erie R. R. Co.* 32 Penn. St. 458. The material and essential characteristic of a general assignment is the presence of a trust. The assignee is merely trustee and not absolute owner. He buys nothing and pays nothing, but takes the title for the performance of trust duties. Finch, J., *Brown* v. *Guthrie*, 110 N. Y. 435, 441; rev'g 46 Supm. Ct. (39 Hun), 29; *Maas* v. *Falk*, 54 State R. 160. In *Hine* v. *Bowe*, 53 Supm. Ct. (46 Hun), 196; affi'd 114 N. Y. 350; s. c. 22 Abb. N. C., 333, n., debtors made an absolute bill of sale of their property to a creditor, and in return took back from him an agreement, that in consideration of the transfer he would discharge an indebtedness due to him, and would also pay certain specified debts of the debtor, and such other claims as the debtors might direct him to pay, not exceeding a specified sum. It was held that this transaction did not constitute a general assignment for the benefit of creditors. There was no element of trust. The covenant to pay the specified claims was a part of the consideration for the *absolute* purchase of the property. See *Lehman* v. *Bentley*, 60 Super. Ct. (28 J. & S.) 473.

(3) The trust must be to convert the estate into money. This is the only trust in real estate for the benefit of creditors authorized by law.[1] 1 R. S. 729, § 56. A power to sell and convey

[1] Trusts for the benefit of creditors were recognized and enforced in this State previous to the Revised Statutes. *Nicoll* v. *Mumford*, 4 Johns. Ch. 522, 529; *Grover* v. *Wakeman*, 11 Wend. 187. The revisers limited the creation of express trusts in land to the cases only "where the purpose of the trust require that the legal estate should pass to the trustees. An assignment for the benefit of creditors, would in most cases be entirely defeated, if the title were to remain in the debtor." Reviser's note to Sec. 56, Art. 1, Title 1, Chap. 1 of Part 2 of Rev. Stat. (5 Edm. St. 580.)

is necessarily implied by a conveyance of property to pay debts. *Planck* v. *Schermerhorn*, 3 Barb. Ch. 644; *Cooper* v. *Whitney*, 3 Hill, 95, 101; *Williams* v. *Otey*, 8 Humph. (Tenn.) 563.

(4) The trustee must be authorized to distribute. *Hooper* v. *Tuckerman*, 3 Sandf. 311, 316.

§ 106. Distinguished from mortgages.—The instruments to which general assignments for the benefit of creditors bear the closest analogy are mortgages and deeds of trust in the nature of mortgages. The distinction, however, is one clearly defined. A mortgage or deed of trust in the nature of a mortgage is a security for debt. An assignment is more than that. It is an absolute appropriation of property to the payment of debts. *Murray* v. *Judson*, 9 N. Y. 73, 83, Gardiner, J.; *Hoffman* v. *Mackall*, 5 Ohio St. 124.

A mortgage creates a lien upon property in favor of the creditor, leaving the equity of redemption still the property of the debtor, and liable to sale or incumbrance by him. *Leitch* v. *Hollister*, 4 N. Y. 211; *Dunham* v. *Whitehead*, 21 N. Y. 131; *McClelland* v. *Remsen*, 3 Abb. Dec. 74; *Van Buskirk* v. *Warren*, 4 Id. 457; *Loeschigk* v. *Baldwin*, 1 Robt. 377; *Appolos* v. *Brady*, 49 Fed. R. 401, 403.

An assignment conveys the entire estate, legal and equitable, to the assignee; and the assignor has no rights, legal or equitable, in the assigned property until the purposes of the trust are satisfied. *Briggs* v. *Davis*, 20 N. Y. 15; s. c. 21 N. Y. 574.

There is a distinction between an assignment by a debtor of his property to trustees, upon trust for the payment of particular and specific debts, reserving the surplus to the debtor, and an assignment by a debtor of his property and effects to his creditor, upon the trust to sell and pay his own debt, reserving the surplus to the assignor. The latter is in effect a mortgage, and when the debt for which it is security is paid, the property reverts to the original owner. *McClelland* v. *Remsen*, 36 Barb. 622; s. c. 14 Abb. Pr. 331; affi'd 5 Abb. Pr. N. S. 250; *Bier* v. *Kibbe*, 50 Supm. Ct. (43 Hun), 174; *Royer Wheel Co.* v. *Frost*, 13 Daly, 233; *Boessneck* v. *Cohn*, 26 State R. 969; s. c. 7 N. Y. Supp. 620.

The essential difference between a general assignment to an

assignee in trust and a pledge, is that in one case the absolute title passes to the assignee, while in the case of a pledge the title remains in the pledgor, and it is the right of possession and the right to hold or apply the pledge to secure the debt that is vested in the pledgee. *Maas* v. *Falk*, 54 State R. 160.

Where a debtor assigns, in good faith, part of his property to creditors *themselves*, for the purpose of securing particular demands, reserving the surplus to himself, the assignment is not void as creating a trust for the debtor, under 2 R. S. 135, § 1. The conveyance, whatever may be its form, is in effect a mortgage of the property transferred. A trust as to the surplus results from the nature of the security, and is not the object or one of the objects of the assignment. The residuary interest may still be reached by the creditors, who are therefore not delayed or hindered. *Leitch* v. *Hollister*, 4 N. Y. 211; *Brown* v. *Guthrie*, 110 N. Y. 435; rev'g 46 Supm. Ct. (39 Hun), 29.

"The distinction in such cases," says Welles, J., in *Dunham* v. *Whitehead* (21 N. Y. 131, 133), "is between a conveyance in trust, in the strict and proper sense of the term, where the trustee acquires the entire title to the subject-matter of the trust, and where the trust can only be enforced or controlled in equity, and a case where a creditor can at once proceed and sell the residuary interest or equity of redemption of the assignor, if the thing assigned be property which may be sold on execution, or, if not, where he may reach that interest by a bill or action in equity in the nature of a creditor's bill—the same as if it never had been assigned—subject only to the lien created by the assignment."

Deeds of trust in the nature of a mortgage with power of sale are also clearly distinguished from general assignments, as known in this State. The radical distinction arises out of the equitable interest which the debtor retains in the property conveyed. See *Hendrickson* v. *Robinson*, 2 Johns. Ch. 283.

§ 107. Assignments directly to creditors.—General assignments are distinguished from conveyances directly to creditors, in the form of a sale of the property to a creditor in payment of his debt, as well as by pledge or hypothecation of the property to a particular creditor, as a security for a debt in the nature of a mortgage, as in the case just referred to.

A conveyance may be made by a debtor of his property to all his creditors, in trust to distribute the proceeds among them, and with power to name an assignee. *Tompkins* v. *Wheeler*, 16 Pet. 106; *Cunningham* v. *Freeborn*, 11 Wend. 240, 256; *Mussey* v. *Noyes*, 26 Vt. 462. But such conveyances are rarely if ever made. So a transfer made by a debtor to one creditor, to deduct his own claim and pay the balance to another creditor, may be in effect a general assignment. *Smith* v. *Woodruff*, 1 Hilt. 462.

It is said by Chan. Kent, in *Nicoll* v. *Mumford* (4 Johns. Ch. 522, 529), referring to *Brown* v. *Minturn* (2 Gall. 557), that if the assignment is directly to creditors, their assent is necessary in law to give validity to the deed; but if the assignment be to trustees, for their use, the legal estate passes and vests in the trustees, and chancery will compel the execution of the trust for the benefit of the creditors, though they be not at the time assenting and parties to the conveyance. As to the first of these propositions, so far as it appears to hold that proof of an express acceptance is necessary in the case of a conveyance direct to a creditor, the point was not necessary to the determination of the case of *Nicoll* v. *Mumford* (*supra*); and in *Van Buskirk* v. *Warren* (4 Abb. Dec. 457, 460), Mr. Justice Potter expressed a decided opinion that, in the case of an assignment directly to a party having a direct beneficial interest in the acceptance of an assignment, the presumption is that the assignee accepts the title, and the *onus* is upon the party claiming in hostility to show that there never was an acceptance. Citing *Nicoll* v. *Mumford*, *supra*, and *Moir* v. *Brown*, 14 Barb. 39, 45.

§ 108. **Assent of creditors.**—Whatever may be the rule in that class of cases, it has been held in this State, from an early time, that, in the case of conveyances to a trustee for the benefit of creditors made in good faith, and without conditions deemed injurious to their interests, the legal estate vests at once in the trustee, and the assent of creditors is presumed, unless the contrary is proved.[1] *Cunningham* v. *Freeborn*, 11 Wend. 240,

[1] In England an assignment for creditors is regarded rather in the nature of a deed of agency than as a deed of trust (*Mackinnon* v. *Stewart*, 20 Law J. [N. S.] Chan. 49; *Garrard* v. *Lauderdale*, 3 Sim. 1; *Acton* v. *Woodgate*, 2 Myl. & K. 492). In the case last cited it is said: "If a debtor conveys

248, 249 ; *Nicoll* v. *Mumford*, 4 Johns. Ch. 522 ; *Halsey* v. *Whitney*, 4 Mason, 206 ; *Tompkins* v. *Wheeler*, 16 Pet. 106, 118 ; *Ludington's Petition*, 5 Abb. N. C. 307. But by this, of course, it is not to be understood that there is no necessity for an acceptance on the part of the assignee. Such an acceptance is essential to the validity of the instrument, both at common law (*Crosby* v. *Hillyer*, 24 Wend. 280 ; *Jackson* v. *Phipps*, 12 Johns. 418), and under the statute. Laws of 1877, c. 466, §§ 2, 7.

§ 109. **The right to assign.**—Assignments for the benefit of creditors are said to have been an American device (Selden, J., in *Dunham* v. *Waterman*, 17 N. Y. 9, 15), and of recent origin. (Tracy, Senator, in *Grover* v. *Wakeman*, 11 Wend. 187, 216 ; but see *Bamford* v. *Baron*, 2 Term R. 594, n., and *Tappenden* v. *Burgess*, 4 East, 230.) They are said, also, to have originated in the desire of creditors to perpetuate their own control over the property in their hands. Selden, J., in *Dunham* v. *Waterman*, *supra*, 16.

The right to make such conveyances depends ultimately upon the absolute dominion which a person has over his property, by which he can make any disposition which he pleases of it not inconsistent with the rights of others. Ch. J. Marshall, in *Brashear* v. *West*, 7 Pet. 608, 614.

An insolvent debtor, at any time before his property becomes

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property in trust for the benefit of his creditors, to whom the conveyance is not communicated, and the creditors are not, in any manner, privy to the conveyance, the deed merely operates as a power to the trustees, which is revocable by the debtor, and has the same effect as if the debtor had delivered money to an agent to pay his creditors, and, before any payment made by the agent, or communication by him to the creditors, had recalled the money so delivered." The distinction in the cases between such a conveyance in trust for creditors and a voluntary settlement in favor of beneficiaries generally, is made apparent by a later case in the same volume (*Bill* v. *Cureton*, 2 Myl. & K. 503), where a voluntary settlement for beneficiaries generally was held to create an irrevocable trust. In Massachusetts the assent of creditors is necessary to render the assignment effectual as against attachment creditors. It becomes operative as to assenting creditors to the amount due to such creditors (*May* v. *Wannemacher*, 111 Mass. 202 ; *Jones* v. *Tilton*, 139 Id. 418). In most of the States the assent of creditors is presumed. See Burrill on Assignments, 6th ed. § 258.

bound by any lien, may assign it over to trustees for the benefit of all his creditors. The assignment is to be referred to an act of duty, attached to his character of debtor, to make the fund available for the whole body of his creditors. Kent, Ch., *Nicoll* v. *Mumford*, 4 Johns. Ch. 522. And a debtor, in securing an equal distribution of his property among his creditors, is performing a moral duty. 2 Spence's Eq. Jur. 350, citing *Pickstock* v. *Lyster*, 3 Maule & S. 371, 374.

Such assignments, especially when they have been made for the equal benefit of all creditors, have uniformly received the approbation of the judicial tribunals before which they have been brought. Field, J., in *Mayer* v. *Hellman*, 91 U. S. 496, 500. Story, J., in *Brown* v. *Minturn*, 2 Gall. 557, 559; Harlan, J., in *Reed* v. *McIntyre*, 98 U. S. 507.

§ 110. **The effect of the assignment.**—The effect of a general assignment must be determined in each instance by the terms and construction of the instrument itself. It may, however, assist in the study of the subject, to state in a general way some of the necessary effects of every general assignment.

It is to be constantly borne in mind that assignments for creditors are simply deeds of trust. They have no other efficacy or effect than can be derived from the deed of trust. When the conveyance is of all the debtor's property for the benefit of all his creditors, they amount to a complete cession of his estate for his creditors. But the surrender of the property is not a surrender to the law for the purpose of administration by the law, like a commission or assignment in bankruptcy, but is a private trust vesting in general only such a title in the assignee as the assignor has conveyed, and for such purposes only as the assignor has prescribed in the assignment.

"The assignee derives all his power from the assignment, which is both the guide and measure of his duty. Beyond that, or outside of its terms, he is powerless and without authority. The control of the court over his actions is limited in the same way, and can only be exercised to compel his performance of the stipulated and defined trust, and protect the rights which flow from it. He distributes the proceeds of the estate placed in his care, according to the dictation and under the sole guidance of

the assignment, and the statutory provisions merely regulate and guard his exercise of an authority derived from the will of the assignor." Finch, J., *Matter of Lewis*, 81 N. Y. 421, 424.

As to the assignor, therefore, after the assignment he ceases to have any legal title to the assigned property, and his equitable interest is confined to such *residuum* of the estate as may remain after all the debts directed to be paid have been satisfied. He remains as before, liable for all his unpaid debts, and subject to all legal process. *Butler* v. *Thompson*, 4 Abb. N. C. 290. The assigned property, however, has ceased to be the debtor's, and is placed beyond the reach of legal process against the debtor or his property. When the assignment is valid, creditors can reach the property only in equity.

As to the assignee, the legal title to the property vests in him, but the beneficial interest is in the *cestuis que trust*, the creditors. The assignee is seized for others, not for himself. The moment he is seized, that moment the substantial interest passes out of him unto others. He is merely the legal recipient or organ by which the conveyance is rendered operative for the purposes declared in it.

As to the creditors provided for in the assignment, their rights become fixed by the execution of the assignment by the assignor, and its acceptance by the assignee. The assigned property becomes appropriated to the payment of their debts. *Murray* v. *Judson*, 9 N. Y. 73, 83. And they may enforce the trust by all the equitable remedies which the law gives to *cestuis que trust*.

§ 111. **The Act of 1860.**—The method of making general assignments for the benefit of creditors, and of enforcing the trusts which they create, was first regulated by statute in this State in 1860 (Laws of 1860, c. 348). That act required that the assignment should be made in writing, and should be acknowledged and recorded (§§ 1, 6). It also required the debtor within twenty days after making the assignment, to make and deliver to the county judge of the county in which the debtor resided, an inventory or schedule precisely as required under the two-thirds act (see *ante*, p. 29). It provided, also, that the assignee should within thirty days after the date of the assignment, and

before he should have power or authority to sell, dispose of, or convert to the purposes of the trust any of the assigned property, execute a bond to the people of the State for the faithful performance of his duties (§ 3). After the lapse of a year from the date of the assignment, the county judge was empowered, upon petition of any creditor of the debtor, to issue a citation compelling the assignee to appear and show cause why he should not account, and to decree the payment of the petitioning creditor's proportional part of the fund. The county judge was clothed with the same power and jurisdiction to compel such accounting as is possessed by surrogates in relation to the estates of deceased persons, and with power to examine the parties to the assignment, and other persons in relation to the assignment and accounting, and to compel their attendance. The right of appeal as from the decrees of a surrogate was also given (§ 4). These, with a provision authorizing the county judge to order the prosecution of the assignee's bond, constituted the substance of the enactment.

In 1867 (Laws of 1867, c. 860), the section in reference to accountings was amended by inserting a provision that the citation should be served upon all persons interested in the assignment, and setting forth the mode of service, and providing also for a reference to take and report the examination of the assignee, and providing for the protection of the assignee upon the accounting, against claims of creditors.

In 1870 (Laws of 1870, c. 92), these amendments were all abrogated, and the section was restored to its original form, with the exception that the petition could be made by a surety as well as by any person interested in the estate.

In 1872 (Laws of 1872, c. 838) the same section was again amended by setting out fully how the citation should be served, and providing that all laws governing surrogates on accountings should be applicable to these proceedings, and that the county judge should have all the powers of surrogates therein. The amendment authorized a reference, and provided for a transfer of the proceedings to the county judge of some adjoining county, when the county judge having original jurisdiction should become incapacitated, and for the continuance of the proceedings in case of the death of the assignee.

In 1873 (Laws of 1873, c. 363), the fifth section of the act was amended so that, in the case of the removal of the assignee and the substitution of another assignee, the substituted assignee might prosecute the bond of his predecessor.

In 1874, for the purpose of obviating the decision in the case of *Juliand* v. *Rathbone* (39 N. Y. 369), where it was held that a failure to make and deliver the inventory and schedule required by the second section had the effect to render the assignment void, it was enacted (Laws of 1874, c. 600), that in case the debtor should omit or refuse to make and deliver the inventory and schedule, the assignment should not for that reason become invalid, but the assignee was authorized within six months after the date of the assignment to make and file the inventory and schedule required, and to compel a discovery by the assignor for the purpose of the preparation of the inventory and schedule.

This act also provided that the county judge might authorize the assignee to advertise for claims of creditors, and specified the manner in which the advertisements should be made.

This act having extended the time within which the inventory and schedule might be filed for six months, left the provision requiring the assignee's bond to be filed within thirty days after the date of the assignment. Inasmuch as the inventory of property was essential to enable the court to fix the penalty of the bond, a serious inconvenience arose, and the next year (Laws of 1875, c. 56) the third section of the act was altered by changing the time, within which the assignee's bond was required to be filed, from thirty days after the date of the assignment to ten days after the delivery of the inventory or schedule. This act also amended the fourth section in reference to accountings, by restoring the section as it originally read in the act of 1860, with the addition of a clause providing for a reference to take and state the assignee's account.

The various decisions under the act of 1860 and its amendments are to be found under the special topics to which the different provisions of the act relate.

§ 112. The General Assignment Act of 1877.—The general assignment act of 1877 (Laws of 1877, c. 466) repealed the act of 1860 and all the enactments mentioned in the previous section,

and substituted in their stead a much more comprehensive system for the administration of the assigned estate, and the enforcement of the equitable interests of creditors in the trust property. It retained all the features of the act of 1860 and its amendments, and supplemented them by what was intended to be a summary and complete proceeding in the county court, for the administration and distribution of the estate without resort to a court of equity. This act was amended in 1878 (Laws of 1878, c. 318), but inasmuch as each of the sections of the act as amended are cited and discussed in the following chapters, no further reference to their details is here required.

In 1884 (Laws of 1884, c. 328), the act was still further amended by the addition of a requirement that in all assignments made under the act the wages or salaries of employees shall be preferred before any other debts, and directing that, if the assets are insufficient to pay all such claims in full that they shall be paid *pro rata*.

In 1885 (Laws of 1885, c. 380), an act was passed to the effect that all powers, rights, and duties conferred upon county judges under the assignment act were also conferred upon and could be exercised by the Supreme Court, and the justices of the Supreme Court concurrently with the county courts and judges. See *post*, Chap. XVIII.

In the same year (Laws of 1885, c. 464), the General Assignment Act was amended by modifying section twenty-three, so as to provide that the county judge might authorize the assignee to sell, as well as to compromise or compound claims or debts belonging to the estate.

In 1886 (Laws of 1886, c. 283), the act of 1884, this section was amended so that § 29 should provide that "in all distributions of assets under all assignments," etc., wages should be preferred, as in the previous enactments. See *post*, § 175.

In 1887 (Laws of 1887, c. 503), a new section (§ 30) was added to the act, the intention of which was to prevent preferences being made to the extent of more than one-third of the assigned estate. See *post*, Chap. XI.

In 1888 (Laws of 1888, c. 294), section two of the act was amended by inserting a provision to the effect that the assignment must specifically state therein the residence and the kind

of business carried on by the assignor at the time of the assignment, and the place at which the business is conducted. See *post*, § 125.

In 1891 (Laws of 1891, c. 34), it was provided that when it becomes necessary to appraise in whole or in part an insolvent estate in the hands of an assignee, the real property shall be taken at its full and true value, taking into consideration actual sales of neighboring real estate similarly situated during the year immediately preceding, and all such property as is customarily bought or sold in open market in New York or elsewhere shall be valued by ascertaining the range of the market and the average of prices running through a reasonable period of time. This provision was not, however, in terms of an amendment to the assignment act.

In 1894 (Laws of 1894, c. 134), the twenty-second section of the act was amended by inserting a provision that a final decree directing the payment of money may be enforced by serving a certified copy thereof personally upon the assignee, and if he wilfully neglects to obey said decree by punishing him for a contempt of court. This remedy, however, does not suspend the right of action against the sureties upon the assignee's bond.

CHAPTER VIII.

PARTIES TO ASSIGNMENTS.

§ 113. **In general.**—The formal parties to an assignment are ordinarily the assignors and the assignee. Creditors are not necessary, and usually not proper, parties to the instrument (see § 113).

Under the act of 1877 (Laws of 1877, c. 466, § 1), it is required that "the assent of the assignee, subscribed and acknowledged by him, shall appear in writing, embraced in or at the end of or indorsed upon the assignment, before the same is recorded, and, if separate from the assignment, shall be duly acknowledged."

§ 114. **Assignments, by whom made.**—Any person capable in law of entering into a contract, may execute an assignment for the benefit of creditors. It was held in the case of *Fox* v. *Heath* (21 How. Pr. 384), that an assignment executed by partners, one of whom was an infant, was void, for the reason that the instrument, being voidable by the infant, the conveyance was not absolute and irrevocable, and was consequently fraudulent as to creditors. This doctrine was disapproved, however, in *Yates* v. *Lyon* (61 N. Y. 344; rev'g 61 Barb. 205). In that case the infant had ratified the deed after he came of age. Independent of that fact, it seems that an appropriation of firm property to the payment of firm debts would bind the infant partner even without his assent. See *Avery* v. *Fisher*, 35 Supm. Ct. (28 Hun), 508.

Previous to the married woman's act of 1860 (Laws of 1860, c. 90), a married woman was disabled by her coverture from making a general assignment of a stock in trade with which she was conducting business. *Cropsey* v. *McKinney*, 30 Barb. 47. Nor did the fact that the husband assented that the business should be conducted in her name, carry with it an implied

authority that she might make an assignment for the benefit of creditors. *Cropsey* v. *McKinney*, *supra*, 58. But the act of 1860, which provides that a married woman may bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business, seems to confer the authority to make a general assignment.

§ 115. **Assignments by non-residents.**—Non-residents carrying on business in this State who execute an assignment within the State of property situated here must comply with the State laws as to the mode and manner in which the assignment is executed. If the assignment in such a case is not executed as required by our laws, it will not be held valid because executed in conformity with requirements of the law of the domicil of the non-resident parties. *Smedly* v. *Smith*, 15 Daly, 421; s. c. 28 State R. 414. The general assignment act contemplates the making of assignments by non-residents within this State, and such conveyances, when executed here, must comply with that law. *Grady* v. *Bowe*, 11 Daly, 259, 271.

In *Ockerman* v. *Cross*, 54 N. Y. 29, the assignment was executed in Canada by residents of that country in conformity with its laws, and it was held valid to pass title to property in this State. . A non-resident could make an assignment under the act of 1860 (*Scott* v. *Guthrie*, 10 Bosw. 408), although the provisions of that statute were not as clearly applicable to non-residents as those of the act of 1877. For further discussion of the questions arising under assignments executed elsewhere of property situated in this State, see Chap. XVII.

§ 116. **Creditors, when proper parties.**—It is not necessary that the creditors be parties to, or to assent to, the assignment. *Cunningham* v. *Freeborn*, 11 Wend. 240, 248; see *Moses* v. *Murgatroyd*, 1 Johns. Ch. 119, 129. When the assignment is manifestly for the advantage of creditors, and contains no provisions prejudicial to them, their assent will be presumed, unless the contrary appears. *Nicoll* v. *Mumford*, 4 Johns. Ch. 522, 529, Kent, Ch.; *Brown* v. *Minturn*, 2 Gall. 557; *Lawrence* v. *Davis*, 3 McL. 177; *Fellows* v. *Greenleaf*, 43 N. H. 421; *Ludington's Petition*, 5 Abb. N. C. 307, 312. See *ante*, § 106*a*, and note.

The legal estate will pass to and vest in the assignees, although the creditors are not at the time assenting and parties to the conveyance. *Nicoll* v. *Mumford*, *supra*; *Halsey* v. *Whitney*, 4 Mason, 206, 214.

If the assignment is drawn with the design that it should be executed by the creditors, or expressly requires their assent or acquiescence, they must execute it or express their assent in the required manner before it will be effectual as to them. *Lawrence* v. *Davis*, *supra*; *Shearer* v. *Loftin*, 26 Ala. 703; *Brown* v. *Lyon*, 17 Id. 659.

When the assignment requires some act to be done which is not presumptively for the benefit of the creditor, as, for instance, where it requires the creditor to execute a release to the debtor, it will not be effectual as against the creditors, unless assented to, and in such cases the creditors would be proper parties to the instrument. *Wakeman* v. *Grover*, 4 Paige, 23; s. c. *sub. nom.* *Grover* v. *Wakeman*, 11 Wend. 187.

The English as well as the Massachusetts doctrine in reference to the implied assent of creditors, is different. Lewin on Trusts, 9th ed. 568; Burrill on Assignments, 6th ed. §§ 258, 259.

§ 117. **Assignments by corporations.**—"It appears to be settled," says Chan. Walworth, in *De Ruyter* v. *The Trustees of St. Peter's Church* (3 Barb. Ch. 119, 124; affi'd 3 N. Y. 238), "by a weight of authority which is irresistible, that a corporation has the right to make an assignment in trust for its creditors; and may exercise that right to the same extent, and in the same manner, as a natural person, unless restricted by its charter, or by some statutory provision." This opinion is sustained by the authorities. *Haxtun* v. *Bishop*, 3 Wend. 13; *Bowery Bank Case*, 5 Abb. Pr. 415; *Hill* v. *Reed*, 16 Barb. 280; *Hurlbut* v. *Carter*, 21 Barb. 221; *Nelson* v. *Edwards*, 40 Barb. 279; *Union Bank* v. *Ellicott*, 6 Gill & J. 363; *State of Maryland* v. *Bank of Maryland*, 6 Gill & J. 205; *Wilkinson* v. *Bauerle*, 41 N. J. Eq. 635; *Town* v. *Bank of River Raisin*, 2 Doug. (Mich.) 530; *Robins* v. *Embry*, 1 Smede & M. Ch. (Miss.) 207; *Beaston* v. *Farmers' Bank of Delaware*, 12 Pet. 102; *In re Conway*, 4 Ark. 302; *Ringo* v. *Biscoe*, 13 Ark. 563; 2 Kent's Comm., 315; see Southern Law Review,

vol. III, N. S. 553; Burrill on Assignments, 6th ed. § 45; Morawetz on Corporations, 2d ed. § 513.

In a very recent case in this State (*Vanderpoel* v. *Gorman*, 140 N. Y. 563, 568) Judge Peckham said: "There can be no doubt that an insolvent corporation could at common law make a general assignment in trust to an assignee for the benefit of its creditors."

But an assignment of all the property of a corporation does not operate as a transfer of the corporate franchise, nor does it work a dissolution of the company. *De Ruyter* v. *The Trustees of St. Peter's Church*, *supra*; *Hurlbut* v. *Carter*, *supra*; *State of Maryland* v. *Bank of Maryland*, *supra*; *Town* v. *Bank of River Raisin*, *supra*.

In *Abbot* v. *American Hard Rubber Co.* (33 Barb. 578; s. c. 21 How. Pr. 193), it was held that a transfer by a majority of the directors of a corporation, of the entire property of the company, except its real estate, with its machinery and fixtures, which in effect terminated the business of the company, was void as against stockholders. The transfer in that case did not purport to be for the benefit of creditors. (33 Barb. 584.) This case is a leading authority in this State, and is also recognized as the leading authority in most of the States. *People* v. *Ballard*, 134 N. Y. 269, 295.

There is a manifest distinction between the assignment of property by an insolvent corporation in trust for the purpose of paying its debts, and the conveyance of its property while solvent, so as to make the continued exercise of its franchises impossible. *Vanderpoel* v. *Gorman*, 140 N. Y. 563, 568. The former is merely a method of paying debts which involves, because the corporation is insolvent, a winding up of its affairs; the latter is the exercise of powers by the officers of a corporation directly and primarily destructive of the purposes for which it was organized, while it still has the capacity to perform those purposes.

Smith v. *N. Y. Consolidated Stage Co.* (18 Abb. Pr. 419) was the case of an assignment by a corporation acting under a resolution adopted by a majority of the directors, of all the corporate property to an assignee to sell, and pay creditors *pro rata*, it was held that if the corporation was solvent the act of the directors was

ultra vires and a fraud upon the stockholders. The decision, however, seems to have gone upon the ground that the transfer was made in contemplation of insolvency, and was therefore void under the statute about to be cited.

§ 118. Statutory restrictions on assignments by corporations.—Although the power of a corporation to make a general assignment was thus unlimited at common law, the statutes of this State for many years restricted the right to a very considerable extent. These restrictions, however, have by recent legislation been greatly modified.

In 1825 (Laws of 1825, c. 325), the legislature passed an act entitled "An act to prevent fraudulent bankruptcies by incorporated companies," etc., and by the sixth section of that act provided: "That whenever any incorporated company shall have refused the payment of any of its notes or other evidences of debt, in specie or lawful money of the United States, it shall not be lawful for such company, or any of its officers, to assign or transfer any of the property or choses in action of such company, to any officer or stockholder of such company, directly or indirectly, for the payment of any debt; and it shall not be lawful to make any transfer or assignment in contemplation of the insolvency of such company, to any person or persons whatever; and every such transfer and assignment to such officer, stockholder or other person, or in trust for them or their benefit, shall be utterly void."

This provision was incorporated *verbatim* into the Revised Statutes. 1 R. S. 603, § 4; 2 R. S. 6th ed. 399; 2 R. S. 7th ed. 1534; 1 Edm. St. 560.

A subsequent section (2 R. S. 605, § 11; as amended by Laws of 1871, c. 883; 2 R. S. 7th ed. 1536), provides that the provisions of the title of the Revised Statutes in which the section occurs, shall not apply to any religious society nor to any moneyed corporation which shall have been or shall be created, or whose charter shall be renewed or extended after January 1st, 1828, and which shall be subject to the provisions of the second title, of the eighteenth chapter, of the first part of the Revised Statutes.

In the case of *Haxtun* v. *Bishop* (3 Wend. 13), decided under

the act of 1825, an assignment, executed after a bank had stopped payment, to persons other than officers or stockholders, in trust to apply the proceeds to the payment of all the creditors of the bank in equal proportions, was considered valid, but the case turned upon another point. See *Harris* v. *Thompson*, 15 Barb. 62, 65. The opinion of the court was that the assignment was not made in contemplation of insolvency within the provision of the statute. See *Robinson* v. *Bank of Attica*, 21 N. Y. 406, 411; *Heroy* v. *Kerr*, 8 Bosw. 194. In *Harris* v. *Thompson* (15 Barb. 62), it was decided that an assignment made by a corporation in contemplation of insolvency, although it had not in fact stopped payment, was within the statute, and the assignment was adjudged void. This opinion was approved by the Court of Appeals in *Sibell* v. *Remsen*, 33 N. Y. 95. Both of the cases last cited were instances of assignments made by corporations organized under the act of 1848, for the formation of manufacturing companies.

In reference to such corporations it was expressly held, under the provisions of the Revised Statutes above cited, that a general assignment for the benefit of creditors, made by a corporation organized under the act of 1848, when insolvent or in contemplation of insolvency, was absolutely void. *Loring* v. *U. S. Vulcanized Gutta Percha Co.* 30 Barb. 644; affi'd, 36 Barb. 329.

It was also held that it was no answer to the operation of the statute declaring the assignment void, that the instrument itself provided for an equal distribution of the assets among the creditors, for the reason that the legislature may have deemed it desirable that the administration of assets should be made by a receiver appointed by the court rather than by an assignee selected by its own officers. Ibid. 36 Barb. 330, 331.

It has also been held that the section of the Revised Statutes cited above was applicable to all corporations except those which are expressly exempted by the subsequent section cited. 1 R. S. 605, § 11. Hence, where a railroad corporation was organized under a special charter by which it was made "subject to the general restrictions and liabilities prescribed by such parts of title third of the eighteenth chapter, of first part of the Revised Statutes as are not repealed," it was held that this express allu-

sion to a specified portion of the statute did not exempt the corporation from the operation of the fourth title of the same chapter in which the section cited above occurs. *Bowen* v. *Lease*, 5 Hill, 221.

In 1882 (Laws of 1882, c. 402, § 1, par. 39), the section cited above was expressly repealed. At the same session of the legislature an act was passed entitled, "An act to revise the statutes of this State relating to banks, banking, and trust companies" (Laws of 1822, c. 409), and by § 187 of that act a portion of the section was re-enacted, but its application appears to have been limited to moneyed corporations only. (See *post*, § 116.) By § 214 the term moneyed corporations is construed to mean "every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurances."

By Laws of 1884, c. 434, the repealing act of 1882 was amended by omitting that portion of the act relating to section four of title four, of chapter eighteen, of part one of the Revised Statutes (*supra*), thereby re-enacting that section and restoring the law as it stood previous to the passage of the act of 1882. Insolvent corporations other than moneyed corporations cannot therefore now make general assignments, although for a short time from 1882 to 1884 it seems that they could do so.

In the case of *Smith* v. *Danzig* (64 How. Pr. 320, 324), which was decided in 1883, the act of 1882 was not referred to. Justice Pratt in deciding that case said: "Unlike the case of individuals, insolvent corporations are forbidden by law to grant preferences to any creditors. They are forbidden from making assignments, partly for that reason and in part because that involved the selection of their own trustee, and so worked out indirectly that which they are forbidden to do directly." Citing *Harris* v. *Thompson*, 15 Barb. 62, and *Sibell* v. *Remsen*, 33 N. Y. 95. Both of these cases, however, were decided solely upon the section of the Revised Statutes cited above.

So in *Nat. Broadway Bank* v. *Wessell Metal Co.* 66 Supm. Ct. (59 Hun), 470, 473, Mr. Justice Barrett, speaking of the powers of a corporation under the Revised Statutes, said: "Nor could the directors prevent the collection of the plaintiff's debt by making a general assignment for the equal benefit of all the cred-

itors, as the statute expressly forbids the making of any assignment whatever, preferential or non-preferential. See *Bicknell* v. *Speir*, 45 State R. 651, and *Ladew* v. *Hudson Riv. B. & S. Co.* 68 Supm. Ct. (61 Hun), 333.

§ 119. Statutory restrictions on assignments by corporations—Recent legislation as to business corporations.—By the Stock Corporation Law passed in 1890 (Laws of 1890, c. 564, § 48), the section of the Revised Statutes cited above was modified so as to read as follows :

"No corporation which shall have refused to pay any of its notes or other obligations when due, in lawful money of the United States, nor any of its officers or directors, shall assign any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt ; and no officer, director or stockholder thereof shall make any transfer or assignment of its property, or of any stock therein, to any person in contemplation of its insolvency ; and every such transfer or assignment to such officer, director or other person, or in trust for them or for their benefit, shall be void."

It was held in *Troy Waste Mfg. Co.* v. *Saxony Woolen Mills*, 4 Misc. 245, and in *Troy Waste Mfg. Co.* v. *Harrison*, 80 Supm. Ct. (73 Hun), 528, that under this statute a manufacturing corporation could not in contemplation of insolvency make a general assignment for the benefit of creditors even without preferences.

By the Stock Corporation Law of 1892 (Laws of 1892, vol. II, p. 1838, § 48) the section of the act of 1890, cited above, was repealed, and in its place the following was enacted :

"No corporation which shall have refused to pay any of its notes or other obligations when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insol-

vent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation shall be valid."

This provision seems to be levelled exclusively against the making of preferences by an insolvent stock corporation, and such corporations seem to have been restored to their common law powers, except as so limited.

§ 120. The present state of the authorities as to assignments by domestic stock corporations.—Conceding the common law power of a business corporation to make a general assignment for the benefit of its creditors, and bearing in mind that there now exists no statutory restriction upon that common law power, except the restriction as to preferences contained in the act of 1892, it seems to follow that such a corporation may make a valid general assignment for the equal benefit of all its creditors. If this power does not exist, it is for the reason that the common law rule has been modified by the decisions of the courts. It is to be remembered that the question was not open for debate from 1825 to 1892, the statutes during that period preventing the making of such assignments by insolvent corporations. Certain decisions, however, have been made which have an indirect bearing upon the subject. Thus there is a class of cases to which reference has already been made, which hold that a transfer by a corporation involving its destruction and the abandonment of the purposes of its organization is illegal as against creditors (*Cole* v. *Millerton Iron Co.* 133 N. Y. 164; *Abbot* v. *Am. Hard Rubber Co.* 33 Barb. 578; s. c. 21 How. Pr. 193; *Nat. Broadway Bank* v. *Wessell Metal Co.* 66 Sup. Ct. [59 Hun], 470); but, as is pointed out in *Vanderpoel* v. *Gorman*, 140 N. Y. 563, 568, that is an act essentially different from a conveyance by an insolvent corporation of its property in trust for creditors. In *Vanderpoel* v. *Gorman*, *supra*, the power of a *domestic* trading corporation to make a general assignment was not before the court, but the general principles laid down in the opinion in that case justify the inference that, when the question is squarely presented under the present statute, the Court of Appeals will hold that an assignment without preferences may be made by such corporation. But see *Compton* v. *Mellis*, 46 State R. 563; s. c. 19 N. Y. Supp. 691.

§ 121. **Assignments by foreign corporations.**—It was finally decided in *Vanderpoel* v. *Gorman*, 140 N. Y. 563, determining a difference of opinion in the lower courts (s. c. 3 Misc. 57, Com. Pleas; *Worthington* v. *Pfister Book Binding Co.* 3 Misc. 418, Super. Ct.; *Lane* v. *Wheelwright*, 76 Sup. Ct. [69 Hun], 180), that the statutes of this State (Laws of 1890, c. 564, § 48, cited *supra*, § 119) did not limit or affect an assignment for the benefit of creditors made in this State by a foreign corporation; the provision of the statute applying only to domestic corporations. Since the change in the statute in 1892, restricting the making of preferences, there is a question as to the validity within this State of a general assignment with preferences made by a foreign corporation. That question was left open in *Vanderpoel* v. *Gorman*, *supra*, p. 574. See *Coats* v. *Donnell*, 94 N. Y. 168. There has been as yet no expression of opinion in the reported cases as to the effect of a preferential assignment by a foreign corporation of property within this State.[1] The question is one of interstate comity which will be considered in another place. See Chap. XVII. In *Barth* v. *Backus*, 140 N. Y. 230, the question of the effect of a voluntary general assignment by a foreign corporation was not before the court. It was there held that an assignment executed as a part of the insolvent law of another State, being in the nature of an involuntary transfer by operation law, had no extra territorial effect. See Chap. XVII.

§ 122. **Assignments by corporations—Banking associations.**—Banking associations organized under the act of 1838 (Laws of 1838, c. 260), although corporations as determined by the weight of authority (*People* v. *Supervisors of Niagara*, 4 Hill, 20; *Willoughby* v. *Comstock*, 3 Id. 389; *People* v. *Assessors of Watertown*, 1 Id. 616; *Leavitt* v. *Blatchford*, 5 Barb. 9; s. c. 17 N. Y. 521; *Gillet* v. *Moody*, 3 N. Y. 479; *Cuyler* v. *Sanford*, 8 Barb. 225), were held not to be subject to the provisions of the second title of the eighteenth chapter of the Revised Statutes, and not therefore included in the exception to the eleventh section, and consequently come under the operation of

[1] See article in 27 American Law Review, 846, by Judge Seymour D. Thompson, entitled "The Power of Corporations to Prefer Creditors."

the section of the Revised Statutes cited above. *Robinson* v. *Bank of Attica*, 21 N. Y. 406 ; *Curtis* v. *Leavitt*, 15 N. Y. 9 ; *Leavitt* v. *Blatchford*, 17 N. Y. 521 ; see *Dutcher* v. *Importers' & Traders' Nat. Bank*, 59 N. Y. 5.

Such corporations, when insolvent or in contemplation of insolvency, could not, while this section of the Revised Statutes remained in force, make a general assignment. *Matter of Empire City Bank*, 10 How. Pr. 498, 502 ; *Robinson* v. *Bank of Attica*, 21 N. Y. 406 ; *Curtis* v. *Leavitt*, 15 N. Y. 9 ; *Leavitt* v. *Blatchford*, 17 N. Y. 521. See *Dutcher* v. *Importers' & Traders' Nat. Bank*, 59 N. Y. 5. But since the repeal of that statute the power of banking associations to make a general assignment is to be determined by the banking act of 1882 (Laws of 1882, c. 409). That act embodies in a revised form the provisions of the act of 1838, c. 260, and of the act of 1849, c. 226. It provides for the supervision and examination of banks by the Superintendent of the Banking Department (Laws of 1882, c. 409, § 12), and for proceedings on the insolvency or imminent danger of insolvency of such corporations (Laws of 1882, c. 409, §§ 130, 131, 132, 133, 134). The Code of Civil Procedure (§ 1785) authorizes the Attorney-General to bring an action for the dissolution of a corporation, if the corporation has banking powers or power to make loans on pledges or deposits, or to make insurances when it becomes insolvent or unable to pay its debts, or has violated any of the provisions of the act by or under which it was incorporated or of any other act binding upon it. While there is no express provision of law now in force prohibiting the making of a general assignment by banking associations, it may be that the provisions of the statute above referred to will be regarded as so inconsistent with the exercise of the power to make an assignment, either with or without preference, and that such power must, therefore, be regarded as impliedly prohibited. *Re Empire City Bank*, 10 How. Pr. 502.

§ 123. Assignments by corporations—Moneyed corporations.—The term "moneyed corporation," as used in the Banking Laws, is declared to mean (Laws of 1882, c. 402, § 214) : "Every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to

make insurances." It is said by Mr. Paine, in his work on the Banking Laws (3d ed. page 219), that the banks referred to in this definition are not banks organized under the Laws of 1838 (c. 4 of the Banking Act of 1882), but to the corporations included in Chapter IX of the banking act—to wit, trust, loan, and mortgage security companies, and certain companies having certain banking powers.

Insurance companies are moneyed corporations, and come within the operation of the section cited prohibiting preferences. *Hill* v. *Reed*, 16 Barb. 280; *Hurlbut* v. *Carter*, 21 Barb. 221; Laws of 1882, c. 409, § 214.

With regard to moneyed corporations, it is to be observed in the first place that neither the provisions of the Revised Statutes, to which we are about to refer, nor the provisions of the banking law of 1882, apply to moneyed corporations existing on the first day of January, 1828. They do, however, apply to such corporations created, or whose charters shall have been renewed or extended after that time, "unless such corporation shall be expressly exempted from the said provisions in the act creating, renewing or extending such corporation." Laws of 1882, c. 409, § 215, 1 R. S. 605, § 11; 2 R. S. 7th ed. 1536.

It was provided in the Revised Statutes that "no conveyance, assignment or transfer, not authorized by a previous resolution of its board of directors, shall be made by any such corporation of any of its real estate, or of any of its effects, exceeding the value of one thousand dollars," etc. 1 R. S. 591, § 8; 2 R. S. 6th ed. 298; 2 R. S. 7th ed. 1366; 1 Edm. St. 549.

And it was further provided, "no such conveyance, assignment or transfer, nor any payment made, judgment suffered, lien created, or security given, by any such corporation when insolvent, or in contemplation of insolvency, with the intent of giving a preference to any particular creditor over other creditors of the company, shall be valid in law; and every person receiving, by means of any such conveyance, assignment, transfer, lien, security or payment, any of the effects of the corporation, shall be bound to account therefor to its creditors or stockholders, or their trustees, as the case shall require." 1 R. S. 591, § 9; 2 R. S. 6th ed. 298, § 9; 2 R. S. 7th ed. 1366; 1 Edm. St. 549.

In 1882, each of the sections of the Revised Statutes cited above, were repealed (Laws of 1882, c. 402, § 1, par. 39), and the following sections were inserted in the banking act (Laws of 1882, c. 409):

"§ 186. No conveyance, assignment or transfer, not authorized by a previous resolution of its board of directors, shall be made by any such[1] corporation of any of its real estate, or any of its effects, exceeding the value of one thousand dollars; but this section shall not apply to the issuing of promissory notes, or other evidences of debt, by the officers of the company in the transaction of its ordinary business, nor to payments in specie or other current money, or in bank bills, made by such officers; nor shall it be construed to render void any conveyance, assignment or transfer, in the hands of a purchaser for a valuable consideration, and without notice.

"§ 187. No such conveyance, assignment or transfer, nor any payment made, judgment suffered, lien created, or security given by any such corporation when insolvent, or in contemplation of insolvency, with the intent of giving a preference to any particular creditor over other creditors of the company, shall be valid in law; and every person receiving by means of any such conveyance, assignment, transfer, lien, security or payment, any of the effects of the corporation shall be bound to account therefor to its creditors or stockholders, or their trustees, as the case shall require; and whenever any incorporated company shall have refused the payment of any of its notes, or other evidences of debt, in specie or lawful money of the United States, it shall not be lawful for such company, or any of its officers, to assign or transfer any of the property or choses in action of such company to any officer or stockholder of such company, directly or indirectly, for the payment of any debt; and every such transfer and assignment to such officer or stockholder shall be utterly void."

In *Brouwer* v. *Harbeck* (9 N. Y. 589, 593), it was held that under this section an assignment by a corporation actually, though not avowedly insolvent or in contemplation of insolvency, which

[1] The word "such" refers back to the antecedent "moneyed corporations" in section 184.

actually ensues, with the intent to give a preference, is void. In delivering the opinion of the court, Mr. Justice W. F. Allen says: "So long as insolvency neither exists nor is contemplated, the corporation, like an individual, can appropriate its means to the payment of its debts in such order and in such amounts and proportions as the directors please. But upon insolvency, either actual or contemplated, this power ceases, and the law declares the absolute right of every creditor to share *pro rata* in the assets of the company, and will not suffer this right to be defeated by any act of the corporation or its officers." See s. c. below, opinion of Bosworth, J., 1 Duer, 114; *Marine Bank* v. *Clements*, 31 N. Y. 33.

In *Coats* v. *Donnell*, 94 N. Y. 168, it was held that a corporation in the absence of statutory restrictions has the same right as an individual to prefer creditors, and that the provisions of the Revised Statutes applied to domestic and not to foreign corporations.

The provisions above cited in reference to moneyed corporations do not, in express terms, prohibit a general assignment made without intent of giving a preference and for the equal benefit of all creditors, and in a number of reported cases such assignments by moneyed corporations have been sustained. *Bowery Bank Case*, 5 Abb. Pr. 415; s. c. 16 How. Pr. 56; *Hurlbut* v. *Carter*, 21 Barb. 221; *Hill* v. *Reed*, 16 Barb. 280; *Curtis* v. *Leavitt*, 15 N. Y. 9, 110.

§ 124. **Preferential assignments by corporations.**—The statutes above cited in effect prohibit insolvent corporations of every description from making preferential assignment. It remains to consider the character of the act which will be regarded by the courts as falling within the description of a transfer or assignment in contemplation of insolvency. These questions will be considered in connection with the subject of preferences, *post*, Chapter XI.

§ 125. **Assignments by partners of partnership property.**—In regard to partnership affairs generally, each partner, being the agent of all, has the right of disposing of all or any part of the partnership effects for any purpose falling legitimately within

the scope of the object for which they have associated together. An absolute sale, therefore, by a single partner, of the entire partnership stock, or a transfer directly by him of all the joint property to creditors in payment of debts, though the act should virtually lead to the dissolution of the firm, is clearly within his powers. *Graser* v. *Stellwagen*, 25 N. Y. 315; *Mabbett* v. *White*, 12 N. Y. 442; *Van Brunt* v. *Applegate*, 44 N. Y. 544; *Avery* v. *Fisher*, 35 Supm. Ct. (28 Hun), 508; *Platt* v. *Hunter*, 11 Weekly Dig. 300; rev'd, 86 N. Y. 641; *McClelland* v. *Remsen*, 3 Abb. Dec. 74; affi'g 36 Barb. 622; *Egberts* v. *Wood*, 3 Paige, 517; *Haggerty* v. *Granger*, 15 How. Pr. 243; see *Kimball* v. *Hamilton Fire Ins. Co.* 8 Bosw. 495.

But a transfer of the entire partnership property to a trustee is of a different character. The distinction is clearly pointed out by Daly, J., in *Fisher* v. *Murray*, 1 E. D. Smith, 341, 344. He says: "When a partner makes a sale of the entire partnership effects in the course of trade, or transfers the whole of the joint property to creditors in the payment of debts, it is not necessary that the other partners should be consulted. His right to do so is undoubted. The necessity for consulting the others in the case of an assignment, however, grows out of the circumstance that the assignment conveys the property not to creditors directly, but to a trustee. From the fact that the assignment is an act which virtually puts an end to the partnership, which divests the partners of all future control over their affairs, and confides the administration of them to a person who is to act thereafter in their place and stead, a trustee is substituted for the firm, who, in the sale and disposition of its assets, and in the general winding up of its affairs, exercises a greater or less amount of discretion. It is in the selection of the person to whom so important a trust is to be committed, that all the partners have a right to be consulted, and whose appointment, therefore, must be a joint act." This doctrine has not uniformly prevailed. See *Anderson* v. *Tompkins*, 1 Brock. 456, Marshall, Ch. J.; *Robinson* v. *Crowder*, 4 McCord's L. 519; Story on Partnership, 7th ed. §§ 307 *et seq.*; Burrill on Assignments, 6th ed. §§ 47–54. But in this State it is settled by overwhelming authority, that one partner is not authorized to execute an assignment for the benefit of creditors, except with the consent and con-

currence of all the partners, for the reason that authority to make such an instrument is not implied by the act of partnership, and consequently cannot be inferred or presumed from the partnership relation. *Welles* v. *March*, 30 N. Y. 344 ; *Robinson* v. *Gregory*, cited in *Welles* v. *March*, *supra;* rev'g s. c. 29 Barb. 560 ; *Adee v. Cornell*, 32 Supm. Ct. (25 Hun), 78 ; *Wetter* v. *Schlieper*, 6 Abb. Pr. 123 ; s. c. 4 E. D. Smith, 707 ; *Hitchcock* v. *St. John*, Hoffm. Ch. 511 ; *Fisher* v. *Murray*, 1 E. D. Smith, 341 ; *Haggerty* v. *Granger*, 15 How. Pr. 243 ; *Pettee* v. *Orser*, 6 Bosw. 123 ; *Havens* v. *Hussey*, 5 Paige, 30 ; *Deming* v. *Colt*, 3 Sandf. 284 ; *Gates* v. *Andrews*, 37 N. Y. 657 ; *Paton* v. *Wright*, 15 How. Pr. 481 ; *Coope* v. *Bowles*, 18 Abb. Pr. 442 ; s. c. 28 How. Pr. 10 ; 42 Barb. 87. See note in 22 Am. L. Reg. N. S. 37, on the right of one partner to assign co partnership property.

In the earlier cases a distinction was attempted to be drawn between assignments with preferences and those which were for the equal benefit of all creditors ; it was held that while there was no implied authority to execute an assignment with preferences, yet possibly there might be such a power if the assignment was ratable. *Hitchcock* v. *St. John*, Hoffm. Ch. 511 ; see *Havens* v. *Hussey*, 5 Paige, 30 ; *Pettee* v. *Orser*, 6 Bosw. 123 ; Pars. on Part. 4th ed. § 110. But there appears to be no substantial reason why the power should exist in one case if it does not in the other. *Wetter* v. *Schlieper*, 4 E. D. Smith, 707 ; s. c. 6 Abb. Pr. 123 ; *Deming* v. *Colt*, 3 Sandf. 284.

§ 126. Assignments by co-partners—Express authority. —One partner may of course execute a general assignment on behalf of the firm if he is expressly authorized to do so by the other partners. *Lowenstein* v. *Flauraud*, 18 Supm. Ct. (11 Hun), 399 ; affi'd, 82 N. Y. 494 ; *Kelly* v. *Baker*, 2 Hilt. 531 ; *Baldwin* v. *Tynes*, 19 Abb. Pr. 32 ; *Roberts* v. *Shepard*, 2 Daly, 110 ; *Nat. Bank of Troy* v. *Scriven*, 70 Supm. Ct. (63 Hun), 375 ; *Emerson* v. *Senter*, 118 U. S. 3, and the authority may be either verbal or in writing ; *Martine* v. *Robinson*, 85 Supm. Ct. (78 Hun), 115 ; s. c. 60 State R. 498.

And such an authority may be implied from circumstances, or acts of the partners not joining in the execution of the instrument.

The following cases illustrate the circumstances under which such an implication of authority will arise. In *Welles* v. *March*, 30 N. Y. 344, one of the partners absconded, leaving a letter addressed to his co-partner, in which he said : " I hereby assign you my interest in the business of Nace & Co. and Nace & Reinnie ; take charge of everything in our business ; close it up speedily." This was held by the Court of Appeals sufficient to confer upon the remaining partner authority to execute an assignment on behalf of the firm. In *Palmer* v. *Myers* (43 Barb. 509 ; s. c. 29 How. Pr. 8) and *National Bank* v. *Sackett* (2 Daly, 395), the act of absconding and leaving the business in the possession of the remaining partners was held to authorize the remaining partners to assign the partnership property for creditors, and to the same effect is *Kelly* v. *Baker*, 2 Hilt. 531 ; *Kemp* v. *Carnley*, 3 Duer, 1 ; see *Rumery* v. *McCulloch*, 54 Wis. 565 ; s. c. 14 Rep. 190.

So, when two partners agreed that if either failed to contribute his proportion of the capital, the other might dissolve and close up the partnership, it was held that if such failure occurred on the part of one the other had sufficient authority, under the agreement, to execute a general assignment of the firm's property for the benefit of creditors, especially where there was evidence that the delinquent partner knew of and consented to the assignment. *Roberts* v. *Shepard*, 2 Daly, 110.

In *Klumpp* v. *Gardner*, 114 N. Y. 153, where one partner being advised of the embarrassed condition of the firm, and being about to sail for a foreign country on business of the firm, directed the remaining partner if he should have to make an assignment to prefer two specified creditors, it was held that the partner who remained was authorized to make an assignment in the firm name, notwithstanding that before the assignment was made the debts due to the creditors who were to be preferred had been paid. This case was followed in *Heald* v. *MacGowan*, 15 Daly, 233 ; 25 State R. 579. In *Hooper* v. *Baillie*, 118 N. Y. 413, it was said that in an action by firm creditors to set aside an assignment, if the plaintiff desires to raise the question of the assent of the non-executing partner, it should be presented by the pleading. In that case the Court of Appeals held, reversing the court below, that sufficient evidence of assent was

found in the conversation and correspondence presented to authorize one partner to execute an assignment on behalf of his co-partner, one of whom was abroad. See same case on second trial. *Hooper* v. *Beecher*, 135 N. Y. 617. Also *Nat. Bank of Troy* v. *Scriven*, 70 Sup. Ct. (63 Hun), 375.

But the temporary insanity of one partner does not authorize the other partner to make a general assignment. *Stadelman* v. *Loehr*, 54 Supm. Ct. (47 Hun), 327.

Nor will the mere fact of the absence of a partner from the country be regarded as conferring an authority upon the remaining partners to execute an assignment. *Robinson* v. *Gregory*, cited in *Welles* v. *March*, 30 N. Y. 344; rev'g s. c. 29 Barb. 560; *Coope* v. *Bowles*, 42 Barb. 87; s. c. 28 How. Pr. 10; 18 Abb. Pr. 442; *Pettee* v. *Orser*, 6 Bosw. 123; see *Sheldon* v. *Smith*, 28 Barb. 593.

But, to render a general assignment in trust for the benefit of creditors, void in law because not executed by all the members of the firm, those who did not sign it must be established partners, not as to third persons, but between themselves and the admitted partners who signed the instrument. Therefore, the fact that one may have become liable as a partner to third persons, does not prevent those who are the actual partners, *inter sese*, from executing a general assignment without his consent. *Adee* v. *Cornell*, 93 N. Y. 572; affi'g s. c. 32 Supm. Ct. (25 Hun), 78. And to similar effect are *Rockafellow* v. *Miller*, 107 N. Y. 507; *St. Nicholas Bank* v. *De Rivera*, 3 N. Y. Supp. 666; *Osborne* v. *Barge*, 29 Fed. R. 725.

When a co-partnership assignment appears on its face to have been executed by one of the partners with the authority of his co-partner, it is not necessary for the assignee claiming under the assignment to establish the authority of the partner so executing, but the burden of proof is upon the person attacking the validity of the assignment to show the want of authority. *Sherman* v. *Jenkins*, 77 Sup. Ct. (70 Hun), 593.

It should be remarked, that where any portion of the partnership assets consists of real estate, it must be conveyed by the party holding the legal title. "No partner," says Mr. Parsons (Parsons on Partnership, 4th ed. § 269), "or partners can convey any interest or title in or to real estate not held of record in their

names, although it is partnership property beyond all question." A conveyance by one partner who has the legal title to an undivided half of real estate, the whole of which in equity is partnership property, can convey a good title to such moiety to a creditor of the firm, without the knowledge or consent of his co-partner. *Van Brunt* v. *Applegate*, 44 N. Y. 544.

§ 127. **Assignment by partner of his interest.**—The interest which each partner has in the partnership property, is an interest subject to the rights of all the partners and all the partnership creditors, and this is the only interest which he can convey. A conveyance of that interest would not vest in the assignee any specific portion of the partnership property, but would give him only the right to call the other partners, and those claiming under them, to account and pay over what might remain after the payment of the firm debts and a settlement with the co-partners. *Haggerty* v. *Granger*, 15 How. Pr. 243, 248, Mitchell, J. ; *Kirby* v. *Schoonmaker*, 3 Barb. Ch. 46, 50 ; *Menagh* v. *Whitwell*, 52 N. Y. 146, 158 ; Parsons on Partnership, 4th ed. § 106.

Thus, where two firms, one in Havana, the other in New York, entered into an agreement to purchase and ship goods on joint account, to be consigned to the New York firm, and thus became partners in the joint enterprise, an assignment by the New York firm of all their property in trust for the benefit of their creditors, carried only their residuary interest in the joint property, and the assignee was enjoined from appropriating the whole partnership assets of the two firms to the payment of the separate debts of the New York house. *Davis* v. *Grove*, 2 Robt. 134, 635 ; s. c. 27 How. Pr. 70.

Where one of the members of a firm becomes insolvent and makes a general assignment of all his property for the payment of his debts, the partnership is thereby dissolved and the solvent partner has the right to manage and close up the business, and to mortgage the firm property for the payment of a firm debt. *Ogden* v. *Arnot*, 36 Supm. Ct. (29 Hun), 146.

§ 128. **Assignment after dissolution.**—Where the partnership has been dissolved and the partnership assets transferred in

good faith to the continuing partners, they may execute an assignment of the property so transferred in trust for the payment of their debts (*Stanton* v. *Westover*, 101 N. Y. 265 ; *Crane* v. *Roosa*, 47 Supm. Ct. (40 Hun), 455 ; *Dimon* v. *Hazard*, 32 N. Y. 35 ; *Smith* v. *Howard*, 20 How. Pr. 121), but if such transfer is fraudulent, and made with the intent of defeating the rights of the partnership creditors, it will not be sustained. *Heye* v. *Bolles*, 2 Daly, 231 ; s. c. 33 How. Pr. 266 ; *Hard* v. *Milligan*, 8 Abb. N. C. 58 ; *Burhans* v. *Kelly*, 17 State R. 552 ; see *post*, § 171.

§ 129. **Assignment by surviving partners.**—It is now settled in this State that a surviving partner can execute a general assignment of the property of the firm. *Williams* v. *Whedon*, 109 N. Y. 333 ; *Haynes* v. *Brooks*, 116 N. Y. 487 ; *Durant* v. *Pierson*, 124 N. Y. 444, 452 ; *Emerson* v. *Senter*, 118 U. S. 3 ; *Beste* v. *Berger*, 17 Abb. N. C. 162, affi'd 110, N. Y. 644. In *Nelson* v. *Tenney*, 43 Supm. Ct. (36 Hun), 327, in an action brought by the representatives of the deceased partner to set aside an assignment executed by the survivor, it was held that as to the representatives of the deceased partner the survivor occupied a relation of trust, and an assignment with preferences executed by him was an attempted abandonment of the trust which equity would prevent and would administer the trust through a receiver. This case must now be regarded as overruled by the authorities above cited, and it may now be regarded as settled that it is not necessary for the representatives of the deceased to assent to the assignment. In the earlier case the right of a surviving partner to make an assignment with preferences is in doubt. See *Hutchinson* v. *Smith*, 7 Paige, 26, 35 ; *Egberts* v. *Wood*, 3 Paige, 517 ; *Loeschigk* v. *Hatfield*, 5 Robt. 26 ; s. c. as *Loeschigk* v. *Addison*, 4 Abb. Pr. N. S. 210 ; affi'd, 51 N. Y. 660.

§ 130. **Power of surviving partner to assign partnership real estate.**—Where real estate is conveyed to a firm, or to copartners in their individual names for the use and benefit of the firm, or in the payment of debts due the firm in the absence of any agreement or understanding to the contrary, the grantees

become at law tenants in common of the land, and upon the death of either the legal title to his individual share descends to his heirs at law. *Buchan* v. *Sumner*, 2 Barb. Ch. 165 ; *Coles* v. *Coles*, 15 Johns. 159 ; Lindley on Partnership, starpaging 341, note.

The heir at law holds in common with the surviving partner in trust for the purposes of the partnership : first, for the creditors ; second, for the members of the firm and their representatives. Lindley on Partnership, *supra ; Broom* v. *Broom*, 3 Myl. & Keen, 443 ; *Howard* v. *Priest*, 5 Metc. (46 Mass.) 582 ; *Buchan* v. *Sumner*, *supra.*

It follows that the surviving partner cannot sell the real estate without the concurrence of the heir at law. *Foster's Appeal*, 74 Pa. State, 391, 397 ; Parsons on Partnership, 4th ed. § 269.

The surviving partner, therefore, cannot by assignment in trust for the creditors convey the legal title to partnership real estate. But since the heir at law has the legal title in common with the surviving partner only in trust for the purposes to which it should be devoted, it has been held that a court of equity will compel the heir at law to join with the assignee of the surviving partner, or with the surviving partner himself, in making an effectual title to the real estate upon a sale in order to liquidate the partnership affairs. Thus, in *Delmonico* v. *Guillaume*, 2 Sand. Ch. 366, in an action for a specific performance, to which the heir at law was made a party, where the surviving partner of an insolvent firm had contracted to sell real estate belonging to the firm, it was held that the legal title to the extent of an undivided half was in the heir at law, but that he might be compelled to join with the surviving partner in executing a conveyance.

And in *Shanks* v. *Klein*, 104 U. S. 18, where a surviving partner had made a general assignment for the benefit of creditors of the firm, and the assignee had conveyed to purchasers real estate owned by the firm which he had sold as such assignee, it was held that the executor of the deceased partner would be restrained in equity from instituting proceedings at law to eject the purchasers from the assignee, and that he would be compelled, furthermore, to execute conveyances to the purchasers in

support of the assignee's title. The English and American cases are to some extent considered in the opinion.

In harmony with this case are *Andrews* v. *Brown*, 21 Ala. 437; *Murphy* v. *Abrams*, 50 Id. 293; *Dupuy* v. *Leavenworth*, 17 Cal. 262. There are cases that hold that one partner with the mere verbal consent of his copartner can make an assignment of the copartnership real estate in the firm name. *Rumery* v. *McCulloch*, 54 Wisc. 565; *Sullivan* v. *Smith*, 15 Neb. 476.

§ 131. **Assignments by limited partnership.**—Under the following statutes, limited partnerships and their members, when insolvent or in contemplation of insolvency, are restricted from making assignments, giving any preference to creditors.

The statute is as follows:

"Every sale, assignment, or transfer of any of the property or effects of such partnership, made by such partnership when insolvent, or in contemplation of insolvency, or after, or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner, over other creditors of such partnership; and every judgment confessed, lien created, or security given, by such partnership, under the like circumstances, and with the like intent, shall be void, as against the creditors of such partnership." 1 R. S. 766, § 20; 3 R. S. 7th ed. 2238.

"Every such sale, assignment, or transfer of any of the property or effects of a general or special partner, made by such general or special partner, when insolvent, or in contemplation of insolvency, or after or in contemplation of the insolvency of the partnership, with the intent of giving to any creditor of his own, or of the partnership, a preference over creditors of the partnership; and every judgment confessed, lien created, or security given, by any such partner, under the like circumstances, and with the like intent, shall be void, as against the creditors of the partnership." 1 R. S. 767, § 21; 3 R. S. 7th ed. 2238.

"Every special partner, who shall violate any provision of the two last preceding sections, or who shall concur in, or assent to, any such violation by the partnership or by any individual partner, shall be liable as a general partner." 1 R. S. 767, § 22; 3 R. S. 7th ed. 2238.

"In case of the insolvency or bankruptcy of the partnership, no special partner shall, except for claims contracted pursuant to section seventeen, under any circumstances, be allowed to claim as a creditor, until the claims of all the other creditors of the partnership shall be satisfied." 1 R. S. 767, § 23; 3 R. S. 7th ed. 2238.

The object and proper construction of these sections were carefully considered in *Fanshawe* v. *Lane* (16 Abb. Pr. 71), and it was there held that they apply not only to preferences by the firm, or any of its partners, in assignments of the firm property; but also to assignments by the individual members of their individual property, including their interest in the firm effects. It was also held that where one of the members of the limited partnership was at the same time a member of a general co-partnership, which had executed an assignment of its property, this did not convey the individual partner's interest in the property of the limited partnership, and the assignment by the general partnership was not therefore affected by the statute.

The statute appears to have constituted the effects of the firm a special fund for the benefit of all the creditors of the firm, to be distributed in case of insolvency among such creditors ratably, and any creditor, although he has not proceeded to judgment and execution at law, may file a bill in equity to restrain the insolvent partners from disposing of the property contrary to law and for the appointment of a receiver. Walworth, Ch., in *Innes* v. *Lansing*, 7 Paige, 583, 585; *Walkenshaw* v. *Perzel*, 4 Robt. 426; *Whitcomb* v. *Fowle*, 7 Abb. N. C. 295; s. c. 56 How. Pr. 365; see *Galwey* v. *U. S. Steam Sugar Refining Co.* 36 Barb. 256, 263; *Hardt* v. *Levy*, 79 Supm. Ct. (72 Hun), 225. And any attempt to create a preference in favor of one creditor, or class of creditors, over another, is rendered void against the creditors of the firm. *Mills* v. *Argall*, 6 Paige, 577; see *Van Alstyne* v. *Cook*, 25 N. Y. 489, 492.

So an assignment by a limited partnership, after the firm has become insolvent or in contemplation of insolvency, is void as against the creditors of the firm, if it provides for the payment of a debt due to the special partner ratably with the other creditors of the firm, or before all the general creditors are satisfied in full for their debts. *Mills* v. *Argall*, *supra*.

An assignment for the benefit of creditors, made by a limited partnership containing preferences, is under the statute above cited void. It is not merely voidable, but it is so inoperative that no title passes, and hence a subsequent assignment made by the assignors without preferences will be valid. *Schwartz* v. *Soutter*, 103 N. Y. 683; s. c. 5 Cent. R. 620.

But an assignment made by a limited partnership in good faith for the equal benefit of all creditors is valid. *Robinson* v. *McIntosh*, 3 E. D. Smith, 221. Indeed it seems to be regarded as the duty of the partners, in case of insolvency of the firm, to make such a disposition of the property. *Whitewright* v. *Stimpson*, 2 Barb. 379; *Jackson* v. *Sheldon*, 9 Abb. Pr. 127. And the neglect to do so will be a sufficient ground for the appointment of a receiver.

Some question has arisen as to the right of the general partners to make a general assignment of the firm property without the consent of the special partner. *Mills* v. *Argall*, 6 Paige, 577, 582; and see *Hayes* v. *Heyer*, 3 Sandf. 293; *Havens* v. *Hussey*, 5 Paige, 30. But in *Robinson* v. *McIntosh* (3 E. D. Smith, 221) an assignment executed by the general partners only was held valid. And see *Darrow* v. *Bruff*, 36 How. Pr. 479; *Schwartz* v. *Soutter*, 103 N. Y. 683.

In *Tracy* v. *Tuffly*, 134 U. S. 206, 224, occurring under the Texas statute, where the powers of general partners are substantially as in our statute, it was held that the general partners had power to execute a general assignment.

§ 132. **To whom the assignment may be made.**—The law permits the debtor to select the assignee who is to execute the trust, without the consent of his creditors, and even without consulting a single creditor. Learned judges throughout the Union have first combated, and then deprecated the sanction of such assignments. And it was with much doubt and difficulty that entire latitude in the selection of the trustee was finally conceded to the assignor. Sandford, A. V. C., in *Cram* v. *Mitchell*, 1 Sandf. Ch. 251; *Webb* v. *Daggett*, 2 Barb. 9.

The right to select the assignee is unlimited, except by the control which courts may have in removing an improper trustee and in the single instance of a corporation which has made de-

fault in payment, in which case it cannot make an assignment to an officer or stockholder of such company. See *ante*, § 119.

The assignment may be made to a relative and to preferred creditors. In the case of *Shultz* v. *Hoagland* (85 N. Y. 464, 468), Finch, J., says: "The relationship of assignor and assignee, and their intimacy and friendship, and the preference given to the latter as a creditor prove nothing by themselves. They are consistent with honesty and innocence, and become only important when other circumstances, indicative of fraud, invest them with a new character and purpose, and transform them from equivocal and ambiguous facts into positive badges of fraud."

While the assignment may be made to a creditor, or to one who is not a creditor, yet a judgment creditor, by accepting an assignment as assignee, waives his right to enforce his judgment by levy and sale under execution (*Hawley* v. *Mancius*, 7 Johns. Ch. 174; *Rogers* v. *Rogers*, Hopk. Ch. 515), for the reason that the assignee must sell, pay, and distribute in the character of a trustee, and not of a judgment creditor; and to take out an execution upon the judgment against property over which he is exercising a discretion and control as trustee, would be incompatible with a due discharge of the trust, and a manifest breach of it. Chan. Kent, in *Hawley* v. *Mancius*, 7 Johns. Ch. 174, 185.

Some authorities have gone so far as to hold that an assignee who is a judgment creditor not only waives his right to sell under execution upon his judgment, but that he in effect waives his lien, and consents to come in as a general creditor, except so far as he is preferred by the assignment. *Harrison* v. *Mock*, 10 Ala. 185; s. c. 16 Ala. 616. But the decisions in this State do not appear to necessarily lead to such a determination.

An assignment by partners cannot be made to one of the firm. *Sewall* v. *Russell*, 2 Paige, 175.

The assignee must be named in the instrument. *Reamer* v. *Lamberton*, 59 Penn. St. 462. A power to name the successor of an assignee, in case the assignee should wish to resign, is void. *Planck* v. *Schermerhorn*, 3 Barb. Ch. 644.

§ 133. Selection and qualifications of assignee.—The selec-

tion of a suitable assignee is a matter of some moment, inasmuch as the choice of an improper person may furnish evidence of a fraudulent intent on the part of the assignor, which will avoid the assignment (*Reed* v. *Emery*, 8 Paige, 417; *Connah* v. *Sedgwick*, 1 Barb. 210; *Browning* v. *Hart*, 6 Id. 91), as well as to subject the assignee to removal by the court.

The assignor is bound to select an assignee that will do all that the law requires of a trustee, in respect to the rights of those that have a beneficial interest in the property assigned. *Olmstead* v. *Herrick*, 1 E. D. Smith, 310.

The following cases furnish illustrations of the rule in reference to the choice of assignees not properly qualified for the performance of their duties.

Thus, where the debtor selected for assignees three relatives, of whom one was incapacitated by his residence, one by blindness, and the third by his want of education, from executing the assignment; this was regarded as strong evidence of an intent on the part of the assignor to keep the control of the property in his own hands, or to appropriate it for his own use and benefit. *Cram* v. *Mitchell*, 1 Sandf. Ch. 251.

But the fact that the assignee does not reside within the State does not of itself furnish proof of fraudulent intent in making an assignment (*Blackington* v. *Goldsmith*, 3 How. Pr. N. S. 77; *Bachrack* v. *Norton*, 132 U. S. 337), though it may be regarded as an element with other circumstances in forming a conclusion of fraud. *Nat. Park Bank* v. *Whitmore*, 104 N. Y. 297; s. c. 47 Supm. Ct. (40 Hun), 499.

So, where a debtor assigned his property in trust for his creditors to his brother, who, on account of a lingering disease, was unable to attend to business at the time of the assignment, and the debtor himself thought the disease of his brother incurable, and the latter subsequently died of it. It was held that this was sufficient cause for declaring the assignment fraudulent and void as against creditors. *Currie* v. *Hart*, 2 Sandf. Ch. 390.

The selection of such assignees furnishes strong presumption of an intent on the part of the assignor to keep the control of his property in his own hands and under his own disposal. This is the natural and inevitable result, when the assignee is physically and mentally incompetent to act efficiently, as well as when

his distance from the scene of action preclude his personal care and supervision. Sandford, A. V. C., in *Currie* v. *Hart*, *supra*.

And where there are circumstances tending to show that the assignment was made with the intent of keeping the assigned property within the control and disposition of the assignor, this presumption will be rendered conclusive by the selection of the near relatives of the debtor as assignees, placing them all before other creditors in the schedule of preferred debts. *Cram* v. *Mitchell*, 1 Sandf. Ch. 251.

It has been held, also, that a debtor cannot lawfully assign his property in trust for creditors to an insolvent assignee. *Haggarty* v. *Pittman*, 1 Paige, 298; *Reed* v. *Emery*, 8 Id. 417; *Connah* v. *Sedgwick*, 1 Barb. 210. But the better doctrine seems to be that the mere fact that the assignee is insolvent will not avoid the assignment, or furnish a ground for the removal of the assignee, where there are no other suspicious circumstances and the assignees are otherwise qualified. *Pearce* v. *Beach*, 12 How. Pr. 404; *In re Paddock*, 6 Id. 215.

And it is thought that this would be especially the case under the present statute, which requires the assignee to give a bond for the faithful performance of his duties, and provides for his removal in case he should fail to do so. Laws of 1877, c. 466.

§ 134. **Joint assignees.**—The assignment may be made to several persons as well as to one. In such a case only those who accept the trust are required to act. *Moir* v. *Brown*, 14 Barb. 39. But those who accept must all act. *Brennan* v. *Willson*, 4 Abb. N. C. 279; s. c. 7 Daly, 59; affi'd, 71 N. Y. 502. A subsequent disclaimer or failure to act with the other assignees will not relieve the renouncing assignee from liability. *Bowman* v. *Rainetaux*, Hoffm. Ch. 150. Nor will it authorize the others to act without him. *Shepherd* v. *McEvers*, 4 Johns. Ch. 136; *Brennan* v. *Willson*, *supra*. He must either be discharged from the trust by an order or decree of a court of equity, or with the general consent of all persons interested in the execution of the trust. *Cruger* v. *Halliday*, 11 Paige, 314; *Thatcher* v. *Candee*, 3 Keyes, 157, 160; *Diefendorf* v. *Spraker*, 10 N. Y. 246.

CHAPTER IX.

MAKING, ACKNOWLEDGING AND RECORDING THE ASSIGNMENT.

§ 135. **The statute.**—The act of 1860 (Laws of 1860, c. 348, § 1) for the first time regulated the manner of making and executing an assignment in this State. That act provided that the conveyance should be by writing, and should be acknowledged before an officer authorized to take the acknowledgment of deeds, and that the certificate of acknowledgment should be indorsed on the conveyance before delivery to the assignee.

The General Assignment Act of 1877 (Laws of 1877, c. 466), extended and incorporated the provisions of the Act of 1860. The second section of the General Assignment Act as amended by Laws of 1888, c. 294, reads as follows:

"Every conveyance or assignment made by a debtor of his estate, real or personal, or both, to an assignee for the creditors of such debtor, shall be in writing, and shall specifically state therein the residence and the kind of business carried on by such debtor at the time of making the assignment, and the place at which such business shall then be conducted, and if such place be in a city, the street and number thereof, and if in a village or town such apt designation as shall reasonably identify such debtor. Every such conveyance or assignment shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds and shall be recorded in the county clerk's office in the county where such debtor shall reside or carry on his business at the date thereof. An assignment by copartners shall be recorded in the county where the principal place of business of such copartners is situated. When real property is a part of the property assigned, and is situated in a county other than the one in which the original assignment is required to be recorded, a certified copy of such assignment shall be filed and recorded in the county where such property is situated. The as-

sent of the assignee, subscribed and acknowledged by him, shall appear in writing, embraced in or at the end of, or indorsed upon the assignment, before the same is recorded, and, if separate from the assignment, shall be duly acknowledged."

§ 136. Provisions directory and mandatory.—Some of the provisions of this section have been regarded as mandatory and others as directory merely. Speaking upon this point, Mr. Justice Earl, in *Warner* v. *Jaffray*, 96 N. Y. 248, 252, says: "Section 2 of chapter 466 of the Laws of 1877 (the General Assignment Act) provides how a general assignment for the benefit of creditors shall be executed. It must be in writing and acknowledged, and the assignee must assent thereto in writing, and when it has thus been executed and delivered, it takes effect, and the title to the property passes to the assignee. All else required by the statute may be done afterward, and if any of the other requirements are omitted the assignment is not thereby rendered void." In that case it was held that the recording of the assignment was not a prerequisite to its validity, in this respect modifying the decision in *Rennie* v. *Bean*, 31 Supm. Ct. (24 Hun), 123. A review of the authorities in reference to the mandatory character of the provisions of this section will be found in *Rennie* v. *Bean*, *supra*, and in *Mullin* v. *Sisson*, 31 State R. 210; s. c. 63 Supm. Ct. (56 Hun), 645.

The requirement of the statute that the assignment shall state the place and kind of business carried on by the assignor is directory merely and not mandatory, the main purpose being to identify the assignor. *Dutchess Co. Mut. Ins. Co.* v. *Wagonen*, 132 N. Y. 398; s. c. 44 State R. 441; *Otis* v. *Hodgson*, 45 State R. 92; s. c. 18 N. Y. Supp. 599; *Taggart* v. *Herrick*, 62 Supm. Ct. (55 Hun), 569; s. c. *sub. nom. Taggart* v. *Sisson*, 29 State R. 424; *Mullin* v. *Sisson*, 31 Id. 210; *Strickland* v. *Laraway*, 29 Id. 873; *Boak* v. *Blair*, 32 Id. 911 *contra*; *Bloomingdale* v. *Seligman*, 22 Abb. N. C. 98.

A compliance with the provisions of the statute is not necessary in order to pass title to property in this State under an assignment made by non-residents in another country which is valid at the place where it is made. Such was the ruling in regard to the act of 1860 (*Ockerman* v. *Cross*, 54 N. Y. 29),

and the principles of the decision apply equally to the act of 1877.

§ 137. **Form of assignment.**—The statute prescribes no form in which the writing shall be drawn. Very informal instruments may constitute a general assignment. The whole of the assignment must be expressed in the written instrument. *Frazier* v. *Truax*, 34 Supm. Ct. (27 Hun), 587. But this rule will not prevent the introduction of parol proof for the purpose of showing that the whole transaction taken together was in effect a general assignment and invalid as such because of a failure to comply with statutory requirements. Thus in the case of *Britton* v. *Lorenz* (45 N. Y. 51 ; affi'g 3 Daly, 23), parol proof was introduced to show that a bill of sale, absolute on its face, was really made upon the trust that the defendants should convert the property into money, and from the proceeds pay all the vendor's debts for borrowed money in full, and distribute the residue *pro rata* among all his other creditors. The instrument was held invalid as a general assignment because not acknowledged.

So also several instruments may be construed together for the purpose of showing the true legal character of the transaction. Thus, since the statute, a deed of real estate, a bill of sale of personal property, and articles of agreement between the parties, all bearing the same date and relating to the same subject-matter, were read together as constituting an assignment of property in trust for the benefit of creditors. *Van Vleet* v. *Slauson*, 45 Barb. 317 ; see *Wynkoop* v. *Shardlow*, 44 Barb. 84 ; s. c. 29 How. Pr. 368 ; *Mann* v. *Witbeck*, 17 Barb. 388 ; *Coddington* v. *Davis*, 1 N. Y. 186.

Previous to the act of 1860, an assignment by a debtor of his property to an assignee in trust for creditors, might, under certain circumstances, have been made without writing, or if in writing, need not have been acknowledged before any officer before delivery to the assignee, in order to be valid and effectual, to accomplish the purpose intended. *Fairchild* v. *Gwynne*, 16 Abb. Pr. 23.

But see *Smith* v. *Woodruff* (1 Hilt. 462), where a doubt was expressed by Brady, J., as to whether a trust *eo nomine* for the benefit of creditors, could be created by parol.

§ 138. Form of the assignment (continued).—The usual form of an assignment in this State consists of a simple conveyance of the debtor's property and a declaration of the trusts with a power of attorney annexed. The very large number of cases to which we shall hereafter have occasion to refer, in which assignments have been held invalid on their face, have, for the most part, arisen from an attempt on the part of the draughtsman to reserve some form of benefit to the assignor. "We have never heard of a case," says Mr. Justice Sandford, in *Litchfield* v. *White* (3 Sandf. 545, 554), "nor do we believe there has ever been one decided in this State, in which an assignment has been held fraudulent, which simply vested the debtor's estate in trustees, and directed them to convert it into money and apply it absolutely, and without reserve, to the payment of his debts; whether equally among all the creditors, or with preferences."

"An assignment," says Chief Justice Comstock, "drawn precisely as it ought to be, will not undertake to speak to the assignee in regard to his duties under the trust. Those duties, unless the creditors themselves direct otherwise, are simply to convert the estate and pay the debts in the order and with the preferences indicated in the instrument. A trustee is always bound by any restrictions contained in the writing which creates the trust, and if these are inconsistent with the rights of creditors, the trust itself must fall to the ground." *Ogden* v. *Peters*, 21 N. Y. 23, 24.

The assignee is a sort of substitute for the officers of the law, and he must be left to act under the obligations and responsibilities which the law imposes. The assignor can neither prescribe conditions, nor invest the assignee with powers which tend in any degree to vary or modify the duties which the law devolves upon him. Any clause in the assignment, therefore, which could be legitimately set up by the assignee as a justification for a course of conduct in regard to the assigned property, in any respect different from that which the law would dictate, of necessity vitiates the assignment. *Jessup* v. *Hulse*, 21 N. Y. 168, 169, Selden, J.

Where the assignment contains a mere clerical error, but the true meaning and intent are manifest, the court must give effect to the instrument according to its true intent. In such a case it

is not necessary that there should be a reformation of the instrument decreed. *Smith* v. *Bellows*, 3 State R. 305.

§ 139. **Contents of the assignment.**—The assignment is drawn with the usual formalities of a deed of conveyance of two parts. It has been customary to commence the instrument with a general recital of the insolvency of the grantor, and sometimes of the circumstances which led to the making of the assignment. Such recitals, while they may be evidence between parties and privies, are not evidence against strangers or third parties. *Kellogg* v. *Slawson*, 15 Barb. 56, 57; see *Huntington* v. *Havens*, 5 Johns. Ch. 23. They should be drawn with care to avoid a construction of an intent on the part of the debtor to hinder or delay his creditors. In *Brigham* v. *Tillinghast* (15 Barb. 618), where the recital was that one purpose of the assignment was to secure the application of the property to the payment of the debts of the assignor in a fair and equitable manner, and "without *sacrifice*," the language was criticised as not happily selected. See s. c. reversed on another ground, 13 N. Y. 215; but see *Vernon* v. *Morton*, 8 Dana (Ky.), 247, 263.

In general it is not desirable to do more than to direct in general terms a sale of the property and collection of the debts assigned, and to designate to what debts and in what order the proceeds shall be applied. *Dunham* v. *Waterman*, 17 N. Y. 9, reversing 3 Duer, 166; s. c. 6 Abb. Pr. 357; *Jessup* v. *Hulse*, 21 N. Y. 168; s. c. 29 Barb. 539; *Litchfield* v. *White*, 3 Sandf. 545.

In the case of *Flagler* v. *Schoeffel*, 47 Supm. Ct. (40 Hun), 178, it was contended that an assignment drawn to the assignee, "his heirs, executors, administrators and assigns," was improper in form. The contention was unsuccessful.

In *Hess* v. *Blakeslee*, 2 State R. 309, it was held that where the assignment was drawn to the assignee, "his successors and assigns," these words were not open to criticism. Under the Revised Statutes (2 R. S. 748, § 1, 7th ed., vol. 3, p. 2205), words of inheritance are not necessary to convey an estate in fee simple, but such words may be needful to convey real estate situated in States where the common law still prevails. See *Van Winkle* v. *Armstrong*, 41 N. J. Eq. 402; s. c. 4 Cent. R. 53.

§ 140. **Consideration.**—The conveyance is ordinarily upon a nominal consideration. Such consideration is sufficient to transfer the legal title. "The amount of the consideration," says Nelson, J., in *Cunningham* v. *Freeborn* (11 Wend. 240, 250; s. c. 1 Edw. Ch. 256; 3 Paige, 557), "was never material for this purpose, and it seems to be well settled that the relation of debtor and creditor between the parties, and the legal consequences of the assignment, constituted a sufficient consideration as between them." *Lawrence* v. *Davis*, 3 McL. 177; *Halsey* v. *Whitney*, 4 Mason, 206, 214; see *Kellogg* v. *Slawson*, 15 Barb. 56; s. c. 11 N. Y. 302; see *Rockwell* v. *McGovern*, 69 N. Y. 294. While this consideration is sufficient to support the conveyance, yet, as we shall see hereafter, the assignee does not thereby become a purchaser for value so as to defeat any pre-existing equities.

§ 141. **The conveyance.**—If the purpose is to make a general assignment, and to include all of the debtor's property in the conveyance, the description should conform to this intention. We shall consider hereafter (see Chap. XX.) the circumstances under which an assignment of all the debtor's property is required.

§ 142. **Description of assigned property.**—The description of the property intended to be assigned must be sufficiently certain to enable the assignee to distinguish it (*Crow* v. *Ruby*, 5 Mo. 484; *Ryerson* v. *Eldred*, 18 Mich. 12; *Bellamy* v. *Bellamy's Admr.* 6 Fla. 62); but if it may be made certain by parol it is sufficient. *State* v. *Keeler*, 49 Mo. 548; *Hatch* v. *Smith*, 5 Mass. 42; *Emerson* v. *Knower*, 8 Pick. 63; *Pingree* v. *Comstock*, 18 Id. 46; *Kevan* v. *Branch*, 1 Gratt. 274.

A general description as of "all and singular the goods and chattels, merchandise, bills, bonds, notes, book accounts, claims and demands, choses in action, books of account, judgments, evidences of debt, and property of every name and nature whatever," is not void for uncertainty, although no inventory of the property be attached to the assignment, or be provided for in it. *Kellogg* v. *Slawson*, 15 Barb. 56; s. c. 11 N. Y. 302; *Mathews* v. *Poultney*, 33 Barb. 127. And, indeed, since the act

of 1860, providing for the making and filing of an inventory of the property, such general description is the usual form. *Terry* v. *Butler*, 43 Barb. 395; *Mathews* v. *Poultney*, 33 Barb. 127. But the general terms employed must be sufficiently apt to embrace all the property intended to be covered by the assignment. Thus, where the assignment was of "all the goods, chattels and effects and property of every kind, personal and mixed," it was held that the words "personal and mixed," limited the conveyance to personal estate. *Rhoads* v. *Blatt*, 16 N. B. R. 32.

But a general assignment of all the property of the assignor's, real and personal, will pass the title to land, although not specifically mentioned in the schedule. *Raynor* v. *Raynor*, 28 Supm. Ct. (21 Hun), 36.

If, in addition to the general terms of conveyance, the assignment refers to the property as enumerated and described in a schedule annexed, it has been held that the description in the schedule would limit the effect of the previous general conveyance. *Wilkes* v. *Ferris*, 5 Johns. 335; see *Holmes* v. *Hubbard*, 60 N. Y. 183; *U. S.* v. *Howland*, 4 Wheat. 108; *Mims* v. *Armstrong*, 31 Md. 87; *Rundlett* v. *Dole*, 10 N. H. 458; *Driscoll* v. *Fiske*, 21 Pick. 503.

It is a rule of construction of all written instruments conveying property, that if a general clause be followed by special words, the instrument shall be construed according to the special matter; and in the application of this rule it is held that the general words of an assignment should be restricted by a subsequent clause referring to a schedule annexed for a more full description. But this rule is subordinate to the paramount and more general rule that requires that all instruments shall be so construed as to give effect to the intention of the parties. *Emigrant Ind. Savings Bk.* v. *Roche*, 93 N. Y. 374. See *Bock* v. *Perkins*, 139 U. S. 628.

In *Turner* v. *Jaycox* (40 N. Y. 470), where the schedule contained no reference to the personal property, which was included in the terms employed in the body of the instrument, it was held that the reference to the schedule annexed did not limit the operation of the conveyance on the principle of construction prohibiting a false or erroneous addition from vitiating what had been previously sufficiently and fully described. To the same

effect is *Platt* v. *Lott*, 17 N. Y. 478. *Turner* v. *Jaycox*, *supra*, and *Platt* v. *Lott*, *supra*, are criticised and distinguished in *Bock* v. *Perkins*, *supra*.

Since the enactment of the statute prescribing the time and manner of the execution of the schedule, it is no longer usual in this State to describe the assigned property by reference to a schedule.

§ 143. Schedule, when to be annexed.—Where the description in the body of the assignment is of all the debtor's property, with a reference to schedules, and the schedules in fact are not annexed at the time of the delivery of the instrument, such omission will not invalidate the assignment. *Birchell* v. *Strauss*, 28 Barb. 293; *Spring* v. *Strauss*, 3 Bosw. 607; *Turner* v. *Jaycox*, 40 N. Y. 470; *Wronkow* v. *Killeen*, 3 Mon. L. B. 82; *Platt* v. *Lott*, 17 N. Y. 478; *Clap* v. *Smith*, 16 Pick. 247; *Brashear* v. *West*, 7 Pet. 608. Contra, *Moir* v. *Brown*, 14 Barb. 39. But a different rule prevails when the assignment designates the debts to be paid by reference to a schedule annexed. *Kercheis* v. *Schloss*, 49 How. Pr. 284; *Averill* v. *Loucks*, 6 Barb. 470; *Hotop* v. *Neidig*, 17 Abb. Pr. 332; see *post*, § 147.

Where the assignment was of all the property contained in Schedule B, and was made to pay all debts mentioned in Schedule A, referring to these schedules as annexed, but they were not annexed or recorded with the assignment, it was held that the schedules were not a necessary part of the assignment, since the assignment conveyed all the debtor's property in trust to pay all his debts. *Burghard* v. *Sondheim*, 50 Supr. Ct. (18 J. & S.) 116. And where the schedule of preferred debts was prepared at the time of the execution of the assignment, and was then signed by the assignors and acknowledged by one of them, but was not annexed to the assignment, and the assignment was recorded, and a day or two afterward the schedule duly acknowledged was sent to the clerk with direction to attach it to the assignment; no rights having intervened it was held that the assignment was not invalid by reason of the informality in its execution. *Franey* v. *Smith*, 125 N. Y. 44; rev'g s. c. 54 Supm. Ct. (47 Hun), 119.

The schedules required to be filed under the act are the subject of consideration in another place. The schedules so required to be filed are regarded a part of the assignment. *Terry* v. *Butler*, 43 Barb. 395 ; *De Camp* v. *Marshall*, 2 Abb. Pr. N. S. 373 ; *Talcott* v. *Hess*, 38 Supm. Ct. (31 Hun), 282 ; *Shultz* v. *Hoagland*, 85 N. Y. 464, 468, 469. See Chap. XIX.

§ 144. **Declaration of trusts.**—The trusts must be declared at the time of the execution of the assignment ; they must accompany the instrument or appear on its face. *Grover* v. *Wakeman*, 11 Wend. 187 ; *Averill* v. *Loucks*, 6 Barb. 470 ; *Sheldon* v. *Dodge*, 4 Den. 217 ; *Kercheis* v. *Schloss*, 49 How. Pr. 284.

The assignment must itself fix and determine the rights of creditors in the assigned property, and not reserve to the assignors, or to the assignee, the power of subsequently doing so. *Kercheis* v. *Schloss*, 49 How. Pr. 284; *Riggs* v. *Murray*, 2 Johns. Ch. 565.

Thus an assignment in which preferences are given to persons who are not creditors of the assignor, upon a verbal trust for real creditors, is void as matter of law. *Frazier* v. *Truax*, 34 Supm. Ct. (27 Hun), 587.

§ 145. **To convert the property into money.**—A trust to sell lands for the benefit of creditors is one of the express trusts permitted by the Revised Statutes. 1 R. S. 728, § 55 ; 2 R. S. 6th ed. 1106, § 55. And trusts of personal property for the same purpose are not prohibited. *Nicholson* v. *Leavitt*, 6 N. Y. 510, 515 ; *Bishop* v. *Halsey*, 3 Abb. Pr. 400.

Authority given in an assignment to sell "all or any part" of the assigned property does limit the assignee's power to sell all the property absolutely. If selling a part will pay all the debts in full, no creditor can be injured by not having the whole sold. *Ginther* v. *Richmond*, 25 Supm. Ct. (18 Hun), 232.

A trust will be sustained even where it is united with a trust which is void by the statute, as where the conveyance was of real estate upon trust to sell or mortgage the same, and apply the proceeds to the payment of debts, it was held that the instrument was valid as to the trust to sell, although invalid as to the trust to mortgage. *Darling* v. *Rogers*, 22 Wend. 483 ; rev'g

Rogers v. *De Forest*, 7 Paige, 272; *Barnum* v. *Hempstead*, 7 Paige, 568.

Where the assignor conveyed real and personal property in trust to sell and apply the proceeds to the payment of his debts, and to invest the residue for his use during his life, or in case of his death to pay over and distribute the estate to his heirs at law, it was held that the trust in the surplus for the grantor was void, as being an attempt to create a passive trust, and that after payment of the assignor's debts the estate vested at once in the grantor. *Kittell* v. *Osborn*, 4 T. & C. 45; see *Rome Exch. Bank* v. *Eames*, 4 Abb. Dec. 83; *Young* v. *Heermans*, 66 N. Y. 374.

An assignment for the payment of debts generally, without any limitations or directions, confers upon the trustee the right to sell. *Planck* v. *Schermerhorn*, 3 Barb. Ch. 644; *Cooper* v. *Whitney*, 3 Hill, 95, 101; *Wood* v. *White*, 4 Myl. & Cr. 460, 481; 2 Perry on Trusts, § 593, p. 147.

§ 146. To pay the expenses of the trust.—The assignment may provide for the payment of the expenses of administering the trust. Where the assignee was authorized to employ and pay all necessary attorneys, clerks and agents, and it was provided that he should be entitled to, and was thereby authorized to take and have, a reasonable compensation for his services, and was authorized to pay and discharge all the just and reasonable costs and expenses attending the due execution of the assignment and the carrying into effect of the trust thereby created, together with a reasonable and lawful compensation for his own services, it was held that the power was not greater than the law would imply as necessary to carry the trust into execution. *Jacobs* v. *Remsen*, 36 N. Y. 668; *Bodley* v. *Goodrich*, 7 How. U. S. 276; *Barney* v. *Griffin*, 2 N. Y. 365; *Meacham* v. *Sternes*, 9 Paige, 398. To the same effect are *Butt* v. *Peck*, 1 Daly, 83; *Iselin* v. *Dalrymple*, 27 How. Pr. 137; s. c. 2 Robt. 142; *Halstead* v. *Gordon*, 34 Barb. 422; *Duffy* v. *Duncan*, 35 N. Y. 187; *Keteltas* v. *Wilson*, 36 Barb. 298; *Campbell* v. *Woodworth*, 24 N. Y. 304; *Eyre* v. *Beebe*, 28 How. Pr. 333.

But where the assignment authorized the payment of a reasonable counsel fee to the assignee in addition to expenses, costs,

and commissions of executing the trusts, it was held to be an appropriation of the assigned property to an illegal purpose, and rendered the assignment void, *Nichols* v. *McEwen*, 21 Barb. 65; s. c. 17 N. Y. 22, and a direction to pay counsel fees for services to be rendered after the assignment invalidates it. *Matter of Gordon*, 56 Supm. Ct. (49 Hun), 370; *Norton* v. *Matthews*, 7 Misc. 569, and see *post*, Chap. XIII. See *Hill* v. *Agnew*, 12 Fed. R. 230. Especially is this true when the direction is to pay a specified sum to counsel for services to be performed after the assignment. *Norton* v. *Matthews*, *supra*.

A provision to pay costs and expenses of suits that may be instituted against the assignor, will invalidate the assignment. *Mead* v. *Phillips*, 1 Sandf. Ch. 83; see *Lentilhon* v. *Moffat*, 1 Edw. Ch. 451; *Levy's Accounting*, 1 Abb. N. C. 177.

§ 147. **Designation of debts to be paid.**—In all assignments the wages or salaries actually owing to the employees of the assignor or assignors at the time of the execution of the assignment must be preferred before any other debt, and it should also be provided in the assignment that if the assets of the assignor or assignors shall not be sufficient to pay in full all such preferred claims that they shall be applied to the payment of the same *pro rata*. (Laws of 1884, c. 328.)

If the assignment provides for the payment of certain creditors or class of creditors in preference to general creditors, the debts or creditors so to be paid in priority must be stated with certainty in the assignment. *Frazier* v. *Truax*, 34 Supm. Ct. (27 Hun), 587; *Keiley* v. *Dusenbury*, 19 Alb. L. J. 498. If the preferred creditors are enumerated in schedules, the schedules must be annexed to the assignment at the time of its execution. *Kercheis* v. *Schloss*, 49 How. Pr. 284; *Averill* v. *Loucks*, 6 Barb. 470; *Hotop* v. *Neidig*, 17 Abb. Pr. 332; see *Scott* v. *Guthrie*, 10 Bosw. 408, 416, 418.

But it appears that if the persons to whom the preference is to be given are identified, it is not necessary that their names and residences should be stated. Thus where the assignees were directed to first pay to the laborers and workmen of the assignors, residing in Albany and Buffalo, the amounts due to them respectively for work, labor and services done and performed for

the assignors, this provision was held to be valid. *Bank of Silver Creek* v. *Talcott*, 22 Barb. 550; *Pratt* v. *Adams*, 7 Paige, 615.

The word "liabilities," as used in the usual form in connection with "debts" ("debts and liabilities"), is synonymously employed, and does not include a claim for rent accruing after the assignment. *Matter of Hevenor*, 77 Supm. Ct. (70 Hun), 56.

So where, after providing for the payment of two classes of preferred creditors, the assignees were directed to advertise for claims, and that all debts which came to the knowledge of the assignees on or before the day named, should constitute the third class of preferred debts, this provision was considered valid and proper. *Ward* v. *Tingley*, 4 Sandf. Ch. 476. So in *Butt* v. *Peck* (1 Daly, 83), the persons to whom the preference was intended to be given were designated, but the amounts were left blank, this was regarded as no objection to the assignment. To the same effect are *Platt* v. *Hedge*, 8 Iowa, 386; *Van Hook* v. *Walton*, 28 Tex. 59; *England* v. *Reynolds*, 38 Ala. 370; *Brown* v. *Knox*, 6 Mo. 382; *U. S. Bank* v. *Huth*, 4 B. Mon. 423; *Halsey* v. *Whitney*, 4 Mason, 206; *Layson* v. *Rowan*, 7 Rob. (La.) 1.

If the assignment is made for the equal benefit of all creditors, it is not necessary that the creditors should be designated. The statute provides for the making and filing of the schedule of creditors, and that schedule is to be regarded as a part of the assignment. *Terry* v. *Butler*, 43 Barb. 395; *De Camp* v. *Marshall*, 2 Abb. Pr. N. S. 373. See Chap. XIX.

Where an express trust is created for the benefit of creditors, without any authority to the trustee to give a preference to any, it is both, at law and in equity, a trust for each of the creditors ratably. *Egberts* v. *Wood*, 3 Paige, 517.

The insertion by the assignor, in the inventory and schedules prepared pursuant to the statute, of an indebtedness as due, has been held to be such a direction for the payment of the indebtedness that the assignee cannot dispute the claim, although usurious, and this was held to be so, although the assignment itself did not refer to the inventory and simply directed the assignee to pay "all debts and demands whatever then existing" against the assignor. *Chapin* v. *Thompson*, 89 N. Y. 270. To the

same effect see *Matter of Thompson*, 37 Supm. Ct. (30 Hun), 195.

§ 148. **Acceptance by assignee.**—Under the provisions of the statute (*ante*, § 125) the assignee is required to formally accept the assignment in writing, and the assent must be acknowledged. An assignment recorded without the assent of the assignee to act having been duly subscribed and acknowledged by him thereon, although he may have orally agreed to act, is void as against creditors claiming under attachments against the property of the assignor. *Rennie* v. *Bean*, 31 Supm. Ct. (24 Hun), 123.

It is necessary, in order to make the assignment effectual, that the assignee should execute and acknowledge the assent, but it is not necessary that the assent should be embraced in or be endorsed upon the assignment. It may be upon a separate paper and be recorded at a time different from that of the recording of the assignment. *Franey* v. *Smith*, 125 N. Y. 44.

When the assignee signed and acknowledged the assignment this was held to be a sufficient assent. "No form of consent is prescribed and no place for its appearance in the assignment is designated, and the statute is fully satisfied by an appearance of assent in the instrument." *Scott* v. *Mills*, 52 Supm. Ct. (45 Hun), 263, 264; affi'd 115 N. Y. 376; s. c. 18 Abb. N. C. 330.

The acceptance binds the assignee to the performance of the trust, and he can be relieved from the duties and liabilities under which he has thus come only by the order of a court of competent jurisdiction. *Brennan* v. *Willson*, 4 Abb. N. C. 279, and see cases cited in note. And such acceptance is decisive evidence against him. *Mead* v. *Phillips*, 1 Sand. Ch. 83. An acceptance is essential to the validity of the assignment, independent of the statute. *Lawrence* v. *Davis*, 3 McLean, 177; *Pierson* v. *Manning*, 2 Mich. 445, 462.

Before the enactment of the statute of 1877, it was held that taking possession of property under an assignment before the actual receipt of the instrument, might amount to an acceptance. *Metcalf* v. *Van Brunt*, 37 Barb. 621.

And when, under a voluntary assignment, the assignee hesi-

tated six hours, although the deed had been placed in his hands, and then accepted, but before his acceptance the property was levied upon by virtue of executions against the assignors, it was held that the judgment-creditors had obtained a lien upon the goods and were entitled to have their debts satisfied in preference to the debts of the creditors provided for by the assignment. *Crosby* v. *Hillyer*, 24 Wend. 280.

The date of the instrument is only presumptive evidence of the time of its actual execution, and whenever fraud or mistake is alleged, this presumption may be contradicted by parol evidence. *Breck* v. *Cole*, 4 Sandf. 79.

Where the assignment is made to several assignees, and some do not accept, the assignment is operative as to the assenting trustees only. The whole estate vests in them, and they act in the same manner as if the other assignees had not been named. *King* v. *Donnelly*, 5 Paige, 46 ; *Matter of Stevenson*, 3 Paige, 420 ; *Moir* v. *Brown*, 14 Barb. 39.

If all of the assignees named should refuse to accept, in analogy to the well-established principle of common law, the trust created for creditors would not be permitted to fail for want of a trustee, but it would devolve upon a court of equity, who would direct the appointment of a new trustee in the place of those who had refused to act. *De Peyster* v. *Clendining*, 8 Paige, 295 ; *King* v. *Donnelly*, 5 Id. 46. See Chap. XXV.

§ 149. **Acknowledgment.**—The section of the statute cited (*ante*, § 125), requires that the assignment shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds. The assent of the assignee, whether embraced in the assignment or separate from it, must also be acknowledged. These provisions in reference to the acknowledgment of the assignment are mandatory, and cannot be dispensed with. An assignment which is not acknowledged or proved according to the statute is void. *Hardmann* v. *Bowen*, 39 N. Y. 196 ; s. c. 5 Abb. Pr. N. S. 332 ; *Fairchild* v. *Gwynne*, 16 Abb. Pr. 23 ; rev'g s. c. 14 Abb. Pr. 121 ; *Britton* v. *Lorenz*, 45 N. Y. 51. Even though the assignment be in writing, and be delivered together with the possession of the assigned property, creditors of the assignor may attach the property in the hands of the assignee

prior to the making of the statutory acknowledgment. *Hardmann* v. *Bowen*, *supra*.

The act applies equally to instruments which are in effect general assignments, although they may not be in the form in which such instruments are usually drawn. Thus, a bill of sale absolute in form was held to be insufficient to convey the title to property, because, in law, it amounted to a general assignment and was unacknowledged. *Britton* v. *Lorenz*, 45 N. Y. 51.

An acknowledgment before an officer who had no previous knowledge of the parties, and who received no more evidence of their identity at the time of execution, is fatally defective, and the defect renders the instrument null and void. *Treadwell* v. *Sackett*, 50 Barb. 440; *Jones* v. *Bach*, 48 Barb. 568.

It has been held by the general term of the Common Pleas, in the case of *Adams* v. *Houghton* (3 Abb. Pr. N. S. 46, Cardozo, J., dissenting), that the assignment must be executed by the debtors in person, and not by their attorney; and, in *Cook* v. *Kelley* (12 Abb. Pr. 35; affi'd 14 Id. 466), it was held by the same court that the assignment could not be proved through the medium of a subscribing witness.

The general term of the Supreme Court, in the first department, decided, in the case of *Lowenstein* v. *Flauraud* (18 Supm. Ct. [11 Hun], 399; affi'd 82 N. Y. 494), that an acknowledgment by an attorney in fact was sufficient. In delivering the opinion of the court, Mr. Justice Davis says: "The statute does not say, in express terms, that the assignment shall in all cases be acknowledged by the assignor himself, but simply that it be duly acknowledgd before an officer authorized to take acknowledgments of deeds; and it is an established principle of law that where power to execute a deed or other instrument is conferred upon an attorney in fact, by an instrument duly acknowledged, such an attorney may perform every act requisite to make the instrument valid and effective for the purpose for which it is made. We fail to see any good reason for saying that the instrument in this case was not duly acknowledged within the meaning of the act of 1860." To the same effect is *Baldwin* v. *Tynes*, 19 Abb. Pr. 32.

When the assignment is made by several assignors, it must be

acknowledged by all. *Treadwell* v. *Sackett*, 50 Barb. 440; *Cook* v. *Kelley*, 12 Abb. Pr. 35; affi'd 14 Id. 466.

But this requirement does not necessarily extend to non-resident members of a partnership. Thus, where an assignment was executed and acknowledged by the resident partner in a limited partnership, both for himself and as attorney in fact for the non-resident partners, who ratified his act, it was held to be a sufficient compliance with the statute. *Darrow* v. *Bruff*, 36 How. Pr. 479.

And where one partner has absconded and surrendered his interest in the firm property, the assignment may be executed and acknowledged by the remaining partner. *Welles* v. *March*, 30 N. Y. 344; *Nat. Bank* v. *Sackett*, 2 Abb. Pr. N. S. 286.

Where the certificate of the officer taking the acknowledgment did not set forth that he knew the persons acknowledging to be the persons described in and who executed the assignment, but that he knew them to be the persons described in and who executed "the same," the certificate being upon the same paper as the assignment and bearing the same date, it was held that under the circumstances the instrument acknowledged was sufficiently identified in the certificate. *Smith* v. *Boyd*, 101 N. Y. 472; rev'g s. c. 10 Daly, 149; s. c. *sub. nom. Smith* v. *Tim*, 14 Abb. N. C. 447; *Smith* v. *Boyle*, 67 How. Pr. 351. The same conclusion was reached as to the same certificate in *Claflin* v. *Smith*, 15 Abb. N. C. 241. See also *Smith* v. *Tim*, 14 Abb. N. C. 447.

The certificate of acknowledgment of an assignment executed by one member of a firm need not state that he was authorized to sign the names of his copartners. It is sufficient if he was in fact authorized to execute the assignment for the firm. *Klumpp* v. *Gardner*, 114 N. Y. 153, 160; *Hooper* v. *Baillie*, 118 N. Y. 413–416; *Nat. Bank of Troy* v. *Scriven*, 70 Supm. Ct. (63 Hun), 375. The officer who took the acknowledgment may be called to testify to what took place before him, and if, in fact, it was properly acknowledged, he may be compelled to make the certificate conform to the facts. *Nat. Bank of Troy* v. *Scriven*, *supra*; *Claflin* v. *Smith*, 15 Abb. N. C. 241; *Camp* v. *Buxton*, 41 Supm. Ct. (34 Hun), 511.

Where the pleadings admit the making of the assignment it is

not competent to show on the trial that a partnership assignment executed by one partner in the firm name was unauthorized. *Hooper* v. *Beecher*, 4 State R. 473.

The fact that the notary who took the acknowledgment was a preferred creditor in the assignment, does not disqualify him from acting. *Wendell* v. *Reves*, 26 Weekly Dig. 239 ; 6 State R. 863.

In *Jones* v. *Howard Ins. Co.* 10 State R. 120, an action brought by an assignee upon a cause of action coming to him under the assignment, it was held that defendant could not question the validity of the assignment on the ground that it was not properly acknowledged. This decision may be questioned. An unacknowledged assignment is void, not voidable, and there is no provision of the assignment act or rule of law which makes it void as to creditors merely, and valid as to the assignor's debtors. *Smedley* v. *Smith*, 15 Daly, 421 ; s. c. 28 State R. 414. See *McMahon* v. *Sherman*, 14 State R. 637.

An assignee claiming under an assignment cannot defend on the ground that the assignment was invalid for want of an acknowledgment. *Randall* v. *Dusenbury*, 39 Super. Ct. (7 J. & S.) 174.

§ 150. **Recording the assignment.**—The statute likewise provides (*ante*, § 125), that the assignment shall be recorded in the county clerk's office of the county where the debtor resided or carried on business at the date thereof. An assignment by copartners is to be recorded in the county where the principal place of business of such copartners is situated. Where real property is a part of the property assigned, and is situated in a county other than the one in which the original assignment is required to be recorded, a certified copy of the assignment is to be filed and recorded in the county where such property is situated.

It may be regarded as settled that the recording of the assignment is not a prerequisite to the vesting of title in the assignee. The assignment takes effect from its delivery. The requirements of the statute subsequent to the delivery are directory merely, and an omission to obey any of them does not invalidate the assignment. *Warner* v. *Jaffray*, 96 N. Y. 248 ; *Ryan* v.

Webb, 46 Supm. Ct. (39 Hun), 435; *Pancoast* v. *Spowers*, 52 Super. Ct. (20 J. & S.) 523; affi'd as *Nicoll* v. *Spowers*, 105 N. Y. 1. *Rennie* v. *Bean*, 31 Supm. Ct. (24 Hun), 123, and *Smith* v. *Boyd*, 10 Daly, 149, so far as they hold to the contrary may be regarded as overruled.

In *McBlain* v. *Speelman*, 42 Supm. Ct. (35 Hun), 263, the assignment was executed, acknowledged and delivered to the assignee, but before it was recorded an attachment was levied, by creditors of the assignor on the assigned goods. It was held that the title to the goods passed under the assignment to the assignee, notwithstanding the fact that the assignment had not been recorded.

The record of the assignment in the county clerk's office is not constructive notice of the conveyance of real estate. Hence, where property previously mortgaged was assigned for the benefit of creditors, and the conveyance was not recorded in the register's office, and the property was subsequently foreclosed without making the assignee a party, it was held that the purchaser on the foreclosure acquired a good title as against the assignee. *Simon* v. *Kaliske*, 6 Abb. Pr. N. S. 224; s. c. 37 How. Pr. 249.

The assignment, therefore, when it includes real estate, should be recorded in the office of the register of the county in which the property is situated.

In *Wagner* v. *Hodge*, 41 Supm. Ct. (34 Hun), 524, it was held that an unrecorded assignment of real estate was not effectual as against a purchaser in good faith, and without notice, approving *Simon* v. *Kaliske*, *supra*.

An assignment by a non-resident should be recorded in the county where the assigned property is situated. *Scott* v. *Guthrie*, 10 Bosw. 408.

A mere neglect to record an assignment does not of itself furnish sufficient evidence of a fraudulent intent on the part of the assignor. *Denzer* v. *Mundy*, 5 Robt. 636.

§ 151. When the assignment takes effect.—Before title to the assigned property will pass to the assignee there must have been a compliance with all the statutory requirements of the second section of the act of 1877. The assignment must have

been reduced to writing and acknowledged by the assignor before an officer authorized to take the acknowledgment of deeds; the assent of the assignee, subscribed and acknowledged by him, must appear in writing in or endorsed upon the assignment, or, if separate from the assignment, must be duly acknowledged.

Delivery is essential to the validity of the conveyance, and it is always competent to show by parol that there has or has not been a delivery. *Stephens* v. *Buffalo & N. Y. City R. R. Co.* 20 Barb. 332; *Brackett* v. *Barney*, 28 N. Y. 333; *Mitchell* v. *Bartlett*, 51 N. Y. 447; affi'g 52 Barb. 319.

In *McIlhargy* v. *Chambers*, 117 N.Y. 532, it appeared that the assignee signed and acknowledged the assignment, which contained sufficient words of acceptance on his part. Subsequently on the same day the assignor executed the assignment and left it with his attorney. More than a week afterward the assignor made a formal and unconditional delivery of the assignment to the assignee's agent, who caused it to be recorded, and the assignee took possession of the assigned property. The question was whether the assignment was good as against a subsequent levy by the sheriff, it being claimed that the assignment became operative by its execution by the assignor and the assent of the assignee, and the withholding of it from record and failure of the assignee to take immediate possession, while the assignor reserved the power of revocation, render it fraudulent as to creditors. It was held, however, that the assignment did not take effect until delivery, and that the court did not err in submitting to the jury the question when delivery took place, and that the jury were justified in finding that there was no delivery until the formal delivery to the assignee's agent.

In *Kingston* v. *Koch*, 64 Supm. Ct. (57 Hun), 12, where the assignment was executed by both the assignor and assignee and left with the assignor's attorney, and there was no evidence of any instruction to the attorney to deliver, it was held that the delivery of the assignment to the assignee by the attorney after a verdict had been rendered against the assignor, but in the absence of instruction from the assignor, did not render the assignment operative. See *Reichenbach* v. *Winkhaus*, 67 How. Pr. 512.

When an instrument is delivered to the clerk for record, and

is recorded, the presumption is that it was duly delivered to the grantee ; but this presumption is merely *prima facie*, and may be rebutted by parol or other evidence, and it may be shown it had never been delivered. *Wilsey* v. *Dennis*, 44 Barb. 354 ; *Van Valen* v. *Schermerhorn*, 22 How. Pr. 416 ; *Rathbun* v. *Rathbun*, 6 Barb. 98 ; *Fryer* v. *Rockefeller*, 63 N. Y. 268, 273 ; affi'g 4 Hun, 800.

CHAPTER X.

THE ASSIGNED PROPERTY.

§ 152. General assignments.—General assignments are such as purport to convey *all* of a debtor's property in trust for the payment of all his debts as distinguished from assignments of a part only of the debtor's property, or of the property assigned for the benefit of a part only of his creditors. The General Assignment Act of 1877, following the act of 1860 (see *post*, Chap. XIX), requires that at the date of the assignment, or within twenty days thereafter, the assignor shall make, under oath and delivery to the county judge, a full and true inventory of all his estate at the date of the assignment. This inventory is properly to be regarded as part of the assignment. *Terry* v. *Butler*, 43 Barb. 395 ; *Shultz* v. *Hoagland*, 85 N. Y. 464.

In the case of *Royer Wheel Co.* v. *Fielding*, 101 N. Y. 504, it was determined that the General Assignment Act does not relate to conveyances of specific pieces of property in payment of certain creditors particularly named, although the conveyance be in trust.

An assignment by an insolvent debtor of part of his property in trust for the benefit of part of his creditors is not void, though not executed as required by the General Assignment Act. *Matter of Gordon*, 56 Supm. Ct. (49 Hun), 370.

§ 153. Assignment of a part of the debtor's property.—Previous to the enactments to which reference has just been made, it appears to have been the opinion of many able judges, that an assignment of a part only of the debtor's property in trust for his creditors, especially when preferences were given, would not be sustained. Thus, in *McClelland* v. *Remsen* (14 Abb. Pr. 331, 334 ; affi'd, 3 Abb. Dec. 74), Mr. Justice Brown says : " Assignments of property upon trust to pay debts, giving preferences, have never been favored by the courts, and

will only be upheld when they fulfill the conditions which the law finds it necessary to prescribe for the prevention of fraud. Among these are, that the debtor shall devote all his property to the satisfaction of his debts without condition or qualification, and that he shall reserve nothing from the assigned property to himself until all his creditors are paid." In that case, the instrument in question was executed after the passage of the act of 1860. The transaction was sustained on the ground that it was in substance a mortgage. In the case of *Oliver Lee & Co.'s Bank* v. *Talcott* (19 N. Y. 146, 148), Mr. Justice Grover says: "The debtor must devote all his property absolutely to the payment of his debts." In that case, however, the question was whether a provision requiring a creditor to surrender certain notes as a condition of payment under the assignment was valid. So, in *Rathbun* v. *Platner* (18 Barb. 272, 275), Mr. Justice Mason remarked, that assignments preferring creditors were only tolerated when honestly made for the purpose of giving the preference, "and devoting the whole property of the debtor to the payment of the debts." And in *Burdick* v. *Post* (12 Barb. 168, 175), Mr. Justice Barculo employed even stronger language. He said: "As we understand the settled law in this State, derived from an examination of all the decisions, assignments preferring certain creditors are only tolerated when they are absolute and unconditional; when they devote the whole of the assignor's property to the immediate and unqualified payment of his debts, *pari passu*, or in a specified order." In that case the assignment was general, and was held void, because conferring on the assignee the power to sell on credit.

In *Goodrich* v. *Downs* (6 Hill, 438), which was an assignment of "nearly all" the debtor's property for the payment of four creditors, with a reservation of the surplus to the assignor, it was held that the assignment was fraudulent and void, Mr. Justice Bronson, who delivered the opinion of the court, remarking that "such transfers have only been allowed to stand where the debtor makes an unconditional surrender of his effects for the benefit of those to whom they rightfully belong." See this case criticised in *Wilson* v. *Forsyth*, 24 Barb. 105, 123, and see also *Schuman* v. *Peddicord*, 50 Md. 560; s. c. 19 Alb. L. J. 463.

And to the same effect are remarks of the same judge in *Barney* v. *Griffin*, 2 N. Y. 365, 371.

On the contrary, after a very exhaustive review of the authorities, in *Wilson* v. *Forsyth* (24 Barb. 105), Mr. Justice Gould reached the conclusion that an assignment, although it gave preferences, and did not assign all the debtor's property, would not be for that reason void. So, in *Grover* v. *Wakeman* (11 Wend. 187, 195), Mr. Justice Sutherland says, that the right to make assignments with preference, either partial or general, was thoroughly incorporated into our system. So, in *Doremus* v. *Lewis* (8 Barb. 124), where the assignment was of a portion of the debtor's property for the payment of a portion of his creditors, without any reservation of the surplus, the assignment was sustained, and to the same effect in *Spies* v. *Joel*, 1 Duer, 669 ; see *Powers* v. *Graydon*, 10 Bosw. 630, 645.

Although the General Assignment Act of 1877 does not in terms direct that the assignment must include all the assignor's property, yet the policy of the statute seems to look to such a disposition of property.

It must now be regarded as settled that a conveyance of a part of the debtor's property in trust, for the payment of particular debts, is not within the operation of the statute, and if made without fraud is not illegal. *Royer Wheel Co.* v. *Fielding*, 101 N. Y. 504 ; *Matter of Gordon*, 56 Supm. Ct. (49 Hun), 370 ; *Knapp* v. *McGowan*, 96 N. Y. 75 ; *Tiemeyer* v. *Turnquist*, 85 N. Y. 516 ; s. c. 39 Am. R. 674 ; *Boessneck* v. *Cohn*, 26 State R. 969 ; *Bier* v. *Kibbe*, 50 Supm. Ct. (43 Hun), 174 ; *Maas* v. *Falk*, 54 State R. 160.

§ 154. Assignments for the benefit of a part of the creditors.—Where the assignment is of all an insolvent debtor's property to a trustee in trust for the payment of a portion of his creditors, and then, without making any provision for other creditors, with a reservation of the surplus to the assignor, the assignment is unquestionably fraudulent and void. *Barney* v. *Griffin*, 2 N. Y. 365 ; *Strong* v. *Skinner*, 4 Barb. 546 ; *Leitch* v. *Hollister*, 4 N. Y. 211 ; *Goodrich* v. *Downs*, 6 Hill, 438. "An insolvent, and even a solvent debtor cannot convey all his property to trustees to pay a portion of his creditors, with a provision

that the surplus shall be returned to him, leaving his other creditors unprovided for; because such a conveyance ties up his property in the hands of his trustees, places it beyond the reach of his creditors by the ordinary process of the law and thus hinders and delays them, and is, therefore, void as to the creditors unprovided for," Earl, J. *Knapp* v. *McGowan*, 96 N. Y. 75, 85; *Sutherland* v. *Bradner*, 116 N. Y. 410. But when the assignment contains no express reservation of the surplus for the use of the assignor, it will not be void, although it provide for a part only of the creditors. *Bishop* v. *Halsey*, 3 Abb. Pr. 400, Bosworth, J.; *Doremus* v. *Lewis*, 8 Barb. 124; *Spies* v. *Joel*, 1 Duer, 669. It is important in this connection to bear in mind the distinction between a conveyance of property to a trustee for the payment of debts, and a conveyance directly to a creditor as security for a debt. The former places the whole legal and equitable title to the assigned property beyond the control of the debtor, and beyond the reach of his creditors by legal process. *Briggs* v. *Davis*, 21 N. Y. 574; s. c. 20 N. Y. 15; *Wilkes* v. *Ferris*, 5 Johns. 335; *Knapp* v. *McGowan*, 96 N. Y. 75. If, therefore, it conveys all the debtor's property, and there are creditors not provided for in the assignment, they are debarred from all legal or equitable recourse against the debtor's property until after a settlement of the trust. They are therefore manifestly hindered and delayed. *Barney* v. *Griffin*, 2 N. Y. 365; *Strong* v. *Skinner*, 4 Barb. 546; *Leitch* v. *Hollister*, 4 N. Y. 211; *McClelland* v. *Remsen*, 14 Abb. Pr. 331; affi'd, 3 Abb. Dec. 74.[1]

But when the conveyance is to creditors themselves by way of security only, the control of the property still remains in the debtor, subject to the lien created; he has an equity of redemption which he may sell or incumber, and which creditors may reach by process of law. *Leitch* v. *Hollister*, 4 N. Y. 211; *Van Buskirk* v. *Warren*, 4 Abb. Dec. 457; *McClelland* v. *Remsen*, 3 Id. 74; *Dunham* v. *Whitehead*, 21 N. Y. 131.

§ 155. What may be assigned.—It is not necessary to state in detail the various descriptions of property which are capable

[1] See the doctrine of the above cases criticised in *Muchmore* v. *Budd* 53 N. J. L. 369; s. c. 22 Atl. R. 518.

of assignment. It is enough to say that the assignee may be clothed with the title to every species of property which is capable of transfer, if the language of the assignment is sufficiently extensive. It has been stated as a general rule, that any interest to which the personal representatives of a deceased person could succeed, is the subject of assignment *inter vivos*. *Zabriskie* v. *Smith*, 13 N. Y. 322, 335, Denio, J.; see *Hyslop* v. *Randall*, 4 Duer, 660, 663; *Johnston* v. *Bennett*, 5 Abb. Pr. N. S. 331; *Boyd* v. *Belmont*, 58 How. Pr. 513.

The Code of Civil Procedure prescribes a very broad rule with regard to the assignability of choses in action. It provides that "Any claim or demand can be transferred, except in one of the following cases:

"1. Where it is to recover damages for a personal injury, or for a breach of promise to marry.

"2. Where it is founded upon a grant, which is made void by a statute of the State; or upon a claim to or interest in real property, a grant of which, by the transferor, would be void by such a statute.

"3. Where a transfer thereof is expressly forbidden by a statute of the State, or of the United States, or would contravene public policy." Code C. P. § 1910.

Thus, rights of action for personal torts which die with the person are not assignable. *Brooks* v. *Hanford*, 15 Abb. Pr. 342; *Hodgman* v. *Western R. R. Co.* 7 How. Pr. 492; *People* v. *Tioga Com. Pleas*, 19 Wend. 73. As damages for an assault and battery. *Pulver* v. *Harris*, 52 N. Y. 73; affi'g 62 Barb. 500; s. c. 7 Alb. L. J. 169.

But a right of action for the wrongful taking and conversion of personal property is assignable; and, under the provisions of the Code, the assignee can recover upon the same in his own name. *Baumann* v. *Jefferson*, 4 Misc. 147.

Hence an assignment by a person, of all his property and estate, transfers a right of action existing in his favor for such conversion. *McKee* v. *Judd*, 12 N. Y. 622; *Sherman* v. *Elder*, 24 N. Y. 381; *Richtmeyer* v. *Remsen*, 38 N. Y. 206.

So a right of action for the conversion of promissory notes will pass under a general assignment. *Whittaker* v. *Merrill*, 30 Barb. 389.

The right to recover against the plaintiff in a replevin suit, the value of the property which has been delivered to him on the writ of replevin, together with damages for its seizure, is a *claim* against such plaintiff, and will pass under a general assignment made of all dues and claims, by the defendant in such suit. *Jackson* v. *Losse*, 4 Sandf. Ch. 381. So also a right of action on an undertaking given on replevin. *Coffin* v. *McLean*, 80 N. Y. 560.

A right of action against a common carrier to recover the value of property intrusted to him is assignable, and the assignee may sue in his own name. *Merrill* v. *Grinnell*, 30 N. Y. 594; *McKee* v. *Judd*, 12 N. Y. 622; and *Waldron* v. *Willard*, 17 N. Y. 466.

Where the assignment is general and includes all the assignor's estate, in the absence of fraud the assignee, except as stated in the following section, takes only such rights and interests as the debtor himself had or could assert at the time of making the assignment. He is subject to all the equities which the assignor himself would be subject to. *Van Heusen* v. *Radcliff*, 17 N. Y. 580; *Warren* v. *Fenn*, 28 Barb. 333; *Maas* v. *Goodman*, 2 Hilt. 275; *Reed* v. *Sands*, 37 Barb. 185; *Addison* v. *Burckmyer*, 4 Sandf. Ch. 498.

As to construction of the language of the transfer, see *ante*, Chap. IX.

§ 156. Property fraudulently transferred.—In one instance only does the assignee acquire the right to set up a claim which the assignor himself could not maintain. It is provided by statute, "that any executor, administrator, receiver, assignee, or other trustee of an estate, or the property and effects of an insolvent estate, corporation, association, partnership or individual, may for the benefit of creditors or others interested in the estate or property so held in trust, disaffirm, treat as void, and resist all acts done, transfers, and agreements made, in fraud of the rights of any creditor, including themselves and others, interested in any estate or property held by or of right belonging to any such trustee or estate. And any creditor of a deceased insolvent debtor, having a claim or demand against the estate of such deceased debtor exceeding in amount the sum of one hundred dollars, may, in like

manner, for the benefit of himself and other creditors interested in the estate or property of such deceased debtor, disaffirm, treat as void, and resist all acts done, and conveyances, transfers and agreements made, in fraud of the right of any creditor or creditors, by such deceased debtor, and for that purpose may maintain any necessary action to set aside such acts, conveyances, transfers or agreements; and for the purpose of maintaining such action, it shall not be necessary for such creditor to have obtained a judgment upon his claim or demand, but such claim or demand, if disputed, may be proved and established upon the trial of such action." Laws of 1858, c. 314, § 1; amended Laws of 1889, c. 487; 2 Birdseye's St., p. 1232.

By another section it is also provided: "That every person who shall, in fraud of the rights of creditors and others, have received, taken, or in any manner interfered with, the estate, property or effects of any deceased person, or insolvent corporation, association, partnership or individual, shall be liable in the proper action to the executors, administrators, receivers, or other trustees of such estate or property, for the same, or the value of any property or effects so received or taken, and for all damages caused by such acts to any such trust estate." Laws of 1858, c. 314, § 2; 2 Birdseye's St., p. 1232.

Previous to this enactment Chan. Kent, in *Bayard* v. *Hoffman* (4 Johns. Ch. 450), sustained a suit by the voluntary assignees of an insolvent debtor to reach property which had been previously disposed of by the assignors in fraud of the rights of creditors, but this case was disapproved by Chan. Walworth, in *Brownell* v. *Curtis* (10 Paige, 210, 218).

And in accordance with the doctrine of the last case, it was held that where an insolvent debtor, on the eve of making a general assignment, transferred in trust for the benefit of certain of his creditors, a bond and mortgage which were not payable until about four years thereafter, and the transfer contained a proviso that the assignee should retain the bond and mortgage until the expiration of the period it had to mature, and should not part with it, nor attempt to collect the principal until that time, that the transfer was fraudulent as against creditors, and that being valid against the assignor, it did not pass by his general assignment made a few days subsequently. *Storm* v.

Davenport, 1 Sandf. Ch. 135. See also *Leach* v. *Kelsey*, 7 Barb. 466.

An assignee acquires no right to avoid a previous voluntary or fraudulent conveyance by virtue of any title, interest, or right of action derived through the assignment from the assignee, but his right to maintain an action to set aside previous fraudulent transfers is conferred solely by the statute.

Under the act of 1858, the assignee has ample power, and it is his duty to attack any conveyance made in fraud of creditors, and to reach the property fraudulently disposed of or concealed. *Miller* v. *Halsey*, 4 Abb. Pr. N. S. 28, 33; *Southard* v. *Benner*, 72 N. Y. 424; *Spring* v. *Short*, 90 N. Y. 538; *Loos* v. *Wilkinson*, 110 N. Y. 195; *Spelman* v. *Freedman*, 130 N. Y. 421; *Ball* v. *Slafter*, 33 Supm. Ct. (26 Hun), 353; *Crouse* v. *Frothingham*, 97 N. Y. 105, 113; *Fort Stanwix Bank* v. *Leggett*, 51 N. Y. 552; *Taft* v. *Wright*, 2 T. & C. 614, 618; *Matter of Raymond*, 34 Supm. Ct. (27 Hun), 508; *Blaut* v. *Gabler*, 77 N. Y 461; s. c. 19 Alb. L. J. 498.

Further observations upon these cases and upon the rights of the assignee to maintain actions and defenses on the ground of the fraudulent character of transfers made by the assignee, will be reserved for discussion when we treat of the rights and powers of assignees. See Chap. XXI.

A distinction is to be observed between a conveyance by the debtor fraudulent as to creditors, because made with the intent to hinder, delay and defraud them, and a conveyance obtained from the debtor by fraud and trick. In the former case, the conveyance is good as against the assignor, and apart from the statute his assignee can obtain no better title than the assignor himself had (see *post*, Chap. XIII), but in the latter case the imposition and fraud would have furnished a ground for the assignor himself to apply to a court of equity for relief, and this right follows the property into the hands of an assignee for creditors.

The case of *McMahon* v. *Allen* (35 N. Y. 403; more fully, 32 How. Pr. 313; rev'g 34 Barb. 56; 12 Abb. Pr. 275), is an extremely instructive and interesting case in this connection. In that case a transfer of property, real and personal, was obtained fraudulently and inequitably, by false representations

made by the transferee to the tranferrer, by abuse of a fiduciary relationship and by practice upon a reckless and improvident sailor. The tranferrer subsequently made a conveyance of all his property and causes of action to an assignee, for the benefit of his creditors. The question was whether the assignee could maintain an action to set aside the previous conveyance as having been fraudulently and inequitably obtained, and by an abuse of a fiduciary relationship. The Court of Appeals were unanimously of opinion that the action could be maintained. The conveyances in that case were made previous to the act of 1858. And the decision was placed upon the ground not of fraud against creditors, but of imposition and fraud upon the assignor. The cases relied upon were *Dickinson* v. *Burrell*, L. R. 1 Eq. 337 ; *Oneida Bank* v. *Ontario Bank*, 21 N. Y. 490 ; *Tracy* v. *Talmage*, 14 N. Y. 162 ; *Waldron* v. *Willard*, 17 N. Y. 466.

The assignee does not succeed to a right of action to compel specific performance of a contract, the only result of which will be to relieve the assignor from a personal liability. *Williams* v. *Boyle*, 1 Misc. 364 ; s. c. 48 State R. 713.

§ 157. **Property held in trust.**—Property held in trust by the debtor does not pass to his assignee under the assignment, and if the property consists of goods remaining in specie or of notes and other choses in action, the *cestui que trust* is entitled to the property, and not the creditors at large. Equity will follow trust funds through any number of transmutations, and preserve it for the *cestui que trust* so long as it can be identified. *Kip* v. *Bank of New York*, 10 Johns. 63 ; *Newton* v. *Porter*, 69 N. Y. 133. See *Holmes* v. *Gilman*, 138 N. Y. 369 ; rev'g 71 Supm. Ct. (64 Hun), 227 ; affi'g *Holmes* v. *Davenport*, 27 Abb. N. C. 341 ; *Denton* v. *Merrill*, 50 Supm. Ct. (43 Hun), 224 ; s. c. 5 State R. 387. Even when the specific thing or the specific proceeds cannot be identified, " it may be sufficient to entitle a party to equitable preference in the distribution of a fund in insolvency, that it appears that the fund or property of the insolvent remaining for distribution, includes the proceeds of the trust estate." *Matter of Cavin* v. *Gleason*, 105 N. Y. 256, 262. It must be made to appear that the avails of the trust property have in some form come into the hands of the assignee before any

preference in the assigned estate can be maintained by the *cestui que trust.*[1] This is illustrated by the case last cited. In that case certain securities were left with the assignor, a broker, to sell and invest in a mortgage. The assignor realized on the securities $3000, and disposed of the entire sum with the exception of $30, and then made a general assignment. It was held that the owner of the securities had no prior right of payment out of the general assets of the assignor, and that a direction to the assignee to pay over to the creditor any larger sum than the $30 which he had received from the specific property was improper. This case is said to have overruled *People* v. *City Bank of Rochester*, 96 N. Y. 32 (see *National B. & D. Bank* v. *Wilkinson*, 10 State R. 290), but is not necessarily inconsistent with it. In the *Rochester Bank Case*, a person who had discounted his notes with the bank sent to it his checks to take up the notes. The notes had been sold by the bank, and the checks were converted into cash and were not used to take up the notes. Upon the insolvency of the bank the receiver found cash on hand in excess of the amount of the checks. It was held that the drawers of the checks were entitled to priority of payment. It

[1] To the same effect are *Ferchen* v. *Arndt*, 37 Pac. R. 161; *Little* v. *Chadwick*, 151 Mass. 109; *Englar* v. *Offutt*, 70 Md. 78; *Thompson's Appeal*, 22 Penn. St. 16; *Columbian Bank's Estate*, 147 Penn. St. 422; *Sherwood* v. *Milford State Bank*, 94 Mich. 78; *Nat. Bank* v. *Ins. Co.* 104 U. S. 54; *Union Nat. Bank* v. *Goetz*, 138 Ill. 127; *Goodell* v. *Buck*, 67 Me. 514; *Nonotuck Silk Co.* v. *Flanders*, 58 N. W. 383.

Mr. Justice Bradley, in *Frelinghuysen* v. *Nugent*, 36 Fed. Rep. 229, 239, says: "Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it, depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property—namely, to that which was procured in place of it by exchange, purchase, or sale. But if it become confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried. The difficulty of sustaining the claim in the present case is that it does not appear that the goods claimed—that is to say, the stock on hand, finished and unfinished—were either in whole or in part the proceeds of any money unlawfully abstracted from the bank." See *Peters* v. *Bain*, 133 U. S. 670.

was not claimed that the proceeds of the checks had not gone into the general funds of the bank, or that they had not passed in some form to the receiver. *Matter of Cavin* v. *Gleason*, *supra*, p. 263.

The general principle is illustrated also by a variety of cases, where banks and bankers, to whom drafts, notes, and checks have been forwarded for collection, have failed before paying over the proceeds of the collections. Thus, in *Nat. Butchers & D. Bank* v. *Hubbell*, 117 N. Y. 384, where drafts and notes had been sent to the assignors for collection by a customer, under a course of dealing in which the assignor credited the customer with the proceeds of collection and remitted weekly, it was held that, as to the amounts collected and used by the assignors before the assignment, the customer was entitled to no priority, but as to the avails collected after the assignment, the assignee must account to the customer, although he had paid out preferences under the assignments which exhausted his receipts. The cases of *Arnot* v. *Bingham*, 62 Supm. Ct. (55 Hun), 553, and *Frank* v. *Bingham*, 65 Supm. Ct. (58 Hun), 580, which grew out of the failure of the First Nat. Bank of Dansville, serve to illustrate that the avails of the collection must have come into the hands of the receiver or assignee before an equitable preference can be secured by the owner of the securities.

Where an administrator deposited certain securities with both sureties on his administration bond for their protection, which they afterward sold and the proceeds of which they appropriated to their own use, and then made a general assignment, it was held that the assets in the hands of the assignee being increased to the amount of the funds so appropriated, was properly chargeable therewith in favor of the representatives of the estate. *Matter of Mumford*, 5 State R. 303. See *Rabel* v. *Griffin*, 12 Daly, 241; *Hooley* v. *Gieve*, 9 Daly, 104; affi'd, 82 N. Y. 625; and see note to this case, 9 Abb. N. C. 41. See also note on commingling trust funds, 17 Abb. N. C. 160.

§ 158. Property transferred by previous assignment.—The assignment of a chose in action will prevent its passing to assignees in virtue of a subsequent general assignment by the same assignor under the bankrupt or insolvent acts; and this without

notice to the debtor or subsequent assignees. *Muir* v. *Schenck*, 3 Hill, 228.

So a claim transferred by a previous general assignment for the benefit of creditors will not pass to a trustee to whom an assignment is subsequently made under the insolvent act. *Hopkins* v. *Banks*, 7 Cow. 650.

Where a debtor, residing in Pennsylvania, to whom a mortgage upon land in this State had been given, delivered the mortgage over, so as to pass the equitable interest in it to another, and then executed an assignment under the insolvent laws of Pennsylvania, it was determined that no interest in the mortgage passed to the assignee under that assignment. *Hosford* v. *Nichols*, 1 Paige, 220.

§ 159. **Rights subsequently accruing.**—Where a general assignment was dated and acknowledged on the 25th day of February, 1876, but was not delivered to the assignee until the 13th day of May, 1876, held that a cause of action accruing to the assignor for services performed between the dates above stated did not pass to the assignee. *Crow* v. *Colton*, 7 Daly, 52.

Where property of the assignor has been forfeited to the United States before it came into the control of the assignee for the benefit of creditors, a subsequent remission of the forfeiture and an order for the payment to the owners of a part of the avails of the property, will not inure to the benefit of the assignee. *Ward* v. *Webster*, 9 Daly, 182.

In the case of *Taft* v. *Marsily*, 120 N. Y. 474; affi'g 54 Supm. Ct. (47 Hun), 175, it was held that a claim for enhanced premiums of insurance, payable under the Act of Congress for the distribution of the "Geneva Award," was not assignable, and did not pass to an assignee in bankruptcy, for the reason that no legal claim existed in favor of such claimants, and the distribution in favor of such claim was a gratuity. Indemnity for loss or injury caused by the foreign government is not, however, bounty, but is a property right, and the award in such cases is capable of assignment. *Comegys* v. *Vasse*, 1 Pet. 193; *Bachman* v. *Lawson*, 109 U. S. 659; *Phelps* v. *McDonald*, 99 U. S. 298; *Leonard* v. *Nye*, 125 Mass. 455; *Heard* v. *Sturgis*, 146 Mass. 545.

§ 160. **Money in bank.**—A general assignment of all a debtor's property passes a deposit to his credit in a bank, and carries to the assignee all the right which the depositor had in the deposit at the date of the assignment; and the bank has no lien in such a case upon the deposit for the amount of a bill of exchange indorsed by the depositor and discounted by the bank, but which bill has not yet matured. *Beckwith* v. *Union Bank*, 9 N. Y. 211; affi'g 4 Sandf. 604; see *Coates* v. *First Nat. Bank*, 47 Super. Ct. (15 J. & S.), 322; *Lawrence* v. *Bank of Republic*, 35 N. Y. 320.

§ 161. **Property in transit.**—An assignment of all the debtor's "goods and chattels, wares and merchandise, rights, credits, notes, accounts, and demands," does not pass his interest in a sum of money borrowed by him, and then in course of transmission to him from the lender. *Sheldon* v. *Dodge*, 4 Den. 217.

So when parties being insolvent purchased a quantity of whisky on a credit of five months, and on the day the goods were shipped the purchasers made a general assignment, it was held that the assignee acquired no title to the whisky, which arrived several days after the execution of the assignment, and the assignee having sold it, was held liable for conversion. *Lacker* v. *Rhoades*, 51 N. Y. 641; rev'g 45 Barb. 499.

But where the assignor had ordered certain goods to be manufactured for him in England, previous to executing the assignment, and the goods arrived here subsequent to the assignment, it was held that the assignee had his election to accept the goods and pay the contract price, or to refuse to accept them; and having accepted them, his title was good against a levy made by the sheriff on an execution against the assignor. *Van Dine* v. *Willett*, 38 Barb. 319.

When the assignor purchases goods which arrive when he is on the point of making an assignment, and therefore informs the seller of his condition, and declines to receive the goods, and afterward assigns, the assignee cannot successfully claim title to the goods. *Flynn* v. *Ledger*, 55 Supm. Ct. (48 Hun), 465.

Property in transit, which is subject to the vendor's right of stoppage *in transitu*, passes to the assignee, subject to the same rights which the vendor would have against the assignee, inas-

much as the voluntary assignee is not to be regarded as a *bona fide* purchaser for value. See note on stoppage in transit, *post*, Chap. XX.

§ **162. Trade-mark—Fixtures.**—It was held in the *Matter of Knox*, 1 Mon. L. B. 47, that a trade-mark belonging to the assignor passes under the assignment, and may be disposed of as other assets. Whether such is the effect of the assignment was questioned, but not decided, in *Milliken* v. *Dart*, 33 Supm. Ct. (26 Hun), 24. See *Hegeman* v. *Hegeman*, 8 Daly, 6. See *Helmbold* v. *Helmbold Mfg. Co.*, 53 How. Pr. 453 ; *Bradley* v. *Norton*, 33 Conn. 157 ; *Warren* v. *Warren Thread Co.* 134 Mass. 247.

As between the general assignee of the mortgagor and a mortgagee claiming certain property as fixtures, the assignee stands in the position of the mortgagor. *Wells* v. *Maples*, 22 Supm. Ct. (15 Hun), 90.

§ **163. Consigned goods.**—When an assignment is made by a commission merchant or one having goods on consignment, the question may arise how far the principal or the owner of the consigned goods has a prior right of payment out of the proceeds of the assigned estate. "The relation between a commission agent for the sale of goods and his principal is fiduciary. The title to the goods until sold remains in the principal, and when sold, the proceeds, whether in the form of money, or notes, or other securities, belong to him, subject to the lien of the commission agent for advances and other charges. The agent holds the goods and the proceeds upon an implied trust to dispose of the goods according to the directions of the principal, and to account for, and pay over to him the proceeds from sales," Andrews, J. *Baker* v. *N. Y. Nat. Exch. Bk.*, 100 N. Y. 31, 33. The inquiry in every case is whether the relation between the parties has been modified by express agreement or by the course of business, so that it has ceased to be fiduciary and has become that of debtor and creditor. *Gindre* v. *Kean* (Com. Pleas), 7 Misc. 582 ; s. c. 58 State R. 505 ; *Wallace* v. *Castle*, 21 Supm. Ct. (14 Hun), 106 ; *Converseville Co.* v. *Chambersburg Woolen Co.* Ibid. 609 ; *Standard Wagon Co.* v. *Nichols*, 48 Supm. Ct. (41 Hun),

261; *Donovan* v. *Cornell*, 3 How. Pr. N. S. 525; *Springville Mfg. Co.* v. *Lincoln*, 16 Daly, 318; s. c 32 State R. 668. The fact that the factor is acting under a *del credere* commission does not necessarily destroy the fiduciary relation. *Wallace* v. *Castle*, 21 Supm. Ct. (14 Hun), 106; *Converseville Co.* v. *Chambersburg Woolen Co.* Ibid. 609; *Gindre* v. *Kean*, 7 Misc. 582. Where the proceeds of the consigned goods can be traced, as, for instance, debts due from purchasers of the consigned goods, they may be reached by the principal in the hands of the assignee. *Converseville Co.* v. *Chambersburg Woolen Co.*, *supra*; *McDonald* v. *Bayne*, 36 State R. 203; s. c. 12 N. Y. Supp. 772; *Bertha Zinc & M. Co.* v. *Clute*, 57 State R. 70; s. c. 7 Misc. 123. And when the proceeds of the consigned goods have been commingled with the funds of the assignor, it has been held that the whole body of the assets received by the assignee are changed, with a lien in favor of the consignors to the amount of such proceeds (*Standard Wagon Co.* v. *Nichols*, 48 Supm. Ct. [41 Hun], 261), but the same rule doubtless applies as that which obtains as to trust property generally—to wit, that the proceeds in some form must have come into the hands of the assignee.

§ 164. Consigned goods—continued.—Wherever a commission merchant or factor receives the goods of his principal with the understanding that he is to sell the goods, of divers consignors, and take in payment one security or one sum for the goods of several principals, with the right to deposit the money and use the security as his own, and pay the consignors as general creditors and not as principals having a right each to the proceeds of his own goods, the consignor cannot follow the proceeds of his goods in the hands of the assignee, nor has his claim any superiority to those of ordinary creditors. *Matter of Kobbe*, 10 Daly, 42. And in analogy to this principle it was held, that where a party agreed to make certain advances to a manufacturer, and took an agreement by which the manufacturer agreed that the amount of such advances should be a prior lien upon manufactured goods and goods in process of manufacture, being in the nature of a continuing security for future advances upon goods to be manufactured, it was held that the party making the advances had no prior lien upon the proceeds of the

goods in the hands of an assignee for the benefit of creditors. *Person* v. *Oberteuffer*, 59 How. Pr. 339. When the goods of the principal or their proceeds are distinguishable in the hands of the assignee the principal may reach them. *Converseville Co.* v. *Chambersburg Woolen Co.* 21 Supm. Ct. (14 Hun), 609 ; *Matter of Kobbe*, *supra*. A principal will estop himself from claiming the proceeds of his goods by presenting to the assignee a demand in the ordinary form of a creditor's claim, and accepting a dividend thereon. If the assignee pays out the fund in dividends the principal cannot make claim to any portion of the fund so paid out, and hold the assignee for a misappropriation. *Matter of Kobbe*, 10 Daly, 42.

The assignee of a factor is under the same obligation to restore to a consignor the proceeds of his goods which are distinguishable as the factor himself. *Francklyn* v. *Sprague*, 17 Supm. Ct. (10 Hun), 589. The assignee, however, is entitled to retain in his hands the proceeds of goods sold by the factor, until the notes or acceptances by the factor are paid or canceled. *Francklyn* v. *Sprague*, *supra* ; *Addison* v. *Burckmeyer*, 4 Sandf. Ch. 498.

§ 165. Stocks held on margin.—In *Sillcocks* v. *Gallaudet*, 73 Supm. Ct. (66 Hun), 522, a firm of brokers made an assignment, and among their assets were certain stocks which they had bought and were carrying for customers on margin, and there were also certain stocks which customers had placed in their hands as collateral for their operations. The brokers themselves owned no stocks. All that they held belonged to customers, for whom they were carrying them on a margin, and they had all been pledged by the brokers. The plaintiff claimed to be able to trace certain stocks which were pledged as having been bought for him. It was held that the plaintiff had no superior equity ; that all the stocks held on a margin having been purchased and disposed of in the same way, no priority arose from the fact that one creditor could identify his while another could not. As to the stock deposited as security, and which had been wrongfully pledged, it was held that the owner was entitled to a priority out of the proceeds of the collateral sold after payment of the pledge.

So where a stock broker having securities of his customers in his possession pledged them to secure his own debt, and the securities were sold by the pledgee, thus diminishing his claim upon other securities, the proceeds of which came to the assignee, it was held that the fund so received by the assignee was impressed with an equity in favor of the owner of the securities wrongfully pledged. *Matter of Smyth*, 2 How. Pr. N. S. 431; affi'd at Gen. Term, 48 Supm. Ct. (41 Hun), 639; s. c. 24 Weekly Dig. 217; Ct. of App. 105 N. Y. 619. See *Powers* v. *Savin*, 71 Supm. Ct. (64 Hun), 560.

§ 166. Judgments.—By § 1263 of the Code of Civ. Pro., a resident of the State, or a person having an office within the State for the regular transaction of business in person, who becomes the owner of a judgment by virtue of a general assignment for the benefit of creditors, of an appointment as a receiver or trustee or assignee, of an insolvent debtor or bankrupt, may file with the clerk in whose office the judgment roll is filed, a notice of the assignment or of his appointment and of his ownership of the judgment. The notice must be subscribed by him, adding to his signature his place of residence, and also, if he resides without the State, his office address. A notice so filed has the same force and effect for the purpose of article third, of title one, of chapter eleventh, of the Code of Civ. Pro., as if it was an assignment of the judgment.

An assignment which in terms conveys all the debtor's property includes a judgment which he owns, although it is not included in the inventory, and is, in fact, unknown to the assignor, and when by subsequent conveyance the assignee assigns all claims, judgments, and evidences of debt, such assignment will pass title to the judgment. *Emigrant Ind. Sav'gs Bank* v. *Roche*, 93 N. Y. 374.

§ 167. Claims against the United States.—An act of Congress (U. S. R. S. § 3477) renders void all transfers and assignments of claims upon the United States, unless executed in the presence of at least two witnesses, after the allowance of the claim and the issuing of a warrant therefor. This enactment has not been regarded as including such assignments or transfers

as are made by operation of law, and for that reason they do not include the transmission of claims of heirs, devisees and assignees in bankruptcy (*Erwin* v. *U. S.* 97 U. S. 392), and for similar reasons it has been held not to include a general assignment for the benefit of creditors. *Goodman* v. *Niblack*, 102 U. S. 556 ; *Stanford* v. *Lockwood*, 95 N. Y. 582 ; 31 Supm. Ct. (24 Hun), 291.

§ **168. Real property.**—Where land is to be conveyed, the assignment should be executed with the formalities of a deed of conveyance ; it should be under seal and should be recorded as a conveyance, otherwise it will not be notice to subsequent purchasers and incumbrances. *Simon* v. *Kaliske*, 6 Abb. Pr. N. S. 224 ; s. c. 37 How. Pr. 249.

Land passes by a general assignment under the insolvent act, and a creditor whose judgment against the insolvent is perfected after the assignment has no lien, and therefore cannot redeem within the act. *Marsh* v. *Wendover*, 3 Cow. 69.

A general assignment which conveys all real estate of the grantor in a specified town, and all leases and reservations and rents thereof issuing therefrom, together with all debts due for rents of land in said town, passes to the assignee the covenants, conditions, or right of entry contained in a lease in fee. *Main* v. *Green*, 32 Barb. 448.

A general designation in the assignment of all the property of the assignor, real and personal, will pass title to land (*Raynor* v. *Raynor*, 28 Supm. Ct. [21 Hun], 36) ; but when the conveyance was of all the debtor's property of every kind, personal and mixed, it was held that these words limited the conveyance to personal estate. *Rhoads* v. *Blatt*, 16 N. B. R. 32 ; see also *Price* v. *Haynes*, 37 Mich. 487 ; s. c. 1 Am. Insol. R. 137.

Where under a verbal agreement to share the profits and losses of the sale of lands standing in the name of an assignor he becomes entitled to recover under the agreement for a share of the losses, this claim passes to the assignee. *Babcock* v. *Read*, 50 Super. Ct. (18 J. & S.) 126.

§ **169. Wife's dower and separate property.**—Unless the wife voluntarily relinquishes her right of dower in real estate

assigned by her husband, the assignee will take the land subject to that right (*Dimon* v. *Delmonico*, 35 Barb. 554), and she will be entitled to her dower in any surplus which may come into the hands of the assignee after foreclosure. *Mathews* v. *Duryee*, 3 Abb. Dec. 220 ; s. c. 4 Keyes, 525 ; affi'g 45 Barb. 69 ; s. c. 17 Abb. Pr. 256. When the wife intends to convey her right of dower, it may be done by deeds of conveyance ancillary to the assignment executed by her husband and herself. *Darling* v. *Rogers*, 22 Wend. 483. A wife takes dower in the surplus after foreclosure and sale of real estate fraudulently assigned by her husband. *N. Y. Life Ins. Co.* v. *Mayer*, 19 Abb. N. C. 92.

Previous to the married woman's acts, an assignment by the husband under the insolvent act vested in the assignee the personal estate of the wife, unless the same was secured to her as her separate property. But the assignee took the legal interest in the same, subject to the wife's right of survivorship, if the husband died before the assignee has reduced such property to possession. The assignee also took the assignment of the wife's estate in action, subject to her equitable claim thereon, for the support of herself and her infant children, if she had no other sufficient means for that purpose, provided such claim was asserted by the wife, or there is a suit instituted in this court for the recovery of such property before the assignee has reduced it to possession. *Van Epps* v. *Van Dusen*, 4 Paige, 63, 74.

§ 169a. **Interests of devisees.**—A devisee of real estate, who was also the recipient of personal property under the will, which was charged with the payment of debts, assigned "all his share and claim in and to the personal estate of the testator, and in and to all moneys which then were or thereafter might come into the hands of the executors, arising from any property or estate of the testator." Previous to the assignment the executors sold a portion of the real estate devised, under a surrogate's order, for the payment of debts, by reason of a deficiency of personal estate. The executors discovered and received other assets after the assignment. It was held that the equitable right of such devisee, to be indemnified for the sale of his real estate out of assets and moneys subsequently discovered and received by the executors, passed to the assignee, although not specially

mentioned in the assignment, and although it did not appear that the assignor knew of the fund in question. *Couch* v. *Delaplaine*, 2 N. Y. 397; and see *Brown* v. *Pease*, 6 State R. 191.

§ 170. Leasehold property.—The question whether leasehold property passes under the assignment to the assignee, is one of importance to the assignee, for if he become the assignee of the lease, he will be bound by all its covenants and conditions, and will therefore become liable for the payment of the rent. The liability of an assignee for rent will be considered in its appropriate place, 1 *post*, § 330. The inquiry at present is under what circumstances the leasehold property passes to him. It seems to be now definitely settled, that assignees under a general assignment, like assignees in bankruptcy, are not bound to accept property which is not valuable to the estate, and that consequently they have an election whether to accept leasehold property burdened with the payment of the rent, or to reject it. *Copeland* v. *Stephens*, 1 Barn. & Ald. 593; *Carter* v. *Warne*, 4 Car. & Pay. 191; *Pratt* v. *Levan*, 1 Miles (Penn.), 358; *Journeay* v. *Brackley*, 1 Hilt. 447; *Stinemets* v. *Ainslie*, 4 Den. 573; *Martin* v. *Black*, 9 Paige, 641; McAdam's Landlord and Tenant (2d ed.), 281.

If the conveyance of the debtor's property is in general terms, without any special designation of the lease, the lease will be deemed property passing under the assignment or not, at the election of the assignee, until he enters under it or, by some other act or omission to act, determines his right to elect. *Carter* v. *Hammett*, 12 Barb. 253, 263; *Bagley* v. *Freeman*, 1 Hilt. 196; *Dennistoun* v. *Hubbell*, 10 Bosw. 155; *Jones* v. *Hausmann*, Id. 168; *Lewis* v. *Burr*, 8 Id. 140; *Foster* v. *Oldham*, 53 State R. 488.

When the assignment was silent as to the lease, but the assignee knew of it before accepting the trust, and took possession of the premises and carried on the assignor's business for three months, this was held to have entered an acceptance of the lease as matter of law. *Myers* v. *Hunt*, 8 State R. 338. But when the assignee refused to assume the lease, but made an offer for temporary possession, which was not accepted, the parties not being able to agree upon the rent, after which he remained in posses-

sion for two months, it was held that the assignee had not assumed the lease, but was merely a tenant by sufferance. *Weil* v. *McDonald*, 21 Wkly. Dig. 440. See also *Stephens* v. *Stein*, 30 State R. 391.

But it seems that if the lease is specifically mentioned in the assignment, or there are apt words of conveyance of leasehold property, and the assignee knows of the existence of the lease, the acceptance of the assignment will amount presumptively to an acceptance of the lease. *Astor* v. *Lent*, 6 Bosw. 612; *Young* v. *Peyser*, 3 Bosw. 308; *Bagley* v. *Freeman*, 1 Hilt. 196; see *Morton* v. *Pinckney*, 8 Bosw. 135; *Powers* v. *Carpenter*, 15 Weekly Dig. 155.

A conveyance of all other real and personal property and estate, whatever and wherever situate, and all interest therein, is sufficiently comprehensive to include the interest of the assignee of a lease equitably assigned. *Astor* v. *Lent*, 6 Bosw. 612.

If the assignee accepts the assignor's lease, he may be removed in summary proceedings for non-payment of rent. *Hasbrouck* v. *Stokes*, 13 N. Y. Supp. 333.

§ 171. **Exemptions.**—The debtor may lawfully except from the operation of the assignment, property which is by law exempt from levy and sale under execution. *Dow* v. *Platner*, 16 N. Y. 562; *Dolson* v. *Kerr*, 12 Supm. Ct. R. (5 Hun), 643; *Heckman* v. *Messinger*, 49 Penn. St. 465; *Baldwin* v. *Peet*, 22 Tex. 708; *Garnor* v. *Frederick*, 18 Ind. 507; *Smith* v. *Mitchell*, 12 Mich. 180; *Farquharson* v. *McDonald*, 2 Heisk. (Tenn.) 404. As to the necessity of specifically describing the property exempt, see cases in other States, collected in note to *Lawrence* v. *Norton*, 22 Am. L. Reg. N. S. 264, 265. In the earlier cases in this State, it was at one time held that the reservation of a sum of money to be paid to the assignors for their maintenance, would be sustained. *Murray* v. *Riggs*, 15 Johns. 571; s. c. 2 Johns. Ch. 565; *Austin* v. *Bell*, 20 Johns. 442. But this doctrine has been distinctly and emphatically overruled. *Goodrich* v. *Downs*, 6 Hill, 438, 440; *Grover* v. *Wakeman*, 11 Wend. 187; *Butler* v. *Van Wyck*, 1 Hill, 438, 463; *Mackie* v. *Cairns*, 5 Cow. 547, 584; *White* v. *Fagan*, 18 Weekly Dig. 358.

And it is now the settled law of this State, that the property covered by the assignment must be unreservedly applied to the benefit of creditors. *Mackie* v. *Cairns*, 5 Cow. 547, 584; *Currie* v. *Hart*, 2 Sandf. Ch. 353.

But it does not necessarily follow that all the debtor's property must be included in the assignment, if the property not included is left open to creditors. Thus, an assignment which expressly excepted a claim then in suit, was held not to create a reservation for the ease, advantage or benefit of the assignor. *Carpenter* v. *Underwood*, 19 N. Y. 520.

If a debtor in failing circumstances makes an assignment of his property for the benefit of a part of his creditors only, and the value of the property assigned is more than could have been supposed necessary to satisfy the claims of those creditors, fraud may be inferred from that circumstance alone, unless a satisfactory excuse is shown for the transfer of the excess. Chan. Walworth, in *Beck* v. *Burdett*, 1 Paige, 305, 309; see *Butler* v. *Stoddard*, 7 Paige, 163.

CHAPTER XI.

PREFERENCES.

§ 172. **In general.**—It cannot be doubted that, in the absence of a bankrupt law or some statutory inhibition, a debtor while he is administering his own affairs may honestly prefer the payment of one debt to another. He may indeed apply all his property to the payment of one debt, if the debt be one for which he is justly liable, and the property be no more than sufficient to pay it without the imputation of fraud. *Archer* v. *O'Brien*, 14 Supm. Ct. (7 Hun), 146; *Auburn Ex. Bank* v. *Fitch*, 48 Barb. 344; *Carpenter* v. *Muren*, 42 Id. 300; *Leavitt* v. *Blatchford*, 17 N. Y. 521; *Woodworth* v. *Sweet*, 51 N. Y. 8; *Hall* v. *Arnold*, 15 Barb. 599, 600; *Waterbury* v. *Sturtevant*, 18 Wend. 353; *Hill* v. *Northrop*, 9 How. Pr. 525; *Williams* v. *Brown*, 4 Johns. Ch. 682; *Jewett* v. *Noteware*, 37 Supm. Ct. (30 Hun), 192; *Spaulding* v. *Strang*, 37 N. Y. 135; *Stanley* v. *Nat. Union Bank*, 115 N. Y. 122; *Jewell* v. *Knight*, 123 U. S. 426; *Bishop* v. *Stebbins*, 48 Supm. Ct. (41 Hun), 243. The law on this subject is forcibly expressed by Mr. Justice E. Darwin Smith, in the following language: "A man may at all times convey or turn out his property in payment of his just debts; and this is none the less true, because he is straitened in his circumstances, and unable to pay all his creditors. At such times he may honestly prefer one creditor to another, and if he sells and conveys his property for a fair price in payment of just debts, no one can question the legality of the conveyance or transfer. There is, there can be, no fraud in such a transaction. Fraud cannot be predicated upon it, on the assumption that the debtor meant to defraud his creditors. There is no fraud in the case, if the property in fact goes to pay and satisfy an honest debt." E. D. Smith, J., in *Auburn Exchange Bank* v. *Fitch*, 48 Barb. 344, 353; see *Laidlaw* v. *Gilmore*, 47 How. Pr. 67.

And where the conveyance is directly to a creditor in consid-

eration of a previous valid indebtedness, it is not repugnant to the statute of frauds as being a voluntary conveyance. It is not necessary that the creditor should show any new consideration, for the obvious reason that his equity, at the time of the transfer, was the same as that of all other creditors, and he is entitled to the benefit of the universal rule, that when the equities are equal the legal title will prevail. *Seymour* v. *Wilson*, 19 N. Y. 417, 421 ; *Archer* v. *O'Brien*, 14 Supm. Ct. (7 Hun), 146 ; see *Towsley* v. *McDonald*, 32 Barb. 604.

And the transfer will be sustained although the debtor designed and intended to prevent some other creditor from taking the property. *Hall* v. *Arnold*, 15 Barb. 599 ; *Jewett* v. *Noteware*, 36 Supm. Ct. (30 Hun), 192, 194.

Nor is the payment or transfer any the less valid because the creditor is acquainted with the insolvent condition of the debtor. Indeed, it has been said that " the creditor, when he discovers circumstances which would put a prudent man on inquiry, should, in the preservation of his own rights, seek the payment of his debt, the protection of his property. Such a course is not only consistent with honesty, but is a duty which he owes to himself, the observation of which is sanctioned by the rules of law authorizing the preference which he obtains." Mr. Justice Brady, in *Archer* v. *O'Brien*, 14 Supm. Ct. (7 Hun), 146, 149 ; *Hale* v. *Stewart*, 14 Supm. Ct. (7 Hun), 591 ; *Del Valle* v. *Hyland*, 83 Supm. Ct. (76 Hun), 493.

So a debtor, after a verdict against him, and previous to the entry of a judgment thereon, may lawfully give a preference to a creditor, by conveying to him real estate in satisfaction of a *bona fide* debt, and thus prevent the attachment of a lien upon the real estate, by virtue of a judgment entered upon the verdict. *Waterbury* v. *Sturtevant*, 18 Wend. 353 ; and see *Wilder* v. *Winne*, 6 Cow. 284 ; affi'd, 4 Wend. 100. This has been the law ever since the leading case of *Holbird* v. *Anderson* (5 T. R. 235). *Weller* v. *Wayland*, 17 Johns. 102 ; *Jackson* v. *Brownell*, 3 Cai. 222.

§ 173. Preferences in general assignments.—Creditors acquire no legal rights in the debtor's property merely from the fact of his insolvency, and the debtor therefore, after as well as

before he becomes insolvent, may make any disposition of his property which does not interfere with the existing rights of others. *Mayer* v. *Hellman*, 91 U. S. 496. It is an exercise of the absolute dominion which a person has over his own property, which has established the rule at common law, that a debtor may assign his property to a trustee in payment of preferred creditors. *Reed* v. *McIntyre*, 98 U. S. 507, 510.

"The true reason," says Senator Tracy, in *Grover* v. *Wakeman* (11 Wend. 187, 218), "why this right of preference has been allowed to the debtor is, that whilst the property is in his hands unshackled of legal liens and incumbrances, his power over it is absolute, and as he can dispose of it by sale to any person, so he may dispose of it by way of satisfaction to any creditor."

This right is unrestrained by statute in this State, except in the special instances which will be referred to, and the cases in which it has been decided that a debtor in failing circumstances has a right to prefer one of his creditors to another in the distribution of his estate, are very numerous. *McMenomy* v. *Roosevelt*, 3 Johns. Ch. 446; *Murray* v. *Riggs*, 15 Johns. 571; *Wilkes* v. *Ferris*, 5 Johns. 335; *Mackie* v. *Cairns*, 5 Cow. 547; affi'g Hopk. Ch. 373; *Wilder* v. *Winne*, 6 Cow. 284; *Wintringham* v. *Lafoy*, 7 Cow. 735; *Hendricks* v. *Robinson*, 2 Johns. Ch. 283; affi'd, 17 Johns. 438; *Hyslop* v. *Clarke*, 14 Johns. 458; *Grover* v. *Wakeman*, 11 Wend. 187; *Webb* v. *Daggett*, 2 Barb. 9; *Brigham* v. *Tillinghast*, 15 Id. 618; *O'Neil* v. *Salmon*, 25 How. Pr. 246; *Cram* v. *Mitchell*, 1 Sandf. Ch. 251; *Jacobs* v. *Remsen*, 36 N. Y. 668; *Casey* v. *Janes*, 37 Id. 608; *Grant* v. *Chapman*, 38 Id. 293; *Putnam* v. *Hubbell*, 42 Id. 106; *Jaycox* v. *Caldwell*, 51 Id. 395; *Dana* v. *Owen*, 54 Id. 646; *Rathbun* v. *Platner*, 18 Barb. 272; *Stern* v. *Fisher*, 32 Id. 198; *Keteltas* v. *Wilson*, 36 Id. 298; *Hauselt* v. *Vilmar*, 76 N. Y. 630; *Matter of Bryce*, 16 Daly, 37; s. c. *sub. nom. Matter of Boyd*, 35 State R. 37; *Barnett* v. *Kinney*, 147 U. S. 476.

In many of the States preferential assignments are prohibited by statute, but in none has the rule at common law, as above stated, been denied. Burrill on Assignments, 6th ed. c. X.

§ 174. The right to prefer not favorably regarded.—Although the right to prefer is sustained by such overwhelming

weight of authority, yet the law simply tolerates assignments giving preferences, it does not favor them. Vice-Chan. Sandford, in *Mead* v. *Phillips*, 1 Sandf. Ch. 83 ; *Rathbun* v. *Platner*, 18 Barb. 272. And it appears to be the settled doctrine of the courts of this State, not to sanction the extension of the principles beyond what must be considered the settled law of the land. See *Wilson* v. *Ferguson*, 10 How Pr. 175.

" The principle of allowing an insolvent debtor to give, arbitrarily, such preferences, among creditors equally worthy, as may result in the payment of the entire debt of one and the loss of the entire debt of another, has been condemned in the strongest terms, by many of the wisest statesmen and the most enlightened jurists of our country. Hence it is that most, if not all the laws which are passed for the relief of insolvent debtors, are found denying their advantages to such debtors as have, in the disposition of their property, given preferences among their creditors." Harris, J., in *Webb* v. *Daggett*, 2 Barb. 9, 11.

While admitting the right to prefer, the policy of permitting its exercise has frequently been criticised and condemned. Thus Mr. Justice Duer, in *Nicholson* v. *Leavitt* (4 Sandf. 252, 280, 282), uses the following emphatic language :

" The preference, which they create in the order of payment, and which, while it probably secures the favored creditors to the full extent of their demands, leaves to those who remain only a faint hope and doubtful chance of a miserable dividend, we condemn as a positive injustice, and lament that the law has denied to us the power of redressing the wrong. We know that the custom of giving such preferences has extensively prevailed, and is warranted in a measure by public opinion as well as by the decisions of our courts ; but we are not the less persuaded that it is forbidden by public policy, and is inconsistent with a sound morality. . . . It is now the undoubted law of the State, and however serious may be the conviction of judges, that the allowance of the practice tends to injustice and tempts to fraud, the legislature alone is competent to apply the remedy. Until the existing law shall have been altered by the National or State Legislature, our jurisprudence must remain liable to the reproach that we are the only nation in the civilized world in which a merchant, knowing or contemplating his insolvency,

is allowed to place his whole property beyond the reach of the body of his creditors, by devoting its avails, principally or exclusively, to the satisfaction of the claims of a few. In every civilized country but our own, it is not only a truth in morals, but a rule in law, that the property of an insolvent debtor belongs to his creditors in the proportion of their debts, and that every disposition made by him, in contravention of their equal rights, is null and void."

And language of a similar character, although perhaps not equally severe, may be found in many of the reports of this State. See remarks of Mr. Justice Sutherland, in *Grover* v. *Wakeman*, 11 Wend. 187, 194; Chancellor Kent, in *Riggs* v. *Murray*, 2 Johns. Ch. 565, 577; Mr. Justice Nelson, in *Cunningham* v. *Freeborn*, 11 Wend. 240, 256; Mr. Justice Roosevelt, in *Nichols* v. *McEwen*, 17 N. Y. 22; Chancellor Walworth, in *Boardman* v. *Halliday*, 10 Paige, 223.

But a more favorable view of the system of preferences has sometimes been expressed. Thus Mr. Justice Porter, in *Townsend* v. *Stearns* (32 N. Y. 209, 213), says: "Some diversity of opinion exists, and occasionally finds expression in the courts, as to the policy of our laws, in permitting a debtor, by his own act, to withdraw his property from the reach of ordinary process. It is true that it tends to the disadvantage of those not preferred; but it operates beneficially to the creditors as a class, by securing the application to the payment of debts, of a large portion of the assets, which would otherwise be exhausted by the costs, incident to a race of legal diligence between the prosecuting creditors. It tends also to such delay as may be needful in the execution of the trust; but this is common to all the creditors, and no more the subject of just complaint, than the delay unavoidably incident to the extinguishment of claims against the estate of a deceased debtor."

Under the statute of 1887, limiting the right to prefer to one-third of the assets, preferential assignments are more tolerable to the extent to which the preference is restricted. In *Mills* v. *Parkhurst*, 126 N. Y. 89, 94, it is said by Mr. Justice Gray, that "If the distribution is to be made unequally among the creditors, and some are preferred to others in payment, the assignment is not viewed by the courts with any favor, and is only

tolerated and upheld, when all conditions are met for the prevention of fraud." As to preferential assignments, the same rule of construction and enforcement apply as in other contracts. (See *post*, § 198.) *Matter of Fay* (Com. Pleas), 6 Misc. 462.

§ 175. **Preference of wages by statute.**—In 1884 the General Assignment Act was amended by inserting the following provision in Section 29: "In all assignments, made in pursuance of this act, the wages or salaries actually owing to the employees of the assignor or assignors at the time of the execution of the assignment, shall be preferred before any other debt; and should the assets of the assignor or assignors not be sufficient to pay in full all the claims preferred, pursuant to this section, they shall be applied to the payment of the same *pro rata* to the amount of each such claim." Laws of 1884, c. 328.

The question was presented in several cases as to whether a failure to comply with the provisions of the act of 1884 renders the assignment invalid.

The case of *Richardson* v. *Thurber*, 104 N. Y. 606, arose on demurrer to a complaint which alleged that the assignors were indebted at the time of the making of the assignment for wages; that they did not prefer such wages debts, but directed that the assigned property should be applied to the payment of other debts in priority to such wages debts. It was held that this assignment, made after the passage of the act of 1884, was not invalid by reason of the failure of the assignors to comply with that statute. The court was of opinion that the legislature intended in the event of the making of a general assignment to create a preference in the distribution of the assigned estate in favor of wages creditors, and it was also held that such a construction of the act would not render it unconstitutional, for the reason that since the legislature has power to regulate the mode of making general assignments, and to permit them to be made only on express conditions, that therefore, "availing himself of the permission, he cannot be supposed also to repudiate its terms." This opinion is open to the criticism that in the case before the court there was no room for presumption as to what the assignor intended by his assignment. It was conceded by the demurrer that his intention was contrary to the requirement

of the statute. That being the case, if a general assignment is still a voluntary conveyance by contract, it is difficult to see how the legislature can constitutionally give it an effect different from its conceded meaning. Such power of remaking private contracts is not believed to exist in the legislature under our constitutional limitations.

A conclusion similar to that in *Richardson* v. *Thurber* was reached in General Term, fifth department, in *Burley* v. *Hartson*, 47 Supm. Ct. (40 Hun), 121, the opinion being placed on somewhat different grounds; and to the same effect are *Roberts* v. *Tobias*, 9 State R. 59; *Johnston* v. *Kelly*, 50 Supm. Ct. (43 Hun), 379.

But in *Smith* v. *Hartwell*, 55 Super. Ct. (23 J. & S.) 325; s. c. 14 State R. 754, since the decision of *Richardson* v. *Thurber*, the General Term of the Superior Court of New York have held, Sedgwick, C. J., writing the opinion, that an assignment which does not comply with the statute is void. In that case it appears (see opinion of Ingraham, J., 14 State R. 754, note) that the plaintiff was an unpreferred wages creditor, and that some of the wages creditors had been preferred by the assignment, but not all. The decision of the Court of Appeals, in *Richardson* v. *Thurber*, was not alluded to.

The first paragraph of the section was amended in 1886, so that it now reads (Laws of 1886, c. 283): "In all distributions of assets under all assignments, made in pursuance of this act, the wages or salaries actually owing to the employees of the assignor or assignors at the time of the execution of the assignment shall be preferred before any other debt."

The statute as now construed in effect works a sequestration *pro tanto* of the property of the debtor, who makes an assignment and applies so much of it as is necessary for the payment of wages for that purpose whether he so intends or not. That this may lawfully be done within constitutional provisions, guaranteeing "due process of law" before one's property can be taken *ad invitum*, is to be regarded as settled by *Richardson* v. *Thurber*, *supra*.

A provision in a general assignment that preferences shall in every particular be made in accordance with laws of the State of New York in regulation of preferential assignments, is a valid

compliance with the statute. *Chambers* v. *Smith*, 67 Supm. Ct. (60 Hun), 248.

When we inquire what obligations are covered by the words "wages" and "salaries," little direct help is to be found in the reported cases.[1] In *Spencer* v. *Hodgman*, 64 Supm. Ct. (57 Hun), 490; s. c. 33 State R. 33, the employee had received notes covering the amount due him, which he had transferred, and at the time of the assignment they belonged to other persons. Subsequently the employee took up the notes and claimed a preference under the assignment. It was held that he was not entitled to a preference, inasmuch as the indebtedness was not owing to him at the date of the assignment. And when an employee who stood in confidential and peculiar relations to her employer permitted her wages to accumulate for many years without drawing any part of them, it was held that her claim was for a loan of money and not for wages. *Clark* v. *Andrews*, 46 State R. 399.

In *Matter of Heath*, 53 Supm. Ct. (46 Hun), 114, it was held that a claim for wages, which arose before the enactment of the statute, was entitled to a preference, and that the right of preference was not affected by the circumstances that the claimant had ceased to be in the employ of the assignor at the time of the assignment. In that case the wages had accumulated for a number of years, the employee taking the notes of the assignor, which were renewed from time to time. It was held that in the absence of an express finding that the employee intended to convert his claim into one for money loaned, the original indebtedness would be presumed to continue.

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[1] The Stock Corporation Law, following the previous statute (Laws of 1892, c. 688, § 54, Laws of 1848, c. 40, § 18), renders stockholders "liable for all debts due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation." In commenting on this provision in *Wakefield* v. *Fargo*, 90 N. Y. 213, 217, Danforth, J., said: "It is plain we think, that the services referred to are menial or manual services—that he who performs them must be of a class whose members usually look to the reward of a day's labor, or service, for immediate or present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence; one who is responsible for no independent action, but who does a day's work, or a stated job under the direction of a superior." That was the case of a book-keeper and general manager. See *Coffin* v. *Reynolds*, 37 N. Y. 640; *Ericsson* v. *Brown*, 38 Barb. 390; *Boutwell* v. *Townsend*, 37 Barb. 205; *Aikin* v. *Wasson*, 24 N. Y. 482; *Balch* v.

Where an employee is entitled to a fixed sum per year as salary, and also to additional compensation equal to a certain percentage of the profits, and the employers make a general assignment during the year, the employee may prove the amount of salary due at the date of the assignment and also the percentage of the profits earned up to that date, and such claim is entitled to a preference under the statute. *Matter of Sawyer*, 31 Abb. N. C. 342.

§ 176. Preferences limited to one-third of the assets—the statute.—In 1887 the General Assignment Act was amended by the insertion of the following provision in Section 30 : "In all general assignments of the estates of debtors for the benefit of creditors hereafter made, any preference created therein (other than for the wages or salaries of employees under chapter three hundred and twenty-eight of the laws of eighteen hundred and eighty-four, and chapter two hundred and eighty-three of the laws of eighteen hundred and eighty-six) shall not be valid except to the amount of one-third in value of the assigned estate left after deducting such wages or salaries, and the costs and expenses of executing such trust ; and should said one-third of the assets of the assignor or assignors be insufficient to pay in full

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N. Y. & O. M. R. R. Co. 46 Id. 521 ; *Hill* v. *Spencer*, 61 N. Y. 274 ; *Kincaid* v. *Dwinelle*, 59 Id. 548 ; *Short* v. *Medberry*, 36 Supm. Ct. (29 Hun), 39. Under the Mechanics' Lien Laws a wider meaning is given to the word "laborers." *Stryker* v. *Cassidy*, 76 N. Y. 50.

By the Laws of 1885, c. 376, § 1, it is provided that "where a receiver of a corporation created or organized under the laws of this State and doing business therein, other than insurance and moneyed corporations, shall be appointed, the wages of the employees, operatives and laborers thereof shall be preferred to every other debt or claim against such corporation, and shall be paid by the receiver from the moneys of such corporation which shall first come to his hands." (1 Birdseye's St., p. 677, § 27.)

In *People* v. *Remington*, 52 Supm. Ct. (45 Hun), 329 ; affi'd, 109 N. Y. 631, it was held that the superintendent and attorney of a corporation were not employees within the meaning of the statute. A review of the cases will be found in the opinion. It was also held that the statute did not apply to claims which arose before its enactment, and that preference thereunder does not pass by assignment of the claim prior to the appointment of the receiver. See *Krauser* v. *Ruckel*, 24 Supm. Ct. (17 Hun), 463. See note on legal interpretation of the words "wages" and "salaries" in 25 Abb. N. C. 376.

the preferred claims to which, under the provisions of this section, the same are applicable, the said assets shall be applied to the payment of the same *pro rata*, to the amount of each said preferred claims." Laws of 1887, c. 503.

§ 177. The limitation on the right to prefer arises only where a general assignment has been made.—The case of *White* v. *Cotzhausen*, 129 U. S. 329, often cited in this connection, arose under the Illinois statute, which provides that "Every provision in any assignment hereafter made in this State providing for the payment of one debt or liability in preference to another shall be void, and all debts and liabilities within the provisions of the assignment shall be paid *pro rata* from the assets thereof." The insolvent debtor in that case, with the intent of giving preferences, executed contemporaneously conveyances, a bill of sale, a confession of judgment, and other transfers directly to creditors. He made no general assignment. It was held that the instruments by which the preferences were created operated as a general assignment, and that the property should be distributed *pro rata* among the creditors. This case was based largely upon the decision in *Preston* v. *Spaulding*, 120 Ill. 208; but in that case there was a general assignment by deed. The Supreme Court of Illinois has not accepted the views of the Supreme Court of the United States, as being in accordance with their decisions. *Farwell* v. *Nilsson*, 133 Ill. 45; *Young* v. *Clapp*, 147 Ill. 176; *Schroeder* v. *Walsh*, 120 Ill. 403, 412; *Weber* v. *Mick*, 131 Ill. 520, 533; *First Nat. Bank* v. *North Wis. Lumber Co.* 41 Ill. App. 383; *Am. Cutlery Co.* v. *Joseph*, 44 Ill. App. 194. In *Young* v. *Clapp*, *supra*, citing the language of the statute, as above quoted, the court says (p. 184): "The assignment act does not prohibit preferences generally, but only preferences which are contained in written deeds of assignment voluntarily executed for the benefit of creditors." In *Hardt* v. *Heidweyer*, 152 U. S. 547, the Supreme Court declined to determine whether it was bound by the construction of the statute placed upon it by the Illinois Court (see *Union Bk. of Chicago* v. *Kansas City Bank*, 136 U. S. 223, 235), or whether there was any substantial difference on the views of the two courts. *White* v. *Cotzhausen* is not now to

be regarded as a controlling authority. *Moore* v. *Meyer*, 47 Fed. R. 99.

In this State the doctrine of *White* v. *Cotzhausen* at one time seemed to be regarded as applicable to our statute. (See the comments on this case in *Berger* v. *Varrelmann*, 127 N. Y. 281, 290.) Thus in *Tompkins* v. *Hunter*, 72 Supm. Ct. (65 Hun), 441; rev'g *Tompkins* v. *First Nat. Bank*, 18 N. Y. Supp. 234, where a firm, being largely indebted to a bank and also to other creditors, transferred all its property to the bank in satisfaction of the indebtedness due to it, with the agreement that the firm would not make a general assignment, it was held, at the suit of a judgment creditor, that the transfer was fraudulent and void, as having been made with the intent of evading the operation of the assignment act. Upon a re-trial of this case (24 N. Y. Supp. 8) there was no evidence furnished of an agreement on the part of the debtors not to execute a general assignment, and the only question considered was whether a transfer of all the debtor's property directly to a creditor, with the intent to give a preference, was within the operation of this assignment act. After a careful consideration of the doctrine of *White* v. *Cotzhausen*, and the argument based upon it at General Term, Judge Bradley, at Special Term, held that, there having been no attempt on the part of the debtor to make what is distinctively known as a general assignment, the preferential transfer which he made was not subject to limitations and restrictions of the assignment act. In *Stein* v. *Levy*, 62 Supm. Ct. (55 Hun), 381, where judgment was entered against the debtor upon an offer of judgment, and under execution upon the judgment the debtor's whole stock of goods was seized, it was held, there being no general assignment, that this did not create an illegal preference under the assignment act, inasmuch as that act relates exclusively to general assignments. To the same effect are *Woodworth* v. *Hodgson*, 35 State R. 964; affi'd, 129 N. Y. 669; *Granger* v. *Lyman*, 39 State R. 288; *Trier* v. *Herman*, 115 N. Y. 163; *First Nat. Bank* v. *Bard*, 32 State R. 1010; *Boessneck* v. *Cohn*, 26 State R. 969; *Macdonald* v. *Wallstein*, 26 State R. 975; *Manning* v. *Beck*, 129 N. Y. 1; *Central Nat. Bank* v. *Seligman*, 138 N. Y. 435, 441; *Abegg* v. *Bishop*, 142 N. Y. 286; *Maas* v. *Falk*, 54 State R. 160.

The assignment act is not compulsory. The law does not require of a failing or insolvent debtor that he shall place his property in trust for his creditors. He may remain inactive while creditors exhaust his property by legal proceedings, or he may himself distribute it among his honest creditors in any manner he sees fit, except that if he resorts to a general assignment, he must then comply with the requirements of the act, and cannot by means of such assignment give preferences in excess of the amount permitted by the statute. So long as he does not make a general assignment, none of the provisions of the assignment act will effect his conduct.

§ 178. Excessive preferences in the assignment do not invalidate it.—An excess of preference in the assignment under this statute does not affect the validity of the assignment. The statute only requires that the preferences shall be reduced *pro rata* until they do not exceed one-third of the assigned estate. *Cent. Nat. Bank* v. *Seligman*, 138 N. Y. 435; *Stein* v. *Levy*, 62 Supm. Ct. (55 Hun), 381; *Cutter* v. *Hume*, 43 State R. 242; *Rose* v. *Renton*, 37 State R. 683. The statute operates upon the preference only and not upon the assignment. It does not undertake to destroy or affect the assignment, except in so far as it provides for preferences beyond the prescribed limit. When the preferences made exceed this limit, the statute intervenes and declares the consequences. It reduces the preference to the limit mentioned in the statute. *Cent. Nat. Bank* v. *Seligman*, 138 N. Y. 435.

§ 179. Preferences contemporaneous with, but not made in the deed of assignment.—When preferences are given by debtors in contemplation of the execution of a general assignment, but by independent instrumentalities intended to evade the limitations of the assignment act, perplexing questions have arisen. Some of these questions have already received definite answer in the court of last resort.

1. It may now be regarded as settled that preferences by special transfers or confessions of judgment, though given in contemplation of the execution of a general assignment, and with the intent of evading the limitations of the statute, if they are

otherwise untainted by fraud, do not render the assignment executed as part of the intended scheme of preference illegal or invalid. *Cent. Nat. Bank* v. *Seligman*, 138 N. Y. 435; *London* v. *Martin*, 86 Supm. Ct. (79 Hun), 229; *Abegg* v. *Bishop*, 142 N. Y. 286. These cases reverse the former rulings in the lower courts in *Abegg* v. *Schwab*, 23 Abb. N. C. 7; *First Nat. Bank* v. *Bard*, 66 Supm. Ct. (59 Hun), 529; *Abegg* v. *Bishop*, 73 Supm. Ct. (66 Hun), 8; s. c. 49 State R. 191.

These decisions rest upon the ground above stated (§ 178), that the assignment act (amendment of 1887) was intended not to defeat the assignment, but to limit the right of preference, and that the effect of the statute is to cut down an excessive preference, and not to strike down the assignment. Hence, assuming that the preferences given in contemplation of the assignment are within the operation of the statute, and are excessive, yet if the transaction is otherwise free from fraud the effect is not to render the assignment invalid. In *London* v. *Martin*, 86 Supm. Ct. (79 Hun), 229, 233, Mr. Justice Parker says, referring to *Cent. Nat. Bank* v. *Seligman*, *supra*, and *Abegg* v. *Bishop*, *supra*: "A failing debtor may now practically prefer his creditors to as great an extent as his property permits, provided he does it by giving mortgages and bills of sale, or confessing judgments, instead of putting it in the general assignment, which it is said the statute (Laws of 1887, c. 503) alone condemns." But this remark requires qualification when the mortgages, bills of sale, or confessed judgments are so connected with it as to constitute a part of it.

2. Preferences given by special methods other than the general assignment, if, in fact, a part of the scheme of assignment, will be regarded as coming within the operation of the general assignment act. *Berger* v. *Varrelmann*, 127 N. Y. 281; *Spelman* v. *Freedman*, 130 N. Y. 421; *Cent. Nat. Bank* v. *Seligman*, 138 N. Y. 435.

"The words of the section must be construed to embrace all of the instrumentalities which failing debtors, in contemplation of a general assignment, voluntarily employ to give preferences to particular creditors," Follett, C. J. *Berger* v. *Varrelmann*, 127 N. Y. 281, 289; *Riessner* v. *Cohn*, 22 Abb. N. C. 312. The word "assignment" is thus construed to embrace not merely

the written instrument, but the entire act of transfer. *Richardson* v. *Thurber*, 104 N. Y. 606, 611. Accordingly, when the debtor has attempted to make preferences by instrumentalities other than the assignment, the assignee, or, if he refuses to act, the creditors in aid of the assignment, may maintain actions to recover the property so disposed of, to the end that it may be administered under the assignment. *Wilcox* v. *Payne*, 19 State R. 893; s. c. 22 Abb. N. C. 307; *Riessner* v. *Cohn*, 22 Abb. N. C. 312; *Spelman* v. *Jaffray*, Id. 315; *Sweetser* v. *Smith*, Id. 318; s. c. 20 State R. 62; *Spelman* v. *Freedman*, 130 N. Y. 421; *Thalheimer* v. *Klapetsky*, 36 State R. 116; s. c. 12 N. Y. Supp. 941.

This is the only remedy in case of excessive preferences when the transaction is not otherwise fraudulent. *Abegg* v. *Bishop*, 142 N. Y. 286, 289. When excessive preferences are made in contemplation of an assignment, and thus come within the operation of the rule above stated, the application of the rule calls for the determination of two other questions. The first of these is whether, in an action brought by an assignee or by a creditor, in aid of the assignment to reach property in the hands of preferred creditors, it must be shown that the preferred creditor received the preference with knowledge of the contemplated assignment. The second is whether preferences not given in the assignment, but in contemplation of it, are void in whole or merely to the excess above the statutory limit.

§ 180. Is it necessary to show knowledge by the creditor preferred before the assignment of the contemplated assignment?—The cases which are of leading importance upon this inquiry are *Manning* v. *Beck*, 129 N. Y. 1; *Berger* v. *Varrelmann*, 127 N. Y. 281; and *Spelman* v. *Freedman*, 130 N. Y. 421. In *Manning* v. *Beck*, *supra*, a father who was indebted to his son gave him a bill of sale of his stock of goods in satisfaction of the debt, and on the following day made a general assignment. It was found that the son had no knowledge when he received the bill of sale that his father contemplated making the assignment. The action was brought by a judgment creditor to set aside both the bill of sale and the assignment as fraudulent. The only fraud attempted to be shown

was "a fraud on the law," in attempting to evade the provisions of the assignment act in giving an excessive preference. A judgment setting aside the assignment and bill of sale for fraud was reversed. It will be observed that this was not an action to subordinate the special preference to the operation of the assignment act, but it was an attack upon both the assignment and the bill of sale.

There are expressions in the opinion in that case to the effect that excessive preferences, though made as parts of the scheme of assignment, would not be affected by the assignment act, unless the preferred creditor had knowledge that the debtor intended to make an assignment, and that the security was given with the intent that it should result in consequence of the assignment in a violation of the provisions of the act. These remarks appear to have been *obiter*. In order to reach the preference in that case, a knowledge of or participation in the assignor's fraud on the part of the preferred creditor was necessary, for the reason that the preferred creditor was a purchaser for value, and the action was one attacking the conveyance to him as well as the voluntary assignment to the assignee as having been made with a fraudulent intent.

In *Berger* v. *Varrelmann*, 127 N. Y. 281, an action brought by general creditors in aid of the assignment, to set aside a preference given by a judgment confessed in contemplation of the assignment, the Second Division of the Court of Appeals by a divided court (Bradley, Haight, and Brown dissenting) affirmed a judgment setting aside the confessed judgment and directing the preferred creditor to pay to the assignee the amount received by him thereunder. In support of the judgment, the court inferred from the evidence, although there was no finding to that effect, that the creditor knew of the contemplated assignment.

In the prevailing opinion, Haight, J., refers to the rule that an excessive preference in the assignment, though known to the preferred creditor, does not defeat the assignment; and he says it is not easy to see why want of knowledge that an assignment is contemplated would avail attacking creditors, though the preference be given by an independent instrument; the statute operating upon both with like effect. *Spelman* v. *Freedman*, 130 N. Y. 421; affi'g 61 Supm. Ct. (54 Hun), 409; affi'g

22 Abb. N. C. 315, was an action in aid of the assignment to set aside judgments confessed in contemplation of the assignment. The complaint which was demurred to was deemed to contain sufficient allegations that the judgment debtor had knowledge of the contemplated assignment. The necessity for such averments was assumed rather than determined.

Considering the question apart from authority, it is to be observed that the theory upon which preferences otherwise valid are affected by the execution of an assignment, is that they are regarded as parts of one transaction together constituting a general assignment. The whole transaction regarded as a general assignment is, therefore, subject to the provisions of the General Assignment Act. It follows, therefore, that the excessive preference, whether found within or without the written assignment, if a part of the assignment, and if not otherwise illegal, is by the operation of the assignment act cut down to the amount permitted by law, and is not wholly invalid. The statute limits and controls the operation of the preference with precisely the same effect as though the assignment had been made by one instead of by several instruments. *Clapp* v. *Clark*, 49 Fed. Rep. 123. This is the reason, and the only reason, which justifies any interference with a preference of a valid debt. There is no question of fraudulent intent in preferring such a debt, and the assignment act does not limit the preference by rendering it fraudulent or illegal (*Cent. Nat. Bank* v. *Seligman*, 138 N. Y. 435, 443), but operates upon it by rendering the excess beyond a certain amount void, wholly irrespective of the intent of the assignor or of the knowledge of the preferred creditor.

When the assignment is fraudulent by reason of a fraudulent intent, as at common law, creditors are not bound by it. They may disregard it, and proceed to enforce their right against the assigned property by remedies which the law affords. Whether creditors can then reach property which has been preferentially conveyed in payment of *bona fide* debts, as a part of the fraudulent assignment, must, it seems, depend upon whether the preferred creditors can be charged with guilty knowledge of the fraud in the assignment. *Clapp* v. *Clark*, 49 Fed. R. 123. See *post*, Chap. XIV.

§ 181. Are preferences given in contemplation of the as-

signment void in whole, or as to the excess?—In *Berger* v. *Varrelmann*, 127 N. Y. 281, the action was brought by a creditor in aid of the assignment to recover moneys obtained by a preferred creditor upon judgments confessed in contemplation of the assignment, and with the intent to evade the instructions of the statute. A divided court (second division) affirmed a judgment for a recovery of the moneys obtained by the preferred creditor. In the dissenting opinion the position was taken that if the preference was a part of the scheme of assignment, the creditor should not be denied entirely the benefit of the preference, but he should at least be treated as a preferred creditor, and should share in the amount permitted by the statute to be distributed among preferred creditors.

Spelman v. *Freedman*, 130 N. Y. 421; affi'g 61 Supm. Ct. (54 Hun), 409; affi'g 22 Abb. N. C. 315, was an action in aid of the assignment to set aside judgments confessed in contemplation of the general assignment. The complaint, which was demurred to, was deemed to contain sufficient allegations that the judgment creditors had knowledge of the contemplated assignment. The relief demanded was that the confessed judgment be set aside, and that the judgment creditors pay to the assignee the amount received by them to be administered under the assignment. The judgment creditors were preferred creditors under the assignment, so that they were entitled in any event to a priority to the extent of one-third of the assets.

In the lower courts cases are numerous in which the preference has been declared wholly void without proof of the knowledge of the preferred creditor. *First Nat. Bk.* v. *Bard*, 66 Supm. Ct. (59 Hun), 529; s. c. (on previous appeal), 32 State R. 1010; *Abegg* v. *Schwab*, 23 Abb. N. C. 7 (affi'd, on the ground of fraud in the assignment, 31 State R. 139); *Kessell* v. *Drucker*, 23 Abb. N. C. 1. See *White* v. *Benjamin* (Supr. Ct.), 3 Misc. 490; *Sweetser* v. *Smith*, 22 Abb. N. C. 319; *Wilcox* v. *Payne*, 22 Abb. N. C. 307. See *Riessner* v. *Cohn*, 22 Abb. N. C. 312; *Otis* v. *Bertholf*, 37 State R. 172. But in none of these cases was the question raised.

In *Manning* v. *Beck*, 129 N. Y. 1; rev'g 61 Supm. Ct. (54 Hun), 102, Judge Peckham, in the opinion of the court, directs attention to the question of knowledge on the part of the

preferred creditor in *Berger* v. *Varrelmann*, *supra*, intimating that if such knowledge had not been inferred, the preference would not have been set aside, but would have been allowed to stand as a valid preference to the extent of one-third of the estate of the assignees.

It is important here, as in the preceding discussion, to consider the method by which the General Assignment Act operates upon excessive preferences. It does not declare them to be fraudulent, nor does it avoid them in whole, but only in part. Whenever a preference is brought within the operation of the act, the effect is not to destroy it, but to limit and control it. It would seem to follow as an inevitable consequence, that in actions brought to recover property conveyed to preferred creditors in violation of the statute, or to restrict preferences, preferred creditors (the preferences being otherwise valid) would be entitled to such share of the preferences as is permitted by the act under the operation of which they are brought.

§ 182. **Manner of distribution under the statute.**—The effect of the statute of 1887 is simply to limit the amount which can be applied to the payment of preferred claims, and an assignor still has the power to designate the manner in which that amount shall be applied. *Matter of Tuller*, 22 State R. 242; *Matter of Boyd*, 35 State R. 37; s. c. *sub. nom. Matter of Bryce*, 16 Daly, 443. The debtor may still direct the application of one third of the net assets toward the payment of the claim of one preferred creditor, before such assets shall be applicable to the payment of the claim of a second or third preferred creditor. *Matter of Bryce*, 16 Daly, 443. He may also provide for the payment of the preferred debts in classes, in such a manner that if one-third of the assets shall be insufficient to pay all the preferred classes, those first preferred shall be paid in priority. *Matter of Sisson*, 66 Supm. Ct. (59 Hun), 330; *Matter of Eaton*, Id. 85. It has also been held that when the direction of the assignment was to pay certain preferred debts in the order named with interest, that the assignee is justified in paying the debts in their order with interest, although by so doing the fund applicable to preferred debts is exhausted before all the preferred creditors are paid. *Matter of Fay*, 6 Misc. 462.

§ 183. **Preferences by corporations.**—The statutes cited when we were considering the authority of different classes of corporations to make assignments for the benefit of creditors (*ante*, §§ 119, 122, 123), as we have seen, in effect prohibit insolvent domestic corporations of every description from making preferential assignments. It remains to consider in this connection the character of the acts which will be regarded as coming within the inhibition of the statutes.

The language of the Stock Corporation Law of 1892 (Laws of 1892, vol. II, p. 1838, § 48) prohibits any corporation which shall have refused to pay any of its notes or obligations when due, in lawful money of the United States, or any of its officers or directors or stockholders from transferring any of its property to any of its officers, directors, or stockholders, directly or indirectly, for the payment of any debt or upon any other consideration than the full value of the property paid in cash. "No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is *insolvent or its insolvency is imminent*, with the intent of giving a preference to any particular creditor over other creditors of the corporation shall be void."

The phrase "insolvent, or its insolvency is imminent," is new. The words of the previous statute were "in contemplation of its insolvency" (see *ante*, § 119). Under the former statute it was held that a payment in the usual course of business, although by an insolvent corporation, was not prohibited. *Dutcher* v. *Importers' & Traders' Nat. Bank*, 59 N. Y. 5. The act to be prohibited must have been done because of existing or contemplated insolvency. *Paulding* v. *Chrome Steel Co.* 94 N. Y. 334; *Casserly* v. *Manners*, 16 Supm. Ct. (9 Hun), 695.

Under the previous statute the transferee of property from an insolvent corporation, when the transfer was not for a valuable consideration or in the usual course of business, was not protected by reason of his ignorance of the company's insolvency, or of the fact that the transfer was preferential. *Atkinson* v. *Rochester Printing Co.* 114 N. Y. 168.

It appears that under the language of the present statute the transfer, if made when the corporation is insolvent, or when its insolvency is imminent, would not be protected because it was made in the usual course of business, and clearly the knowledge by the transferee of the financial condition of the company or of the intent to prefer is immaterial.

And under the Revised Statutes a transfer to an officer of the corporation, when it was, in fact, insolvent, was invalid without regard to the intention to prefer, while a different rule applied in the case of transfers to persons who were not officers or stockholders.

In *Milbank* v. *Welch*, 81 Supm. Ct. (74 Hun), 497, the corporation in 1891, being in need of money, made a loan from several of its directors, which the company secured by an assignment of accounts, with an agreement that other accounts might be substituted in place of the accounts so assigned. An assignment of claim was made September 1, 1893, after the company had failed to meet its obligations at maturity. Three of the persons to whom the last assignment was made resigned as directors before the assignment. It was held that, as to these three persons, the burden of proof was on the plaintiff, the receiver who assailed the transfer, to show that it was made with the intent to give a preference, but that as to the persons who were then directors the transfer was absolutely invalid, as having been made after this company had refused to pay its obligations.

§ 184. Preferences by corporations—judgments suffered. —The Revised Statutes prohibited "any transfer or assignment in contemplation of the insolvency of such company."

In *Kingsley* v. *First Nat. Bank*, 38 Supm. Ct. (31 Hun), 329, it was held that when the company, being insolvent, offered to allow judgment to be taken against it and such judgments were entered, it in effect transferred and assigned its property in contemplation of insolvency, and the judgments so entered might be avoided at the suit if a receiver subsequently be appointed.

The Stock Corporation Law of 1892 (*supra*, § 119) contains the words as quoted above, "nor any payment made, *judgment suffered*, lien created, or security given."

In *Varnum* v. *Hart*, 119 N. Y. 101, it was held that the ob-

ject of the section of the Revised Statutes was to prevent preferences by putting a restraint upon the action of the corporation and its officers. It is there said by Earl, J. (p. 105):

"The statute places no restraint whatever upon the creditors, and they are permitted to pursue their remedies in all the ways allowed by the law, and to procure satisfaction of their claims if they can. Furthermore, the statute contemplates no affirmative action on the part of the corporation, and it cannot be violated by mere silence or omission to act on its part or the part of its officers. An insolvent corporation is not obliged to defend any suit brought against it for the sole purpose of defeating a preference, and it may in such case suffer default and thus allow a judgment to be obtained against it, knowing that the creditor designs to obtain, and will thus obtain, a preference. Such conduct on its part does not constitute a transfer or assignment of its property, and there is nothing in the statute which condemns judgments thus obtained." See *Dickson* v. *Mayer*, 26 Abb. N. C. 257.

In *Throop* v. *Hatch Lithographic Co.* 125 N. Y. 530, decided under the provisions of the Revised Statutes, it was held that the statute prohibited the acquisition by a director of an insolvent corporation who is also a creditor, through the process of attachment of a preferential lien on the corporate assets; and this, although the writ was issued in hostility to, and not in collusion with the corporation. See *Dickson* v. *Mayer*, 35 State R. 616.

These decisions made a distinction between a creditor who is also a director or stockholder and other creditors, and held that while it is competent for a corporation to permit creditors to take hostile proceedings by which a preference may be obtained through vigilance, and may even suffer default in an action upon a just claim (*Varnum* v. *Hart*, 119 N. Y. 101), yet when the creditor who is also a stockholder and director of a corporation undertakes thus to obtain a preference by an action at law, with the co-operation of his associates in the board of trustees, the case is brought directly within the condemnation of the statute, and amounts to an unlawful preference by way of assignment and transfer of property in contemplation of insolvency. *King* v. *Union Iron Co.* 33 State R. 545; *Dickson* v. *Mayer*, 35 State R. 616.

The disability which attaches to a director under the statute does not exist in the case of foreign corporations, to which the statute has no application. *Hill* v. *Knickerbocker Elec. L. & P. Co.* 45 State R. 761.

When a judgment has been confessed in violation of the statute, and the property of the corporation has been sold thereunder and the proceeds paid over to the plaintiff in the confessed judgment, a subsequent judgment creditor cannot maintain an action to recover damages for the wrongful acts of the former parties. His remedy is in equity to recover the property for the equal benefit of creditors. *Braem* v. *Merchants' Nat. Bank*, 127 N. Y. 508.

§ 185. **Agreement to give preference.**—In *Nat. Park Bank* v. *Whitmore*, 47 Supm. Ct. (40 Hun), 499, it was held that an agreement made by a debtor at the time of contracting a debt, that in the event of his subsequently executing an assignment the indebtedness should be preferred, rendered invalid an assignment afterward made in accordance with such agreement. This view, however, was not sustained by the Court of Appeals. 104 N. Y. 297. Earl, J., writing the opinion, remarked (p. 304), "A failing debtor may make an assignment preferring one or more creditors because he is under a legal, equitable or moral obligation to do so, or he may do it from mere caprice or fancy, and the law will uphold such an assignment honestly made. If he may make such an assignment without any antecedent promise, why may he not make it after and in pursuance of such a promise? How can an act otherwise legal be invalidated because made in pursuance of a valid or invalid agreement honestly made?"

In the United States courts the decisions are in harmony with the Court of Appeals. *Smith* v. *Craft*, 123 U. S. 436; affi'g 17 Fed. R. 705; rev'g 11 Biss. 340. The case of *Clark* v. *Andrews*, 46 State R. 399, so far as it is inconsistent with *Nat. Park Bank* v. *Whitmore*, 104 N. Y. 297, must be regarded as overruled.

§ 186. **What debts may be preferred.**—The assignor may lawfully prefer any legal debts and liabilities. He may prefer his wife for money loaned by her to him (*McCartney* v. *Welch*,

44 Barb. 271 ; affi'd, 51 N. Y. 626), even where the loans were all made previous to the act of 1848 (Laws of 1848, c. 200). *Jaycox* v. *Caldwell*, 51 N. Y. 395 ; see *Woodworth* v. *Sweet*, Ibid. 8 ; *Kluender* v. *Lynch*, 2 Abb. Dec. 538. So he may prefer her for money loaned under an agreement with him that she might keep boarders and have the profits arising therefrom (*Lyon* v. *Davis*, 32 State R. 340 ; *Kittredge* v. *Van Tassell*, Id. 76), or for a valid indebtedness. *Smith* v. *Perine*, 121 N. Y. 376. " Dealings between husband and wife which result in the appropriation of the husband's property for the payment of a debt claimed to be due to the wife, to the exclusion of other creditors, it must be admitted furnish uncommon opportunities for the perpetration of fraud, and should be carefully and rigidly scrutinized." O'Brien, J. *Manchester* v. *Tibbetts*, 121 N. Y. 219, 222. See *White* v. *Benjamin*, 3 Misc. 490, 499. In *Nichols* v. *Wellings*, 68 Supm. Ct. (61 Hun), 601 ; s. c. 41 State R. 881, where it appeared that the assignor had been in the habit of giving his wife a certain sum weekly for household expenses, the whole of which she did not expend, and from time to time returned to him the unexpended balance, it was held that in the absence of satisfactory evidence of gift a preference to the wife for the amount so returned would be deemed fictitious. See *Talcott* v. *Thomas*, 50 State R. 621. In *Third Nat'l Bank* v. *Guenther*, 123 N. Y. 568 ; rev'g 17 State R. 403, it was held that where a married woman, having a separate estate, employed her husband to manage her business upon an agreement to pay him a fixed salary, and also to support the family, the preference in assignment of a claim for the salary agreed to be paid to the husband, did not render the assignment invalid. A similar view of the same assignment was taken in *Romer* v. *Koch*, 56 Supm. Ct. (49 Hun), 483. See also *Stanley* v. *Nat. Union Bk.*, 115 N. Y. 122.

As to the nature of the obligation between husband and wife, which will support a preference to the wife, the court, after reviewing the authorities in *Lyon* v. *Zimmer*, 30 Fed. R. 401, 409, says : " If a husband, not acting in a fiduciary character as to the wife's income, of which she personally has entire control, collects such income habitually with her consent and acquiescence, and mixes those collections with his own moneys, and does not, at

or before the time of collecting them, give proof, by his own declarations or acts, that he receives them as hers, for her separate use, and holds them as a debt due from himself to her, and she permits this appropriation of her income to go on for a protracted period, then, and in such a condition of affairs, she cannot afterwards, on the occurrence of a family quarrel, of insolvency, or other event, recall a permission so long indulged, and require him or his assignees to make her a creditor of her husband for the amounts so collected." See *Syracuse Chilled Plow Co.* v. *Wing*, 85 N. Y. 421; affi'g 27 Supm. Ct. (20 Hun), 206; and see cases collected in note to *Lyon* v. *Zimmer*, *supra*, p. 411.

A debtor may prefer claims not yet due. This does not tend to hinder or delay creditors, for the assignees may retain in their hands sufficient to meet such claims, and distribute the residue without delay. *Read* v. *Worthington*, 9 Bosw. 617. He may give a preference to a surety or indorser. *Hendricks* v. *Walden*, 17 Johns. 438; s. c. as *Hendricks* v. *Robinson*, 2 Johns. Ch. 283; *Cunningham* v. *Freeborn*, 11 Wend. 240; *Keteltas* v. *Wilson*, 36 Barb. 298; s. c. 23 How. Pr. 69; *Lansing* v. *Woodworth*, 1 Sandf. Ch. 43. But he may not secure debts not in existence, or make provision for the payment of future advances (*Hendricks* v. *Robinson*, *supra*; *Barnum* v. *Hempstead*, 7 Paige, 568), or future indorsements (*Lansing* v. *Woodworth*, 1 Sandf. Ch. 43), or for future services (*Stafford* v. *Merrill*, 69 Supm. Ct. [62 Hun], 144). And he may give a preference to a person holding claims which he has purchased at a large discount. *Low* v. *Graydon*, 50 Barb. 414; *Powers* v. *Graydon*, 10 Bosw. 630. He may prefer obligation for trust funds. *Cohen* v. *Moorhouse*, 21 State R. 436.

But a preference of a fictitious debt or of a creditor for an amount as excessive of that to which he may be justly entitled, will render the whole assignment invalid. See Chap. XIV.

If there is an attachment upon property which has not yet been decided by the court, an assignment preferring this attachment debt will not be void. The fact that the preference is conditional or contingent makes no difference, if unnecessary delay is not thereby caused. *Grant* v. *Chapman*, 38 N. Y. 293.

Debts which have been previously secured may be preferred,

but the secured creditors will be held bound in equity to resort to their previous security first, so as to give the other creditors provided for, the benefit of the assigned fund. *Dimon* v. *Delmonico*, 35 Barb. 554; *Besley* v. *Lawrence*, 11 Paige, 581. See *Smith* v. *Perine*, 121 N. Y. 376.

§ 187. **There must be an absolute surrender of the property without conditions.**—It has been frequently declared that assignments giving preferences must devote the assigned property to the satisfaction of the debts, without condition or qualification; and that the debtor shall reserve nothing to himself until all the creditors are paid. Such assignments cannot be made the instrument of placing the assigned property beyond the reach of creditors, for the benefit, either immediate or remote, of the insolvent himself. *Grover* v. *Wakeman*, 11 Wend. 187; *Haydock* v. *Coope*, 53 N. Y. 68; *Goodrich* v. *Downs*, 6 Hill, 438; *Nichols* v. *McEwen*, 17 N. Y. 22; *McClelland* v. *Remsen*, 14 Abb. Pr. 331; *Rathbun* v. *Platner*, 18 Barb. 272. But this principle, although announced in cases in which preferential assignments have been made, is not exclusively applicable to such cases. And an assignment made for the equal benefit of all creditors is subject to the same rule.

The cases illustrative of the principle here referred to will be found more fully collected in another connection. See Chap. XIII.

§ 188. **Preferences must be declared.**—As we have already had occasion to remark, the assignment must itself fix and determine the rights of the creditors in the assigned property. The assignor cannot reserve to himself the right to determine the preferences to be given. To permit this would be to place the creditors in the power of the debtor, and compel them to acquiesce in such terms as the debtor may think proper to prescribe as the only condition upon which they are permitted to participate in his property. This would be a fraud upon the creditors, and necessarily delay and hinder them in the collection of their debts. *Averill* v. *Loucks*, 6 Barb. 470, 476; *Grover* v. *Wakeman*, 11 Wend. 187, 203; s. c. *sub. nom. Wakeman* v. *Grover*, 4 Paige, 23, 41; *Barnum* v. *Hempstead*, 7 Paige, 568, 571;

Boardman v. *Halliday*, 10 Id. 223, 227 ; *Sheldon* v. *Dodge*, 4 Denio, 217 ; *Hyslop* v. *Clarke*, 14 Johns. 458, 462 ; *Kercheis* v. *Schloss*, 49 How. Pr. 284 ; *Brown* v. *Guthrie*, 46 Supm. Ct. (39 Hun), 29, 33.

Where the assignee was authorized, after paying certain specified creditors, to apply the residue of the proceeds of the property to pay all the other debts of the assignor in such order of priority as the assignee should deem proper, and if the residue of the fund was not sufficient to pay all such debts in full, the assignees were to apply it to the payment of such and such parts of those debts as they should judge most just and equitable ; this provision was held to render the assignment void. *Boardman* v. *Halliday*, 10 Paige, 223 ; *Barnum* v. *Hempstead*, 7 Paige, 568. The fact that the assigned property was not sufficient to pay the creditors whom the assignor had himself preferred was not deemed significant. The intent of the assignor at the time of making the assignment must control. *Boardman* v. *Halliday*, *supra*.

Thus when an assignment provided that the payment should be made to a creditor after an accounting had been had between him and the assignor, and the exact amount due the creditor has been agreed upon by the assignor, it was held that since the amounts and time of payment were thus within the control of the assignor, the agreement was void. *Keiley* v. *Dusenbury*, 19 Alb. L. J. 498.

And when the preferred creditors were described as a class and not by name, this was not regarded as rendering the assignment fraudulent, as delegating to the assignee the power to designate future preferences. *Maack* v. *Maack*, 56 Supm. Ct. (49 Hun), 507.

So in the case of *Frazier* v. *Truax*, 34 Supm. Ct. (27 Hun), 587, where preferences were given to certain persons who were not creditors, and it was attempted to be shown by parol that the preferences were made really for the benefit of certain other persons who were actual creditors, it was held that the assignment was void as matter of law. Cullen, J., in delivering the opinion of the court, said : " If this mode be tolerated it will make most glaring frauds easy of accomplishment. It is settled law that a power reserved to either the assignor or assignee to desig-

nate future preferences renders the assignment void. (*Sheldon* v. *Dodge*, 4 Den. 217.) To be valid the instrument must definitely settle the respective rights of the creditors."

But a mistake in the name of a creditor (*Webb* v. *Thomas*, 49 State R. 462), or a mere indefiniteness or incorrectness in the description of the debt (*Bernheimer* v. *Rindskopf*, 116 N. Y. 428; *Roberts* v. *Vietor*, 130 N. Y. 585), will not invalidate an assignment.

An application of the rule stated above will be found in the case of a preference upon a secret trust for the benefit of the assignor. Thus, where the assignor, acting in concert with his son, one of the assignees, but without the knowledge of the other assignees, simultaneously, with the making of the assignment, procured from certain of the creditors to whom a preference was given under the assignment, agreements in writing to lend to his son, one of the assignees, a large portion of the money that they should receive upon their debts under the assignment, for the term of five years; such loan to be secured by the notes of the son, indorsed by the assignor, and authorizing the assignees to pay to this son the sums so agreed to be loaned, and take his receipt therefor; and the name of the son was used for the benefit of the assignor, and the agreement was in fact made between the creditors and the assignor, to enable the latter to prosecute business in the name of the son, for his own benefit, and to use the money in such business; the assignment was deemed fraudulent and void. *Haydock* v. *Coope*, 53 N. Y. 68, 76. Mr. Justice Grover, in pronouncing the opinion in that case, made use of the following language: "To hold that a debtor may exercise his right of giving preferences among his creditors so as to secure to himself the future control of the property assigned or its proceeds, would give facilities for the grossest frauds and utterly defeat the ends for which assignments have been sustained, which are the application of the property of insolvents to the payment of their debts. It would enable insolvent debtors to coerce creditors into almost any agreement which they desired. Under such a rule such a debtor could not only compel a release of the whole upon preferring a part of the debt, but could, as in the present case, compel the creditors to leave the property in his hands, subject to his control, upon such terms as he should dic-

tate." Further illustrations of the rule here stated will be found *post*, Chap. XIII.

§ 189. Other limitations on the right to prefer.—The right to give preferences in cases of insolvency has been expressly denied to corporations. See *ante*, § 183. And also to limited partnerships. 1 R. S. 766, §§ 20, 21; 3 R. S. 7th ed. 2238, cited at length, *ante*, § 121; and see the cases there referred to.

In addition to these express restrictions, the giving of a preference is a bar to a discharge under the two-thirds act. See *ante*, § 34.

A debtor who had been proceeded against under the act known as the Stilwell act (Laws of 1831, p. 400), could execute a general assignment so as to defeat the priority obtained by the debtor who instituted those proceedings. *Spear* v. *Wardell*, 1 N. Y. 144; *Hall* v. *Kellogg*, 12 N. Y. 325; *Wood* v. *Bolard*, 8 Paige, 556, 557. But this act has now been repealed.

CHAPTER XII.

APPROPRIATION OF PROPERTY IN ASSIGNMENTS BY FIRMS AND THEIR MEMBERS.

§ 190. When firm and individual property included.—Assignments may be made by copartners of the partnership property for the payment of their partnership debts, and by individuals of their interest in the copartnership for the benefit of their creditors (*ante*, §§ 125, 127), but assignments are also frequently made in which firm and individual property is assigned for the payment of firm and individual debts.

An assignment made by copartners reciting their copartnership and their indebtedness as such, and purporting to convey all their property, will be deemed to assign only that which was the joint partnership property, and not any of their individual property. *Morrison* v. *Atwell*, 9 Bosw. 503, 510.

In the *Matter of Davis*, 1 How. Pr. N. S. 79, where the assignment was made by copartners, but contained no specific reference to individual property or debts, it was held that it should not be construed as intending to provide for individual creditors or to convey the individual assets. Such an assignment may properly be executed in the firm name. *Klumpp* v. *Gardner*, 114 N. Y. 153; *Hooper* v. *Baillie*, 118 N. Y. 413; *Sherman* v. *Jenkins*, 77 Supm. Ct. (70 Hun), 593.

But in *Becker* v. *Leonard*, 49 Supm. Ct. (42 Hun), 221; s. c. 3 State R. 765, where the assignment recited that it was made by copartners, and conveyed all the property of the parties of the first part, with directions for the payment of individual debts, it was held that the title to the individual property of the assignors passed under the assignment. Citing *Eastwood* v. *Ward*, 35 Law Times, N. S. 502; *Williams* v. *Hadley*, 21 Kan. 350; s. c. 30 Am. R. 430; *Judd* v. *Gibbs*, 3 Gray, 539.

Although the Assignment Act of 1877 relates to general as-

signments only, by which is understood a conveyance of the whole body of a debtor's property, yet an assignment by the members of a firm of the firm property is within the Act, although the individual property of the partners is not included in the conveyance. *Royer Wheel Co.* v. *Fielding*, 101 N. Y. 504; s. c. 2 Cent. R. 512; rev'g 38 Supm. Ct. (31 Hun), 274.

It is no objection to an assignment of joint or copartnership property, that it does not include the individual property, or that it directs that the residue after payment of the copartnership debts should be returned to the assignors without making provision for the payment of the individual debts of the partners. *Bogert* v. *Haight*, 9 Paige, 297, 301, 302; see *Collomb* v. *Caldwell*, 16 N. Y. 484; s. c. as *Collumb* v. *Read*, 24 N. Y. 505.

When the assignment does include both firm and individual property, the fund created by the disposition of the property is not an entire fund to be distributed indiscriminately, but the proceeds of the firm and individual property severally create several funds which are to be separately administered.

Thus, Mr. Justice Robertson, in *Scott* v. *Guthrie* (10 Bosw. 408, 426; s. c. 25 How. Pr. 512), in discussing the questions raised under such an assignment, says: "The order of equities of partnership and individual creditors in partnership funds, virtually divides them in two parts; one being so much as is necessary to pay the former, and the other the residue subject to equities between the partners for over-contributions in paying debts, or over-drafts of their shares of the profits. They are as distinct in their nature as two kinds of property, and although joined in an assignment of them, for different purposes, by one instrument, motives in regard to the disposition of one thereby cannot be made to operate on the disposition of the other, in regard to which no such or similar motive exists. The error arises from considering the property assigned entire, the creditors of the firm and individual partners as one body having equal rights, the instrument as one, and the purpose as to the whole, single."

"It is an established and a very just and reasonable doctrine," says Mr. Justice Duer, in *Nicholson* v. *Leavitt* (4 Sandf. 252, 299), "that when a partnership becomes insolvent, all its assets,

using the term in its largest sense, must be applied exclusively in the first instance to the payment of the partnership debts, so as to confine the remedy of the separate creditors of each partner to the share of their debtor, in the surplus that may remain after the debts of the firm have been satisfied."

For a careful collection and examination of the cases in support of the rule that individual property of a partner should, in equity, be applied primarily to the payment of the individual debts of the partner. See *Davis* v. *Howell*, 33 N. J. Eq. 72; s. c. 1 Am. Insol. R. 357, Runyon, Chan.

When an assignment is made by partners, of their firm and individual property, for the payment of their firm and individual debts, the individual creditors of one partner are entitled to payment of their claims in full, with interest to the date of payment, from his individual estate, before the surplus of such estate is applied to the payment of the claims of firm creditors. *Matter of Duncan*, 10 Daly, 95; s. c. *sub. nom. In re Shipman*, 1 Am. Insol. R. 413.

§ 191. **Assignment of firm property providing for payment of individual debts.**—The appropriation in an assignment by an insolvent firm, of partnership property to the payment of the separate debts of one partner, renders the assignment fraudulent and void as against firm creditors. *Booss* v. *Marion*, 129 N. Y. 536; aff'g 35 State R. 710; *Durant* v. *Pierson*, 124 N. Y. 444; *Nordlinger* v. *Anderson*, 123 N. Y. 544; *Bulger* v. *Rosa*, 119 N. Y. 459; *Roe* v. *Hume*, 79 Supm. Ct. (72 Hun), 1; *Citizens' Bank* v. *Williams*, 35 State R. 542; *Nat'l Bank of Granville* v. *Cohen*, 6 State R. 318; *Schiele* v. *Healy*, 61 How. Pr. 73; s. c. 10 Daly, 92; *Windmuller* v. *Dodge*, 67 How. Pr. 253; *First Nat'l Bank* v. *Halsted*, 20 Abb. N. C. 155; *Friend* v. *Michaelis*, 15 Abb. N. C. 354; *Imp. & Traders' Nat. Bk.* v. *Burger*, 6 N. Y. Supp. 189; *Wilson* v. *Robertson*, 21 N. Y. 587; *Hurlbert* v. *Dean*, 2 Abb. Dec. 428; see also *Grover* v. *Wakeman*, 11 Wend. 187; *Jackson* v. *Cornell*, 1 Sandf. Ch. 348; *Egberts* v. *Wood*, 3 Paige, 517; *Cox* v. *Platt*, 32 Barb. 126; *Lester* v. *Pollock*, 3 Robt. 691; *Kemp* v. *Carnley*, 3 Duer, 1; *Walsh* v. *Kelly*, 42 Barb. 98.

This question was first raised in the leading case of *Grover* v. *Wakeman*, *supra*, but was not passed upon. See remarks of Senator Edmonds, p. 206. In *Kirby* v. *Schoonmaker* (3 Barb. Ch. 46), Chan. Walworth expressed the opinion that if the copartners were insolvent and unable to pay the debts of the concern, either out of their copartnership effects or of their individual property, an assignment of the property of both to pay the individual debt of one of the copartners only, would be a fraud upon the joint creditors. But under the facts of that case the opinion does not seem to have been essential. In *Nicholson* v. *Leavitt* (4 Sandf. 252, 299), Mr. Justice Duer was clearly of the opinion, that where a preference was given to separate creditors in an assignment of partnership property, partnership creditors have unquestionable title to relief in equity. He was of the opinion, however, that the illegal provision did not vitiate the whole instrument, but was itself simply void. This case was reversed on appeal on another ground.

The question was distinctly presented to the Court of Appeals, in *Wilson* v. *Robertson*, 21 N. Y. 587. In that case the assignment was made by insolvent copartners, of their firm and individual property, directing that out of the proceeds of the assigned property certain debts of one of the partners should be paid before all the partnership creditors were paid in full. Mr. Justice Wright, in delivering the opinion of the court, said (p. 592): "It will be conceded that the creditors of the firm are, legally and equitably, first entitled to the partnership effects. Such creditors have a claim upon the joint effects prior to every other person, which the court will enforce and protect alike against the individual partners and their creditors. Indeed, the partnership property must be exhausted in satisfying partnership demands before resort can be had to individual property of the members of the firm. The firm is not liable for the private debts of one of its members, nor is there any liability resting upon the other members in respect to those debts. An appropriation of the firm property to pay the individual debt of one of the partners is, in effect, a gift from the firm to the partner—a reservation for the benefit of such partner, or his creditors, to the direct injury of the firm creditors. Can it be reasonably doubted that, when an insolvent firm assign their effects

for the payment of the private debts of a member, for which neither the firm nor the other members, nor the firm assets nor the interests of the other members therein, are liable, such an assignment and appropriation are a direct fraud upon the joint creditors of the assignors?" It was held that the assignment was wholly void as to partnership creditors,, as having been made with the intent to defraud them.

In *Knauth* v. *Bassett* (34 Barb. 31), where the assignment was of individual and firm property, with preferences to certain individual creditors, it was thought that, giving full force to the decision in *Wilson* v. *Robertson*, the assignment was not fraudulent and void *on its face*. Mr. Justice Sutherland remarked (p. 36): "If in fact the assignment included sufficient individual property of each partner to pay his individual debts to be paid by the assignee, I do not think that the case of *Wilson* v. *Robertson* goes to the extent of holding that the assignment would be fraudulent, although in that case it would appear that the joint assignment included some individual property of the partner whose creditors were preferred." As a question of fact, however, the court found that the individual property assigned was not sufficient to pay the individual debt preferred.

In *Hurlbert* v. *Dean* (2 Abb. Dec. 428; s. c. 2 Keyes, 97), the case of *Wilson* v. *Robertson* was followed and approved, and it was further decided that the preference of individual debts in such an assignment, created a presumption of fraud which rendered the assignment fraudulent and void upon its face, and that the burden of showing the non-existence of such debts rests on the parties claiming under the assignment.

In *Booss* v. *Marion*, 129 N. Y. 536; aff'g 35 State R. 710, an assignment of firm property, after providing for the payment of certain preferred debts, directed the assignee to pay "all the debts and liabilities now due or to grow due from the parties of the first part, together or respectively, with all interest moneys due or to grow due," and if the residue should not be sufficient to pay in full, then to apply it to the payment of said debts and liabilities ratably and in proportion. It was held that this language did not permit of a construction which would limit the application of the firm property to the primary payment of the firm debts, but that the fund was to be applied indiscrimi-

nately to the payment of firm and individual debts, and that the assignment was, for that reason, fraudulent and void. In *Roe* v. *Hume*, 79 Supm. Ct. (72 Hun), 1, very similar language was used, and the assignment was likewise declared invalid. In *Crook* v. *Rindskopf*, 105 N. Y. 476; rev'g 41 Supm. Ct. (34 Hun), 457, it was held that a fair interpretation of the language of the assignment did not require the application of firm property to the payment of individual debts, and that, in any event, the amount of the individual obligations was relatively so small as to repel any presumption of a fraudulent intent.

In *Citizens' Bank* v. *Williams*, 128 N. Y. 77; rev'g 35 State R. 542, partners had given their joint and several promissory notes for an indebtedness due by one partner, the other partner signing as surety. In an assignment subsequently executed by the firm there was a direction to pay these notes. It was held that it was not a fraud to appropriate the firm property to the payment of debts for which all the partners were liable, although the indebtedness did not arise in the business of the firm and did not constitute a firm debt. See *Bernheimer* v. *Rindskopf*, 116 N. Y. 428, 438; *Saunders* v. *Reilly*, 105 N. Y. 12, 18.

The preference of an individual debt out of firm assets, effected by a payment to the individual creditor prior to and in contemplation of a general assignment, is indicative of a fraudulent intent in making the assignment. *Schwab* v. *Kaughran*, 42 State R. 407; *Chambers* v. *Smith*, 67 Supm. Ct. (60 Hun), 248. See *Goodrich* v. *Clute*, 3 N. Y. Supp. 102. In *Ransom* v. *Van Deventer* (41 Barb. 307), where a division was made by the partners of partnership assets, and then each partner applied the portion set off to him, in payment of his individual debts, the partnership being insolvent, this was held to be a fraud upon the partnership creditors. See also *Menagh* v. *Whitwell*, 52 N. Y. 146.

Only a firm creditor can complain of an appropriation of firm assets to the payment of the individual debts of the assignor. *Haynes* v. *Brooks*, 116 N. Y. 487; aff'g 49 Supm. Ct. (42 Hun), 528; *Crooks* v. *Rindskopf*, 105 N. Y. 476; *Williams* v. *Whedon*, 109 Id. 333, 338.

§ 192. Firm equitably liable for individual debts.—When

it is made to appear that the firm is equitably liable for the individual debts, the appropriation of the firm property to their payment will not render the assignment fraudulent.

Thus in *Durant* v. *Pierson*, 124 N. Y. 444, where a surviving partner borrowed money from a bank, which was used in the payment of firm obligations, it was held that an assignment subsequently made by the surviving partner was not rendered invalid by a preference to the bank, for although the bank was not a firm creditor, yet its claim represented the firm debts which its funds had paid. So in *Nordlinger* v. *Anderson*, 123 N. Y. 544, where one partner on his individual note borrowed money, which was put into the firm business, and the firm subsequently, and before it became insolvent, gave its note for the indebtedness, it was held that a preference of the note in a subsequent assignment of the firm property did not invalidate the assignment. See *Gorham* v. *Innis*, 115 N. Y. 87. So in *Peyser* v. *Myers*, 135 N. Y. 599, where an incoming partner was deemed to have assumed the obligations of the prior firm, it was held that a preference of a debt of the prior firm in an assignment made by the new firm was not fraudulent as to the creditors of the new firm.

Further illustrations of the rule will be found in *Denton* v. *Merrill*, 50 Supm. Ct. (43 Hun), 224; *Haynes* v. *Brooks*, 8 Civ. Pro. 106; *McCarthy* v. *Fitts*, 20 Wkly. Dig. 225; *Bulger* v. *Rosa*, 119 N. Y. 459; *Hurlbert* v. *Dean*, 2 Abb. Dec. 428. But see *Chambers* v. *Smith*, 67 Supm. Ct. (60 Hun), 248.

§ 193. **Assignment of individual property providing for payment of firm debts.**—Whether an assignment by a copartner of his separate property, directing the payment of the firm debts in exclusion of or in preference to his individual creditors, will be sustained, has given rise to some conflict of opinion. The question was first presented to Vice-Chan. Sandford, in *Jackson* v. *Cornell*, 1 Sandf. Ch. 348. He examined the question on principle, and arrived at the conclusion that such a preference rendered the whole transfer void. The decision was placed upon the rule of equity, requiring the application of partnership property primarily to the payment of partnership debts, and of individual property to the payment of individual debts.

It was said that an assignment which attempts to carry out, through trustees, a principle which a court of equity will never permit any fiduciary to carry out, is a fraud upon the court and upon the law which tolerates assignments.

In *Kirby* v. *Schoonmaker* (3 Barb. Ch. 46), which was decided a few years later, the assignment was of both firm and individual property. The assignment provided first for the payment of a partnership debt, and then for the payment, out of one of the partner's joint and separate portion of the proceeds, of a debt for borrowed money, a part of which was the separate debt of the partner and the residue the debt of the firm. It also provided for the payment out of the other partner's joint or separate portion of the proceeds of a debt due by him. The chancellor sustained the assignment. He laid down the rule without qualification that copartners may assign their individual property as well as their partnership property to pay the joint debts of the firm ; thereby giving the creditors of the firm a preference in payment out of the separate estate of the assignors over the separate creditors. See remarks of Mr. Justice Brown in reference to this case in *Hurlbert* v. *Dean*, 2 Abb. Dec. 428, 433. The case of *Kirby* v. *Schoonmaker* (*supra*) was followed and approved in *Van Rossum* v. *Walker* (11 Barb. 237) and *O'Neil* v. *Salmon* (25 How. Pr. 246). In the case last cited, Mr. Justice Allen distinguishes this class of cases from those which come within the rule established in *Wilson* v. *Robertson* (21 N. Y. 587). An appropriation of partnership property to the payment of an individual debt of one of the members of the firm is an appropriation of the property of the firm to the payment of a debt for which some of the members of the firm are not liable. But neither the reason nor the rule applies to an appropriation of individual property to the payment of a firm debt, for the reason that each partner is individually liable for the payment of all the firm debts. Nor is there any rule of equity which gives to the creditors of the individual members of the firm a lien upon their individual property while it is still within their control. Brown, J., in *Hurlbert* v. *Dean*, 2 Abb. Dec. 428, 435 ; see *Haggerty* v. *Granger*, 15 How. Pr. 243 ; *Haynes* v. *Brooks*, 49 Supm. Ct. (42 Hun), 528 ; affi'd 116 N.Y. 487 ; *Smith* v. *Perine*, 17 State R. 226 ; affi'd 121 N. Y. 376.

And it may now be regarded as settled that an insolvent member of a firm may devote his individual property to the payment of firm debts to the exclusion of his individual creditors. *Crook* v. *Rindskopf*, 105 N. Y. 476; *Saunders* v. *Reilly*, 105 N. Y. 12; *Royer Wheel Co.* v. *Fielding*, 101 N. Y. 504; *Haynes* v. *Brooks*, *supra*; *Ralph* v. *Brickell*, 28 State R. 446; *Smith* v. *Perine*, 17 State R. 266; affi'd 121 N. Y. 376; *Becker* v. *Leonard*, 49 Supm. Ct. (42 Hun), 221, 224; *Smith* v. *Clarendon*, 3 Silv. (Supm. Ct.) 136.

But an assignment of individual property for the payment of partnership debts, reserving the surplus to the grantors, without any provision for the individual creditors, where there are such, is fraudulent and void as against an individual creditor. This is illustrated by the case of *Collomb* v. *Caldwell* (16 N. Y. 484), where partners holding certain real estate as tenants in common assigned it, with other property, for the payment of the firm debts, reserving the surplus. This case was again before the Court of Appeals as *Collumb* v. *Read* (24 N. Y. 505), and it having then been shown that the real estate assigned was partnership property, the assignment was sustained.

When a creditor of a firm has obtained judgment against the partners, he may then maintain a creditor's bill to reach the individual property of a partner which had been fraudulently transferred, and it seems that he may do this notwithstanding that there are individual creditors of the partner. *Royer Wheel Co.* v. *Fielding*, 38 Supm. Ct. (31 Hun), 274.

Where one of the members of a firm of bankers was treasurer of a railroad company, which company deposited its funds with the firm, and both the firm and the individual members executed assignments, it was held that the railroad company was not an individual creditor entitled to share with other individual creditors in the assigned estate of the individual member. *N. Y., P. & B. R. R. Co.* v. *Dixon*, 114 N. Y. 80.

§ 194. **Payment of individual debts out of the joint fund.** —It has sometimes happened that assignments of firm and individual property, after providing for the payment of partnership debts, have directed the payment of the debts of the several individual partners out of the total residuum remaining. In that

event, if the balance belonging to the several partners upon a settlement of the partnership affairs is not in exact proportion to the debts due by them severally, the result of such a provision must necessarily be to appropriate the property of some one of the partners to the payment of debts not owing by him. This was the case of *O'Neil* v. *Salmon* (25 How. Pr. 246), and the court there held that it was a palpable fraud which vitiated the assignment. And it was further held, that the fact that there may be no surplus after the payment of the partnership debts, and therefore no actual diversion and misapplication of the individual property of either, cannot aid the assignment. But in the case of *Turner* v. *Jaycox* (40 N. Y. 470), where the facts in this respect were similar, for the purpose of overcoming the presumption of fraudulent intent, each of the assignors was permitted to testify that he owed no individual debts and owned no individual property, and this was deemed sufficient. Such an assignment is undoubtedly voidable by individual creditors, but not by partnership creditors, since they are in no way prejudiced by the illegal provision. In *Crook* v. *Rindskopf*, 105 N. Y. 476, it was held that when the individual assets were insignificant in amount that the inference of fraud arising from their having been placed in a common fund for the indiscriminate payment of individual creditors was repelled. *Scott* v. *Guthrie*, 10 Bosw. 408 ; s. c. 25 How. Pr. 481, 512 ; *Morrison* v. *Atwell*, 9 Bosw. 503 ; *Smith* v. *Howard*, 20 How. Pr. 121. The cases cited above must be taken as overruling *Eyre* v. *Beebe* (28 How. Pr. 333), so far as that case holds that a direction to an assignee, after payment of partnership debts, to pay the private and individual debts of each assignor out of the common fund, is not illegal. In that case the court held that the direction being to pay out of the remaining proceeds, the assignee would be presumed to pay the private debts of each partner out of his portion of the proceeds, and such would be taken to be the effect of the conveyance, unless an express provision to the contrary appeared.

§ 195. Provisions for the payment of debts due a partner or in which a partner has an interest.—When a firm was indebted to one of its partners for goods sold to it by him, and both the firm and the individual partner executed general assign-

ments for the benefit of their respective creditors, it was held, on an accounting of the firm assignee, that the debt due to the partner could be paid only after all the other creditors of the copartnership had been fully paid. *Matter of Rieser*, 26 Supm. Ct. (19 Hun), 202. The principle of this decision would invalidate an assignment providing for the payment from firm assets of a debt due one of the members of the firm. And the rule is that a provision for the payment of a debt due to one partner out of firm assets will invalidate a general assignment by the firm. *Whitney* v. *Hirsch*, 46 Supm. Ct. (39 Hun), 325 ; *Chambers* v. *Smith*, 67 Supm. Ct. (60 Hun), 248 ; *Claflin* v. *Hirsch*, 19 Wkly. Dig. 248. See *Smith* v. *Smith*, 136 N. Y. 313 ; affi'g 39 State R. 46 ; *Durant* v. *Pierson*, 124 N. Y. 444 ; *Denton* v. *Merrill*, 50 Supm. Ct. (43 Hun), 224 ; *Peyser* v. *Myers*, 135 N. Y. 599 ; *Bernheimer* v. *Rindskopf*, 116 N. Y. 428. For an instance of a claim by a firm against the funds arising out of an assignment by an individual member, see *Cheever* v. *Brown*, 40 State R. 610 ; s. c. 128 N. Y. 670.

This rule does not necessarily include an indebtedness due to a firm in which one or more members of the assigning firm are partners. In *Peckham* v. *Mattison*, 15 Abb. N. C. 367, n., it was held that when the assigning firm was indebted to an independent firm composed of two of the members of the assigning firm it might properly prefer such indebtedness. Lindley on Part., 2d Am. ed., p. * 725 ; Parsons on Part., 4th ed., § 401 ; Story on Part., 7th ed., § 394 ; *Ex parte* St. Barbe, 11 Ves. 413 ; *Ex parte* Castell, 2 Glyn & J. 124.

It has been said (Wait on Fraud. Conv., 2d ed., § 329), that the case of *Fanshawe* v. *Lane* (16 Abb. Pr. 71) asserts the absolute right of an assigning firm to prefer such debts. That case, however, went no further than to hold that when a limited partnership was preferred in an assignment executed by a general partnership in which the members of the limited partnership were also members, that a creditor of the limited partnership could not avail himself of the invalidity of the assignment executed by the general partnership. Although the referee who decided the case (Alex. W. Bradford) expressed the opinion that such a preference did not invalidate the assignment, either as creating a trust for the benefit of the assignor or as having been made with the

intent to hinder and delay creditors, an attempt to prefer a partner in either a general or a special copartnership, for the amount contributed by him as capital to the firm business, will invalidate the assignment. *Whitcomb* v. *Fowle*, 7 Abb. N. C. 295 ; s. c. 10 Daly, 23 ; *Claflin* v. *Hirsch*, 19 W'kly Dig. 248.

Where a firm, being solvent, gave its notes in settlement of an account with another firm composed of some of the same members, which notes were made payable and delivered to the wives of such members, as gifts from their husbands, and the firm making the notes subsequently assigned for the benefit of creditors, preferring the wives for the amount of the notes, it was held that a judgment-creditor of such firm could not maintain an action to set aside the assignment as fraudulent because of the preferences. *First Nat. Bk.* v. *Wood*, 128 N. Y. 35 ; s. c. 38 State Rep. 422 ; rev'g 52 Supm. Ct. (45 Hun), 411.

A preference given for an indebtedness for money loaned to the firm by one partner as administrator of an estate is not fraudulent as being a provision for the benefit of that partner where it appears merely that he was one of the heirs of the decedent, but not that he had any interest in the estate at the time of the assignment. *Kennedy* v. *Wood*, 59 Supm. Ct. (52 Hun), 46.

§ 196. **Assignment by partners after dissolution.**—Where, upon dissolution of the firm, the joint property is transferred to one of the firm, the effect of such transfer as between the partners is to vest the title to the property in the individual partner, with the right to use and dispose of it as his separate estate. *Dimon* v. *Hazard*, 32 N. Y. 65. And if the conveyance is made in good faith, and without any intent to defraud the creditors of the firm, or to deprive them of their legal or equitable claims upon the joint estate in case of insolvency, the property becomes separate estate, wholly free from any claims of joint creditors, and the individual partner may make an assignment of it for the payment of his individual debts. *Stanton* v. *Westover*, 101 N. Y. 265 ; *Dimon* v. *Hazard*, *supra* ; *Menagh* v. *Whitwell*, 52 N. Y. 146. Accordingly, where I., T. & S. were partners, and I. sold out in good faith to T. & S., and received from them upon the sale their note, and T. & S. continued the business as partners and then failed and made a general

assignment preferring this note and providing for the payment *pro rata* of the debts of the old and new firm, it was held that the creditors of the old firm had no equity against the partnership property of the old firm in the hands of the new firm or their assignee, and that the preference of the note was not fraudulent. *Smith* v. *Howard*, 20 How. Pr. 121 ; *Mattison* v. *Demarest*, 4 Robt. 161 ; *Friedburger* v. *Jaberg*, 11 State R. 718 ; *Bates* v. *McNulty*, 4 State R. 646 ; *Durfee* v. *Bump*, 20 State R. 833 ; *Gorham* v. *Innis*, 115 N. Y. 87 ; *Matter of Dawson*, 66 Supm. Ct. (59 Hun), 239 ; *Weaver* v. *White*, 46 State R. 467.

The *bona fides* of the purchase of the firm assets is the controlling factor, and to this Finch, J., says in *Stanton* v. *Westover*, *supra*, " The insolvency of the purchasing partner, if known to him and to the seller, might very well be strong evidence of an intent to defraud the partnership creditors, and become conclusive upon that question if there was no explanation."

In *Crane* v. *Roosa*, 47 Supm. Ct. (40 Hun), 455, where it appeared that when the firm was insolvent one of the partners bought out the other, paying him a sum of money and assuming the firm debts, of which he paid a part, and then made an assignment in which he preferred his individual creditors, it was left the jury to determine whether it was the intention of the purchasing partner to obtain the firm property so that he might prefer his individual creditors out of the proceeds, with the instruction that if such was the intent the assignment was fraudulent as to the firm creditors. Landon, J., dissenting, was of opinion that the assignment was absolutely fraudulent by reason of the existing insolvency at the time of the purchase and of the assignment.

To the same effect is *Burhans* v. *Kelly*, 17 State R. 552. In *Bulger* v. *Rosa*, 119 N. Y. 459, 465, the general principle is stated by Andrews, J., as follows :

" There can be no controversy as to the rule of law governing the relations between an insolvent firm and its creditors, and their mutual rights in respect of the firm property. The partnership as such has its own property and its own creditors, as distinct from the individual property of its members and their individual creditors. The firm creditors are preferentially en-

titled to be paid out of the firm assets. Whatever may be the true foundation of the equity, it is now an undisputed element in the security of the firm creditors. The insolvent firm cannot apply the firm assets in payment of the individual debts of the partners, nor can the equity of the firm creditors be defeated by an attempted conversion of the assets of the firm into the individual assets of one of the partners through a transfer by one partner of his interest therein to the other. In either of the cases supposed, they would remain, as to the firm creditors, firm assets, which could be followed and taken on execution by the firm creditors, until they had come to the hands of a *bona fide* purchaser, and where an individual creditor of one of the members of an insolvent firm, knowing of such insolvency, takes a transfer of firm property in payment of his individual debt, his act is not merely a violation of an equitable right of the firm creditors, but it constitutes a fraud under the statute of Elizabeth. The law regards it as a voluntary transfer made to hinder, delay and defraud the firm creditors, and as to them is void."

In *Lester* v. *Pollock* (3 Robt. 691), where two of the members of a firm of three had purchased the share of the other partner, and then executed an assignment directing the assignee to pay off all the debts owing by the new firm and by the old firm, or by either of the members of said firms to a specified creditor, the assignment was declared void as to the creditors of the old firm. And where the conveyance of the firm property is not made in good faith, but with an intent to defraud the creditors of the firm, an assignment made by the purchaser preferring his own creditors will be declared void as to the firm creditors. *Heye* v. *Bolles*, 2 Daly, 231; see *Paton* v. *Wright*, 15 How. Pr. 481.

So, where one partner sold out to his copartner, taking in payment his notes secured by mortgage, and the latter afterwards made a general assignment for the benefit of creditors, it was held that the mortgage was void as against firm creditors. *Hard* v. *Milligan*, 8 Abb. N. C. 58. See *Warner* v. *Lake*, 37 State R. 799.

CHAPTER XIII.

FRAUD ON THE FACE OF THE ASSIGNMENT.

§ 197. **Statutory provisions.**—The validity of a general assignment for the benefit of creditors, may be tested by its conformity to the statutory requirements as to its mode of execution (see *ante*, Chap. IX). An assignment of this character must be made, executed and acknowledged in the manner and according to the forms prescribed by statute. *Kercheis* v. *Schloss*, 49 How. Pr. 284, 287.

If it is wanting in any essential requisite to its validity as a legal instrument under the statute, it will give the assignee no title to the property which may then be levied upon by judgment-creditors, or other remedies may be taken to prevent the assignee from carrying the trust into effect. Daly, F. J., in *Place* v. *Miller*, 6 Abb. Pr. N. S. 178, 180; *Rennie* v. *Bean*, 31 Supm. Ct. (24 Hun), 123; *Smith* v. *Boyd*, 3 Court Journal, 20; *Jaffray* v. *McGehee*, 107 *U. S.* 361.

And in *De Camp* v. *Marshall* (2 Abb. Pr. N. S. 373, 374), it was said, that when there is not a substantial and full compliance with the statute, the courts are bound, as matter of law, to conclude that the assignment was made with intent to defraud creditors. In that case, a portion of the estate was suppressed for the purpose of diminishing the security required of the assignee, and he was directed to pay to a certain creditor, a sum larger than the amount due him, so that the assignment was fraudulent apart from the failure to comply with the statute.

But whether the failure to comply with the requirements of the statute will render the assignment fraudulent, would seem to depend upon the character of the omission and the intent of the assignor. *Tim* v. *Smith*, 1 Am. Insol. R. 466.

It does not follow that because the omission to do any or all of the acts required by the statute, may render an assignment in-

operative and void, that it is thereby rendered fraudulent also. *Scott* v. *Guthrie*, 10 Bosw. 408 ; s. c. 25 How. Pr. 512 ; *Tim* v. *Smith*, 1 Am. Insol. R. 466 ; *Denzer* v. *Mundy*, 5 Robt. 636.

But, although an assignment may conform in every particular to the statutory requirements, it may nevertheless be fraudulent and void as against creditors, because made with the intent to hinder, delay and defraud creditors, and thus within the operation of the statute of frauds. 2 R. S. 137 (4 R. S., 8th ed. 2592), § 1.

The instrument of assignment itself may furnish evidence upon its face of an attempt to hinder, delay or defraud creditors, or the evidence of such intent may arise from facts and circumstances extrinsic to the writing, but in either case, when such fraudulent intent is established, the assignment is void. The purpose of this chapter is to present the various instances in which courts have held that provisions appearing upon the face of the assignment have furnished evidence of a fraudulent intent.

Beside the statute of frauds, it will become necessary also to refer to another statute, sometimes called " the statute of personal uses." *Rome Exch. Bank* v. *Eames*, 4 Abb. Dec. 83, 95 ; s. c. 1 Keyes, 588 ; *Young* v. *Heermans*, 66 N. Y. 374.

That statute provides, that " all deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." 2 R. S. 135 (4 R. S., 8th ed. 2590), § 1.

§ 198. **Assignments, how construed.**—It has been said that assignments by debtors are not regarded with indulgence by the law ; that while the law gives a right of preference, a wholesome policy demands that this right should be watched with strict vigilance, and its exercise restricted to its narrowest limits. Mr. Justice Clerke, in *Wilson* v. *Ferguson*, 10 How. Pr. 175, 180. And it must be confessed, in not a few instances courts have apparently been more astute to discover grounds on which to set aside the assignment than to sustain it. See remarks of Roosevelt, J., in *Ely* v. *Cook*, 18 Barb. 612, 614. However this may be, the true rule of construction in reference to general

assignments as well as to all other written instruments, is *ut res magis valeat quam pereat. Darling* v. *Rogers*, 22 Wend. 483. An assignment should be upheld, if the language permit it, rather than be defeated, and fraud is not presumed, unless fairly inferable. *Brigham* v. *Tillinghast*, 15 Barb. 618.

In construing the provisions of a general assignment, says Mr. Justice Porter, in *Townsend* v. *Stearns* (32 N. Y. 209, 213), we are to be governed by the rules applicable to ordinary conveyances. There is the same presumption in favor of good faith with respect to them, as in the case of ordinary contracts and conveyances. They will be supported rather than declared void. Where the language of an assignment for the benefit of creditors can be abundantly satisfied by a construction which will support the instrument, such construction should be given. *Benedict* v. *Huntington*, 32 N. Y. 219, 224; *Bogert* v. *Haight*, 9 Paige, 297; *Mann* v. *Witbeck*, 17 Barb. 388; *Sherman* v. *Elder*, 24 N. Y., 381; *Kellogg* v. *Slauson*, 11 N. Y. 302; *Platt* v. *Lott*, 17 N. Y. 478; *Bank of Silver Creek* v. *Talcott*, 22 Barb. 550; *Brainerd* v. *Dunning*, 30 N. Y. 211; *Read* v. *Worthington*, 9 Bosw. 617, 630. *Matter of Fay*, 6 Misc. 462.

And where an instrument is ambiguous in its terms, and admits of two constructions, that interpretation should be given to it which will render it legal and operative, rather than that which will render it illegal and void. *Grover* v. *Wakeman*, 11 Wend. 187. *Roberts* v. *Victor*, 61 Supm. Ct. (54 Hun), 461.

As far as the cases of *Woodburn* v. *Mosher* (9 Barb. 255) and *Murphy* v. *Bell* (8 How. Pr. 468) maintain a different rule of construction, they have been overruled by the Court of Appeals. *Benedict* v. *Huntington*, 32 N. Y. 219, 227, Potter, J.

"Two rules," says Judge Finch, in *Coyne* v. *Weaver* (84 N. Y. 386, 390), "should guide us to the proper result. The meaning and intention of the assignor is to be gathered from the whole instrument, and where two different constructions are possible, that is to be chosen which upholds and does not destroy the instrument." The burden is on the party who alleges it to be fraudulent upon its face, to show that the instrument is vitiated by some provision affirmatively illegal. *Townsend* v. *Stearns*, 32 N. Y. 209; *Oliver Lee & Co.'s Bank* v. *Talcott*, 19 N. Y. 146; *Newman* v. *Cordell*, 43 Barb. 448.

The following language of Judge Finch, in *Shultz* v. *Hoagland* (85 N. Y. 464, 467), forcibly expresses the rule. He says: "The case furnishes no exception to the rule that fraud is to be proved and not presumed. (*Grover* v. *Wakeman*, 11 Wend. 187.) It is seldom, however, that it can be directly proved, and usually is a deduction from other facts, which rationally and logically indicate its existence. Such facts, nevertheless, must be of a character to warrant the inference. It is not enough that they are ambiguous, and just as consistent with innocence as with guilt. That would substitute suspicion as the equivalent of proof. They must not be, when taken together and aggregated, when interlinked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting."

Any particular provision in an assignment should be construed in the light of the whole context, and in view of the general rule that a construction will be preferred which will uphold rather than one which will destroy an instrument. *Bagley* v. *Bowe*, 105 N. Y. 171, 177; and *Crook* v. *Rindskopf*, 105 N. Y. 476, 485.

Whether a presumption of fraud arising from a provision contained in the assignment can be rebutted by parol evidence, tending to show that under the circumstances of the particular case the provision would not, in fact, work an injury to creditors, is a question not entirely free from doubt. See *Crook* v. *Rindskopf*, 105 N. Y. 476, 482. See *ante*, § 167A; *Chambers* v. *Smith*, 67 Supm. Ct. (60 Hun), 248.

§ 199. **Fraud in law and fraud in fact.**—It has been declared by the Revised Statutes, that the question of fraudulent intent in all cases arising under the statute, shall be deemed a question of fact and not of law. 2 R. S. 137 (4 R. S. 8th ed. 2593), § 4.

When the fraudulent intent is sought to be shown by reason of matters extrinsic to the instrument, or from a state of facts shown to exist, operating in connection with the writing, then it is the province of the jury to determine the question. *Livermore* v. *Northrup*, 44 N. Y. 107; *Vance* v. *Phillips*, 6 Hill, 433; and a finding upon conflicting evidence will not be disturbed. *Cohen* v. *Irion*, 26 State R. 1.

Unless the facts admitted by the parties, or established by the evidence, without dispute or explanation, make the assignment necessarily fraudulent, according to the law of the case. *Kavanagh* v. *Beckwith*, 44 Barb. 192.

But, whenever an assignment contains provisions which are calculated *per se* to hinder, delay or defraud creditors, although the fraud must be passed upon as a question of fact, it nevertheless becomes the duty of the court to set aside the finding of it in opposition to the plain inference to be drawn from the face of the instrument. Mr. Justice Selden, in *Dunham* v. *Waterman*, 17 N. Y. 9.

And where an assignment on its face shows that it must necessarily have the effect of defrauding the creditors of the assignor, it is conclusive evidence of a fraudulent intent, and it is void. *Kavanagh* v. *Beckwith*, 44 Barb. 192 ; see *Sheldon* v. *Dodge*, 4 Den. 217 ; *Goodrich* v. *Downs*, 6 Hill, 438 ; *Wakeman* v. *Dalley*, 44 Barb. 498, 503 ; affi'd 51 N. Y. 27 ; *Griffin* v. *Marquardt*, 21 N. Y. 121 ; *Cunningham* v. *Freeborn*, 11 Wend. 240 ; *Sturtevant* v. *Ballard*, 9 Johns. 337 ; *Forbes* v. *Waller*, 25 N. Y. 430.

Mr. Justice Danforth, in *McConnell* v. *Sherwood* (84 N. Y. 522, 528), in passing upon the inference of fraud to be derived from a clause in an assignment authorizing the assignee to compromise with the creditors of the assignor, remarked that the rule must be applied which was declared in *Wakeman* v. *Grover* (4 Paige, 23 ; s. c. *sub. nom. Grover* v. *Wakeman*, 11 Wend. 187), and adopted in many later cases, either in words or effect, as the only safe one, and which regards every assignment operating to delay creditors for any reason not distinctly calculated to promote their interests, as contrary to the statute of frauds and therefore void.

" An assignment for the benefit of creditors, which directs or authorizes such a disposition to be made of the property conveyed, or of its proceeds, as will, if so carried into effect by the assignee, operate to deprive the assignor's creditors of their right to have such property applied to the payment of their claims, is proven by itself, and, therefore, by evidence which is incontrovertible, to be fraudulent, in fact, as against the creditors of the assignor. For the assignor must be held to have intended to do

what he has done, and to have designed to defraud his creditors, if the assignment directs or permits it, and the evidence of such intention, there found, is conclusive under well-established rules of law, and cannot be contradicted by oral testimony.'' Barbour, J., in *Lester* v. *Pollock*, 3 Robt. 691, 692.

Mr. Wait says : " Whenever the effect of a particular transaction with a debtor is to hinder, delay, or defraud creditors, the law infers the intent, though there may be no direct evidence of a corrupt or dishonorable motive, but, on the contrary, an actual honest motive existed." Wait on Fraud. Conv. § 9 ; see *Coleman* v. *Burr*, 93 N. Y. 17, 31. The court may take the question of fact from the jury when the fraudulent intent is conclusively established or conclusively rebutted. See *post*, Chap. XV.

But in the case of *Milliken* v. *Dart* (33 Supm. Ct. [26 Hun], 24), where a general assignment for creditors contained a provision authorizing the assignee to compound with debtors and to sell on credit, the latter of which clauses has been frequently held to furnish absolute evidence of a fraudulent intent, under the statute of frauds, it was held, by the Supreme Court in the first department, that this did not furnish sufficient evidence of an intent to defraud creditors, to warrant the issuing of an attachment under § 636 of the Code of Civ. Pro. This decision appears to be open to question. It is difficult to perceive any reason for a different construction of the words " with intent to defraud," as used in the statute of fraudulent conveyances, and in the attachment laws, and no such distinction has heretofore been attempted, although such a distinction has been sustained in the construction of the section of the Code authorizing the issuing of an order of arrest. *Hoyt* v. *Godfrey*, 88 N. Y. 669.

§ 200. **Void in part, good in part.**—Where one or more provisions in assignment are adjudged to indicate an intent to hinder, delay, or defraud creditors, the fraudulent intent vitiates the whole instrument and not merely the obnoxious provision. *Wakeman* v. *Grover*, 4 Paige, 23 ; s. c. *sub. nom. Grover* v. *Wakeman*, 11 Wend. 187 ; *Hyslop* v. *Clarke*, 14 Johns. 458 ; *Fiedler* v. *Day*, 2 Sandf. 594 ; *Mackie* v. *Cairns*, 5 Cow. 547 ; *O'Neil* v. *Salmon*, 25 How. Pr. 246 ; see *Barney* v. *Griffin*, 2 N. Y. 365, 372. The taint as to a part affects the entirety.

O'Neil v. *Salmon*, 25 How. Pr. 246. *Norton* v. *Matthews*, 58 State R. 806; *Nat. Bank of Granville* v. *Cohn*, 49 Supm. Ct. (42 Hun), 381; *Billings* v. *Russell*, 101 N. Y. 226.

Where a conveyance is good in part and bad in part, as against the provisions of the statute, it is void *in toto*, and no interest passes to the grantee under the part which is good. *Hyslop* v. *Clarke*, 14 Johns. 458. Indeed, if the whole of the conveyance made in violation of a statute, is not held to be void merely because it may be good in one particular, it would be very easy to elude the statute in every case. One good trust might always be inserted, so that what could not be accomplished directly would be attained indirectly, and in this manner the fraudulent purpose might be easily effected notwithstanding the statute, and the triumph of debtors over their creditors would thus be complete. *Hyslop* v. *Clarke*, *supra*, 466.

Another and a very satisfactory reason for the rule, is given by Mr. Justice Selden, in *Jessup* v. *Hulse*, 21 N. Y. 168, 170. He says: "If he (the assignor) annex an improper condition, the court must pronounce the assignment itself void. It cannot hold the transfer good, and disregard the condition; because that would be to take the property from the assignor against his will. He having consented to part with his title only upon certain conditions, the transfer and the condition must stand or fall together."

A forcible illustration of the rule is found in the case of *Fiedler* v. *Day* (2 Sandf. 594), where one of the preferred debts was fictitious, although another preferred debt and the unpreferred debts were all due in good faith, the court held the whole instrument fraudulent and void, and numerous other illustrations will occur in the course of the present chapter. *Johnson* v. *Philips*, 2 N. Y. Supp. 432.

While there is great harmony in the cases in applying this rule to assignments which are rendered void by reason of fraudulent provisions establishing an intent to hinder, delay, or defraud creditors, yet when the trust created is void by other statutory enactments, a different rule has been applied.

Thus, an assignment of real estate for the benefit of creditors, upon trust to sell *or mortgage* the same, and apply the proceeds to the payment of debts, is a valid instrument under the statutes of uses and trust as to the trust *to sell*, notwithstanding that the

trust to mortgage, being for the benefit of creditors at large, is void. *Darling* v. *Rogers*, 22 Wend. 483 ; rev'g s. c. as *Rogers* v. *De Forest*, 7 Paige, 272. "There can never be any difficulty," says Verplanck, Senator, in this case (22 Wend. 483, 494), "in applying this construction of the statute, where the two trusts are wholly separate though in the same instrument ; as where part of the land is conveyed to one purpose, that being a valid one, and part to another and an invalid one, or where the whole is assigned first for a valid trust, and that failing, to some void purpose. But when the purposes are in the *alternative*, or when they are mixed and complicated together, the separation of the good and the bad may not be obvious, and sometimes not possible. When the void part is so complicated with a trust otherwise valid, as to form an essential part of the intent and object of the person creating it, it may vitiate the whole, because the trust may be in fact single, though composed of several parts, one of which is void. . . . The prevailing doctrine of equity (and in many cases of our common and statute law also), is that when good and bad provisions are mixed in a deed, the good shall be saved so far as consistent with probable intent."

So, where the assignment is assailed under 2 R. S. 135, § 1, as creating a trust for the assignor, the statute avoids only so much of the grant as is not sustained by the valid purposes for which it was made. It does not avoid the entire instrument which contains the invalid use. *Curtis* v. *Leavitt*, 15 N. Y. 9, 176 ; *Rome Exch. Bank* v. *Eames*, 4 Abb. Dec. 83 ; s. c. 1 Keyes, 588 ; *Barney* v. *Griffin*, 2 N. Y. 365, and see this case commented upon and distinguished in *Campbell* v. *Woodworth*, 24 N. Y. 304 ; see, also, *Van Veghten* v. *Van Veghten*, 8 Paige, 104, 119 ; *De Kay* v. *Irving*, 5 Den. 646 ; affi'g s. c. *sub. nom. Irving* v. *DeKay*, 9 Paige, 521.

§ 201. **Good as between the parties.**—It should be remarked also, in this connection, that a fraudulent provision in an assignment does not render the instrument void as between the assignor and the assignee, but only as to those creditors who do not consent to it. *Smith* v. *Howard*, 20 How. Pr. 121 ; see Wait on Fraud. Conv. chap. xxvi. The conveyance, though void as to

creditors, is good against the grantor and his representatives. *Storm* v. *Davenport*, 1 Sandf. Ch. 135 ; *Mackie* v. *Cairns*, 5 Cow. 547 ; *Morrison* v. *Brand*, 5 Daly, 40 ; *Ogden* v. *Prentice*, 33 Barb. 160 ; *Sweet* v. *Tinslar*, 52 Barb. 271 ; *Stewart* v. *Ackley*, 52 Barb. 283 ; *Waterbury* v. *Westervelt*, 9 N. Y. 598, 605 ; *Osborne* v. *Moss*, 7 Johns. 161 ; *Jackson* v. *Cadwell*, 1 Cow. 622.

An assignment in due form is valid as between the parties to it, and upon the acceptance of the trust the assignee becomes bound to execute its directions. If fraudulent as against creditors it is only voidable by adjudication at their election or that of some one of them, and until an attack is made with a view to such a judicial determination it will be treated as valid and must be executed accordingly. Hence where an assignee had paid preferred creditors, and the assignment was afterward set aside at the suit of a judgment creditor, it was held that the preferred creditors so paid could not be compelled to refund the payment. *Knower* v. *Cent. Nat'l Bank*, 124 N. Y. 552.

Equity will give no relief to the fraudulent grantor against the grantee by directing an accounting and reconveyance. *Sweet* v. *Tinslar*, *supra* ; *Stewart* v. *Ackley*, *supra* ; *Mosely* v. *Mosely*, 15 N. Y. 334.

§ 202. **Indicia of fraud.**—There are certain provisions in conveyances intended to defraud creditors, and certain circumstances attending the execution of such instruments which experience has shown often accompany a fraudulent intent. These are sometimes designated as "indicia of fraud," or "badges of fraud." See Bump on Fraud. Con. ch. 4. They create a suspicion of fraud, and sometimes furnish conclusive evidence of a fraudulent intent. The provisions in general assignments which we are about to consider are of this class, and may not inappropriately be designated as "indicia of fraud."

§ 203. **Assignments exacting releases.**—Great conflict of opinion has existed in the courts of various States, as to whether an assignment by an insolvent debtor, which limited the right of creditors to participate in the benefits of an assignment by requiring a discharge and release of the debtor from his debts as a con-

dition to such participation, would be sustained. In some instances such assignments have been held valid. *Lippincott* v. *Barker*, 2 Binn. 174; *Pearpoint* v. *Graham*, 4 Wash. C. C. 232; *Brashear* v. *West*, 7 Pet. 608; *McCall* v. *Hinkley*, 4 Gill, 128; *Green* v. *Trieber*, 3 Md. 11; *Farquharson* v. *Eichelberger*, 15 Id. 63; *Whedbee* v. *Stewart*, 40 Md. 414; *Nightingale* v. *Harris*, 6 R. I. 321; and see cases collected in Burrill on Assignment, 6th ed. § 148 *et seq.*; see note to *Lawrence* v. *Norton*, 22 Am. L. Reg. 264.

But in this State it is now the settled law that assignments containing a stipulation for the release of the debtor, whether as a condition for receiving any benefit under the assignment or only as a condition of preference, are fraudulent and void. *Hyslop* v. *Clarke*, 14 Johns. 458; *Austin* v. *Bell*, 20 Id. 442; *Wakeman* v. *Grover*, 4 Paige, 23; s. c. 11 Wend. 187; *Armstrong* v. *Byrne*, 1 Edw. Ch. 79; *Lentilhon* v. *Moffat*, 1 Id. 451; *Mills* v. *Levy*, 2 Id. 183; *Smith* v. *Woodruff*, 1 Hilt. 462; *Berry* v. *Riley*, 2 Barb. 307; *Chadwick* v. *Burrows*, 49 Supm. Ct. (42 Hun), 39.

The ground of these decisions is well stated by Vice-chancellor McCoun in *Armstrong* v. *Byrne* (*supra*). He says: "A debtor in failing circumstances may lawfully assign his property for the benefit of his creditors, and prefer one creditor or a class of creditors. But he shall not fix terms or conditions in order to benefit himself, and likewise say to his creditors, 'you must subscribe to these provisions, or you shall not touch the property.' Such conditions are inadmissible. He does not benefit himself by merely creating a preference of payment among his creditors, because he remains liable to the others until all his debts are paid; but if he stipulates for an absolute discharge before a creditor shall have the benefit of the property, he thereby assumes to himself a power over the creditors for his own personal advantage, namely, of being discharged from his debts by a payment of a part only. And if he can be allowed to lock up his property by means of such an assignment until the creditors comply with his terms, he can successfully delay, hinder and defraud his creditors."

In *Chadwick* v. *Burrows*, 49 Supm. Ct. (42 Hun), 39, a firm of two members having become insolvent, one of them abscond-

ed, the other, after calling a meeting of his creditors, with the approval of all but one of them, conveyed all the firm property to an assignee, who covenanted to pay each creditor fifty cents on the dollar of his claim. In an action brought by the creditor, who did not assent, to set aside the conveyance, it was held that it was not fraudulent, no release having been exacted, and it was also held that the creditor was entitled to recover from the assignee fifty per cent. of his claim.

§ 204. Assignments preferring creditors who have agreed to execute releases.—Although the rule is thus fully established in reference to assignments in which preferences are given as a *condition* for the subsequent execution of a release, yet where the preference is given not conditionally but absolutely, not as a condition for a future release, but in consideration of a previous release and agreement, the same considerations do not prevail, and the assignment is not necessarily void. *Spaulding* v. *Strang*, 37 N. Y. 135; 38 Id. 9; rev'g 36 Barb. 310, and 32 Barb. 235; *Low* v. *Graydon*, 50 Barb. 414; *Powers* v. *Graydon*, 10 Bosw. 630; *Renard* v. *Graydon*, 39 Barb. 548; *Renard* v. *Maydore*, 25 How. Pr. 178. In the two first cases cited the question arose upon the same assignment. A firm being in insolvent circumstances, made a proposition to their creditors to pay fifty cents on the dollar in full satisfaction of their debts, and a portion of the creditors agreed thereto. Thereupon an agreement in writing was made by the firm with such creditors, by which the former agreed to pay and the latter agreed to accept of fifty per cent. of their debts in full satisfaction; providing, further, that in case the firm should be unable to pay pursuant to the agreement, they should make an assignment, giving a preference, as specified in the agreement, of fifty cents on the dollar upon the debts of those who became parties to the agreement. Several creditors became parties, and executed releases of their debts to the firm. The firm was unable to make the payments according to the agreement, and made an assignment giving a preference of fifty per cent. upon the debts of those who had become parties thereto. The question was whether this made the assignment fraudulent. It was held that it did not, for the reason that it

was not found or proved that any coercion was used by the assignors to induce the creditors to make the agreement, and for the further reason that, at the time the agreement was made, the assignors had made no disposition of their property; that it was still subject to the remedy of creditors, and that under these circumstances, the parties were at liberty to make any contracts they chose in respect to the terms upon which the indebtedness should be discharged. See these cases distinguished in *Haydock* v. *Coope*, 53 N. Y. 68, 74.

The other cases cited arose upon an assignment executed by the firm of Graydon, McCreery & Co. The facts were somewhat similar to those in the case above cited. The creditors had executed an agreement of compromise by which they agreed to accept fifty cents on the dollar within a specified time, in full discharge of their debts, whether the money was received by preferences in an assignment or other disposition of property (10 Bosw. 653). It was held that the agreement and an assignment subsequently executed were not parts of the same transaction (25 How. 179), and the fact that the creditors who had executed the agreement were preferred to the extent of fifty cents on the dollar, did not render the assignment void. The opinions rendered in the case of *Powers* v. *Graydon* (10 Bosw. 630), are particularly instructive.

Analogous to these cases is *Hastings* v. *Belknap*, 1 Den. 190. There a debtor entered into an arrangement with some of his creditors, by which an assignment of his property was made to trustees, in trust for his creditors, generally, and by which the trustees personally bound themselves to the debtor, to procure for him a release and discharge from all the creditors, except certain ones who were specified. It was held that the assignment was not conditional or partial, or liable to the objection of being intended to coerce a release from the creditors. The rule in reference to all this class of cases is well expressed by Mr. Justice Robertson, in *Powers* v. *Graydon*, 10 Bosw. 630. He says (p. 635): "In fine, while a debtor is in possession of his property, he has a perfect right to agree to dispose of it as he thinks proper, in payment of lawful debts, and to use that power of disposition as a means of procuring favorable releases; the moment he undertakes to put it out of his possession by a conveyance in trust,

such instrument must contain no clause coercive of creditors to release, under the peril of being held to be void. The mere holding out inducements to creditors in this case to release for less than their claims, upon a promise to prefer them in an assignment, was a perfectly legitimate mode of negotiation."

§ 205. **Preferences conditional upon other acts of creditors.**—Conditions may be imposed upon creditors, limiting their right to a preference where the conditions are such as are not prejudicial to creditors, and are such as are in the line of their duty.

In *Bellows* v. *Patridge* (19 Barb. 176), the assignment preferred in the third class of creditors two notes made to one H., upon condition that H. accounted for certain collaterals. If he did not account for them, however, no portion of the assigned property was to be applied on these notes until all the residuary creditors were paid, except B. The notes were then to be paid, and B.'s claim was to follow. In any event, B. was to be paid last. It was held by the court that these provisions were nothing more than the exercise of the assignor's undoubted right to direct preferences and to prescribe the order in which the debts should be paid, and did not render the assignment void.

And when A. borrowed the promissory note of B., agreeing to pay it at maturity, and give to B. his own note, payable at the same time, A. afterward indorsed the borrowed note to C., and becoming insolvent, made an assignment, providing for the payment of B.'s note only on condition that B. should surrender the note of the assignor to be canceled. It was held that the two notes constituting but one debt, the condition did not coerce the creditor or secure a benefit to the assignor so as to render the assignment void. *Oliver Lee & Co.'s Bank* v. *Talcott*, 19 N. Y. 146.

So where an assignment giving preferences to a first and second class of creditors, who were designated, provided that the assignee should, as soon as convenient, advertise in such paper or papers as he might deem best calculated to give information to the creditors, requesting them to render their claims to him at a reasonable time and place; that the debts of the assignor which should come to the assignee's knowledge by the expiration of

such time (not in the first two classes), should constitute the third class, and be paid ratably; that all other debts should be paid after these. It was held not to be fraudulent. *Ward* v. *Tingley*, 4 Sandf. Ch. 476.

§ 205. **Trusts for the assignor.**—There can be no question, but that a conveyance which places an insolvent debtor's property beyond the reach of his creditors by legal process, and at the same time, either expressly or impliedly, creates a trust in the property for his own use, is void. This point was decided in the case of *Goodrich* v. *Downs* (6 Hill, 438); see *Mackie* v. *Cairns* (5 Cow. 547, 548). The decision in *Goodrich* v. *Downs* was based upon the statute which prohibits the creation of a trust for the use of the person making the same. 2 R. S. 135 (4 R. S. 8th ed. 2590), § 1. And so far as the decision turned upon that statute, it was overruled in *Curtis* v. *Leavitt*, 15 N. Y. 9; see *Collomb* v. *Caldwell*, 16 N. Y. 484; *Sloan* v. *Birdsall*, 65 Supm. Ct. (58 Hun), 317, 321. But the doctrine of the decision, to wit, that an assignment by an insolvent is void for actual fraud if it contains a reservation of benefit for the assignor, is undoubted. See *Collomb* v. *Caldwell*, *supra*; *Barney* v. *Griffin*, 2 N. Y. 365.

The construction placed upon the statute, in *Curtis* v. *Leavitt* (15 N. Y. 9), is such that it would not ordinarily apply to assignments for creditors. It was there held that the statute applies only to conveyances and transfers, wholly or primarily for the use of the grantor, and not to instruments for other and active purposes, when the reservations are incidental and partial only; that if it can be applied to instruments executed for real and active purposes, such as to secure debts or to procure money on loans, it avoids only so much of the grant as is not sustained by the valid purposes for which it was made. It does not avoid the entire instrument which contains the invalid use.

But in *Wilson* v. *Robertson* (21 N. Y. 587, 594), which was an assignment by a firm preferring certain debts of one of the partners, Mr. Justice Wright, who spoke for the court, seemed to be of the opinion that the assignment would be void under the statute referred to. And see *McClelland* v. *Remsen*, 36 Barb. 622; *Powers* v. *Graydon*, 10 Bosw. 630; *Scott* v. *Guthrie*,

Id. 408, 420; s. c. 25 How. Pr. 512; *Rome Exch. Bank* v. *Eames*, 4 Abb. Dec. 83, 95; *Spies* v. *Boyd*, 1 E. D. Smith, 445, 448; *McLean* v. *Button*, 19 Barb. 450; *Sloan* v. *Birdsall*, 65 Supm. Ct. (58 Hun), 317, 321.

§ 207. **Reservations of property.**—A mere exception of property from the assignment, is a different thing from a reservation to the debtor of a benefit from the assigned property. Thus, where certain specified property was exempted from the operation of the assignment, the conveyance was not for that reason declared invalid. *Carpenter* v. *Underwood*, 19 N. Y. 520. So, in another case, where an insolvent debtor, in assigning his personal estate for his creditors, authorized the assignees to use a judgment previously confessed by him to secure them against contingent liabilities as his sureties, for the purpose of perfecting title to his real estate, declaring that all that should be realized from the real estate should be assets in the hands of the trustees, to be distributed according to the terms of the assignment; but he did not assign his statutory right of redeeming the land from a sale on the judgment, or his right to the rents and profits before the expiration of the period of redemption. It was held that this was not such a reservation of property as vitiated the assignment. *Dow* v. *Platner*, 16 N. Y. 562.

In the case of *Rose* v. *Meldrum* (11 W'kly Dig. 354), where the assignors reserved certain property as exempt from execution, but it did not appear that they were householders, it was held that the question, whether any of their property was retained under the claim of exemption, with intent to defraud, should be left to the jury. When the assignment on its face purports to transfer all the property of the assignors, the schedules subsequently filed in compliance with the statute amount to a representation that their contents disclose all the property of the assignors, with nothing omitted or concealed and hidden; but an omission of existing assets from the schedule does not make the assignment void under the statute, *ipso facto*. The act of 1877 involves no such result. *Shultz* v. *Hoagland*, 85 N. Y. 464, 473.

§ 208. **Reservation to assignor of a benefit out of the as-**

signed property.—It has been declared a great many times with the greatest emphasis, that the reservation of any benefit to the assignor from the assigned property, will render the assignment fraudulent and void as against creditors not assenting. *Grover* v. *Wakeman*, 11 Wend. 187; s. c. 1 Am. L. Cas. 63 (5th ed. 68); *Mackie* v. *Cairns*, 5 Cow. 547; *Goodrich* v. *Downs*, 6 Hill, 438; *Judson* v. *Gardner*, 4 N. Y. Leg. Obs. 424; *Lentilhon* v. *Moffat*, 1 Edw. 451; *Hyslop* v. *Clarke*, 14 Johns. 458; *Nicholson* v. *Leavitt*, 4 Sandf. 252, 273; *Jackson* v. *Parker*, 9 Cow. 73, 86; *Mead* v. *Phillips*, 1 Sandf. Ch. 83, 86; see note to *Lawrence* v. *Norton*, 22 Am. L. Reg. N. S. 264; *Means* v. *Dowd*, 128 U. S. 273.

Any devise to cover the property for the benefit of the assignor, or to secure to him directly or indirectly any benefit, is fraudulent. Thus, when an assignor, the day before executing a general assignment, withdrew from the bank $573.12, and on the day of the assignment $125, and no part of the money came to the assignee, and no explanation was given of the disposition of this money, the assignment was declared fraudulent and void. *White* v. *Fagan*, 18 W'kly Dig. 358; see Chap. XIV., Withdrawal of Assets.

In *Mackie* v. *Cairns* (5 Cow. 547; s. c. 1 Hopk. 373), the assignment contained a provision that the assignees should pay to the assignor the sum of two thousand dollars a year for his support; this clause was declared to render the assignment wholly void. This and subsequent cases have reversed a contrary ruling in *Murray* v. *Riggs*, 15 Johns. 571; and *Austin* v. *Bell*, 20 Johns. 442.

In *Swift* v. *Hart*, 42 Supm. Ct. (35 Hun), 128, the assignor transferred to his attorney certain judgments in consideration of services already rendered, also for services to be rendered in the future and shortly afterward executed a general assignment, it was held that the transfer to the attorney was fraudulent as being a provision for the benefit of the assignor, and to the like effect are *Norton* v. *Matthews*, 58 State R. 806, *Matter of Gordon*, 56 Supm. Ct. (49 Hun), 370.

So where the assignor preferred a claim for rent accruing before and subsequent to the assignment, for the purpose of securing to himself and family the future use of a dwelling-house, the

assignment was declared void. *Elias* v. *Farley*, 2 Abb. Dec. 11 ; s. c. 3 Keyes, 398 ; s. c. 5 Abb. Pr. N. S. 39. A stipulation that the assignor shall be permitted to transact business for a certain period without any proceedings being taken against him, either at law or equity, avoids the assignment. *Berry* v. *Riley*, 2 Barb. 307. So where an assignment was made by one partner in an insolvent firm, to the other partner, of the property of the firm which could not be reached by execution, in trust to pay the assignor's expenses in obtaining the benefit of the insolvent act, and the costs of all suits that might be brought by the creditors of the firm, and for the payment of the creditors in a certain order, it was held that it was fraudulent and void. It was a palpable attempt by the partners to keep the property under their own control. Unless there was a surplus beyond the firm debts, the assignor had no interest in the partnership effects, which could pass by the assignment, so as to give any greater interest to the assignee than he before had. The only effect of the assignment was to exclude the assignor from any control over the property. *Sewall* v. *Russell*, 2 Paige, 175. See *ante*, § 206.

§ 209. **Resulting trust to the assignor.**—When the property is conveyed in trust, generally for the payment of debts, after the object of the trust is accomplished what remains will revert to the assignor by operation of law. *Wintringham* v. *Lafoy*, 7 Cow. 735. And in conformity with this rule of law it has been held, that when the assignment was for the equal benefit of all the assignor's creditors, allowing no exceptions, with no preferences, a provision that after all the creditors should be fully paid and satisfied, the surplus should be repaid to the assignor, is not improper. *Ely* v. *Cook*, 18 Barb. 612 ; *Van Rossum* v. *Walker*, 11 Barb. 237 ; *Wintringham* v. *Lafoy*, *supra*.

But, as we have seen (*ante*, § 142), where the assignment is of all the property for the benefit of a portion only of the creditors, an express reservation of the surplus to the assignor will render the assignment void. *Barney* v. *Griffin*, 2 N. Y. 365 ; *Goodrich* v. *Downs*, 6 Hill, 438 ; *Lansing* v. *Woodworth*, 1 Sandf. Ch. 43 ; *Strong* v. *Skinner*, 4 Barb. 546 ; and see *Collomb* v. *Caldwell*, 16 N. Y. 484.

§ 210. **Reservation of powers to assignors.**—An insolvent

assignment reserving to the assignor power of revocation is void in judgment of law. *Riggs* v. *Murray*, 2 Johns. Ch. 565 ; s. c. *sub. nom. Murray* v. *Riggs*, 15 Johns. 571 ; *Reichenbach* v. *Winkhaus*, 67 How. Pr. 512. And so also is an assignment which confers upon the assignor the power to alter the order or amount of preferences or of debts to be paid out of the assigned property. The debtor must settle the respective rights of the creditors under the assignment at the time of the transfer and cannot reserve the power to create preferences to himself or give it to the assignee. See *ante*, §§ 147, 188, and cases there cited.

§ 211. Provisions for continuing the assignor's business. —A provision in an assignment authorizing the assignees to continue the business of the assignor will render the assignment void. Thus, where a part of the assigned property was unfinished machinery and engines in process of manufacture, and the assignment provided that the assignees should "pay any such sums of money as they might find proper and expedient, in and above the management of the said property or payment of hands employed or to be employed in and about the same, or in the business of completing the manufacture of any of the said property, or fitting the same for sale, or of making up material, etc., so as to realize the greatest possible amount of money therefrom," this clause was held to avoid the assignment. *Dunham* v. *Waterman*, 17 N. Y. 9 ; rev'g 3 Duer, 166 ; overruling *Cunningham* v. *Freeborn*, 11 Wend. 240 ; *Renton* v. *Kelly*, 49 Barb. 536 ; *Jones* v. *Syer*, 52 Md. 211 ; s. c. 1 Am. Insol. R. 289.

An authority to the assignee "to manage and improve" the assigned estate, where the property consisted of a stock of goods, was held to render the assignment fraudulent and void upon its face. *Schlussel* v. *Willet*, 12 Abb. Pr. 397 ; s. c. 34 Barb. 615.

But where the assignment conveyed real estate heavily incumbered, and authorized the assignees to manage and improve the assigned property, it was held that a fair construction of the language was, that the property was to be so managed and improved or ameliorated in respect to its condition as would be most beneficial for the estate and the creditors, and should not be regarded

as authorizing the assignees to retain the assigned property for the purpose of erecting buildings, making alterations and repairs upon the real estate, and to use the trust fund for such purposes, and thus to hinder, delay and prevent creditors from obtaining their just debts. *Hitchcock* v. *Cadmus*, 2 Barb. 381.

In *Robbins* v. *Butcher*, 104 N. Y. 575, the assignment contained a provision to the effect that should it be necessary and to the better performance of the trust, the assignee should have authority to finish unfinished work, and complete buildings. The court held that this clause gave the assignee no independent discretion to continue the business of the assignor, but that he was subject to the control and supervision of the courts, which was not superseded or destroyed by the provision of the assignment.

The right of the assignee to continue the business, irrespective of any express power in the assignment, will be considered hereafter.

§ 212. **Future liabilities.**—A general assignment which contains a provision for the payment out of the proceeds of the assigned property of future advances to the assignor, or of future liabilities which the assignees may assume for him, in preference to or to the exclusion of the debts which are due to creditors whose debts had been contracted previous to such assignment, is fraudulent and void as against such creditors. *Barnum* v. *Hempstead*, 7 Paige, 568; *Lansing* v. *Woodworth*, 1 Sandf. Ch. 43.

A transfer of property by an insolvent in trust to secure the payment for services to be thereafter rendered, but which the person for whose benefit the transfer is made is under no present legal obligation to render, is void as against the creditors of the assignor. *Swift* v. *Hart*, 42 Supm. Ct. (35 Hun), 128; *Matter of Gordon*, 56 Supm. Ct. (49 Hun), 370; *Stafford* v. *Merrill*, 69 Supm. Ct. (62 Hun), 144; *Norton* v. *Matthews*, 58 State R. 806.

A sheriff assigned, for the benefit of his creditors, his fees due and to become due. One of the objects of the assignment was to indemnify his sureties against future misappropriation of moneys which should be collected on executions. The

assignment was held to be void. *Currie* v. *Hart*, 2 Sandf. Ch. 353.

And where the assignor preferred a creditor on a claim for rent, part of which was to accrue subsequent to the assignment, this was held to invalidate the assignment. *Elias* v. *Farley*, 2 Abb. Dec. 11 ; s. c. 3 Keyes, 398 ; s. c. 5 Abb. Pr. N. S. 39.

But a direction in an assignment authorizing the assignee to pay "debts due and to grow due" is not objectionable. It confines the payment to debts, etc., for which the assignor was then liable. It could not in any way be made to cover debts not then in existence. *Van Dine* v. *Willett*, 38 Barb. 319 ; s. c. 24 How. Pr. 206 ; see *Butt* v. *Peck*, 1 Daly, 83.

A direction to the assignee to pay to certain preferred creditors "the sums of money which are or may be due to them," and afterward to pay the rest of the creditors "what may be due to them," is valid.

Such an assignment is not objectionable on the ground that, under its provisions, a preferred creditor could purchase other demands than those he held at the time of the assignment, and thus secure a preference for them also. For the provision giving a preference to the specified creditors for sums which "may become due to them," should be construed to apply to actual debts already owing to them, or contingent liabilities already incurred by them, at the time of the assignment and thereafter to become payable.

Nor is the assignment objectionable because it might exclude those creditors whose debts had become payable at the time of making the assignment. The direction to pay the rest of the creditors such sums as "may become due to them" cannot be construed to exclude the payment of claims already due. *Read* v. *Worthington*, 9 Bosw. 617.

But if the intention was to secure debts or claims not then in existence, but which were afterward to be created, either by the assignor or the assignee, it would be void. *Brainerd* v. *Dunning*, 30 N. Y. 211 ; *Sheldon* v. *Dodge*, 4 Den. 217 ; *Lansing* v. *Woodworth*, 1 Sandf. Ch. 43 ; *Swift* v. *Hart*, 42 Supm. Ct. (35 Hun), 128 ; *Matter of Gordon*, 56 Supm. Ct. (49 Hun), 370.

In this respect an assignment differs noticeably from a mort-

gage, which may be made to secure future as well as present responsibilities. *Hendricks* v. *Robinson*, 2 Johns. Ch. 283; affi'd, as *Hendricks* v. *Walden*, 17 Johns. 438; *Maas* v. *Falk*, 54 State R. 160; *Swift* v. *Hart*, 42 Supm. Ct. (35 Hun), 128.

§ 213. **Contingent liabilities.**—Liabilities actually existing, although contingent in their character and not yet matured, may be protected by an assignment. Instances of this are liabilities as indorser, surety, or bail. *Keteltas* v. *Wilson*, 36 Barb. 298; s. c. 23 How. Pr. 69; *Griffin* v. *Marquardt*, 21 N. Y. 121; *Loeschigk* v. *Jacobson*, 26 How. Pr. 526; s. c. 2 Robt. 645; *Cunningham* v. *Freeborn*, 11 Wend. 241; s. c. 1 Edw. 256; s. c. 3 Paige, 557; *Brainerd* v. *Dunning*, 30 N. Y. 211; *Webb* v. *Thomas*, 49 State R. 462.

Whatever debt, says Mr. Justice Robertson, in *Read* v. *Worthington* (9 Bosw. 617, 628), can be secured by conveyance directly to the surety, may be secured by one to an assignee in trust; nor is there any principle which puts a contingent liability beyond the reach of being protected. An assignment to protect a contingent liability no more hinders or delays a creditor than one to pay a debt not yet due, even if the assignees were not authorized to pay such debt before its maturity. Assignees have a right to retain sufficient in their hands to meet such liability, and distribute the residue; and after the liability is disposed of, distribute what remains.

Liabilities of the debtor upon which others are indorsers or sureties may be provided for. *Bank of Silver Creek* v. *Talcott*, 22 Barb. 550. And where the evidences of debt are in the hands of third parties, a direction to pay the debt, although the holder is not named, will amount to an appropriation of the property assigned to the payment of such debts. *Griffin* v. *Marquardt*, 21 N. Y. 121.

§ 214. **Provisions tending to delay.**—Any provisions contained in the assignment, which shows that the debtor at the time of its execution intended to prevent the immediate application of the assigned property to the payment of the debts, will avoid the assignment, because it shows that the assignment was made with the intent to hinder and delay creditors in the collection of their

debts. *Brigham* v. *Tillinghast*, 13 N. Y. 215; *Townsend* v. *Stearns*, 32 N. Y. 209.

Numerous illustrations of this rule will be found in the succeeding sections, where direction to the assignee as to the time, manner and terms of sale of the assigned property, and instructions as to the disposition of the proceeds, have been held fatal to the assignment, because indicating a fraudulent intent to hinder and delay creditors. *D'Ivernois* v. *Leavitt* (23 Barb. 63) is directly in point. In that case the assignments contained provisions allowing the assignee to withhold the distribution and division of the assets for any length of time, which he in his discretion, might think proper. In declaring the assignments void for this reason, the court said (p. 80): "This, if carried out, gives him a coercive power over the creditors, arming him with the means of constraining them to a commutation or release of their claims. It is, in a great measure, to prevent and ignore such a design, that courts of justice have so generally, of late, evinced a disposition to avoid all instruments investing the assignee with any discretion beyond what is absolutely inseparable from the performance of his trust." See *Storm* v. *Davenport*, 1 Sandf. Ch. 135.

§ 215. Directions as to the time of sale.—Creditors are entitled to have the assigned property converted into money and applied to the payment of their debts, without any unreasonable delay. *Meachem* v. *Sternes*, 9 Paige, 398, 406. And any provision contained in an assignment, which shows that the debtor, at the time of its execution, intended to prevent such immediate application, will avoid the instrument, because it shows that it was made with "intent to hinder and delay creditors in the collection of their debts." *Brigham* v. *Tillinghast*, 13 N. Y. 215, 220; s. c. 15 Barb. 618. Thus, in *Woodburn* v. *Mosher* (9 Barb. 255), where the assignees were authorized to convert the premises into money "within convenient time as to them shall seem meet," this clause was held to render the assignment void; and in *Murphy* v. *Bell* (8 How. Pr. 468), where the same language was employed, it was held equally fatal. But these cases probably carried the rule of an adverse construction too far (see *ante*, § 198). In *Benedict* v. *Huntington* (32 N. Y. 219, 227), where

substantially the same language was held to be unobjectionable, and the later cases in the Court of Appeals, a rule of construction more favorable to the validity of the instrument, appears to have been adopted. In *Ogden* v. *Peters* (21 N. Y. 23), where the provision was to convert the property "into cash as soon as the same may conveniently and properly be done," this language was considered harmless, as conferring no power or direction outside of the duty of the assignee to go on at once and convert the estate, and pay the debts. In *Griffin* v. *Marquardt* (21 N. Y. 121), where the direction was "to sell the property without delay for the best price that can be procured," it was held that a fair interpretation of this language was, that the assignee should proceed to sell and convert the assigned property into money without unnecessary or unreasonable delay; although it is declared that if the direction operated to vest any discretionary power in the assignee not legally incident to his trust, nor to be, on the application of creditors, at all times controlled by the court, it would be the duty of the court to pronounce the assignment fraudulent.

In *Jessup* v. *Hulse* (21 N. Y. 168), the assignee was empowered "to sell, dispose of and convey the said real estate and personal property, at such time or times, and in such manner, as shall be most conducive to the interests of the creditors of the said party of the first part, and convert the same into money, as soon as may be consistent with the interests of said creditors." This provision was held to be but a mere affirmance of the legal obligations of the assignee, and therefore did not affect the validity of the instrument.

In *Townsend* v. *Stearns* (32 N. Y. 209), the assignee was clothed with full power "to sell and dispose of the assigned premises, at such time or times, and in such manner, as to him may seem to be most for the benefit and advantage of the creditors." It was held that this provision was free from all objection. And see *Wilson* v. *Robertson*, 21 N. Y. 587; *Bellows* v. *Patridge*, 19 Barb. 176; *Clapp* v. *Utley*, 16 How. Pr. 384.

In *Sutherland* v. *Bradner*, 46 Supm. Ct. (39 Hun), 134, the assignment covered real and personal property; it contained no direction for the sale of the personal property and provided that after the payment of specified creditors the assignee should re-

turn the surplus of the assigned property to the assignors, the assignment was declared invalid.

§ 216. Provisions as to mode of sale.—The general principles which are applicable to provisions in reference to the time of sale, apply equally to provisions in reference to the manner of sale. The assignment must contain no provision which conflicts with the obligations conferred by law upon the assignee. He is bound to bring the property to sale in the manner most advantageous to creditors, and this may be either at public auction or at private sale. Hence, a provision in the assignment, which authorizes him to sell the property "at public or private sale, as he may deem most beneficial to the interest of the creditors," is not objectionable. *Halstead* v. *Gordon*, 34 Barb. 422.

But a restriction in the assignment requiring the assignees to sell at public sale, may render the assignment null and void, especially where, taken in connection with other circumstances, it shows that the object of the whole transaction was to coerce or persuade the creditors into a settlement. *Work* v. *Ellis*, 50 Barb. 512. And, doubtless, if by the terms of the assignment itself the assignee was directed to delay the sale of the property, so as to dispose of it at retail, that would be a fraud upon creditors. *Hart* v. *Crane*, 7 Paige, 37.

§ 217. Authority to sell on credit.—It has been frequently decided that an express power reserved in the assignment to the assignee, to sell on credit, will vitiate the assignment. *Nicholson* v. *Leavitt*, 6 N. Y. 510; s. c. 10 Id. 591; rev'g 4 Sandf. 252; *Burdick* v. *Post*, 6 N. Y. 522; affi'g 12 Barb. 168; *Barney* v. *Griffin*, 2 N. Y. 365; *Porter* v. *Williams*, 9 N. Y. 142; *Rapalee* v. *Stewart*, 27 N. Y. 310; *Wilson* v. *Robertson*, 21 N. Y. 587; *Gates* v. *Andrews*, 37 N. Y. 657; *Houghton* v. *Westervelt*, Seld. Notes, 34; *Morrison* v. *Brand*, 5 Daly, 40; *D'Ivernois* v. *Leavitt*, 23 Barb. 63; *Whitney* v. *Krows*, 11 Barb. 198.

A contrary opinion was expressed by the chancellor, in *Rogers* v. *De Forest* (7 Paige, 272); but the authority of that case must be regarded as overruled by the cases cited above.

The ground of this rule is well expressed by Mr. Justice Bron-

son, in *Barney* v. *Griffin*, 2 N. Y. 365, 371. "An insolvent debtor cannot, under color of providing for creditors, place his property beyond their reach, in the hands of trustees of his own selection, and take away the right of the creditors to have the property converted into money for their benefit without delay. They have the right to determine for themselves whether the property shall be sold on credit; and a conveyance which takes away that right and places it in the hands of the debtor, or in trustees of his own selection, comes within the very words of the statute; it is a conveyance to hinder and delay creditors, and cannot stand."

An assignment which withholds from the assignee any discretion to sell the trust property on credit, and requires it to be sold only for cash, is not void for that reason. *Carpenter* v. *Underwood*, 19 N. Y. 520; *Grant* v. *Chapman*, 38 N. Y. 293; *Stern* v. *Fisher*, 32 Barb. 198; *Van Rossum* v. *Walker*, 11 Barb. 237.

In the case last cited it is said (p. 240, per Edwards, J.): "It may be that such a provision is an unwise one, and one that ought not to be countenanced, and when there are any circumstances which go to show that a forced sale was intended, to the injury of the creditors, it ought to be taken into consideration as an important item of evidence, which, in connection with the other circumstances, would justify this court in setting aside the assignment. But, it seems to me, that this is all the effect which should be given to such a provision."

Where it can be fairly inferred from the language of the assignment, that it was the intention of the assignor to confer upon the assignee a power to sell on credit, it will be equally fatal to the assignment. The construction of the language employed in assignments has given rise to much discussion as to when an authority to sell on credit will be inferred. In *Meacham* v. *Sternes* (9 Paige, 398), where an assignment directed the trustee to sell the trust property at such reasonable times as shall seem proper to him, it was held that he was not authorized to sell the property at retail and on credit, nor to send it to agents to be sold on commission.

In *Whitney* v. *Krows* (11 Barb. 198), where, by the terms of the assignment, the assignees were authorized "to sell and dis-

pose of the property, upon such terms and conditions as in their judgment may appear best, and most for the interest of the parties concerned, and convert the same into money," it was held that the discretion conferred upon the assignees was a discretion to sell upon lawful terms, and since a sale on credit is unlawful, it was not to be inferred that such authority was intended. It is said that a fair construction of the whole provision is that the trustees are to exercise their judgment as to the manner of sale, but when they sell they are to receive the money. They are to convert the property into *money* not into *debts*.

But in *Moir* v. *Brown* (14 Barb. 39, 51), where the same language was used in the assignment, Mr. Justice Hand said: "This language certainly gives a broad discretionary power; sufficient, in an ordinary power of attorney, to sustain a sale on credit." The assignment, however, was declared void upon other grounds.

In *Schufeldt* v. *Abernethy* (2 Duer, 533), where the authority to the assignee was to sell the assigned property on such terms and conditions as, in his judgment, might be deemed best, it was held, on the authority of *Nicholson* v. *Leavitt* (6 N. Y. 510; rev'g 4 Sandf. 252), that the assignment was fraudulent and void on its face, because conferring upon the assignee a discretionary power to sell on credit. To the same effect is *Lyon* v. *Platner*, 11 N. Y. Leg. Obs. 87. In *Nicholson* v. *Leavitt*, however, there was an express authority to sell on credit. The language of the assignment was to sell "for cash or on credit, or partly for cash and partly upon credit."

This difference in the language was noticed, but the court were of opinion that the discretion conferred upon the assignees was one which, by a necessary implication, conveyed the power to sell on credit.

In *Kellogg* v. *Slawson* (15 Barb. 56), in the Supreme Court, substantially the same language was held to be unobjectionable. It was held that the words employed could be fully satisfied short of conferring a power to sell on credit. And this opinion was sustained on appeal to the Court of Appeals (11 N. Y. 302). And to the same effect are *Southworth* v. *Sheldon*, 7 How. Pr. 414; *Clark* v. *Fuller*, 21 Barb. 128; *Nichols* v. *McEwen*, 21 Barb. 65; affi'd, 17 N. Y. 22; *Wilson* v. *Robertson*, 21 N. Y.

587; *Benedict* v. *Huntington*, 32 N. Y. 219; s. c. 19 How. Pr. 350; *Townsend* v. *Stearns*, 32 Id. 209.

In *Brigham* v. *Tillinghast* (15 Barb. 618), where the assignee was directed to convert "all and singular the premises and estate aforesaid into money or *available means*," the court at general term were of opinion that the words "available means" signified means suitable for the purpose described, to wit, the payment of debts, and therefore were unobjectionable. But on appeal to the Court of Appeals (13 N. Y. 215), the judgment of the Supreme Court was reversed on the ground that the clause referred to necessarily conferred a power upon the assignee to convert the assigned property into securities which were not money.

And in *Bellows* v. *Patridge* (19 Barb. 176), where the trust was to convert the assigned property into money by sale, either public or private, as soon as reasonably practicable with due regard to the rightful interests of the parties concerned, this was held not to authorize a sale on credit. This case, however, turned principally upon the supposed authority to delay the sale of the property, and falls among the class of cases to which we have previously referred. See *ante*, § 215.

And where the direction to the assignee was to sell the property "to the best possible advantage," this was held not to authorize a sale on credit. *Judson* v. *Abeel*, 5 W'kly Dig. 221.

The principle which courts have adopted in construing the language of assignments in the particular as to which we are now inquiring, is well illustrated by the case of *Rapalee* v. *Stewart*, 27 N. Y. 310. There the language was "to be converted into cash or otherwise disposed of to the best advantage." These words clearly conferred a discretion to dispose of the property otherwise than for cash. They conferred not merely a discretion to act inside the rules of law, but a discretion to exceed the limits which the law allows in the execution of such trusts. They were consequently declared fatal to the validity of the assignment. See *Muller* v. *Norton*, 132 U. S. 501.

§ 218. **Power to declare future preferences.**—An assignment which reserves to the assignor the right to give future preferences, is fraudulent and void. The same is the case if the assignee be empowered to give future preferences. *Boardman* v.

Halliday, 10 Paige, 223 ; *Barnum* v. *Hempstead*, 7 Id. 568 ; *Averill* v. *Loucks*, 6 Barb. 470 ; *Sheldon* v. *Dodge*, 4 Den. 217 ; *Strong* v. *Skinner*, 4 Barb. 546 ; *Kercheis* v. *Schloss*, 49 How. Pr. 284 ; *Wakeman* v. *Grover*, 4 Paige, 23 ; s. c. *sub. nom. Grover* v. *Wakeman*, 11 Wend. 187, 203.

" The reason," says Mr. Justice Van Vorst, in *Kercheis* v. *Schloss* (*supra*), " why the reservation of such power in the assignors is fraudulent, is obvious. The debtor, in such an assignment, puts his property beyond the reach of his creditors, and yet reserves the right to control the manner of its distribution among them, which control would enable him to exact from them such terms as he might choose to offer." And somewhat similar language is employed by Chancellor Walworth, in *Boardman* v. *Halliday* (*supra*). He says : " One very serious objection to such an assignment is, that none of the creditors among whom such preferences are to be given, can ever know what their rights are under the assignment, where the fund is insufficient to pay all the debts ; so as to render it safe for them to attempt to assert those rights in any suit or proceeding, either at law or in equity. For if any one of such creditors should institute a suit to compel the assignees to account, and pay over the trust fund as directed by the assignment, such assignees would unquestionably exercise the discretion of preferring other creditors to him. . . . The effect of the assignment, therefore, is to place the creditors directly within the power of the assignees, and to compel them to acquiesce in such terms as the assignees may think proper to prescribe, as the only condition upon which they can get any part of the proceeds of the property of their debtor."

In *Bagley* v. *Bowe*, 50 N. Y. Super. 100, it appeared that after the declarations of trusts the assignment contained a clause empowering the assignee to execute and acknowledge—for such consideration, in money *or other thing*, as he may deem sufficient—all such deeds, etc., as in his discretion may, from time to time, be necessary to carry into effect the intent and purpose of this instrument, it was held that this clause, taken in connection with the other provisions of the assignment, did not confer on the assignee the power to sell the assigned property on credit. This construction was sustained by the Court of Appeals (*Bagley* v. *Bowe*, 105 N. Y. 171), although the judgment was reversed on another ground.

§ 219. **Power to compound with creditors.**—A provision in an assignment which gives an assignee full power and liberty to compound with all or any of the creditors in such manner and upon such terms as they shall deem proper, but so as not to interfere with or depart from the order of preference established in the assignment, does, in effect, perpetuate the right of giving preferences by vesting in the assignee an arbitrary power of compounding with any one of the creditors upon such terms as they may think proper. Such a provision, therefore, cannot be sustained. *Wakeman* v. *Grover*, 4 Paige, 23; s. c. *sub. nom. Grover* v. *Wakeman*, 11 Wend. 187, 203. In *Van Nest* v. *Yoe* (1 Sandf. Ch. 4, 5), where it was provided in the assignment as follows, "nothing, however, hereinbefore contained, shall be considered as restricting or preventing" the assignee "from liquidating or compounding with any of the creditors by making, assigning over, or transferring, any of the choses in action, debts or accounts due to the assignors," the court refused to infer a fraudulent intent from this clause.

Where the assignment contained a clause to the effect that the assignee should have the right to compromise with the creditors of the assignor if, in the opinion of the assignee, it would be advantageous to the assignor and his creditors, this was held to invalidate the assignment. *McConnell* v. *Sherwood*, 84 N. Y. 522; affi'g 26 Supm. Ct. (19 Hun), 519. Danforth, J., in delivering the opinion of the court, said (p. 529): "If the assignment is valid, the trust to compromise is to be observed and regarded by the courts, and delay for that purpose in the disposition of the property or the distribution of the avails could be justified by the assignee, although required by a creditor to hasten the conversion of assets or pay over its avails. So too, in negotiating for or arranging a compromise, the interest of the debtor is to be regarded and kept in view by the assignee, for it is permitted only when in his opinion such proceeding would be advantageous to the assignor. It therefore cannot be said that the assignor has devoted his property absolutely and unconditionally to the payment of his debts."

§ 220. **Power to compound debts due the assignor.**—When the authority is to compound claims due to the assignor,

there is no necessary implication of fraudulent intent. So where the assignee in the collection of the debts was authorized, in the exercise of a sound discretion, to compromise such as were doubtful by receiving a part of the money due, this clause was held to be unobjectionable. *Dow* v. *Platner*, 16 N. Y. 562. And where the assignees were authorized "to compromise all bad and doubtful claims," it was held that this clause was not of itself evidence of a fraudulent intent. *Brigham* v. *Tillinghast*, 15 Barb. 618. And a similar conclusion was reached where the direction to the assignee was to compound, compromise and settle the claims assigned, in his discretion. *Bellows* v. *Patridge*, 19 Barb. 176. Some doubt as to the validity of such provisions was suggested in the case of *Murphy* v. *Bell*, 8 How. Pr. 468. But that doubt has been set at rest by *Bagley* v. *Bowe*, 105 N. Y. 171, where it was held that a provision in an assignment authorizing the assignee to compound or compromise dues owing to the assignor, does not invalidate an assignment.

In *Coyne* v. *Weaver* (84 N. Y. 386), where the assignment contained a clause authorizing the assignee to compound for the choses in action assigned, "taking a part for the whole when he shall deem it expedient," the court, in construing this clause, said (p. 391): "The clause in question, therefore, must be held to have given to the assignee no arbitrary power to compromise where such action was neither necessary nor proper; but merely the discretion which the law recognizes, to compromise doubtful and dangerous debts, in cases where the safety and interest of the fund demands such action; and that in such case only can he honestly 'deem' a compromise 'expedient' or be allowed to plead that authority as a protection." So a similar clause was held not to invalidate an assignment, in *McConnell* v. *Sherwood*, 84 N. Y. 522; *Ginther* v. *Richmond*, 25 Supm. Ct. (18 Hun), 232.

Such provisions are unnecessary. The assignee may be authorized under the provisions of the act of 1877, in a proper case, to compromise or compound any claim or debt belonging to the estate, upon application to the county court. Laws of 1877, c. 466, § 23. See *post*, Chap. XXIII.

§ 221. Power to pay taxes, insurance and rent.—When

part of the property assigned is real estate, the assignment is not rendered void by a direction to pay rents, taxes and assessments, which may become due before the lands can be sold, as this may be presumed to have been intended for the benefit of creditors, where an immediate sale is contemplated, and there is no proof of fraud. *Morrison* v. *Atwell*, 9 Bosw. 503.

A direction in an assignment, that the assignee should pay the rents and taxes on the real estate until sold, is a necessary power to preserve the property, and the assignee would have been authorized to do it, if the authority had not been included in the instrument itself. *Van Dine* v. *Willett*, 38 Barb. 319; s. c. 24 How. Pr. 206.

An assignment will not be rendered invalid because it contains a provision authorizing the assignees to effect an insurance upon a portion of the assigned property, and to keep good an insurance already existing upon another portion of the property, so long as in their judgment it shall be necessary. *Whitney* v. *Krows*, 11 Barb. 198. And in the same case, it was held that an assignment was not vitiated by a provision authorizing the assignees, if they shall deem it necessary, to pay the interest on a mortgage which is a prior lien upon the assigned property, and the principal and interest on another mortgage, if they shall deem it for the interest of the creditors to do so.

And where an assignment by copartners authorized the assignee to pay the rents, taxes and assessments on the separate property of the individual copartners, it was held that this would not confer an authority to make the payments out of the partnership funds. *Eyre* v. *Bebe*, 28 How. Pr. 333.

§ 222. **Power to employ agents, attorneys, etc.**—A general assignment is not rendered fraudulent and void on its face by a provision authorizing the assignee "to employ suitable agents at a reasonable compensation, to be paid out of the effects assigned, and generally to adopt such measures in relation to the settlement of the estate as will, in his judgment, promote the true interest thereof." The discretion conferred by such a provision will not be construed to mean a discretion unlimited by the rules of law, but one to be kept within the legal limits. *Mann* v. *Witbeck*, 17 Barb. 388; *Jacobs* v. *Remsen*, 36 N. Y. 668; *Casey* v.

Janes, 37 N. Y. 608 ; *Van Dine* v. *Willett*, 38 Barb. 319 ; s. c. 24 How. Pr. 206. So an authority to employ an attorney. *Van Dine* v. *Willett*, *supra* ; *Jacobs* v. *Remsen*, *supra*.

But a provision authorizing the payment of "a reasonable counsel fee" to the assignee, a lawyer, in addition to the expenses and commissions for executing the trust, is illegal, and renders the assignment void. *Nichols* v. *McEwen*, 17 N. Y. 22 ; affi'g 21 Barb. 65 ; see *Hill* v. *Agnew*, 12 Fed. R. 230.

§ 223. Provisions exempting assignee from liability.— "Every provision in an assignment, which exempts the assignee from any liability that he would by law be subjected to as assignee, is of itself a badge of fraud." Sandford, J., in *Litchfield* v. *White*, 3 Sandf. 545, 553 ; affi'd, 7 N. Y. 438.

Thus, an assignment containing a clause that the assignee shall not be liable or accountable for any loss that might be sustained by the trust property or the proceeds thereof, unless the same should happen by reason of the gross negligence or willful misfeasance of the assignee, is void. *Litchfield* v. *White*, 7 N. Y. 438 ; affi'g 3 Sandf. 545.

Where it is provided in an assignment that the assignee shall not be accountable, except for gross neglect and willful misfeasance, and only for property that may come to his hands and under his control, the legal inference is that the assignment is made with a fraudulent intent. *Olmstead* v. *Herrick*, 1 E. D. Smith, 310. And see *Metcalf* v. *Van Brunt* (37 Barb. 621), where a similar provision was presumed to avoid the instrument.

The ground of this rule is stated by Mr. Justice Daly, in *Olmstead* v. *Herrick* (*supra*), as follows : "When a man in failing circumstances assigns his property in trust for the payment of his debts, he is bound to select an assignee that will do all that the law requires of a trustee, in respect to the rights of those that have a beneficial interest in the property assigned. When the debtor, therefore, absolves his assignee from the exercise of that care and diligence essential to the due administration of the trust—when he consents that he shall be released from all liability, except when he is guilty of willful misfeasance or gross neglect—that is, that he shall not be answerable for any losses that may be occasioned by his want of ordinary caution, his inex-

cusable mistakes, or any act of negligence which is not gross in degree; the debtor does that which he has no right to do. . . . It is urged, that as the condition is repugnant to the policy of the law, the assignee would, notwithstanding its existence, continue liable for the want of ordinary care and diligence. Upon this point, however, I think that creditors coming in under the assignment, and claiming the benefit of its provisions, would be bound by the stipulation upon which the assignee accepted the trust." See *Jewett* v. *Woodward*, 1 Edw. 195, 197.

Where the assignment contains a provision that the assignees should not be accountable for the defalcation of any clerk employed by the assignors, it will be void. *Van Nest* v. *Yoe*, 1 Sandf. Ch. 4.

In *Jacobs* v. *Allen* (18 Barb. 549), where the assignment provided that the trustees should not be answerable for the acts, neglects or defaults of any attorney or agent that they might appoint, nor for any misfortune, loss or damage which might happen without their willful default—but this provision was followed by an express covenant, on the part of the assignees, to accept the trust and to act faithfully and justly in the execution of the same—it was held that these clauses construed together did not render the assignment fraudulent upon its face. In *Casey* v. *Janes* (37 N. Y. 608), it is said that it is usual to insert in an assignment, more for the protection of the assignee against liability for demands against insolvent and irresponsible parties than for any other purpose, a clause exonerating the assignee from liability to account for debts which he is unable to collect, and such a clause does not vitiate the assignment.

§ 224. **Power to defend suits and to pay costs.**—An assignment by an insolvent debtor, which provides for the payment of all costs and expenses necessarily incurred by the assignor, in defending any suits that might be instituted against him by any creditor or other person, for anything growing out of the assignment, or in any way connected with it, is fraudulent as against creditors. *Mead* v. *Phillips*, 1 Sandf. Ch. 83.

It is a fraud upon the creditors to authorize the assignee to employ the proceeds of the assigned property in defending suits which may be brought against the assignor by his creditors, to

recover their several debts. *Planck* v. *Schermerhorn*, 3 Barb. Ch. 644; *Levy's Accounting*, 1 Abb. N. C. 177, 181. But an authority to the assignee "to commence, continue, maintain and prosecute to effect, and also to defend all actions at law and equity, and other proceedings which they may deem necessary to the execution of the said trust," confers upon the assignee a discretionary power to defend suits, which they would exercise at their peril as between themselves and the creditors interested. *Van Nest* v. *Yoe*, 1 Sandf. Ch. 4.

§ 225. **Power to lease or mortgage.**—A power to lease or mortgage the assigned estate, is void. *Planck* v. *Schermerhorn*, 3 Barb. Ch. 644; *Darling* v. *Rogers*, 22 Wend. 483; s. c. as *Rogers* v. *De Forest*, 7 Paige, 272. The only trust which can be created in real property, for creditors, is a trust to sell; 1 R. S. 728 (4 R. S., 8th ed., 2437), § 55. But an attempt to create a void trust, to lease or mortgage, does not invalidate the whole instrument, the legal trust only is effectual. *Darling* v. *Rogers*, 22 Wend. 483; *Van Nest* v. *Yoe*, 1 Sandf. Ch. 4.

CHAPTER XIV.

FRAUD FROM EXTRINSIC CIRCUMSTANCES.

§ 226. **In general.**—In the previous chapter attention has been called to those provisions appearing upon the face of the assignment, which have been brought into question before the courts as indicating a fraudulent intent on the part of the assignor. The object of the present chapter is to consider those matters which, taken in connection with the assignment, but not necessarily appearing upon its face, furnish evidence of a similar fraudulent intent.

§ 227. **Fraudulent intent on the part of the assignor defeats the assignment.**—The statute of fraudulent conveyances renders an assignment made with intent to hinder, delay and defraud creditors void (2 R. S. 137, § 1; 2 Birdseye, p. 1236, § 19). While that provision does not impair the title of a purchaser for value without notice of the fraud (*ibid.* § 5), yet it is well settled in this State that a voluntary assignee in a general assignment is not a purchaser for value, and is therefore not within the protection of the provision last cited. It follows that if a general assignment is made by the assignor with the intent to hinder, delay or defraud creditors, it is invalid as against creditors, no matter how free from knowledge of or participation in the fraud the assignee may be. *Loos* v. *Wilkinson*, 110 N. Y. 195; *Starin v. Kelly*, 88 N. Y. 418; *Kingston* v. *Koch*, 64 Supm. Ct. (57 Hun), 12; *Cuyler* v. *McCartney*, 40 N. Y. 221; *Schofield* v. *Scott*, 20 State R. 815; *Wilson* v. *Forsyth*, 24 Barb. 105; *Rathbun* v. *Platner*, 18 Barb. 272. The authorities in this State are uniform in support of the position that an assignee under a general assignment is not a purchaser for value within the meaning of the statute above referred to. *Talcott* v. *Hess*, 38 Supm. Ct. (31 Hun), 282, 284; *Putnam* v. *Hubbell*, 42 N. Y. 106, 114; *Waverly Nat. Bk.* v. *Halsey*, 57 Barb. 249, 263,

264 ; *Cuyler* v. *McCartney*, 40 N. Y. 221, and upon this point see also *Griffin* v. *Marquardt*, 17 N. Y. 28 ; *Work* v. *Ellis*, 50 Barb. 512 ; *Mead* v. *Phillips*, 1 Sandf. Ch. 83 ; *Sands* v. *Hildreth*, 14 Johns. 493 ; *Waterbury* v. *Sturtevant*, 18 Wend. 353. In some States a different rule seems to prevail.[1] Bump on Fraud. Conv. 2d ed., pp. 352, 354.

Where an assignment is made by copartners one of whom has been guilty of conduct which shows a fraudulent intent connected with the making of the assignment, this will render the assignment invalid, although the intent is not brought home to the other partner. Such is the character of the ownership of partnership property that a fraudulent intent on the part of one partner in its disposition must necessarily pervade the whole transaction. Partners hold as joint tenants ; each owns the whole as well as his share of the firm property ; each conveys the whole as well as his share. If the conveyance by one is made with fraudulent intent the whole conveyance is necessarily made with fraudulent intent. In *Fourth Nat. Bank* v. *Burger*, 15 State R. 101, it was contended that an assignment which contained a preference for the payment of an individual debt of one partner was not invalid because of the ignorance of two of the assignors of the attempted illegal preference. The court did not pass directly upon the question, but remarked that "it may be very well claimed that if the assignment is executed by any one of the assignors, with a fraudulent purpose, and with intent to hinder and delay the creditors of the firm, it is absolutely void whether such intent and purpose is participated in by his copartners or not." And in *Importers' & Traders' Nat. Bk.* v. *Burger*, 25 State R. 136, 3 Silv. (Supm. Ct.) 122, where the same assignment was before the court, this rule received further confirmation. In *Illinois Watch Co.* v. *Payne*, 33 State R. 967, and in *Wilcox* v. *Payne*, 28 State R. 712, it appeared from the statement of facts that one of the

[1] In some States the assignee stands as a *bona fide* purchaser. To invalidate the deed notice of the fraud must be brought home to him (*Peters* v. *Bain*, 133 U. S. 670, 686 ; so in Virginia, *Talley* v. *Curtain*, 54 Fed. R. 43 ; so in Ark., *Hunt* v. *Weiner*, 39 Ark. 70 ; *Mandel* v. *Peay*, 20 Ark. 325, 329 ; and in Supreme Court of U. S., *Marbury* v. *Brooks*, 7 Wheat. 556, 577 ; *Brooks* v. *Marbury*, 11 Wheat. 78, 89 ; *Tompkins* v. *Wheeler*, 16 Pet. 106, 118 ; *Emerson* v. *Senter*, 118 U. S. 3).

partners had no participation in the frauds perpetrated. In *Schwab* v. *Kaughran*, 42 State R. 407, one partner gave his wife a sum of money out of the firm assets to pay his individual debt. This was held to avoid the assignment, although there was no evidence that the other partner knew of it. When the transaction by the individual partner is wholly outside of the firm business, the other partner or partners are not chargeable with a fraudulent intent arising therefrom; as where one partner at or about the time of the execution of a firm assignment conveyed his individual property to his wife by voluntary conveyance which was alleged to be fraudulent. *Van Bergen* v. *Lehmaier*, 79 Supm. Ct. (72 Hun), 304.

In *Warner* v. *Warren*, 46 N. Y. 228, where a husband carried on business as agent of his wife, and the wife was ignorant of the frauds perpetrated by her husband in the business, "but was a passive instrument in the hands of her husband, by whom the frauds were perpetrated," it was held that an assignment executed by her as a part of the husband's fraudulent schemes was void. See *White* v. *Benjamin*, 3 Misc. 490, 496.

As above stated, voluntary conveyances for creditors are distinguished from conveyances to a vendee for value by the essential feature that the intent of the assignor is alone material. Honesty of purpose in the assignee is not the test. *Wilson* v. *Forsyth*, 24 Barb. 105. When the transferee is a purchaser for value without knowledge of the fraud his title is unimpeachable, however fraudulent may have been the intent of the grantor. *Ruhl* v. *Phillips*, 48 N. Y. 125; rev'g 2 Daly, 45; *Jaeger* v. *Kelly*, 52 N. Y. 274; *Dudley* v. *Danforth*, 61 N. Y. 626. But although the purchaser may acquire the property for value, yet if he was cognizant of and a party to the fraud, the conveyance may be set aside at the suit of a judgment creditor. *Billings* v. *Russell*, 101 N. Y. 226; *Vietor* v. *Levy*, 79 Supm. Ct. (72 Hun), 263; *Durr* v. *Beck*, 83 Supm. Ct. (76 Hun), 540; *Higgins* v. *Curtis*, 44 State R. 194. The character of the notice which will charge a purchaser for value with knowledge of the fraud of his grantor is discussed in the opinion of Rapallo, J., in the leading case of *Parker* v. *Conner*, 93 N. Y. 118. See also *Shauer* v. *Alterton*, 151 U. S. 607.

§ 228. The fraud in the assignment must be at the time

of its making.—The assignment, like every other instrument, is good or bad at the time of its making. If it is valid in its creation, no subsequent fraudulent or illegal acts of the parties can invalidate it (*Browning* v. *Hart*, 6 Barb. 91); and if it is invalid then, no subsequent act can give it validity. *Averill* v. *Loucks*, 6 Barb. 470; *Pittsfield Nat. Bank* v. *Tailer*, 47 State R. 318; *Schwab* v. *Kaughran*, 42 State R. 407.

"You may, doubtless," says Mr. Justice Gould, in *Wilson* v. *Forsyth* (24 Barb. 105, 121), "go outside of the mere naked writing, to show facts bearing on the question of fraudulent intent. But they are, then, nothing but evidence of what was the intent with which that writing was made. As, for instance, leaving the assignor in the possession and control of assigned personal property; this (unexplained) tends to show that the transfer was intended but as a cover; and is always proper evidence, on the question of fraudulent intent in making the assignment. Here it is not the subsequent act that renders void the instrument; but the presumption, therefrom, of the prior intention; an intention to give color of title to an assignee, to hinder creditors from interfering with the property; and yet leaving the control, real disposal and benefit, to the assignor."

For the purpose of testing the motives and integrity of an insolvent debtor in disposing of his property, it is, as a general rule, permissible to inquire into the details of his business transactions and the manner in which he has managed his property for such a length of time immediately preceding the assignment as will throw light on the question of his intent. *First Nat. Bank* v. *Warner*, 62 Supm. Ct. (55 Hun), 120. The acts immediately preceding and necessarily leading up to the assignment are inseparable from the execution of the assignment itself, and must be deemed a part of the general purpose. *Davis* v. *Harrington*, 62 Supm. Ct. (55 Hun), 109.

In *Shultz* v. *Hoagland* (85 N. Y. 464, 467), it is said: "The evidence also must ascertain and establish the assignor's intent at the time of the execution of the instrument. As was said in *Hardmann* v. *Bowen* (39 N. Y. 196, 200), 'If the assignment was valid in creation, having been honestly and properly executed and delivered, no subsequent illegal acts, either of omission or commission, can in any manner invalidate it.' But this rule must be

taken as not intended to deny that such subsequent acts may reflect light back upon the original intent, and help us to discern that correctly."

"The intent to defraud is an emotion of the mind, and can usually be shown only by the acts and declarations of the party. These and all the concomitant circumstances must be established, and then the motive may be deduced from them in accordance with those principles which are shown by experience and observation to rule human conduct." McAdam, J., *White* v. *Benjamin*, 3 Misc. 490, 505.

It is upon this principle that the immediate conduct of the assignees in taking or professing to take possession, their acts, when they find that the good faith of the assignment is questioned, and all like circumstances are permitted to go to the jury as parts of the *res gestæ*. *Cuyler* v. *McCartney*, 40 N. Y. 221. In *Pine* v. *Rikert* (21 Barb. 469), no inventory was made of the assigned goods, nor was there any list of creditors. The goods remained in the actual possession of the assignor. They were sold by him and his former clerks at private sale, and in the customary manner, by retail. His name was still upon the various signs of the store. Some of the goods were sold to pay an old debt not included in the first class. It did not appear that the assignee sold anything himself, nor did he give any reason for allowing the property to remain under the control of the assignor. It was held that these were most suspicious circumstances, and tended strongly to show that the whole transaction was for the purpose of defrauding the creditors of the assignor.

And in *Shepherd* v. *Hill* (6 Lans. 387), fraudulent acts of the assignee in disposing of the assigned property were received as evidence establishing fraud in the execution of the assignment. And see *Waverly Nat. Bank* v. *Halsey*, 57 Barb. 249.

When, at the time of the execution of a general assignment, it was agreed between the assignor and assignees that they should lease all the assigned property to the wife of the assignor, which agreement was carried into effect, the assignees never taking possession of the property, but leaving it with the assignor and his wife, it was held that the assignment was void, as tending to hinder, delay and defraud creditors. *Dolson* v. *Kerr*, 12 Supm. Ct. (5 Hun), 643.

So in *Nicholson* v. *Leavitt* (4 Sandf. 252, 273), it was assumed by Mr. Justice Duer, that if the assignment was executed upon the agreement and condition that the assignees were to employ the assignor, and pay him a salary out of the assigned property, this would have furnished evidence of fraud, as being a reservation out of the assigned property in favor of the assignor, but an employment of the assignor by the assignees after the assignment, which was no part of the agreement upon which the assignment was executed, would not necessarily furnish evidence of a fraudulent intent in making the conveyance. *North River Bank* v. *Schumann*, 63 How. Pr. 476.

§ 229. **Incidental delay.**—Although conveyances made with the "intent to hinder, delay or defraud" creditors are void, yet the necessary effect of every general assignment, even where the creditors are to be paid *pari passu*, is to hinder and delay creditors in the collection of their debts. *Nicholson* v. *Leavitt*, 4 Sandf. 252, 284. If mere hindrance and delay, therefore, avoided an instrument of this nature, then, of course, in no case whatever could it be upheld. As the law recognizes and upholds such a disposition of a debtor's property when it is in other respects without taint, it is palpable that the mere effect of hindrance and delay cannot invalidate the conveyance.

An assignment which has the effect to delay a creditor in the enforcement of his demand by the ordinary process of law, is not for that reason alone fraudulent and void. Harlan, J., *Reed* v. *McIntyre*, 98 U. S. 507, 510; see also *Mayer* v. *Hellman*, 91 U. S. 496, 500. If the assignment be free from fraud it will not be avoided because it will incidentally and inevitably hinder and delay creditors; the necessary delay incident to the execution of the trust is not within the meaning or condemnation of the statute of frauds declaring void conveyances made with intent to hinder, delay or defraud creditors. *Hauselt* v. *Vilmar*, 76 N. Y. 630; affi'g 43 Super. Ct. 574 and 2 Abb. N. C. 222. But the delay must be incidental and necessary to the existence of the trust or the exercise of the power. *Nicholson* v. *Leavitt*, 6 N. Y. 510, 515, Gardiner, J.; and see remarks of Duer, J., in s. c., below, 4 Sandf. 252, 284; and *Eyre* v. *Beebe*, 28 How. Pr. 333, Clerke, J.; *Meux* v. *Howell*, 4 East, 1; *Wilder* v.

Winne, 6 Cow. 284; s. c. *sub. nom. Wilder* v. *Fondey*, 4 Wend. 100; *Pickstock* v. *Lyster*, 3 M. & S. 371; *Rex* v. *Watson*, 3 Price, 6; *Stewart* v. *English*, 6 Ind. 176. Such delay is common to all the creditors, and is no more the subject of just complaint than the delay unavoidably incident to the extinguishment of claims against the estate of deceased debtors. Porter, J., in *Townsend* v. *Stearns*, 32 N. Y. 209, 213.

But when the delay, instead of being incidental, is the primary object to be accomplished by the creation of the trust, then the intent avoids the assignment. *Nicholson* v. *Leavitt*, 6 N. Y. 510, 517. And this will be the result even when the moral intention of the debtor is honest, as where he thinks that the property could be sold more advantageously for the interests of the creditors at a future time, and for this primary purpose executes an assignment. *Eyre* v. *Beebe*, 28 How. Pr. 333.

§ 230. **Intent to effect a settlement.**— Whether the mere motive or expectation of the debtor in executing an assignment unaccompanied by an improper or suspicious act, and manifested by no objectionable clause in the assignment, will have the effect to vitiate the conveyance, may well be doubted. *Whedbee* v. *Stewart*, 40 Md. 414; Bump on Fraud. Convey. 2d. ed. 349; see *Eyre* v. *Beebe*, 28 How. Pr. 333.

In *Keteltas* v. *Wilson* (36 Barb. 298), where the debtor made an assignment with preferences in favor of bail and sureties, although it was admitted that the assignor had the legal right to prefer such liabilities, yet since it appeared that the preferences were given to produce delay and to enable the debtor to compromise with his creditors, it was held that the assignment was, for that reason, fraudulent and void. In *Work* v. *Ellis* (50 Barb. 512), where the assignor testified, in effect, that his intention in making the assignment was to accomplish a settlement, and he was corroborated in his evidence by the assignee, this was regarded as conclusive evidence of an intent to hinder and delay creditors. But in *Griffin* v. *Marquardt* (21 N. Y. 121), where the assignor testified that he made the assignment for the purpose of gaining time to pay his creditors, and this testimony was relied on as showing conclusively a fraudulent intent to hinder and delay creditors, the court held

that there was no force in the suggestion. Mr. Justice Wright said that if the assignor had testified unqualifiedly that his "sole purpose in making the assignment was to gain time to pay his creditors, it would not have been testimony so conclusive in its nature as to have constrained the judge who tried the cause, regardless of all the other evidence in the case, to find against the *bona fides* of the assignment." The declaration was evidence to be weighed in determining the question of fraudulent intent.

Judge Van Vorst, in the case of *North River Bank* v. *Schumann*, 63 How. Pr. 476, 479, expressed his opinion upon this question in the following language: "The fact that a man may honestly believe that an adjustment of his affairs may yet be reached which would prevent a further sacrifice of his property should not invalidate an assignment made by him for the benefit of his creditors, unless such belief in the end finds formal expression in the language of the deed, or in a contemporaneous agreement between him and his assignee, which would hamper him in an expeditious closing of the trust according to its terms."

Efforts by an assignor to bring about a compromise with his creditors after an assignment has been made furnish no evidence of fraudulent intent in making the assignment where the assignor has parted with control of his property and no elements of coercion are disclosed. *Van Bergen* v. *Lehmaier*, 79 Supm. Ct. (72 Hun), 304.

§ 231. **Solvency of the assignor.**—Although a debtor assign all or a portion of his property when he believes himself to be solvent, this will not invalidate the instrument. *Ogden* v. *Peters*, 21 N. Y. 23; s. c. 15 Barb. 560. An intent to hinder and delay creditors cannot be inferred from the solvency any more than from the insolvency of the debtor. The contrary doctrine, however, was maintained in *Van Nest* v. *Yoe*, 1 Sandf. Ch. 4; *Planck* v. *Schermerhorn*, 3 Barb. Ch. 644; see *German Ins. Bank* v. *Nunes*, 80 Ky. 334, 335. In *Rokenbaugh* v. *Hubbell* (5 Law. Rep. N. S. 95; s. c. 15 Barb. 563, note), it was said that the true rule in such cases is, that a purpose to delay creditors would avoid an assignment when the sacrifice was sought to be prevented by the debtor himself, so as to enable him to realize something by way of a surplus or otherwise, but not where

the sole or primary intent was to enable all the creditors to realize their entire demands, and prevent loss or injury to any one. It was also held in that case, that where a man has ample means to pay all his debts in cash, there can be no reason for making an assignment with preferences, except for the purpose of delaying creditors, and that such an assignment would be void. The case would be different, however, when a debtor has sufficient property to pay all his debts at its cash value, but is unable to pay in cash as his debts become due, and his property is in danger of being sacrificed by some of his creditors.

In *Kennedy* v. *Wood*, 59 Supm. Ct. (52 Hun), 46, the opinion was expressed that proof of the debtor's solvency known to himself might be some evidence on the question of his intent in making an assignment.

In the case of *Livermore* v. *Northrup*, 44 N. Y. 107, Commissioner Leonard expressed the opinion that when the assets were clearly in excess of the liabilities of the debtor to a large extent, it might raise a presumption of an intent to hinder and delay creditors in the collection of their just demands, and amounts to a *prima facie* case of fraud ; but in that case it was held that the facts warranted no such conclusion. And see remarks of Roosevelt, J., in *Ely* v. *Cook*, 18 Barb. 612, 614 ; *Johnson* v. *Rogers*, 15 N. B. R. 1, 2.

§ 232. **Intent to defeat execution.**—The fact that an assignment is made with the intent to prevent the assignor's creditors from gaining a preference by execution, does not tend to establish any fraudulent purpose. *Holbird* v. *Anderson*, 5 T. R. 235 ; *Reed* v. *McIntyre*, 98 U. S. 507 ; *Welles* v. *March*, 30 N. Y. 344 ; *Hauselt* v. *Vilmar*, 2 Abb. N. C. 222 ; *Place* v. *Miller*, 6 Abb. Pr. N. S. 178 ; *Wilder* v. *Winne*, 6 Cow. 284 ; *Jackson* v. *Cornell*, 1 Sandf. Ch. 348. Although the claims of some of the creditors may be ripe for execution, and the debtor have property out of which they might be collected, yet an assignment by which they will receive only a share, with other claims not overdue, works no legal fraud. Mercer, J., in *Wilson* v. *Berg*, 88 Pa. St. 167 ; s. c. 1 Am. Insol. R. 169, 172. Nor will a threat to make an assignment, which is a threat to do a perfectly lawful act, furnish evidence of an intended fraudulent disposition

of the property. *Dickinson* v. *Benham*, 12 Abb. Pr. 158 ; s. c. 20 How. Pr. 343 ; *Wilson* v. *Britton*, 6 Abb. Pr. 97 ; rev'g s. c. *ibid.* 33. So a threat that the debtor will make a preferential assignment is not evidence of a fraudulent intent to assign property which furnishes ground for the issuing of an attachment. *Evans* v. *Warner*, 28 Supm. Ct. (21 Hun), 574 ; *Kipling* v. *Corbin*, 66 How. Pr. 12 ; *Farwell* v. *Furniss*, 67 How. Pr. 188 ; *Gillott* v. *Redlich*, 57 Supm. Ct. (50 Hun), 390 ; *Davis* v. *Howard*, 80 Supm. Ct. (73 Hun), 347.

§ 233. Threats to make an assignment and promises not to do so.—There are, however, cases which hold that an insolvent debtor cannot hold over his creditors a threat that he will make a general assignment in such a way as to defeat the recovery of their debts for the purpose of coercing them into a compromise of their claims, or for the purpose of deterring them from taking legal proceedings while he is placing his property beyond their reach, and that threats under such circumstances furnish evidence of a fraudulent intent in making a subsequent assignment. *Gasherie* v. *Apple*, 14 Abb. Pr. 64 ; *Livermore* v. *Rhodes*, 27 How. Pr. 506 ; *Anthony* v. *Stype*, 26 Supm. Ct. (19 Hun), 265 ; *U. S. Net. & T. Co.* v. *Alexander*, 42 State R. 668 ; *Ross* v. *Wigg*, 41 Supm. Ct. (34 Hun), 192, 202 ; *Clark* v. *Andrews*, 46 State R. 399.

In *Gasherie* v. *Apple* (14 Abb. Pr. 64, 68), it is said: "The law allows a debtor to assign his property to pay his debts, and even to make preferences, but compels him to make his selection without any conditions for personal gain to himself ; thus he cannot, by an assignment, hold out a hope of an extra share of his assets, or a fear of loss of any participation therein, as a means to induce a creditor to abandon all, or any part of his claim, or to forbear pursuing his legal remedies therefor." Cited with approval in *Anthony* v. *Stype*, *supra*.

A debtor may, by promises and inducements held out to a creditor to deter him from legal proceedings, estop himself from the right to execute a general assignment valid as against such creditor. Thus, where a judgment had been taken against a firm by default, and they obtained a stay of proceedings on the ground that they had a good defense, and their attorney assured

the plaintiffs that in the meantime the firm would make no assignment, but, pending the motion, they made an assignment giving preferences, thus preventing the plaintiffs from realizing anything on their judgment, it was held that the assignment was void as against such judgment-creditors, as being made with intent to hinder and delay them. *Jaques* v. *Greenwood*, 12 Abb. Pr. 232. That case was distinguished by Sedgwick, J., in *Hauselt* v. *Vilmar* (2 Abb. N. C. 222, 227), and it was there held that mere dilatory proceedings, although taken in view of an anticipated assignment, will not defeat a subsequent assignment executed in good faith.

In *Clark* v. *Taylor*, 44 Supm. Ct. (37 Hun), 312, a debtor against whom a judgment was about to be entered, agreed with the creditor that if judgment was delayed he would pay the debt in installment, and also that "if he was pressed in any way, or if he was threatened, he would at once notify the plaintiff's attorneys, so that they might enter judgment and issue an execution thereon ahead of any assignment or other creditor," at the same time making a false statement as to his financial standing. It appeared that an assignment had then been drafted. After making some payments on account, the debtor subsequently drew a general assignment without notice to the creditor of his intention to do so. On this state of fact the majority of the court were of opinion that the evidence sustained the finding of a fraudulent intent in making the assignment; Hardin, P. J., being of opinion that the agreement conferred a trust upon the assets in the hands of the assignee, which the court would enforce; and see *Clark* v. *Andrews*, 46 State R. 399.

In *Hess* v. *Blakeslee*, 2 State R. 309, where the debtor made certain statements to induce the creditor to abstain from issuing execution, and then executed an assignment with the intent to defeat the priority of an execution, the General Term sustained a finding upholding the assignment.

§ 234. Contemporaneous acts—Fraudulent scheme.—It appears, from what has been stated in a previous section, that contemporaneous acts of the assignor which are connected with the execution of the assignment may be resorted to for the purpose of showing the intent with which the assignment was made.

It is apparent that frauds prior to and independent of the assignment cannot effect it.[1] They may constitute frauds upon the assignment, but they are not frauds in the assignment. *Loos* v. *Wilkinson*, 110 N. Y. 195, 210; *Cutter* v. *Hume*, 43 State R. 242; *Vietor* v. *Nichols*, 13 State R. 461. But where the acts are connected together and form one scheme for the purpose of the disposition of the property of the debtor, then all the acts are to be taken together and the intent governing the debtors in the doing of one act establishes an intent as to the whole, and where an assignment is the culmination of whole scheme fraud in the acts leading up to it will vitiate the assignment. *Loos* v. *Wilkinson*, 110 N. Y. 195; *Rothschild* v. *Salomon*, 59 Supm. Ct. (52 Hun), 486; *Smith* v. *Clarendon*, 6 N. Y. Supp. 809; *Warren* v. *Lake*, 37 State R. 799; *First Nat. Bank* v. *Warner*, 62 Supm. Ct. (55 Hun), 120; *Davis* v. *Harrington*, 62 Supm. Ct. (55 Hun), 109; *Hardt* v. *Schwab*, 79 Supm. Ct. (72 Hun), 109; *White* v. *Benjamin*, 3 Misc. 490, 497; *Talcott* v. *Hess*, 38 Supm. Ct. (31 Hun), 282; s. c. on second appeal, 4 State R. 62; *Haydock* v. *Coope*, 53 N. Y. 68; *Abegg* v. *Schwab*, 31 State R. 139.

Acts which are contemporaneous with and are parts of the assignment may modify it without destroying it. Thus preferential conveyances, mortgages, or confessed judgments which are given in contemplation of the assignment, and may be regarded as forming a part of the assignment, and as intended to prefer creditors in excess of the amount permitted by statute, do not render the assignment invalid. *Abegg* v. *Bishop*, 142 N. Y. 286; *Cent. Nat. Bank* v. *Seligman*, 138 N. Y. 435, 441. The effect of the attempt to give preferences in this manner as part of the act of assignment is to enable the assignee to bring the property thus disposed of by preferential transfer apart from the assignment within its operation. *Spelman* v. *Freedman*, 130

[1] A fraudulent disposition of property does not of itself impair a subsequent general assignment. The assignee may sue for its recovery, and if successful it will be for the benefit of the creditors precisely as if it had been included in the assignment. *Estes* v. *Gunter*, 122 U. S. 450. This statement is applicable to this State, where the power to recover in such cases is given to the assignee by statute. A fraudulent disposition of property invalidates a subsequent assignment for the benefit of creditors only where the deed of assignment is part of a scheme to defraud creditors. *Hill* v. *Woodberry*, 49 Fed. R. 138.

N. Y. 421; *Berger* v. *Varrelmann*, 127 N. Y. 281; *Clapp* v. *Clark*, 49 Fed. R. 123. But when the acts accompanying or contemporaneous with the assignment are such as to indicate a fraudulent intent on the part of the assignor the assignment may be defeated. See *ante*, § 179 *et seq.*

Contemporaneous acts within the meaning of the rule need not have taken place at the same time, so long as the transactions are so connected and similar in their relations that the same motive may reasonably be attributed to all. McAdam, J., in *White* v. *Benjamin*, 3 Misc. 490, 497, 506. In the case last cited, after the plaintiff had brought suit against the assignor, his wife sued him for a larger amount. A verdict was directed for the plaintiff upon the trial of his action with direction that the exception should be heard at general term when judgment was given for plaintiff. Immediately before the entry of the judgment in plaintiff's suit judgment was entered in the wife's action which had been permitted to lie inactive, and executions were issued on the debtor's property. Shortly thereafter the debtor executed a general assignment. During the progress of plaintiff's action several transfers of real property were made by the debtor to his wife which were not recorded until immediately before the execution of the assignment.[1] The debtor was insolvent during the whole period. These facts and others extending over a considerable period of time were regarded as forming parts of one scheme which included the general assignment ultimately executed.

In *Hardt* v. *Schwab*, 79 Supm. Ct. (72 Hun), 109, and *Abegg* v. *Schwab*, 31 State R. 139, a surviving partner of Schwab & Co. confessed judgments under which executions were issued, and all the leviable property, consisting of a stock of goods, was taken thereunder. Immediately thereafter he executed a general assignment.

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[1] The withholding of deeds from record may be a badge of fraud. *Talcott* v. *Levy*, 47 State R. 399; s. c. 29 Abb. N. C. 3; *White* v. *Benjamin*, 3 Misc. 490, 495. But the fact that the grantor remains in possession of real property when the deed is delivered and recorded does not of itself show any intention to commit a fraud. *Clute* v. *Newkirk*, 46 N. Y. 684; *Wallace* v. *Berdell*, 97 N. Y. 13; *Davis* v. *Howard*, 80 Supm. Ct. (73 Hun), 347. See *post*, § 241. But see *Bacon* v. *Harris*, 62 Fed. R. 99, 103; *Blennerhassett* v. *Sherman*, 105 U. S. 100; *Neslin* v. *Wells*, 104 U. S. 428.

The goods were then sold by the sheriff and bid in by the judgment creditors, who turned them over to the debtor's brother, who continued business at the same place under the name of Schwab & Bros., under the management of the debtors, upon an agreement to pay the judgment debtors as they realized upon the goods. It was found that the whole transaction was a device to place the stock of goods beyond the reach of creditors and under cover for the benefit of the debtors, and that the general assignment was part of the device and was consequently fraudulent. Other illustrations of the invalidity of an assignment tainted by fraud as shown by contemporaneous acts and circumstances will be found in the note.[1]

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[1] Where the debtor sold all his property to his brother, a young man without family, experience or property resources, and who was employed as his clerk, upon a credit of one year; and afterward executed a general assignment with preferences, it was held that the sale and assignment were to be regarded as one transaction, and that the circumstances afforded sufficient evidence of a fraudulent intent to justify an injunction and receiver. *Litchfield* v. *Pelton*, 6 Barb. 187. But a sale upon credit of part of their property, by an insolvent firm, while it is a circumstance which may be considered with others, bearing upon the question of fraudulent intent in an assignment subsequently made, does not necessarily establish it. And when the evidence shows that the property was sold upon a usual credit, to a person of undoubted responsibility, for all that it was reasonably worth, and that the debts preferred by the assignment were honestly owing, and nothing appeared but that there was other property of the insolvents not covered by the sale, the court will not overrule the finding of a referee, that the sale and assignment had not been made with intent to hinder, delay or defraud creditors. *Roberts* v. *Shepard*, 2 Daly, 110.

Where certain creditors attacked a sale made by a firm indebted to them, on the ground that it was fraudulent and void, an assignment previously made by one of the firm to his son was admitted as evidence on the ground that it came within the rule in respect to evidence of contemporaneous frauds. *Angrave* v. *Stone*, 45 Barb. 35; affi'g 25 How. Pr. 167.

In *Browning* v. *Hart* (6 Barb. 91), where a sale by an insolvent on credit was followed shortly afterward by an assignment, the sale was declared void, but the assignment was sustained.

Where a firm transferred its stock in trade and assets to a creditor, at a fair valuation, who agreed to dispose of the property and repay upon a fixed credit any surplus of the proceeds, after satisfying his claim, and subsequently the firm made a general assignment for the benefit of creditors, including four promissory notes given by the creditor who had previously received the goods, and the assignment preferred his claim, it was held that neither the original transfer nor the assignment were void against creditors

A general assignment may be made by a debtor merely as a device to prevent the unearthing of previous frauds by placing the right of action to recover back the property fraudulently conveyed beyond the reach of creditors and in the hands of a friendly assignee, thus interposing a title between his property and his creditor, to hinder, delay, and defraud the creditor, and when made with such a purpose the assignment is fraudulent as to creditors. *Davis* v. *Harrington*, 62 Supm. Ct. (55 Hun), 109. See *Morris* v. *Morris*, 78 Supm. Ct. (71 Hun), 45.

When fraudulent conveyances and transfers have been made by the assignors in contemplation of the assignment, the assignee may, under the authority derived from the Act of 1858 (Laws of 1858, c. 314; see *post*, Chap. XXI.), maintain actions to set aside and disaffirm the fraudulent act of the debtor and recover the property for the benefit of the creditors under the assignment, and where the assignment is not itself invalid by reason of its connection with such fraudulent acts or otherwise the right of

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of the firm, by their terms or the circumstances of their execution. *Loeschigk* v. *Baldwin*, 1 Robt. 377; affi'd, in 38 N. Y. 326; see also *Lansing* v. *Woodworth*, 1 Sandf. Ch. 43.

Thus, when the assignors immediately before making the assignment bought merchandise which they did not intend to pay for, but which they sold on credit and assigned the debt owing for the price to the assignee; and at the time of making the assignment retained a large amount of money from the assignee for their own use, and allowed money to be retained by clerks either for their own use or for the benefit of the assignor, these facts were held to furnish sufficient evidence of a fraudulent intent in making the assignment. *Waverly Nat. Bank* v. *Halsey*, 57 Barb. 249.

Where the assignor, acting in concert with his son, who was one of the assignees, but without the knowledge of the other assignees, simultaneously with the making of the assignment, procured from certain of the creditors, to whom a preference was given under the assigoment agreements in writing, to lend to his son, one of the assignees, a large portion of the money that they should respectively receive upon their debts under the assignment for the term of five years, such loan to be secured by the notes of the son indorsed by the assignor, and authorizing the assignee to pay to this son the sums so agreed to be loaned and take his receipt therefor, and the name of the son was used for the benefit of the assignor, and the agreement was in fact made between these creditors and the assignor, to enable the latter to prosecute business in the name of the son for his own benefit, and to use the money in such business, it was held that the inference was properly drawn from these facts that the assignment was made by the assignor with intent to hinder, delay and defraud his creditors. *Haydock* v. *Coope*, 53 N. Y. 68.

action is exclusively in the assignee. *Spring* v. *Short*, 90 N. Y. 538 ; *Crouse* v. *Frothingham*, 97 N. Y. 105, 113 ; *Loos* v. *Wilkinson*, 110 N. Y. 195. But where the assignment is itself fraudulent, judgment creditors may in one action seek to set it aside and also to set aside previous fraudulent conveyances. *Loos* v. *Wilkinson*, 110 N. Y. 195 ; *Chandler* v. *Powers*, 9 State R. 169 ; and see *post*, Chap. XXI. ; *Estes* v. *Gunter*, 122 U. S. 450.

§ 235. Obtaining property in contemplation of assignment —Fraudulent representations.—A further illustration of fraud in the execution of an assignment arising from extraneous circumstances may be found in the purchase of goods by the assignor upon false representations in anticipation of the assignment. Thus, where a person in failing circumstances buys goods and shortly afterward makes an assignment giving preferences, in attacking the assignment as fraudulent false representations made at the time of the purchase of the goods as to the settlement of former debts, and also statements as to the buyer's expectation of future ability to pay, are proper to submit to the jury on the question of fraud. *Byrd* v. *Hall*, 1 Abb. Dec. 285 ; s. c. 2 Keyes, 646 ; *Wilson* v. *Ferguson*, 10 How. Pr. 175. See *Miller* v. *Halsey*, 4 Abb. Pr. N. S. 28. But the mere fact that goods were purchased and an assignment with preferences afterward made does not justify a conclusion of fraud. *Achelis* v. *Kalman*, 60 How. Pr. 491.

The decisions go no further than to hold that when there is evidence of a preconcerted scheme to obtain goods by false representations, and then to turn them over under an assignment so that the proceeds shall go to preferred creditors, the fraud in the purchase will color the subsequent assignment. An assignment will not necessarily be regarded as a fraudulent disposition of property simply because the assignor has previously obtained goods upon credit by false representations and has preferred certain creditors in his assignment. *Talcott* v. *Rosenthal*, 29 Supm. Ct. (22 Hun), 573 ; *Achelis* v. *Kalman*, 60 How. Pr. 491 ; *Tim* v. *Smith*, 13 Abb. N. C. 31 ; *Milliken* v. *Dart*, 33 Supm. Ct. (26 Hun), 24 ; *Pool* v. *Ellison*, 63 Supm. Ct. (56 Hun), 108 ; *Hyman* v. *Kapp*, 6 N. Y. Supp. 31 ; *Kibbe* v.

Herman, 58 Supm. Ct. (51 Hun), 438. Nor can an attachment be sustained on the ground that the debtor has fraudulently disposed of his property by proof of representations as to the amount of his property, which are shown to have been false. *Fleitmann* v. *Sickle*, 13 State R. 399; *Greef* v. *Sickle*, 15 State R. 248; *Kibbe* v. *Herman*, 58 Supm. Ct. (51 Hun), 438; *Johnson* v. *Buckel*, 72 Supm. Ct. (65 Hun), 601, 605.

The Court of Appeals held, in *Nat. Park Bank* v. *Whitmore*, 104 N. Y. 297, that where a few days before the assignment was made the defendants reported they were entirely solvent and could pay all their debts in full, and made a statement of their affairs showing a large surplus of assets over liabilities; and soon after these representations claimed that they could not pay their debts in full, and that they were insolvent, and proposed to their creditors a compromise of fifty cents on the dollar, payable in nine, twelve, and fifteen months without security, and the evidence tended to show that they had been engaged in a prosperous business yielding them large profits, and they gave no satisfactory or intelligible explanation of their sudden alleged insolvency, but threatened that unless their offer of compromise was accepted they would make an assignment preferring one creditor, and that then the rest of their creditors would get little or nothing; these facts, taken in connection with the efforts of the defendants with the co-operation of their assignee after the assignment, apparently to coerce a compromise at twenty-five cents on the dollar, their offer "to fix it up" with a creditor afterward if he would assent to the compromise, their selection of a foreign assignee, the relations between him and them, and the secret promise of a future preference, justified the Supreme Court in refusing to vacate an attachment obtained upon the ground that the assignment was made with the intent to hinder, delay, and defraud creditors.

So in *Kennedy* v. *Wood*, 59 Supm. Ct. (52 Hun), 46, it was held that statements made by the debtors as to their solvency a short time before execution of an assignment were competent evidence as to the *bona fides* of the assignment, not as evidence of inducement to credit, but as showing that the debtors believed themselves to be largely solvent, and that this fact was material on the question of intent.

Where a vendor, from whom goods have been obtained by fraud, instead of disaffirming the contract of sale, affirms it by bringing suit thereon and prosecuting it to judgment, neither he nor a receiver (who stands simply in the place of the judgment-creditor), appointed in supplementary proceedings instituted upon such judgment, can set up the fraud in the sale for the purpose of defeating an assignment of the property made by the vendee for the benefit of creditors, although the assignment was made in furtherance of the fraud, with full notice thereof on the part of the assignee. *Kennedy* v. *Thorp*, 51 N. Y. 174; rev'g 2 Daly, 258; *Cohen* v. *Irion*, 26 State R. 1, 5.

A sudden and unexplained disappearance of assets, as evidenced by the difference between statements made by the debtors and their condition as shown by the schedule, furnishes evidence of fraudulent intent in making a general assignment. *Buhl* v. *Ball*, 48 Supm. Ct. (41 Hun), 61; see *Globe Woolen Co.* v. *Carhart*, 67 How. Pr. 403; *Vietor* v. *Henlein*, 41 Supm. Ct. (34 Hun), 562; *Skinner* v. *Oettinger*, 14 Abb. Pr. 109; *Claflin* v. *Hirsch*, 19 Wkly. Dig. 248.

§ 236. Withdrawal of assets.—The intentional withholding of assets from the assignee has repeatedly been held to be a fraud upon the rights of creditors sufficient to render the assignment void. *Shultz* v. *Hoagland*, 85 N. Y. 464; *Coursey* v. *Morton*, 132 N. Y. 556; *Hoyt* v. *Godfrey*, 88 N. Y. 669; *Smith* v. *Perine*, 121 N. Y. 376; *Faxon* v. *Mason*, 83 Supm. Ct. (76 Hun), 408; *Davis* v. *Harrington*, 62 Supm. Ct. (55 Hun), 109; *Schwab* v. *Kaughran*, 42 State R. 407; *Illinois Watch Co.* v. *Payne*, 33 State R. 967; *Wilcox* v. *Payne*, 28 State R. 712; *Passavant* v. *Cantor*, 43 State R. 247; *Chambers* v. *Smith*, 67 Supm. Ct. (60 Hun), 248; *Rothschild* v. *Salomon*, 59 Supm. Ct. (52 Hun), 486; *White* v. *Benjamin*, 3 Misc. 490; *Bagley* v. *Bowe*, 50 Super. Ct. (18 J. & S.) 100; *Talcott* v. *Hess*, 38 Supm. Ct. (31 Hun), 282; s. c. 4 State R. 62; *Crouse* v. *Hessler*, 17 Wkly. Dig. 519; *Iselin* v. *Henlein*, 2 How. Pr. N. S. 211; *Vietor* v. *Henlein*, 41 Supm. Ct. (34 Hun), 562; *Untermeyer* v. *Hutter*, 33 Supm. Ct. (26 Hun), 147.

"The policy of the law in regard to general assignments is that the debtor shall devote all his property to the satisfaction of

his debts. The nature of the relation created by insolvency requires that the transfer should be of this comprehensive character. Creditors have an equitable claim on all the property of their debtor, and it is his duty as well as his right, to devote the whole of it to the satisfaction of their demands." McAdam, J., *White* v. *Benjamin*, 3 Misc. 490, 497.

In *Rothschild* v. *Salomon*, 59 Supm. Ct. (52 Hun), 486, it appeared that within two days before the making of the assignment a considerable sum of money was withdrawn from the firm funds and given to the wife of one of the assignors, and was charged to her on the books of the firm against a fictitious credit; it was held that the abstraction of this money constituted a fraudulent element in the scheme of which the assignment was a part, and that the assignment was consequently invalid. In *Coursey* v. *Morton*, 132 N. Y. 556, the assignor on the day of the assignment drew $963.50 out of the bank and gave it to his wife. Judgment setting aside the assignment was affirmed, the court remarking (p. 558): "The rule is that the intentional withholding and secreting of assets of a substantial value from the possession of the assignee is a fraud upon the rights of creditors, and renders the assignment void." In *Chambers* v. *Smith*, 67 Supm. Ct. (60 Hun), 248, it appeared that on the day of the assignment the assignor, in contemplation of the assignment, gave his wife $200. This was regarded as sufficient evidence on which the assignment might be set aside. In *Schwab* v. *Kaughran*, 42 State R. 407, shortly before making an assignment one of the assignors gave his wife from the assets of the firm $3700 in payment of a debt that he, and not the firm, owed. The court found that this was done through an honest mistake and in the belief that he had a right to apply the money to the payment to the discharge of his indebtedness; the court, however, held the assignment fraudulent.

Again, where it appeared that the assignors intentionally withheld a considerable portion of their estate from the operation of the assignment, and appropriated it to their own use in contemplation of and as part of the plan of the assignment, it was held that this fraud was inseparable from the assignment itself, and rendered it fraudulent as to creditors. *Iselin* v. *Henlein*, 2 How. Pr. N. S. 211. The same question was presented, and

the same principle applied in the case of an attachment issued on the ground of the fraudulent disposition of property under this same assignment. *Vietor* v. *Henlein*, 41 Supm. Ct. (34 Hun), 562.

Even though the property so withdrawn is subsequently turned over to the assignee, that will not affect the propriety of the original transaction. "The intent that controls is the intent of the assignor at the time of making the assignment, and this intent is not overruled by showing that after the assignment, and on the demand of the assignee, the money that had been in law fraudulently transferred was returned to the assignee." *Schwab* v. *Kaughran*, 42 State R. 407; *Coursey* v. *Morton*, 132 N. Y. 586; *Friedburgher* v. *Jaberg*, 20 Abb. N. C. 279.

But the question whether the property was withdrawn with fraudulent intent or whether its omission from the assignment was unintentional or of such a character and amount as not to disclose a wrongful purpose is one for the jury to determine as a question of fact. *Fay* v. *Grant*, 60 Supm. Ct. (53 Hun), 44; *Smith* v. *Clarendon*, 6 N. Y. Supp. 809; *Lewis* v. *Bache*, 28 State R. 405; *Shultz* v. *Hoagland*, 85 N. Y. 464. See *Smith* v. *Perine*, 121 N. Y. 376.

Where, before making the assignment, the partners drew small sums for the purpose of paying private debts and to support their families, held that such withdrawals did not necessarily prove that the assignment afterward made was fraudulent. *Vietor* v. *Nichols*, 13 State R. 461; *Vietor* v. *Henlein*, 41 Supm. Ct. (34 Hun), 562. So where the assignors had been in the habit of drawing a small sum of money each month for household expenses, and each assignor withdrew $30 for this purpose as usual, but shortly before making an assignment, it was held that the assignment was not thereby rendered invalid. *Servis* v. *Holwede*, 33 State R. 773.

§ 237. Omissions of property from schedules.—The schedules which the assignment act requires the assignor to make and file when made and filed by the assignor may be treated as part of the assignment, and as having been in contemplation when the assignment was made, and hence as characterizing the purpose of the assignor in making the assignment. *Shultz* v. *Hoag-*

land, 85 N. Y. 464; *Talcott* v. *Hess*, 38 Supm. Ct. (31 Hun), 282; s. c. 4 State R. 62; *Terry* v. *Butler*, 43 Barb. 395; *Pratt* v. *Stevens*, 94 N. Y. 387. Hence when property is intentionally omitted from the schedule filed by the assignor this will be indicative of a fraudulent intent in making the assignment. *Pittsfield Nat. Bank* v. *Tailer*, 67 Supm. Ct. (60 Hun), 130; *De Camp* v. *Marshall*, 2 Abb. Pr. N. S. 373; *Talcott* v. *Hess*, 38 Supm. Ct. (31 Hun), 282; s. c. on retrial, 4 State R. 62; but see *Ellis* v. *Myers*, 28 State R. 120, and *Miller* v. *Halsey*, 4 Abb. Pr. N. S. 28, but the wrongful intent must exist. *Blain* v. *Pool*, 13 State R. 571.

An omission from the schedule of property which has no value is no evidence of fraud. *Shultz* v. *Hoagland*, 85 N. Y. 464; *Pittsfield Nat. Bank* v. *Tailer*, 67 Supm. Ct. (60 Hun), 130.

Where the assignors resided in New Jersey, and had personal property situated there, which they owned individually, and this property was not included in the schedule made after the making of a preferential assignment in New York, the court was of the opinion that if the property had been situated in New York the omission from the schedule would have been indicative of a fraudulent purpose in the assignment; but inasmuch as under the New Jersey statute a transfer to an assignee under a preferential assignment is absolutely void, so that the assignee could take no title to the property situated in New Jersey, its omission from the schedule was not a subject of criticism. *Eastern Nat. Bank* v. *Hulshizer*, 2 State R. 93. See *Blain* v. *Pool*, 13 State R. 571.

When the schedule subsequently filed by the assignor contains fictitious debts the assignment itself may be regarded as providing for the payment of such debts and as, therefore, fraudulent. *Roberts* v. *Vietor*, 130 N. Y. 585; *Terry* v. *Butler*, 43 Barb. 395; *Talcott* v. *Hess*, 38 Supm. Ct. (31 Hun), 282. But it may be shown that the amount of the indebtedness was mistakenly inserted in the inventory without any intent to defraud. *Roberts* v. *Buckley*, 87 Supm. Ct. (80 Hun), 58.

When the schedules are prepared and filed by the assignee they are not in themselves evidence of the assignor's intent in

making the assignment. *Denton* v. *Merrill*, 50 Supm. Ct. (43 Hun), 224; s. c. 5 State R. 387; and see *post*, § 257.

§ 238. Other subsequent acts of the assignor.—As has been already stated, all an assignor's acts connected with, or coincident in time with, his assignment, may generally be inquired into, because the law allows the greatest latitude in searching for evidence of a fraud which, from the nature of the case, must be confined almost exclusively within the assignor's bosom. Gould, J., in *Wilson* v. *Forsyth*, 24 Barb. 105, 128. But subsequent acts of the assignor, unconnected with the assignment, are wholly immaterial. *Shultz* v. *Hoagland*, 85 N. Y. 464; *Roberts* v. *Buckley*, 87 Supm. Ct. (80 Hun), 58, 62. Thus, where the assignor on absconding, after executing the assignment, carried off a sum of money with him, the assignment was not for that reason void. *Wilson* v. *Forsyth*, *supra*; see *Am. Ex. Bank* v. *Webb*, 15 How. Pr. 193.

Where it appeared that the assignor continued in possession of the assigned property, and was employed by the assignee to sell the stock, and assist in making collections at the store where the business was formerly carried on, and the amounts so collected were paid over to the assignee; that this continued about six months, when the whole remaining stock was sold at 25 per cent. on the cost price to a brother-in-law of the assignor, who had paid a large portion of the purchase money, and was fully responsible for the balance, the sale having been made for the full value of the goods, it was held, that in an action to set aside the assignment for fraud, there was not sufficient evidence of fraud to warrant an injunction and receiver. *Beamish* v. *Conant*, 24 How. Pr. 94.

So where the assignor, at the request of the assignee, promised in advance to render services which might be needed, and after the assignment did aid in disposing of the merchandise, this was not regarded as evincing a fraudulent intention. *North River Bank* v. *Schumann*, 63 How. Pr. 476.

Where the assignors were allowed by the assignee to make use of assigned machinery to work up new stock, and they also gratuitously worked up the assigned stock and the property was sold at auction and bid in by a third person for the benefit of the

wife of one of the assignors, there being no evidence to show that the sale was not fairly conducted, it was held that the circumstances furnished but slight if any evidence of fraud in the making of the assignment. *Turney* v. *Van Gelder*, 75 Supm. Ct. (68 Hun), 481 ; s. c. 52 State R. 664.

Where the assignment was made to a clerk of the assignors, who sold a portion of the property and disposed of the remainder to the mother of one of the assignors, who was a preferred creditor, and she afterwards carried on the business under her son's name, adding the word "agent," it was held that though these facts were suspicious they were not such as would justify the General Term in reversing a finding in favor of the assignment in the court below. *Eastern Nat. Bank* v. *Hulshizer*, 2 State R. 93.

Subsequent acts of the assignor, and the control which he exercises over the assigned property, may prove of importance (*Persse & Brooks Paper Works* v. *Willett*, 1 Robt. 131), but only in so far as they may be legitimately referred back to the time of the execution of the assignment, and serve to establish the intent of the assignor at that time (*ante*, § 206). This distinction is an important one. The assignor does not lose all interest in the assigned property by the execution of the assignment. He still retains an equitable interest in what may remain after payment of the debts provided for, and in seeing to it that the property be made available for the payment of his debts. *Billing's Case*, 10 Abb. Pr. 258 ; s. c. 21 How. Pr. 448 ; *Dickinson* v. *Benham*, 12 Abb. Pr. 158 ; s. c. 20 How. Pr. 343. And this interest will give him a standing in court to move to vacate an attachment previously granted against him. *Dickinson* v. *Benham*, *supra*. This interest of the assignor will justify him in all proper efforts to assist in making the property realize the utmost.

"It cannot be justly said," says Mr. Justice Clerke, in *Eyre* v. *Beebe* (28 How. Pr. 333, 337), "that every kind of interference by an assignor with the property of the trust" indicates a fraudulent intent. "Every insolvent debtor has at least a moral interest in the advantageous disposition of the property, in order that it may go as far as possible in the payment of his debts and the satisfaction of his creditors, and, therefore, any suggestion offered by him which may be useful to the trustee, and beneficial to the

creditors, so far from showing that he intended by the assignment to defraud his creditors, indicates that he was actuated by good motives from the beginning, if we can at all ascertain a past intent by subsequent conduct."

§ 239. **Delivery of possession.**—The Revised Statutes provide that "every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or the creditors of the person making such assignment or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment that the same was made in good faith, and without any intent to defraud such creditors or purchasers." 2 R. S. 136, § 5; 4 R. S. 8th ed. 2591, § 5.

Under the provisions of the statute, unless an assignment be accompanied by an immediate delivery of the assigned property, and be followed by an actual and continued change of possession, the courts are bound to presume it fraudulent and void as against creditors, and to regard it as conclusively so, unless satisfied that it was made in good faith, and without any intent to defraud. *Connah* v. *Sedgwick*, 1 Barb. 210; *Ball* v. *Loomis*, 29 N. Y. 412; *Van Buskirk* v. *Warren*, 2 Keyes, 119; s. c. 4 Abb. Dec. 457; *Terry* v. *Butler*, 43 Barb. 395; *Putzel* v. *Schulhof*, 59 Super. Ct. (27 J. & S.) 88; *Russell* v. *Lasher*, 4 Barb. 232; *Griswold* v. *Sheldon*, 4 N. Y. 581; *Dewey* v. *Adams*, 4 Edw. 21; *Currie* v. *Hart*, 2 Sandf. Ch. 353; *Van Nest* v. *Yoe*, 1 Sandf. Ch. 4; *Hitchcock* v. *St. John*, Hoffm. Ch. 511; *Cram* v. *Mitchell*, 1 Sandf. Ch. 251; *Fiedler* v. *Day*, 2 Sandf. 594; *McConihe* v. *Derby*, 69 Supm. Ct. (62 Hun), 90.

There must be an actual and continued change of possession as well as a nominal and constructive change, or the transaction will be fraudulent as against creditors. *Currie* v. *Hart*, 2 Sandf. Ch. 353; *Miller* v. *Halsey*, 4 Abb. Pr. N. S. 28; *Randall* v.

Parker, 3 Sandf. 69 ; *Betz* v. *Conner*, 7 Daly, 550 ; *Waverly Nat. Bank* v. *Halsey*, 57 Barb. 249 ; *McCarthy* v. *McDermott*, 10 Daly, 450.

If a debtor assigns his property to one of his creditors, and acting as the creditor's agent retains the possession and retails the goods without any visible change in the mode of doing business, receiving compensation for his services, this is not a change of possession within the statute. *Butler* v. *Stoddard*, 7 Pai. 163 ; affi'd, 20 Wend. 507 ; *Wilson* v. *Ferguson*, 10 How. Pr. 175. So where a debtor assigned a stock of merchandise in trust for his creditors, and after a mere symbolical delivery the assignee permitted the assignor and his clerk to continue in possession of the goods, selling them as before the assignment, and apparently for the benefit of the assignor, it was held that these facts unexplained were evidence that the assignment was made in fraud of creditors. *Adams* v. *Davidson*, 10 N. Y. 309 ; see also *Pine* v. *Rikert*, 21 Barb. 469. So when the assignor assigned a stock of goods, and the assignee took the key of the store containing the goods, which was closed for about a week thereafter, and then the assignor continued the business, making purchases and sales as before, without any indication of a change of ownership except the addition of the letters " Agt." to his name on one of the signs, it was held that this did not constitute such a continued change of possession as is contemplated by the statute. *Einstein* v. *Chapman*, 42 Super. Ct. (10 J. & S.) 144.

Immediate possession of the assigned property is taken by the assignee when directly after the execution of the assignment the property passes into his possession, and the assignor exercises no control over it save to assist in the sale of some of it. *Ryder* v. *Duffy*, 80 Supm. Ct. (73 Hun), 605 ; *Turney* v. *Van Gelder*, 75 Supm. Ct. (68 Hun), 481 ; s. c. 52 State R. 664 ; s. c. on former appeal, 45 State R. 333.

If the delivery by the assignor be sufficient it is not necessary that the property should be removed from the place of delivery. *Hitchcock* v. *St. John*, Hoffm. Ch. 511.

The change must be continuous, although a sale be accompanied by immediate delivery and followed by an actual change of possession, yet if thereafter, however long may be the interval, it comes again into the possession of the vendor by the act

or with the knowledge of the vendee, with no intermediate change of title, the presumption of fraud arises. *Tilson* v. *Terwilliger*, 56 N. Y. 273.

The circumstance that the assignee constitutes the assignor his agent, is not alone sufficient to show that the assignment was made with fraudulent intent, especially when it appears that the assignee was not familiar with the business, and that he had confidence in the assignor, who was familiar with it. *Wilbur* v. *Fradenburgh*, 52 Barb. 474 ; *North River Bank* v. *Schumann*, 63 How. Pr. 476 ; see cases cited, *ante*, § 208. The fact that the assignee employs the same clerks that were previously employed by the assignor is not evidence of fraud. *Parker* v. *Jervis*, 3 Abb. Dec. 449. Thus where, at the time of executing the assignment, the assignor delivered to the assignee the keys of the store for the purpose of giving him dominion over the property, and the former clerks were discharged by the assignor, and all again employed by the assignee to take charge of and remain with the goods of the assignee, and they did so take charge of the goods and hold them for the assignee and in their actual possession ; and the assignee at the same time took the books, the notes and accounts, from the store to his office, and the signs were taken down—this evidence was regarded as showing a fair case of delivery of the goods, and a continued change of possession under the assignment. *Parker* v. *Jervis*, *supra*.

Although a continued possession of the assignor is presumptive evidence of fraud, and conclusive unless rebutted, yet it may be shown to be consistent with good faith and to have been free from fraud. *Smith* v. *Acker*, 23 Wend. 653 ; *Ball* v. *Loomis*, 29 N. Y. 412 ; *Van Buskirk* v. *Warren*, 4 Abb. Dec. 457 ; s. c. 2 Keyes, 119 ; *Hall* v. *Tuttle*, 8 Wend. 375.

When the presumption of fraud arises from the continued possession by the vendor, the burden of proof is on the vendee to make it appear that the sale was made in good faith and without any intent to defraud creditors. *Siedenbach* v. *Riley*, 111 N. Y. 560, 568 ; *Carr* v. *Johnson*, 36 State R. 783 ; *Wallace* v. *Nodine*, 64 Supm. Ct. (57 Hun), 239 ; s. c. 32 State R. 657.

But when this presumption has been met by evidence of good faith, it is not necessary that the party should go further and show that there was an excuse or reason for the want of change

of possession. *Mitchell* v. *West*, 55 N. Y. 107. Although, generally, it is a badge of fraud if the assignor continue in possession of the whole, or even a part of the assigned property, yet where there is no inventory of the property assigned accompanying the assignment, the assignor's retaining some property that he might have assigned, or that being covered by the general terms of the assignment, he might have delivered under it, is not an act that will make the whole assignment void of course. *Wilson* v. *Forsyth*, 24 Barb. 105. Where an assignment was made in good faith, and the assignor continued in possession of the assigned property at the request and for the benefit of his assignees, who had used reasonable diligence to get the possession, it was held, previous to the Revised Statutes, that the assignment was not fraudulent; that the possession of the assignor, under the circumstances, was not material, and was consistent with the real intent of the assignment. *Vredenbergh* v. *White*, 1 Johns. Cas. 156.

Where the goods are not in the possession or under the control of the assignor, as when they have been taken by a sheriff under a levy on execution, the transaction is not within the purview of the statute, and the assignee's title to the goods, subject to the levy, is not affected by a failure to take possession. *Mumper* v. *Rushmore*, 79 N. Y. 19.

The property need not be taken into the manual possession of the assignee. If it comes under his actual custody and control, it will be enough, although the delivery be merely symbolical or constructive. Thus a delivery of the keys of the place where the goods are stored may be sufficient to pass a valid title to the property. *Bullis* v. *Montgomery*, 50 N. Y. 352; *Woodworth* v. *Hodgson*, 63 Supm. Ct. (56 Hun), 236. So, in an early case, where an assignment of household goods was made, and a silver cup was delivered to the assignee in token of delivery, and he proceeded to advertise the goods for sale, but left the bulk of them in the possession of the assignor, the assignment was held valid. *Vredenbergh* v. *White*, 1 Johns. Cas. 156. This decision was made previous to the Revised Statutes (2 R. S. 136), and the rule of law is now more stringent. In *Hitchcock* v. *St. John* (Hoffm. Ch. 511), it was said that a symbolical delivery of a small portion of the property will not be sufficient. And in

Mead v. *Phillips* (1 Sandf. Ch. 83, 89), Vice-chancellor Sandford said : " I need not determine whether the omission to deliver a small portion of the assigned property (in this instance it was about one third) would be a badge of fraud, when the assignee is shown to have taken the immediate possession of the residue, and to have continued in the possession thereof ; the assignment being shown to have been made in good faith in all other respects. The want of an immediate and continued change of the possession of a material or substantive portion of the assigned property, renders it imperative for the party supporting the validity of the transaction to prove that it was executed *in good faith, and without any intent* to defraud."

But a failure to comply with the statute in reference to a delivery and change of possession of the assigned property is an objection which can be taken only by creditors or purchasers in good faith. The fact that assignees, immediately after the acceptance of the assignment, refused to take possession of the entire property, does not deprive them of their rights, nor relieve them of their obligations under it. *Sheldon* v. *Stryker*, 42 Barb. 284 ; s. c. 27 How. Pr. 387.

§ 240. Change of possession—Real property.—Real estate is not included in the express language of the statute. The continuance in possession of a grantor of real estate, after the conveyance, while it may be a circumstance proper to be considered, in connection with other evidence, tending to show a design to defraud creditors, does not of itself warrant a finding, as a legal conclusion, that the deed was fraudulent. *Clute* v. *Newkirk*, 46 N. Y. 684 ; *Wallace* v. *Berdell*, 97 N. Y. 13 ; *Every* v. *Edgerton*, 7 Wend. 259 ; see *Jackson* v. *Cornell*, 1 Sandf. Ch. 348.

But where the debtor was permitted to retain possession of real estate which he had assigned, for a number of years under a nominal lease to his son, without paying any rent, the conveyance was declared fraudulent and void as against creditors. *Bank of Orange Co.* v. *Fink*, 7 Paige, 87 ; see *Mead* v. *Phillips*, 1 Sandf. Ch. 83 ; *Dolson* v. *Kerr*, 12 Supm. Ct. (5 Hun), 643 ; *Hitchcock* v. *St. John*, Hoffm. Ch. 511. See *Loos* v. *Wilkinson*, 110 N. Y. 195. And in the case of *Dewey* v. *Adams*

(4 Edw. Ch. 21), an assignment was declared void because the assignee left furniture, embraced by it, in the assignor's possession, renting it to him until a favovable time for sale.

When real property was conveyed without consideration by a husband to his wife and the conveyance was not recorded, and the husband remained in the possession and apparent ownership of the property, in the meanwhile conducting a business in which purchases are made on credit, such a conveyance was declared fraudulent against subsequent creditors. *Talcott* v. *Levy*, 29 Abb. N. C. 3. See *Blennerhassett* v. *Sherman*, 105 U. S. 100; *Savage* v. *Murphy*, 34 N. Y. 508; affi'g 8 Bosw. 75; *Case* v. *Phelps*, 39 N. Y. 164. The failure to record the deed, though not conclusive evidence, is a suspicious and strong circumstance tending to prove fraudulent intent. *Talcott* v. *Levy*, *supra*. See *Perry* v. *Bedell*, 38 State R. 321; *Crawford* v. *Neal*, 144 U. S. 585.

§ 241. **Subsequent acts of the assignee.**—Where the assignment has been honestly made for a lawful purpose, it cannot be defeated by proof that the assignee has abused his trust, misappropriated the property, or acted dishonestly in its disposal. *Cuyler* v. *McCartney*, 40 N. Y. 221, rev'g 33 Barb. 165; *Hotop* v. *Durant*, 6 Abb. Pr. 371, note; *Mathews* v. *Poultney*, 33 Barb. 127; *Wilson* v. *Forsyth*, 24 Id. 105; *Hardmann* v. *Bowen*, 39 N. Y. 196; *Casey* v. *Janes*, 37 Id. 608; *Browning* v. *Hart*, 6 Barb. 91; *Cox* v. *Platt*, 32 Id. 126; *Pac. Mut. Ins. Co.* v. *Machado*, 16 Abb. Pr. 451; *Am. Ex. Bank* v. *Webb*, 15 How. Pr. 193; *Judson* v. *Abeel*, 5 Weekly Dig. 221. Thus, an unauthorized act of the assignee in selling on credit a part of the assigned property cannot make void an assignment which was valid when made. *Mathews* v. *Poultney*, *supra*.

If the assignment is legally complete and perfect, and is intended to devote, and does devote, all the debtor's property to the payment of his debts, it cannot be invalidated through the subsequent remissness or inefficiency of the assignee. Creditors have ample remedy against the assignee for his misconduct if any, and they should be held to their remedies rather than be allowed to subvert the assignment on the claim that such remissness is an evidence of original fraudulent intent. *Olney* v. *Tan-*

ner, 10 Fed. Rep. 101, 115. Hence the subsequent employment of the assignor, and the continuance of the business by the assignee, were, in the case last cited, held not to furnish sufficient evidence of a fraudulent intent.

The sale of the assigned property for much less than its inventored value when it was duly and properly advertised, and the fact that the property was bought in by third persons in the interest of the assignor's wife, were held to furnish slight if any evidence of fraud in the assignment. *Turney* v. *Van Gelder*, 75 Supm. Ct. (68 Hun), 481; s. c. 52 State R. 664.

But the subsequent acts of the assignee, under the principles discussed in the previous sections, may furnish important evidence of the fraudulent intent of the assignor when these acts can be connected with previous matters showing that the entire transaction, including the assignment, was one.

In *Dambmann* v. *Butterfield* (9 Supm. Ct. [2 Hun], 284), where the action was to set aside an assignment as fraudulent, on the ground that a preferred debt was fictitious, the question arose whether upon an examination of the assignee he could be compelled to state what disposition had been made by him of a portion of the assets.

In delivering the opinion of the court, Mr. Justice Davis said: "It may be true that a valid assignment is not avoidable by the subsequent fraud or misconduct of the assignee; but where the issue is upon the validity of the instrument itself for fraud, it is competent to show the disposition of the assigned property by the assignee, as tending to throw light upon the alleged invalidity of the assignment. Especially is this so where the fraud alleged is that the preferences to the assignee are of fictitious debts, or of debts that have been wholly or in part paid."

§ 242. Fictitious and fraudulent debts.—An assignment by an insolvent debtor which undertakes to provide for the payment of debts not owing by the assignor, or for amounts in excess of sums justly due by him, is fraudulent and void, for the manifest reason that the provision for such fictitious debts must have the effect either to defraud the *bona fide* creditors of the assignor, or to delay and embarrass them in the collection of their debts.

Webb v. *Daggett*, 2 Barb. 9 ; *De Camp* v. *Marshall*, 2 Abb. Pr. N. S. 373 ; *Fiedler* v. *Day*, 2 Sandf. 594 ; *Mead* v. *Phillips*, 1 Sandf. Ch. 83 ; *Terry* v. *Butler*, 43 Barb. 395 ; *Jacobs* v. *Remsen*, 36 N. Y. 668 ; *Planck* v. *Schermerhorn*, 3 Barb. Ch. 644 ; *Am. Ex. Bank* v. *Webb*, 36 Barb. 291 ; *Bostwick* v. *Menck*, 40 N. Y. 383 ; *Claflin* v. *Hirsch*, 19 Wkly. Dig. 248 ; and see *Struthers* v. *Hoffstadt*, Id. 242 ; see *Dambmann* v. *Butterfield*, 9 Supm. Ct. (2 Hun), 284 ; *Cohen* v. *Irion*, 26 State R. 1, 2 ; *Talcott* v. *Hess*, 4 State R. 62 ; *Stafford* v. *Merrill*, 69 Supm. Ct. (62 Hun), 144 ; *Chambers* v. *Smith*, 67 Supm. Ct. (60 Hun), 248 ; *Chandler* v. *Powers*, 9 State R. 169 ; *First Nat. Bank* v. *Raymond*, 14 State R. 868 ; *First Nat. Bank* v. *Halsted*, 20 Abb. N. C. 155 ; *Waples-Platter Co.* v. *Low*, 54 Fed. R. 93 ; *Bickham* v. *Lake*, 51 Fed. R. 892, 895.

The preference of a debt for which the assignor is not liable, even though he believes himself to be liable, when the preference is absolute, renders the assignment invalid. *Roberts* v. *Vietor*, 130 N. Y. 585 ; *Chambers* v. *Smith*, 67 Supm. Ct. (60 Hun), 248. See *Friedman* v. *Bierman*, 50 Supm. Ct. (43 Hun), 387 ; *Brown* v. *Halsted*, 17 Abb. N. C. 197 ; *First Nat. Bank of Westport* v. *Raymond*, 14 State R. 868. This is so for the reason that the *bona fide* creditors are deprived by the preference of property which is rightfully applicable to the payment of their debts. It is for this reason that appropriations of firm property to the payment of individual debts of the members of the firm render an assignment fraudulent as against firm creditors ; see *ante*, § 191. And the substance of the wrong is that the parties coming in under the assignment cannot dispute the correctness or validity of debts which the assignee is specifically directed to pay at certain and fixed amounts, and if the amounts so directed to be paid are excessive or illegal, creditors are necessarily wronged. *Roberts* v. *Vietor*, *supra*.

But when the error is one merely of amount, arising from an erroneous calculation of interest or of the amount due, it does not necessarily follow that the assignment will be declared fraudulent. *Peyser* v. *Myers*, 135 N. Y. 599, 606. The law is interested in the substance and not in the mere appearance. The case of *Roberts* v. *Vietor*, *supra*, having been sent back for a new trial upon appeal from the judgment for defendant on

the second trial (*Roberts* v. *Buckley*, 87 Supm. Ct. [80 Hun], 58), it was held that although a preferred debt was stated in the schedule at a larger amount than was actually due, it might be shown that the error was unintentional and the result of a mistake.

Where all the debts were contracted in a firm name under which the assignor did business, but they were really the individual debts of the assignor by whom all the assigned property was owned, the assignment was held not to be fraudulent merely because it described some of the debts as firm debts, and others as individual debts. *Gorham* v. *Innis*, 115 N. Y. 87.

Where the assignors assigned certain claims to a creditor to reimburse him for money loaned, and afterward made a general assignment and preferred the creditor, it was held that this did not invalidate the assignment, inasmuch as the creditor was entitled to be paid only once, either out of the assigned claims or by the preference. *Blain* v. *Pool*, 13 State R. 571. And to the same effect is *Smith* v. *Perine*, 121 N. Y. 376; and see *Smith* v. *Smith*, 136 N. Y. 313. So where the preference is given to the endorser and not to the holder of a note. *Webb* v. *Thomas*, 49 State R. 462; see *ante*, § 214.

The burden of proof is upon the party asserting that the preferred debt is fictitious. *Mack* v. *Davidson*, 58 Super. Ct. (26 J. & S. 75).

Some further illustrations of the application of the general principle will be found in the following cases:

In *Kavanagh* v. *Beckwith* (44 Barb. 192), where certain debts were overstated in the assignment, but the assignor filed an inventory, under the statute, containing the true amounts, the court held that, upon a fair construction of the language of the assignment and the subsequent inventory, the overstatement of the amounts did not render the assignment fraudulent. So, where the assignor, who had been selling goods on commission, preferred the consignors of the goods for an amount of the goods sold by him, but exceeding what he had collected and was liable for, it was held that in the absence of any fraudulent intent, that the preference was not fraudulent and the assignment was good. *Whiting* v. *Lebenheim*, 14 Wkly. Dig. 415.

But in the case of *Talcott* v. *Hess*, 38 Supm. Ct. (31 Hun), 282, where the assignor inserted in the schedule of debts made

and verified by her, a debt as due which had been in fact paid, and there was no circumstance and no explanation tending to show a mistake, this was held to invalidate the assignment. If the assignor is not indebted to the persons named as creditors, the assignment cannot be sustained by showing that such persons were to receive payment upon a verbal trust for real creditors. *Frazier* v. *Truax*, 34 Supm. Ct. (27 Hun), 587.

The fact that the defendant included in his schedule of liabilities more debts than he disclosed to the plaintiff just before the assignment, is, of itself, no evidence of fraud, unless it appears that the debts mentioned in his schedules, or a portion of them, were fraudulent. *Freeman* v. *Campbell*, 1 State R. 728. Where it appeared that the assignors, shortly before making the assignment, stated that they owed no private debts, but the assignment contained preferences to their relatives for sums which were not entered in their books, this evidence cast upon the assignee the burden of proving that the preferences were *bona fide*. *Beatty* v. *Soman*, 6 State R. 669.

Where the assignor made and filed and inserted a sum as due to a preferred creditor, and afterward the preferred creditor presented a claim for a larger amount and the debtor testified to the correctness of the latter claim, it was held that the schedule being truthful, even if the parties subsequently conspired to attempt to procure the allowance by the assignee of a fictitious sum, that was not evidence of a fraudulent intent in the making of the assignment. *Phillips* v. *Tucker*, 14 State R. 120 ; affi'd, 122 N. Y. 649. This case illustrates the rule that the fraudulent intent must be in the making of the assignment ; *ante*, § 229.

In *Friedman* v. *Bierman*, 50 Supm. Ct. (43 Hun), 387, the wife of the assignor was preferred upon an alleged indebtedness, which arose as follows : the wife having brought an action for divorce, the husband paid her the sum of $3000 upon her discontinuing the action and agreeing to live apart from him ; afterward she returned to live with him and returned him the $3000, for which he gave his note, which constituted the preferred indebtedness ; it was held that the note was without consideration, and the assignment fraudulent.

A debt is not necessarily fictitious or fraudulent because the debtor has a good defense to it, of which he might avail himself

if he so desired. Thus a debtor may provide for the payment of usurious debts. *Murray* v. *Judson*, 9 N. Y. 73; *Pratt* v. *Adams*, 7 Paige, 615; *Green* v. *Morse*, 4 Barb. 332. A debtor is not required to avail himself of the statute against usury to avoid the payment of a debt justly due; and he may properly provide in an assignment for the payment of any debt which he himself might rightfully pay. *Murray* v. *Judson*, *supra*.

And when the usurious debt is not specifically preferred in the assignment itself, but is included by the assignor in the inventory of his debts prepared and filed in compliance with the statute, he thereby recognizes the validity of such usurious debt and renders it valid and enforceable as against the assigned property. *Chapin* v. *Thompson*, 89 N. Y. 270; s. c. 25 Supm. Ct. (18 Hun), 446; *Matter of Thompson*, 37 Supm. Ct. (30 Hun), 195.

The same rule and the same reason which applies to usurious debts exists in reference to provisions for the payment of debts barred by the statute of limitations. *Livermore* v. *Northrup*, 44 N. Y. 107; *Davis* v. *Howard*, 80 Supm. Ct. (73 Hun), 347, 349. And to those in which compound interest has been allowed in accordance with agreement. *Mellen* v. *Banning*, 55 State R. 319, 328.

§ 243. **Evidence of intent.**—A person is presumed to intend the necessary consequences of his own acts; and when the necessary result of an assignment, as shown by unlawful provisions on its face or by undisputed facts determined by extrinsic evidence, is to hinder, delay and defraud creditors, the debtor will be charged with the intent to effect the result which necessarily follows such illegal provisions or facts. *Kavanagh* v. *Beckwith*, 44 Barb. 192; *Webb* v. *Daggett*, 2 Barb. 9; *Coleman* v. *Burr*, 93 N. Y. 17.

While this is true, it is also to be remembered that fraud is never to be presumed, but is to be proved. *Sullivan* v. *Warren*, 43 How. Pr. 188; *Nichols* v. *Pinner*, 18 N. Y. 295.

In *Shultz* v. *Hoagland*, 85 N. Y. 464, speaking of the evidence sufficient to defeat an assignment, Judge Finch remarks: "The case furnishes no exception to the rule that fraud is to be proved and not presumed. (*Grover* v. *Wakeman*, 11 Wend. 187.) It is seldom, however, that it can be directly proved, and usually is a deduction from other facts which natu-

rally and logically indicate its existence. Such facts, nevertheless, must be of a character to warrant the inference. It is not enough that they are ambiguous, and just as consistent with innocence as with guilt. That would substitute suspicion as the equivalent of proof. They must not be, when taken together and aggregated, when interlinked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting." And see remarks of Mr. Justice McAdam in *White* v. *Benjamin*, 3 Misc. 490, 505.

When conveyances are attacked for fraud, and there are many facts surrounding the case which cast suspicion upon the transaction, the defendants should be prepared to meet the allegations of unfairness; and if they fail to do so the plaintiff will be entitled to the benefit of all the unfavorable inferences which may legitimately be drawn from their neglect and the general features of the case. *Newman* v. *Cordell*, 43 Barb. 448.

An assignor who is a witness in an issue of fact as to whether an assignment or transfer of property was made to hinder, delay or defraud creditors, may be asked whether in making the assignment or transfer he intended to delay or defraud his creditors. *Seymour* v. *Wilson*, 14 N. Y. 567; *Forbes* v. *Waller*, 25 N. Y. 430; *Mathews* v. *Poultney*, 33 Barb. 127; *Persse & Brooks Paper Works* v. *Willett*, 1 Robt. 131; s. c. 19 Abb. Pr. 416; *Bedell* v. *Chase*, 34 N. Y. 386; *Sperry* v. *Baldwin*, 53 Supm. Ct. (46 Hun), 120. But this rule will not be extended so as to allow one who acted as agent for the assignor in the management of the property to testify as to whether the assignment was made in good faith. *Talcott* v. *Hess*, 38 Supm. Ct. (31 Hun), 282.

The assignee cannot be asked whether he had an intent to hinder, delay and defraud creditors for the reason that his intent is not material. *Kennedy* v. *Wood*, 59 Supm. Ct. (52 Hun), 46.

Evidence to show that there was no agreement at the time of the assignment that the assignor should retain possession of the assigned property, is not competent. The assignment speaks for itself, and must be judged by its terms and in the light of the contemporaneous and subsequent acts of the parties. *Forbes* v. *Waller*, 25 N. Y. 430.

In the case last cited, Judge Allen says (p. 439): "The use that

was made of the assignment, and the acts of the parties under it, must furnish the data to judge of the intent and motives with which it was executed. The assignee cannot give evidence of agreements not contained in the assignment, to uphold it or change its legal effect. In terms, the assignment gave the assignee the right of immediate possession; and whether he exercised that right seasonably was a fact to be established by evidence like other facts, and not by evidence of what the parties to the instrument privately agreed should or should not be done."

In *Acker* v. *Leland*, 109 N. Y. 5, it was held that in an action to set aside the assignment judgments recovered by preferred creditors were competent evidence as proof of the validity of the debts.

§ 244. Declarations of the assignor and assignee as evidence to impeach the assignment. Whether in an action by creditors to attack an assignment, statements made by the assignor either before or after the assignment are competent evidence to defeat the title of the assignee, and if so, whether they are generally admissible, or only under special circumstances, are important inquiries. There can be no doubt that declarations of the assignor are competent evidence against himself. *Loos* v. *Wilkinson*, 110 N. Y. 195, 210; *Kennedy* v. *Wood*, 59 Supm. Ct. (52 Hun), 46. And since he is a necessary party to a creditor's action to set aside an assignment, such evidence cannot be excluded by the court in actions of that character. *Loos* v. *Wilkinson*, *supra*; *Scofield* v. *Spaulding*, 61 Supm. Ct. (54 Hun), 523. But after the evidence has been admitted the inquiry still remains whether it can serve as a basis of a judgment to defeat the assignee's title.

As a general rule between vendor and vendee declarations of the vendor either before or after the sale are incompetent to effect the vendee's title, "unless the statements sought to be proved were contemporaneous with the transaction of sale, and, as being illustrative of it, would fairly constitute parts of the *res gestæ*; or where the evidence tended to show that the party, as a pseudo vendor only, was engaged in a joint scheme with the purpose of defrauding others through the alleged transactions; in which case what he may have stated respecting it at any time

would be relevant and material in disclosing it and in defeating its successful accomplishment." *Flannery* v. *Van Tassel*, 131 N. Y. 639 ; see *Paige* v. *Cagwin*, 7 Hill, 361 ; *Baldwin* v. *Short*, 125 N. Y. 553 ; *Bush* v. *Roberts*, 111 N. Y. 278 ; *Foote* v. *Beecher*, 78 N. Y. 155 ; *Van Gelder* v. *Van Gelder*, 81 N. Y. 625 ; *Tabor* v. *Van Tassell*, 86 N. Y. 642 ; *Truax* v. *Slater*, 86 N. Y. 630 ; *Clews* v. *Kehr*, 90 N. Y. 633 ; *Jones* v. *East Society of M. E. Church*, 21 Barb. 161 ; *Carver* v. *Barker*, 80 Supm. Ct. (73 Hun), 416.

In accordance with this general rule it is settled by abundant authority that the declarations of the assignor cotemporaneously with the assignment or in immediate contemplation of it are admissible against the assignee as being in the nature of *res gestæ*. *Loos* v. *Wilkinson*, 110 N. Y. 195 ; *Cuyler* v. *McCartney*, 40 N. Y. 221 ; *Newlin* v. *Lyon*, 49 N. Y. 661. In *Flagler* v. *Wheeler*, 47 Supm. Ct. (40 Hun), 125, declarations of the assignor made prior to the preparation and execution of the assignment were not regarded as part of the *res gestæ ;* and see *Scofield* v. *Spaulding*, 61 Supm. Ct. (54 Hun), 523.

If it be proved as a fact in the case that the assignor and assignees were in a conspiracy to defraud the creditors, then the acts and declarations of either, made in execution of the common purpose and in aid of its fulfilment, are competent against any of the parties. But the existence of such conspiracy must be established as against the assignee, by evidence independent of any declarations and acts of the assignor subsequent to the assignment, and such declarations and acts cannot properly be used in addition to the other evidence, when not sufficiently clear without it, to establish that fact. *Loos* v. *Wilkinson*, 110 N. Y. 195 ; *Cuyler* v. *McCartney*, 40 N. Y. 221 ; *Newlin* v. *Lyon*, 49 N. Y. 661 ; see *Waterbury* v. *Sturtevant*, 18 Wend. 353 ; *Sprague* v. *Kneeland*, 12 Wend. 161 ; *Pease* v. *Batten*, 31 State R. 57.

In some cases it has also been held that when the debtor remains in possession of the assigned property, his declarations are competent against the assignee. *Adams* v. *Davidson*, 10 N. Y. 309 ; *Loos* v. *Wilkinson*, 110 N. Y. 195 ; *Jellenik* v. *May*, 48 Supm. Ct. (41 Hun), 386, but this statement must probably be qualified. The mere fact of possession will not make the assignor's declarations evidence against the assignee unless they are

in the nature of *res gestæ*. *Loos* v. *Wilkinson*, *supra*; *Scofield* v. *Spaulding*, 61 Supm. Ct. (54 Hun), 523; and see *Adams* v. *Davidson*, *supra*; criticised in *Cuyler* v. *McCartney*, 40 N. Y. 221; and also in *Coyne* v. *Weaver*, 84 N.Y. 386, 393; and see on admissibility of evidence of declarations of grantor against grantee after delivery and recording of deed. *Gibney* v. *Marchay*, 34 N. Y. 301; *Vrooman* v. *King*, 36 N. Y. 477; *Hutchins* v. *Hutchins*, 98 N. Y. 56, 64; *McDuffie* v. *Clark*, 46 Supm. Ct. (39 Hun), 166, 170; *Carver* v. *Barker*, 80 Supm. Ct. (73 Hun), 416.

Yet where the declarations are not admissible as part of the *res gestæ*, and where no evidence connecting the assignee with a scheme or conspiracy of the debtor to defraud creditors by the assignment has been shown, it has nevertheless been held that declarations of the assignor made before the assignment are admissible against the assignee in a creditor's action brought against the assignor and assignee to set aside the assignment. *Kennedy* v. *Wood*, 59 Supm. Ct. (52 Hun), 46, 49; *Passavant* v. *Cantor*, 43 State R. 247; *Von Sachs* v. *Kretz*, 72 N. Y. 548. See also *Tabor* v. *Van Tassell*, 86 N. Y. 642, 643; *Wright* v. *Nostrand*, 94 N. Y. 31, 41; *First Nat. Bank* v. *Moffatt*, 84 Supm. Ct. (77 Hun), 468, 471; *contra*, *Flagler* v. *Wheeler*, 47 Supm. Ct. (40 Hun), 125. In *Passavant* v. *Cantor*, *supra*, it is said by Van Brunt, J., announcing the opinion of the court, that any evidence which would be admissible against the assignor if he had been the sole party to the action is proper as against the assignee upon the question of the assignee's good faith. In the cases cited a distinction is drawn between the competency of such evidence as between vendor and vendee, and assignor and assignee under a general assignment, on the ground that the assignee is not a purchaser for value. *Von Sachs* v. *Kretz*, *supra*, is not a direct authority to the proposition stated. That was an action by an assignee in bankruptcy, and it was held that declarations of the bankrupt made before the bankruptcy were admissible as evidence against the assignee to support a claim against the estate of the bankrupt. In that case title passed to the assignee by operation of law. In *Passavant* v. *Cantor*, *supra*, there was a dissent by Barrett, J. The argument upon which the prevailing opinion in these cases rests is that the assignor's intent is the material inquiry, and that his declarations are direct

evidence of that intent, which, if established to have been fraudulent, defeats the assignee's title irrespective of his complicity in the fraud. Since, therefore, his title rests upon the assignor's intent and not upon his knowledge of that intent, and since he stands only in the place of the assignor, evidence which is competent against the assignor ought also to be competent as against him. The answering argument is that there is no such identity of interest between the assignor and assignee as is assumed ; that the assignee holds for creditors and represents their interests primarily, and not those of the assignor only or primarily, and that all the considerations which go to the exclusion of such evidence in the case of vendor and vendee apply with equal force to the relation of assignor and assignee.

The general tendency is to open the door to such evidence either by extending the area of *res gestæ* so as to take in the general conduct of the assignor in his business leading up to the failure, or upon the broader ground above stated.

The reception in evidence in such cases of the entries contained in the books of account kept by the debtor is in harmony with the rule respecting the competency of other declarations of the assignor. These are competent not only for the purpose of showing the declarations of the assignors and the financial condition of the debtor's business, but also for the purpose of showing the acts and conduct of the assignor pertinent to the inquiry of intent. *Loos* v. *Wilkinson*, 110 N. Y. 195. See *Von Sachs* v. *Kretz*, 72 N. Y. 548 ; *Becker* v. *Koch*, 104 N. Y. 394.

In actions of replevin and in actions to recover for conversion brought against the assignee by creditors seeking to disaffirm sales made to the assignors on the ground of fraud to which the assignor is not a party, it has been many times decided that the declarations of the assignor are inadmissible against the assignee, save where a conspiracy to defraud between the vendor and vendee has been shown or where they are part of the *res gestæ*. *Flannery* v. *Van Tassel*, 131 N. Y. 639 ; s. c. 127 N. Y. 631 ; *Bullis* v. *Montgomery*, 50 N. Y. 352 ; *Cuyler* v. *McCartney*, 40 N. Y. 221 ; *Truax* v. *Slater*, 86 N. Y. 630 ; *Flagler* v. *Schoeffel*, 47 Supm. Ct. (40 Hun), 178 ; *Peck* v. *Crouse*, 46 Barb. 151 ; *Ball* v. *Loomis*, 29 N. Y. 412 ; *Wells* v. *O'Connor*, 34 Supm. Ct. (27 Hun), 426 ; *Vidvard* v. *Powers*, 41 Supm. Ct. (34 Hun), 221.

And it seems that this rule applies also to affidavits of such declarations to be used in judicial proceedings. *Minzesheimer* v. *Mayer*, 66 How. Pr. 484.

The declarations of the assignor made *after* the assignment are not admissible to defeat the assignee's title, except upon proof of conspiracy to defraud. *Coyne* v. *Weaver*, 84 N. Y. 386, 392 ; *Burnham* v. *Brennan*, 74 N. Y. 597 ; *Schofield* v. *Scott*, 20 State R. 815 ; *Cuyler* v. *McCartney*, 40 N. Y. 221 ; *Jacobs* v. *Remsen*, 36 N. Y. 668, 670 ; *Newlin* v. *Lyon*, 49 N. Y. 661 ; *Noyes* v. *Morris*, 63 Supm. Ct. (56 Hun), 501 ; *Beste* v. *Berger*, 110 N. Y. 644 ; *Scofield* v. *Spaulding*, 61 Supm. Ct. (54 Hun), 523 ; *Minzesheimer* v. *Mayer*, 66 How. Pr. 484 ; or, as has been held in some cases on proof of the continued possession of the assignor, *Newlin* v. *Lyon*, 49 N. Y. 661 ; *Adams* v. *Davidson*, 10 N. Y. 309 ; this case commented on in *Cuyler* v. *McCartney*, 40 N. Y. 221 ; and also in *Coyne* v. *Weaver*, 84 N. Y. 386, 393 ; *Scofield* v. *Spaulding*, 61 Supm. Ct. (54 Hun), 523. A possession resumed after delivery once made and continued is not enough to let in such evidence. *Tilson* v. *Terwilliger*, 56 N. Y. 273.

The examination of the assignor taken in proceedings supplementary to execution after the assignment is not competent evidence against the assignee. *Scofield* v. *Spaulding*, 61 Supm. Ct. (54 Hun), 523 ; *Passavant* v. *Cantor*, 43 State R. 247, 252. Although where the assignor has been called as a witness in support of the assignment such examination may be used against all the parties for the purpose of contradicting the witness. *Wright* v. *Nostrand*, 94 N. Y. 31 ; *First Nat. Bank* v. *Moffatt*, 84 Supm. Ct. (77 Hun), 468.

When the debtor is called by the assailant of the assignment and gives evidence in chief which would justify the conclusion that he had made it with fraudulent intent, and on cross examination gives evidence in explanation of his apparently fraudulent conduct, the whole of the assignor's evidence must be submitted to a jury, and the court should not dismiss the action on the ground that the party calling the witness is necessarily bound by the explanation since he cannot impeach his own witness. *Becker* v. *Koch*, 104 N. Y. 394.

§ 245. Assignment, when fraudulent in bankruptcy.—

Under the operation of the late bankrupt law, it was determined that a general assignment, executed in good faith and for the equal benefit of all creditors, and in conformity with the law of the State where it was made, was not fraudulent and void, but at most was voidable only by the assignee in bankruptcy in proceedings instituted by him within the time and in the manner provided in the bankrupt law. *Mayer* v. *Hellman*, 91 U. S. 496; *In re Kimball*, 16 N. B. R. 188; *Reed* v. *McIntyre*, 98 U. S. 507. And the Supreme Court of the United States decided in the case first cited that the assignee, under the common law assignment, would not be required to surrender the estate to the bankruptcy assignee when the proceedings in bankruptcy were not instituted within six (now three) months after the execution of the assignment pursuant to U. S. R. S. § 5130. But, unless the petition has been filed within the time limited, the assignment cannot be impeached by the assignee in bankruptcy, except upon the ground of actual fraud; nor can he recover possession of the assigned estate (*Mayer* v. *Hellman*, 91 U. S., 496; s. c. 13 N. B. R. 440; *In re Kimball*, 16 N. B. R. 188); and, until the general assignment is set aside as void, as against the assignee in bankruptcy, the title remains in the assignee under the general assignment. *Belden* v. *Smith*, 16 N. B. R. 302; *In re Manahan*, 19 Id. 65. Where the assignment is not infected with actual or constructive fraud, the courts of this State will not compel the assignee under the assignment to surrender the trust estate to the assignee in bankruptcy. *Haas* v. *O'Brien*, 66 N. Y. 597; s. c. 52 How. Pr. 27; s. c. 16 N. B. R. 508; see *Thrasher* v. *Bentley*, 59 N. Y. 649; s. c. 1 Abb. N. C. 39; *Syracuse, B. & N. Y. R. R. Co.* v. *Collins*, 57 N. Y. 641; s. c. 1 Abb. N. C. 47; *Boese* v. *King*, 108 U. S. 379; affi'g 78 N. Y. 471; rev'g *Boese* v. *Locke*, 24 Supm. Ct. (17 Hun), 270; *Coates* v. *First Nat. Bank*, 47 Super. Ct. (15 J. & S.) 322. *Contra*, *Dolson* v. *Kerr*, 52 How. Pr. 481; s. c. 16 N. B. R. 405; see *Von Hein* v. *Elkus*, 15 Supm. Ct. (8 Hun), 516; s. c. 15 N. B. R. 194.

And where no proceedings in bankruptcy have been instituted against a debtor who has made an assignment in conformity with the laws of this State, there was held to be nothing in the existence of the bankrupt law, or any provision contained in it,

which rendered such an assignment void. *Thrasher* v. *Bentley*, 1 Abb. N. C. 39 ; less fully, 59 N. Y. 649 ; *Syracuse, B. & N. Y. R. R. Co.* v. *Collins*, 1 Abb. N. C. 47 ; less fully, 57 N. Y. 641.

In the case of *Dolson* v. *Kerr* (52 How. Pr. 481 ; s. c. 16 N. B. R. 405), it seems to have been assumed that the State assignee had made a voluntary surrender to the bankruptcy assignee, and the principal point upon which that case was decided has been since overruled in *In re Biesenthal*, 15 N. B. R. 228.

Hence it is no answer to an action brought by an assignee under a general assignment, that the assignment is invalid in bankruptcy. *Bostwick* v. *Burnett*, 74 N. Y. 317 ; rev'g 18 Supm. Ct. (11 Hun), 301 ; *Williams* v. *Pitts*, 55 How. Pr. 331. So far as *Dolson* v. *Kerr* (52 How. Pr. 481) expresses any other opinion it must be regarded as overruled.

The assignment is void only under the provision of the bankrupt law, and as against the assignee in bankruptcy. *Seaman* v. *Stoughton*, 3 Barb. Ch. 344, 349 ; *Dodge* v. *Sheldon*, 6 Hill, 9 ; *Freeman* v. *Deming*, 3 Sandf. Ch. 327 ; see *Allen* v. *Montgomery*, 10 N. B. R. 503.

But in an action by the assignee in bankruptcy appointed in proceedings instituted within the time limited, an assignment for the benefit of creditors, although made for the equal benefit of all creditors, will be set aside. Such a conveyance is held by the bankruptcy courts to be conclusive evidence of an intent to defeat the operation of the bankrupt act. *Globe Ins. Co.* v. *Cleveland Ins. Co.* 14 N. B. R. 311 ; *Jackson* v. *McCulloch*, 13 Id. 283 ; *Barnewall* v. *Jones*, 14 Id. 278 ; *Macdonald* v. *Moore*, 15 Id. 26 ; *In re Biesenthal*, Id. 228 ; *In re Temple*, 17 N. B. R. 345 ; *Barnes* v. *Rettew*, 8 Phila. 133 ; *Platt* v. *Preston*, 19 N. B. R. 241 ; *Linder* v. *Lewis*, Id. 455.

Until the general assignment is set aside as against the assignee in bankruptcy, the title to the assigned property remains in the assignee under the general assignment. *Belden* v. *Smith*, 16 N. B. R. 302.

§ 246. Levy after assignment and before bankruptcy.— When a judgment creditor levy executions upon the assigned property after the execution of the assignment and before pro-

ceedings are instituted in bankruptcy, and the assignment is consequently set aside at the suit of the assignee in bankruptcy, the levy does not become a lien upon the property as against the assignee in bankruptcy. *Reed* v. *McIntyre*, 98 U. S. 507; *In re Biesenthal*, 15 N. B. R. 228; *Johnson* v. *Rogers*, 15 N. B. R. 1; *In re Walker*, 18 N. B. R. 56; *Belden* v. *Smith*, 16 N. B. R. 302. *Contra*, *Macdonald* v. *Moore*, 15 N. B. R. 26.

And the assignee in bankruptcy, in an action brought by him against the State assignee to set aside the assignment, to which action the execution creditors are parties, may recover back from the execution creditors moneys received by them on a levy and sale of the assigned property, made by the sheriff after the assignment and before the filing of the petition in bankruptcy. *Linder* v. *Lewis*, 19 N. B. R. 455.

Where, after the assignment, but before the commencement of the proceedings in bankruptcy, the sheriff levied upon and sold the assigned property, and the voluntary assignee thereupon sued the sheriff for trespass, and he defended on the ground that the assignment was fraudulent and void, and obtained a judgment in his favor, it was held that the assignee in bankruptcy was bound by the judgment as being in privity with the sheriff, and that the property was bound by the prior lien of the execution. *In re Biesenthal*, 18 N. B. R. 120.

But where the assignment became void because the inventory and schedule were not filed within thirty days after the date of the assignment, as provided by the Act of 1877 (before the amendment of 1878), and an execution was levied on the assigned property, it was held that the title of the assignee, appointed in bankruptcy proceedings commenced before the time to file the schedule expired, was superior to the lien of the executions. *In re Croughwell*, 17 N. B. R. 337.

§ 247. **Protection of State assignee in bankruptcy.**—The State assignee is protected even in the bankrupt court, when the assignment is set aside, to the amount of his expenses and reasonable commissions. *Macdonald* v. *Moore*, 15 N. B. R. 26; *In re Pierce & Holbrook*, 3 Id. 258; see *Catlin* v. *Foster*, 3 Id. 540; *In re Cohn*, 6 Id. 379; *In re Stubbs*, 4 Id. 376; *Burk-*

holder v. *Stump*, 4 Id. 597 ; *In re Lains*, 16 Id. 168 ; *Clark* v. *Marx*, 6 Bcn. 275 ; *Havemeyer* v. *Loeb*, 5 Abb. N. C. 338.

But it has recently been held that although the necessary expenses of administering the estate while in his hands will be allowed to the State assignee, yet he will not be allowed compensation for his own services except in a case where it is clear that the estate will not be subjected to a double expense. *In re Kurth*, 17 N. B. R. 573.

§ 248. Assignments fraudulent as against proceedings under the non-imprisonment act.—A debtor could not, by executing a general assignment, defeat the priority of creditors who had instituted regular and valid proceedings against him under the "non-imprisonment act" (Laws of 1831, c. 300). This act has now been repealed. Thus, while proceedings were pending against the debtor under that act, he executed a general assignment of all his property for the benefit of all his creditors without preference. On a bill filed by a creditor who had instituted the proceedings to set aside the assignment, it was held that the assignment was a fraud upon the law, and the assignee under the general assignment was held to be a trustee for the creditors to the extent of their debts. *Spear* v. *Wardell*, 1 N. Y. 144 ; *Hall* v. *Kellogg*, 12 N. Y. 325 ; *Wood* v. *Bolard*, 8 Paige, 556 ; see *Matter of Hurst*, 7 Wend. 239.

CHAPTER XV.

PROCEEDINGS OF CREDITORS TO AVOID THE ASSIGNMENT.

§ 249. **In general.**—Where the assignment is fraudulent and void as against creditors, they have their election either to regard it as a nullity and proceed to the enforcement of their claims by legal process against the assigned property, or they may resort to an action to have the assignment declared fraudulent and void as to them ; or, in certain cases, they may proceed by attachment under the provisions of the Code of Civil Procedure. These proceedings on the part of creditors to satisfy their claims out of the assigned property are the subject of consideration in the present chapter.

§ 250. **Creditors who assent.**—It is not all creditors who may assail the assignment. An assignment, even though void as to creditors who choose to disaffirm it, is valid as to those creditors who are provided for in it, and who think proper to insist upon their rights against the assignee. *Mills* v. *Argall,* 6 Paige, 577 ; *Hone* v. *Henriquez*, 13 Wend. 240 ; affi'g *Henriques* v. *Hone*, 2 Edw. 120 ; *Pratt* v. *Adams*, 7 Paige, 615.

Having intentionally and with knowledge of the facts accepted the assignment, they cannot thereafter attack its validity.

An assignment is in this state a deed of trust, it is not merely a deed of agency. By it the title passes completely out of the debtor and into the assignee, who takes merely in a representative capacity, the real grantees being the creditors. When, therefore, creditors with knowledge of the facts have accepted this grant, the rule which applies in the case of deeds and wills applies equally to them. That rule is that a person cannot accept and reject the same instrument, and having availed himself of part, defeat its provisions in any other part. *Noys* v. *Mordaunt* and *Streatfield* v. *Streatfield,* Lead. Cases in Eq., 6th ed.,

Vol. 1, 393, 395. *Moller* v. *Tuska*, 87 N. Y. 166 ; *Conrow* v. *Little*, 115 N. Y. 387 ; *Terry* v. *Munger*, 121 N. Y. 161. When creditors with knowledge of the facts have accepted a benefit under an assignment they cannot thereafter question its validity, nor insist upon some other but inconsistent legal right. *Cavanagh* v. *Morrow*, 67 How. Pr. 241 ; *Johnson* v. *Rogers*, 15 N. B. R. 1 ; *Thompson* v. *Fry*, 58 Supm. Ct. (51 Hun), 296 ; *Levy* v. *James*, 56 Supm. Ct. (49 Hun), 161.

The application of the general doctrine of election of rights to a creditor under a general assignment is referred to with apparent distrust in *Mills* v. *Parkhurst*, 126 N. Y. 89, 93. Judge Gray says : " It is conceivable that the rule may be so extended as to apply to the case where a creditor comes in under an assignment by his debtor for the benefit of creditors, in such way and in such attitude as should preclude him from thereafter assailing its validity." It may be that, in view of this statement, the point is to be regarded as open and undetermined in the Court of Appeals. The weight of authority, however, supports the rule as stated above. *Mills* v. *Argall*, 6 Paige, 577 ; *Hone* v. *Henriquez*, 13 Wend. 240 ; affi'g 2 Edw. 120 ; *Pratt* v. *Adams*, 7 Paige, 615 ; *Cavanagh* v. *Morrow*, 67 How. Pr. 241 ; *Johnson* v. *Rogers*, 15 N. B. R. 1 ; *Thompson* v. *Fry*, 58 Supm. Ct. (51 Hun), 296 ; *Levy* v. *James*, 56 Supm. Ct. (49 Hun), 161.

In *Cavanagh* v. *Morrow*, *supra*, Mr. Justice Van Vorst said (p. 245) : " When a debtor in failing circumstances has made an assignment of his estate for the payment of his debts, his creditors may come in under the assignment and insist that the assignee shall, with fidelity, execute the trust in pursuance of the terms of the instrument. Or the creditors may stand aloof, refusing to recognize the validity of the instrument, on the ground of actual fraud or other illegality, and they may institute appropriate proceedings at law or in equity to test the validity of the assignment in the courts. Creditors have an election as to which course they will adopt. They cannot pursue both. Creditors cannot in one moment take steps in recognition of the assignment, and in the line of its strict enforcement, according to its terms, and seek to hold the assignee to its performance, and in the next repudiate it as fraudulent and void."

So in *Levy* v. *James*, 56 Supm. Ct. (49 Hun), 161, when

creditors notified the assignee in writing that they accepted the assignment, it was held that in the absence of the knowledge of any new fact which might have affected their action the creditors were precluded from afterward attacking the assignment.

§ 251. When creditors will be held to have accepted the assignment.—It may well be doubted whether the mere presentation of a verified claim by a creditor to the assignee is such an acceptance of the assignment as will amount to an irrevocable acceptance of the assignment by a creditor. That it will not has been held in *Talcott* v. *Hess*, 4 State R. 62 ; *Schofield* v. *Scott*, 20 State R. 815 ; *Turney* v. *Van Gelder*, 75 Supm. Ct. (68 Hun), 481 ; s. c. 52 State R. 664 ; *Thompson* v. *Fry*, 58 Supm. Ct. (51 Hun), 296 ; and see *Cavanagh* v. *Morrow*, 67 How. Pr. 241 ; *Wilson Bros. W. & T. Co.* v. *Daggett*, 9 Civ. Pro. 408, 411 ; *McLean* v. *Prentice*, 41 Supm. Ct. (34 Hun), 504.

A person who by his bill claims a beneficial interest under an assignment without alleging it to be fraudulent, cannot be permitted at the hearing to claim relief on the ground that the assignment is proved to be fraudulent. *Ontario Bank* v. *Root*, 3 Paige, 478 ; *Rome Exch. Bank* v. *Eames*, 4 Abb. Dec. 83 ; s. c. 1 Keyes, 588 ; *Jewett* v. *Woodward*, 1 Edw. 195. So if a creditor, with knowledge that an assignment by his debtor is fraudulent in law upon its face, enters into an agreement with the debtor and the trustees named in the assignment for the management of the trust property—the performance of such agreement having been entered upon—he is precluded from impeaching the assignment for such patent defect. *Rapalee* v. *Stewart*, 27 N. Y. 310.

Where a creditor under an assignment which is liable to be defeated for fraud, takes a dividend, he cannot afterward avoid the assignment without, at least, restoring the dividend to the assignee. *Ex parte Freeman*, 4 Ves. 836 ; *Ex parte Grosvenor*, 14 Ves. 587 ; *Wells* v. *Munro*, cited in *Babcock* v. *Dill*, 43 Barb. 577. But where the partner of a creditor had received a payment on account of his debt from the assignee, and he had been informed that the creditors were all to share alike under the assignment, and was ignorant of the fraudulent circumstances connected with it, it was held that he was not by such receipt

precluded from setting aside the assignment for fraud. *Van Nest* v. *Yoe*, 1 Sandf. Ch. 4.

And when the creditors were consulted by the assignors before the assignment was executed, and were cognizant of the financial condition of the assignors, and assented to the plan of making a general assignment, and, after it was executed, discontinued actions which they were prosecuting for the recovery of their debts, in conformity to an understanding between the assignor's other creditors and themselves that they would thus discontinue if the assignment should be made, it was held that, having concurred in the execution of the assignment, they could not be heard to allege that it was fraudulent, because of facts of which they were fully informed when they gave their assent. *Johnson* v. *Rogers*, 15 N. B. R. 1.

So a creditor may, by his conduct and actions, acquiesce in the fact of the assignment and its legality, and in the right of the assignee to manage the assigned estate, and dispose of the same for the benefit of those interested under the deed of trust, in pursuance of its terms, and so preclude himself from the right to attack the assignment. The creditor, however, must have knowledge or means of knowledge of the wrongful acts, of which he afterward complains, at the time of the acquiescence. *Cavanagh* v. *Morrow*, 67 How. Pr. 241. But a creditor will not be presumed to have knowledge of the laws of a foreign State, and when a creditor entered into a negotiation or agreement with an assignee named in an assignment executed in Pennsylvania, which was invalid because not recorded as required by the laws of that State, it was held that this was not such an election as precluded the creditor from attacking the validity of the assignment. *Stedman* v. *Davis*, 93 N. Y. 32; rev'g 11 Weekly Dig. 86.

Under the New Jersey statute which bars the creditor who proves his debt under an assignment from having afterward any action or suit at law or equity against the assignor or his representatives, where a firm makes an assignment of firm property merely, a firm creditor who proves his debt under such assignment, is not precluded from afterward suing the individual members of the firm. *Huggard* v. *Lehman*, 43 Supm. Ct. (36 Hun), 307; see note Am. L. Reg. N. S. 403, 411.

But the mere fact that a creditor purchases a portion of the assigned property from the assignee does not preclude him from insisting that the assignment is void. *Haydock* v. *Coope*, 53 N. Y. 68 ; see *Palmer* v. *Smith*, 10 N. Y. 303.

In the case of the *American Exch. Bank* v. *Webb* (36 Barb. 291), where, after the execution of an assignment which was fraudulent and void as against creditors, the wife of the assignor entered into an arrangement with the assignee, by which she agreed to release her dower upon condition that, if the assignment was held valid, she should receive the amount provided for her under the assignment, and if invalid, that she should have her dower out of the proceeds, and the plaintiff assented to these terms, it was held that there was nothing in these facts which should prevent the plaintiff from maintaining an action to set aside the assignment as fraudulent.

§ 252. **Creditors attacking unsuccessfully may share in assignment.**—But the converse of the proposition stated in the foregoing sections is not true. A creditor who brings an action to set aside an assignment as fraudulent in which he is defeated is not thereby precluded from afterward sharing in the distribution of the assigned estate. *Mills* v. *Parkhurst*, 126 N. Y. 89. So a creditor who has obtained an attachment under which he attempts to levy on the assigned property but takes nothing is not precluded from afterward maintaining an action to compel an accounting under the assignment. *Sternfeld* v. *Simonson*, 51 Supm. Ct. (44 Hun), 429 ; and see also *Iselin* v. *Henlein*, 2 How. Pr. N. S. 211, 218.

§ 253. **Creditors who are not injured.**—A creditor cannot avoid an assignment because it is illegal if it benefits instead of injuring him. *Fox* v. *Heath*, 16 Abb. Pr. 163 ; see *Moseley* v. *Moseley*, 15 N. Y. 334 ; *Fort Stanwix Bank* v. *Leggett*, 51 N. Y. 552. No creditor but the one who is hindered, delayed or defrauded by the particular provision complained of, can avoid the instrument on that account. Thus, where a general assignment by a partnership gives preference to the payment of the partnership debts, a creditor of the partnership cannot have the assignment set aside as void, because its provisions as to the sub-

sequent payment of creditors of individual partners contain a direction calculated to hinder and delay them. *Morrison* v. *Atwell*, 9 Bosw. 503 ; *Scott* v. *Guthrie*, 10 Bosw. 408 ; *Powers* v. *Graydon*, Id. 630.

So an application of individual property to the payment of firm debts since it benefits instead of injuring the firm creditors, is not available to the firm creditors as ground for impeaching an assignment. *Haynes* v. *Brooks*, 116 N. Y. 487 ; *Royer Wheel Co.* v. *Fielding*, 101 N. Y. 504, 510 ; *Crook* v. *Rindskopf*, 105 N. Y. 476.

A distinction is to be observed between void and voidable assignments. Assignments which never become operative because not legally executed, or which are declared void by statute, as, for instance, assignments with preferences made by limited partnerships, may be adjudged void at the suit of any judgment-creditor. Such assignments stand in the way of the enforcement by any creditor of his claim against his debtor. But where the assignment is good between the parties, and the creditor seeks to set it aside because made with a fraudulent intent, then the rule applies that one cannot be heard to complain of that as a fraud upon him which is in no respect injurious to him.

§ 254. Proceedings by attachment—Fraudulent intent of debtor.—The Code of Civil Procedure, § 636, provides for the issuing of a warrant of attachment against the debtor's property in certain cases, upon proof that the debtor has or is about to assign his property with intent to defraud his creditors. Creditors may, therefore, avail themselves of this remedy where their debtor has made a general assignment with such intent.

The character of the proof required to warrant the conclusion of such fraudulent intent must primarily be considered. In the first place the mere fact that an assignment is invalid because of a failure to comply with some statutory requirement or because it is declared void by statute, will not justify a finding of a fraudulent intent. Illustrations of the first of these instances will be found in a case where the assignment has not been duly acknowledged. The assignment is inoperative but not necessarily fraudulent. *Tim* v. *Smith*, 13 Abb. N. C. 31. So an omission to record an assignment is not necessarily evidence of a

fraudulent intent on the part of the assignor in making it. *Denzer* v. *Mundy*, 5 Robt. 636. The omission to do any of the acts required under the statute to render the assignment valid, as that one partner in a firm fails to sign an assignment of the firm property, or any other circumstance establishing the mere invalidity of the assignment, is not available on an application for an attachment except so far as it bears on the question of a fraudulent intent in making the assignment. "If," says Daly, J., "it is wanting in any essential requisite to its validity as a legal instrument, it will give the assignee no title to the property, which may then be levied upon by judgment-creditors, or other remedies may be taken to prevent the assignee from carrying the trust into effect. But the property cannot be seized in the first instance, nor an attachment sustained, unless the assignment was made with a fraudulent intent." *Place* v. *Miller*, 6 Abb. Pr. N. S. 178, 180. So it is said by Monell, J., in *Scott* v. *Guthrie*, 25 How. Pr. 481: "It does not follow that because the omission to do any or all of the acts required by the law of 1860, relative to assignments for the benefit of creditors, may render an assignment inoperative and void, that it is thereby rendered fraudulent also." Again, when by the terms of a prohibiting statute an assignment is declared "void," the making of such an assignment will not sustain the issuing of a warrant of attachment. An illustration of this is an assignment by a limited partnership giving preference. Such an assignment is by statute declared void, but it is not, therefore, necessarily fraudulent.

Whether proof of constructive fraud merely—that is of such acts as the law declares to be injurious to creditors and stamps as fraudulent, although done without any fraudulent motive or even with an honest motive—will sustain an attachment, has been doubted. Such constructive frauds, when established, will warrant the filing of a creditor's bill by means of which a judgment-debtor may ultimately reach the property on the ground that it was assigned with intent to defraud, and it is difficult to see why the same end should not be obtained on the same facts and same language of the statute by means of an attachment. But in *Milliken* v. *Dart* (33 Supm. Ct. [26 Hun], 24), when in an assignment the assignee was given a power to sell on credit, which is conclusive evidence of a fraudulent intent by the as-

signor in making the assignment under the statute of frauds, it was held that in the absence of a fraudulent motive, the assignment, though fraudulent in law, was not made with the intent to defraud creditors within the meaning of the attachment law. A *dictum* of Sutherland, J., to a similar effect, will be found in *Belmont* v. *Lane*, 22 How. Pr. 365. And to the same purport are *Blackington* v. *Goldsmith*, 3 How. N. S. 77. See *Friend* v. *Michaels*, 15 Abb. N. C. 354.

Wherever an assignment is made with actual and not merely constructive fraudulent intent, creditors may resort to an attachment. Many of the cases already cited in the previous chapter concerning fraud in assignments demonstrated by extrinsic facts, were cases arising under the attachment laws.

§ 255. Proceedings by attachments—What property can be levied on.—When a warrant of attachment has been issued against the property of a debtor who has made a general assignment, the question at once arises how far the sheriff holding the warrant will be justified in seizing the assigned property. As to personal property capable of manual delivery it is very clear that the sheriff may seize such property under the warrant, and will thereby obtain a lien upon it, and may defend and maintain his possession and lien by proving that the assignment was invalid and the property, therefore, the defendant's. *Hess* v. *Hess*, 117 N. Y. 306; *Rinchey* v. *Stryker*, 28 N. Y. 45; s. c. 26 How. Pr. 75; s. c. 31 N. Y. 140; *Hall* v. *Stryker*, 27 N. Y. 596; rev'g 29 Barb. 105; s. c. 9 Abb. Pr. 342; *Carr* v. *Van Hoesen*, 33 Supm. Ct. (26 Hun), 316; *Castle* v. *Lewis*, 78 N. Y. 131; *Jacobs* v. *Remsen*, 12 Abb. Pr. 390; s. c. 35 Barb. 384; affi'd, 36 N. Y. 668; see *Frost* v. *Mott*, 34 N. Y. 253; *Kelly* v. *Lane*, 42 Barb. 594; s. c. 28 How. Pr. 128; *Schlussel* v. *Willet*, 12 Abb. Pr. 397; *Skinner* v. *Oettinger*, 14 Abb. Pr. 109. The sheriff may defend his possession by showing that the assignment is fraudulent before the creditor has obtained judgment and execution. *Lux* v. *Davidson*, 63 Supm. Ct. (56 Hun), 345. So far as *Deutsch* v. *Reilly* (57 How. Pr. 75) asserts, any other rule is not consistent with the decisions in the Court of Appeals. See *Carr* v. *Van Hoesen*, *supra*, p. 318. But the sheriff, under the warrant, cannot maintain an action to set aside the assign-

ment as fraudulent. That can be done only by a judgment-creditor. The distinction between the right of the sheriff under an attachment to attack the validity of the assignment by way of defense when his possession of property is attacked, and his want of power to set up the same invalidity as an affirmative cause of action to set aside the assignment, is well settled. *Thurber* v. *Blanck*, 50 N. Y. 80; *Castle* v. *Lewis*, 78 N. Y. 131; *Anthony* v. *Wood*, 96 N. Y. 180; s. c. 19 Weekly Dig. 177; *Bowe* v. *Arnold*, 38 Supm. Ct. (31 Hun), 256; *Grady* v. *Bowe*, 11 Daly, 259; s. c. 16 Weekly Dig. 136. But as to the limitation on this rule in actions to preserve the fund from dissipation until judgments can be obtained, see § 256.

As to choses in action a special rule prevails. Such property after it has been assigned cannot be attached by the sheriff as the property of the assignor. It can be attached only when the legal title is in the attachment debtor; when the title has passed to the assignee, since the property itself is intangible and incapable of manual possession, the sheriff can acquire no title to such choses in action under the attachment and no lien thereon. *Hess* v. *Hess*, 117 N. Y. 306; *Throop Grain Cleaner Co.* v. *Smith*, 110 N. Y. 83; *Thurber* v. *Blanck*, 50 N. Y. 80; *Castle* v. *Lewis*, 78 N. Y. 131; *Smith* v. *Longmire*, 31 Supm. Ct. (24 Hun), 257; *Bowe* v. *Arnold*, 38 Supm. Ct. (31 Hun), 256; *Carr* v. *Van Hoesen*, 33 Supm. Ct. (26 Hun), 316. And where the assigned property has been sold by the assignee, and its identity gone, the proceeds cannot be attached or levied upon by the sheriff, as the debtor's property. *McAllaster* v. *Bailey*, 127 N. Y. 583; *Lawrence* v. *Bank of the Republic*, 35 N. Y. 320; *Matter of True*, 4 Abb. N. C. 90; *Lanning* v. *Streeter*, 57 Barb. 33; *Campbell* v. *Erie Ry. Co.* 46 Id. 540; *Greenleaf* v. *Mumford*, 50 Id. 543; s. c. 35 How. Pr. 148; *McElwain* v. *Willis*, 9 Wend. 548, 569. In such a case the avails of the assigned property are held by the assignee as trustee for the creditors of the assignor, and can be reached only by an action in the nature of a creditor's bill, which a sheriff cannot maintain. Johnson, J., in *Lanning* v. *Streeter*, *supra*, 44.

In *Nassau Bank* v. *Yandes*, 51 Supm. Ct. (44 Hun), 55, it was held that an assignment executed in Indiana was operative to transfer an indebtedness due to the assignors in this State, and

that such indebtedness could not be attached here. The rule is recognized that even if the assignment was fraudulent the title to a chose in action passes to the assignee and an attachment cannot be levied on such assigned chose in action at the instance of a creditor of the assignor.

An attachment regularly issued, although afterward set aside, may be pleaded by the sheriff as a justification to a taking under it. *Day* v. *Bach*, 87 N. Y. 56 ; *Hess* v. *Hess*, 117 N. Y. 306 ; *Lux* v. *Davidson*, 63 Supm. Ct. (56 Hun), 345. But if, after the attachment has been vacated, the attached property is demanded, it is retained, the sheriff will be liable for a wrongful detention. See *Bowe* v. *Wilkins*, 105 N. Y. 322 ; rev'g 1 How. Pr. N. S. 21.

Where several processes are issued at successive times it seems that the plaintiff in the first process may be liable for the whole value of the goods seized, but subsequent plaintiffs and their indemnitors will be liable only for such sum as can be shown to be the value remaining after the preceding seizures have been deducted. *Posthoff* v. *Schreiber*, 54 Supm. Ct. (47 Hun), 593. See *Posthoff* v. *Bauendahl*, 50 Supm. Ct. (43 Hun), 570.

When property has been levied upon under a warrant of attachment which is afterward vacated and the defendant then executes a general assignment and the order vacating the attachment is reversed on appeal, the attachment is not received as against the assigned property. *Pach* v. *Gilbert*, 124 N. Y. 612.

§ 256. Proceedings by creditors based on attachment.— It not infrequently happens that property is seized by the sheriff under confessed judgments and judgments suffered by default, which there is reason to believe are fraudulent. These may be followed by an assignment which is likewise open to attack. Creditors who desire to test the validity of the judgments and of the assignment may not have been able to obtain judgments, and it may be impossible for them to do so before the property of the debtors is dissipated by sheriff's sales under the confessed judgments. The question has arisen whether creditors who under such circumstances procure attachments on the debtor's property can resort to an action in equity to restrain the sheriff's sales, until the validity of the judgments is determined. The cases

bearing upon this inquiry are *Bates* v. *Plonsky*, 35 Supm. Ct. (28 Hun), 112 ; *Bowe* v. *Arnold*, 38 Supm. Ct. (31 Hun), 256 ; *Keller* v. *Payne*, 22 Abb. N. C. 352, note ; *Tannenbaum* v. *Rosswog*, 22 Abb. N. C. 346 ; and *People ex rel. Cauffman* v. *Van Buren*, 136 N. Y. 252. The first of these cases was founded upon facts similar to those above supposed. Executions upon confessed judgments had been levied upon tangible property. These were followed by a general assignment. The plaintiff obtained an attachment and levied upon the property taken under the judgments, and then brought action to restrain the sale and disposition of the property, until the validity of the confessed judgments and assignment could be determined. The case came up on appeal from an order denying a motion to vacate a preliminary injunction, and the right to the injunction was affirmed. In *Bowe* v. *Arnold*, 38 Supm. Ct. (31 Hun), 256, it was held that an action could not be maintained by an attaching creditor (and the sheriff) to set aside an assignment for creditors made by the debtor on the ground that it was brought for the protection and enforcement of the lien obtained under the attachment. The court distinguished *Bates* v. *Plonsky* (35 Supm. Ct. [28 Hun] 112), upon the ground that that was an action in effect brought to prevent the distribution of the proceeds of the property until the conflicting rights of different claimants could be settled and a lawful distribution be made. But an action to determine the rights of parties to the proceeds of property fraudulently disposed of as between a creditor and the fraudulent transferee is in substance an action to set aside the fraudulent transfer. Probably *Bowe* v. *Arnold* and *Bates* v. *Plonsky* cannot be reconciled unless it be upon the theory suggested in *Tannenbaum* v. *Rosswog*, that *Bowe* v. *Arnold* went upon the ground that the attachment had been levied upon equitable assets, which if they have been fraudulently assigned the sheriff could not in any event reach under a warrant of attachment. *Throop Grain Cleaner Co.* v. *Smith*, 110 N. Y. 83 ; *Anthony* v. *Wood*, 96 Id. 180. *Keeler* v. *Payne*, *supra*, was an appeal from an injunction order in a case similar upon its facts to *Bates* v. *Plonsky*, and the order was affirmed. The action was to have the confessed judgments and the assignment declared void and to enforce the priority of the claims of the attachment creditors.

In *Tannenbaum* v. *Rosswog*, *supra*, the action was brought by an attaching creditor to restrain the sheriff and prior judgment creditors from disposing of the property subsequently levied upon and a preliminary injunction was sustained.

The question was indirectly before the Court of Appeals in *People ex rel. Cauffman* v. *Van Buren*, *supra*. That was a proceeding to punish the respondent for contempt. It appeared that a failing debtor confessed judgments which the relator believed to be fraudulent. He thereupon obtained an attachment which was levied upon the property seized under execution upon the confessed judgment. The relator thereupon brought suit alleging the fraudulent character of the confessed judgments, and procured an injunction order restraining the sale under execution. The sheriff, disregarding the injunction, proceeded with the sale, and for this act as a violation of the injunction order he was adjudged guilty of contempt, and this adjudication was affirmed by a divided court.

It will be observed that the question we are discussing came up in that case in such a manner that this adjudication cannot be regarded as conclusive. Unless the court was absolutely without jurisdiction of the subject matter, the defendant was bound to obey the injunction order. But it may be that the court, although not so absolutely without jurisdiction of the subject matter as to render its proceedings nugatory, may nevertheless decline to exercise its jurisdiction when it appears as an affirmative defense in the action itself that essential facts are wanting. *Hollins* v. *Brierfield C. & I. Co.*, 150 U. S. 371, 380.

The necessity for the relief administered in the cases above cited, however, seems likely to produce a recognized innovation upon the general rule that only creditors who have reduced their claims to judgments can maintain actions to test the validity of previous fraudulent transfer by their debtor by permitting attaching creditors to at least enjoin the sale of property or the distribution of the proceeds under judgments against the debtor, when the fraudulent character of such judgments is made to appear.

In the case of *National Park Bank* v. *Goddard*, 131 N. Y. 494, it was held that an attaching creditor might maintain an action for equitable relief when a failing firm by false repre-

sentations had obtained goods from many creditors which they had commingled in the manufacture of clothing. Each creditor under the principle of *Silsbury* v. *McCoon*, 3 N. Y. 379, seized upon replevin such of the manufactured articles containing any portion of his goods as he could secure. In this way the whole stock was taken from the attaching creditor who brought the action to procure a determination to the conflicting claims to the goods.

§ 257. Fraudulent assignment as ground for arrest in civil action.—The fact that one member of a firm with knowledge of its insolvency has paid certain of his individual debts out of the firm's property is not such evidence of an intent to defraud creditors as will justify the issuing of a warrant of arrest under the provisions of the Code (*Sherrill Roper Air Eng. Co.* v. *Harwood*, 37 Supm. Ct. [30 Hun], 9), but where it appeared in addition to such payments from firm property, that there were other suspicious circumstances, such as a statement showing a large surplus of assets made to a commercial agency shortly before the failure to induce credit, unusually large sales of merchandise at auction and confessions of judgments for large amounts, these circumstances were held to be such as to justify a finding of a fraudulent intent in making the assignment as would support an order of arrest. *Hinck* v. *Dessar*, 24 Week. Dig. 500.

In *Untermeyer* v. *Hutter*, 33 Supm. Ct. (26 Hun), 147, where it appeared that the debtor having made a general assignment, concealed and withheld part of the assets from the assignee, and upon this ground an order of arrest was obtained by a creditor, it was held that the fact that the assignee had a cause of action to recover the concealed assets furnished no reason why the order of arrest should be vacated. See *McButt* v. *Hirsch*, 4 Abb. Pr. 441.

§ 258. Proceedings by execution.—Leviable property, whether real or personal, which has been transferred by the debtor in fraud of creditors, may, notwithstanding such transfer, be levied upon and sold under execution by a judgment creditor. *Smith* v. *Reid*, 134 N. Y. 568; *Chautauqua Co. Bank* v. *Risley*, 19 N. Y.

369. The purchaser of real property may impeach the conveyance of land in a suit at law to recover possession, or if he can gain possession he can defend the title thus acquired against the fraudulent grantee or those claiming under him. *Chautauqua Co. Bank* v. *Risley*, 19 N. Y. 369; *Bergen* v. *Carman*, 79 N. Y. 146, 153. The theory upon which relief is granted to creditors is that as between the debtor making the conveyance and his creditors the fraudulent grantee takes by it no title. *Nat. Tradesmen's Bank* v. *Wetmore*, 124 N. Y. 241, 252. If the property is personal the sheriff may be compelled to levy and sell notwithstanding the transfer if he is indemnified by the judgment creditor as required by law. (Code of Civ. Pro., § 1419.) The remedy of the claimant under the transfer is then by trespass or replevin. Equity will not enjoin a levy and sale of the assigned property by a judgment creditor at the suit of the assignee because the remedy at law is ample. *Chittenden* v. *Davidson*, 52 Super. Ct. (20 J. & S.) 421.

Where an assignment is void as against a statute, and where a creditor takes the property on execution, which that assignment intended to convey, he takes no *residuum* or equitable interest of the assignors, but he takes property belonging to his debtors, the title of which never passed from them to their assignees, and though the effect of this is to give one of the creditors an entire satisfaction of his debt, while others equally meritorious may go either wholly or partially unpaid, yet the law serves those who are vigilant, and the creditor who has first obtained judgment and execution reaps the fruits of his vigilance. *Austin* v. *Bell*, 20 Johns. 442; *McConnell* v. *Sherwood*, 84 N. Y. 522.

§ 259. Assignee's action to establish the assignment.— The amendments to the Code of Civil Procedure which require the substitution of the indemnitors upon the bonds given to the sheriff by attachment and execution creditors in the place of the sheriff in actions brought by claimants to recover the property levied upon by the sheriff or damages for its seizure or detention have given rise to difficulties in apportioning the damages against different classes of indemnitors when various attachments and executions have been levied at different times. Instances are found in *Posthoff* v. *Schreiber*, 54 Supm. Ct. (47 Hun),

593, and *Posthoff* v. *Bauendahl*, 50 Supm. Ct. (43 Hun), 570; *Dyett* v. *Hyman*, 37 State R. 251. Upon the ground that the assignee's remedy at law by reason of this legislation was rendered inadequate when the assigned property is thus taken under attachments or execution by different creditors at different times, the court in *Newcombe* v. *Irving Nat. Bank*, 58 Supm. Ct. (51 Hun), 220; s. c. 23 Abb. N. C. 3, note (where the complaint in the action is set out), entertained an action to establish the assignment and enjoined the creditors, upon receiving proper security, from levying executions upon the assigned property during the pendency of the action. This case is distinguished from *Chittenden* v. *Davidson*, 52 Super. Ct. (20 J. & S.) 421 only by reason of the provisions of the code referred to.

§ 260. **Proceedings supplementary to execution.**—The code affords the judgment creditor opportunity for the examination of the judgment debtor as to the disposition of his property by assignment or otherwise by proceedings supplementary to execution. The fact that the debtor has made a general assignment is no ground for limiting the examination to property acquired after the assignment. It is competent on such proceeding to examine into the good faith and validity of the assignment. *Schneider* v. *Altman*, 8 C. P. 242; *Wilson Bros. W. & T. Co.* v. *Daggett*, 9 Id. 408; *Selligman* v. *Wallach*, 67 How. Pr. 514; *Lathrop* v. *Clapp*, 40 N. Y. 328. The fact that a judgment-creditor has commenced a creditor's action to set aside the assignment is no reason why he may not also prosecute proceedings supplementary to execution and therein examine both the assignor and the assignee as to matters relating to the assignment. *Matter of Sickle*, 59 Supm. Ct. (52 Hun), 527; *Schloss* v. *Wallach*, 16 Abb. N. C. 319, note; rev'd, 45 Supm. Ct. (38 Hun), 638, 102 N. Y. 683. When the assignee is called as a witness in such proceedings he may be required by subpœna *duces tecum* to produce the books of account of the assignor. *Matter of Sickle*, *supra*.

The construction which has been given to the sections of the General Assignment Act relating to the examination of the assignor and witnesses limiting such examination to inquiries in aid of the assignment and not in hostility to it (see *post*, Chap.

XXI.), confine creditors who are proceeding to attack the assignment as fraudulent in the judicial examination of the debtor and other persons connected with the supposed fraud to proceedings supplementary to execution and to the examination of parties before trial under Code, § 870 *et seq.* But these proceedings afford ample facilities for the examination of the assignor, the assignee and other persons, and for the production and discovery of books and papers. An inspection of the assignor's books may also in a proper case be obtained under Code Civ. Pro. §§ 803, 804. See *post*, § 269.

A receiver of the debtor's property appointed in supplementary proceedings acquires a right of action by the Act of 1858 (Laws of 1858, Chap. 314, *ante*, § 156) to set aside previous fraudulent transfers made by the debtor, but he has no title or lien in respect to such property until the commencement of his suit. *Bostwick* v. *Menck*, 40 N. Y. 383; *Metcalf* v. *Del Valle*, 71 Supm. Ct. (64 Hun), 245; see *post*, Chap. XXI.

§ 261. Proceedings by creditors in equity.—The rules which in general apply to actions in equity brought by creditors to reach the property of their debtor fraudulently conveyed, are those which apply to actions to set aside fraudulent assignments. None but judgment-creditors, with the exceptions hereafter mentioned, can maintain such an action. A mere creditor at large cannot bring an action to reach property of his debtor which has been fraudulently assigned. *Frothingham* v. *Hodenpyl*, 135 N. Y. 630; *Cates* v. *Allen*, 149 U. S. 451; *Southard* v. *Benner*, 72 N. Y. 424; *Geery* v. *Geery*, 63 N. Y. 252; *Estes* v. *Wilcox*, 67 Id. 264; *Adee* v. *Bigler*, 81 Id. 349; *Neustadt* v. *Joel*, 2 Duer, 530; affi'd, as *Reubens* v. *Joel*, 13 N. Y. 488; *Andrews* v. *Durant*, 18 N. Y. 496; *Coope* v. *Bowles*, 18 Abb. Pr. 442; s. c. 28 How. Pr. 10; s. c. 42 Barb. 87; *Willetts* v. *Vandenburgh*, 34 Barb. 424; *Cropsey* v. *McKinney*, 30 Barb. 47; *Hastings* v. *Belknap*, 1 Den. 190.

There are two forms of action to which a judgment-creditor may resort.[1] If, having issued an execution upon his judgment,

[1] There are two classes of cases where a plaintiff is permitted to come into a court of equity for relief, after he has proceeded to judgment and execu-

a valid levy has been made thereon upon real or personal property of the debtor, subject to levy, which has been fraudulently assigned by the debtor, the creditor may bring an action in aid of the execution to enforce the lien of his execution and to remove the obstruction to his legal remedy occasioned by the fraudulent assignment. *Beck* v. *Burdett*, 1 Paige, 305, 308; *Mohawk Bank* v. *Atwater*, 2 Id. 54; *Macauley* v. *Smith*, 132 N. Y. 524, 532; *Frost* v. *Mott*, 34 N. Y. 253; *Chautauqua Co. Bank* v. *White*, 6 N. Y. 236, 252; *Bishop* v. *Halsey*, 3 Abb. Pr. 400; *McElwain* v. *Willis*, 9 Wend. 548; *Crippen* v. *Hudson*, 13 N. Y. 161, 166; *Parshall* v. *Tillou*, 13 How. Pr. 7; *Shaw* v. *Dwight*, 27 N. Y. 244, 247; *Brinkerhoff* v. *Brown*, 4 Johns. Ch. 671; see *Fox* v. *Moyer*, 54 N. Y. 125; *Payne* v. *Sheldon*, 63 Barb. 169, 173; *Heye* v. *Bolles*, 33 How. Pr. 266.

In *Royer Wheel Co.* v. *Fielding*, 38 Supm. Ct. (31 Hun), 274, where the action was to set aside several conveyances of real estate, including a general assignment, and the execution was outstanding at the time of the commencement of the action, but was returned unsatisfied before the trial, it was held that such return did not prevent the maintenance of the action. Though the judgment was reversed in the Court of Appeals (101 N. Y. 504), the ruling upon this point in the court below was approved.

With regard to personal property subject to levy it seems to have been thought, in some cases, that an execution outstanding was essential to enable the judgment-creditor to maintain an action to set aside a transfer of the property as fraudulent. The

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tion at law without obtaining satisfaction of his debt. In one case the issuing of the execution gives to the plaintiff a lien upon the property, but he is compelled to come here for the purpose of removing some obstruction fraudulently or inequitably interposed to prevent a sale on the execution. In the other, the plaintiff comes here to obtain satisfaction of his debt out of property of the defendant which cannot be reached by execution at law. In the latter case, his right to relief here depends upon the fact of his having exhausted his legal remedies without being able to obtain satisfaction of his judgment. In the first case the plaintiff may come into this court for relief immediately after he has obtained a lieu upon the property by the issuing of an execution to the sheriff of the county where the same is situated; and the obstruction being removed, he may proceed to enforce the execution by a sale of the property, although an actual levy is probably necessary to enable him to hold the property against other execution creditors or *bona fide* purchasers. Chan. Walworth, in *Beck* v. *Burdett*, 1 Paige, 305, 308.

reason of the rule has been said to be that the equitable aid of the court to set aside such conveyance can be invoked only by one having a lien on the property, and that the lien on personal property would be lost by the return of the execution. See remarks of Daly, C. J., in *Buswell* v. *Lincks*, 8 Daly, 518, 520. But the principle of the decision in the case of *Adsit* v. *Butler* (87 N. Y. 585), which was a case where a transfer of real estate was attacked by a judgment-creditor, applies equally to personal property subject to levy. A creditor has his option either to proceed by creditor's bill after return of execution unsatisfied, or to bring his action in aid of execution, in which latter case the execution must remain outstanding. *Ocean Nat. Bank* v. *Olcott*, 46 N. Y. 12.

A judgment-creditor's action under the Code of Civil Procedure, § 1871, can be maintained only when the execution has been returned wholly or in part unsatisfied. The provisions of the Code are not construed as limiting the general equity power of the court in creditors' suits. *Nat. Tradesmen's Bank* v. *Wetmore*, 124 N. Y. 241, 248 ; *Hart* v. *Albright*, 28 Abb. N. C. 74. To the maintenance of a creditor's suit in equity apart from statute the existence of judgment or of judgment and execution is necessary first as adjudicating and definitely establishing the legal demand, and second as exhausting the legal remedy. *Cates* v. *Allen*, 149 U. S. 451, 457 ; *Hollins* v. *Brierfield Coal & I. Co.*, 150 U. S. 371. The principle upon which courts of equity act in such cases is stated by Mr. Justice Field in *Scott* v. *Neely*, 140 U. S. 106, 113, as follows : " In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment, or, to speak with greater accuracy, there must be, in addition to such acknowledged and established debt, an interest in the property or a lien thereon created by contract or by some distinct legal proceeding." See also *Bacon* v. *Harris*, 62 Fed. R. 99, 102. The necessity for a judgment under the Chancery practice has limitations which will be considered in the succeeding section.

It has been said that when the subject sought to be reached is choses in action an execution returned is necessary by the ex-

press provision of the statute. Code of Civ. Pro. § 1871 ; 2 R. S. 174 ; *Bishop* v. *Halsey*, 3 Abb. Pr. 400 ; *Shaw* v. *Dwight*, 27 N. Y. 244, 249 ; *Del Valle* v. *Hyland*, 40 State R. 924 ; *Clarkson* v. *De Peyster*, 3 Paige, 320 ; *Adsit* v. *Butler*, 87 N. Y. 585 ; *Fox* v. *Moyer*, 54 Id. 125. The filing of the creditor's bill gives the creditor a lien upon all equitable assets. *Brown* v. *Nichols*, 42 N. Y. 26 ; *Clark* v. *Brockway*, 1 Abb. Dec. 351.

Where the property sought to be reached is real estate it has been sometimes thought that since a judgment is a lien upon such property it was not necessary that an execution should have been issued. It seems to be now definitely settled by the case of *Adsit* v. *Butler* (87 N. Y. 585), that in an action to set aside a fraudulent conveyance of realty, the complaint must allege the issuance of an execution and its return unsatisfied, or the action must be brought in aid of an execution then outstanding. See *Fox* v. *Moyer*, 54 N. Y. 125 ; *Crippen* v. *Hudson*, 13 Id. 161 ; *Shaw* v. *Dwight*, 27 Id. 244 ; *Haswell* v. *Lincks*, 87 N. Y. 637.

It will be observed, therefore, that the remedy of judgment-creditors in equity is threefold. 1. As against leviable assets he may maintain an action in aid of the execution. 2. He may maintain an action under the Code for discovery and for the satisfaction of his judgment out of property of the judgment-debtor, so discovered or reached. 3. He may proceed as in a creditor's action under the inherent powers of a court of equity.

§ 262. **Proceedings by creditor's suit.**—The distinction between a judgment-creditor's action under the Code (§ 1871) and a creditor's suit in equity is not clearly defined. The sections of the Code have no reference to actions brought in aid of the execution. *Easton Nat. Bk.* v. *Buffalo Chemical Works*, 55 Supm. Ct. (48 Hun), 557. That is apparent, since the Code action cannot be brought until the execution has been returned. Neither does the Code in express terms authorize a creditor's action to reach property fraudulently disposed of by the debtor. It authorizes an action "to compel the discovery of any thing in action, or other property belonging to the judgment-debtor, and of any money, thing in action, or other property due to him, or held in trust for him ; to prevent the transfer thereof, or the payment or

delivery thereof, to him, or to any other person; and to procure satisfaction of the plaintiff's demand" (Code, § 1871). Whether this language includes the right to recover property fraudulently transferred is not perhaps a matter of practical importance, since such an action may be maintained under the general equity power of the court, which, as we have seen, is not limited by the language of the Code.

In *Hart* v. *Albright*, 28 Abb. N. C. 74, which was an action for a discovery of certain book accounts alleged to have been concealed and fraudulently transferred, it was held that the complaint stated a sufficient cause of action under the old practice, and therefore was not open to demurrer even though it did not state a cause of action under the Code.

Whether the action is regarded as being brought under the provisions of the Code or by virtue of the inherent equity power of the court, it is alike essential that the plaintiff should first have exhausted his remedy at law, and that he should have a judgment upon which execution has been issued and returned unsatisfied.[1] *Frothingham* v. *Hodenpyl*, 135 N. Y. 630; *Adsit* v. *Butler*, 87 N. Y. 585; *Andrews* v. *Durant*, 18 N. Y. 496; *Estes* v. *Wilcox*, 67 N. Y. 254; *McCartney* v. *Bostwick*, 32 N. Y. 53; *Adee* v. *Bigler*, 81 N. Y. 349; *Macauley* v. *Smith*, 132 N. Y. 524, 532; *Kerr* v. *Dildine*, 67 Supm. Ct. (60 Hun), 315; *Knauth* v. *Bassett*, 34 Barb. 31; *Wilson* v. *Forsyth*, 24 Barb. 105; *Hastings* v. *Belknap*, 1 Den. 190; *Willetts* v. *Vandenburgh*, 34 Barb. 424, and cases cited, *ante*, § 261. In *Nat. Tradesmen's Bank* v. *Wetmore*, 124 N. Y. 241, 248, it is said, that "it has become the settled will in this State not to dispense with those preliminary proceedings at law, although it may be made to appear by evidence that no benefit could result to the creditor from them."

§ 263. Creditor's suit—Instances in which judgment and execution are not essential.—There are exceptions in the application of this rule, one of which was presented in the case last

[1] In the federal courts of otherwise competent jurisdiction, a creditor's suit may be based upon a judgment recovered in a state court, but only where the execution has been issued and returned within the territorial jurisdiction of the court. *Bacon* v. *Harris*, 62 Fed. R. 99.

cited. In that case it was held that where the debtor, being a non-resident, had fraudulently conveyed real property situated in this State, and afterward an assignee of his estate had been appointed in insolvency proceedings in Connecticut, who acquired no right of action to the property in this State, and the debtor afterward died, and actions against his personal representations were not permitted by the laws of that State, a creditor might maintain an action in this State to reach the property fraudulently conveyed without judgment and execution, for the reason that the recovery of such judgment was impossible.

Creditors of a limited partnership stand in a more favorable position than creditors generally, since they may file a bill in equity to restrain insolvent partners from disposing of the partnership property contrary to law, and for the appointment of a receiver. *Van Alstyne* v. *Cook*, 25 N. Y. 489; *Innes* v. *Lansing*, 7 Paige, 583; *Whitcomb* v. *Fowle*, 7 Abb. N. C. 295; s. c. 10 Daly, 23; *Hardt* v. *Levy*, 79 Supm. Ct. (72 Hun), 225.

A receiver appointed in supplementary proceedings may, after perfecting his appointment, maintain an action in his own name to set aside an assignment of real and personal property made by a judgment-debtor, on the ground of fraud, without having first received from such debtor an assignment to himself as such receiver. *Porter* v. *Williams*, 9 N. Y. 142; *Bostwick* v. *Menck*, 40 N. Y. 383.

The appointment of the receiver does not vest him with the legal title to the property so assigned, but only with the right of action which a judgment-creditor would have to attack the assignment; and the assignment will be set aside only so far as to enforce the payment of the judgment upon which he was appointed receiver, and the expenses of that proceeding and costs. *Bostwick* v. *Menck*, 40 N. Y. 383; *Olney* v. *Tanner*, 10 Fed. R. 101, 113; affi'd, 18 Id. 636; *Metcalf* v. *Del Valle*, 71 Supm. Ct. (64 Hun), 245.

An assignee in bankruptcy may maintain an action to set aside a conveyance as fraudulent without the necessity of a previous judgment and execution against the debtor who made it, as is required in the case of an individual creditor; and although none of the creditors have obtained a specific lien or have a standing in court to attack the conveyance. *Southard* v. *Benner*, 72

N. Y. 424. As to the extent and limit of power of an assignee in bankruptcy to bring actions to set aside fraudulent transfers, see Wait on Fraud. Conv., 2d ed., § 114.

An apparent exception to the rule that a creditor at large cannot maintain a creditor's bill arises in those cases in which the creditors occupy the position of *cestui que trust*, and the fiduciary being clothed with statutory power to maintain such actions for their benefit, refuses or neglects to do so. *Spelman* v. *Freedman*, 130 N. Y. 421, affi'g 61 Supm. Ct. (54 Hun), 409; *Harvey* v. *McDonnell*, 113 N. Y. 526; *Lowery* v. *Clinton*, 39 Supm. Ct. (32 Hun), 267; *Swift* v. *Hart*, 42 Supm. Ct. (35 Hun), 129; *Riessner* v. *Cohn*, 22 Abb. N. C. 312; *Bate* v. *Graham*, 11 N. Y. 237. In such cases the creditor in support of the trust and in aid of the assignment or several judgment creditors holding distinct and several judgments may maintain an action. *White's Bank* v. *Farthing*, 101 N. Y. 344; *Loomis* v. *Brown*, 16 Barb. 325, 331, and cases cited; *Brinkerhoff* v. *Brown*, 6 John. Ch. 139; *Fellows* v. *Fellows*, 4 Cow. 682; *Fish* v. *Howland*, 1 Paige, 20; *Egberts* v. *Wood*, 3 Id. 517.

By the amendment to Act of 1858 (Laws of 1858, c. 314; laws of 1889, c. 487, quoted in full, *ante*, § 156) a general creditor of a deceased debtor or having a claim exceeding $100 may maintain for the joint interest of all the creditors to set aside fraudulent conveyances and transfers made by the deceased debtor. In such a case judgment and execution are not necessary, but the creditor bringing the action secures no priority. The complaint in such cases must set out a good cause of action by the creditor, and it must also show that the action is being prosecuted for the benefit of all creditors. *Louis* v. *Belgard*, 43 State R. 766.

§ 264. Creditor's suit—Parties.—The action may be brought by the plaintiff on behalf of himself and all others similarly situated. *Brownson* v. *Gifford*, 8 How. Pr. 389, 395; *Habicht* v. *Pemberton*, 4 Sandf. 657; *Hammond* v. *Hudson Riv. I. & M. Co.* 20 Barb. 378.

But the action may be, and more often is, brought by the creditor simply in his own behalf. He is under no obligation to sue on behalf of all the other creditors. *Hendricks* v. *Robin-*

son, 2 John. Ch. 283 ; *Edmeston* v. *Lyde*, 1 Paige, 637 ; *Parmelee* v. *Egan*, 7 Id. 610 ; *Reubens* v. *Joel*, 13 N. Y. 488.

The assignors are necessary parties. *Lawrence* v. *Bank of Republic*, 35 N. Y. 320 ; *Hubbell* v. *Merch. Nat. Bk.*, 49 Supm. Ct. (42 Hun), 200 ; *Miller* v. *Hall*, 40 Super. Ct. (8 J. & S.), 262 ; affi'd, 70 N. Y. 250. So, if the assignor dies during the pendency of the action, it must be revived against his representatives. *Edwards* v. *Woodruff*, 90 N. Y. 396. The objection that there is a defect of parties by reason of the failure to make the assignor a party defendant is waived if not taken by demurrer or answer. *Hurlbert* v. *Dean*, 2 Abb. Dec. 428 ; s. c. 2 Keyes 97.

Preferred creditors may be made parties, and when their preferences are attacked as invalid they are proper parties. *Genesee Co. Bk.* v. *Bank of Batavia*, 50 Supm. Ct. (43 Hun), 295, and though all the creditors are nominally represented by the assignee, yet they may be allowed to intervene. *Chandler* v. *Powers*, 32 Supm. Ct. (25 Hun), 445 ; *Davies* v. *Fish*, 54 Supm. Ct. (47 Hun), 314.

§ 265. **Creditor's suit—The complaint.**—The material allegations of the complaint in an action by a creditor to set aside an assignment as fraudulent, are (1) the recovery of judgment, (2) the return of execution (*Adsit* v. *Butler*, 87 N. Y. 585), (3) the conveyance or assignment complained of, and (4) the fact that the assignment was made with the intent to hinder, delay and defraud creditors. It is not necessary to allege and set forth in the complaint the specific acts of fraud or facts showing a fraudulent intent upon which the plaintiff relies to establish the fraudulent intent when the fraud appears on the face of the instrument. *Wilson* v. *Forsyth*, 24 Barb. 105 ; *Hastings* v. *Thurston*, 18 How. Pr. 530 ; s. c. 10 Abb. Pr. 418 ; see *Mott* v. *Dunn*, 10 How. Pr. 225 ; *Jessup* v. *Hulse*, 29 Barb. 539.

And this is the rule, whether the fraud is one evidenced by provisions on the face of the assignment or by facts extrinsic to the instrument. *Pittsfield Nat. Bk.* v. *Tailer*, 67 Supm. Ct. (60 Hun), 130 ; *Durant* v. *Pierson*, 29 State R. 510 ; *Nat. Union Bank* v. *Reed*, 27 Abb. N. C. 5 ; and see note as to the distinction between pleading fraud and intent to defraud.

If the facts from which a fraudulent intent constructively appear are set out in the complaint it will not be dismissed because

it contains no allegation of fraudulent intent, even though it be conceded that the parties intended no fraud. If the facts lead to the conclusion that the assignment is fraudulent in law, then the conclusion is also pleaded. *Stafford* v. *Merrill*, 69 Supm. Ct. (62 Hun), 144.

The judgment-creditor may in the same action attack not only the assignment, but all other fraudulent conveyances made by the debtor, and if he succeeds in proving that the general assignment is void because of fraud, then the question of the fraudulent character of the previous conveyance can be determined in the action. *Loos* v. *Wilkinson*, 110 N. Y. 195; *Chandler* v. *Powers*, 9 State R. 169. *Higgins* v. *Crichton*, 11 Daly, 114, so far as it holds to the contrary must be regarded as overruled. But if the judgment-creditor in such an action fails in his attack upon the assignment he must also fail in the effort to show that the previous conveyances were fraudulent, for the reason that the right of action as against those conveyances will then be found to be in the assignee. *Cutter* v. *Hume*, 43 State R. 242.[1]

[1] Attention should perhaps be directed to certain cases in which there has been presented the necessity of alleging and proving that the fraudulent conveyance complained of left the debtor insolvent and without sufficient property to pay his existing debts. See *Kain* v. *Larkin*, 131 N. Y. 300; *Maders* v. *Whallon*, 81 Supm. Ct. (74 Hun), 372; *Fuller* v. *Brown*, 83 Supm. Ct. (76 Hun), 557. It will be observed that none of these were actions relating to general assignments. Indeed the question can hardly arise in an action simply to set aside a general assignment the effect of which is to place all a debtor's property beyond the reach of legal proceedings by creditors. It might arise, however, in an action brought to set aside previous fraudulent transfers and also the assignment. The necessity of such averment is in any event confined to actions by subsequent creditors. As to creditors existing at the time of the transfer, an intent to hinder, defraud, and delay, whether the debtor be solvent or insolvent, will defeat the conveyance. *Cole* v. *Tyler*, 65 N. Y. 73, 78. See *Carpenter* v. *Roe*, 10 N. Y. 227. But whatever may be the necessity of proving that the conveyance left the debtor insolvent, the fraudulent intent is the ultimate fact, and evidence of insolvency, if it be necessary to establish that fact, is admissible under the general allegation. *Fuller* v. *Brown*, 83 Supm. Ct. (76 Hun), 557.

When the property fraudulently conveyed is destroyed before it comes into the hands of the assignee, the judgment-creditor has no cause of action against the assignee. *Putzel* v. *Schulhof*, 59 Super. Ct. (27 J. & S.), 88; but if the property is still in existence, even though it has not been delivered to the assignee, and he claims nothing under it, the creditor may have the apparent conveyance set aside as an obstacle to the collection of his debt. *Gasper* v. *Bennett*, 12 How. Pr. 307.

§ 266. **Creditor's action—Bill of particulars.**—The Code of Civil Procedure (§ 531) provides that "the court may, in any case, direct a bill of the particulars of the claim of either party to be delivered to the adverse party." The court undoubtedly has the power under the warrant of this provision to compel the plaintiff to furnish the particulars of the facts upon which he founds the charge of fraudulent intent. *Claflin* v. *Smith*, 13 Abb. N. C. 205; *Passavant* v. *Cantor*, 55 Supm. Ct. (48 Hun), 546; *Faxon* v. *Ball*, 50 State R. 495. The application is addressed to the discretion of the court, and where the assignee is shown to be in possession of all the facts and the granting of the application will practically have the effect only of confining the plaintiff to the proof of specific fact, the motion will not be granted. *Passavant* v. *Cantor*, *supra*; *Faxon* v. *Ball*, *supra*.

§ 267. **Creditor's action—Defences, previous actions.**—It is a defense to an action brought by a judgment-creditor to set aside an assignment that prior to the commencement of the action the whole of the assigned estate had been distributed under a decree of the county court and that the assignee had been discharged. *McLean* v. *Prentice*, 41 Supm. Ct. (34 Hun), 504. But in *Turney* v. *Van Gelder*, 75 Supm. Ct. (68 Hun), 481, where an action for an accounting had been brought by one creditor on behalf of himself and others in which notice was given to all creditors to present their claims, but no notice of application for judgment was given to the plaintiff, and the estate distributable among creditors was not more than sufficient to pay the claim of the assignee who was a preferred creditor, it was held that the plaintiff was not barred by the judgment from bringing an action to set aside the assignment. But an action for an accounting by one creditor on behalf of himself and all other creditors to which a creditor is made a party by proper notice will preclude him from afterward maintaining an action for an accounting. *Kerr* v. *Blodgett*, 48 N. Y. 62. See *post*, Chap. XXVII.

Since, as we have already seen, each judgment-creditor is at liberty to bring a separate action to attack the conveyance the recovery of judgment by one judgment-creditor will not preclude subsequent judgments in favor of other creditors.

When there are a number of actions pending by different

judgment-creditors attacking the same assignment, all involving the same issue, the trial of all but one of the actions may be stayed to await the determination of one trial. *Brown* v. *May*, 17 Abb. N. C. 205; *N. Y., L. E. & W. R. R. Co.* v. *Robinson*, 15 State R. 237.

The defendant may show in defense to the plaintiff's action that the judgment upon which he bases his right of recovery was fraudulently recovered. *Richardson* v. *Trimble*, 45 Supm. Ct. (38 Hun), 409. Wait on Fraud. Conv., 2d ed., § 270.

It has been held that in an action by a judgment-creditor against the assignee, the assignor, and the alleged fraudulent mortgagee, to set aside an assignment and chattel mortgage, the assignee cannot set up an affirmative claim that the mortgage was given as part of the assignment, with the intent of creating an excessive preference, and ask for relief that the lien of the mortgage be reduced within the limits of preferences permitted by law. *Van Allen* v. *Rogers*, 5 Misc. 420.

§ 268. Injunction and receiver.—The court has power in such an action to restrain the transfer of the assigned property by the assignee, and to appoint a receiver. *Bloodgood* v. *Clark*, 4 Paige, 574; *Lent* v. *McQueen*, 15 How. Pr. 313; *Haggarty* v. *Pittman*, 1 Paige, 298; *Connah* v. *Sedgwick*, 1 Barb. 210; *Manning* v. *Stern*, 1 Abb. N. C. 409; *Whitcomb* v. *Fowle*, 7 Abb. N. C. 295; s. c. 10 Daly, 23. This power is expressly conferred upon the court by § 1877 of the Code of Civil Procedure. But it is not a matter of course to enjoin the assignee from proceeding, and to appoint a receiver. The assignee may be permitted to convert the property into money, while he is enjoined from making any distribution of it until after the determination of the action. *Bishop* v. *Halsey*, 3 Abb. Pr. 400.

In *People's Bank* v. *Fancher*, 21 N. Y. Supp. 545, a receiver during the pendency of the action was appointed, where it appeared that the assignee had participated in the acts which were regarded as showing that the assignment was illegal. When the facts presented on such an application make it appear probable that the assignment will be set aside the appointment is proper. *Ibid.*, *Babcock* v. *Jones*, 69 Supm. Ct. (62 Hun), 565; s. c. 17 N. Y. Supp. 67; *Empire Pav. & Constr'n Co.* v. *Robinson*,

33 State R. 897. But a clear case should be presented. *Minzesheimer* v. *Mayer*, 66 How. Pr. 484.

Where an injunction is obtained restraining the enforcement of judgments confessed cotemporaneously with and as part of the assignment, the complainant is not required to give a bond for the full amount of the judgment under Code, § 613. The amount of the bond is in discretion of the court. *Sweetser* v. *Smith*, 22 Abb. N. C. 319.

Where an action is brought to set aside an assignment for fraud, it is a strong reason against appointing a person receiver of the property assigned, that he was a party to the assignment. *Smith* v. *N. Y. Consolidated Stage Co.*, 18 Abb. Pr. 419. And where the assignee has been appointed receiver and a judgment is given setting aside the assignment and directing the assignee to account, the receiver will be removed and some other person will be substituted, so that the party to whom and by whom the account is rendered shall not be the same. *Eichberg* v. *Wickham*, 21 N. Y. Supp. 647.

§ 269. Creditor's action—Inspection of debtor's books.—An inspection of the books and papers of the assignor may be obtained in a judgment-creditor's action under §§ 803, 804 of the Code of Civil Procedure and the rules of court (Rule 14), and it would seem that an inspection of the assignor's books in such an action is almost a matter of right. The insolvent estate is the product of the property of creditors ; the accounts touching the estate are the accounts in reality of their property. This is one of the cases in which the party applying for an inspection has an interest in the very thing of which an inspection is sought, and that circumstance brings the case into analogy with cases of partnership and principal and agent. *Manley* v. *Bonnel*, 11 Abb. N. C. 123 ; *Duff* v. *Hutchinson*, 19 W'kly Dig. 20 ; *Kelly* v. *Eckford*, 5 Paige, 548 ; *Stebbins* v. *Harmon*, 24 Supm. Ct. (17 Hun), 445, in which an inspection is fully allowed. An instance in which such an inspection was allowed and the petition and order will be found in *Bundschu* v. *Simon*, 23 N. Y. Supp. 214.

§ 270. Creditor's action—Trial.—A creditor's action to set aside a general assignment which includes real estate, must be

brought in the county in which the real estate is situated. An offer on the part of the plaintiff to stipulate that he will not attempt to reach the real estate, or make any claim of title or intent therein, will not defeat a motion to change the venue to the proper county. *Wyatt* v. *Brooks*, 49 Supm. Ct. (42 Hun), 502; *Sweetser* v. *Smith*, 22 Abb. N. C. 319, 327.

The question of fraudulent intent in a case triable before a jury, must be submitted to the jury if there is ground for opposite inferences, and a conclusion either way would not shock the sense of a reasonable man. This rule was applied and a judgment holding an assignment invalid on the direction of the judge at trial term, was reversed where the evidence, although establishing a case of the wrongful withholding of assets from the assignee, was yet held not to be so conclusive as to justify the court in taking the case from the jury. *Bagley* v. *Bowe*, 105 N. Y. 171, 179. If the necessary effect of a provision contained in an assignment is to defraud creditor the court may direct the jury to find the assignment invalid. See *ante*, § 199.

And where the question of fraud is dependent upon evidence extrinsic to the written assignment, the statute declaring the question of fraudulent intent to be one of fact and not of law does not, as now interpreted, interfere with the prerogative of the court to direct a verdict provided the fraudulent intent is conclusively established on the face of the instrument of transfer or by the uncontradicted verbal evidence. *Bulger* v. *Rosa*, 119 N. Y. 459, 464; *Bagley* v. *Bowe*, 105 N. Y. 171; *Coleman* v. *Burr*, 93 N. Y. 17, 31; and if the evidence of fraud is completely rebutted so that a verdict finding the fraud would be set aside the court may direct a verdict accordingly. *Prentis Tool & S. Co.* v. *Schirmer*, 136 N. Y. 305; *Chambers* v. *Smith*, 67 Supm. Ct. (60 Hun), 248.

§ 271. Repelling presumptions of fraud by parol evidence. —We have already had occasion to refer to certain cases in which it has been held that directions in an assignment to pay individual debts out of firm assets may be shown by parol evidence to be innocuous where no such debts in fact existed, or where the obligations were equitably chargeable against the firm (§ 192). In *Crook* v. *Rindskopf*, 105 N. Y. 476, the question whether

parol evidence was admissible to show that provisions in themselves indicative of fraud were not fatal to the validity of the assignment if by reason of the existence of a state of facts they were harmless was raised but not disposed of. Reference was made to *Collomb* v. *Caldwell*, 16 N. Y. 484, where it was held that assignors providing in their assignment for an illegal disposition of property, are not at liberty in an action to set it aside to show as proof of innocence of fraudulent intent that the assigned fund was insufficient to satisfy the prior valid provisions of the assignment, and could not, therefore, be affected by the alleged illegal provision, and reference was also made to *Turner* v. *Jaycox*, 40 N. Y. 470, and *Bogert* v. *Haight*, 9 Paige, 297; see *ante*, § 192, where it was held that the presumption of fraud arising from the provisions of an assignment may be repelled by parol evidence. Where, however, the provision has a necessary tendency to injure creditors, the assignor's ignorance of its effect or his mental state cannot change the inevitable consequence of the provision, and the assignment will be invalid. *Chambers* v. *Smith*, 67 Supm. Ct. (60 Hun), 248.

§ 272. Creditor's action—Priority of creditors—Lis pendens.—The interest which different judgment-creditors may acquire in the assigned estate by commencing proceedings in the nature of creditors' actions and prosecuting them may properly be considered in this connection. The general rule is that during the pendency of an action, the subject-matter of which is specific property, an alienation of any part of the property is subject to the final decree. The leading case in this country is *Murray* v. *Ballou*, 1 Johns. Ch. 566, in which Chancellor Kent stated the history of the English decisions down to that time. The doctrine rests upon the necessity for such a rule in order to render the decree of the court effectual. The rule varies somewhat in its application to different species of property which may be the subject-matter of the litigation. It varies also in its application to different classes of persons as to whether they are parties to the suit or third person purchasing with or without notice. The most perplexing questions, however, arise between creditors pursuing their remedies as against the property fraudulently transferred.

It is to be observed that the creditor's right to reach the debtor's property is in no true sense an interest in that property; it is at most only an equitable lien on the property. Pom. Eq. Jur., 2d ed., § 1057, n.

§ 273. Creditors' suits—Priority as to real estate.—Chancellor Kent, in *Murray* v. *Ballou* (1 Johns Ch. 566, 576), stated the rule in Courts of Chancery both in England and in this State, previous to the adoption of the Code, as follows: "The established rule is, that a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser so as to effect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed." This rule required a sufficiently accurate description of the property to give notice to an intending purchaser who might examine the bill. The filing of the bill and the service of the subpœna constituted in effect a constructive notice such as is now the result of the filing of a notice of pendency of action under the Code. The Chancery rule was abrogated by the enactment of the Code in 1848 (§ 132), and pendency of action is now constructive notice only from the time of filing a notice of the pendency of the action as required by the Code. (Code of Civil Procedure, §§ 1670, 1671.) The rule as to third persons who acquire interests in real estate after the commencement of the action is therefore quite definitely fixed. See *Hailey* v. *Ano*, 136 N. Y. 569. With regard to the priorities which different creditors may acquire in the real estate of their debtor which has been fraudulently conveyed there is not the same degree of certainty. Where judgments are docketed against a debtor who has made a fraudulent conveyance of his real estate, and actions are subsequently brought by junior judgment-creditors who succeed in setting aside the fraudulent conveyance, the question has arisen whether by their diligence they are entitled to satisfaction of their judgments in priority to senior judgments which have been docketed.

Judgments are by statutes made liens upon real estate in the order in which they are docketed. (Code Civil Procedure, § 1251.) And it has been held that the priority obtained by the docketing of a judgment applies to real estate which has been previously conveyed by the debtor where such conveyance is subse-

quently declared fraudulent. Such was the ruling in the case of *White's Bank* v. *Farthing*, 101 N. Y. 344. This rule may, to some extent, be effected by the form of remedy which the creditor pursues. In the *Chautauqua County Bank* v. *Risley*, 19 N. Y. 369, it was held that where a receiver appointed in such creditor's action makes a sale of the property, he cannot give a title good as against valid liens existing prior to the filing of the complaint.

But when the holder of the lien or claimant of prior interest in the premises is made a party to the suit, and the validity of his claim or lien is an issue and is adversely disposed of by the judgment, a sale or conveyance by the receiver will vest in his grantee a superior title. *Shand* v. *Hanley*, 71 N. Y. 319.

In *Erickson* v. *Quinn*, 15 Abb. Pr. N. S. 166, reported less fully 47 N. Y. 410, Allen, J., states the remedies of creditors against real estate as follows: "The plaintiffs, judgment-creditors of O'Maley, in pursuing their remedy against the lands alleged to have been fraudulently conveyed to the defendant, had the choice of three several proceedings. They might have sold the premises by execution on the judgment, and left the purchaser, after his title should have become perfect by a deed from the sheriff, to contest the validity of the defendant's title, in an action of ejectment; or, secondly, they might have issued their execution and brought their action to remove the fraudulent obstruction, and awaited the result of the action before selling the property; or, thirdly, they had the right, upon the return of an execution unsatisfied, to bring an action in the nature of a creditor's bill, to have the conveyance to the defendant adjudged fraudulent as against their judgment, and the lands sold by a receiver or other officer of the court, and the proceeds applied to the satisfaction of the judgment, as equitable interests and things in action of a judgment-debtor are reached and applied to the satisfaction of judgments against them." The learned judge proceeds in his opinion to remark that under the cases of *Chautauqua Co. Bank* v. *White*, 6 N. Y. 236, and *Chautauqua Co. Bank* v. *Risley*, 19 N. Y. 369, a creditor pursuing the last remedy is liable to lose the priority of his lien by judgment. Such does not seem to be the construction put upon those cases in *Shand* v. *Hanley*, 71 N. Y. 319, and *Royer Wheel Co.* v. *Fielding*, 101

N. Y. 504; *Wilkinson* v. *Paddock*, 64 Supm. Ct. (57 Hun), 191; affi'd, 125 N. Y. 748.

In the case of the *New York Life Ins. Company* v. *Mayer*, 19 Abb. N. C. 92; affi'd, 12 State R. 119; affi'd, 108 N. Y. 655, it was held that the lien acquired by the docketing of a judgment upon lands covered by the fraudulent assignment is not waived by the commencement of a suit by the judgment-creditor to set aside the assignment, seeking to have a receiver appointed and lands sold, if the plaintiff does not finally take the relief so demanded, but takes a decree declaring the assignment void and his judgment a lien upon the lands as if the assignment had not been made. It was held also in that case, that the lien acquired upon individual property of a partner by the docketing of a judgment by a firm creditor is superior to the equitable right of the individual creditors. It was also held that these rules applied to surplus moneys arising from the sale of real estate under a foreclosure of mortgage, the legal and equitable liens being transferred to the fund as they existed against the real estate. *Wilkinson* v. *Paddock*, *supra*. The case of *Warden* v. *Browning*, 19 Supm. Ct. (12 Hun), 497, appears to be in conflict with the later decisions, though upon its special facts perhaps distinguishable.

In *Scouton* v. *Bender*, 3 How. Pr. 185, where creditors' bills were filed in several actions against a judgment-debtor, to set aside as fraudulent an assignment made by the debtor of all his real and personal estate, and to compel the satisfaction of the judgments out of the equitable interests and other property of the judgment-debtor, and the assignment was declared fraudulent and void as to creditors, and was decreed to be set aside, with directions to the receiver to convert the real and personal estate assigned to him into money for the purpose of satisfying the complainants, held, on a motion that the court prescribe a rule for a distribution of the funds received as proceeds of the personal and real estate in the hands of the receiver, there being insufficient to satisfy the whole, *that the creditors were entitled to satisfaction of their judgments respectively out of the funds derived from the real estate in the order of priority of their judgments, and out of the personal funds in the order in which the bills were filed and the equitable liens created.*

In the same case it was also held that a judgment-creditor, who had a *prior* outstanding judgment against the judgment-debtor, and who was not made a party to any of the creditors' bills filed, and was not a party to the motion for distribution, could not be paid out of the fund in court, but that the sale of the real estate under the decree of the court did not subvert the lien of his judgment.

In *Wilkinson* v. *Paddock*, 64 Supm. Ct. (57 Hun), 191, a proceeding for distinction of surplus moneys arising out of a sale under foreclosure of certain lands alleged to have been fraudulently transferred, it was held that the judgments of the respective judgment-creditors were entitled to prior payment in the order in which they were docketed and were not affected by the order in which suits to set aside the fraudulent transfer were instituted. The judgment-creditors who were adjudged entitled to priority in this proceeding had not in some instance taken any proceeding in avoidance of the fraudulent transfer. *Brooks* v. *Wilson*, 60 Supm. Ct. (53 Hun), 173, in which a conflicting doctrine was declared, has been reversed. (See 125 N. Y. 256.)

§ 274. Creditors' suit—Priority of creditors—Personal property.—It is asserted by Commissioner Dwight in *Holbrook* v. *New Jersey Zinc Co.*, 57 N. Y. 616, 629, where an exhaustive review of the cases will be found, that "an examination of the English reports will show that the law of *lis pendens* has only been used in England in cases involving the title to real estate or interests therein." He was referring, however, to the doctrine as applied to the case of an innocent purchaser pending litigation. In this country, before the introduction of the Code practice and even since, the doctrine has been held applicable to transfers of personal property to innocent purchasers. The application of the general doctrine of *lis pendens* to transfers of personal property pending the action was first discussed in this State in *Murray* v. *Lylburn*, 2 Johns. Ch. 441, by Chancellor Kent. In that case he applied it to certain mortgage securities, and there are reported cases in this State which would seem to extend the rule to personal property generally. *Scudder* v. *Van Amburgh*, 4 Edw. Ch. 29; *Edmeston* v. *Lyde*, 1 Paige, 637, 640; see *Corning* v. *White*, 2 Paige, 567; *Brinkerhoff* v.

Brown, 4 Johns. Ch. 671 (see opinion of Dwight, C., *Holbrook* v. *N. J. Zinc Co.*, *supra*). It seems to be conclusively settled, however, that the rule does not apply to transfers, pending litigation, of stocks, bonds or negotiable securities. *Leitch* v. *Wells*, 48 N. Y. 585; *County of Warren* v. *Marcy*, 97 U. S. 96; *Dovey's Appeal*, 97 Penn. St. 153; *Holbrook* v. *New Jersey Zinc Co.*, 57 N. Y. 616; *Lindsley* v. *Diefendorf*, 43 How. Pr. 357. The common law doctrine of *lis pendens*, as it relates to innocent purchasers, is a harsh one, and the party seeking to apply it must bring himself precisely within the rule. Not only must the bill have been filed, but it must contain so definite a description of the property as to be notice to the purchaser, if he examine the bill.

Under the Code Practice which does not require the filing of pleadings until final judgment, it may well be doubted whether the common law doctrine of *lis pendens* in its technical application to innocent purchasers of personal property any longer exists. See *Holbrook* v. *N. J. Zinc Co.*, 57 N. Y. 616; *Leitch* v. *Wells*, 48 N. Y. 585, 609; *Miller* v. *Sherry*, 2 Wall. 237.

But as between the parties to the suit and persons having actual notice of the pendency of the litigation, and as determining the priorities between various judgment-creditors seeking to reach the property of their debtor, the doctrine of *lis pendens* has undoubtedly a well-established and important position. In *Claflin* v. *Gordon*, 46 Supm. Ct. (39 Hun), 54, 59, Mr. Justice Bradley speaks upon this subject as follows: "When there is no interruption by any effectual intervening rights of others, the successful result of an action brought to reach property, has relation to the time of its commencement, and the judgment perfects the relief sought as of such time, so that the defendants, in the meantime, cannot legally do anything with the subject of the action to impair the beneficial effect of the judgment, nor can a third person affected by notice of the action and its purpose, be permitted (except by proceeding *in invitum* by legal process) to acquire any rights to the prejudice of the relief which the judgment purports to give to the plaintiffs." This rule is qualified, as to personal property capable of levy and sale under execution. A creditor who seizes such property, even after the commencement of legal proceedings effecting it, is not prejudiced by the

pendency of such proceedings, but may proceed to a sale, and the satisfaction of his debt out of such property, and his right in that regard will not be limited until an order is made appointing a receiver. *Storm* v. *Waddell*, 2 Sandf. Ch. 494, 516; *Davenport* v. *Kelly*, 42 N. Y. 193; *Albany City Bank* v. *Schermerhorn*, Clarke Ch., 297; *Storm* v. *Badger*, 8 Paige, 130; *Claflin* v. *Gordon*, *supra*; *Knower* v. *Cent. Nat. Bank*, 124 N. Y. 552, 559; *Kitchen* v. *Lowery*, 127 N. Y. 53.

As to the equitable assets of the judgment-debtor the lien created by the filing the bill has been frequently recognized and applied. *Albany City Bank* v. *Schermerhorn*, Clarke Ch., 297; *Utica Ins. Co.* v. *Power*, 3 Paige, 365; *Hayden* v. *Bucklin*, 9 Paige, 512; *Roberts* v. *Albany & W. S. R. R. Co.*, 25 Barb. 662; *Jeffres* v. *Cochrane*, 47 Barb. 557; affi'd, 48 N. Y. 671; *Beck* v. *Burdett*, 1 Paige, 305; *Talcott* v. *Thomas*, 50 State R. 621; *Metcalf* v. *Del Valle*, 71 Supm. Ct. (64 Hun), 245.

The commencement of an action by a creditor to reach the choses in action and equitable interests of the debtor, which cannot be reached by execution at law, creates a lien in favor of the plaintiff, good against all persons who have knowledge or are chargeable with knowledge of such lien. *Jeffres* v. *Cochrane*, 47 Barb. 557; affi'd, 48 N. Y. 671.

§ 275. Creditors' suit—Time at which the plaintiff's right attaches.—The priorities of creditors in the debtor's real estate and the method in which they may be secured have been considered (*ante*, § 273). As to the debtor's personal property a distinction is to be observed between rights acquired as against innocent purchasers and rights acquired as against purchasers with notice. As to the former at common law, the rule was well established that the *lis pendens* began from the service of the subpœna after the bill was filed. "This," says Bennett in his work on *lis pendens* (section 28), "has been the rule for over three hundred years, established by a long series of well-considered cases, and while, as a new question, very strong reasons may be assigned for a different rule, it is too well established to be now shaken." He cites the following New York cases: *Murray* v. *Ballou*, 1 Johns. Ch. 566; *Murray* v. *Lylburn*, 2 *Id.* 441; *Green* v. *Slayter*, 4 *Id.* 38; *Hopkins* v. *McLaren*, 4 Cow.

667 ; *Murray* v. *Blatchford*, 1 Wend. 583 ; *Jackson* v. *Andrews*, 7 *Id.* 152 ; *Parks* v. *Jackson*, 11 Wend. 442 ; *Griffith* v. *Griffith*, 1 Hoffm. Ch. 153 ; *White* v. *Carpenter*, 2 Paige, 217, 252 ; *Hayden* v. *Bucklin*, 9 *Id.* 512 ; *Jackson* v. *Losee*, 4 Sandf. Ch. 381.

As to third parties a *lis pendens* is not created under the present system until the summons has been served and a complaint filed, in which the claim of the plaintiff upon the specific property is set forth. Courts will not indulge in any presumption that the complaint was filed for the purpose of effecting an innocent purchaser with notice of pendency. *Leitch* v. *Wells*, 48 N. Y. 585. Indeed, it may well be doubted whether the Code Practice, with its provisional remedies, contemplates the continued existence of the chancery doctrine of *lis pendens* as to innocent purchasers, except in the manner provided as to real estate.

As to purchasers with notice, and as determining the priorities between creditors, the priority is obtained at the time when the court first acquires jurisdiction at the suit of the creditor. Under the old chancery practice the creditor who, after first filing his bill, obtained the first service of the subpœna, or made a *bona fide* attempt to serve the same, had his suit first commenced and was entitled to a priority in payment out of the property of the judgment-debtor. *Boynton* v. *Rawson*, 1 Clarke Ch., 584 ; *Corning* v. *White*, 2 Paige, 567 ; *Fitch* v. *Smith*, 10 Paige, 9 ; *Burrell* v. *Leslie*, 6 Paige, 445.

In *Albert* v. *Back*, 52 Super. Ct. (20 J. & S.) 550 ; affi'd, 101 N. Y. 656, it appeared that after a summons had been served on the assignee in an action to set aside an assignment, which was not accompanied with a complaint, nor did it designate the purpose of the action, the assignee paid a sum of money to a preferred creditor ; in proceedings for an accounting on a judgment in the action setting aside the assignment, it was held that inasmuch as the assignee had actual notice of the object of the action before making the payment, he could not be allowed the sum so paid.

Whether the title of a receiver appointed on the final decree, to tangible personal property, dates back to the beginning of the action or only to the date of the order of appointment, depends

upon whether legal rights have intervened. In *Clark* v. *Brockway*, 1 Abb. Dec. 351, it seems to be assumed that as to some classes of property the receiver's title commences from the filing of the order directing the appointment of the receiver, and that it relates back to the date of that order only.

Becker v. *Torrance*, 31 N. Y. 631; *Van Alstyne* v. *Cook*, 25 *Id.* 489, and *Davenport* v. *Kelly*, 42 N. Y. 193, hold that the lien, if any, created by the filing of a creditor's bill in favor of the plaintiff upon leviable personal property, is subject to priorities to be obtained by other creditors, by judgment or attachment, at any time prior to the appointment of a receiver. Whether the junior of two creditors who has commenced actions could obtain a priority as to personal property over the senior, by procuring the appointment of a temporary receiver, has not been determined, but it seems that he could under the decisions cited. In *Claflin* v. *Gordon*, 46 Supm. Ct. (39 Hun), 54, 57, J. Bradley stated the rule as follows: "By the commencement of an action in equity, by a judgment-creditor as such, he obtains a lien upon the things in action and equitable interests of the debtor, which is defeasible until, and becomes effectual upon, his recovery of judgment (citing cases). But the rule is otherwise in respect to property which is the subject of levy by execution, in so far that the action is no interruption to such legal remedy. And no lien is acquired in or by the action to defeat the right to make such levy until a receiver is appointed."

A creditor by the commencement of a judgment-creditor's suit in equity obtains at once a lien on all choses in action and personal property not subject to levy, and upon all equitable interests in real estate, which the judgment-debtor may have. The phrase "commencement of a judgment-creditor's suit" is here used technically, and includes all steps necessary to create a *lis pendens*—a pending suit in equity. Thus, under the old chancery practice it included, first, filing of the bill; second, issuing of subpœna, and, third, service of the subpœna, or a *bona fide* attempt to serve the same. *Boynton* v. *Rawson*, 1 Clarke Ch., 584; *Corning* v. *White*, 2 Paige, 567; *Fitch* v. *Smith*, 10 Paige, 9.

§ 276. Protection of assignee—Takes subject to liens

allowed for—Liens paid.—The assignee takes the assigned property subject to all liens and equities (Chap. XX.). The setting aside of the assignment does not disturb the validity of such liens, although it does in one instance restore a right which would otherwise have passed to creditors. When the wife of the assignor has joined in the conveyance if it is set aside as fraudulent, her dower is restored. *Wilkinson* v. *Paddock*, 64 Supm. Ct. (57 Hun), 191, 196; *Hinchliffe* v. *Shea*, 103 N. Y. 153.

If the assignee has paid off valid liens and encumbrances upon the assigned property, and the assignment is afterward set aside, he will be allowed the amount so advanced. He must account for the value of the property he has received under the assignment, but subject to valid liens. *Hamilton Nat. Bank* v. *Halsted*, 134 N. Y. 520.

The principle upon which the assignee is allowed such advances is distinguishable from that which denies to a fraudulent grantee, upon an accounting with creditors who have set aside the assignment, the consideration paid by him upon the conveyance. *Boyd* v. *Dunlap*, 1 Johns. Ch. 478; *Union Nat. Bank* v. *Warner*, 19 Supm. Ct. (12 Hun), 306; *Shand* v. *Hanley*, 71 N. Y. 319; *Davis* v. *Leopold*, 87 N. Y. 620. The consideration paid by the fraudulent grantee is not a charge upon the property. If the property is unencumbered he takes the whole and must account for the whole, but if the property is encumbered, he takes only the equity of redemption and must account only for that. If he pay off the encumbrance, creditors are still only entitled to the equity, and to give them the property free from the lien would be a sequestration of the property of the assignee to which creditors have neither legal nor equitable right. See opinion Parker, J., *Hamilton Nat. Bank* v. *Halsted*, 134 N. Y. 520, 523.

§ 277. Protection of assignee—Payments to creditors.—When a general assignment is set aside as fraudulent against creditors, the assignee will be allowed for moneys paid by him to creditors before the commencement of the action. *Wakeman* v. *Grover*, 4 Paige, 23; *Ames* v. *Blunt*, 5 Paige, 13; *Collumb* v. *Read*, 24 N. Y. 505; *Averill* v. *Loucks*, 6 Barb.

470, 477 ; *Iddings* v. *Bruen*, 4 Sandf. Ch. 417 ; *Pond* v. *Comstock*, 27 Supm. Ct. (20 Hun), 492 ; affi'd, 87 N. Y. 627.

" This is because the assignment, as between the parties to it, is valid, and the assignee in making such payments is doing no more than the assignor might at that time lawfully have done if no assignment had been made. In such case all that can be said is, if the assignment be declared void, that the assignor paid certain of his creditors indirectly and through the agency of the assignee at a time when he had the right to do it directly but for the assignment." Peckham, J., *Nat. B. & D. Bank* v. *Hubbell*, 117 N. Y. 384, 397.

The assignee will be protected in payments made to *bona fide* creditors even though he be chargeable with participation in the fraud rendering the assignment invalid. *Smith* v. *Wise*, 132 N. Y. 172 ; rev'g s. c. *sub. nom. Smith* v. *White*, 27 State R. 227 ; *Knower* v. *Cent. Nat. Bank*, 124 N. Y. 552, 563 ; affi'g s. c. *sub. nom. First Nat. Bank* v. *Central Nat. Bank*, 60 Supm. Ct. (53 Hun), 575, and even though a firm of which he is a member is endorser upon the preferred notes which are paid. But there are cases that hold that he will not be allowed payments made to himself. *Bostwick* v. *Beizer*, 10 Abb. Pr. 197 ; *Coope* v. *Bowles*, 42 Barb. 87 ; *Swift* v. *Hart*, 42 Supm. Ct. (35 Hun), 128. See *Hone* v. *Henriquez*, 13 Wend. 240. It is on the principle of the above cases that courts have declined to compel preferred creditors who have received payment of their debts from the assignee to account for the moneys so received to a creditor who subsequently brings an action in which the assignment is set aside. *Knower* v. *Cent. Nat. Bank*, 124 N. Y. 552 ; *Peyser* v. *Myers*, 135 N. Y. 599. If the payment is made by the assignee after the creditor's suit is commenced a different rule prevails under the principles of *lis pendens* heretofore considered. But the bringing of an action by one creditor before the payment will not avail another creditor whose action was not brought until after the payment. *Knower* v. *Cent. Nat. Bank*, *supra*.

When the preferred debt paid by the assignee was in excess of the amount actually due by reason of an erroneous calculation of interest, the excess having been refunded, it was held that the actual debt could not be recovered by a judgment-creditor upon

whose judgment the assignment had been declared invalid. *Peyser* v. *Myers*, 135 N. Y. 599.

§ 278. Protection of assignee—Payments made in defending the trust and in preservation of estate.—It has been seriously questioned whether, when the assignment is set aside by judgment-creditors, the assignee should, upon accounting, be allowed for his expenses in defending suits, and also whether he should be allowed expenditures made in the preservation or betterment of the estate. In *Dorney* v. *Thacher*, 83 Supm. Ct. (76 Hun), 361, it was held that the assignee, although not guilty of participation in the fraud, will be allowed counsel fees expended in defending the assignment. This case overrules *Myer* v. *Hazard*, 56 Supm. Ct. (49 Hun), 222, and *Dexter* v. *Adler*, 1 N. Y. Supp. 684. But where the assignee himself is a party to the fraud he will not be allowed for such expenditures. *Smith* v. *Wise*, 132 N. Y. 172; *Sands* v. *Codwise*, 4 Johns. 536; *Davis* v. *Leopold*, 87 N. Y. 620; *Swift* v. *Hart*, 42 Supm. Ct. (35 Hun), 128.

As to expenditures made by the assignee in keeping up the estate and in its management the assignee will be allowed such disbursements as were made in good faith and are beneficial to creditors. *Loos* v. *Wilkinson*, 113 N. Y. 485; rev'g 58 Supm. Ct. (51 Hun), 74; *Smith* v. *Wise*, 132 N. Y. 172; *Colburn* v. *Morton*, 1 Abb. Dec. 378; *Scouton* v. *Bender*, 3 How. Pr. 185.

In *Loos* v. *Wilkinson*, *supra*, the assignee was allowed payment made for taxes and assessments for interest on mortgages and for necessary repairs to real estate by a divided court for commissions paid an agent in collecting rents. He was disallowed payments for premiums of insurance on the ground that the latter in no way benefited the creditors, the policies being payable to the assignee. In *Smith* v. *Wise*, *supra*, where the assignee was implicated in the fraud, he was allowed the amount paid workmen in the factory for services performed prior to the assignment and the additional value given to the stock by working it after the assignment, so as to give the creditors the value only of the property as of the date of the assignment. He was disallowed all other disbursements.

§ 279. Protection of assignee—Commissions.—It seems to

be determined by the weight of authority in the lower courts that where an assignment has been set aside for fraud the assignee can recover no commissions and no compensation for his services, although he be altogether innocent of any knowledge of or participation in the assignor's fraud. *Dorney* v. *Thacher*, 83 Supm. Ct. (76 Hun), 361 ; *Mayer* v. *Hazard*, 56 Supm. Ct. (49 Hun), 222 ; *Dexter* v. *Adler*, 1 N. Y. Supp. 684.

In *Leavitt* v. *Yates*, 4 Edw. Ch. 134, and *Coope* v. *Bowles*, 42 Barb. 87, it was held that the assignee was not entitled to compensation where a general assignment was set aside, but in each of those cases the assignment was *void*, not voidable. (See 4 Ed. Ch. 205.)

In *Bostwick* v. *Beizer*, 10 Abb. Pr. 197, the assignee was allowed all payments made to others than himself.

In *MacDonald* v. *Moore*, 1 Abb. N. C. 53 ; *Havemeyer* v. *Loeb*, 5 Abb. N. C. 338 ; *Platt* v. *Archer*, 13 Blatchf. 351, where assignments were set aside in the United States courts in bankruptcy, the State assignees were allowed their commissions.

In re Stubbs, 4 N. B. R. 376 ; *Clark* v. *Marx*, 6 Ben. 275 ; *Burkholder* v. *Stump*, 4 N. B. R. 597, a contrary rule was applied.

In *Hunker* v. *Bing*, 9 Fed. R. 277, where the assignment was declared void, the assignee, although not allowed commissions as such, was allowed an aggregate sum as compensation for services which he had rendered and which were regarded as beneficial to the estate.

If the question can now be considered as open, the rule most consistent with what appears to be just and right is that the assignee should be paid for his services upon a *quantum meruit*, so far as they have been beneficial to the judgment-creditor. In preserving the assigned estate and converting it into money, if the services have been faithfully rendered the assignee has done that which would necessarily be done by a receiver at the expense of the estate. The receiver appointed by the decree in the creditor's suit should not be paid for services he has not rendered, and the judgment-creditor ought not to profit by such services at the expense of an innocent assignee. Moreover, the assignee's right to compensation grows out of the direction of the assignor to him to do that which without the assignment he

might lawfully do, and so far as he has in good faith performed such lawful directions, the funds in his hands are chargeable with the payment *pro tanto* of his services under the doctrine of *Nat. B. & D. Bank* v. *Hubbell*, 117 N. Y. 384, 397; *Knower* v. *Cent. Nat. Bank*, 124 N. Y. 552, 561, and *Smith* v. *Wise*, 132 N. Y. 172, 179.[1]

[1] The general rule applicable to the allowance of expenses incurred by trustees has been frequently stated.

It is expressed by Judge Duer, in *Noyes* v. *Blakeman*, 3 Sandf. 531, 543, in this language: "The law is most clearly settled, and it would be a reproach to its principles or its administration were it otherwise, that all the necessary expenses of a trustee, *that is, all expenses of every kind, which are reasonably and in good faith incurred by him, for the defence, protection, or reparation of the estate*, are to be treated in equity as a charge, in all cases," either on the income or principal of the trust estate. The principle upon which this doctrine rests, as applied to counsel fees, is thus stated by Finch, J., in *Matter of Attorney-General* v. *North American Life Insurance Co.*, 91 N. Y. 57, 61: "The principle upon which counsel fees are granted in such instances is that of a necessary disbursement, and it stands upon the same ground as any other necessary expense of the preservation of the fund. Often and usually the trustee has no interest, outside of the performance of duty. What he does is for the benefit of others whose interests are for the time being in his keeping. He owes them no duty to expend his own money for their benefit, and whatever he does so expend in the reasonable and prudent care of the trust fund is properly allowed to him as an expense. Counsel fees thus incurred to an extent approved by the court may, therefore, be allowed him, and if fixed in advance of his actual payment, they are none the less the necessary expenses of his trust."

So in *Downing* v. *Marshall*, 37 N. Y. 380, 389, it is said, as the rule at common law: "In short, the trustee, though allowed nothing for his trouble, is allowed everything for necessary expenses in executing the trust. His duties relate to the property and interests of others, and he is to be indemnified for necessary expenses in protecting such trust property, and has an equitable lien upon it for such expenses."

The opinions thus expressed are in harmony with all the adjudged cases and with the conclusions of text writers. *Sullivan* v. *Miller*, 106 N. Y. 635, 643; see *Lewin on Trusts*, Ch. XXIV., § 2 (9th ed., p. 714); *Pomeroy's Equity*, 2d ed., § 1085; *Perry on Trusts*, 4th ed., § 910.

The general rule being thus unquestioned, the inquiry is whether it includes expenses of litigations unsuccessfully undertaken or defended by the assignee without practical benefit to the estate, assuming them to have been incurred in good faith and with the prudence which an intelligent and careful man would show in his own affairs. A rule which would preclude a trustee from such allowances would certainly be a severe one. It would require of him an infallibility of judgment which we do not expect in the highest judicial tribunals where opinions are sometimes conflicting. It is suggested in

§ 280. Title of purchaser from assignee.—Though a general assignment be fraudulent as against creditors, this does not affect the title of a purchaser from the assignees, if he be not connect-

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Mayer v. *Hazard*, *supra*, that an assignee may protect himself against loss by calling upon the creditors to indemnify him before he proceeds with litigation. It is doubtful whether that is a practical protection to the assignee. Undoubtedly, after the expenditures have been incurred he would have a remedy over against the *cestui que trust* (Code, § 1916), but whether he could compel the *cestui que trust* in advance to indemnify him is not clear. *Lewin on Trusts*, Ch. XXIV., § 2 (9th ed., p. 723); *Fraser* v. *Murdoch*, L. R. 6 Appeal Cases, 855, 872. It would seem that if minors or other persons under disability were among the *cestui que trust*, the trustee could not escape liability for abandoning his trust by calling upon them for indemnity. And there are cases where the assignee has been held personally responsible to creditors for not bringing actions the result of which we could not with certainty foresee. (See *post*, Chap. XXIV.) Indeed, it is the positive duty of a trustee to defend the life of the trust whenever it is assailed, if the means of defense are known to him or can with diligence be discovered. *Cuthbert* v. *Chauvet*, 136 N. Y. 326, 332.

As between the *cestui que trust* and the trustee, there seems to be no reported case where the trustee has been held personally liable for expenses incurred in defending or prosecuting actions on behalf of the trust, because he was unsuccessful, if he was guilty of no negligence or wrong. The contrary was held in *Courtney* v. *Rumley*, 6 Irish Reports, Equity, 99; *Holford* v. *Phipps*, 4 Beav. 475; *Poole* v. *Pass*, 1 Beav. 600.

With regard to cases where the trust is set aside by creditors, the decisions are conflicting as to whether the trustee should be allowed for his expenses of defending against their attack.

Wakeman v. *Grover*, 4 Paige, 23, cited in *Mayer* v. *Hazard*, was taken to the Court of Errors, and the opinions in that court are reported in 11 Wend. 187. On the question of allowances, a divided court held that the trustee and all the parties to the suit were entitled to their costs to be paid out of the fund.

In *Goldsmith* v. *Russell*, 5 DeG. M. & G. 547, 556, upon a decree setting aside a trust at the suit of a creditor, the trustee was allowed all his costs and expenses.

And in *Travis* v. *Illingworth*, Weekly Notes, 1868, p. 206, which is an extreme case, the court held that where trustees had been invalidly appointed, but had acted *bona fide* in the trust, believing themselves to be duly appointed, they were entitled to their cost, charges and expenses as if their appointment had been valid.

In *Woods* v. *Axton*, Weekly Notes, 1866, p. 207, where an assignment for creditors was set aside at the suit of an assignee in bankruptcy, it was held that the voluntary assignee should be allowed his expenses. But in *Platt* v. *Archer*, 13 Blatchf. 351; *Smith* v. *Dresser*, L. R. 1 Eq. 651, and *Elsey* v. *Cox*, 26 Beav. 95, which were all cases in bankruptcy, the courts refused to allow the trustee his expenses of defending the suit in which the assignment was set aside.

In neither *Ames* v. *Blunt*, 5 Paige, 13, nor *Colburn* v. *Morton*, 1 Abb. Dec.

ed with the fraud, and, in fact, be a purchaser in good faith and for a valuable consideration, and without notice of the fraud. *Sheldon* v. *Stryker*, 42 Barb. 284; s. c. 27 How. Pr. 387; *Stearns* v. *Gage*, 79 N. Y. 102; s. c. 1 Am. Insol. R. 333.

378, was the precise point we are now considering discussed or passed upon.

In *Meyers* v. *Becker*, 36 Supm. Court (29 Hun), 567; affi'd, 95 N. Y. 486, such expenses were allowed without dispute, and see *Bostwick* v. *Beizer*, 10 Abb. Pr. 197; *MacDonald* v. *Moore*, 1 Abb. N. C. 53; *Havemeyer* v. *Loeb*, 5 *Id.* 338.

In *O'Conner* v. *Gifford*, 117 N. Y. 275, the cases are received that was a case where an executor sought protection for the payment of moneys for masses under a trust which was declared invalid. The question of the allowance of expenses in attempting to support where the trustee is not chargeable with knowledge of facts which render it illegal was not before the court.

This being the state of authorities, it is permissible to examine the question upon principle. The distinction between a trust which is absolutely void and one which is voidable merely must be borne in mind. In the latter case the conveyance is good as against the grantor until it is judicially declared invalid. In the case now under discussion, the person seeking to set aside the trust is not one having the legal or the equitable title to the property conveyed, but is simply a creditor seeking to collect his debt. A creditor's right in any specific property of his debtor arises at law only by levy of process; in equity by the operation of equitable remedies. In neither tribunal can the creditor take more than the debtor has at the moment of seizure, except so far as a Court of Equity makes its decree retroactive under the doctrine of *lis pendens*. If, therefore, the assignee can be charged with moneys which he has paid out before the appointment of a receiver, it must be because the judgment-creditor has acquired a lien upon such money by the commencement of his suit.

But the assignee acquires by virtue of his appointment as against the assignor an equitable charge upon the property in his hands for the repayment of all his expenses. In making disbursements to sustain the trust imposed upon him, he is at once a trustee for creditors and he is the agent of the assignor. The judgment-creditor succeeds only to the rights of the assignor as they are at the moment his attack becomes operative. He can get no more than the assignor himself is entitled to at that moment. *Nat. B. & D. Bank* v. *Hubbell*, 117 N. Y. 384, 397; *Knower* v. *Cent. Nat. Bank*, 124 N. Y. 552. The whole inquiry therefore resolves itself down to the question whether the creditor's lien created by the commencement of his action is superior to that of the assignee who has disposed of the property under the direction of the trust before the appointment of a receiver. This, at most, is not a question of legal right, but of the enforcement of equitable charges. Creditors do not stand as the legal owners of the fund in the hands of the assignee. The lien created by the commencement of a creditor's action is an equitable lien, and should be so enforced as not to work an injustice. An assignee who has accepted an apparently valid trust authorized by law, and who is ignorant of

It was decided in the early case of *Anderson* v. *Roberts*, 18 Johns. 515 ; rev'g *Roberts* v. *Anderson*, 3 Johns. Ch. 371, that the provision in the statute of fraudulent conveyances (2 R. S. 137, § 5 ; 2 Birdseye, 1237, § 23) which protects purchasers for a valuable consideration without notice applies equally to purchaser from a fraudulent grantor or from a fraudulent grantee.

Such a transfer is valid and effectual under the authority of the original proprietor, who has still the right to sell the property. *Pine* v. *Rikert*, 21 Barb. 469.

But if the assigned property were such that it might be seized and sold on an execution, it seems it might still be levied on in the hands of a purchaser from the assignees, provided he had either actual or constructive notice of the fraud at the time of the assignment. *Ames* v. *Blunt*, 5 Paige, 13.

§ 281. **Costs.**—Where an assignment is of such a suspicious character as would naturally induce a creditor to call for explanation, and an action is brought to set aside the assignment, the plaintiff will not be subjected to costs, if the relief asked for be not granted. *Cunningham* v. *Freeborn*, 11 Wend. 240.

The assignee will not be charged with costs where he is not implicated in the assignor's fraud and where he is not personally acquainted with the facts constituting the fraud. *Durant* v.

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any fraud in its creation, and who assumes toward innocent third parties the obligation to maintain the trust, has a manifest right to appeal to a court of justice for protection against loss in the performance of his duty, up to the point at least where it can be shown that he knew or had reason to know that the trust was invalid. It does not seem to be a harsh rule to require that the creditor who has possession of evidence unknown to the assignee, upon which he expects to be able to set aside the assignment, should at least proceed to the appointment of a receiver on such evidence before it should be adjudged that the assignee should be held personally responsible for the protection of the trust which he has innocently assumed.

It is to be observed, however, that the only cases in which the assignee has not been allowed such expenses are those in which the attack was made by an assignee in bankruptcy. The title of an assignee in bankruptcy to property fraudulently disposed of by the bankrupt, is in some respects different from the right of a judgment-creditor toward such property. An adjudication in bankruptcy clothes the assignee at once with the title to all the bankrupt's property, and when he removes a fraudulent incumbrance he simply frees the estate which is already his from such incumbrance. Such, however, as we have seen, is not the precise position of a judgment-creditor.

Pierson, 33 State R. 207 ; *Faxon* v. *Mason*, 83 Supm. Ct. (76 Hun), 408 ; *Webb* v. *Daggett*, 2 Barb. 9. See *Matter of Felt* v. *Bell*, 59 Supm. Ct. (52 Hun), 60.

The court may order the costs of all parties to be paid out of the funds in the hands of the assignees. *Grover* v. *Wakeman*, 11 Wend. 187, 226.

It is not usual to charge the assignee with costs, even when the assignment is fraudulent on its face, except in cases of gross abuse of his trust. *Webb* v. *Daggett*, 2 Barb. 9.

Where the assignee, in a conveyance which is impeached on the ground of fraud, instead of disclaiming, puts in an answer which requires the complainant to reply and go into proofs, and it turns out that the conveyance is fraudulent, and such assignee had direct or constructive notice of the fraud, he will be subjected to the costs of the suit. *Mead* v. *Phillips*, 1 Sandf. Ch. 83 ; see *Leavitt* v. *Yates*, 4 Edw. Ch. 134.

§ 282. **The relief granted.**—The Code of Civil Procedure provides for the judgment which is to be entered in cases in judgment-creditors' actions brought under the Code procedure, § 1873. Assignments, fraudulent as to creditors under the statute, are not void *ab initio*, but voidable only at the instance of creditors who file bills to impeach and set them aside, and when an assignment is found to be thus fraudulent, the decree generally goes no further than to adjudge it fraudulent as to the creditor who has filed the bill, and to set it aside so far as to give an opportunity of obtaining his debt and costs out of the property which was covered by it. *Davis* v. *Perrine*, 4 Edw. Ch. 62, 66 ; *Henriquez* v. *Hone*, 2 Id. 120 ; s. c., *sub. nom. Hone* v. *Henriquez*, 13 Wend. 240 ; *Wakeman* v. *Grover*, 4 Paige, 23, 42, 43 ; *Hitchcock* v. *St. John*, Hoffm. Ch. 511 ; *Scouton* v. *Bender*, 3 How. Pr. 185.

So a receiver, appointed in supplemental proceedings, who brings any action to set aside a fraudulent conveyance made by the judgment-debtor, can obtain a decree setting aside the transfer only so far as is necessary to satisfy the judgment upon which he was appointed, with the costs. *Bostwick* v. *Menck*, 40 N. Y. 383 ; see *Verplanck* v. *Van Buren*, 76 N. Y. 247.

When the property has been converted into money, the decree

may simply direct that the assignee pay the plaintiff's claim and costs out of the assigned property or its proceeds in his hands. *Lester* v. *Pollock*, 3 Robt. 691, 693. But when it may be necessary to effectuate the purpose that the property be disposed of or otherwise made available for the satisfaction of the judgment, a receiver will be appointed by the court, and he may be directed to sell and apply the proceeds to the payment of the plaintiff's debt. *Edmeston* v. *Lyde*, 1 Paige, 637.

So where an action is brought by a judgment-creditor on behalf of all other judgment-creditors as well as himself, to set aside fraudulent conveyances of the debtor's real estate, a judgment is not improper adjudging the appointment of a receiver to take a conveyance of and to sell the real estate. *Shand* v. *Hanley*, 71 N. Y. 319; *Clift* v. *Moses*, 82 Supm. Ct. (75 Hun), 517; s. c. 57 State R. 347.

And the assignee will be directed to account for the assigned property before a referee. *Produce Bank* v. *Morton*, 67 N. Y. 199; *Myers* v. *Becker*, 95 N. Y. 486; affi'g 36 Supm. Ct. (29 Hun), 567.

Where the action is framed for the purpose of setting aside the assignment, if the assignment is sustained, the assignee will not be compelled to account in that action. The creditor is not entitled to such a decree. *Cunningham* v. *Freeborn*, 11 Wend. 240; *Nicholson* v. *Leavitt*, 4 Sandf. 252, 311.

When the case is tried before a referee the referee's report stands as the decision of the court, but the referee does not select the receiver, though he adjudges that one should be appointed. The practice seems to apply to the court at special term to name the receiver. *Durant* v. *Pierson*, 33 State R. 207. The judgment also appoints a referee before whom the proper parties defendant are required to account for the assigned property which has come into their hands. *Produce Bank* v. *Morton*, 67 N. Y. 199. The proceedings on the accounting are in general regulated by the Chancery rules and follow as far as consistent the proceedings for an accounting by the assignee under the assignment.

§ 283. **Enforcement of judgment.**—The practice when the plaintiff is successful in his attack upon the assignment provides

first for a preliminary or interlocutory judgment setting aside the assignment as to the plaintiff's judgment, and appointing a receiver of the assigned property and directing the parties defendant to account for the assigned property before a referee. Upon the coming in of the referee's report final judgment may be entered directing the assignee, or in a proper case the assignor, or both, to pay over to the receiver the proceeds of the assigned property and so much thereof as remains in specie. A judgment directing the payment by the assignee to the receiver of a specific sum of money cannot be enforced by proceedings for contempt under § 2263 of the Code of Civil Procedure. Such a judgment is final and can be enforced by execution, and hence the remedy by contempt is not available (Code of Civ. Pro., § 1241). *Myers* v. *Becker*, 95 N. Y. 486; affi'g 36 Supm. Ct. (29 Hun), 567; *Matter of Hess*, 55 Supm. Ct. (48 Hun), 586. But it seems that if the decree directs the delivery to the receiver of specific property, that portion of the decree may be enforced by proceedings for contempt. *People ex rel. Borst* v. *Grant*, 47 Supm. Ct. (41 Hun), 351. In this particular the enforcement of a judgment in action to set aside the assignment differs from a decree upon a final accounting under the assignment directing a distribution by the assignee. By recent statute (Laws of 1894, chap. 134) a decree upon a final accounting directing the payment of money may be enforced by proceedings to punish the assignee for a contempt of court. See *Ross* v. *Butler*, 64 Supm. Ct. (57 Hun), 110.

CHAPTER XVI.

AMENDMENT, REFORMATION AND REVOCATION OF ASSIGNMENTS.

§ 284. **Alteration by assignor.**—The general principle in reference to all contracts is, that having been once made they are not subject to alteration or revocation, except by the consent of all parties or by a decree of a competent court of equity on the ground of mistake. This principle is applicable to general assignments. After the execution and delivery of the instrument, the assignor has no power to alter, amend or vary its terms or provisions. *Sheldon* v. *Smith*, 28 Barb. 593; *Porter* v. *Williams*, 9 N. Y. 142; *Metcalf* v. *Van Brunt*, 37 Barb. 621; *Messonnier* v. *Kauman*, 3 Johns. Ch. 3; *Bell* v. *Holford*, 1 Duer, 58.

The court has no power under the statute to amend the assignment, although the schedules may be amended. *Matter of Wilson*, 1 Mon. L. B. 5.

But this principle applies only to instruments which have become perfected and completed instruments, although voidable at the election of creditors, and not to such as are wholly void. Thus an assignment which has not been properly acknowledged is wholly invalid under the statute (see *ante*, § 149). A subsequent acknowledgment, therefore, does not vary the instrument, but simply gives it a legal inception. So where an assignment was held void because the inventory and schedules were not filed within the time limited in the statute (the rule is now otherwise), it was held, that inasmuch as the assignment was insufficient to convey any title to the assignee, a subsequent conveyance by the assignor was good. *Juliand* v. *Rathbone*, 39 N. Y. 369.

Where the assignment is sufficient to convey a title to the assignee, although voidable as to creditors, the rule is different.

Thus, in the case of *Sheldon* v. *Smith* (*supra*), it was held that he effect of an assignment could not be varied by the execution

of a note after the assignment, dating it back to a day prior to the assignment, for the purpose of having the note embraced in the schedule of debts preferred in the assignment. Nor can a defect in an assignment be cured, after creditors have acquired a lien by the subsequent execution of an instrument designed to remedy the evil. Thus, where an assignment was fraudulent and void because containing a direction to the assignee to sell on credit, and after the institution of supplemental proceedings by creditors, the assignor executed another instrument, reciting the previous assignment and directing the assignees to sell for cash only, it was held that the assignors had no power to revoke or alter the previous assignment, at all events not to the prejudice of a creditor whose lien on the property had attached by the institution of supplementary proceedings. *Porter* v. *Williams*, 9 N. Y. 142. The doctrine of this case has been approved, although the point was said to be not necessarily involved in the case. See *Gates* v. *Andrews*, 37 N. Y. 657.

In *Whitcomb* v. *Fowle* (7 Abb. N. C. 295), where, after executing an assignment which preferred a special partner, and after an action had been brought by a creditor to have the assignment declared void, the assignee re-assigned the property to the assignors, who thereupon executed an assignment for the equal benefit of their creditors, it was held that such revocation in no way prejudiced or impaired the rights of the attacking creditors.

In *Hone* v. *Woolsey* (2 Edw. Ch. 289), where the original assignment was constructively fraudulent on its face, the assignees, before any lien of creditors had accrued, released and reconveyed to the assignors all the property embraced in the assignment, and a new assignment was executed by the assignors, free from the objectionable conditions contained in the former. The vice-chancellor was of opinion, that since the first assignment was voidable and not void, it was capable of confirmation, and that the re-assignment and second conveyance transferred the property to the assignees divested of the objectionable features in the first assignment. The decision is rested upon the ground that creditors had not accepted the first deed, nor had their rights attached under it. This case was followed and approved by the chancellor in *Mills* v. *Argall*, 6 Paige, 577.

Upon strict principles of law it is difficult to see how these de-

cisions can be sustained. The first conveyance in each case was sufficient to convey a title good as against the assignor, upon the conditions contained in the assignment. The assignee, having accepted the trust, had but one duty to perform, and that was to carry out the provisions of the instrument. A re-conveyance by him to the assignor was in direct subversion of the duties he had assumed, and in violation of the trust; that it was made with the ulterior object and expectation of receiving back a better conveyance from the assignor, did not make it any the less a violation of duty. Such a conveyance, in contravention of the trust, is, under the statute (1 R. S. 730, § 65), absolutely void. And see *Briggs* v. *Davis*, 21 N. Y. 574; *Movan* v. *Hays*, 1 Johns. Ch. 339.

In *Whitcomb* v. *Fowle* (*supra*), it is said that these cases establish the principle that, as between the parties to it, the assignment is binding and revocable at their pleasure. But no case goes to the extent of holding that such a revocation could in any way impair the rights of creditors.

When the assignment is void, and is therefore inoperative, as where a limited copartnership executes an assignment with preference which by statute is declared void (1 R. S. 766, §§ 20, 21), no title passes, and a subsequent valid assignment may be made by the assignors. *Nat. Bank of Troy* v. *Scriven*, 70 Supm. Ct. (63 Hun), 375. In *Schwartz* v. *Soutter*, 103 N. Y. 683; affi'g 48 Supm. Ct. (41 Hun), 323, it was held that the assignment was void because the statute was not complied with respecting the written assent of the assignee to the assignment, and that the subsequent assignment was valid.

In *Sutherland* v. *Bradner*, 116 N. Y. 410; affi'g 46 Supm. Ct. (39 Hun), 134, where the assignment directed the assignee, after payment of certain preferences, to return the assigned property to the assignors, and the assignors subsequently executed another assignment which directed the distribution of the surplus among the general creditors, it was held that the first assignment was good between the parties, that the assignor had nothing therefore that he could convey under the second assignment, nor was it competent for the court to correct the first assignment on the ground of mutual mistake, so as to prejudice the subsequently acquired rights of creditors. *Warner* v. *Jaffray*, 96 N. Y. 248, 255.

An assignment for creditors by a firm not executed in conformity to law, in that it was not acknowledged by the assignors, and that the assignee's acceptance was not acknowledged by him, does not work a dissolution of the firm so as to render ineffectual a subsequent assignment. *Smedley* v. *Smith*, 15 Daly, 421.

§ 285. **Revocation of the assignment.**—Nor can the assignment be revoked by the act of the assignor without the concurrence of all the parties to the instrument. In England, where a different rule prevails in reference to the implied assent of creditors to a deed of assignment, it has been held that such instruments are revocable by the grantor, until there has been actual acceptance by creditors, or acts tantamount to an acceptance. *Garrard* v. *Lauderdale*, 3 Sim. 1 ; *Page* v. *Broom*, 4 Russ. 6 ; *Acton* v. *Woodgate*, 2 M. & K. 492 ; *Griffith* v. *Ricketts*, 7 Hare, 299 ; *Smith* v. *Hurst*, 10 Hare, 30 ; s. c. 15 Eng. L. & Eq. 520 ; *Law* v. *Bagwell*, 4 Dr. & War. 398 ; *Browne* v. *Cavendish*, 1 Jones & LaT., 606 ; *Gibbs* v. *Glamis*, 11 Sim. 584 ; *Ravenshaw* v. *Hollier*, 7 Sim. 3 ; *Simmonds* v. *Palles*, 2 Jones & LaT. 489 ; *Walwyn* v. *Coutts*, 3 Sim. 14.

But in this country, as we have seen (*ante*, § 108), the rule is otherwise.

§ 286. **Reformation of assignment.**—In *Van Winkle* v. *Armstrong*, 41 N. J. Eq. 402 ; s. c. 4 Cent. R. 53, suit was brought to rectify an assignment made in New York, so as to insert words of inheritance under which real estate in New Jersey would pass.

Where the assignment contains a mere clerical error, but the true meaning and intent cannot be doubted, the court must give effect to the instrument according to its true intent. In such a case it is not necessary that there should be a reformation of the instrument decreed. *Smith* v. *Bellows*, 3 State R. 305.

CHAPTER XVII.

FOREIGN AND DOMESTIC ASSIGNMENTS.

§ 287. **In general.**—An assignment executed within this State may include lands or chattels, real or personal, situated in another State, and in like manner, assignments executed elsewhere may embrace various classes of property within this State. The question at once arises, by what law are these transfers to be governed. The assignment may be made in one State, the property assigned may be situated in another, the litigation may arise in one or the other of these States or in a third State, and the parties may have their domicile in still a different State. The inquiry therefore is whether the law of the place where the assignment is made, or of that where the property is situated, or of that where the litigation arises, or of that where the one or the other of the parties has his domicile, is to control. These systems of law are denominated the *lex loci contractus*, the *lex rei sitæ*, the *lex fori*, and the *lex domicilii*. Much learning and great research have been applied to the elucidation and determination of the law governing the general principles of jurisprudence upon which the questions thus presented depend. The purpose of this chapter is to present an outline of the judicial decisions in this country, which control the courts in determining the questions presented to them for adjudication upon questions of foreign and domestic assignment. In the first place, it is to be observed that the laws of a State can have, of their own vigor, no extra-territorial effect. So far as the laws of any State are regarded, outside of the jurisdiction of that State, it is simply by force of international or inter-State comity. This comity is not extended to all kinds of transfers, nor to transfers of all species of property. For the present purpose it is necessary at the outset to observe the distinction between bankrupt assignments which are the result of statutory proceedings, and voluntary assignments which rest on the consent of parties.

§ 288. Bankrupt assignments.—With regard to transfers under foreign bankrupt and insolvent law, there is in this country little, if any, conflict of authority. It appears to be settled law that a conveyance by operation of proceedings under foreign bankrupt and insolvent laws, cannot affect property outside of the State or country in which the law is enacted. Story on Conf. of Laws, §§ 410, 411; *Hibernia Nat. Bank* v. *Lacombe*, 28 Supm. Ct. (21 Hun), 166; affi'd, 84 N. Y. 367. See *Cole* v. *Cunningham*, 133 U. S. 107, 129. This principle has been most frequently applied in contests between assignees claiming under a foreign bankrupt assignment and resident creditors claiming under attachment proceedings, and in such cases it has been held in this State, and in most, if not all of the United States, that the title acquired under the foreign bankrupt or insolvent proceedings, will not prevail against the rights of attaching creditors where the property is situated. *Harrison* v. *Sterry*, 5 Cranch, 289; *Ogden* v. *Saunders*, 12 Wheat. 213; *Plestoro* v. *Abraham*, 1 Paige, 236; *Holmes* v. *Remsen*, 20 Johns. 229; *Hoyt* v. *Thompson*, 5 N. Y. 320; *Hoyt* v. *Thompson's Ex'r*, 19 N. Y. 207, 226; *Kelly* v. *Crapo*, 45 N. Y. 86; rev'd, 16 Wall. 610; *Hibernia Nat. Bk.* v. *Lacombe*, 84 N. Y. 367, 385; *Osborn* v. *Adams*, 18 Pick. 245, 246; *Felch* v. *Bugbee*, 48 Me. 9; *Rhawn* v. *Pearce*, 110 Ill. 350; *Smith's Appeal*, 104 Pa. St. 381; *Weider* v. *Maddox*, 66 Tex. 372; *Walters* v. *Whitlock*, 9 Fla. 86; *Catlin* v. *Wilcox Silver Plate Co.*, 123 Ind. 477; 2 Kent's Com. 405, 408.

Whatever be the true ground of the rule, it is now to be regarded as definitely settled. See the reason of the rule stated in *Coflin* v. *Kelling*, 83 Ky. 649, 653. Elaborate discussions of the subject will be found in the cases above cited, and especially in the leading cases of *Blake* v. *Williams*, 6 Pick. 286; *Holmes* v. *Remsen*, 4 Johns. Ch. 460; s. c. 20 Johns. 229; *Milne* v. *Moreton*, 6 Binn. (Pa.) 353; and in Story on Conf. of Laws, § 410, *et seq.* So far has the rule been extended as to permit even a resident of a foreign State to obtain an attachment which will be good as against a subsequent bankrupt assignment in his own State. *South Boston Iron Co.* v. *Boston Locomotive Works*, 51 Me. 585; see *Johnson* v. *Hunt*, 23 Wend. 87; *Hibernia Nat. Bank* v. *Lacombe*, 28 Supm. Ct. (21 Hun), 166;

affi'd, 84 N. Y. 367; see *Warner* v. *Jaffray*, 37 Supm. Ct. (30 Hun), 326; affi'd, 96 N. Y. 248.

In *Barth* v. *Backus* (140 N. Y. 230) is found the latest enunciation of the principle; and in *Vanderpoel* v. *Gorman* (Id. 563, 568) the Court of Appeals stated that it refused to recognize the validity of the assignment in *Barth* v. *Backus* because it was not the voluntary act of the debtor, but drew all its virtue from the law of Wisconsin, which was in effect a bankrupt law. See *Reynolds* v. *Adden*, 136 U. S. 348, 355; *Paine* v. *Lester*, 44 Conn. 196, 203.

In *Barth* v. *Backus*, *supra*, it is said that the cases in this State since *Holmes* v. *Remsen* (4 Johns. Ch. 460), in which the chancellor sought to maintain the English doctrine on the subject, have uniformly sustained the rights of domestic-attaching creditors against a title under a prior statutory assignment in another State or country, the several States of the Union being treated for this purpose as foreign to each other.

The fact that the conveyance made in the course of such foreign bankrupt or insolvent proceedings is executed by the debtor himself, and not by an officer of the court, is not significant, if in point of fact it is merely ancillary to the legal proceedings. *Hutcheson* v. *Peshine*, 16 N. J. Eq. 167; *Holmes* v. *Remsen*, 20 Johns. 229, 254; *Dunlap* v. *Rogers*, 47 N. H. 281; *Paine* v. *Lester*, 44 Conn. 196; *May* v. *Wannemacher*, 111 Mass. 202; see article in Am. Law Review, vol. xv., pp. 251, 259.

In *Matter of Accounting of Waite*, 99 N. Y. 433, 448, overruling *Mosselman* v. *Caen*, 34 Barb. 66; s. c. 4 T. & C. 171; and reviewing *Abraham* v. *Plestoro* (3 Wend. 538), *Willitts* v. *Waite* (25 N. Y. 577), *Johnson* v. *Hunt* (23 Wend. 87), and *Raymond* v. *Johnson* (11 Johns. 488), the court deduces the following rules: "(1) The statutes of foreign States can in no case have any force or effect in this State *ex proprio vigore*, and hence the statutory title of foreign assignees in bankruptcy can have no recognition here solely by virtue of the foreign statute. (2) But the comity of nations, which Judge Denio, in *Petersen* v. *Chemical Bank* (32 N. Y. 21), said is part of the common law, allows a certain effect here to titles derived under, and powers created by the laws of other countries, and from such comity the titles of foreign statutory assignees are

recognized and enforced here, when they can be, without injustice to our own citizens, and without prejudice to the rights of creditors pursuing their remedies here under our statutes; provided, also, that such titles are not in conflict with the laws or the public policy of our State. (3) Such foreign assignees can appear, and, subject to the conditions above mentioned, maintain suits in our courts against debtors of the bankrupt whom they represent, and against others who have interfered with, or withheld the property of the bankrupt."

In *Phelps* v. *Borland*, 103 N. Y. 406, it was held that a foreign discharge in bankruptcy is not a defense to an action brought here upon a debt or obligation of the bankrupt by a citizen who was not a party to and did not appear in the bankruptcy proceedings, although such debt or obligation was contracted under the law of the jurisdiction of the bankruptcy court, and was to be there paid.

A note to this case, with a collection of authorities, will be found in 5 Cent. R. 424.

The statute of Minnesota provides for the making of assignments which shall operate for the benefit of such creditors only as shall file releases of their debts. This act was declared not to be unconstitutional as to debts contracted after its passage, and it was also held in effect that this was not an insolvent law. *Denny* v. *Bennett*, 128 U. S. 489.

In New Jersey it is provided by statute that creditors who come in and share under an assignment are barred from subsequently maintaining actions against the debtor upon their claims. This statute was before the court in *Boese* v. *King*, 78 N. Y. 471; affi'd 108 U. S. 379, where it was held that this provision was in the nature of an insolvent law, and was suspended by the existence of a national bankrupt law.

§ 289. **Right of foreign bankrupt assignee to sue.**—It was formerly held in this State that under general principles of comity, assignees of a foreign bankrupt were entitled to sue for and recover debts due to the bankrupt within this State, except when the claim of the assignees came into conflict with creditors in this State claiming under attachments against the bankrupt's property. *Bird* v. *Pierpont*, 1 Johns. 118; *Bird* v. *Caritat*, 2 Id.

342 ; *Holmes* v. *Remsen*, 4 Johns. Ch. 460 ; s. c. 20 Johns. 229, 267. The assignee sued as the representative of the bankrupt. After the case of *Abraham* v. *Plestoro* (3 Wend. 538), this doctrine was doubted if not denied. *Johnson* v. *Hunt*, 23 Wend. 87, 91 ; *Raymond* v. *Johnson*, 11 Johns. 488 ; *Mosselman* v. *Caen*, 34 Barb. 66 ; *Hoyt* v. *Thompson*, 5 N. Y. 320, 351 ; *Willitts* v. *Waite*, 25 N. Y. 577 ; s. c. 13 How. Pr. 34 ; see the cases collected and discussed by Barrett, J., in *Hibernia Nat. Bank* v. *Lacombe* (84 N. Y. 367). Though Shipman, J., in *Hunt* v. *Jackson* (5 Blatchf. 349), expressed the opinion that these decisions do not go to the extent of prohibiting assignees, under foreign bankrupt laws, from suing in the courts of this State. See *Hooper* v. *Tuckerman*, 3 Sandf. 311.

In *Matter of Waite*, 99 N. Y. 433, the question of the right of a foreign bankruptcy assignee to appear in our courts was fully discussed on the authorities, and the conclusion was reached that neither *Abraham* v. *Plestoro*, 3 Wend. 538, nor *Johnson* v. *Hunt*, 23 Wend. 87, 91, had directly passed upon the question. The case of *Mosselman* v. *Caen*, 34 Barb. 66 ; s. c. 4 T. & C. 171, was overruled, and the conclusion was reached which is stated in the third proposition cited in the preceding section.

In *Bank* v. *McLeod* (38 Ohio St. 174) is an elaborate discussion of the right of a receiver appointed in Kentucky to sue in the courts of Ohio, and such right was recognized and upheld through the county, no Ohio creditor making any claim and no policy of Ohio being contravened. The attaching creditor in this case was a citizen of Kentucky. In *Rhawn* v. *Pearce* (110 Ill. 350) a different result was reached, the court holding that foreign trustees in insolvency appointed by a court in Pennsylvania, pursuant to statutory enactment of that State, could not enforce their claim to property in Illinois even as against an attaching creditor resident in Pennsylvania.

§ **290. Voluntary assignments.**—Voluntary assignments stand upon entirely different principles from involuntary bankrupt or insolvent assignments. *Hoyt* v. *Thompson*, 5 N. Y. 320, 352.

The latter are compulsory, and operate *in invitum ;* the former are the voluntary act of the assignor, and have such force and

effect as is given in law to all contracts. Story on Confl. of Laws, 8th ed. § 411. "It is therefore admitted," says Justice Story, in the section cited, "that a voluntary assignment by a party, according to the law of his domicile, will pass his personal estate, whatever may be its locality, abroad as well as at home." But this statement is greatly qualified by the learned writer cited, and, as we shall see, is sustained by the authorities only to a limited extent.[1] A distinction is to be taken at the outset as to conveyances of real as distinguished from conveyances of personal property.

§ 291. **Real estate.**—It is said by Mr. Justice Duer, in *Nicholson* v. *Leavitt* (4 Sandf. 252, 276), that, "If it is possible to state any legal proposition or maxim that has never been the subject of dispute or doubt, but which is proclaimed and established by the unbroken and unvarying harmony of the decisions in England and the United States, it is, that the validity of every disposition of lands, whether the disposition be absolute or qualified, whether it passes an estate or merely imposes a charge, depends exclusively upon the municipal law of the country or State in which the lands are situate. (Citing Story's Confl. of Laws, § 428.) It is of no consequence where the instrument containing the disposition is made or delivered, nor where the parties reside, since in all cases it is neither the '*lex loci contractus* nor the *lex domicilii*, but solely the *lex loci rei sitæ*' that governs the construction; and so universal is the rule, that neither in the law of England nor in our own (although it seems to be otherwise in some foreign countries) has a solitary exception ever been admitted."

In support of a rule which can be stated thus absolutely and without qualification, it will be necessary to refer only to a few of the principal authorities. *Bonati* v. *Welsch*, 24 N. Y. 157; *Slatter* v. *Carroll*, 2 Sandf. Ch. 573; *Hutcheson* v. *Peshine*, 16 N. J. Eq. 167; *McGoon* v. *Scales*, 9 Wall. 23; *Osborn* v. *Adams*, 18 Pick. 245; *Loving* v. *Pairo*, 10 Iowa, 282; *King* v. *Glass*, 73 Iowa, 205; *Lucas* v. *Tucker*, 17 Ind. 41; *Heyer* v.

[1] See note on the effect to be given to foreign voluntary assignments. *Askew* v. *La Cygne Ex. Bk.* (83 Mo. 366), 24 Am. L. Reg. 403.

Alexander, 108 Ill. 385 ; *Rodgers* v. *Allen*, 3 Ohio, 488 ; *Nelson* v. *Bridport*, 8 Beav. 547 ; *Brodie* v. *Barry*, 2 Ves. & B. 127, 131 ; *Curtis* v. *Hutton*, 14 Ves. 537 ; *Birtwhistle* v. *Vardill*, 9 Bligh, N. R. 32 ; *Harrison* v. *Harrison*, 42 L. J. Chan. 495.

But while this rule is admitted in its full force, it does not follow that because an assignment executed in this State covers real property situated in another State, that therefore it cannot be assailed here on the ground that the instrument was in fraud of citizens here, or that it was obtained fraudulently from the grantor. *D'Ivernois* v. *Leavitt*, 23 Barb. 63, 80 ; see *Nicholson* v. *Leavitt*, 4 Sandf. 252, 276, 277.

An apparent if not a real exception to the rule so broadly stated by Justice Duer is to be found in the case of *Thurston* v. *Rosenfield*, 42 Mo. 474. In that case the assignment was executed in New York, covering real estate situated in Missouri. The assignment was good in New York but bad under the Missouri law, although executed and acknowledged in compliance with that law. It was held in Missouri that the assignment was good as against an execution creditor who was a resident of the State of New York.

There is no distinction between general assignment and other conveyances of real property. If the assignment or ancillary instruments are sufficient to pass title, the conveyance will be sustained with like effect as though it had been made for any other purpose.

§ 292. The remedy is governed by the forum.—Another proposition which is well established, and which helps to clear the general subject of some perplexity, is that with regard to the remedies, the methods of procedure, all the machinery of the law—the place of trial governs. *Lodge* v. *Phelps*, 1 Johns. Cas. 139 ; *Ruggles* v. *Keeler*, 3 Johns. 263 ; *Scoville* v. *Canfield*, 14 Johns. 338 ; *Andrews* v. *Herriot*, 4 Cow. 508, and note ; *Speed* v. *May*, 17 Penn. St. 91 ; *Jones* v. *Taylor*, 30 Vt. 42, 48 ; *Harrison* v. *Sterry*, 5 Cranch, 289 ; *Smith* v. *Atwood*, 3 McLean, 545.

§ 293. Voluntary assignments of tangible personal prop-

erty—General rule.—It is with reference to corporeal personal property that the greatest conflict of opinion exists, as to whether it is to be governed by the law of the place where it is situated or by the law of the place of the contract of transfer. Speaking of personal property, Mr. Justice Story says (Story on Confl. of Laws, 8th ed., § 383): "That the laws of the owner's domicile should in all cases determine the validity of every transfer, alienation or disposition made by the owner, whether it be *inter vivos* or be *post mortem*. And this is regularly true, unless there is some positive or customary law of the country where they are situate, providing for special cases (as is sometimes done), or from the nature of the particular property, it has a necessarily implied locality."

Dr. Wharton, in his work on Conflict of Laws, while admitting that until recently the view expressed by Justice Story was the prevailing one, insists that the rule has of late undergone a change, and he undertakes to formulate the true proposition in reference to what is commonly known as personal property, as follows: "Movables, when not massed for the purposes of succession or marriage transfer, and when not in transit, or following the owner's person, are governed by the *lex situs*," except so far as the parties interested may select some other law. Wharton on Confl. of Laws, 2d ed., § 311.

It may safely be asserted, however, that the decisions of the courts in this country have been quite uniformly based upon the rule as stated by Judge Story, and the conflict of authority, in so far as it exists, arises from a want of uniformity in the application of the exception stated.

Now, as to foreign voluntary assignments which do not conflict with the law of the place where the personal property is situated, it is in most States freely admitted that such conveyances operate to transfer the title to the assignee as against process in favor of resident creditors. *Kelstadt* v. *Reilly*, 55 How. Pr. 373, Van Brunt, J.; *Moore* v. *Willett*, 35 Barb. 663; *Caskie* v. *Webster*, 2 Wall. Jr. 131; *Speed* v. *May*, 17 Penn. St. 91; *Law* v. *Mills*, 18 Penn. St. 185; *Bholen* v. *Cleveland*, 5 Mason, 174; *Hoyt* v. *Thompson's Ex'r*, 19 N. Y. 207; *Parsons* v. *Lyman*, 20 N. Y. 103; *Greene* v. *Mowry*, 2 Bailey (S. C.) Law, 163; *Smith* v. *Chicago & N. W. Ry. Co.* 23 Wis. 267; *Forbes* v. *Scannell*, 13 Cal. 242; *Van Wyck* v. *Read*, 43 Fed. Rep. 716; *Sortwel* v.

Jewett, 9 Ohio, 180; *Smith's Appeal*, 104 Pa. St. 381; s. c. 117 Pa. St. 30; *Cook* v. *Van Horn*, 81 Wis. 291; *First National Bank* v. *Walker*, 61 Conn. 154; *Bank of the Valley* v. *Gettinger*, 3 W. Va. 309; *Gregg* v. *Sloan*, 76 Va. 497; *Miller* v. *Kernaghan*, 56 Ga. 155; *Walters* v. *Whitlock*, 9 Fla. 86; *Russell* v. *Tunno*, 11 Rich. Law. (S. C.), 303; *Weider* v. *Maddox*, 66 Tex. 372, 379. But this rule will not apply where the assignment is defective in any particular declared to be *essential* by the law of the State where the property is situated, or where that law makes some act, recording, for instance, a *condition precedent* to the validity of the assignment. The lack of assent of the creditors, as required in Massachusetts, is an illustration of the former exception, and lack of actual notice of the assignment and failure to record, as required in Pennsylvania, of the latter. See *Faulkner* v. *Hyman*, 142 Mass. 53; *Steel* v. *Goodwin*, 113 Pa. St. 288; *Bacon* v. *Horne*, 123 Pa. St. 452.

There is a class of cases which disclaim the enforcement of the foreign voluntary assignment on any ground of comity, but uphold it upon the ground that it not only does not conflict with the law of the *situs*, but conforms thereto as well as to that of the domicile or *lex loci contractus*. The following are illustrations: *Train* v. *Kendall*, 137 Mass. 366; *Askew* v. *La Cygne Exch. Bank*, 83 Mo. 366; *Palmer* v. *Mason*, 42 Mich. 146, 152–153; *Walters* v. *Whitlock*, 9 Fla. 86.

There are decisions in Maine and Massachusetts which seem to place foreign voluntary assignments upon the same basis with foreign bankrupt assignments. *Ingraham* v. *Geyer*, 13 Mass. 146; *Fox* v. *Adams*, 5 Greenl. (Me.) 245; see also *Borden* v. *Sumner*, 4 Pick. 265; *Blake* v. *Williams*, 6 Id. 286; *Fall River Iron Works Co.* v. *Croade*, 15 Id. 11; 2 Kent's Com. 407; *Pierce* v. *O'Brien*, 129 Mass. 314.

Generally courts which have refused to give effect to foreign assignments, valid where made, have placed their decisions upon the ground that such assignments were repugnant to some statutory or customary law of the State where they were sought to be enforced. It becomes important, therefore, to consider what is meant by the exception which prescribes that the principle of comity yields when the laws and policy of the State where the property is located has prescribed a different rule of transfer from that of the State where the owner lives.

§ 294. Assignments which contravene the law of the situs.—The exception to the law of transfer of personal property, if it be an exception, to wit, that a transfer, valid where made, will not operate upon personal property situated in a foreign State where the transfer is repugnant to the laws of that State, is the more difficult of clear apprehension, because it has been expressed in such various forms of language. Thus Chancellor Kent (2 Kent's Com. 454) says: "The necessary intercourse of mankind requires that the acts of parties, valid where made, should be recognized in other countries, *provided they be not contrary to good morals, nor repugnant to the policy and positive institutions of the State.*"

Judge Redfield, in *Hanford* v. *Paine* (32 Vt. 442, 456), says: "In regard to general voluntary assignments for the benefit of creditors, it seems to be an admitted rule, that if valid, according to the laws of the place of the domicile of the assignor, they will have the effect to pass all the personal property of the assignor, wherever situated, unless their operation is limited or restrained by some local law or policy of the State where the same is situated."

Speaking of the same rule of law, but in the case of a different class of transfers, Mr. Justice Walker says, in *Mumford* v. *Canty* (50 Ill. 370, 375): "This rule" (the enforcement of foreign contracts) "is, however, never adopted when it would contravene our criminal laws, or would sanction vice and immorality, *or is against a positive prohibition of law.*"

And in *Guillander* v. *Howell* (35 N. Y. 657, 659), Mr. Justice Peckham says: "What is injurious to the rights of the citizens where the property is situate should be the subject of positive legislation, and not left to the discretion of the courts;" citing Story on Conf. of Laws, § 390.

In *Edgerly* v. *Bush*, 81 N. Y. 199, 203, citing *Green* v. *Van Buskirk*, 7 Wall. 139, Folger, Ch. J., states the rule thus: "Though a transfer of personal property, valid by the law of the domicile, is valid everywhere as a general principle, there is to be excepted that territory in which it is situated and where a different law has been set up, when it is necessary for the purpose of justice that the actual *situs* of the thing be examined." See *Howard Nat. Bank* v. *King*, 1 Am. Insol. R. 461.

It will be seen from these citations, that the instances in which a judicial tribunal may refuse to regard a transfer of personal property made elsewhere as being repugnant to the laws or policy of the place where the property is situated, are not clearly defined.

The decisions of different States of the Union are not in harmony as to what constitutes repugnancy to the law or policy of the *situs*, some holding that mere nonconformity to local statutes is such repugnancy ; others that the transfer must work injury to citizens of the State where the property is situated ; and still others that there must be some rule of natural equity or good morals ignored in order to constitute repugnancy. In some cases the application of the local statute is limited to assignments within the State making it, and it has been said that the policy of the State where the property is situated either favoring or discouraging such transfers affects the question.

§ 295. **Contravention of the law of the situs—Attachment proceedings.**—As against attachment proceedings by domestic creditors, the general rule is that the validity of the transfer must be determined by the law of the State where the property is situated rather than by that of the jurisdiction where the owner lives or where the transfer was made. *Guillander* v. *Howell*, 35 N. Y. 657 ; *Green* v. *Van Buskirk*, 5 Wall. 307, 312 ; *Keller* v. *Paine*, 107 N. Y. 83 ; *Hallgarten* v. *Oldham*, 135 Mass. 1 ; *O'Neil* v. *Nagle*, 15 State R. 358. Mr. Justice Holmes states the rule on *Hallgarten* v. *Oldham*, *supra*, as follows : " When a sale, mortgage, or pledge of goods within the jurisdiction of a certain State is made elsewhere, it is not only competent, but reasonable, for the State which has the goods within its power to require them to be dealt with in the same way as would be necessary in a domestic transaction, in order to pass a title which it will recognize as against domestic creditors of the vendor or pledgor."

In *Guillander* v. *Howell* (35 N. Y. 657 ; s. c. 6 Am. Law Reg. [N. S.] 522 ; see note, p. 527), where an assignment was made in New York, containing preferences, and the assignors had certain personal property in New Jersey covered by the assignment, which property was attached by the defendants, who were creditors residing in New Jersey, and sold in satisfaction of

their claims, in an action brought in this State against the defendants for the detention and conversion of the property, it having been shown that an assignment giving preferences was void in New Jersey by the laws of that State, it was held that the assignment was ineffectual to convey the personal property situated in New Jersey, although valid under the laws of this State.

The case of *Van Buskirk* v. *Warren* (34 Barb. 457 ; s. c. 13 Abb. Pr. 145 ; affi'd, 2 Keyes, 119 ; 4 Abb. Dec. 457 ; rev'd on appeal to U. S. Supm. Ct. as *Green* v. *Van Buskirk*, 5 Wall. 307 ; 7 Wall. 139 ; s. c. 38 How. Pr. 52), which went through all the courts, is an important and instructive case. The facts were as follows : One Bates, who lived at Troy, New York, and owned certain iron safes in Chicago, Ill., in order to secure an existing indebtedness to Van Buskirk and others, executed and delivered, in the State of New York, a chattel mortgage on the safes. Two days after this, Green, also a creditor of Bates, sued out of the proper court of Illinois a writ of attachment, caused it to be levied on the safes, got judgment in the attachment suit, and had the safes sold in satisfaction of his debt. At the time of the levy of the attachment the mortgage had not been recorded in Illinois, nor had the attaching creditor notice of its existence. The mortgagees subsequently sued Green in New York for taking and converting the safes. He defended the taking and conversion under the Illinois attachment proceedings, but judgment was nevertheless rendered against him in the lower court, which was affirmed on appeal to the Court of Appeals, but reversed in the Supreme Court of the United States. The decisions of the State courts were placed upon the ground that all the parties to the transaction being residents of the State of New York, the transfer was to be governed by the law of the owner's domicile, and that therefore Bates, at the time of the attachment, had no property in the safes upon which the suit could operate, and no title could be acquired under it. It should be observed that under the Illinois statute, mortgages on personal property have no validity against the rights and interests of third persons without being acknowledged and recorded, unless the property be delivered to and remain with the mortgagee.

The Supreme Court of the United States affirmed its jurisdic-

tion (5 Wall. 307), to entertain an appeal under the constitutional provision that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and considering the question upon its merits, decided that the law of the State of Illinois having been shown to be such that no title to the personal property passed under the mortgage as against creditors by reason of the want of delivery of the property, and that the lien of the attachment proceedings was therefore valid, the full faith and credit required by the constitution to be given to the judicial proceedings of other States required the New York courts to respect the title of the attachment creditor in Illinois. Speaking of the ground on which the decision in the State court was placed, Mr. Justice Davis makes use of the following observations (7 Wall. 139, 150): "The theory of the case is, that the voluntary transfer of personal property is to be governed everywhere by the law of the owner's domicile, and this theory proceeds on the fiction of law that the domicile of the owner draws to it the personal estate which he owns, wherever it may happen to be located. But this fiction is by no means of universal application, and as Judge Story says, 'yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined.'" He adds, "We do not propose to discuss the question how far the transfer of personal property lawful in the owner's domicile will be respected in the courts of the country where the property is located and a different rule of transfer prevails. It is a vexed question, on which learned courts have differed; but, after all, there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed. And this principle of comity always yields when the laws and policy of the State where the property is located has prescribed a different rule of transfer with that of the State where the owner lives." See *Hervey* v. *Rhode Island Loco. Works*, 93 U. S. 664, 671, 672.

In *Warner* v. *Jaffray*, 96 N. Y. 248, an assignment was made by debtors in this State who owned personal property situated in Pennsylvania. The statute of that State provides that assignments shall be recorded, and that a *bona fide* purchaser, mortgagee, or creditor shall not be prejudiced by the assignment until recorded. Creditors obtained attachments on the personal prop-

erty in Pennsylvania, and an action was brought by the assignee against such creditors to restrain the prosecution of their suits. It was held that the property of the debtors in Pennsylvania was liable to attachment notwithstanding the assignment in this State, and that the courts of this State are bound to respect the lien of the attachment and to give full faith and credit to the judicial proceedings in which the attachments were obtained.

In this State an assignment effectual to transfer the title to personal property, where it is made and not repugnant to our statutes or policy, will be sustained as against proceedings by attachments instituted by our own citizens (*Nassau Bank* v. *Yandes*, 51 Supm. Ct. [44 Hun], 55; affi'g s. c. *sub nom. Nassau Bank* v. *Ritzinger*, 5 State R. 309), or at the instance of a foreign creditor (*Hibernia Nat. Bank* v. *Lacombe*, 84 N. Y. 367). And such is the rule in most of the States. *Coffin* v. *Kelling*, 83 Ky. 649; *Johnson* v. *Sharp*, 31 Ohio St. 611; *Walters* v. *Whitlock*, 9 Fla. 86; *West* v. *Tupper*, 1 Bailey (S. C.) Law, 193; *Greene* v. *Mowry*, 2 Bailey (S. C.) Law, 163; *Gregg* v. *Sloan*, 76 Va. 497; *Bank of the Valley* v. *Gettinger*, 3 W. Va. 309; *First Nat. Bk.* v. *Walker*, 61 Conn. 154; *Cook* v. *Van Horn*, 81 Wis. 291; *Palmer* v. *Mason*, 42 Mich. 146; *Hanford* v. *Paine*, 32 Vt. 442; *Noble* v. *Smith*, 6 R. I. 446, 449; *Paine* v. *Lester*, 44 Conn. 196, 203.

In New Jersey it is distinctly held that a voluntary assignment made by a non-resident debtor, which is valid by the laws of the place where made, cannot be impeached in New Jersey with regard to property situated there by non-resident creditor. *Bentley* v. *Whittemore*, 19 N. J. Eq. 462; *Moore* v. *Bonnell*, 31 N. J. Law, 90; *Receiver of State Bank of N. B.* v. *First Nat. Bk. of Plainfield*, 34 N. J. Eq. 450; *Van Winkle* v. *Armstrong*, 41 Id. 402; *Kimball* v. *Lee*, 40 N. J. Eq. 403; *Halsted* v. *Straus*, 32 Fed. R. 279. But domestic creditors may proceed in disregard of such assignment if in substantial respects it is inconsistent with the New Jersey statute. In *Bentley* v. *Whittemore*, *supra*, it is said (p. 470): "The true rule of law and public policy is this: that a voluntary assignment made abroad, inconsistent, in substantial respects, with our statute, should not be put in execution here to the detriment of our citizens, but that, for all other purposes, if valid by the *lex loci*, it should be carried fully into effect."

In *Blain* v. *Pool*, 13 State R. 571, where an assignment with preferences was made in this State by debtors, one of whom owned real estate in New Jersey which was not taken possession of by the assignee, and was afterward conveyed by the debtor in discharge of firm debts, it was held that under the recent New Jersey decisions—*Bentley* v. *Whittemore*, and cases cited above—the assignment made here, although with preference, was valid to pass title in New Jersey, except as to citizens of that State, and that the doctrine of that State, as expressed in *Varnum* v. *Camp*, 13 N. J. Law, 326, and *Moore* v. *Bonnell*, 31 N. J. Law, 90, had been modified by the later decisions.

§ 296. Contravening the law of the situs—Regulations as to the manner of making assignments.—When testing the validity of a foreign assignment under the law of the State where property has been attached we are confronted with the question whether the local law regulating the form and method of executing the assignment is to be applied to such foreign assignment. If not, then what are the fundamental and determinative requirements of the local law which determine the validity of the foreign assignment?

As a general rule, the cases are in harmony that statutory regulations as to the mode of executing and administering assignments, such as the Assignment Act of this State, are intended to affect only assignments executed within the State or such as are made by residents of the State. *Vanderpoel* v. *Gorman*, 140 N. Y. 563; *Ockerman* v. *Cross*, 54 N. Y. 29; *Moore* v. *Battin*, 14 State R. 191; *Hanford* v. *Paine*, 32 Vt. 442; *Wilson* v. *Carson*, 12 Md. 54; *Russell* v. *Tunno*, 11 Rich. Law (S. C.) 303; *Butler* v. *Wendell*, 57 Mich. 62; *Schroder* v. *Tompkins*, 58 Fed. R. 672; *Schuler* v. *Israel*, 27 Fed. R. 851; *Atherton* v. *Ives*, 20 Fed. R. 894; *Halsted* v. *Straus*, 32 Fed. R. 279; *Birdseye* v. *Underhill*, 82 Ga. 142.

The case of *Barnett* v. *Kinney* (147 U. S. 476) turned on such a restriction of the statute of the Territory of Idaho. That statute provided that assignments not made according to its provisions did not bind creditors, and prohibited preferences. The assignment was made in Utah. It transferred personal property situated in Idaho, and preferred certain creditors. The Su-

preme Court of Idaho Territory held the assignment invalid against an attacking creditor, a resident of Minnesota. The Supreme Court of the United States reversed the judgment and said the assignment was valid at common law and by the law of Utah, and that it was in contravention of no settled policy of the Territory of Idaho.

In Pennsylvania the statute provides that unless the assignment is recorded as provided by the act, a *bona fide* purchaser, mortgagee, or creditor shall not be prejudiced by it until recorded. The Pennsylvania courts have held that this statute operates as to foreign assignments only in favor of residents of that State, and that non-residents of the State cannot proceed by attachment against property of a non-resident assignor, claiming that the assignment had not taken effect because not recorded. *Philson* v. *Barnes*, 50 Pa. St. 230; *Bacon* v. *Horne*, 123 Pa. St. 452; *Steel* v. *Goodwin*, 113 Pa. St. 288; *Long* v. *Girdwood*, 150 Pa. St. 413.

§ 297. Contravening the law of the situs—Statute of fraudulent conveyances.—Turning now from the cases in which a foreign assignment has been held invalid, because of some statutory prohibition relating to such instruments, to the cases in which the invalidity has been sought to be established by showing that the assignment, though valid where made, is invalid because fraudulent by reason of a construction placed upon the statute of fraudulent conveyances by the courts where the property is situated different from the construction adopted at the place where the assignment is made, we shall find that the cases are by no means so easy of reconciliation. The preponderance of authority, as well as the weight of argument, seems to be in favor of sustaining such transfers.

Thus, in the Supreme Court of the United States, in a case elaborately argued, where the assignment was made in Rhode Island by persons residing there, conveying property a portion of which was situated in New York, and the deed of assignment contained reservations which, although valid in Rhode Island, would have rendered the conveyance void if made in New York, in a creditor's action brought in the Circuit Court of the United States in New York, it was held that the assignment, being valid

in Rhode Island, was sufficient to sustain the title in the assignees in New York. *Livermore* v. *Jenckes*, 21 How. (U. S.) 126.

So in *Baltimore & Ohio R. R. Co.* v. *Glenn* (28 Md. 287), where an assignment was made in Virginia by a corporation of that State, containing provisions which, under the statute of fraudulent conveyances as expounded in the State of Maryland, would have rendered it void, but which were valid under the laws of the State of Virginia, the assignment was sustained in Maryland. The court recognized and acted upon the principle that if the deed was a legal instrument in Virginia, where it was made, it was so everywhere "unless it violates good morals or is repugnant to some law or policy of the State."

And to the same general effect are *Frazier* v. *Fredericks*, 24 N. J. L. (4 Zab.) 162; *Mowry* v. *Crocker*, 6 Wis. 326; *Law* v. *Mills*, 18 Penn. St. 185; *Caskie* v. *Webster*, 2 Wall. Jr. 131; *Fuller* v. *Steiglitz*, 27 Ohio St. 355.

In *Moore* v. *Willett* (35 Barb. 663), where the assignment was made in North Carolina and contained a clause allowing the assignees to sell on credit, and also to continue the business at their election, provisions which, as we have seen, would render the assignment, if executed here, fraudulent and void in an action brought here by the assignees to recover the possession of a portion of the assigned property levied upon by the sheriff under an execution on a judgment obtained by a creditor in this State, it was held that the provisions in the assignment, good where it was executed, but rendering it void in this State, did not impair its validity here, and the title of the assignee was sustained.

But in *Rice* v. *Courtis* (32 Vt. 460), where the assignment was made in New York and was valid under the laws of that State, but a portion of the property covered by it was in Vermont, and there was no change of possession of the property such as is required by the local law of Vermont, as declared by its courts, it was held that the assignment was invalid as against a subsequent attachment in Vermont.

In *Ingraham* v. *Geyer* (13 Mass. 146), the assignment was made in Pennsylvania, and was invalid under the common law of Massachusetts. The Massachusetts court refused to sustain it against a resident attaching creditor. This case was followed in *Fall River Iron Works Co.* v. *Croade*, 15 Pick. 11; *Fox* v. *Adams*,

5 Greenl. 245 ; see *Rhode Island Cent. Bank* v. *Danforth*, 14 Gray (Mass.), 123. In that State an assignment not assented to by creditors is void at common law. *Edwards* v. *Mitchell*, 1 Gray, 239 ; *Russell* v. *Woodward*, 10 Pick. 408.

§ 298. Distinction between repugnancy and mere non-conformity.—There is no conflict in the cases respecting the invalidity of a foreign assignment sought to be enforced as to property in a State with whose laws the assignment is in direct conflict in an element made *essential* by the law of such State. Thus, in Massachusetts the assent of the creditors is an element without which the assignment is a nullity. This is the result of judicial decision in that State. In South Carolina assignments with preferences are by statute null and void. The statute of New York *requires* the preference of certain employees. In a suit in South Carolina certain creditors, citizens of New York and other States, attached real and personal property in South Carolina subsequent to an assignment, covering the same property for the benefit of creditors, made in New York in conformity to New York law and giving the preferences required by the New York statute. It was held that the assignment was void and that the attaching creditors acquired a lien. The court observed : " We do not see by what authority a court, called upon to administer the laws of this State, could undertake to declare that an assignment providing for such preferences was good and valid, and give it just as full force and effect as if the legislature had made no such declaration. Surely the courts of this State cannot treat that as valid which the legislature has expressly declared shall be null and void." And the court fully conceded the force and existence of the general rule that the validity of such assignments is to be determined by the *lex loci contractus*. *Ex parte* Dickinson, *In re Sheldon* v. *Blauvelt*, 29 S. C. 453, 460.

It is held in Georgia that mere non-conformity to the laws of that State not going to the essence of the transaction does not render the foreign assignment invalid as to property in that State ; but that it is only invalid when it *violates* the policy of the law. *Birdseye* v. *Underhill*, 82 Ga. 142.

In *Frank* v. *Bobbitt* (155 Mass. 112, 116) the court prefaced its decision by remarking that there were no Massachusetts creditors

whose interests were affected by the assignment, and that the question was wholly between non-residents living in two different States, and then held that the assignment with preferences, being valid in North Carolina, where it was made, was valid in Massachusetts. Such assignments are voidable in that State at the instance of the assignee. See *Train* v. *Kendall*, 137 Mass. 366.

In Pennsylvania a statute reqnires the record of a foreign assignment. If not recorded, and the attaching creditor have no actual notice of the assignment, he acquires a lien. But this statute is only for the protection of domestic creditors. Therefore, as to them they must have actual notice, or, in its absence, recording is made an essential to the validity of the assignment. But recording is a non-essential as to non-resident creditors. See *Steel* v. *Goodwin*, 113 Pa. St. 288 ; *Bacon* v. *Horne*, 123 Pa. St. 452 ; *Long* v. *Girdwood*, 150 Pa. St. 413.

In Minnesota mere non-conformity to statutory requirements not involving any substantial policy of the State will not invalidate a foreign assignment. *In re Paige & Sexsmith Lumber Co.*, 31 Minn. 136. And this is the rule in Maryland, South Carolina, Texas, Vermont, Connecticut, and perhaps in other States. *Wilson* v. *Carson*, 12 Md. 54, 76-78 ; *Balt. & Ohio R. R. Co.* v. *Glenn*, 28 Md. 287, 321-323 ; *West* v. *Tupper*, 1 Bailey (S. C.) Law, 193 ; *Russell* v. *Tunno*, 11 Rich. Law (S. C.) 303, 317 ; *Weider* v. *Maddox*, 66 Tex. 372, 377, 378 ; *Hanford* v. *Paine*, 32 Vt. 442, 459 ; *Atwood* v. *Protection Ins. Co.*, 14 Conn. 555.

§ 299. **This rule as to preferences.**—The validity of a foreign voluntary assignment preferring creditors depends on more than one consideration. In a State where an assignment of that character is declared null and void, the preference is *repugnancy*. South Carolina is such a State. *Ex parte* Dickinson, *In re Sheldon* v. *Blauvelt*, 29 S. C. 453.

Some States make the assignment void only to the extent of the preference, and uphold it in other respects. Such a State is Missouri. *Bryan* v. *Brisbin*, 26 Mo. 423. But see *Thurston* v. *Rosenfield*, 42 Mo. 474, *et seq.* In New-York the assignment is not void ; the statute operates only on the unlawful preference.

Central Nat. Bank v. *Seligman*, 138 N. Y. 435; *Abegg* v. *Bishop*, 142 N. Y. 286. See *ante*, § 178. In Kentucky, Ohio, Michigan, Pennsylvania, and Connecticut the preference is not *repugnancy;* but in Iowa the rule is different because of its statute. *Atherton Co.* v. *Ives*, 20 Fed. Rep. 894; *Fuller* v. *Steiglitz*, 27 Ohio St. 355; *Butler* v. *Wendell*, 57 Mich. 62; *Smith's Appeal*, 117 Pa. St. 30; *Moore* v. *Church*, 70 Iowa, 208. And in Connecticut, which may be called one of the liberal States as opposed to those which favor their own citizens, the rule is doubtless the same. In *Egbert* v. *Baker* (58 Conn. 319) all the parties were non-residents; the assignment was with preferences, and this would have rendered the assignment invalid if made there; but the court held that preferences given by assignment made in another State and valid there does *not* contravene the policy of the State. As in other decisions of that State, already cited under proper heads, citizens of other States have all the rights of citizens of Connecticut—no more, no less; the *non-residence* of the parties in *Egbert* v. *Baker* may be considered immaterial. In Massachusetts, New Jersey, and Illinois, though preferences are forbidden, yet assignments containing them are upheld when no resident creditor's interests are affected. To summarize, it may be stated that where a statute clearly shows what is the "policy" of a State by declaring certain assignments *void*, the statute must be obeyed to the letter; where the local statute makes unlawful only a particular provision there is no contravention of the law so as to make the whole instrument void; and where the local statute is a mere regulation and directory, not going to the essence of the transaction, mere non-conformity is not fatal. But it must always be borne in mind that certain States, in order to prefer their own citizens, make themselves exceptions to all rules.

§ 300. Discrimination in favor of residents.—It is now the settled law of New York that no discrimination is to be made between residents of that State and those of other States. The rule in *Hibernia Nat. Bank* v. *Lacombe* (84 N. Y. 367) was reaffirmed in *Barth* v. *Backus* (140 N. Y. 230, 239); and in *Vanderpoel* v. *Gorman* (Id. 563, 573, 574) the court, through Peckham, J., very pertinently observes upon the liberal policy of the

State respecting the distribution of the assets of foreign and domestic corporations among foreign and domestic creditors. As to the States of Connecticut, the Virginias, South Carolina, Georgia, Florida, Texas, Kentucky and Ohio it will be seen, from the cases cited (*supra*), that there is no discrimination. In each of them a creditor of any other State has the same rights and must observe the same rules as a domestic creditor. The tendency, at least of Vermont, is the same way. See *Hanford* v. *Paine*, 32 Vt. 442. In *Paine* v. *Lester* (44 Conn. 196) it is said that the Constitution of the United States establishes the equality of citizens of each State under the laws and before the tribunals of every State. In *Chafee* v. *Fourth Nat. Bank* (71 Me. 514) it is said that a discrimination in favor of resident citizens is not unconstitutional. But it has been denounced as barbarous by Judge Seymour D. Thompson, of Missouri (*Zuppann* v. *Bauer*), 17 Mo. Ap. 678, 682, and substantially so pronounced by Chief Justice Redfield, of Vermont (*Hanford* v. *Paine*, *supra*). In New Jersey, Massachusetts, Illinois, Pennsylvania, Maine, and some other States, the rule and spirit is illiberal toward citizens of other States, though a foreign voluntary assignment will be enforced in them if no domestic creditor is affected, and it is valid in the State where made, and this even though directly contrary to the positive law of the State.

§ 301. **The Illinois rule.**—The rule established by the decisions in Illinois is that a voluntary assignment by a non-resident which is valid by the laws of the assignor's residence and not in conflict with the statutes or policy of Illinois will not be enforced to the prejudice of residents of the State of Illinois. Residents of Illinois may under attachment proceedings levy upon property of the assignor situated in that State which has been transferred by a valid assignment executed without the State, although the assignment is in all respects in harmony with the requirements of the Illinois law. *Consolidated Tank Line Co.* v. *Collier*, 148 Ill. 259; *Woodward* v. *Brooks*, 128 Ill. 222; *May* v. *First Nat. Bank*, 122 Ill. 551; *Heyer* v. *Alexander*, 108 Ill. 385; *Sheldon* v. *Wheeler*, 32 Fed. R. 773. This rule is not supported by argument based upon any infirmity in the assignment, or, as in Massachusetts and in other States, upon the theory that the

assignment does not become operative until accepted by creditors, but is placed upon the ground that "as a voluntary foreign assignment, valid in the State where made, is enforced in this State as a matter of comity, our courts will not enforce it to the prejudice of our citizens who may have demands against the assignor. It is contrary to the policy of our laws to allow the property or funds of a non-resident debtor to be withdrawn from this State before his creditors residing here have been paid, and thus compel them to seek redress in a foreign jurisdiction." *Woodward* v. *Brooks*, 128 Ill. 222, 227. The Illinois doctrine is severely commented upon in *Zuppann* v. *Bauer*, 17 Mo. Ap. 678, 682.

On the other hand, the assignment, if valid where made, although it may contravene the laws of Illinois, will be enforced in favor of non-resident creditors, including creditors of the assignor's domicile, so long as the rights of resident creditors are not affected. *Consolidated Tank L. Co.* v. *Collier*, 148 Ill. 259, modifying the language of *Woodward* v. *Brooks*, 128 Ill. 222, 227. Hence a preferential assignment executed in New York between residents of that State will be given efficacy in Illinois, although by the statute of that State preferences in assignments are declared void. The true rule is stated to be that laid down in *Bentley* v. *Whittemore*, 19 N. J. Eq. 462, 470, "that a voluntary assignment made abroad inconsistent in substantial respects with our statute should not be put in force here to the detriment of our citizens, but that for all other purposes if valid by the *lex loci* it should be carried fully into effect. *May* v. *First Nat. Bank*, 122 Ill. 551.

§ 302. Where the parties are all subjects of the State in which the assignment is made.—As against citizens of the State where the assignment was made, the rule appears to hold without qualification, that an assignment, valid by the laws of the State in which it is made, is valid everywhere. Burrill on Assgts. 6th ed. § 283. Where questions as to extra-territorial property arise between foreign assignees and foreign creditors domiciled in the same State, the foreign laws to which such parties are subject will be upheld. *Bentley* v. *Whittemore*, 19 N. J. Eq. 462; rev'g s. c. 18 N. J. Eq. 366; *Abraham* v. *Ples-*

toro, 3 Wend. 540; s. c. *sub. nom. Plestoro* v. *Abraham*, 1 Paige, 236; *Sanderson* v. *Bradford*, 10 N. H. 260; *Hall* v. *Boardman*, 14 N. H. 38; *Thurston* v. *Rosenfield*, 42 Mo. 474; *Burlock* v. *Taylor*, 16 Pick. 335; *Moore* v. *Bonnell*, 31 N. J. Law, 90; *Whipple* v. *Thayer*, 16 Pick. 25; *Martin* v. *Potter*, 11 Gray, 37; *Chafee* v. *Fourth National Bank*, 71 Me. 514; s. c. 36 Am. R. 345.

In *Cunningham* v. *Butler* (142 Mass. 47) it appeared that a resident of that State, having become embarrassed financially, suspended payment, and offered a compromise to his creditors. Pending the discussion of the proposition of compromise, a Massachusetts creditor assigned a claim against the debtor to a resident of New York, who thereupon commenced attachment proceedings in that State, and attached a debt due to the debtor. Subsequently the debtor was adjudged insolvent under the Massachusetts Insolvent Law, and an action was brought by the assignee to restrain the Massachusetts creditor from prosecuting the attachment proceedings in New York, and an injunction was granted accordingly.

But when an assignment with preferences was made in New York, and the assignee, under an order of the court, made on notice to all the creditors, assented to the compromise of a claim due to the debtor, and the other contracting party, who was a receiver appointed in New Jersey, had become obligated to pay the composition, it was held that a New Jersey creditor could not, in the New Jersey courts, attach the claim due to the assignor and treat the assignment as void. *Kimball* v. *Lee*, 40 N. J. Eq. 403; s. c. 4 Cent. R. 332.

§ 303. **Effect of assignee's possession.**—This seems to depend altogether on the common or statute law of the State where it is sought to enforce the assignment. Pennsylvania makes actual notice of the assignment or the recording of it essential. These are usually made the equivalent of delivery everywhere. But the statute of Pennsylvania is only for the protection of domestic creditors. It has no application to citizens of other States. See *Long* v. *Girdwood*, 150 Pa. St. 413; *Steel* v. *Goodwin*, 113 Id. 288; *Bacon* v. *Horne*, 123 Id. 452.

In South Carolina it has been held that an assignment made and

delivered in New York took effect from the delivery of the assignment in New York. *West* v. *Tupper*, 1 Bailey (S. C.) Law, 193. Such seems to be the rule in New York. *Van Buskirk* v. *Warren*, 2 Keys, 119. In Texas no delivery is necessary. *Weider* v. *Maddox*, 66 Tex. 372. In *Hanford* v. *Paine* (32 Vt. 442) the assignment was made in New York and conformed to its laws, but not to those of Vermont, as to recording. But the assignee had taken possession. It was held that he acquired title against attaching creditors. An assignment made in Missouri and mailed there to a citizen of Ohio was held to pass the title to the assignee without further ceremony. *Johnson* v. *Sharp*, 31 Ohio St. 611. In *Barnett* v. *Kinney* (147 U. S. 476) the assignee took possession prior to their seizure by the sheriff in Montana. The assignment was held to prevail, but the court seems not to have adverted to the effect of the possession, and the influence of that fact on the mind of the court must be left to conjecture. This case of *Barnett* v. *Kinney* is cited by the court in *Schroder* v. *Tompkins* (58 Fed. Rep. 672, 676), and the matter of possession taken by the assignee was adverted to by the court both as to *Barnett* v. *Kinney* and the case then under consideration ; but the significance of the possession was not otherwise indicated. In *Reynolds* v. *Adden* (136 U. S. 348, 354) the Supreme Court of the United States, in a case coming up from Louisiana, and citing cases from that State, observed that in Louisiana transfers of property by judicial operation in other States were invalid in Louisiana, adding, "at least until the legal assignee has reduced the property into possession, or done what is equivalent thereto." It seems to be the rule that possession by the assignee, lawfully obtained, will hide a multitude of defects or irregularities in a foreign assignment.

§ 304. Injunction against creditor of the State of the assignor from proceeding in another jurisdiction.—The well-established rule that equity aims its remedies at the conduct of persons within its jurisdiction, and operates on the consciences of men, regardless of the locality of the property affected, has been made an instrument in the administration of domestic assignments. Where, to illustrate, the statutes or clearly defined policy of a State places all its citizens on equality in the distribution of an

insolvent's estate, and prohibit preferences if a citizen of that State goes into a foreign jurisdiction where there is property covered by the assignment, and seeks by attachment or other legal proceeding to secure it to himself, thus destroying the equilibrium established at his domicile, and refusing to abide by a law he has helped to make and is subject to, equity, having jurisdiction of his person, will, on a proper bill, restrain him from prosecuting his remedy or suit in the foreign court. This action of the court is not placed on any ground of the extra-territorial force of laws, but on the ground that the laws of a State *must be given intra-territorial force* as to all citizens within the jurisdiction and other persons temporarily sojourning there. Such injunction is held to be no interference with a foreign and independent tribunal or in the affairs of another State, but a rightful command to a citizen of the State of the *forum* which he is in duty and good conscience bound to obey. *See article in* 23 *Central Law Journal*, 268, entitled "*Injunction to Restrain a Creditor's Proceedings in a Foreign Jurisdiction*," and citing many authorities. See also *Cunningham* v. *Butler*, 142 Mass. 47; *Cole* v. *Cunningham*, 133 U. S. 107; *Wilson* v. *Joseph*, 107 Ind. 490.

In *Cole* v. *Cunningham*, 133 U. S. 107, the Supreme Court of the United States elaborately reviewed numerous authorities, English and American, and fully sustained the exercise of this power by injunction as an instrument in the administration of insolvent estates assigned for creditors, and held it not in conflict with the constitution of the United States requiring full faith and credit to be given to judicial proceedings in other States.

§ 305. **Choses in action.**—With regard to debts and choses in action generally, since they can have no locality, they are said to follow the person, and pass by a general assignment executed by him, even though the persons owing the debts are foreign to the domicile of the assignor. *Howard Nat. Bank* v. *King*, 1 Am. Insol. R. 461; *Guillander* v. *Howell*, 35 N. Y. 657; s. c. 6 Am. L. Reg. (U. S.) 522; and see the able note to this case at page 527; see criticism on this case, 15 Am. L. Review, 268; *Caskie* v. *Webster*, 2 Wall. Jr. 131; *Speed* v. *May*, 17 Penn. St. 91; *Noble* v. *Smith*, 6 R. I. 446; *Clark* v. *Conn. Peat Co.*, 35

Conn. 303 ; *Smith* v. *Chicago & N. W. Ry. Co.*, 23 Wis. 267 ; *Birdseye* v. *Underhill*, 82 Ga. 142 ; Wharton on Conf. of Laws, § 545 ; *Walters* v. *Whitlock*, 9 Fla. 86, *et seq.* And the title will pass to the assignee without notice to the assignor's debtor except only so far as the debtor may have dealt in good faith with the assignor. *Beckwith* v. *Union Bank*, 9 N. Y. 211 ; *Noble* v. *Smith*, 6 R. I. 446 ; *Warren* v. *Copelin*, 4 Metc. 594 ; see *Anderson* v. *Van Alen*, 12 Johns. 343 ; *Wilkins* v. *Batterman*, 4 Barb. 47. If, by the laches of the assignee in leaving the debtor in ignorance of his claim, the debtor deals with the original creditor as if he were still his creditor, and thereby becomes prejudiced, it is the loss of the assignee and not of the debtor. *Noble* v. *Smith*, *supra* ; *Holmes* v. *Remsen*, 4 Johns. Ch. 460 ; see *Emerson* v. *Patridge*, 27 Vt. 8 ; *Ward* v. *Morrison*, 25 Id. 593 ; *Muir* v. *Schenck*, 3 Hill, 228 ; Story on Conf. of Laws, § 396 ; *Mowry* v. *Crocker*, 6 Wis. 326.

Upon the questioning of the *situs* of debts and choses in action, and the rule of comity in the enforcement of foreign voluntary assignments conveying debts and choses, see *Van Wyck* v. *Read*, 43 Fed. Rep. 716 ; *Walters* v. *Whitlock*, 9 Fla. 86 ; *Consolidated Tank Line Co.* v. *Collier*, 148 Ill. 259. (In this case the rule that debt have no *situs* except the owners is affirmed as to all people except citizens of Illinois.) *Fuller* v. *Steiglitz*, 27 Ohio St. 355 ; *Means* v. *Hapgood*, 19 Pick. 105 ; *May* v. *Wannemacher*, 111 Mass. 202 ; *Smith* v. *Chicago & N. W. Ry. Co.*, 23 Wis. 267 ; *In re Dalpay*, 41 Minn. 532 ; *Sanderson* v. *Bradford*, 10 N. H. 260 ; *Hall* v. *Boardman*, 14 N. H. 38 ; *Dunlap* v. *Rogers*, 47 N. H. 281 ; *Atwood* v. *Protection Ins. Co.*, 14 Conn. 555 ; *Paine* v. *Lester*, 44 Conn. 196, 203 (a case of an involuntary transfer) ; *Egbert* v. *Baker*, 58 Conn. 319, 323 ; *First Nat. Bank* v. *Walker*, 61 Conn. 154, 156 ; *Bank of the Valley* v. *Gettinger*, 3 W. Va. 309 ; *Gregg* v. *Sloan*, 76 Va. 497 ; *Princeton Mfg. Co.* v. *White*, 68 Ga. 96, 98 ; *Birdseye* v. *Underhill*, 82 Ga. 142.

The case of *Atwood* v. *Protection Ins. Co.* (14 Conn. 555, 562) is an important case. There is a full and able discussion of the *situs* of choses in action. The court observed : " As to debts generally, there is no color for the idea that they are impliedly located in the State where the debtor resides. On the contrary,

they are now universally treated as having no *situs* or locality (which is in precise accordance with their nature, they being incorporeal, and therefore not susceptible of local position), and are deemed, in contemplation of law, to be attached to, and to follow, the person of the creditor.''

§ 306. **Ships at sea.**—Property at sea or in transit passes by any valid conveyance made by the owner. Wharton Conf. of Laws, 2d ed., § 356 ; *Plestoro* v. *Abraham*, 1 Paige, 236. Hence an assignment of a ship on the high seas passes title to the assignees, if the assignment is valid at the place where it is made. *Moore* v. *Willett*, 35 Barb. 663 ; *Southern Bank* v. *Wood*, 14 La. Ann. 561. And the same rule has been applied where the assignment was made under bankrupt proceedings. Thus, in *Crapo* v. *Kelly* (16 Wall. 610) an assignment of the debtor's property was made under the insolvent laws of Massachusetts. Among the assigned property was a ship which was at sea at the time of the assignment. Subsequently the vessel arrived at the port of New York, where she was attached by a creditor residing in that State, and the action was brought to determine with whom was the prior right. The Court of Appeals (*Kelly* v. *Crapo*, 45 N. Y. 86) held that the title to the vessel did not pass to the assignee ; but this opinion was overruled in the Supreme Court of the United States upon the ground that the vessel, being a Massachusetts vessel, was to be deemed a portion of the territory of that State, and that the assignment by the insolvent court of that State passed the title to her in the same manner and with the like effect as if she had been physically within the bounds of that State when the assignment was executed. See *People ex rel Pacific Mail S. S. Co.* v. *Comrs. of Taxes*, 58 N. Y. 242, 246.

PART IV.

THE ADMINISTRATION OF THE ASSIGNED ESTATE.

CHAPTER XVIII.

JURISDICTION OF COUNTY COURT AND COMMON PLEAS UNDER THE GENERAL ASSIGNMENT ACT OF 1877.

§ 307. **In general.**—Having heretofore discussed the various methods by which assignments for creditors may be made, both under the provision of the Code of Civil Procedure in reference to insolvent debtors, and also under the act of 1877 and the common law in reference to general voluntary assignments, we come now to a consideration of the rights and duties of the assignee and of creditors growing out of the execution of such instruments.

But before proceeding to the consideration of these matters in detail, it is proper to inquire into the extent and limit of the jurisdiction conferred upon the county court by the general assignment act of 1877.

§ 308. **Jurisdiction of county court.**—The sections of the act of 1877, to which it is necessary to refer in this connection, are as follows: "Any proceeding under this act shall be deemed for all purposes, including review by appeal or otherwise, to be a proceeding had in the court as a court of general jurisdiction, and the court shall have full jurisdiction to do all and every act relating to the assigned estate, the assignees, assignors and creditors, and jurisdiction shall be presumed in support of the orders

and decrees therein unless the contrary be shown; and after the filing or recording of an assignment under this act, the court may exercise the powers of a court of equity in reference to the trust and any matters involved therein." Laws of 1877, c. 466, § 25.

Under this section the court acts as a court of general jurisdiction in respect to the assigned estate and any matter involved therein. As to the management and control of the trust fund, the court has all the power of a court of equity, and the power of the court may be invoked by petition. *Matter of Bonner*, 8 Daly, 75; see *Matter of Nicholas*, 22 Supm. Ct. (15 Hun), 317.

This was otherwise under the act of 1860. *Shipman's Petition*, 1 Abb. N. C. 406.

The language of the statutory power conferred is very broad, and it has been held that where an assignee had by mistake paid over to a creditor certain of the proceeds of the assigned property, to which a preferred creditor was in fact entitled, the county court had power under the jurisdiction so conferred, upon petition of the creditor entitled to the fund and upon notice to the creditor receiving it, to order the latter to return the amount to the assignee, to be by him paid out as directed by the assignment. *Matter of Morgan*, 99 N. Y. 145; see this case commented on in *Matter of Underhill*, 117 N. Y. 471. But the county court has no power on petition of a party claiming property in the possession of the assignee to determine the claim by special proceeding; the remedy of the claimant is by action. *Matter of Potter* v. *Durfee*, 51 Supm. Ct. (44 Hun), 197.

It is also provided by a previous section, that "All orders or decrees in proceedings under this act shall have the same force and effect, and may be entered, docketed and enforced and appealed from, the same as if made in an original action brought in the county court. And all proceedings under this act shall be deemed to be had in court. The said court shall always be open for proceedings under this act. The county judge, when named in this act, shall, in such proceedings, be deemed to be acting as the court." Laws of 1877, c. 466, § 22; amended Laws of 1878, c. 318.

In addition to the general powers conferred under these sec-

tions, the act expressly authorizes the county court (the county judge when named in the act, in all proceedings under the act, is deemed to be acting as the court) to authorize the assignee to advertise for creditors to present claims (§ 4), to remove the assignee (§ 6), and to require and allow amendments to the inventory and schedules (§ 6), to require further security to be given by the assignee (§ 7), to continue proceedings on the death of the assignee (§ 10), to compel an accounting and distribution of the assigned estate (§§ 11–21), and to order the examination of witnesses and the production of books and papers (§ 21), and to authorize the assignee to compromise and compound claims or debts belonging to the estate (§ 23). These various matters are made the subject of special examination in the succeeding chapters.

§ 309. Concurrent jurisdiction of Supreme Court.—By chapter 380, Laws of 1885, it is provided that "all powers, rights and duties conferred upon county courts and county judges by chapter four hundred and sixty-six of the Laws of eighteen hundred and seventy-seven, entitled 'An act in relation to assignments of the estates of debtors for the benefit of creditors,' and by acts amendatory thereof and additional or supplemental thereto, are hereby also conferred upon and shall be exercised by the Supreme Court and the justices of the Supreme Court of the State of New York, concurrently with county courts and county judges. All applications under said acts made in the Supreme Court shall be made to the court, or a justice thereof, within the judicial district where the assignment is recorded, and all proceedings and hearings under said acts had in the Supreme Court upon the return of a citation shall be had at a special term of said court held in the county where the judgment-debtor resided at the time of the assignment, or in case of an assignment by copartners, in the county where the principal place of business of such copartners was at the time of such assignment."

§ 310. In case of disability of county judge.—The Code of Civil Procedure has provided for a continuance of special proceedings in case of the disability of the county judge.

"If the county judge is, for any cause, incapable to act in an

action or special proceeding, pending in the county court, or before him, he must make, and file in the office of the clerk, a certificate of the fact; and thereupon the special county judge, if any, and if not disqualified, must act as county judge in that action or special proceeding. Upon the filing of the certificate, where there is no special county judge, or the special county judge is disqualified, the action or special proceeding is removed to the Supreme Court, if it is then pending in the county court; if it is pending before the county judge, it may be continued before any justice of the Supreme Court within the same judicial district. The Supreme Court, upon the application of either party, made upon notice, and upon proof that the county judge is incapable to act in an action or special proceeding pending in the county court, may, and if the special county judge is also incapable to act, must, make an order removing it to the Supreme Court. Thereupon the subsequent proceedings in the Supreme Court must be the same, as if it had originally been brought in that court, except that an objection to the jurisdiction may be taken, which might have been taken in the county court." Code of Civ. Pro. § 342.

It was held at special term of the Court of Common Pleas, that the Code of Civil Procedure does not apply to proceedings under the assignment act, and hence when the bond of any assignee was approved by a judge of the Supreme Court it was held that such approval was a nullity, and that the assignee acted without lawful authority in disposing of the assigned estate. *Matter of Robinson*, 10 Daly, 148. But this was previous to the Laws of 1885, c. 380, conferring concurrent powers upon the Supreme Court (*ante*, § 309).

§ 311. Jurisdiction of Court of Common Pleas.—"In the city and county of New York all papers, except assignments, which by this act are required to be hereafter filed or recorded in the county clerk's office shall be filed or recorded in the office of the clerk of the Court of Common Pleas of said city and county; and any judge of said court may exercise all the powers of a county judge for said county for the purposes of this act, and any act or proceeding commenced or returnable before, or instituted or ordered by, one of the judges of said court, may be

heard, continued or completed, by or before any other of them." Laws of 1877, c. 466, § 24; see Code of Civ. Pro. §§ 266, 267.

The judges of the Court of Common Pleas were included in the term county judge, employed in the act of 1860 and its amendments; and the jurisdiction conferred by those acts upon the county judge was rightfully exercised by the judges of the Court of Common Pleas, when the debtor resided in the city of New York. *In re Morgan*, 56 N. Y. 629.

§ 312. Concurrent jurisdiction in equity.—It will be observed that these powers, conferred upon the county court and Court of Common Pleas by this act, are those ordinarily exercised by courts of equity. And those courts still retain and may exercise their jurisdiction over the same matters. This act has not limited or abridged their powers. It has given a new and more expeditious remedy to creditors, but that remedy, upon familiar principles of construction, is cumulative and not exclusive. *Scidmore* v. *Smith*, 13 Johns. 322; *Colden* v. *Eldred*, 15 Id. 220; *Platt* v. *Sherry*, 7 Wend. 236; *Stafford* v. *Ingersol*, 3 Hill, 38; *Waterford & W. Turnpike* v. *People*, 9 Barb. 161.

So it has been held that the authority conferred upon the county court under this act, to entertain proceedings for an accounting is not exclusive. An action for an accounting in equity may still be brought in any court having equity jurisdiction. *Schuehle* v. *Reiman*, 86 N. Y. 270; *Hurth* v. *Bower*, 37 Supm. Ct. (30 Hun), 151; *Converseville Co.* v. *Chambersburg Woolen Co.*, 21 Supm. Ct. (14 Hun), 609; *Noyes* v. *Wernberg*, 15 Weekly Dig. 72; *Matter of Cromien*, 10 Daly, 41.

§ 313. Filing and recording papers under the act—Fees.—"The clerk of the court shall keep a separate book, in which shall be entered each case, the date and place of record of the assignment, and a minute of all proceedings therein, under this act, with such particularity as the court shall direct by general order. He shall record therein at length the orders and decrees of the court, settling, rejecting or adjusting claims, and directing the payment of money, or releasing assets by the assignee, and removing or discharging the assignee and his sureties, and such other orders as the court shall direct by general order. The said

clerk shall securely keep the papers in each case in a file by themselves, and shall be entitled to a fee of one dollar for filing all the papers in each case, and entering the proceedings in the minute book, and fifty cents, to be paid by the assignee, unless otherwise directed, for recording each order or decree required by this act or the general order of the court." Laws of 1877, c. 466, § 22; as amended by Laws of 1878, c. 318.

"In the city and county of New York all papers, except assignments, which, by this act, are required to be hereafter filed or recorded in the county clerk's office shall be filed or recorded in the office of the clerk of the Court of Common Pleas of said city and county." Laws of 1877, c. 466, § 24.

CHAPTER XIX.

THE INVENTORY, SCHEDULES AND BOND.

§ 314. In general.—The first step to be taken under the general assignment act, after the execution of the assignment, is the preparation of the inventory and schedules, and the assignee's bond. These matters, which in part devolve upon the assignor and in part upon the assignee, are properly to be considered before entering at large upon the rights and duties of the assignee under the assignment.

§ 315. The inventory and schedules.—By the third section of the general assignment act of 1877, as amended, it is provided as follows :

"A debtor making an assignment shall, at the date thereof or within twenty days thereafter, cause to be made, and delivered to the county judge of the county where such assignment is recorded, an inventory or schedule containing,

"1. The name, occupation, place of residence, and place of business, of such debtor.

"2. The name and place of residence of the assignee.

"3. A full and true account of all the creditors of such debtor, stating the last known place of residence of each, the sum owing to each, with the true cause and consideration therefor, and a full statement of any existing security for the payment of the same.

"4. A full and true inventory of all such debtor's estate at the date of such assignment, both real and personal, in law and in equity, with the incumbrances existing thereon, and of all vouchers and securities relating thereto, and the nominal as well as actual value of the same according to the best knowledge of such debtor.

"5. An affidavit made by such debtor, that the same is in all respects just and true. But in case such debtor shall omit, neg-

lect or refuse to make and deliver such inventory or schedule within the twenty days required, the assignee named in such assignment shall, within thirty days after the date thereof, cause to be made, and delivered to the county judge of the county where such assignment is recorded, such inventory or schedule as above required, in so far as he can ; and for such purpose said county judge shall at any time upon the application of such assignee, compel by order such delinquent debtor, and any other person to appear before him and disclose, upon oath, any knowledge or information he may possess, necessary to the proper making of such inventory or schedule. The assignee shall verify the inventory and schedule so made by him, to the effect that the same is in all respects just and true to the best of his knowledge and belief. But in case the said assignee shall be unable to make and file such inventory or schedule, within said thirty days, the county judge may, upon application upon oath, showing such inability, allow him such further time as shall be necessary, not exceeding sixty days. If the assignee fail to make and file such inventory or schedule within said thirty days or such further time as may be allowed, the county judge shall require, by order, the assignee forthwith to appear before him, and show cause why he should not be removed. Any person interested in the trust estate may apply for such order, and demand such removal. The books and papers of such delinquent debtor shall at all times be subject to the inspection and examination of any creditor. The county judge is authorized by order to require such debtor or assignee to allow such inspection or examination. Disobedience to such order is hereby declared to be a contempt, and obedience to such order may be enforced by attachment. The inventory or schedule shall be filed by said county judge in the office of the clerk of said county in which said assignment is recorded." Laws of 1877, c. 466, § 3, as amended by Laws of 1878, c. 318, § 1 ; see Laws of 1860, c. 348, § 2 ; Laws of 1874, c. 600, § 1.

§ 316. **Previous statutory provisions.**—The act of 1860 (Laws of 1860, c. 348, § 2) provided that, at the date of the assignment or within twenty days thereafter, the debtor should make and deliver to the county judge of the county in which the

debtor resides at the date of the assignment, an inventory or schedule, precisely as required of an insolvent debtor under the two-thirds act (*ante*, § 23), with the additional requirement that he should state the value of the estate according to the best knowledge of such debtor.

In 1874 (Laws of 1874, c. 600) the section was amended by providing that, in case the debtor omitted or refused to make and deliver the inventory specified, the assignment should not, for that reason, be invalid or ineffectual. It further provided that, in case of such refusal or neglect on the part of the assignor, the assignee might, within six months after the date of the assignment, make and file an inventory or schedule of all the property of the debtor which he might be able to find.

The act of 1860, with the amendment of 1874, was repealed by the act of 1877, and an inventory and schedule, as required by the section cited above, were provided. It will be observed that the inventory or schedule differs in form, though not materially in substance, from that required under the former act. The act of 1877, however, provided, that in case the inventory should not be filed within thirty days by the debtor or the assignee, the assignment should be void. This provision was repealed by the amendatory act of 1878, and the removal of the assignee is now the only penalty for a failure to file the inventory and schedules.

§ 317. Failure to file inventory and schedules.—Under the provisions of the act of 1860, previous to the amendment of 1874, it was held that the making and delivery of the inventory and schedules within the time limited in the act was essential to the validity of the assignment. *Juliand* v. *Rathbone*, 39 N. Y. 369 ; rev'g s. c. 39 Barb. 97 ; *Hardmann* v. *Bowen*, 39 N. Y. 196 ; see *Fairchild* v. *Gwynne*, 16 Abb. Pr. 23 ; s. c. 14 Abb. Pr. 121 ; *contra*, *Van Vleet* v. *Slauson*, 45 Barb. 317 ; *Evans* v. *Chapin*, 12 Abb. Pr. 161 ; s. c. 20 How. Pr. 289 ; *Barbour* v. *Everson*, 16 Abb. Pr. 366 ; *Read* v. *Worthington*, 9 Bosw. 617.

The act of 1874 (Laws of 1874, c. 600) provided that the omission to make or deliver the schedule should not invalidate the assignment. It was the intent of that act to abrogate the rule laid down in *Juliand* v. *Rathbone* (*supra*), and the provision

allowing the assignee six months to file the schedules was not intended as a condition the breach of which would invalidate the assignment. *Produce Bank* v. *Morton*, 67 N. Y. 199, 203; s. c. 40 N. Y. Super. Ct. (8 J. & S.) 328; *Produce Bank* v. *Baldwin*, 49 How. Pr. 277.

The act of 1877 made another change, and provided that in case the inventory should not be made and filed within thirty days, the assignment should be void. Laws of 1877, c. 466, § 3.

Under this act it was held that, after the failure to file the inventory within the time named, the assignee had no title to the assigned property, the assignment ceased to exist, and hence the court had no power to remove the assignee and appoint a new one in his place. *Matter of Leahy*, 8 Daly, 124. The statute, however, did not say that the assignment should be void *ab initio*, and hence it appears that until the thirty days had elapsed without the filing of the inventory the assignee had title to the property. *In re Croughwell*, 17 N. B. R. 337.

This provision was repealed by the amendatory act of 1878 (Laws of 1878, c. 318), and the section was put into the form cited above (*ante*, § 315).

Since the passage of the Act of 1878 (Laws of 1878, c. 318) the assignment does not become inoperative by reason of a failure to file the inventory. *Warner* v. *Jaffray*, 96 N. Y. 248; see *Pratt* v. *Stevens*, 94 *Id.* 387.

A failure by the assignee to file the inventory and schedule within thirty days, or such additional time as may be allowed, is ground for his removal. (See § 328.)

§ 318. Schedules which are not required by statute.—Previous to the act of 1860 it was customary to draw the assignment with special reference to schedules of the debtor's property which were intended to be annexed, and with reference to schedules of creditors who were provided for in the assignment. This was merely, as a matter of convenience, to avoid the necessity for a description of the property and the designation of the creditors in the body of the assignment. There is no objection to pursuing such a course still. It will often be found convenient, where preferences are given to classes of creditors, to specify the various debts in their order of priority of payment, by schedules

annexed to the assignment. Where schedules are thus used as a part of the instrument, we have already considered the effect of a failure to annex them at the time of the execution of the assignment. See *ante*, §§ 130, 131, 135.

The schedules so used as part of the assignment do not supply the place of the inventory and schedule required by the act. The act requires that the assignment shall be recorded in the county clerk's office of the proper county. See *ante*, § 125. The inventory and schedules required by the act are to be delivered to the county judge, and by him filed in the office of the clerk of the county in which the assignment is recorded. See *ante*, § 254.

§ 319. The inventory and schedules are part of the assignment.—Although the inventory and schedule required by the act do not accompany the assignment, and are not referred to in it, and in fact may not be prepared until several days after the execution of the assignment, yet, when they are prepared and verified by the assignor, and delivered to the judge and filed as required by the act, they are to be regarded as part of the assignment so far as they designate the creditors to be paid, and the amount of their debts. *Roberts* v. *Vietor*, 130 N. Y. 585; *Roberts* v. *Buckley*, 87 Supm. Ct. (80 Hun), 58; *Terry* v. *Butler*, 43 Barb. 395, 398; *Shultz* v. *Hoagland*, 85 N. Y. 464; *Kavanagh* v. *Beckwith*, 44 Barb. 192; *Talcott* v. *Hess*, 38 Supm. Ct. (31 Hun), 282; *Pratt* v. *Stevens*, 94 N. Y. 387; rev'g s. c. 33 Supm. Ct. (26 Hun), 229.

Hence, when the schedule subsequently filed by the assignor contained fictitious debts, the assignment itself was regarded as providing for the payment of such debts, and was therefore held void. *Terry* v. *Butler*, *supra*; *Talcott* v. *Hess*, *supra*.

The inquiry is whether the inventory and assignment read together indicate that the assignor intended that debts set out are absolutely and unqualifiedly to be paid. If so the assignment is invalid if the debts so provided for are illegal or excessive. *Roberts* v. *Vietor*, 130 N. Y. 585. But the assignment may provide only for the payment of the lawful indebtedness of the assignor, and in that event it would seem that the mere insertion in the inventory of an indebtedness in excess of the amount due

would not invalidate the assignment, since the assignee would be bound to pay only the sum actually due. See *Webb* v. *Thomas*, 49 State R. 462 ; and when the case of *Roberts* v. *Vietor*, *supra*, came before the court upon an appeal from a judgment on a retrial *sub nom. Roberts* v. *Buckley*, 87 Supm. Ct. (80 Hun), 58, the defendants were permitted to show that the amount of the debt was stated in the schedule at an excessive amount by excusable mistake.

With regard to the schedule of assigned property a somewhat different question is presented. The statute imposes upon the assignor the duty of preparing a full and true inventory of all his estate. If he does not prepare it, it may be prepared by the assignee. When the assignor undertakes to make such a schedule any omission of property may indicate an intent to conceal assets for his own benefit or to prevent them from reaching the creditors through the assignee. It is true that all the debtor's property passes under the assignment to the assignee, whether it is detailed in the assignment or not (see *ante*, § 142), but the assignee's intent that it should be reserved and concealed may be evidenced by what he inserts or fails to insert in the schedule which he prepares. The omission of assets from the schedule prepared by the assignor has in several instances to which we have already referred been regarded as evidence of fraudulent intent on the part of the assignor in making the assignment. *Pittsfield Nat. Bank* v. *Tailer*, 67 Supm. Ct. (60 Hun), 130 ; *De Camp* v. *Marshall*, 2 Abb. Pr. N. S. 373 ; *Talcott* v. *Hess*, 4 State R. 62, and on previous trial, 38 Supm. Ct. (31 Hun), 282 ; *Phillips* v. *Tucker*, 14 State R. 120 ; *Shultz* v. *Hoagland*, 85 N. Y. 464. (See *ante*, § 238.)

When the schedule of property was prepared and filed pursuant to the act, and the assignor withheld from the schedule about $15,000 of his property, so as to enable the assignee to give the requisite security, and it also appeared that there was a direction to pay one creditor a little over $2000, when, in point of fact, the actual indebtedness to such creditor was $11,400, the assignment was declared fraudulent and void. *De Camp* v. *Marshall*, 2 Abb. Pr. N. S. 373. See *Talcott* v. *Hess*, 4 State R. 62 ; *Phillips* v. *Tucker*, 14 State R. 120.

In *Pittsfield Nat. Bank* v. *Tailer*, 67 Supm. Ct. (60 Hun),

130, the omission of stock of large value, which had been pledged to secure an indebtedness set out in the schedule, but with a statement that it was unsecured, was regarded in the absence of the strongest and clearest proof that it was unintentional as furnishing evidence that the assignment was fraudulent. But the mere omission of property from the schedule, although prepared by the assignor, will not necessarily establish a conclusion of fraudulent intent. It may be shown by way of explanation that the omitted item is valueless or that it was omitted accidentally or unintentionally. *Shultz* v. *Hoagland*, 85 N. Y. 464; *Ellis* v. *Myers*, 28 State R. 120; *Blain* v. *Pool*, 13 State R. 571. So where it appeared that a creditor held a double security for his debt, the omission of the fact of the additional security from the inventory was not regarded as necessarily indicative of fraudulent intent. *Cutter* v. *Hume*, 43 State R. 242. But where the inventory and schedule are prepared by the assignee under the provisions of the section cited (*ante*, § 315), a different rule prevails. Thus in *Denton* v. *Merrill*, 50 N. Y. Supm. Ct. (43 Hun), 224, 232, s. c. 5 State R. 387, 393, where the schedule was prepared by the assignee, it was said that this schedule may have been competent as evidence, but it was not necessarily a part of the assignment in such sense as to make the amount mentioned as the debt to a particular creditor the amount intended to be paid to that creditor under a preference in the assignment. "It is difficult," says Bradley, J., in the case last cited, "to see how the act of an assignee subsequent to the assignment, in causing to be made a schedule, 'in so far as he can,' can ordinarily be treated as characterizing the intent of the assignor in making it; at all events it cannot as matter of law be said that the assignee in such case has expressed in the schedule the purpose of the assignor when he executed the assignment and thus give invalidity to the latter."

"The making of the schedules, when made by the assignor, may so far be treated as within his contemplation when the assignment was executed as to reflect upon and characterize his purpose in making the assignment, and it is usually entitled to such effect." *Phillips* v. *Tucker*, 14 State R. 120, 122, citing *Talcott* v. *Hess*, 38 Supm. Ct. (31 Hun), 282; *Shultz* v. *Hoagland*, 85 N. Y. 464, 468, 469.

§ 320. **Form of inventory and schedules.**—The statutes (*ante*, § 315) does not particularize the contents of the inventory and schedules except that it must contain :

1. The name, occupation, place of residence, and place of business of such debtor.

2. The name and place of residence of the assignee.

3. A full and true account of all the creditors of such debtor, stating the last-known place of residence of each, with the true cause and consideration therefor, and a full statement of any existing security for the payment of the same.

4. A full and true inventory of all such debtor's estate at the date of such assignment, both real and personal in law and in equity with the encumbrances existing thereon, and of all vouchers and securities relating thereto and the nominal as well as actual value of the same according to the best knowledge of such debtor.

5. An affidavit made by such debtor that the same is in all respects just and true. The form of inventory and schedules in common use will be found in the Appendix of Forms. A general statement of what the debts were contracted for is a sufficient statement of the cause and consideration to satisfy the statute. *Eastern Nat. Bank* v. *Hulshizer*, 2 State R. 93, and where obligations of the debtor are in the form of promissory notes, the objection that the consideration for which the notes given is not set out in the inventory will not be regarded as so defective as to show fraud on the assignment. *Pratt* v. *Stevens*, 94 N. Y. 387.

The Rules of the Court of Common Pleas require that the schedule of liabilities and assets to be filed by the assignor or assignee, shall fully and fairly state the nominal and actual value of the assets and the cause for the difference, and a separate affidavit is required, which shall fully explain the cause of such difference. If required, the affidavits of disinterested experts as to such value must be furnished. See Rule 8, *post*, Addenda. When there is more than one sheet of paper necessary to contain the schedules, each page shall be signed by the person or persons verifying the same. The sheets of paper on which the schedules are written, shall be securely fastened before the filing thereof, and shall be indorsed with the full names of the assignor and as-

signee, and when filed by an attorney shall also be indorsed with his name and business address. Rule 9, *post.* The name, residence, occupation and place of business of the assignor, and name and place of residence of the assignee, may be incorporated in the affidavit or annexed to the schedule. Rule 11, *post.* At the end of the schedule there must be a recapitulation, as follows:

Debts and liabilities, amount to.....$——— —
Assets, nominally worth.....$——— —
Assets, actually worth.....$——— —

Rule 12, *post.* It is required that contingent liabilities should appear on a separate sheet of paper. Rule 13, *post.*

A statute passed in 1891 (Laws of 1891, c. 34) contains a direction to the effect that where an assignee for the benefit of creditors among other fiduciaries named is required to make an appraisal of property, he shall take the real estate at its full and true value, taking into consideration actual sales in the neighborhood during the previous year—property, stocks, bonds or securities customarily bought or sold in open markets in the city of New York or elsewhere—by ascertaining the range of prices and taking the average for a reasonable time.

§ 321. **Verification.**—When the inventory and schedules are made by the debtor, they must be verified by him to the effect that they are in all respects just and true (*ante*, § 315).

In the case of *Produce Bank* v. *Baldwin* (49 How. Pr. 277), it was held that an inventory and schedule properly verified before a competent officer was, under the act of 1860, as amended by the act of 1874, a pre-requisite to the vesting of a title in the assignee. In that case the verification was made before a notary public for Kings County, whose certificate had not been filed in New York. An appeal to the Court of Appeals was dismissed (*Produce Bank* v. *Morton*, 67 N. Y. 199), but that court expressed the opinion that, assuming the verification to be bad, the assignment was valid notwithstanding the failure to make and verify the inventory and schedules.

A verification to the inventory and schedule, by the assignor, "that the same was in all respects just and true to deponent's best knowledge, information and belief," was held to be a sub-

stantial compliance with the statute. *Pratt* v. *Stevens*, 94 N. Y. 387.

A statement of the "true cause and consideration therefor" does not require, where the indebtedness consists of promissory notes, that the inventory should state what they are given for. A statement as to each note, of its date, time of payment, payee, to whom belonging, and the amount due thereon, is sufficient. *Pratt* v. *Stevens*, *supra*.

If there are several debtors, each must join in the verification of the inventory. *Cook* v. *Kelly*, 14 Abb. Pr. 466.

When the inventory and schedules are prepared by the assignee, he is required to verify it to the effect that the same is in all respects just and true to the best of his knowledge and belief.

§ 322. **Delivery of inventory.**—The statute provides that the inventory or schedule shall be delivered to the county judge of the county where the assignment is recorded, who shall file it with the clerk of that county. Laws of 1877, c. 466; Laws of 1878, c. 318.

A delivery to the judge's clerk, at the office of the county judge, is a substantial compliance with the statute. So also a delivery of the inventory to the county judge of an adjoining county, who is holding court in the county, is sufficient. *Pratt* v. *Stevens*, 94 N. Y. 387.

§ 323. **Preparation of schedules by assignee.**—The statute provides (*ante*, § 315), that, in case the debtor omit, neglect or refuse to make and deliver the inventory or schedule within the twenty days required, the assignee named in the assignment shall, within thirty days after the date thereof, cause to be made and delivered to the county judge of the county where such assignment is recorded, such inventory and schedule, in so far as he can; and for that purpose the county judge may, upon the application of the assignee, compel by order the assignor or any other person to appear before him and disclose, upon oath, any knowledge or information he may possess necessary to the proper making of such inventory or schedule. He may also compel a production of books and papers.

Previous to this statute it was held that where an assignor refused to furnish a schedule referred to in the assignment, a court of equity would sustain a bill against him for a discovery and to obtain a delivery of the books and securities. *Keyes* v. *Brush*, 2 Paige, 311; see *Von Hein* v. *Elkus*, 15 Supm. Ct. (8 Hun), 516–518; *Matter of Strauss*, 1 Abb. N. C. 402.

The tenth Rule of the Court of Common Pleas (*post*, Addenda), requires that, when the schedules are filed by the assignee, there must be a full affidavit made by the assignee and some disinterested expert, showing the nature and value of the property assigned.

§ 324. Extension of time to file inventory and bond.—In cases where the assignor does not prepare and file the inventory and schedule, and that duty devolves upon the assignee, he may be unable to prepare them within thirty days after the date of the assignment, and since the schedule of property is essential to fix the penalty of the bond, it has been the custom of the Court of Common Pleas in a proper case to make an order extending the time within which the bond might be filed.

§ 325. Amendment of inventory or schedule.—By the sixth section of the act of 1877 (Laws of 1877, c. 466, as amended Laws of 1878, c. 318, § 2), it is provided, that "the county judge shall have power, by order, to require or allow any inventory or schedule filed to be corrected or amended, and also to require and compel, from time to time, supplemental inventories or schedules to be made and filed within such time as he shall prescribe, and to enforce obedience to such orders by attachment."

A mere omission in the inventory or schedules, if it occurs innocently, will not avoid the assignment. *Mattison* v. *Demarest*, 4 Robt. 161, 172; see *Butt* v. *Peck*, 1 Daly, 83; see *Shultz* v. *Hoagland*, 85 N. Y. 464. See *ante*, § 238.

The fourteenth Rule of the Court of Common Pleas provides that an application to amend the schedules shall be made by verified petition, in which the amendments sought to be made shall be verified in the same manner as the original schedules were verified.

§ 326. **Assignee's bond.**—By the fifth section of the act of 1877 (Laws of 1877, c. 466, § 5), it is provided:

"The assignee named in any such assignment shall, within thirty days after the date thereof, and before he shall have any power or authority to sell, dispose of, or convert to the purposes of the trust any of the assigned property, enter into a bond to the people of the State of New York, in an amount to be ordered and directed by the county judge of the county where such assignment is recorded, with sufficient sureties to be approved of by such judge, and conditioned for the faithful discharge of the duties of such assignee and for the due accounting for all moneys received by him, which bond shall be filed in the clerk's office of the county where such assignment is recorded, but in case the debtor shall fail to present such inventory within the twenty days required, then the assignee, before the ten days thereafter shall have elapsed, may apply to said county judge by verified petition for leave to file a provisional bond, until such time as he may be able to present the schedule or inventory as hereinbefore provided." See Laws of 1860, c. 348, § 3; Laws of 1875, c. 56, § 1.

The provision of the act of 1860, as amended by Laws of 1875, c. 56, was substantially the same, except that it required that the bond should be made within ten days after the delivery of the inventory and schedules, and it contained no provision in reference to a provisional bond.

By an amendment to § 3320, Code of Civ. Pro., it is provided that "any receiver, assignee, guardian, trustee, committee, executor or administrator, required by law to give a bond as such, may include as part of his lawful expenses such reasonable sum, not exceeding one per cent per annum, upon the amount of such bond paid his sureties thereon, as such court or judge allows."

§ 327. **Bond not essential to validity of assignment.**—The act does not make the giving of the statutory security by the assignee a condition precedent to the vesting of the estate in the trustee, nor does the failure to give the security within the time limited invalidate the transfer and restore the title of the assigned property to the assignors. *Brennan* v. *Willson*, 4 Abb. N. C. 279; s. c. 71 N. Y. 502; *Thrasher* v. *Bentley*, 1 Abb. N. C.

39 ; less fully, 59 N. Y. 649 ; *Syracuse, etc. R. R. Co.* v. *Collins*, 1 Abb. N. C. 47 ; s. c. 57 N. Y. 641 ; *Worthy* v. *Benham*, 20 Supm. Ct. (13 Hun), 176 ; *Von Hein* v. *Elkus*, 15 Id. (8 Hun), 516 ; *Hardmann* v. *Bowen*, 39 N. Y. 196 ; *Van Vleet* v. *Slauson*, 45 Barb. 317 ; *Evans* v. *Chapin*, 20 How. Pr. 289 ; *Barbour* v. *Everson*, 16 Abb. Pr. 366 ; *Plume & Atwood Mfg. Co.* v. *Strauss*, 24 Supm. Ct. (17 Hun), 586 ; *Sinclair* v. *Oakley*, 6 W'kly Dig. 513 ; *Bigler* v. *Nat. Bk. of Newburgh*, 33 Supm. Ct. (26 Hun), 520 ; s. c. 14 W'kly Dig. 410.

When the assignee executed a lease before he had given a bond, it was held that by subsequently recognizing the lease and acquiescing it and receiving rent under it, he was estopped from denying the validity of the lease. *Smith* v. *Newell*, 39 Supm. Ct. (32 Hun), 501.

§ 328. **Failure to file the bond.**—The failure to file the bond as required by the Act of 1877, could have no effect on the validity of an assignment made before that act went into effect. *Smith* v. *Newell*, 39 Supm. Ct. (32 Hun), 501.

In *Ryan* v. *Webb*, 46 Supm. Ct. (39 Hun), 435, it appeared that the assignee having failed to file a bond, issued an execution upon a judgment which he himself recovered under which he bought at sheriff's sale the assigned property. In a subsequent proceeding a new assignee was appointed, who demanded the property from the old assignee, who then claimed to hold it as purchaser at the sheriff's sale. It was held that, by the execution and acceptance of the assignment, the title to the assigned property vested in the assignee as trustee, and that his sureties on an appeal bond were liable in an action brought on his failure to surrender the property.

When the assignee fails to give a bond he will not be permitted on his own motion to resign his trust and be discharged. The proper course in such a case is for the court to remove the assignee and hold him to account for the assigned estate. *Matter of Parker*, 10 Daly, 16.

§ 329. **Authority of assignee before giving bond.**—The section of the act cited above (*ante*, § 326) requires that the assignee shall give the bond required "before he shall have any

power or authority to sell, dispose of, or convert to the purposes of the trust any of the assigned property."

An attempt on the part of the assignee to execute a conveyance of real property before giving the required bond is a nullity. *Brennan* v. *Willson*, 4 Abb. N. C. 279, 289 ; s. c. 71 N. Y. 502 ; *Woodworth* v. *Seymour*, 29 Supm. Ct. (22 Hun), 245. But the assignee's title to the property is complete, and he may maintain an action for its conversion. *Kilpatrick* v. *Dean*, 15 Daly, 182. Until he has complied with the statute by giving the bond, his trust is but a dry trust, merely to take possession and hold the property until he becomes qualified and has authority under the statute to dispose of it and convert it to the purposes of the trust. *Brennan* v. *Willson*, *supra*.

An inchoate right to the property in the meantime vests in the assignees for the purposes of the trust, although they are not empowered to dispose of it until the required bond is given. *Von Hein* v. *Elkus*, 15 Supm. Ct. (8 Hun), 516, 518.

In *Smith* v. *Newell*, 39 Supm. Ct. (32 Hun), 501 ; s. c. 19 W'kly Dig. 225, where the assignee executed a lease of a farm which was part of the assigned property, and accepted rent before he gave his bond, and after giving the bond continued to recognize the tenancy, this was taken to be a ratification of the lease, and was held good as against an execution creditor who attempted to levy on crops on the farm after the bond was given.

§ 330. **The form and amount of the bond.**—One object of the inventory is to aid in determining the amount of the bond to be given. *Von Hein* v. *Elkus*, 15 Supm. Ct. (8 Hun), 516, 518. The judge may, however, in his discretion, require that other proof should be presented to him to enable him to fix the proper penalty of the bond.

The rules of the Court of Common Pleas (Rule 15) require that the bond shall be joint and several in form and must comply with the requirements of § 812 of the Code of Civil Procedure. That section reads as follows :

" A bond or undertaking, executed by a surety or sureties, as prescribed in this act, must, where two or more persons execute it, be joint and several in form ; and, except as otherwise expressly prescribed by law, it must be accompanied with the affi-

davit of each surety subjoined thereto, to the effect that he is a resident of, and a householder or a freeholder within the State, and is worth the penalty of the bond, or twice the sum specified in the undertaking, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under execution. A bond or undertaking given by a party, without a surety must be accompanied by his affidavit to the same effect. The bond, or undertaking, except as otherwise expressly prescribed by law, must be approved by the court before which the proceeding is taken, or a judge thereof, or the judge before whom the proceeding is taken. The approval must be indorsed upon the bond or undertaking."

The rules of the court also provide that the court may, in its discretion, require any surety to appear and justify (Rule 16). They also provide that at least one of the sureties shall be a freeholder. If the penalty of the bond be twenty thousand dollars or over, it may be executed by two sureties, the amount of whose justification united is double the penalty of the bond. (Rule 17.) The general rules of the Court of Common Pleas provide that "every bond required to be given by an assignee, under the act of April 13th, 1860, respecting voluntary assignments for the benefit of creditors, must specify the place of residence of each surety named therein at the time of presenting it for approval; it must be accompanied by an affidavit showing the nominal value, and also the actual value, of the property assigned; and no bond will be hereafter approved until these requirements are complied with. No bond will be approved until the schedule of assets and liabilities shall have been filed, unless satisfactory proof by affidavit be produced, showing the reason of not filing the same." (Rule 20, General Rules.)

The general rules of the court also provide: "No bond or undertaking will be allowed to be filed by the clerk of this court in his office, unless the same be legibly written, and all interlineations or erasures therein duly noted as having been made before the execution thereof." (Rule 21, General Rules.)

The direction as to the amount of the bond and the approval of the sureties are matters intrusted by the assignment act (§ 5) to the county judge, and in the city of New York to the judges of

the Court of Common Pleas, but the authority may be exercised by a judge of the Supreme Court under the statute.

§ 331. **Provisional bond.**—The last clause of the section cited (*ante*, § 326) is intended to meet a case where the assignor has failed to file the inventory and schedule, and the assignee is unable to prepare the same, while the exigencies of the estate may require that he should be at once clothed with all the powers which he can exercise only upon giving security. In order to enable the assignee to give such security and to afterward proceed to the preparation of a proper inventory and schedules, he may, upon petition presented to the county judge, be authorized to file a provisional bond until such time as he may be able to present the schedules or inventory provided for. The petition should set out the particulars of the assignment, the reason why the inventory and schedules have not been filed and cannot be filed, a detailed statement of all the assets covered by the assignment as fully as the assignee has been able to obtain information in reference to it, the incumbrances on the property and the amount of the liabilities. See Rule 18, *post*, Addenda.

For the purpose of obtaining the information necessary to prepare this petition, the assignee under the third section of the act (*ante*, § 366), may apply for and obtain an order from the county judge requiring the assignor and any other person to appear and disclose any knowledge or information they may possess.

It has been customary for the judges of the Court of Common Pleas in New York City to authorize the filing of what is termed a provisional bond in some cases, even though the twenty days referred to in the section have not expired. This practice is justified by the fact that there is nothing in the general assignment act which requires that the inventory and schedule shall be filed before the bond is given. The judge may fix the penalty of the bond at any time and upon any evidence which seems to him satisfactory. The court may require further security to be given under the authority of the seventh section of the act, but until an order to that effect is made by the judge, the bond given, however the penalty may have been fixed, would appear to be a sufficient compliance with the statute. (See Rule 18.) The practice, however, in New York has been and is, when such

a bond has been given and the schedules are afterward filed, to obtain an order fixing the penalty of the bond, and if such an amount is named as does not require the execution of a new bond, to then apply for an order making the provisional bond the permanent bond. In that event it is required that the sureties on the provisional bond should consent to the order.

§ 332. **Liability of sureties.**—The condition of the bond "is for the faithful discharge of the duties of the assignee and for the due accounting for all moneys received by him." The liability on the bond is for the discharge of the assignee's duties *under the assignment*, and not for his responsibility for the assigned property in case the assignment is set aside. *People* v. *Chalmers*, 8 Supm. Ct. (1 Hun), 683; affi'd, 60 N. Y. 154. In the case cited, Mr. Justice Daniels says (p. 687): "The remedy is clearly provided for, and confined to, those creditors claiming a benefit under the terms of the assignment itself. And that design is still further exhibited by the provisions made, concerning the action which may be brought upon the bond. (See *post*, § 332.) For it is only when the assignee shall omit, or refuse, to perform any decree or order made against him, for the payment of a debt out of the trust fund, by a judge or court having jurisdiction, that the bond can be ordered to be prosecuted. The default for which that can be done, is limited to the non-performance of the decree or order requiring payment to be made out of the trust fund, provided for, and contemplated by the assignment. And it clearly presupposes the continuance and execution of the trusts mentioned in it."

But in the case of *Adams* v. *Hyams* (19 Blatchf. 487), in the United States Circuit Court, it was held, that the sureties were responsible to an assignee in bankruptcy, who had obtained a decree setting aside the assignment for the default of the State assignee in not paying over to the bankruptcy assignee the balance of the trust funds found to be in his hands.

The statute of limitations does not run against the claims of the assignor's creditors while the estate remains unsettled in the hands of the assignee as against the sureties on his bond. *People* v. *White*, 35 Supm. Ct. (28 Hun), 289.

The mere delay of creditors to call an assignee to account until

after he has become insolvent, will not relieve the sureties on his bond from liability. *People* v. *White*, *supra*.

An order made on the accounting against the assignee is presumptive evidence on which to charge the sureties, but subject to rebuttal and explanation. *People* v. *White*, *supra*; *Thomson* v. *MacGregor*, 81 N. Y. 592; *Bridgeport Ins. Co.* v. *Wilson*, 34 N. Y. 275.

The liability of sureties who have undertaken that the assignee "should faithfully execute and discharge the duties of such assignee and duly account for all moneys received by him as such assignee," extends not merely to his rendering an account, but also to the making of distribution under the decree. So that in a case where the decree provided for the payment by the assignee of certain sums to his counsel the failure to make such payment created a liability on the part of the assignee's sureties. *Van Slyke* v. *Bush*, 123 N. Y. 47.

§ 333. **Discharge of sureties.**—By an amendment to section 812 of the Code of Civil Procedure (Laws of 1892, c. 568), it is provided as follows: "The surety or sureties, or the representatives of any surety or sureties, upon the bond of any trustee, committee, guardian, assignee, receiver or executor may present a petition to the court or judge that appointed him, or that approved or accepted such bond, praying to be relieved from further liability as surety or sureties for the acts or omissions of the trustee, committee, guardian, assignee, receiver or executor occurring after the date of the order relieving surety or sureties, and that the principal on the bond be required to show cause why he should not give new sureties. Thereupon the court or judge must issue the order to show cause accordingly, and may restrain such trustee, committee, guardian, assignee, receiver or executor from acting, except to preserve the trust estate, until further order.

"Upon the return of the order so issued, if the principal in the bond file a bond in the usual form, with new sureties to the satisfaction of the court or judge, then, within such reasonable time, not exceeding five days, as the court or judge fixes, the court or judge must make a decree or order releasing the surety or sureties petitioning from liability upon the bond for any subsequent act or default of the principal; otherwise a decree must

be made that such trustee, committee, guardian, assignee, receiver or executor, account before the court or judge, or a referee appointed, and that upon the trust fund or estate being found or made good and paid over or properly secured, the surety or sureties shall be discharged from any and all further liability as such, of the subsequent acts or omissions of the trustee, committee, guardian, assignee, receiver or executor occurring after the date of his or their being so relieved or discharged, and discharging such trustee, committee, guardian, assignee, receiver or executor."

§ 334. **Prosecution of assignee's bond.**—"Any action brought upon an assignee's bond may be prosecuted by a party in interest by leave of the court; and all moneys realized thereon shall be applied by direction of the county judge in satisfaction of the debts of the assignor, in the same manner as the same ought to have been applied by such assignee." Laws of 1877, c. 466, § 9.

See Code of Civ. Pro. § 1890, in reference to actions on the bond of an assignee of an insolvent debtor.

The method of bringing action on the bond of an assignee, for the benefit of creditors, is now regulated by § 1915 of the Code of Civil Procedure, which is a substitute for article second, chapter six, title six, part three, Revised Statutes. The remedy was formerly by *scire facias*. It seems now that the court can authorize any number of actions upon an assignee's bond, and that the system of enforcing sheriff's bonds under the Revised Statutes furnishes a proper guide in such cases. *Matter of Stockbridge*, 10 Daly, 33; see Laws of 1860, c. 348, § 5; Laws of 1873, c. 363. Under the former acts the bond was prosecuted in the name of the people by the district attorney of the county where the bond was filed.

§ 335. **Additional security.**—"The county judge may, upon his own motion or upon the application of any party in interest, and on such notice as he may direct to be given to the assignor, assignee and surety, require further security to be given whenever in his judgment the security afforded by the bond on file is not adequate." Laws of 1877, c. 466, § 7.

Compare similar provisions in case of executors and administrators, *et seq.*, Code of Civ. Pro. § 2597.

CHAPTER XX.

POWERS AND DUTIES OF ASSIGNEES IN GENERAL.

§ 336. Distinction between voluntary assignees and assignees of insolvent debtors under the Revised Statutes.—The powers, duties, and obligation of trustees and assignees appointed under the statutory proceedings set out in Parts I and II of this work, are declared in article eight, of title one, of chapter five, of the second part of the Revised Statutes. The provisions of that article, except so far as they are declaratory merely of the common law, have no applicability to assignees under general voluntary assignment for the benefit of creditors. This fact must be constantly borne in mind, and the provisions referring exclusively to trustees of insolvent debtors under the Revised Statutes must be distinguished from the general principles stated as applicable to assignees in general.

§ 337. Assignees of insolvent debtors under the Revised Statutes—Oath—When vested with property.—The Revised Statutes provide, that "all assignees and trustees, appointed under any authority, conferred by any of the provisions of the preceding articles of this title, in the several cases therein contemplated, are hereby declared to be trustees of the estate of the debtor, in relation to whose property they shall be appointed, for the benefit of his creditors; and shall be vested with all the powers and authority hereinafter specified, and shall be subject to the control, obligations and responsibilities hereinafter declared, in respect to trustees." 2 R. S. 40, § 1; 4 R. S. 8th ed. 2525, § 1; 2 Edm. St. 42.

"Before proceeding to the discharge of any of their duties, all such trustees shall take and subscribe an oath, that they will well and truly execute the trust by their appointment reposed in them, according to the best of their skill and understanding; which oath shall be filed with the officer or court, that appointed

them." 2 R. S. 41, § 5 ; 4 R. S. 8th ed. 2526, § 5 ; 2 Edm. St. 42.

"The trustees taking such oath, shall be deemed vested with all the estate, real and personal, of such debtor (except such as is exempted by the preceding articles), as follows :

"1. In proceedings under the first article of this title, from the first publication of the notice to the non-resident, absconding or concealed debtor.[1]

"2. In proceedings, under second article, from the appointment of trustees.[2]

"3. In proceedings under the third,[3] fifth[4] and sixth[5] articles, from the execution of the assignment, in those articles directed.

"4. In proceedings under the fourth[6] article, when the assignment was voluntary, from the time of its execution ; when executed by an officer as therein directed, from the time of the first publication of the notice in that article required to be given to creditors." 2 R. S. 41, § 6 ; 4 R. S. 8th ed. 2526, § 6 ; 2 Edm. St. 42.

Taking the oath is a prerequisite to the complete vesting of the title in the assignee. The presumption, when the assignee actually enters upon the discharge of his duties, is that he took the oath. *Hoag* v. *Hoag*, 35 N. Y. 469, 474, 475. But without such evidence that he entered upon the discharge of his duties, no presumption can be indulged in that he took the oath. *Rockwell* v. *Brown*, 42 How. Pr. 226, 227.

§ 338. Powers of trustees of insolvent debtors under the Revised Statutes.—The statute also provides, in reference to trustees appointed in the various statutory proceedings, that "The said trustees shall have power :

"1. To sue in their own names or otherwise, and recover all the estate, debts and things in action, belonging or due to such

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[1] Repealed Laws of 1877, c. 417.

[2] 2 R. S. part 2, c. 5, title 1, art. 2. Repealed.

[3] *Ante*, Chapters II, III and IV.

[4] *Ante*, Chapter V.

[5] *Ante*, Chapter VI.

[6] Repealed.

debtor, in the same manner and with the like effect as such debtor might or could have done if no attachment had been issued, or trustees appointed, or an assignment had not been made; and no set-off shall be allowed in any such suit, for any debt, unless it was owing to such creditor, by such debtor, before the first publication of the notice required in the first article,[1] or before the appointment of trustees under the second article,[2] or before presenting the petition of the insolvent under the third,[3] fifth[4] and sixth[5] articles, or before the publication of notice to creditors under the fourth[6] article. But no suit in equity shall be brought by assignees of insolvents under the third, fourth and fifth articles, without the consent of the creditors having a major part of the debts which shall have been exhibited and allowed, unless the sum in controversy exceeds five hundred dollars:

"2. To take into their hands, all the estate of such debtor, whether attached, or delivered to them, or afterwards discovered; and all books, vouchers and securities relating to the same:

"3. In the case of a non-resident, absconding or concealed debtor, to demand and receive of every sheriff who shall have attached any of the property of such debtor, or who shall have in his hands, any moneys arising from the sale of such property, all such property and moneys, on paying him his reasonable costs and charges, for attaching and keeping the same, to be allowed by the officer having jurisdiction:

"4. From time to time, to sell at public auction, all the estate, real and personal, vested in them, which shall come to their hands, after giving at least fourteen days' public notice of the time and place of sale, and also publishing the same for two weeks in a newspaper, printed in the county, where the sale shall be made, if there be one:

"5. To allow such credit on the sale of real property by them, as they shall deem reasonable, not exceeding eighteen months, for not more than three-fourths of the purchase money; which credit

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[1] Repealed Laws of 1877, c. 417.
[2] 2 R. S. part 2, c. 5, title 1, art. 2. Repealed.
[3] *Ante*, Chapters II, III and IV.
[4] *Ante*, Chapter V.
[5] *Ante*, Chapter VI.
[6] Repealed.

shall be secured by a bond of the purchaser, and a mortgage on the property sold :

" 6. On such sales, to execute the necessary conveyances and bills of sale :

" 7. To redeem all mortgages and conditional contracts and all pledges of personal property, and to satisfy any judgments, which may be an incumbrance on any property so sold by them ; or to sell such property subject to such mortgages, contracts, pledges or judgments :

" 8. To settle all matters and accounts between such debtor, and his debtors, or creditors, and to examine any person touching such matters and accounts, on oath, to be administered by either of them :

" 9. Under the order of the officer appointing them, to compound with any person indebted to such debtor, and thereupon to discharge all demands against such person." 2 R. S. 41, § 7 ; 4 R. S. 8th ed. 2526 ; 2 Edm. St. 43.

Under the authority of the first paragraph of this section, the assignee may maintain an action against the sheriff for suffering goods attached by him to be lost through his negligence. *Acker* v. *Witherell*, 4 Hill, 112. And he may maintain trover for the conversion of the personal property of the debtor before his appointment. *Gillet* v. *Fairchild*, 4 Den. 80.

The provisions of the statute in reference to the sale of the property are mandatory, and the court has no power to release the assignee from complying with the statute, or to require him to perform his duties in any other manner. *Hackley* v. *Draper*, 4 T. & C. 614 ; see *Libby* v. *Rosekrans*, 55 Barb. 202. In *Hackley* v. *Draper* (*supra*), it was held that when a receiver of an insolvent corporation, who has by law (2 R. S. 469) the same power and authority conferred upon trustees of the estates of insolvent debtors, made application to, and obtained the order of the special term of the Supreme Court, authorizing him as receiver, to sell certain of the trust property at public or private sale in his discretion, and upon such terms as he should deem best, it was held that a private sale consummated in pursuance of the order was not merely voidable, but absolutely void. But an order directing the receiver, under like circumstances, as to the manner in which he should proceed in giving notice of and

making the sale, and which directs him to proceed in compliance with the requirements of the statute, does not prejudice the sale. See *Libby* v. *Rosekrans*, *supra*.

Trustees are entitled to redeem the lands of the debtor of whose estate they have charge; but such redemption does not entitle them to a deed of the property sold, or authorize them to direct the execution of the deed to a third person. Its effect is the same as would be a redemption by the debtor himself, and not otherwise. *Phyfe* v. *Riley*, 15 Wend. 248.

When the demand of a creditor is unliquidated, it is competent for the trustees to assess and determine the damages of the creditor in the same manner as a jury would do in an action of covenant. *Matter of Negus*, 7 Wend. 499. The decision of the trustees in determining the amount due to the several creditors will, however, be reviewed by the Supreme Court.

If they err in the application of a principle of law, the court will correct the error; but if they err on a question of fact or opinion, as in the assessment of unliquidated damages, their decision will be set aside if clearly against the weight of evidence, but not otherwise. *Matter of Negus*, *supra*. The court will not enjoin the proceeding of the trustee. If they do not comply with their duty, the creditor's remedy is by summary application to the Supreme Court. *Huyler* v. *Westervelt*, 7 Paige, 155.

§ 339. **Rights of assignee under voluntary assignment.**— The assignee under a general assignment takes the legal title to the property conveyed. His interest is that merely of a trustee; the beneficial interest is in the creditors provided for. But neither the assignee nor the creditor part with any existing right in consideration of the assignment. They merely take what the conveyance gives. Hence, the assignee is not a purchaser for value (*ante*, § 228). He acquires no rights of property superior to those of his assignor. *Flynn* v. *Ledger*, 55 Supm. Ct. (48 Hun), 465. The property is subject to the same liens and equities in his hands which existed against it before the execution of the assignment. *Leger* v. *Bonnaffe*, 2 Barb. 475; *Haggerty* v. *Palmer*, 6 Johns. Ch. 437; *In re Howe*, 1 Paige, 125; *Addison* v. *Burckmyer*, 4 Sandf. Ch. 498; *Corning* v. *White*, 2 Paige, 567; *Blydenburgh* v. *Thayer*, 3 Keyes, 293; s. c. 34

How. Pr. 88; *Bush* v. *Lathrop*, 22 N. Y. 535; *Schieffelin* v. *Hawkins*, 14 Abb. Pr. 112; *Warren* v. *Fenn*, 28 Barb. 333; *Van Heusen* v. *Radcliff*, 17 N. Y. 580.

So he acquires no higher right by the transfer of negotiable paper to him than the assignor had. If the assignor could not maintain an action on such paper his assignee cannot. *Reed* v. *Sands*, 37 Barb. 185.

And under the recording acts he has no better right than his assignee against an unrecorded conveyance. *Paige* v. *Waring*, 14 Weekly Dig. 524.

§ 340. **Takes subject to liens.**—He takes property subject to the lien of a creditor which has attached by the filing of a bill in equity before the assignment (*Corning* v. *White*, 2 Paige, 567), and subject to the lien of a judgment (*Livingston* v. *Livingston*, 2 Caines, 300) and levy. *Slade* v. *Van Vechten*, 11 Paige, 21.

And where an execution is in the hands of the sheriff at the time of the execution of a general assignment of the property of the defendant, for the payment of his debts, the lien of the execution upon the personal property liable to seizure and sale thereon, is paramount to the title of the general assignee. The assignee is not a *bona fide* purchaser within the intent and meaning of the Revised Statutes, which protect the title of *bona fide* purchasers who have purchased between the delivery of the execution to the sheriff and an actual levy upon the property. *Slade* v. *Van Vechten*, 11 Paige, 21; *In re Paine*, 17 N. B. R. 37; see Code, §§ 1405, 1409.

A judgment-debtor, upon whose property an execution has been levied, remains owner and can make any assignment of the property subject to the lien of execution. *Mumper* v. *Rushmore*, 79 N. Y. 19.

The assignee takes land subject to the equitable lien of the vendor for purchase money (*Warren* v. *Fenn*, 28 Barb. 333), and subject to the lien of an equitable mortgage. *In re Howe*, 1 Paige, 125. So he takes goods subject to any right of stoppage *in transitu* which may exist against his assignor (*Harris* v. *Pratt*, 17 N. Y. 249; affi'g *Harris* v. *Hart*, 6 Duer, 606; see *Clark* v. *Mauran*, 3 Paige, 373), and subject to any conditions

or equitable rights existing between the assignor and his vendor. *Haggerty* v. *Palmer*, 6 Johns. Ch. 437.

He takes a judgment subject to the equitable lien of the attorney for costs. *Schnitzler* v. *Andrews*, 16 Weekly Dig. 74.

Seamen who have a lien for wages on the insurance money received on the loss of a vessel, will retain their lien against the insurance moneys paid to the assignee of the owners of the vessel. *Matter of Ripley*, 9 Daly, 252.

The assignee is not a *bona fide* purchaser within the purview of the act respecting the filing of chattel mortgages, and he takes the property subject to the lien of such mortgage. Thus, where the debtor had executed a chattel mortgage on certain furniture as security for rent, and the mortgage was unrecorded, and the debtor subsequently executed a general assignment, it was held that he could not hold the proceeds of the furniture against the assignee of the lease. *Van Heusen* v. *Radcliff*, 17 N. Y. 580. A contrary view was expressed by Chan. Kent, in *Dey* v. *Dunham* (2 Johns. Ch. 182, 188), reversed on other grounds in 15 Johns. 555.

But the rule laid down in the Court of Appeals is the prevailing doctrine. See *In re Collins*, 12 N. B. R. 379; *Platt* v. *Stewart*, 13 Blatch. 481; see also *Barker* v. *Smith*, 12 N. B. R. 474; *Wilkins* v. *Davis*, 15 Id. 60, and see *post*, § 364.

§ 341. **Stoppage in transitu after assignment.**—Where imported goods have arrived subject to the payment of duties, it is sometimes important for the assignee to know whether the vendor under the particular circumstances can exercise the right of *stoppage in transitu*. This will, of course, depend upon the inquiry whether the goods have come into the actual or constructive possession of the assignee.

There are three situations in which the goods may be placed:

1st. They may be on shipboard, or on the wharf, the entry at the Custom House having been made but the goods not having been removed. In this case, the right of stoppage exists. *Holbrook* v. *Vose*, 6 Bosw. 76; *Harris* v. *Pratt*, 17 N. Y. 249; *Mottram* v. *Heyer*, 5 Den. 629.

2d. The goods may have been stored by reason of the failure of the owner to claim them, and may thus be "subject to gen-

eral order." In this case also, the right *of stoppage in transitu* exists.

In *Mottram* v. *Heyer*, 5 Den. 629, 631, the court says: "Under our revenue laws, if the consignee or owner of goods neglects to enter them, and pay or secure the duties within the time prescribed by law for that purpose, so as to get a permit to land the goods, the revenue officers are required to take and retain the possession thereof. . . . And the removal of the goods from the vessel to the public store by the Custom House officers, until the consignees should entitle themselves to claim the possession and disposition of the goods by completing their entry by the payment of the duties, was merely substituting the public store in the place of the vessel, as a place of deposit in the transmission of the goods to their place of destination." This is in conformity with *Northey* v. *Field*, 2 Esp. 613, and other English cases. See *Strahlheim* v. *Wallach*, 12 Daly, 313.

3d. The goods may have been entered and regularly bonded and warehoused. In this case, the stoppage ceases. This is well reasoned and illustrated in the case of *Fraschieris* v. *Henriques*, 6 Abb. Pr. N. S. 251 (Gen. Term Supm. Court), in an opinion of Barrett, J., in which he shows that the plan of our revenue system permitting the entry and bonding of goods, gives the importer such rights and powers as are incompatible with the idea of a continued transit, and he cites with approval the language of Chancellor Walworth, in *Mottram* v. *Heyer* (5 Den. 629, 632) as follows: "Where goods are placed in the public store under the warehousing system, either in this country or in England, after a perfect entry of them for that purpose, they are to be considered as having come to the possession of the vendee, at the place where he intends they shall remain until he gives further order for their disposal. . . And in such a case, I have no doubt that the right of *stoppage in transitu* should be considered as at an end the moment the goods are thus deposited, after a perfect entry for that purpose has been made." A decision of similar effect is *Wiley* v. *Hall*, 2 Canada Super. Ct., R. 1.

§ 342. Mechanics' liens.—The mechanics' lien law of 1885 (Laws of 1885, c. 342, § 1) preserves the right of lien conferred

by the act in case of a general assignment when the notice of lien is filed within thirty days after the making of the assignment.

Under prior statutes it had been held that the assignee, for the benefit of creditors, takes the property of the assignor free from the lien unless it has been perfected by filing the notice prior to the assignment. *Quimby* v. *Sloan*, 2 Abb. Pr. 93 ; s. c. 2 E. D. Smith, 594 ; *Jackson* v. *Sloan*, 2 E. D. Smith, 616 ; s. c. 2 Abb. Pr. 104 ; *Noyes* v. *Burton*, 29 Barb. 631.

But when the contractor makes a general assignment, and payments under the contract are afterward earned or paid, the assignee will take them subject to the same rights of sub-contractors, which would exist against the original contractor. *McMurray* v. *Hutcheson*, 10 Daly, 64 ; *Henderson* v. *Sturgis*, 1 Daly, 336 ; *Oates* v. *Haley*, Id. 338 ; *Mandeville* v. *Reed*, 13 Abb. Pr. 173.

§ 343. **Contracts of assignor.**—Where a contract made by the assignor is of such a character that it passes to the assignee by the assignment, yet the assignee under the terms of the trust he assumes has no power to proceed to perform it without the consent of those beneficially interested in the trust. *Patton* v. *Royal Baking Powder Co.*, 114 N. Y. 1 ; affi'g 52 Supm. Ct. (45 Hun), 248 ; *Matter of Adams*, 12 Daly, 454, 461. But when the assignee undertakes to perform the contract, and does so in part, and fails to fully perform, the assignee, if he seeks to recover compensation for the work performed after the assignment, will be subject to a counter-claim for damages for a breach of the contract. *Patton* v. *Royal Baking Powder Co. supra.*

In the *Matter of Adams*, 12 Daly, 454, where it appeared that the assignor, a manufacturer, had contracted to deliver all his product to the claimant or commission merchant, it was held that after an assignment the assignee could not be compelled to deliver the manufactured goods on hand at the time of the assignment to the claimants. See remarks of Daly, C. J., p. 461.

If a contract entered into by the assignor is not assignable, of course it will not pass under the assignment, and the assignee acqnires no rights in it, and the assignor's relation to it remains unchanged. If it he assignable and therefore passes under the assignment, the mere fact of the insolvency of the assignor and

his assignment does not justify the other party in treating the contract as abrogated, or give cause for rescinding the contract; nor does it discharge the assignor from his obligation to perform. *New Eng. Iron Co.* v. *Gilbert El. R. R. Co.* 91 N. Y. 153.

Where a person had contracted to build certain houses for a stipulated sum, to be paid in part during the progress of the work, and in full upon the completion of the buildings, and during the performance of the work the contractor executed a general assignment, and the plaintiff, subsequent to the execution of the assignment, acquired a mechanics' lien upon the premises, it was held that the fact of the assignment did not change the relations between the contractor and the owner. The assignee was not thereby substituted in the place of the contractor, nor did he contract any obligation to perform the contract, or acquire any rights to the money to become due on its performance, beyond the balance which might remain after the defendants had retained enough to discharge such sums as were due to persons who had performed work on the buildings and acquired a right to be paid under the statute. *Mandeville* v. *Reed*, 13 Abb. Pr. 173.

So, in *Osborn* v. *Thomas* (46 Barb. 514), it was held, that an assignee for the benefit of creditors of a person who had contracted to build a boat had no claim, legal or equitable, upon the sum agreed to be paid upon the completion of the boat, according to the terms of the contract, until the expenses of such completion had first been paid.

The assignee will not be liable to the seller for a breach of contract to take and pay for goods made by the assignor, for the reason that there is no privity of contract between the assignee and the seller. *Clark* v. *Dickinson*, 74 N. Y. 47. The assignee acquires by the assignment the legal title to all the assignor's interest in the contract. He may, therefore, release and discharge the obligations of the contract. *Allen* v. *Randolph*, 4 Johns. Ch. 693.

§ 344. Application to the court for instructions.—The General Assignment Act (§ 23, as amended, Laws of 1885, c. 464) empowers the county judge when the assignment is recorded, upon the application of the assignee, and for good and sufficient cause shown, and upon such terms as he may direct, to

authorize the assignee to sell, compromise, or compound any claim or debt belonging to the estate of the debtor. "But such authority shall not prevent any party interested in the trust estate from showing upon the final accounting of such assignee that such debt or claim was fraudulently or negligently sold, compounded or compromised. The sale of any debt or claim heretofore made in good faith by any assignee shall be valid, subject, however, to the approval of the county judge, and the assignee shall be charged with and be liable for, as part of the trust fund, any sum which might or ought to have been collected by him." The authority to the assignee to apply to the court for instruction under the statute is thus limited to the sale, compounding, or compromising of a claim or debt belonging to the estate of the debtor. This provision does not warrant a general order allowing the assignee to compound such claims as he thinks proper to compound. The circumstances of each particular case must be laid before the court if the assignee wishes to obtain its approval or direction as to the compounding of claims. *Matter of Ransom*, 8 Daly, 89.

The statute contains no direction as to any notice to be given to creditors of such applications. It is believed that the courts uniformly require notice to be given to the creditors, though this may be by mail.

In the *Matter of Youngs* (5 Abb. N. C. 346), where the application was made by the assignee for leave to compromise a claim due the estate, the court referred the application to a referee with directions to give, by mail or personally when practicable, eight days' notice to the persons indicated by the schedules as creditors.

Under the authority of this section the assignee may sell the uncollectable outstandings for the purpose of closing up his trust; but in his petition to the court for leave to make such sale, he should particularize as to each of the claims, stating the character of the claim and the efforts which have been made to collect it, and the reasons which render it proper that it should be sold.

In addition to the special authority of Section 23 of the act, a trustee in honest doubt as to his powers may apply to a court of equity to define them and give judicial sanction to his acts. See Mr. Abbott's note to *Matter of Youngs*, 5 Abb. N. C. 346, 347;

Anon. v. *Gelpcke*, 12 Supm. Ct. (5 Hun), 245; *Wiswell* v. *First Congregational Church*, 14 Ohio St. 31, 43; *Petition of Baptist Church*, 51 N. H. 424; Perry on Trusts, 4th ed. § 476*a*; Hill on Trustees, 488. This is frequently done by suit in equity, to obtain a construction of a will, or for directions in respect to investments or changes of securities. *Woodruff* v. *Cook*, 47 Barb. 304; *Manice* v. *Manice*, 43 N. Y. 303; *Att'y-Gen.* v. *Moore's Exrs.*, 19 N. J. Eq. 503; *Goodhue* v. *Clark*, 37 N. H. 525; *Hooper* v. *Beecher*, 68 Supm. Ct. (61 Hun), 370; s. c. 40 State R. 756.

But the rule is general and applicable to all trustees, and a court of equity will entertain an action brought by an assignee for creditors for directions as to the right to a fund held by him to which there are several claimants. *Coe* v. *Beckwith*, 10 Abb. Pr. 296; s. c. 31 Barb. 339.

The practice of courts of equity as to entertaining such applications on petition is not in this State clearly defined. It is said by Ingalls, P. J., in the *Matter of Foster* (22 Supm. Ct. [15 Hun], 387, 392), that "in matters of equitable cognizance, proceeding by petition is as old as jurisprudence, and has been favored rather than discouraged by the courts. It is difficult, if not absolutely impossible, to indicate an unvarying rule by which to determine in equity cases when an action is indispensable; we think it must mainly be left to the sound discretion of the court to be exercised in view of the circumstances of the particular case." An order made in the course of a proceeding for an accounting, directing a re-sale of certain lands by the assignee, is made without authority and is void. *Matter of Nicholas*, 22 Supm. Ct. (15 Hun), 317. Nor has the county court power to set aside on motion a sale made by an assignee for the reason that the assignee is in no sense an officer of the court. *Matter of Rider*, 30 Supm. Ct. (23 Hun), 91.

When the application is by petition, the subject of notice becomes important. This matter is discussed at length by Mr. Justice Daniels in *Anon.* v. *Gelpcke*, 12 Supm. Ct. (5 Hun), 245, 251. He says: "It has been the common practice for courts of equity to advise and direct trustees as to the discharge of their duties, when that may be so much involved in doubt as to render it necessary; and, when the order may not have the effect of de-

termining controverted rights, notice of the application for it does not seem to have been, and probably would not be, indispensable to its validity. For, in that class of cases, it is at most permissive and advisory, adding or refusing the sanction of the court to the judgment, or convictions of the trustees as to what may be judicious under the circumstances presented for consideration. It is simply evidence of their care and good faith in doing what may be deemed best in the execution of the trusts. That was the nature of the course pursued in *Curtis* v. *Leavitt* (1 Abb. Pr. 274) and *Matter of Croton Ins. Co.*) 3 Barb. Ch. 642). But where controverted rights or doubtful acts are to be determined, that practice would be altogether improper. For it would oppose the fundamental principle which protects parties against the consequences of judicial proceedings of which they may have had no notice. To render them controlling and obligatory in that class of cases, not only notice, but an opportunity to oppose the application to be made, are both matters of vital necessity. *Stone* v. *Miller*, 62 Barb. 430 ; *People* v. *Soper*, 7 N. Y. 428–431. Consequently, important rights are never judicially determined without securing to the parties to be affected, such a hearing as may afford them complete and ample protection against an erroneous or improper adjudication. And trustees have been required to observe this principle in the applications which they have found it necessary to make for their guidance in doubtful cases.''

The practice in courts of equity is not altogether uniform. In *Coe* v. *Beckwith* (10 Abb. Pr. 296 ; s. c. 31 Barb. 339), which was an action by a trustee for creditors for directions, it was held that unknown creditors or parties in interest if numerous need not be joined.

In *Petition of Baptist Church in Londonderry*, the petition was presented on notice (51 N. H. 424). In *Wheeler* v. *Perry* (18 Id. 307) the proceeding was by bill. *Dimmock* v. *Bixby* (20 Pick. 368) was the same. See also *Freeman* v. *Cook*, 6 Iredell's Eq. 373 ; Burrill on Assignments, 6th ed. § 384 ; 2 Perry on Trusts, 4th ed. §§ 476*a*, 928. So far as the practice has been indicated it has usually been by bill of complaint, and when the less formal course by petition has been taken, it has been accompanied by notice to the parties interested in opposing it.

And that is required by the principle which protects all parties against condemnation or prejudice to any of their rights, without the opportunity of first being heard. No good reason exists why trustees should be exempted from its control, but, on the contrary, that good faith and caution, which have always been required of them, should certainly subject them to its control. The application, if in a collateral matter, may be either by petition or by bill. *Codwise* v. *Gelston*, 10 Johns. 507. It must be addressed to a court of equity. See *post*, Chap. XXIII., Compromise of Claims.

The General Assignment Act confers upon the county court the powers of a court of general jurisdiction, and provides that "the court shall have full jurisdiction to do all and every act relating to the assigned estate, the assignees, assignors and creditors, and jurisdiction shall be presumed in support of the orders and decrees therein unless the contrary be shown; and after the filing or recording of an assignment under this act, the court may exercise the powers of a court of equity in reference to the trust and any matters involved therein" (§ 25).

In the *Matter of Witmer*, 47 Supm. Ct. (40 Hun) 64, it was claimed that the court had power on motion to compel the assignee to deliver up property which the assignor had wrongfully received. This claim was based on the section of the assignment act above cited. It was held, however, that this section gave the court no power to compel the assignee to do an act which was not in the line of the performance of the trust, but in hostility to it.

In the *Matter of Potter* v. *Durfee*, 51 Supm. Ct. (44 Hun), 197, the opinion expressed in the *Matter of Witmer*, *supra*, was approved, and it was held that under the assignment act there was no power conferred upon the court to determine on petition conflicting claims to property which had come into the possession of the assignee. The provision of section 22 of the act providing for entering orders and decrees of the court, "releasing assets by the assignee," was said to contemplate cases where the assignee should himself be satisfied that a release should be made, and where he is willing to make it, in such a case the court may authorize and approve the action of the assignee, and thus furnish by the record protection to him. These cases appear to over-

rule *In re Assignment of Watson*, 3 How. Pr. N. S. 313, and *Matter of Mumford*, 5 State R. 303.

In the *Matter of Morgan*, 99 N. Y. 145, affi'g 34 Hun, 217, it was held that in a proceeding for an accounting by the assignee the court had power to make an order directing a party to whom the assignee had mistakenly made a payment which should have been made to another creditor to return the same, and directing its proper application. It will be observed, however, that this order was made in a proceeding to enforce the trust. See comments on this case in *Matter of Underhill*, 117 N. Y. 471 ; and see also *Matter of Connor*, 24 W'kly Dig. 217 ; affi'd without opinion 105 N. Y. 619.

The assignee cannot on a mere motion apply to the court for instructions as to the performance of his duties under the assignment. *Hooper* v. *Beecher*, 68 Supm. Ct. (61 Hun), 370 ; s. c. 40 State R. 756. The assignee is not an officer of the court.

§ 345. Rights of the assignor which the assignee cannot enforce.—The assignee is not a borrower within the meaning of the usury law, and cannot maintain an action to procure the cancellation of usurious notes or securities given by the assignor without paying, or offering to pay, the sums actually loaned. *Wright* v. *Clapp*, 35 Supm. Ct. (28 Hun), 7.

§ 346. Duties of the assignee.—It is said by Mr. Justice Robinson, in *Levy's Accounting* (1 Abb. N. C. 177, 187), that "the position and office of an assignee for the benefit of creditors, has become more and more with occurring legislation that of a *quasi* public officer. *Nichols* v. *McEwen*, 17 N. Y. 22, 27. Instead of being, as at common law, the mere agent and trustee of the immediate parties to the assignment, his duties 'are very much such as the sheriff may perform under an execution' (*Nichols* v. *McEwen*, *supra*), and he is now subjected to such jurisdiction in the county court as the surrogate exercises over an executor or administrator in compelling an account ; in settling the same, and adjudging payment of any debt out of the trust fund ; and to his summary removal and substitution of another trustee by reason of his insolvency, or for other cause, etc., by a court of equity (1 R. S. 730, § 70), on petition or complaint."

But it is not to be understood that an assignee can exercise any other or different rights, or has any other powers than those which he derives as trustee under the deed of trust. The control of the court over the assignee can be exercised only to compel his performance of the stipulated and defined trust declared in the assignment, and to protect the rights which flow from it. The assignee distributes the proceeds of the estate placed in his care according to the dictation and under the sole guidance of the assignment, and the statutory provisions merely regulate and guard his exercise of an authority derived from will of the assignor. *Matter of Lewis*, 81 N. Y. 421, 424.

The duties of an assignee are in general of a twofold character: (1) The collection and sale of the assigned property; and (2) the distribution of the proceeds among the creditors entitled. These matters are made the subject of distinct discussion in succeeding chapters.

The duties of an assignee in general are those of a trustee, and he is held to the responsibilities and duties of a trustee, under the control of a court of equity.

A trustee is bound to manage the trust property for the benefit of his *cestuis que trust*, with the care and diligence of a provident owner. *Matter of Cornell*, 110 N. Y. 351, 357; *Matter of Barnes*, 140 N. Y. 468; *Matter of Dean*, 86 N. Y. 398; *Litchfield* v. *White*, 7 N. Y. 438, 443; *Jacobs* v. *Allen*, 18 Barb. 549. The fact that he receives a compensation for his services distinguishes his liability from that of a gratuitous bailee. He stands, therefore, in regard to his obligation to exercise diligence, in the light of a paid agent for the parties interested, and not in that of a gratuitous bailee or trustee. *Litchfield* v. *White*, *supra*. But he should be held to no higher degree of diligence than that which governs cautious and prudent men in the management of their own affairs. Otherwise the office of trustee would be one of such hazardous responsibility that no prudent or competent man would ever accept it. *Higgins* v. *Whitson*, 20 Barb. 141, 146; *Matter of Dean*, *supra*.

No principle is better settled than this, that trustees cannot be permitted to hold a position hostile to the trust. Upon this principle it was held by Chan. Kent, in the case of *Hawley* v. *Mancius* (7 Johns. Ch. 174), that an assignee, who is also a

judgment-creditor, cannot take out an execution upon his judgment against the assigned property in his hands as trustee. See *ante*, § 122 ; see also *Colburn* v. *Morton*, 1 Abb. Dec. 378.

§ 347. **Joint assignees.**—Where several persons are named as trustees, and one of them refuses to accept and execute the trust, the whole estate will vest in the others, who act in the same manner as if he were dead or had not been named as a trustee. *King* v. *Donnelly*, 5 Paige, 46. This is the general rule in reference to trustees. *Leggett* v. *Hunter*, 19 N. Y. 445 ; *Davoue* v. *Fanning*, 2 Johns. Ch. 252 ; *Matter of Stevenson*, 3 Paige, 420 ; *Matter of Van Schoonhoven*, 5 Id. 559 ; *Moir* v. *Brown*, 14 Barb. 39.

The trustees who do accept must perform their duties in their joint capacity ; they must all act. *Brennan* v. *Willson*, 4 Abb. N. C. 279 ; *Shook* v. *Shook*, 19 Barb. 653 ; *De Peyster* v. *Ferrers*, 11 Paige, 13 ; *Ridgeley* v. *Johnson*, 11 Barb. 527 ; *Sinclair* v. *Jackson*, 8 Cow. 543 ; *Franklin* v. *Osgood*, 14 Johns. 527. They cannot, like executors, act separately ; all must join, both in receipts and conveyances. *Ridgeley* v. *Johnson*, *supra*.

They constitute in law but one person, and must all unite in bringing an action (*Thatcher* v. *Candee*, 4 Abb. Dec. 387 ; *Brinckerhoff* v. *Wemple*, 1 Wend. 470), or in making a sale of the property (*Brennan* v. *Willson*, 4 Abb. N. C. 279 ; *Sinclair* v. *Jackson*, 8 Cow. 543 ; Perry on Trusts, 4th ed. § 411 ; Hill on Trustees, 4th Am. ed. *305), or in making a compromise of a claim due the estate. *Anon.* v. *Gelpcke*, 12 N. Y. Supm. Ct. (5 Hun), 245, 255.

If one trustee becomes incompetent to act by reason of lunacy or other inability, the others cannot act without him. The only remedy is by an application to the court to remove the incompetent trustee. *Matter of Wadsworth*, 2 Barb. Ch. 381. And in a recent case under the assignment act, where one of three assignees was incompetent to join in a conveyance, because he had failed to give the security required by the act, it was held that the others were unable to make a valid conveyance without him. *Brennan* v. *Willson*, 4 Abb. N. C. 279. An assignee cannot divest himself of the obligation to perform the duties of the trust without an order of the court or the consent of all the *cestuis que*

trust. *Thatcher* v. *Candee*, 4 Abb. Dec. 387 ; s. c. 3 Keyes, 157 ; *Shepherd* v. *McEvers*, 4 Johns. Ch. 136 ; *Cruger* v. *Halliday*, 11 Paige, 314 ; *Ridgeley* v. *Johnson*, 11 Barb. 527.

Upon the death of one of the joint assignees the office survives, and all the interest in the trust property vests in the survivors, and they may exercise all the powers. *Shook* v. *Shook*, 19 Barb. 653 ; *Belmont* v. *O'Brien*, 12 N. Y. 394. Upon the death of the last survivor at common law, the trust property, if real estate, passed to the heir or devisee ; and if personal, it went, by operation of law, to the executor or administrator of the trustee charged with the trust. *De Peyster* v. *Ferrers*, 11 Paige, 13 ; see *post*, Chap. XXV. But the Revised Statutes provide that, " Upon the death of a surviving trustee of an express trust, the trust estate shall not descend to his next of kin or his personal representatives ; but the trust, if then unexecuted, shall vest in the Supreme Court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose, under the direction of the court. But no person shall be appointed to execute said trust until the beneficiary thereof shall have been brought into court by such notice and in such manner as the court may direct." 1 R. S. 730, § 68 ; 4 R. S. 8th ed. 2440, § 68 ; see Laws of 1882, c. 185.

§ 348. Joint trustees of insolvent debtors under Revised Statutes.—The provisions of the Revised Statutes, in reference to the powers, duties, and obligations of trustees of insolvent debtors, apply where there are several trustees as well as where there is only one. 2 R. S. 41, § 2 ; 4 R. S. 8th ed. 2526, § 2 ; 2 Edm. St. 42.

The statute also provides, that " When there are more trustees than one appointed, the debts and property of the debtor may be collected and received by any one of them ; and when there are more than two trustees appointed, every power and authority conferred by this title on the trustees may be exercised by any two of them." 2 R. S. 41, § 3 ; 4 R. S. 8th ed. 2526, § 3 ; 2 Edm. St. 42.

" The survivor or survivors of any trustees, shall have the powers and rights given by this title to trustees. All property in the hands of any trustee at the time of his death, removal or in-

capacity, shall be delivered to the remaining trustee or trustees if there be any ; or to the successor of the one so dying, removed or incapacitated ; who may demand and sue for the same." 2 R. S. 41, § 4 ; 4 R. S. 8th ed. 2526, § 4 ; 2 Edm. St. 42.

CHAPTER XXI.

TAKING POSSESSION AND CUSTODY OF THE ASSIGNED PROPERTY.

§ 349. In general.—The first duty of the assignee, after accepting the trust, is to take possession of the assigned property, and provide for its safe-keeping until such time as it can be brought properly to sale. The assignee being bound to exercise the care of a provident owner, must exercise such discretion in the protection of the property as the circumstances of each particular case may require. On the part of the assignor no act should be omitted which can serve to express an absolute transfer of the possession, and an entire renunciation of all control over the property, so as to give every quality of reality and good faith to the transaction.

§ 350. Manner of taking possession.—We have already had occasion to refer to the necessity of a change of possession as affecting the validity of the assignment. (See *ante*, § 240.)

The duty of the assignee requires that he should proceed at once to secure the actual possession of the property. He should assume command of it, and should employ his own agents to watch over and care for it. He should demand possession of the books of account and evidences of indebtedness which have been transferred to him. He should examine the extent and particulars of the assigned property, and if no inventory has been made, his first business is to make, or cause to be made, an exact inventory of the assets. *Cram* v. *Mitchell*, 1 Sandf. Ch. 251. If an inventory has been made, he should verify it at once, so that he may not, when afterwards charged with the contents of the inventory, be without evidence of the amount and character of the property which was, in point of fact, transferred to him.

In like manner he should, for his own protection, cause the property to be appraised or examined by persons familiar with

the value of like property, so that he may be able, on an accounting, to furnish proof of value.

§ 351. **Continued change of possession.**—An assignment unaccompanied by an immediate delivery, and not followed by an actual and continued change of possession of the assigned property, is, as we have seen (*ante*, § 240), presumptively fraudulent and void as against creditors. It is not only the debtor's duty to deliver the property to the assignee, it is the assignee's duty to take and retain possession.

Where, after an assignment of a stock of goods, the assignees permitted the assignor to retain the possession of the goods, and collect the debts for them, without any visible change in the mode of doing business at the store, this was held insufficient. And it was said that a construction of the statute which would allow the vendor or assignor of a store of goods to continue in possession and to sell them out as the agent of the purchaser, would render the statutory provision for the prevention and detection of frauds a mere nullity. *Butler* v. *Stoddard*, 7 Paige, 163, 166; affi'd, 20 Wend. 507.

So, in another case, where the assignee permitted the assignor to conduct the business as his agent, and to buy and sell goods, and to receive and spend the receipts, this was held sufficient ground for an injunction and the appointment of a receiver. *Connah* v. *Sedgwick*, 1 Barb. 210.

So where the assignor, after the assignment, is permitted to sell the goods at retail, in the customary manner, and his name continues to remain upon the various signs of the store. *Pine* v. *Rikert*, 21 Barb. 469.

But the mere fact that the assignor assists in the sale of the goods for which the assignee receives the purchase price does not furnish proof that immediate possession was not taken by the assignee. *Ryder* v. *Duffy*, 80 Supm. Ct. (73 Hun), 605; s. c. 56 State R. 836.

In *Bullis* v. *Montgomery* (50 N. Y. 352), the assignor received the key of the building where the goods were, and unlocked the door, but did not go in, the sheriff subsequently seized the goods on a writ of replevin in an action against the assignor, the assignee sued for trespass, it was held that, though he had a valid

transfer of title, and there had been a symbolical delivery and constructive possession, yet the actual possession had not departed from the assignor, and the sheriff therefore was protected by his process in seizing the property.

So money received from the assigned property cannot be paid over to the assignor; it is the assignee's duty to receive it. *Currie* v. *Hart*, 2 Sandf. Ch. 353.

A mere perfunctory ceremony, such as the delivery of the key of a store, where the assignor and his clerks are permitted to continue selling the goods and transacting the business as before, will not be enough. *Adams* v. *Davidson*, 10 N. Y. 309.

§ 352. **Of the custody of the property.**—Until a sale can be effected, it is the duty of the assignee to preserve and protect the assigned property, so that it may be disposed of to the best advantage. *McQueen* v. *Babcock*, 41 Barb. 337.

He not only may but should insure the property. *Whitney* v. *Krows*, 11 Barb. 198, 201, 202. If the property is already insured under the usual form of policy, which provides that in case of any assignment, transfer, or termination of the interest of the assured, without the consent of the insurer, the policy shall become void, an assignment for the benefit of creditors will terminate the policy. *Mellen* v. *Hamilton Fire Ins. Co.*, 17 N. Y. 609; *Dey* v. *Poughkeepsie Mut. Ins. Co.*, 23 Barb. 623; see *People* v. *Beigler*, Hill & D. Sup. 133; *Savage* v. *Howard Ins. Co.*, 52 N. Y. 502. Hence the assignee should at once obtain the consent of the insurer when the policies are transferred to him, or cancel them and take out new policies.

Assignees have the right to relieve the property from prior liens, if, in the fair exercise of their discretion, they deem it for the best interests of the creditors. *Whitney* v. *Krows*, 11 Barb. 198, 202. But they cannot use the trust property for the purpose of erecting buildings and making alterations and repairs upon real estate. *Hitchcock* v. *Cadmus*, 2 Barb. 381.

Trustees of insolvent debtors under the Revised Statutes, are expressly empowered to pay off incumbrances. 2 R. S. 41, § 7; 4 R. S. 8th ed. 2526, § 7.

§ 353. **Of the care of intangible property.**—If the assigned

property consists in part of notes, bonds, policies of insurance and other similar choses in action, notice should be given to the promisors, obligors and makers of the instruments. Perry on Trusts, 4th ed. § 438. For, although no notice is necessary to perfect the assignment, yet, in default of notice, if the assignor's debtor in good faith pay the debt to the assignor, it will be a good payment and discharge him from further liability. *Beckwith* v. *Union Bank*, 9 N. Y. 211 ; affi'g 4 Sandf. 604 ; *Baker* v. *Kenworthy*, 41 N. Y. 215 ; *Coates* v. *First Nat. Bank*, 91 N. Y. 20 ; and see *ante*, § 243, and cases cited. It is the duty of the assignee forthwith to reduce all choses in action to possession, and if he unreasonably delay collection he will make himself personally liable. *Winn* v. *Crosby*, 52 How. Pr. 174.

§ 354. Custody and care of the trust funds.—It is the duty of the assignee to keep the trust funds entirely separate and distinct from their own moneys. *Duffy* v. *Duncan*, 32 Barb. 587 ; affi'd, 35 N. Y. 187.

If deposited in a bank, it should be deposited to a separate account, and in the name of the trustee, as such, to the end that the fund may at all times be traced and identified. *Duffy* v. *Duncan*, 32 Barb. 587. If he deposits it in his own name in a bank, and the bank becomes insolvent, the loss will fall on the trustee. *Matter of Stafford*, 11 Barb. 353.

If the assignees make use of the trust fund, or mingle it with their own money, they make themselves liable not only to make good all losses which may occur, and may also be required to pay interest on the money, whether it earn any or not. *Matter of Barnes*, 140 N. Y. 468 rev'g 4 Misc. 136 ; *Mumford* v. *Murray*, 6 Johns. Ch. 1 ; *Case* v. *Abeel*, 1 Paige, 393 ; *Hood's Estate*, 1 Tuck. 396 ; *Utica Ins. Co.* v. *Lynch*, 11 Paige, 520 ; *Manning* v. *Manning*, 1 Johns. Ch. 527. See *post*, Chap. XXIV.

The trustee cannot loan the trust money on personal security, nor can he invest it for any purposes of trade or speculation. *Smith* v. *Smith*, 4 Johns. Ch. 281 ; *King* v. *Talbot*, 40 N. Y. 76, 96 ; s. c. 50 Barb. 453 ; *Flagg* v. *Ely*, 1 Edm. 206 ; see Perry on Trusts, 4th ed. §§ 453, 454, 459, 464. And if he makes any use of it, all the profit which he makes will enure to the estate, while he will be personally charged for any loss as well as for in-

terest. *Norris's Appeal*, 71 Penn. St. 106 ; *Brown* v. *Rickets*, 4 Johns. Ch. 303.

It is the duty of an assignee for the benefit of creditors to pay the money received by them over to the creditors without delay. If for any sufficient reason they retain the money, it should be invested so as to render it productive, and if they neglect to pay it over or invest it, they will be charged with interest. *Dunscomb* v. *Dunscomb*, 1 Johns. Ch. 508.

§ 355. **Duty to keep accounts.**—A trustee is bound to keep clear, distinct and accurate accounts. Perry on Trusts, 4th ed. § 821. By Rule 20 (*post*, Addenda), the assignee is required to keep full, exact and regular books of account of all receipts, payments and expenditures of money by him, which shall always during business hours be open to the inspection of any person interested in the trust estate.

If an assignee for creditors keeps his accounts in a negligent way, or keep no account whatever of his receipts, all presumptions will be strongly against him, and obscurities and doubts will not operate to his advantage, but adversely. *Blauvelt* v. *Ackerman*, 23 N. J. Eq. 495.

And where a trustee refused to render an account of his receipts of rents, he was held chargeable with what in the opinion of the referee would be a reasonable rent. *Green* v. *Winter*, 1 Johns. Ch. 26.

And if he neglect to keep regular accounts, or mingle the trust funds with his own, he will be charged interest as if the fund had been kept invested upon interest. *Spear* v. *Tinkham*, 2 Barb. Ch. 211.

§ 356. **The right to reject property.**—"It has long been a recognized principle of the bankrupt law that the assignees of a bankrupt were not bound to take property of an onerous or unprofitable character—to accept, in fact, a *damnosa hæreditas.*" Robson's Law of Bank'cy, 2d ed. 375. A provision in reference to such property is incorporated into the English bankrupt law (32 and 33 Vict. c. 71, § 23). In *Carter* v. *Warne* (4 Car. & Pay. 191), it was held by Lord Tenterden, that assignees under an assignment for the benefit of creditors are to be considered in the same situation in this respect with assignees of a bankrupt.

The right of the assignee to reject property has most frequently arisen in reference to leasehold property. See *ante*, § 170, and cases there cited. But the rule applies also to other property of an onerous character upon which the assignee may be required to spend money. Thus, in the case of an executory contract to manufacture goods for the assignor, it seems that the assignee is not bound to accept the goods and make himself liable for the purchase-money. *Van Dine* v. *Willett*, 38 Barb. 319.

And under the English bankrupt law the rule has been applied to shares of a corporation liable to further call. *Graham* v. *Van Diemen's Land Co.* 11 Exch. 101; *Lawrence* v. *Knowles*, 5 Bing. N. C. 399. And the section of the English bankrupt law referred to extends to land of any tenure burdened with onerous covenants, unmarketable shares in companies, unprofitable contracts, or any other property that is unsalable or not readily salable by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money.

In reference to all onerous property subject to this rule, the assignee has his election either to reject or accept it. If he elects to accept it, he cannot afterward renounce it because it turns out to be a bad bargain. *Turner* v. *Richardson*, 7 East, 335. And if the property is valuable to the estate he will be guilty of a breach of duty to the estate in abandoning it. *Turner* v. *Richardson*, *supra*.

He has, therefore, a reasonable time within which to elect. *Graham* v. *Van Diemen's Land Co.* 11 Exch. 101. But if he exercise acts of ownership, and deal with the property as though he had accepted, that will be proof of an election to accept. *Thomas* v. *Pemberton*, 7 Taunt. 206; see *Goodwin* v. *Noble*, 8 El. & B. 587; *Jones* v. *Hausmann*, 10 Bosw. 168; *Morton* v. *Pinckney*, 8 Id. 135.

The assignee, if he intends to disclaim the property, should do so with as little delay as possible, and if the property be a lease, he should, for his own protection, notify the landlord that he declines to accept the same.

§ 357. **Employment of agents.**—The assignee may employ other persons to act for him when circumstances render it neces-

sary, and when for good and sufficient reasons he is unable to give the business his personal supervision and attention. *Casey* v. *Janes*, 37 N. Y. 608, 612; *Mann* v. *Witbeck*, 17 Barb. 388; *Van Dine* v. *Willett*, 38 Id. 319; and see *ante*, § 223; also *Grinnell* v. *Buchanan*, 1 Daly, 538.

But he cannot delegate his powers. Thus he cannot convey the assigned property to a third person to appropriate the same in the manner provided for in the assignment, because that amounts to the substitution of another trustee. *Small* v. *Ludlow*, 1 Hilt. 189.

The trust created by an assignment for the benefit of creditors is an active trust to be executed by the assignee himself for the advantage of such creditors. *Litchfield* v. *White*, 3 Sandf. 545, 551.

There is no impropriety in his employing the same clerks who were previously employed by the assignor. *Parker* v. *Jervis*, 3 Abb. Dec. 449. But he cannot employ clerks for an unlawful purpose, as to sell goods at retail in the usual course of business. *Carman* v. *Kelly*, 12 Supm. Ct. (5 Hun), 283.

And the assignee will not be allowed for moneys paid to clerks or agents employed by him in continuing the assignor's business, or for any other purpose except the care of the property and its prompt conversion into money. *Matter of Dean*, 86 N. Y. 398, and cases cited, *post*, Chap. XXIII.

§ 358. Employing the assignor as agent.—Although the appointment of the assignor as his agent by the assignee is a circumstance ordinarily regarded with suspicion (*Butler* v. *Stoddard*, 7 Paige, 163; s. c. *sub nom. Stoddard* v. *Butler*, 20 Wend. 507; *Pine* v. *Rikert*, 21 Barb. 469; *Adams* v. *Davidson*, 10 N. Y. 309); yet that circumstance alone will not afford sufficient evidence of an original intent on the part of the assignor and assignee, or either of them, to defraud creditors. *Browning* v. *Hart*, 6 Barb. 91; see *Hitchcock* v. *St. John*, Hoffm. Ch. 511; *Nicholson* v. *Leavitt*, 4 Sandf. 252, 272; *Casey* v. *Janes*, 37 N. Y. 608; *Ogden* v. *Peters*, 21 N. Y. 23; *Beamish* v. *Conant*, 24 How. Pr. 94. And when the assignee is not acquainted with the business, and has no acquaintance with those who are indebted to the assignor, the fact that he employs the

assignor as his agent, if he has confidence in his integrity, is not improper. *Wilbur* v. *Fradenburgh*, 52 Barb. 474 ; *North River Bank* v. *Schumann*, 63 How. Pr. 476.

§ 359. **Property fraudulently obtained by the assignor—Replevin.**—When the assignor turns over to the assignee property which has been fraudulently obtained, the assignee, not being a purchaser for value, will have no higher right to the property than the assignor himself had. *Joslin* v. *Cowee*, 60 Barb. 48 ; *Raymond* v. *Richmond*, 78 N. Y. 351 ; *Chaffee* v. *Fort*, 2 Lans. 81. His title, therefore, is voidable at the election of the person from whom the property was originally fraudulently obtained. But before the assignee can be required to surrender the goods, he should be requested to do so upon a distinct ground, with notice of an explicit assertion of the claim that the goods were obtained by fraud. *Bliss* v. *Cottle*, 32 Barb. 322 ; *Goodwin* v. *Wertheimer*, 99 N. Y. 149. While the rule would be otherwise if the assignee was a party to the fraud, yet where he has received the goods innocently, an action cannot be maintained against him until after a demand and refusal. *Jessop* v. *Miller*, 2 Abb. Dec. 449 ; s. c. 1 Keyes, 321 ; *Bliss* v. *Cottle*, *supra ;* see *King* v. *Fitch*, 2 Abb. Dec. 508 ; *Chambers* v. *Lewis*, 28 N. Y. 454 ; *Goodwin* v. *Wertheimer*, *supra ;* affi'g *Goodwin* v. *Goldsmith*, 49 Super. Ct. (17 J. & S.) 101 ; *Griswold* v. *Burroughs*, 67 Supm. Ct. (60 Hun), 558 ; *Nat. B. & D. Bk.* v. *Hubbell*, 117 N. Y. 384, 398. And the complaint in such an action should contain an allegation of demand. *Scofield* v. *Whiteleggc*, 49 N. Y. 259 ; *Cumisky* v. *Lewis*, 14 Daly, 466.

When a demand upon the assignee is requisite under the rule above stated, the demand must be made upon the assignee personally or upon some person who has authority from the assignee to comply with the demand.

A demand upon a servant having custody of the assigned property for the assignee and his refusal to deliver, unless the servant acted under the direction of master, will not suffice. "An agent or servant having the custody merely of goods cannot bind the principal by acceding to the demand of a third person, nor, on the other hand, by refusing to deliver the property." *Goodwin* v. *Wertheimer*, 99 N. Y. 149, 154 ; but see

Roome v. *McGovern*, 9 Daly, 60. Whether a demand on the servant would be sufficient where the master had concealed himself or was out of the jurisdiction, was considered but not decided in *Goodwin* v. *Wertheimer*, *supra*.

When a part of the purchase price has been paid before the fraud has been discovered, the vendor may retake the goods upon tender of whatever he has received of value on the sale, but where the goods, after payment by the vendee of part of the purchase-money, were passed to an assignee under a general assignment, it was held that the vendor might replevy such of them as remained in possession of the assignee, upon an offer at the trial to restore the amount received, less the value of the goods unreplevied and the depreciation in value of those replevied. *Schoonmaker* v. *Kelly*, 49 Supm. Ct. (42 Hun), 299; s. c. 3 State R. 771. This case is open to criticism so far as it appears to hold that the sale can be rescinded without an offer at the time of the rescission, to restore the purchaser to his position. See dissenting opinion of Learned, J., and cases cited by him.

But when title to property has never passed to the assignor, and the assignee has simply taken possession of property belonging to a third person, no demand is requisite to enable such person to maintain an action against the assignee to recover the proceeds of the property. *Nat B. & D. Bank* v. *Hubbell*, 117 N. Y. 384.

It was held in *Wise* v. *Grant*, 140 N. Y. 593, that when the goods fraudulently obtained by the assignor had been attached by a creditor of the assignor before a rescission of the sale by the vendor, the vendor's right to replevin the goods was cut off by the provisions of § 1690 of the Code of Civil Procedure. This section of the Code was amended in 1894 (Laws of 1894, c. 305), so as to give the vendor a right of replevin when the goods are taken under an attachment against the assignor.

When the proceeds of the goods claimed to have been fraudulently obtained by the assignor are in the hands of an insolvent assignee, and a bill has been filed by the vendee to reach the fund, the court will order the money to be paid into court to await the determination of the action. *Haggerty* v. *Duane*, 1 Paige, 321. But when the vendors, instead of electing to rescind the sale, affirm it by bringing an action against the fraudu-

lent vendee to recover for goods sold and delivered, and prosecutes the suit to judgment, they cannot afterward set up the fraud for the purpose of defeating an assignment of the property made by the vendee for the benefit of creditors, although the assignment was made in furtherance of the fraud, with full notice thereof on the part of the assignee. *Kennedy* v. *Thorp*, 51 N. Y. 174.

§ 360. **Replevin—When goods are in possession of custom authorities.**—When the goods sought to be replevied are in the custody of the custom officials, and therefore not subject to process of replevin, an equitable action in the nature of a replevin may be maintained against the fraudulent assignors and the assignee, requiring the assignee to make entry of the goods in the custom house and to take such steps as may be needful to enable the purchasers to obtain possession of their property, and in such an action an injunction may be issued restraining the defendants from disposing of the goods. *Strahlheim* v. *Wallach*, 12 Daly, 313.

§ 361. **Remedy of vendor in equity.**—When the sale is conditional or was not intended to be absolute until the purchase-money is paid, if sold for cash or upon a credit for endorsed notes until such notes are given, the vendor may follow the goods or the proceeds into the hands of the assignee. *Haggerty* v. *Palmer*, 6 Johns. Ch. 437; *Keeler* v. *Field*, 1 Paige, 312; *Buck* v. *Grimshaw*, 1 Edw. Ch. 140, 146. In *American Sugar Refining Co.* v. *Fancher*, N. Y. L. J., Oct. 19, 1894, s. c. 87 Supm. Ct. (80 Hun), when goods had been fraudulently purchased by the assignor, and the assignee before notice of rescission by the vendors sold the goods upon credit, it was held that the vendor of the goods could not maintain an action to reach the proceeds of these goods in the hands of the assignee. The prevailing opinion was based upon the argument that until rescission of the sale the assignor had a valid title to the goods, which passed to the assignee, and the goods having been sold by the assignee before notice of rescission, the title became absolute. This case is distinguishable from those above cited, where the delivery was conditional, the title never, in fact, passing to the assignor.

§ 362. Property fraudulently transferred by assignor—Assignee's right of action.— By virtue of the provisions of the act of 1858, c. 314 (cited in full, *ante*, § 156), an assignee for the benefit of creditors is authorized to disaffirm, treat as void, and resist all acts done, transfers and agreements made, in fraud of the rights of any creditor interested in the estate held by the assignee. Under this statute the assignee acquires all the rights of a judgment-creditor to reach property fraudulently transferred by the assignor, and he can maintain an action to reach such property before the recovery of a judgment against the assignor. *Southard* v. *Benner*, 72 N. Y. 424; *Spring* v. *Short*, 90 N. Y. 538; *Crouse* v. *Frothingham*, 97 N. Y. 105; *Locs* v. *Wilkinson*, 100 N. Y. 195; *Spelman* v. *Freedman*, 130 N. Y. 421; *Smith* v. *Payne*, 56 Super. Ct. (24 J. & S.) 451; *Childs* v. *Kendall*, 37 Supm. Ct. (30 Hun), 227; *Swift* v. *Hart*, 42 Supm. Ct. (35 Hun), 128, 134; *Hard* v. *Milligan*, 8 Abb. N. C. 58; *Guilford* v. *Mills*, 64 Supm. Ct. (57 Hun), 493.

In *Spelman* v. *Freedman*, 130 N. Y. 421, 427, it is said that "the Act of 1858 authorized a new class of actions, analogous in many respects to creditor's bills, to be brought for the benefit of all the creditors alike, by the assignee or other representative of an insolvent estate, to set aside fraudulent transfers by the debtor. Such actions require no lien, but are maintainable by force of the statute." The assignee is in this respect more favorably circumstanced than a creditor, for "the creditor can assert no right until by judgment and execution he has a lien, or a right to a lien, upon the specific property; but in favor of an assignee for his benefit, the legislature have substituted a statutory right in place of these conditions." *Reynolds* v. *Ellis*, 103 N. Y. 115, 123. See also *Harvey* v. *McDonnell*, 113 N. Y. 526, 531.

The assignee is not only vested with a right of action, but he acquires by virtue of the statute the exclusive right, so long as the assignment remains in force, to maintain actions to set aside previous fraudulent transfers by the assignor. *Spring* v. *Short*, 90 N. Y. 538; *Smith* v. *Payne*, 56 Super. Ct. (24 J. & S.) 451; *Swift* v. *Hart*, 42 Supm. Ct. (35 Hun), 128, 134.

Thus, where a mortgagor has made a valid general assignment of all his property, it was held that a judgment-debtor, whose judgment was recovered after the making of the assignment,

could not attack the validity of the mortgage. The right of action was in the assignee or a previous judgment-debtor. *Spring* v. *Short*, 90 N. Y. 538; *Tremaine* v. *Mortimer*, 128 N. Y. 1.

So where two chattel mortgages were made by a debtor who afterward made a general assignment, it was held that a creditor who obtained judgment after the making of the assignment could not maintain an action to avoid the chattel mortgage, there being no question raised as to the validity of the assignment. *Childs* v. *Kendall*, 37 Supm. Ct. (30 Hun), 227. The case of *Leonard* v. *Clinton*, 33 Supm. Ct. (26 Hun), 288, is overruled by these cases.

In *Fort Stanwix Bank* v. *Leggett* (51 N. Y. 552) an action brought by a judgment-creditor after an assignment by the debtor to set aside a previous fraudulent conveyance, it was held that the judgment-debtor could not raise the objection that the assignee only had the right of action. The assignee was not a party to the suit, and it was held that while the judgment-debtor might have raised by action or demurrer the objection that the assignee was a necessary party, but that having failed to do so, the objection was waived. See *Taft* v. *Wright*, 2 T. & C. 614.

The rule appears to be well settled that under the late bankrupt law the assignee in bankruptcy had the exclusive right to bring such actions. *Glenny* v. *Langdon*, 98 U. S. 20; *Trimble* v. *Woodhead*, 102 Id. 647; *Moyer* v. *Dewey*, 103 Id. 301; rev'g *Dewey* v. *Moyer*, 72 N. Y. 70.

The creditor's right of action does not arise until the assignee is in a position where he may act or be required to act. Hence where the assignee had never qualified, and therefore was not in a position to maintain the action, it was held that creditors could not sue to reach property fraudulently disposed of by the assignor upon the ground that the assignee had neglected to proceed for its recovery. *Mills* v. *Goodenough*, 18 Civ. Pro. 151.

It has been held in an action brought to set aside a general assignment and chattel mortgage as having been made with intent to defraud creditors, in which action the assignee and the holder of the chattel mortgage were parties defendant, that the assignee could not set up an affirmative claim against his co-defendant, the holder of the mortgage, alleging that it was in-

tended to create an excessive preference and asking that the lien be reduced accordingly. *Van Allen* v. *Rogers*, 5 Misc. 420.

A purchaser from an assignee does not succeed to the rights which the assignee has by virtue of the statute. *McConihe* v. *Fales*, 107 N. Y. 404.

Since the assignee has the exclusive right of action, it follows that he will be liable for a negligent omission to assail fraudulent transfers made by the assignor prior to the assignment. *In re Cornell*, 110 N. Y. 351.

The validity of a transfer made by the assignor to the assignee before the execution of the general assignment cannot be attacked in the proceedings of the assignee to account under the general assignment. *Matter of Raymond*, 34 Supm. Ct. (27 Hun), 508.

§ 363. Fraudulent transfers by assignor—Right of action by creditor.—When the assignee unreasonably refuses to exercise his right to attack fraudulent conveyances made by the assignor, or when it appears that he is acting in collusion with the fraudulent transferee, a creditor may maintain on behalf of himself and all other creditors to reclaim the property fraudulently transferred, making the assignee a party defendant. *Fort Stanwix Bank* v. *Leggett*, 51 N. Y. 552; *Crouse* v. *Frothingham*, 34 Supm. Ct. (27 Hun), 123; rev'd, 97 N. Y. 105; *Spelman* v. *Freedman*, 130 N. Y. 421; *Harvey* v. *McDonnell*, 113 N. Y. 526, 531; *Dewey* v. *Moyer*, 72 N. Y. 70, 78; *Kendall* v. *Mellen*, 36 State R. 805.

Such an action is in aid of the assignment. The *cestui que trust* brings the suit in support of the trust in the place of the recalcitrant trustee. Hence under such circumstances any creditor who would be benefited by the result may maintain the action whether he be judgment creditor or a creditor at large. *Harvey* v. *McDonnell*, 113 N. Y. 526; *Spelman* v. *Freedman*, 130 N. Y. 421, 427. Hence also the fruits of recovery by the plaintiff in such an action are recovered for the benefit of creditors under the assignment, and are to be distributed according to its terms. *Crouse* v. *Frothingham*, 97 N. Y. 105.

§ 364. Title of assignee as against unfiled chattel mort-

gage.—The weight of authority is to the effect that the assignee cannot impeach the title of the mortgagees under an unfiled chattel mortgage on the ground that by Chap. 314 of the Laws of 1858 the assignee can disaffirm and treat as void mortgages made by his assignor when made in fraud of the rights of creditors. If the only infirmity in the mortgage is that it is unfiled, the assignee has no greater rights to assail it than the mortgagor had. *Crisfield* v. *Bogardus*, 18 Abb. N. C. 334; *Dorthy* v. *Servis*, 53 Supm. Ct. (46 Hun), 628; *Niagara Co. Nat. Bank* v. *Lord*, 40 Supm. Ct. (33 Hun), 557; *Van Heusen* v. *Radcliff*, 17 N. Y. 580. The case last cited arose before the Act of 1858.

In *Crisfield* v. *Bogardus*, 18 Abb. N. C. 334, Brown, J., at Special Term, decided that a mortgage executed by an assignor free from fraud could not be treated as void by the assignee, because it had not been filed before the making of the assignment. He cites a number of decisions in other States bearing upon the question. In *Niagara Co. Nat. Bank* v. *Lord*, 40 Supm. Ct. (33 Hun), 557, upon an accounting the plaintiff, a judgment-creditor, sought to bring into general distribution the proceeds of certain goods, secured by a pledge under an instrument in the nature of a warehouse receipt. The court held that the pledge being good between the parties the assignee had no power to assail it on the mere fact of omission to file the instrument. And an unfiled chattel mortgage was held good as against a receiver in supplementary proceedings, in *Steward* v. *Cole*, 50 Supm. Ct. (43 Hun), 164, and in *Dorthy* v. *Servis*, 53 Supm. Ct. (46 Hun), 628, which was an action brought by the assignee and a judgment-creditor, it was held that as to the assignee the unfiled chattel mortgage took precedence of the conveyance to him and as to the judgment-creditor, his judgment not having been obtained until after the assignment, there remained no property-right in the debtor which he could reach.

In *Tremaine* v. *Mortimer*, 128 N. Y. 1, the question whether an assignee can impeach a chattel mortgage free from fraud on the sole ground that it had not been filed was raised but was not determined, and it does not appear that the question has been distinctly passed upon by the Court of Appeals since the Act of 1858.

When the chattel mortgages is fraudulent as to creditors the

assignee may assail it upon that ground by virtue of the Act of 1858.

Thus *Ball* v. *Slafter*, 33 Supm. Ct. (26 Hun), 353; affi'd, 98 N. Y. 622, when the mortgage was unfiled the judgment was placed upon the ground that upon the facts the mortgage was as matter of law fraudulent and void as to creditors.

In *Reynolds* v. *Ellis*, 41 Supm. Ct. (34 Hun), 47; affi'd, 103 N. Y. 115, it appeared that the lessor of a store had stipulated in the lease that the landlord should have a lien upon his stock in trade as security for the rent, which lien, however, was not to apply to goods which had been sold in the regular course of business. The lessor subsequently executed a general assignment, and in an action by the landlord to enforce his lien it was held that the assignee might resist the enforcement of the provision of the lease as being fraudulent as to creditors. This case was put on the ground of actual fraud on the face of the agreement, following the decisions in *Edgell* v. *Hart* (9 N. Y. 213), and *Gardner* v. *McEwen* (19 *Id.* 123). In *Sullivan* v. *Miller* (106 N. Y. 635; affi'g 40 Hun, 516), after a chattel mortgage has been executed and while it remained unfiled, the mortgagor executed a general assignment, and on the same day the chattel mortgage was filed; subsequently the assignee having been removed and a receiver appointed, he took possession of the mortgaged property, and under the order of the court sold it and applied the proceeds to payment of the mortgages, and on application by a judgment-creditor to vacate this order it was held that even if the assignee could not defeat the lien of the mortgage, a subsequent judgment-creditor could not acquire any lien upon the mortgage property until after levy, and no levy having been made the judgment-creditor was not in position to dispute the correctness of the order.

§ 365. Rights of creditors when unfiled chattel mortgage is followed by assignment.—Although an unfiled chattel mortgage when the mortgagor remains in possession is void as against the creditors of the mortgagor, yet the creditors cannot seize the mortgaged property until they have obtained judgment and execution. If before the creditors have acquired a lien by execution the mortgagor delivers the property to the mortgagee or to

an assignee for the benefit of creditors, the creditor's right to pursue the property is lost. Thus in *Wheeler* v. *Lawson*, 103 N. Y. 40, where the owner of property executed a chattel mortgage which was unfiled and afterward executed a general assignment, and the assignee surrendered the property to the mortgagee, it was held that a judgment-creditor whose judgment was obtained after the delivery of the property was not justified in levying upon the mortgaged property, and that the sheriff in making such levy was guilty of a trespass. So in *Kitchen* v. *Lowery*, 127 N. Y. 53, where chattel mortgages which had been executed more than a year previously were put on record, and on the same day the mortgagor executed a general assignment, and the assignee took possession of the mortgaged property, it was held in an action brought by a judgment-creditor, whose judgment was subsequently obtained, to set aside the assignment and the mortgages, that the instruments were not fraudulent in fact, and that the creditor not having secured a lien on the property before the assignment had lost his right to proceed against the mortgaged property. So in *Tremain* v. *Mortimer*, 128 N. Y. 1, where chattel mortgages had not been ratified, and one of the mortgagees took possession, and the mortgagor afterward executed a general assignment, it was held that creditors who subsequently obtained judgments could not reach the mortgaged property for the reason that if the mortgage was invalid the mortgagor's interest passed to the assignee, and if valid the title passed to the mortgagees and was not subject to levy under the creditor's executions.

§ 366. Fraudulent transfers by assignor—Actions where assignment is attacked.—While a general assignment by an insolvent debtor remains unimpeached a judgment-creditor cannot maintain an action to set aside previous conveyances and transfers by the debtor as having been made in fraud of creditors. Such right of action remains in the assignee so long as the assignment stands. A judgment-creditor may, however, sustain an action in which he seeks to attack at the same time the assignment and previous fraudulent transfers, and if he succeeds in the attack upon the assignment he may secure to himself the prior rights of a diligent creditor by the recovery of the prop-

erty fraudulently disposed of by the assignor. *Loos* v. *Wilkinson*, 110 N. Y. 195; *Spelman* v. *Freedman*, 130 N. Y. 421, 427. If in such an action the judgment-creditor fails to make good his charge of fraud in the assignment his entire action will fail. *Cutter* v. *Hume*, 43 State R. 242.

§ 367. Examination of debtor and other witnesses, and production of books and papers under the general assignment act.—The general assignment act has provided a summary method by which the assignee may make himself acquainted with the circumstances of the assigned estate, and obtain an inspection and delivery of the debtor's books and papers. And by the third section of the act (cited *ante*, § 253), it is provided that the books and papers of the debtor shall at all times be subject to the inspection and examination of any creditor, and the county judge is authorized, by order, to require the debtor or assignee to allow such inspection or examination, and by the twenty-first section of the same act it is provided that:

"The county judge may also, at any time, on petition of any party interested, order the examination of witnesses and the production of any books and papers by any party or witness before him or before a referee appointed by him for such purpose, and the evidence so taken, together with books and papers, or extracts therefrom, as the case may be, shall be filed in the county clerk's office, and may be used in evidence by any creditor or assignee in any action or proceeding then pending, or which may hereafter be instituted. No witness or party as above provided shall be excused from answering on the ground that his answer may criminate him, but such answer shall not be used against him in any criminal action or proceeding." Laws of 1877, c. 466, § 21.

The examination of witnesses under this statute rests entirely within the discretion of the court, and application therefor should be granted only in those cases where benefit will probably result to the assigned estate or those interested therein. *Matter of Swezey*, 10 Daly, 107; s. c. 64 How. Pr. 353; affi'g 62 Id. 215. The examination allowed by the assignment act is to aid in the administration of the assignment. Hence, it will not be allowed solely for the purpose of enabling a party to obtain evidence or

information with which to attack the assignment. *Matter of Holbrook*, 99 N. Y. 539 ; *In re Rindskopf*, 8 Civ. Pro. 246, *n.* ; *Matter of Burtnett*, 8 Daly, 363 ; *Matter of Everit*, 10 Id. 99 ; *Matter of Goldsmith*, 15 W'kly Dig. 110 ; s. c. 10 Daly, 112 ; *Matter of Brown*, 10 Daly, 115.

In *Matter of Wilkinson*, 43 Supm. Ct. (36 Hun), 134, a different view was taken, and it was thought that the examination should be allowed under the statute when the petition showed that there was reasonable ground for apprehending that the assignor had fraudulently disposed of his assets or that the assignor or assignee had fraudulently omitted assets from the inventory or placed upon the schedule claims which were fraudulent in whole or in part, even if the evidence obtained upon the examination might enable the creditor to attack the assignment ; to the same effect is *Matter of Landaur*, 22 W'kly Dig. 73.

The examination will be allowed for the purpose of a discovery of the assigned property or to ascertain what property passed under the assignment, as, for instance, to ascertain whether a particular trade-mark was of such a character that it passed to the assignee. *Matter of Swezey*, 10 Daly, 107. And although the examination is a matter of right to a creditor on a statement of facts showing its necessity or propriety, that is on showing that his interests under the assignment would be thereby secured, and although the order should not be capriciously denied, yet the judge should not grant it without proof of its necessity for some legal purpose. *Matter of Koonz*, 11 W'kly Dig. 55. Such an order may be made at any time. It is not confined to cases where a proceeding under the act is pending. *Matter of Bryce*, 56 How. Pr. 359.

The order for examination should name the witnesses to be examined and designate the books and papers to be produced. It should not authorize a referee to subpœna witnesses to appear before him with their books and papers and direct the assignors to produce before the referee all their books and papers and direct the referee to report his opinion. *Matter of Holbrook*, 99 N. Y. 539.

The creditors have an absolute right to an inspection of the assignor's books. Such inspection need not be made by the creditor personally. He may designate some one to make it for him,

and it is no objection that the person so designated is an expert. *Matter of Isidor*, 59 How. Pr. 98; *Matter of Strauss*, 1 Abb. N. C. 402; *Matter of Winn*, 1 Mon. L. B. 47. It is not necessary to allege or prove a demand and refusal of inspection in the petition. *Matter of Bryce*, 56 How. Pr. 359.

An assignee should allow the creditors reasonable opportunity to examine the books of the debtor, and where he permits the debtor to remain in possession of the books, and the debtor refuses creditors access to them, this is a suspicious circumstance, and, taken in connection with other suspicious circumstances, will warrant the appointment of a receiver of the assigned property. *Manning* v. *Stern*, 1 Abb. N. C. 409.

There is no authority in the court to compel the assignee to permit creditors to inspect the assigned stock. *Matter of Crowder*, 10 Daly, 132.

§ 368. Examination of an insolvent debtor under the provisions of the Revised Statutes.—Provisions are also made for the examination of the insolvent debtor and other witnesses under the statutory proceedings in reference to insolvent debtors set out in Parts I. and II. of this work, for the purpose of a discovery of property.

"Whenever the trustees shall show by their own oath or other competent proof, to the satisfaction of any officer named in the first section of the seventh article of this title (see *ante*, § 11), or of any judge of a county court, that there is good reason to believe that the debtor, his wife, or any other person has concealed or embezzled any part of the estate of such debtor vested in the said trustees; or that any person can testify concerning the concealment or embezzlement thereof; or that any person who shall not have rendered an account as above required, is indebted to such debtor, or has property in his custody or possession, belonging to such debtor; such officer or judge shall issue a warrant, commanding any sheriff or constable to cause such debtor, his wife, or other person, to be brought before him at such time and place as he shall appoint for the purpose of being examined." 2 R. S. 43, § 12; 4 R. S. 8th ed. 2528, § 12; 2 Edm. St. 44.

Under this section it is enough for the assignee who applies

for the warrant to swear to the facts on information and belief. *Noble* v. *Halliday*, 1 N. Y. 330; s. c. *sub nom. Halliday* v. *Noble*, 1 Barb. 137, 148. And when the person has property of the debtor in his possession, either individually or as administrator, he may be compelled, under oath, to state what he knows in reference to such property. *Noble* v. *Halliday*, *supra*.

And it is further provided that:

"The officer issuing such warrant, shall examine every person so brought before him, on oath, in the presence of the trustees or any of them, touching all matters relative to the debtor, his dealings and estate, and touching the detention or concealment of any part of his property, and touching the indebtedness of any person to such debtor; and shall reduce the examination to writing; which the person so examined is hereby required to sign, and which shall be attested by the officer." 2 R. S. 43, § 13; 4 R. S. 8th ed. 2528, § 13; 2 Edm. St. 45.

"If any person so brought before such an officer shall refuse to be sworn, or to answer satisfactorily, all lawful questions put to him, or shall refuse to sign the examination, not having a reasonable objection thereto, to be allowed by such officer, the said officer shall by warrant commit such person to prison, there to remain without bail, until he shall submit to be sworn or to answer as required, or to sign such examination; in which warrant, the particular default of the person committed shall be specified; and if it be, in not answering any question, such question shall also be specified therein." 2 R. S. 44, § 14; 4 R. S. 8th ed. 2528, § 14; 2 Edm. St. 45.

"If any person so committed shall bring a writ of *habeas corpus*, he shall not be discharged by reason of any insufficiency in the form of the warrant of commitment; but the court or officer before whom such person shall be brought, shall recommit such person, unless it shall be made to appear that he hath answered all lawful questions put to him, or had sufficient reason for refusing to sign the examination, as the case may be; or unless such person shall then answer, on oath, the questions so put to him." 2 R. S. 44, § 15; 4 R. S. 8th ed. 2529, § 15; 2 Edm. St. 45.

"Any sheriff or jailer willfully suffering any person so committed or recommitted, pursuant to the foregoing sections, to

escape, shall be liable to indictment for a misdemeanor; and on conviction thereof, in addition to any other punishment the court may inflict, shall forfeit to the trustees a sum equal to the whole amount of debts due to the creditors of such debtor, not exceeding two thousand five hundred dollars." 2 R. S. 44, § 16; 4 R. S. 8th ed. 2529, § 16; 2 Edm. St. 45.

"The person so examined, and answering to the satisfaction of the officer, shall not be liable to any penalty imposed in this article for concealing and not delivering any property, or paying any debt; but his answers on such examination, may be given in evidence in the same manner, and with the like effect, as if they had been made in answer to a bill in equity filed by such trustees." 2 R. S. 44, § 17; 4 R. S. 8th ed. 2529, § 17; 2 Edm. St. 46.

§ 369. Premium for discovering secreted property of insolvent debtor under Revised Statutes.—It is also provided, in reference to insolvent debtors, under the proceedings in Parts I. and II. of this work, that:

"Any person who shall discover to the trustees any secreted effects, property, or things in action, belonging to such debtor, so that they shall be recovered by them, shall be entitled to ten dollars on the hundred dollars, and at that rate, on the value of the effects so discovered, to be paid by the trustees, out of the estate of such debtor; but this section shall not extend to persons who have such property, effects or things, in their own possession." 2 R. S. 44, § 18; 5 R. S. 8th ed. 2529, § 18; 2 Edm. St. 46.

CHAPTER XXII.

COLLECTING IN THE ESTATE. SUITS BY ASSIGNEE.

§ 370. **In general.**—It will be convenient, in the first place, to consider the rights and duties of assignees under general assignments, in reference to the subject-matter of this chapter, and afterwards to take up by themselves the statutory provisions in reference to trustees of insolvent debtors appointed under the Revised Statutes.

§ 371. **The right to sue.**—The assignee is not only clothed with the legal title to the assigned property, which gives him the standing to maintain legal proceedings in reference to it, but it is his duty, having received the property and accepted the trust, to defend his possession and preserve the property. *McQueen* v. *Babcock*, 41 Barb. 337. Even when he has been enjoined in a creditor's suit from intermeddling, receiving, or collecting any of the property assigned, it is still his right and duty to bring trespass against any person who disturbs his possession. *McQueen* v. *Babcock*, *supra*; *Van Wagoner* v. *Terpenning*, 53 Supm. Ct. (46 Hun), 423. Being in possession by the act and consent of the assignor, his possession is sufficient to entitle him to maintain an action for trover as against any one but the real owner and those claiming under him. *Otis* v. *Hodgson*, 45 State R. 92; s. c. 18 N. Y. Supp. 599. It is enough for the assignee to show the execution and delivery of the assignment to support his title to a chose in action of the assignor. *McMahon* v. *Sherman*, 14 State R. 637, and the assignee cannot divest himself or be divested of his right to sue for assets so long as the trust continues. *Stanford* v. *Lockwood*, 95 N. Y. 582. If the assignor refuses to furnish an inventory of the property and to turn over the assigned estate to the assignee, the assignee may compel a delivery and a discovery, and he may also, if necessary, have an

injunction restraining the assignor from wasting the property. *Keyes* v. *Brush*, 2 Paige, 311.

If the assignee neglect to take immediate possession, and the assigned goods become mingled with goods subsequently acquired by the assignor, he will be guilty of conversion if he seizes any of the property acquired after the assignment. *Price* v. *Murray*, 10 Bosw. 243.

It frequently becomes the duty of the assignee to bring actions for trespass where creditors, after the execution of the assignment, levy attachments or executions upon the assigned property for the purpose of testing the validity of the assignment. In such cases it is his duty to assert his title, and if he carelessly or negligently permits the property to be taken from him, he will be liable to the creditors whom he represents. *McQueen* v. *Babcock*, *supra*.

A general assignee is not a borrower within the meaning of the usury laws, and he cannot maintain an action to procure the cancellation of usurious notes or securities given by the assignor without paying or offering to pay the sums actually loaned, and the right to do so cannot be conferred upon the assignee by any provision inserted in the assignment. *Wright* v. *Clapp*, 35 Supm. Ct. (28 Hun), 7; *Wheelock* v. *Lee*, 64 N. Y. 242.

Hence, when such a suit has been brought by the debtor, and he afterwards makes an assignment, the assignee should not be substituted in the place of the assignor, nor should he be made a party. *Richards* v. *Ludington*, 67 Supm. Ct. (60 Hun), 135. But it seems that the assignee may recover excessive interest paid by the assignor under the statute (2 Birdseye's St., p. 1663, § 3); *Wheelock* v. *Lee*, *supra*.

Where one partner has withdrawn from the firm sums in excess of what he was entitled to, and a general assignment has been made by the firm, the right to recover such excess is in the assignee, and a suit in equity between the partners for an accounting cannot be maintained. *Kuehnemundt* v. *Haar*, 58 How. Pr. 464.

§ 372. Duty as to collections.—The duties of assignees are, so far as they are analogous, determined by the same rules which govern executors under similar circumstances. *Jermain* v.

Pattison, 46 Barb. 9. It is not enough for an executor to apply for payment of debts due the estate through an attorney; he must follow the collection up actively through legal proceedings. 1 Perry on Trusts, 4th ed., § 440. But he is not bound to prosecute a claim of a very doubtful character, unless those who desire him to do so will indemnify the estate against costs. *Hepburn* v. *Hepburn*, 2 Bradf. 74. He certainly would not be justified in wasting the estate in idle litigation.

But if, by his neglect or carelessness, the estate suffers a loss, he will be answerable for it. Thus, if he delay commencing suit until after the claim is barred by the statute of limitations. *Simpson* v. *Gowdy*, 19 Ind. 292; *Hayward* v. *Kinsey*, 12 Mod. 568, 573; see Williams on Ex.* 1805 (6th Am. ed. vol. 3, 1909).

And when the assignee retains notes belonging to the estate for a number of years, without making any effort to collect them, and when called upon to account, sets up that the maker is solvent and responsible, he will be charged with the face of the notes. *Winn* v. *Crosby*, 52 How. Pr. 174.

So an assignee will be chargeable with culpable negligence if he fails to bring actions to set aside fraudulent transfers made by the assignor under the authority conferred upon him by the statute. *Matter of Cornell*, 110 N. Y. 351; affi'g s. c. *sub nom. Matter of Carpenter*, 52 Supm. Ct. (45 Hun), 552; see *post*, Chap. XXIV.

§ 373. **Parties.**—The general rule is that all persons materially interested in the subject-matter of the suit should be made parties, and the *cestui que trust*, as well as the trustees, should be brought before the court, so as to make the performance of the decree safe to those who are compelled to obey it, and to prevent the necessity of the defendant litigating the same question again with other parties.

But the case of assignees, or other trustees of a fund for the benefit of creditors, who are suing for the protection of the fund, or to collect moneys due to the fund from third persons, appears to be an exception to the general rule that the *cestui que trust* must be made a party to a suit brought by a trustee. *Christie* v. *Herrick*, 1 Barb. Ch. 254. In the case last cited it was held

that an assignee for the benefit of creditors might maintain an action in his own name to foreclose a mortgage which passed to him under the assignment.

Even before the Code, an assignee for creditors could file a bill in his own name relative to the trust estate, without making the creditors provided for in it parties. *Wakeman* v. *Grover*, 4 Paige, 23 ; *Lewis* v. *Graham*, 4 Abb. Pr. 106, 108 ; see *Sherman* v. *Burnham*, 6 Barb. 403, 414. But the Code expressly provides that the trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted. Code of Proc., § 113 ; Code of Civ. Pro. § 449.

The assignee may bring an action to collect a debt due the estate in his own name, or in his representative capacity. *Hoagland* v. *Trask*, 48 N. Y. 686 ; affi'g 6 Robt. 540 ; *Ogden* v. *Prentice*, 33 Barb. 160. But in order to secure that he be not personally chargeable with costs in case of defeat, it is wiser for him to sue as assignee. Code, § 3246.

If there are several assignees they must all join in bringing suit. This is on the principle that joint assignees constitute in law but one person. *Brinckerhoff* v. *Wemple*, 1 Wend. 470 ; *Thatcher* v. *Candee*, 4 Abb. Dec. 387 ; s. c. 3 Keyes, 157. But only those who accept need join. *Van Valkenburgh* v. *Elmendorf*, 13 Johns. 314.

And, for the same reason, if one of the assignees die, the action continues in the name of the survivors.

It was formerly, held that where all the assignees die the property, if it were personal estate, passed under the common law to personal representatives of the last survivor, and if the cause of action survived, it vested in them. *Emerson* v. *Bleakley*, 5 Abb. Pr. N. S. 350 ; *Bunn* v. *Vaughan*, Id. 269 ; s. c. 1 Abb. Dec. 253 ; 3 Keyes, 345 ; *Bowman* v. *Rainetaux*, Hoffm. 150.

Upon the death of the surviving trustee the trust vests in the Supreme Court and will be executed by a trustee appointed by that court. So that the rule in relation to personal property now conforms to that which, under the Revised Statutes, formerly applied to real estate only. 1 R. S. 730 (4 R. S., 8th ed., 2440), § 68. See *Savage* v. *Burnham*, 17 N. Y. 561 ; *Kane* v. *Gott*, 24 Wend. 641 ; *Bunn* v. *Vaughan*, *supra*.

The Revised Statutes provided that upon the death of a sur-

viving trustee of an express trust the trust estate shall not descend to his heirs or pass to his personal representatives; but the trust, if then unexecuted, shall rest in the Court of Chancery with all the powers and duties of the trustees, and shall be executed by some person appointed for that purpose under the direction of the court. 1 R. S. 730 (4 R. S., 8th ed., 2440), § 68.

In *Bunn* v. *Vaughan*, 5 Abb. Pr. N. S. 269, it was held that this statute did not apply to a trust of personal property, and that notwithstanding the statute a trust in personal property devolved upon the personal representatives of the last surviving trustee. A different opinion was expressed in *Curtis* v. *Smith*, 60 Barb. 9.

It is provided by the Laws of 1882, c. 189 (cited *post*, Chap. XXV.), that upon the death of the surviving trustee the trust shall devolve upon the Supreme Court.

It has been held, *Matter of Magnus*, 2 Misc. 347, that the Act of 1882 does not apply to general assignments, but that they are to be regarded as governed in this particular by § 10 of the General Assignment Act (Laws of 1877, c. 466), which provides that "in case an assignee shall die during the pendency of any proceeding under this act, or at any time subsequent to the filing of any bond required herein, his personal representative, or successor in office, or both, may be brought in and substituted in such proceeding on such notice of not less than eight days, as the county judge may direct to be given; and any decree made thereafter shall bind the parties thus substituted as well as the property of such deceased assignee, provided, however, that if such assignee die subsequent to the filing of his bond and before any proceedings may have been had thereunder, then the surety on such bond may apply to the county judge for an accounting, who may, on such terms as to him seem just and proper, appoint another assignee and release such surety." It would appear that this section was intended to apply to proceedings for the substitution either of the personal representative or of the newly appointed assignee in pending actions or proceedings rather than to the devolution of the trust or to the manner of appointment of the new trustee. *Matter of Grove*, 64 Barb. 526; affi'd, 53 N. Y. 645.

It is said in the opinion in *Matter of Magnus*, *supra*, that the

Act of 1882 applies only to the express trusts set forth in § 55 R. S. ; but among the express trusts set forth in that section is included the trust to sell lands for the benefit of creditors, and so far as trusts of personal property are regarded as governed by or in analogy to the provisions of the Revised Statutes respecting trusts, general assignments of personal property are to be regarded as express trusts. It would seem, therefore, by no means certain that any court other than the Supreme Court has power to appoint a substituted assignee in the place of a deceased assignee.

The personal representative of the deceased assignee does not succeed to the trust and is not entitled to be substituted as plaintiff in an action brought by the assignee unless he has been substituted as assignee. *Steinhouser* v. *Mason*, 135 N. Y. 635.

Where a suit has been commenced by the insolvent before the assignment of his estate, the action may be continued in the insolvent's name for the benefit of the assignee, or the court may direct the assignee to be substituted in the action. Code of Civ. Pro. § 756 ; *Raymond* v. *Johnson*, 11 Johns. 488 ; *Sedgwick* v. *Cleveland*, 7 Paige, 287 ; see *Getty* v. *Spaulding*, 58 N. Y. 636 ; *Glenville Woolen Co.* v. *Ripley*, 11 Abb. Pr. N. S. 87.

But if a claim which passes under the assignment is prosecuted to judgment in the name of the assignor, the title to the judgment is in the assignee, and the judgment will not vest in a receiver of the assignor's property, although the assignee had died between the recovery of the judgment and the appointment of a receiver. *Merritt* v. *Sawyer*, 6 T. & C. 160.

Where a debt is due to two persons jointly, and one of them is decreed to be a bankrupt, or where one of them makes an assignment under the insolvent acts, the action for the recovery of the debt, in a court of law, must be brought in the name of the other creditor and the assignee jointly, and neither can sue in his own name alone. *Ontario Bank* v. *Mumford*, 2 Barb. Ch. 596 ; *Willink* v. *Renwick*, 23 Wend. 63.

If one of the assignees receive and retain a portion of the estate, and if he convert it to his own use, his co-assignee cannot maintain an action against him or his personal representative to recover the property, or for its conversion. The only remedy in such a case, for the assignee, is to bring an action to restrain and remove his unfaithful associate, but the property can be reached

only by a bill filed by the creditors to compel an accounting. *Bartlett* v. *Hatch*, 17 Abb. Pr. 461.

But in all actions in reference to the trust estate the trustees are necessary parties. *Movan* v. *Hays*, 1 Johns. Ch. 339; *Sells* v. *Hubbell's Adm'rs*, 2 Johns. Ch. 394. And wherever the suit is to take the trust fund out of the hands of the trustees, or where it is for an account of the trust fund, being in fact a bill for the execution of the trust, the *cestuis que trust* must all be parties. *Sherman* v. *Burnham*, 6 Barb. 403, 414.

As a general rule a trustee cannot institute proceedings in equity relating to the trust property without making the whole of the *cestuis que trust* parties. Hill on Trustees, *543 (4th Am. ed., 845); *Malin* v. *Malin*, 2 Johns. Ch. 238; *Fish* v. *Howland*, 1 Paige, 20; *Schenck* v. *Ellingwood*, 3 Edw. Ch. 175; *Whelan* v. *Whelan*, 3 Cow. 537.

But under the Code they may, when numerous, be made parties constructively, under §§ 448, 786. These sections of the Code will be considered more particularly under the head of accounting.

§ 374. **Defenses.**—As we already have had occasion to remark, the assignee takes the property and estate of the debtor subject to all equities against it in the hands of the assignor. Any defense, therefore, which would be available against the assignor is equally available against the assignee.

A person indebted to the estate cannot avail himself of a defense that the assignment is fraudulent and void as against creditors, if the assignment is sufficient to pass title between the assignor and assignee. *Sheridan* v. *Mayor, etc., of N. Y.*, 68 N. Y. 30; *Allen* v. *Brown*, 44 N. Y. 228; *Stone* v. *Frost*, 61 N. Y. 614; *Richardson* v. *Mead*, 27 Barb. 178; *Crosbie* v. *Leary*, 6 Bosw. 312. But when the assignment is absolutely void, and not voidable merely, so that no title passes under it, the rule is otherwise.

Nor can an assignee who is sued for rent on a lease which he has accepted, defend on the ground that he has not complied with the requirements of the assignment law. *Powers* v. *Carpenter*, 15 W'kly Dig. 155.

Where the assignee of an insolvent firm brought an action to recover moneys due the firm, and the complaint alleged an as-

signment by the firm to the plaintiff, the execution of which the defendants admitted on the trial, it was held that defendants could not afterwards object to the assignment on the ground that it was not executed by all the partners. The objection should have been made on the trial, because the want of the signature of one of the defendants might have been remedied by proof of his assent to the signature of the firm. *Colwell* v. *Lawrence*, 38 Barb. 643. Where the assignee sued an accommodation indorser upon a promissory note made by the assignor, and which had been transferred to the assignee individually, before the assignment, in payment of goods sold, it was held that the indorser could not, in that action, ask to have the *pro rata* share due under the assignment applied in payment upon the note, for the reason that the amount due was unascertained, and could not be ascertained except in an action for an accounting, which could not be had in that action. *Bailey* v. *Bergen*, 67 N. Y. 346; rev'g s. c. 9 Supm. Ct. (2 Hun), 520. It was said that if the accounts of the plaintiff, as assignee, had been settled, and he had in his hands an admitted or established balance, it might be that, in order to avoid circuity of action, he could be compelled to make the application.

But where the assigned property is levied upon by the sheriff under attachment or execution in an action of replevin or trover brought by the assignee, the sheriff may justify his taking by showing that the assignment was fraudulent. (See *ante*, § 254.)

This defense is available only to the extent of the claim of the creditor whose process the sheriff acts under. Any property or proceeds beyond are recoverable by the assignee, even though the assignment be found to be fraudulent. *Waterbury* v. *Westervelt*, 9 N. Y. 598.

§ 375. Evidence—Declarations of assignor.—We have heretofore (§ 245) discussed the competency of the declarations of the assignor as evidence against the assignee on actions brought by creditors to set aside the assignment as fraudulent. In actions brought by the assignee to recover the assigned property from third persons or to recover damages for its conversion, the declarations of the assignor are not admissible as evidence against the assignee unless they are parts of the *res gestæ* or unless it is shown

that the assignor and assignee were combined in a common conspiracy to defraud the assignor's creditors. *Bullis* v. *Montgomery*, 50 N. Y. 352, 358, 359; *Cuyler* v. *McCartney*, 40 N. Y. 221, 225; *Newlin* v. *Lyon*, 49 N. Y. 661.

The cases will be found collected in § 244, *ante*.

§ 376. **Set-off.**—The assignee takes the debt assigned to him subject to the right of set-off which the debtor had against it at the time of the assignment. If, therefore, at the time of the assignment the debtor has a valid *present* claim against the assignor, he may use the claim as a set-off in any action brought by the assignee. *Martin* v. *Kunzmuller*, 37 N. Y. 396; *Myers* v. *Davis*, 22 N. Y. 489; *Jordan* v. *Nat. Shoe & Leather Bank*, 74 N. Y. 467, 474; *Hicks* v. *McGrorty*, 2 Duer, 295; *Thompson* v. *Hooker*, 4 N. Y. Leg. Obs. 17; *Williams* v. *Brown*, 2 Keyes, 486; *Crosbie* v. *Leary*, 6 Bosw. 312; *Wells* v. *Stewart*, 3 Barb. 40; *Chance* v. *Isaacs*, 5 Paige, 592; *Mason* v. *Knowlson*, 1 Hill, 218; *Ogden* v. *Cowley*, 2 Johns. 274; *Martine* v. *Willis*, 2 E. D. Smith, 524; *Keep* v. *Lord*, 2 Duer, 78; *Beckwith* v. *Union Bank*, 9 N. Y. 211; affi'g 4 Sandf. 604; *Lawrence* v. *Bank of Republic*, 35 N. Y. 320; *Westlake* v. *Bostwick*, 35 Super. Ct. (3 J. & S.) 256; *Roberts* v. *Carter*, 38 N. Y. 107.

In the case of *Martin* v. *Kunzmuller* (37 N. Y. 396; affi'g 10 Bosw. 16), where at the time of the assignment the defendants were indebted to the assignors for goods sold, and held three promissory notes of the assignors, two of which had matured at the time of the assignment, the other being not yet due, in an action brought by the assignee upon the claim for goods sold, it was held that the defendants might offset the notes which had matured at the date of the assignment, but not the other note.

A claim against the assignor, acquired by purchase or otherwise after the assignment, is not available as an offset against a claim due to the assignor in the hands of the assignee. *Johnson* v. *Bloodgood*, 1 Johns. Cas. 51; *Mason* v. *Knowlson*, 1 Hill, 218; *Crosbie* v. *Leary*, 6 Bosw. 312; *Myers* v. *Davis*, 22 N. Y. 489; *Smith* v. *Brinkerhoff*, 6 N. Y. 305; *Van Dyck* v. *McQuade*, 85 N. Y. 616.

But although the claims may not be within the statute of set-

off, in an action at law an equitable set-off may in some cases be allowed. The equitable rule is that where at the date of the assignment the debt due to the insolvent has not matured, but the debt due by the insolvent has matured, the creditor to the insolvent estate may compel a set-off. *Hughitt* v. *Hayes*, 136 N. Y. 163; *Fera* v. *Wickham*, 135 N. Y. 223; rev'g 68 Supm. Ct. (61 Hun), 343; *Richards* v. *La Tourette*, 119 N. Y. 54; affi'g 60 Supm. Ct. (53 Hun), 623; *Rothschild* v. *Mack*, 115 N. Y. 1; affi'g 49 Supm. Ct. (42 Hun), 72; *Littlefield* v. *Albany Co. Bank*, 97 N. Y. 581; *Munger* v. *Albany City Nat. Bank*, 85 N. Y. 580; *Davidson* v. *Alfaro*, 80 N. Y. 660; *Smith* v. *Felton*, 43 N. Y. 419; *Smith* v. *Fox*, 48 N. Y. 674; *Lindsay* v. *Jackson*, 2 Paige, 581; *Hicks* v. *McGrorty*, 2 Duer, 295; *Keep* v. *Lord*, 2 Duer, 78; *Chance* v. *Isaacs*, disapproved.

But if the debt due to the insolvent has matured, but the debt due by the insolvent has not matured, a set-off will not be allowed, for that would be to give the person holding an unmatured claim against the insolvent estate a priority to which he would not be equitably entitled as against the other creditors of the insolvent. *Fera* v. *Wickham*, 135 N. Y. 223; *Bradley* v. *Angel*, 3 N. Y. 475.

The equitable principle which justifies the set-off in the cases above referred to arises from the fact that the debtor to the estate may waive the extended credit and regard the debt from him to the insolvent as immediately due, and the debt to him being due there arises the mutuality of obligation which lies at the basis of the doctrine of set-off. *Richards* v. *La Tourette*, 119 N. Y. 54, 59; *Rothschild* v. *Mack*, 115 N. Y. 1; *Munger* v. *Albany City Nat. Bank*, 85 N. Y. 580–588. Equity by compelling a set-off under such circumstances with the consent of the person entitled to the credit and where third persons are not injured follows the rule at law. *Bradley* v. *Angel*, 3 N. Y. 475. The insolvency of the debtor who holds the unmatured claim while he is himself indebted upon a claim presently due furnishes a ground for the intervention of equity, and his assignee stands in no better position equitably than the assignor. *Smith* v. *Felton*, 43 N. Y. 419.

When neither debt is due at the date of the assignment a set-off cannot be had in equity by reason of the circumstance that

the debt due from the assignor matures before the debt due by the assignor. *Fera* v. *Wickham*, 135 N. Y. 223, distinguishing *Rothschild* v. *Mack*, 115 N. Y. 1, and *Rothschild* v. *Mack*, 49 Supm. Ct. (42 Hun), 72, and *Schieffelin* v. *Hawkins*, 1 Daly, 289. But the mere fact that a demand is technically necessary before the creditor could bring suit against the assignor is not enough to defeat the right of equitable set-off. *Richards* v. *La Tourette*, 119 N. Y. 54; *Hughitt* v. *Hayes*, 136 N. Y. 163; *Smith* v. *Felton*, 43 N. Y. 419; *Fort* v. *McCully*, 59 Barb. 87; *Seymour* v. *Dunham*, 31 Supm. Ct. (24 Hun), 93. "Claims in the eye of a court of equity will be regarded as due, notwithstanding the absence of a technical demand, when equitable considerations require that they shall be applied each to the other." *Hughitt* v. *Hayes*, 136 N. Y. 163, 167. In *Rothschild* v. *Mack* (115 N. Y. 1), it was held that a creditor who had been induced by false representations to advance moneys to the assignor upon credit might, upon proof of the fraud, disaffirm the credit and claim as upon a debt presently due upon *assumpsit* and set off such debt against a claim of the assignee. See *Fera* v. *Wickham*, 135 N. Y. 223.

In *Shipman* v. *Lansing* (32 Supm. Ct. [25 Hun], 290), where the assignee of a firm, who was also assignee of the individual partner, brought an action against defendants to recover an amount due to the partner, and the firm at the time of the assignment were indebted to the defendant, it was held that, inasmuch as all the creditors of the partner had been paid and the recovery would be for the benefit of firm creditors, the firm debt should be offset.

The holders of the bills of an insolvent bank may set them off against a claim by the receiver of the bank, but not if the bills were obtained after the bank stopped payment though before a receiver was appointed. *In re Receiver of Middle Dist. Bank*, 9 Cow. 414, note; see s. c. 1 Paige, 585; see *McLaren* v. *Pennington*, 1 Paige, 102.

In the case of *Lawrence* v. *Bank of Republic* (35 N. Y. 320), the plaintiffs, as assignees, sued the defendant to recover a debt due them for certain moneys deposited to their credit. The defendants undertook to set up a claim to the fund on the ground of an attachment obtained by them against the property of the

assignors for the reason that the assignment was fraudulent, and it was held that they acquired no lien upon the funds by the institution of their action, and had no equitable set-off or counter-claim.

In *Beckwith* v. *The Union Bank* (9 N. Y. 211; affi'g 4 Sandf. 604), where an insolvent firm, having money deposited in bank, made a general assignment of their property for the benefit of their creditors, and soon after, but before the bank had notice of the assignment, a bill against the firm, held by the bank, greater in amount than the sum on deposit, fell due, it was held that the assignee, after demand of the sum on deposit, was entitled to recover it of the bank, and that his right was complete without giving notice of the assignment, and that the bank, by its subsequent acts, had not affected his rights.

It was held, also, that the bank could not, as against the assignee, apply the deposit in payment of the bill. *Beckwith* v. *The Union Bank of New York*, 9 N. Y. 211; affi'g 4 Sandf. 604.

Where a corporation, after its insolvency, pays dividends to its stockholders, such stockholders are liable for the amounts thus received to the creditors of the corporation or to a receiver of it. And in an action by the receiver against one of the stockholders for the amount paid to him as a dividend by the insolvent company, he cannot offset against the receiver in such action any claims which he holds against the company, for the reason that the receiver represents not the company, but the creditors who are parties beneficially interested. The case is, therefore, not brought within the statute in relation to set-offs, nor within the spirit of the decisions relating to set-offs. *Osgood* v. *Ogden*, 4 Keyes, 70; and see *Sawyer* v. *Hoag*, 17 Wall. 610.

It is not necessary that the assignees should give a judgment-creditor of the assignor notice of the assignment to them, in order to prevent such creditor from using his judgment, obtained after the assignment against the assignor, as a set-off or other defense in an action by the assignee against his judgment-creditor. The lack of notice is not material where the defendant does not do any act, subsequent to the assignment, which he would not have done if he had received notice. *Ogden* v. *Prentice*, 33 Barb. 160.

A judgment obtained against the assignor subsequent to the assignment cannot be set off against a claim of the assignee, although the assignment was made without notice to the judgment-creditor. *Ogden* v. *Prentice*, 33 Barb. 160. And judgments purchased after the assignment cannot be set off. *Spencer* v. *Barber*, 5 Hill. 568; *Graves* v. *Woodbury*, 4 Id. 559; see *Roberts* v. *Carter*, 38 N. Y. 107; rev'g 24 How. Pr. 44.

In an action brought by a creditor to compel an accounting, the assignee cannot set up expenditures made by him by way of counterclaim and insist upon their allowance because no reply was interposed. *Duffy* v. *Duncan*, 35 N. Y. 187, 189.

Where a general assignment provided that the assignee should use and apply the fund in the same order and manner in which the estate of a bankrupt is required to be used, and applied for and towards the payment of the debts of such bankrupt proved and allowed under the bankrupt act, it was held that this applied to a case of set-off, and that, under the provisions of the bankrupt act, the debtor might set off a debt provable in bankruptcy, though not due at the time of the assignment. *Fort* v. *McCully*, 59 Barb. 87; see *post*, § 381.

§ 377. **Compromise of debts due the estate.**—The general assignment act of 1877 provides that "the county judge of the county where the assignment is recorded may upon the application of the assignee and for good and sufficient cause shown, and on such terms as he may direct, authorize the assignee to compromise or compound any claim or debt belonging to the estate of the debtor. But such authority shall not prevent any party interested in the trust estate from showing upon the final accounting of such assignee that such debt or claim was fraudulently or negligently compounded or compromised. And the assignee shall be charged with, and be liable for, as part of the trust fund, any sum which might or ought to have been collected by him." Laws of 1877, c. 466, § 23.

Previous to this enactment the county court had no power to direct the assignee in the general administration of his trust. That power resides only in a court of equity. *Shipman's Petition*, 1 Abb. N. C. 406; see *ante*, § 344.

Where the assignee made application under this section by

petition, setting forth that a large portion of the assets of the assignor's estate consisted of claims against persons in the Southern States, that these claims were about four hundred and sixty in number and of various amounts, from $2 to $2,150, and that sixty of them could not be collected, as the assignors believed, for the reason, among others, that they were in suspense ; and that the assignee had learned, by long experience, that delay in settling such debts—especially in the Southern States—usually ends in loss, and asking for an order authorizing him to compromise, in his discretion and upon the best terms that he could obtain, all claims due to the assignors, and to receive in settlement thereof cash, notes, securities, and such available assets as he may deem best, it was held that there was no authority for an order of the court conferring such general powers ; that the circumstances of the particular case are to be laid before the judge, and that he, and not the assignee, is to determine whether the debt should be compromised, and upon what terms. *In re Ransom*, 8 Daly, 89.

Independent of the statute the assignees have the authority, though not expressly given them in the assignment, to compromise or compound such debts as cannot be wholly collected, provided they act in good faith and do that which is best for the creditors under the circumstances. *Anon.* v. *Gelpcke*, 12 Supm. Ct. (5 Hun), 245, 254, Daniels, J.

Before the statute the assignee could always apply to the court for its advice on a question of compromise. *In re Croton Ins. Co.* 3 Barb. Ch. 642 ; *Anon.* v. *Gelpcke*, *supra.* The act of 1877, in this respect, is merely cumulative, and extends to the county court, in the given case, an authority which before could be exercised only by a court of equity. *Coyne* v. *Weaver*, 84 N. Y. 386, 392.

The statute makes no provision for notice to creditors of the application. It expressly reserves to the creditors the right to show that the debt or claim was fraudulently or negligently compounded or compromised, and the assignee is made liable for any sum which might or ought to have been collected by him. The result of the statute, therefore, is, that when notice is not given to the creditors, so as to bind them by the order of the court, the order obtained only shifts the burden of proof upon an accounting, and throws upon the creditors the necessity of showing that

the claim might or ought to have been collected by the assignee. As to the requirement of notice to protect the assignee, see *ante*, § 344.

But the uniform practice in the Court of Common Pleas in New York City is to order a reference to take proof of the facts and circumstances. When the amount of the claim due the estate is small, leave may be granted on the petition and proofs without ordering a reference. *Matter of Wooster*, 10 Daly, 6.

§ 378. **Costs.**—The Code provides (Code of Proc. § 317 ; see §§ 3246, 3271, Code C. P.) that in an action prosecuted or defended by the trustee of an express trust costs shall be recovered as in an action by and against a person prosecuting or defending in his own right, but such costs shall be chargeable only upon, or collected of the estate, fund or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally for mismanagement or bad faith in such action or defense. It has been held that a general assignee for the benefit of creditors is a trustee of an express trust within this section. *Cunningham* v. *McGregor*, 12 How. Pr. 305 ; s. c. 5 Duer, 648 ; see also *Cutter* v. *Reilly*, 5 Robt. 637.

And when the assignee intervenes to defend an action pending against the assignor at the time of the assignment and is unsuccessful, and costs are awarded against him, payable out of the estate, he may be examined on supplemental proceedings. *Felt* v. *Dorr*, 36 Supm. Ct. (29 Hun), 14.

But the assignee is not liable for the costs of an action against the assignor continued after the assignment where he is not instrumental in carrying it on. None of the cases charge the assignee unless he has employed the attorney, contributed money or in some way been instrumental in carrying on the litigation. *McCarthy* v. *Wright*, 63 Supm. Ct. (56 Hun), 387 ; *Taylor* v. *Bolmer*, 2 Denio, 193 ; *Heather* v. *Neil*, 14 W'kly. Dig. 46.

The assignee will be chargeable personally with the costs of an action which he has brought or defended as assignee when he has been guilty of "mismanagement or bad faith." It has been held that the assignee is not guilty of mismanagement because he has paid out all of the assigned estate without reserving funds with which to meet the costs of the litigation in which he is in-

volved. *Jack* v. *Robie*, 55 Supm. Ct. (48 Hun), 181, criticising *Butler* v. *The Boston & Albany R. R. Co.*, 31 Supm. Ct. (24 Hun), 99. When the trial court awards costs against the assignee payable out of the estate that is an adjudication that he is not personally liable for the costs, and this determination cannot be attacked collaterally. *Hone* v. *De Peyster*, 106 N. Y. 645; *Jack* v. *Robie*, 55 Supm. Ct. (48 Hun), 181. See *Slocum* v. *Barry*, 38 N. Y. 46.

§ 379. **Security for costs.**—It is provided by section 3271 of the Code of Civil Procedure, that "in an action brought by or against an executor or administrator, in his representative capacity, or the trustee of an express trust, or a person expressly authorized by statute to sue, or to be sued; or by an official assignee, the assignee of a receiver, or the committee of a person judicially declared to be incompetent to manage his affairs; the court may, in its discretion, require the plaintiff to give security for costs."

Security in cases of this kind is a matter of discretion, and such discretion should not be exercised against an assignee unless there are reasonable grounds therefor. *Barnett* v. *Goble*, 50 Supm. Ct. (43 Hun), 354, and an assignee for the benefit of creditors will not be compelled to give security when he shows merits and has assets in his hands. *Day* v. *Bach*, 1 Mon. L. B. 76.

The Revised Statutes provided "that when a suit shall be commenced in any court for or in the name of the trustees of any debtor, or for or in the name of any person being insolvent, who shall have been discharged from his debts, or whose person shall have been exonerated from imprisonment, pursuant to law, for the collection of any debt contracted before the assignment of his estate, the defendant may require the plaintiff to file security for costs." 2 R. S. 620, § 1; 3 R. S. 6th ed. 900, § 1.

It was held that this provision did not apply to an assignee under a general assignment for the benefit of creditors, but simply to trustees of insolvent debtors appointed under the Revised Statutes. *Ferriss* v. *Am. Ins. Co.* 22 Wend. 586; see *Ranney* v. *Stringer*, 4 Bosw. 663. The statute has now been repealed and incorporated into the section of the Code cited above.

Where an action was commenced by a person who had been exonerated from arrest under the statute more than ten years before, it was held that the defendant must furnish other proof of the plaintiff's inability to pay costs before security would be required. *Gomez* v. *Garr*, 18 Wend. 577.

§ 380. Trustees of insolvent debtors appointed under Revised Statutes—Reference as to disputed claims.—The Revised Statutes provide a special method for the settlement of controversies as to claims in favor of or against the estate of an insolvent debtor, under the statutory proceedings considered in Parts I and II of this work.

It is enacted that: "If any controversy shall arise between the trustees and any other person in the settlement of any demands against such debtor, or of debts due his estate, the same may be referred to one or more indifferent persons, who may be agreed upon by the trustees and the party with whom such controversy shall exist, by a writing to that effect signed by them." 2 R. S. 45, § 19; 4 R. S. 8th ed. 2529, § 19; as amended by Laws of 1862, c. 373; 2 Edm. St. 46.

"If such referee or referees be not selected by agreement, then the trustees or the other party to the controversy may serve a notice of their intention to apply to the officer who appointed said trustees, or to any judge of the Supreme Court at chambers, residing in the same district with said trustees, for the appointment of one or more referees, specifying the time and place when such application will be made, which notice shall be served at least ten days before the time so therein specified." 2 R. S. 45, § 20; 4 R. S. 8th ed. 2529, as amended by Laws of 1862, c. 373; 2 Edm. St. 46.

"On the day so specified, upon due proof of the service of such notice, the officer before whom the application is made shall proceed to select one or more referees, the same in all respects as they are now selected, according to the rules and practice of the Supreme Court." 2 R. S. 45, § 21; 4 R. S. 8th ed. 2530, as amended by Laws of 1862, c. 373; 2 Edm. St. 46.

"When any witness to such controversy shall reside out of the county where the said trustees resided at the time of their appointment, the referee or referees appointed to hear said contro-

versy shall have power to issue a commission or commissions in like manner as justices of the peace are now authorized to issue the same, and the testimony so taken shall be returned to said referee or referees in the same manner, and be read before them on a hearing, in like manner as testimony taken on commission before justices of the peace." 2 R. S. 45, § 22; 4 R. S. 8th ed. 2530, as amended by Laws of 1862, c. 373; 2 Edm. St. 46. As to the manner of taking commission, see Laws of 1838, c. 243, § 2; Laws of 1847, c. 329.

"The officer before whom they shall be selected, shall certify such selection in writing. Such certificate, or the written agreement of the parties, shall be filed by the trustees in the office of a clerk of the Supreme Court, when the trustees were appointed under the first article of this title; and in the said office, or in that of the clerk of the Court of Common Pleas of the county, when the trustees were appointed under any other article of this title; and a rule shall thereupon be entered by such clerk in vacation or in term, appointing the persons so selected to determine the controversy." 2 R. S. 45, § 23; 4 R. S. 8th ed. 2530, 2 Edm. St. 47.

"Such referees shall have the same powers, and be subject to the like duties and obligations, and shall receive the same compensation, as referees appointed by the Supreme Court, in personal actions pending therein." 2 R. S. 45, § 24; 4 R. S. 8th ed. 2530; 2 Edm. St. 47.

"The report of the referees shall be filed in the same office where the rule for their appointment was entered, and shall be conclusive on the rights of the parties, if not set aside by the court." 2 R. S. 45, § 25.; 4 R. S. 8th ed. 2530; 2 Edm. St. 47.

The debtor may compel the trustee by *mandamus* to appoint referees to contest the validity of the debts presented and claimed against him. *Titus* v. *Kent*, 1 How. Pr. 80; *Matter of Belknap*, 2 Id. 200.

The reference is only authorized by the statute when a controversy shall arise on the settlement of any demands against the debtor, or of debts due his estate. And, accordingly, where the trustees of non-resident debtors claimed that certain shares of the capital stock of a foreign bank, which were standing upon the books of the agent of the bank in this State. in the names of the

debtors, and which had been assigned with the consent of the trustees to third persons, and by the latter to the trustees, should be transferred to them by the agent; and this was refused by the agent, and the trustees thereupon procured the appointment of referees to settle the controversy; and on the hearing before the referees it was objected that the referees had no jurisdiction to determine the matter in dispute, and the referees reported in favor of the trustees, subject to the opinion of the court. It was held that the referees had no jurisdiction of the case, the matter in controversy not being a *debt* within the meaning of the statute; and the report of the referees was set aside. *Matter of Denny*, 2 Hill, 220.

The referee, when requested, must report the findings of fact and conclusions of law separately. *Matter of Harmony Fire & M. Ins. Co.* 14 Abb. Pr. N. S. 292, note.

The question of the constitutionality of this provision for a compulsory reference was raised but not determined, in *Austin* v. *Rawdon*, 42 N. Y. 155; rev'g *Matter of Austin*, 44 Barb. 434.

There is no express provision of the statute authorizing the entry of judgment upon the report of the referees. But the declaration that the report shall be "conclusive on the rights of the parties if not set aside by the court," is equivalent to a judgment, and the entry of a judgment upon the report is the proper practice. *Austin* v. *Rawdon*, *supra*.

§ 381. Set-off in case of assignees of insolvent debtors appointed under the Revised Statutes.—The following are the provisions of the Revised Statutes in reference to set-off in the case of insolvent debtors:

"Where mutual credit has been given by any debtor (except a debtor proceeding under the sixth article of this title)[1] and any other person, or mutual debts have subsisted between such debtor and any other person, the trustees may set off such credits or debts, and pay the proportion or receive the balance due. But no set-off shall be allowed of any claim or debt, which would not have been entitled to a dividend, as hereinbefore directed." 2 R. S. 47, § 36; 4 R. S. 8th ed. 2532; 2 Edm. St. 49.

"No set-off shall be allowed by such trustees, of any claim or

[1] *Ante*, Chap. VI.

debt, which shall have been purchased by, or transferred to, the person claiming its allowance, which could not have been set off by him, according to the provisions of this article, in a suit brought by such trustees." 2 R. S. 47, § 37; 4 R. S. 8th ed. 2532; 2 Edm. St. 49; 1 Fay's Dig. 391; and see paragraph 9, § 9, cited *ante*, § 377; and see similar provision of bankrupt law, R. S. U. S. § 5073.

The rules applicable to set-off in the case of assignees of insolvent debtors under the statutory proceedings are therefore different from those which prevail in reference to set-off by assignees under a general assignment. The statute provides for the set-off of "mutual credits" as well as "mutual debts," under which it has been held that claims not yet matured and not liquidated, although capable of liquidation, are within the statute. *Osgood* v. *De Groot*, 36 N. Y. 348; *Nelson* v. *Edwards*, 40 Barb. 279; *Pardo* v. *Osgood*, 5 Robt. 348; *Berry* v. *Brett*, 6 Bosw. 627.

The receivers of insolvent insurance companies are vested by statute with all the powers and authorities conferred by law upon the trustees of insolvent debtors—2 R. S. 469, §§ 68–74 (4 R. S. 8th ed. 2681–2682)—and several cases have arisen in which the statute has been applied to such receivers. Thus, after a general average loss under a marine insurance policy, and while the loss was unliquidated, the company became bankrupt. The receivers held a liquidated claim against the insured on his premium note, which matured earlier than the claim against the company, and which they proceeded to enforce. It was held that, as the two claims arose out of the same transaction, the insured was entitled to have the loss set off against his obligation to the company. *Osgood* v. *De Groot*, 36 N. Y. 348; see *Nelson* v. *Edwards*, 40 Barb. 279; *Pardo* v. *Osgood*, 5 Robt. 348; *In re Globe Ins. Co.* 2 Edw. Ch. 625.

So in the case of a receiver of a bank, vested with the same powers as trustees of insolvent debtors, where, at the time of the failure of a bank, the bank was indebted to a certain creditor in a given sum, and the same creditor owed the bank a smaller sum upon a note not then due, this was regarded as a case of mutual credit. *Jones* v. *Robinson*, 26 Barb. 310; *Holbrook* v. *The Receivers of the Am. Fire Ins. Co.* 6 Paige, 220.

§ 382. **Compromise of claims by assignee of insolvent debtor appointed under Revised Statutes.**—The trustees of an insolvent debtor (see *ante*, § 338) are empowered, under the order of the officer appointing them, to compound with any person indebted to the debtor, and to discharge all demands against such person. In such case the judicial officer must have all the facts of the particular case before him before he can make an order that the debt may be compounded and the debtor discharged, for there is no authority to make a general order that the assignee may compound any claims against the estate which in his discretion he may think proper. *In re Ransom*, 8 Daly, 30.

CHAPTER XXIII.

SALE OF THE ASSIGNED PROPERTY.

§ 383. **Power of sale.**—An assignment in trust to pay debts necessarily implies a power of sale, though none is given in words. 2 Perry on Trusts, 4th ed., § 766 ; Hill on Trustees, 4th Am. ed., 732 (*471) ; see *ante*, § 145.

A power of sale can be exercised only in the mode and subject to the qualifications prescribed by the instrument creating the power. The assignor being the absolute owner of the property, and in no manner obliged to assign, may annex such conditions and qualifications to the transfer as he pleases. If he annex an improper condition the court may pronounce the assignment itself void. It cannot hold the transfer good and disregard the condition. *Jessup* v. *Hulse*, 21 N. Y. 168, 170.

Whatever discretion or authority the assignment confers the assignee may not only exercise but he becomes bound by the acceptance of the trust to exercise. See *Mason* v. *Martin*, 4 Md. 124.

A trust to sell will not authorize the trustee to mortgage. *Bloomer* v. *Waldron*, 3 Hill, 361 ; *Waldron* v. *McComb*, 1 Hill, 111 ; *Russell* v. *Russell*, 36 N. Y. 581 ; *Albany Fire Ins. Co.* v. *Bay*, 4 N. Y. 9 ; *Coutant* v. *Servoss*, 3 Barb. 128, 133.

§ 384. **Duty in regard to sale.**—The assignee is bound to regard the interests of the creditors in the management of the affairs of his office, and as to the manner of sale. Lord Eldon laid down the rule that a trustee should bring the estate to the hammer under every possible advantage to his *cestuis que trust*. *Downes* v. *Grazebrook*, 3 Mer. 200, 208 ; *Hart* v. *Ten Eyck*, 2 Johns. Ch. 62, 110 ; *Franklin* v. *Osgood*, 14 Johns. 527.

If the trustees sell under circumstances of haste or improvidence, or if they contrive to advance the interests of one party at the expense of another, they will be personally responsible to

the injured party for the loss. *Osgood* v. *Franklin*, 2 Johns. Ch. 1, 27; s. c. 14 Johns. 527; *Quackenbush* v. *Leonard*, 9 Paige, 334, 347.

"As the agent or officer of the law, the assignee is necessarily invested with some discretionary power. He cannot sell instanter, but is bound to exercise reasonable care and prudence in regard to the time and circumstances of the sale. He may take time to advertise, and must therefore select the day when the sale is to take place. If no bidders should attend upon the day appointed, he would have power, and it would be his duty, to postpone the sale to another day. He would be obliged also, to determine whether the property should be sold in separate parcels, or all in one parcel, and to exercise, in that and other similar respects, some discretion as to the manner and circumstances of the sale." Selden, J., in *Jessup* v. *Hulse*, 21 N. Y. 168, 169.

It is the duty of the assignee to be present at the sale and control it, and if the sale is so conducted as to prevent fair competition, whether cognizant of the circumstances or not, he is bound to make good the loss, and should be charged in the settlement of his accounts with the fair value of the property sold, and interest upon it, just as if the money had been received. *Harvey's Admr.* v. *Steptoe's Admr.* 17 Gratt. 289.

A trustee who sells at an improper time, or without conforming to the conditions of his power, will be liable for a deficiency of the proceeds of sale, though his intentions were good. He will be held responsible for the highest value the property can be shown to have had, and be decreed to account for the difference. *Melick* v. *Voorhees*, 24 N. J. Eq. 305.

A trustee who takes no active part in the sale is equally responsible, for he cannot delegate his powers to a co-trustee. *Berger* v. *Duff*, 4 Johns. Ch. 368.

"Mere inadequacy of price, unless it is so gross as to be evidence of fraud, is not sufficient to invalidate a sale, if the transaction is in good faith and due diligence was used in getting the best possible price for the property." 2 Perry on Trusts, 4th ed., § 770.

§ 385. Time of sale.—Assignees are bound to convert the assigned property into money, and distribute it among the cred-

itors without any unreasonable delay. *Hart* v. *Crane*, 7 Paige, 37; *Meacham* v. *Sternes*, 9 Paige, 398, 406; see *ante*, § 189.

And it is made the duty of trustees of insolvent debtors, appointed under the Revised Statutes, to convert the estate, real and personal, of the debtor into money as soon as possible. 2 R. S. 45, § 26; 4 R. S. 8th ed. 2530.

If the assignee should unnecessarily retain the property unsold, and incur expense in its custody, or the property should depreciate by the delay, he would undoubtedly be responsible for all loss occasioned to the estate thereby.

§ 386. Sales on credit.—An authority in an assignment to the assignee to sell on credit will invalidate the instrument (*ante*, § 217), and that which the assignment may not lawfully provide and direct in express terms can find no justification under any implied authority derivable under it. *Levy's Accounting*, 1 Abb. N. C. 177, 181, Robinson, J. Hence an assignee for the benefit of creditors is not allowed to sell on credit in this State, without obtaining leave from the court on application with notice to the creditors, or without obtaining their consent. *Burdick* v. *Post*, 12 Barb. 168, 184; *Matter of Petchell*, 10 Daly, 102; and see cases cited *ante*, § 217.

So in reference to an administrator, if he sell the estate of his intestate on credit and without security he will be charged with the whole amount of the purchase-money, on the ground that he was guilty of negligence in parting with the estate without payment or security. *Hasbrouck* v. *Hasbrouck*, 27 N. Y. 182; *King* v. *King*, 3 Johns. Ch. 552; *Orcutt* v. *Orms*, 3 Paige, 459.

Trustees for sale must conform to their powers. If they are authorized by the power to sell on credit they may sell upon such credit as they are authorized to give; but if the power is silent on the subject of credit they cannot sell upon a credit. *Waldron* v. *McComb*, 1 Hill, 111; *McComb* v. *Waldron*, 7 Hill, 335; *Ives* v. *Davenport*, 3 Hill, 373.

§ 387. Sales at retail—Continuing the assignor's business.—As has been already stated, an express provision in an assignment authorizing the assignee to continue the assignor's

business will invalidate the assignment. *Ante*, § 185 ; *Dunham* v. *Waterman*, 17 N. Y. 9 ; rev'g 3 Duer, 166 ; *Renton* v. *Kelly*, 49 Barb. 536 ; affi'd, 51 N. Y. 633.

In the absence, therefore, of an express permission to the assignee on the part of all those interested in the estate, it is a breach of trust on the part of the assignees to delay the sale of the property for the purpose of retailing it out for higher prices. *Hart* v. *Crane*, 7 Paige, 37 ; *Hart* v. *Gedney*, 1 Law Reporter, 69.

And in a number of cases already referred to, the circumstance that the assignee permitted the assignor, nominally as his agent, to continue the business and dispose of the goods at retail, was regarded as a marked evidence of fraud. See *Browning* v. *Hart*, 6 Barb. 91 ; *Shepherd* v. *Hill*, 6 Lans. 387 ; *Pine* v. *Rikert*, 21 Barb. 469 ; *Waverly Nat. Bank* v. *Halsey*, 57 Barb. 249 ; *Butler* v. *Stoddard*, 7 Paige, 163 ; affi'd, 20 Wend. 507 ; *Adams* v. *Davidson*, 10 N. Y. 309. See *ante*, §§ 210, 211.

The rule of law in reference to sales of the assigned property at retail is very fully stated by Mr. Justice Robinson, in *Levy's Accounting*, 1 Abb. N. C. 177, 185. He says :

" The idea that a general assignee for the benefit of creditors can, in the exercise of any proper discretion imposed upon him by virtue of an assignment, proceed to conduct and carry on the previous business of the assignor, so long as he pleases to do so, or to do any act in respect thereto, except such as tends to the most speedy conversion of the assigned estate into cash, is wholly untenable. . . . Attempts to convert it into cash by carrying on the business of the assignor, at retail, involve the responsibility that it should thereby (after deducting all expenses), realize at least as much as if immediately sold by the assignor by private or public sale, and that no injury occurred to the creditors from any delay. While the judicious efforts of an assignee for the benefit of creditors, to carry on the business of the assignor ; or to convert the assigned property into cash through deferred credits ; by manufacturing of raw materials, or altering goods into such other kinds of property as might prove more available, might be regarded as more advantageous than by peremptory sale, and be held as morally commendable, such efforts and experiments are, however, at the risk of the assignee and his sureties, so far as they prove unprofitable, and are not assented to

by the creditors, and they are legally unjustifiable as against the non-concurring creditors." *Levy's Accounting*, 1 Abb. N. C. 177, 186, 187.

And in a number of cases since decided, assignees have been held responsible for losses incurred by them in continuing the assignor's business after the assignment. Thus, in the *Matter of Dean* (86 N. Y. 398), where the assignee continued at a loss a livery business in which the assignor had been engaged, both the receipts and the disbursements of the business so conducted were stricken from the assignee's accounts. So it has been repeatedly held that an assignee who has continued the assignor's business, on a settlement of his accounts, will be charged the full value of the assets originally received and will be allowed the expenses of getting them in, but nothing for his losses. *Matter of Rice*, 10 Daly, 1; *Matter of Orsor*, Id. 26; *Matter of Petchell*, Id. 102; *Matter of Rauth*, Id. 52; *Matter of Marklin*, Id. 122.

The investment of any of the proceeds of the assigned property in new stock for the purposes of keeping up the business, would be a direct violation of the duties of the trustee in the care of the trust property, and would render him liable for any loss, and probably for interest on the money so invested. See *ante*, § 354; and *Connah* v. *Sedgwick*, 1 Barb. 210; *Meacham* v. *Sternes*, 9 Paige, 398.

For the same reason the assignee has no right to make use of any part of the assigned property for the purposes of making a profit out of it. Thus, where the assignee owned individually one-fourth of a steamboat, and the other three-fourths belonged to the assigned estate, and the assignee made repairs on the boat, and defended suits brought against her, and ran her on joint account, and she was finally lost by fire, it was held that, although as owner of one-fourth he had a right to run the boat, yet he neglected his duty in not selling the interest of the estate in her for the best price he could obtain, before any repairs or expenditures for running expenses were made. The court allowed the assignee three-fourths of the expense of defending the suits against the vessel, but nothing for the expense for repairs and running the vessel. *Duffy* v. *Duncan*, 35 N. Y. 187.

So an assignee for the benefit of creditors has no right to em-

ploy clerks to sell a stock of goods assigned to him at retail, in the usual course of business. *Carman* v. *Kelly*, 12 Supm. Ct. (5 Hun), 283; *Matter of Petchell*, 10 Daly, 102; *Matter of Marklin*, Id. 122.

§ 388. **Sales at auction.**—The assignee has in general a discretion to sell at public or private sale, as may appear to be most for the interest of creditors. *North River Bank* v. *Schumann*, 63 How. Pr. 476; *Halstead* v. *Gordon*, 34 Barb. 422. See *ante*, § 215. But if he cannot make an early and advantageous disposition of the property at private sale, it is his duty to bring the property to sale at auction, upon proper notice. *Hart* v. *Crane*, 7 Paige, 37, 38. A provision in the assignment restricting him to a sale at auction was regarded as a suspicious circumstance, in *Work* v. *Ellis*, 50 Barb. 512, 515.

By Rule 20 of the Court of Common Pleas, at sales by auction the assignee is required to sell by printed catalogue, in parcels, and to file a copy of the catalogue, with the prices obtained for the goods sold, with his final account.

§ 389. **Notice of sale.**—When the assignee cannot make an advantageous sale of the property at private sale, his proper course is to sell it at auction, giving the creditors reasonable notice of such sale, so that they may attend and see that it is not sold below its cash value. *Hart* v. *Crane*, 7 Paige, 37, 38.

In addition to the notice to creditors, the assignee must give such public notice of the time and place of sale, and of the quantity and character of the property to be sold, as the assignment may prescribe; or, in the absence of any direction in the assignment, as will be most likely in his judgment to attract bidders. *McDermut* v. *Lorillard*, 1 Edw. Ch. 273.

If he sell without public notice, and without disclosing the nature of the debtor's interest, and for an inadequate price, the assignee will be personally liable for the loss resulting to the creditors. *Hays* v. *Doane*, 11 N. J. Eq. 84.

By Rule 20 of the Court of Common Pleas it is provided that, in making sales at auction of personal property, the assignee shall give at least ten days' notice of the time and place of sale, and of the articles to be sold, by advertisement in one or more

newspapers, and he shall give notice of the sale at auction of any real estate at least twenty days before such sale. Notice by one advertisement ten days before the sale is sufficient. *Matter of Herron*, 1 Mon. L. B. 31.

Trustees of insolvent debtors under the Revised Statutes (*ante*, § 338) are required to give at least fourteen days' public notice of the time and place of sale, and also to publish the notice for two weeks in a newspaper printed in the county where the sale is made, if there be one.

§ 390. **Disability of assignee to purchase.**—"The general principle of equity," says Vice-chancellor Sandford, in *Dickinson* v. *Codwise* (1 Sandf. Ch. 214, 226), "which prohibits a purchase by parties placed in a situation of trust or confidence with respect to the subject of the purchase, has been steadily and uniformly enforced, from the time of Lord Keeper Bridgman, in 1670 (*Holt* v. *Holt*, 1 Chan. Cas. 190), to the present day."

This question was examined and all the authorities collated by Chancellor Kent in the case of *Davoue* v. *Fanning* (2 Johns. Ch. 252), and the rule determined by that case, which has since continued the uniform rule in this State, is that, if a trustee, or person acting for others, sells the trust estate, and becomes himself interested in the purchase, the *cestui que trust* are entitled as of course to have the purchase set aside and the property re-exposed to sale under the direction of the court. A large number of cases may be referred to as sustaining this general doctrine. *Torrey* v. *Bank of Orleans*, 9 Paige, 649; *Van Epps* v. *Van Epps*, Id. 237; *Iddings* v. *Bruen*, 4 Sandf. Ch. 223; *Ackermann* v. *Emott*, 4 Barb. 626; *Conger* v. *Ring*, 11 Id. 356; *Johnson* v. *Bennett*, 39 Id. 237; *Gallatian* v. *Cunningham*, 8 Cow. 361; *Hawley* v. *Cramer*, 4 Id. 717; *Green* v. *Winter*, 1 Johns. Ch. 26; *Gardner* v. *Ogden*, 22 N. Y. 327; *De Caters* v. *De Chaumont*, 3 Paige, 178; *Dobson* v. *Racey*, 3 Sandf. Ch. 60; *Colburn* v. *Morton*, 1 Abb. Dec. 378; s. c. 3 Keyes, 296; s. c. 5 Abb. Pr. N. S. 308; *Fulton* v. *Whitney*, 66 N. Y. 548.

This principle is applicable to an assignee for the benefit of creditors. *Chapin* v. *Weed*, Clarke, 464.

And it makes no difference that the trustee acted from the

best motives, and that the sale was fairly conducted, and that the price obtained was full and ample, the courts will open and order a resale if the parties—the *cestuis que trust*—are not satisfied with it, and their bill is filed within a reasonable time. *Johnson* v. *Bennett*, 39 Barb. 237. Nor is it material that the sale was made at auction or by a judicial decree. *Gallatian* v. *Cunningham*, 8 Cow. 361 ; *Davoue* v. *Fanning*, 2 Johns. Ch. 252.

What will be deemed a reasonable time for creditors to object will depend upon the exercise of the discretion of the court, taking all the circumstances of each particular case into consideration. *Hawley* v. *Cramer*, 4 Cow. 717.

Nor can the sale be effected through a third person who acts for the trustee. *Ames* v. *Downing*, 1 Bradf. 321. And the rule applies equally to a person who stands in a relation of confidence to the trustee—he cannot become a purchaser. If he does, he becomes chargeable as trustee, and must reconvey or account for the value of the property. *Gardner* v. *Ogden*, 22 N. Y. 327.

Where a trustee bids in the property at the sale for himself, the transaction is not void, but voidable at the election of the *cestui que trust*, and the latter may, if he choose, hold the trustee to the consequences of his act. And when there is no legal incapacity in the *cestui que trust*, and he has full knowledge of all the facts, and is free from undue influence arising out of the relation of the parties, a clear and unequivocal affirmance of the sale may conclude him. *Boerum* v. *Schenck*, 41 N. Y. 182.

The rule applies equally to property not included in the trust, if it is connected with the trust property in such a way that its sale for less than its value will diminish the trust fund (*Fulton* v. *Whitney*, 66 N. Y. 548), and to liens or securities upon the trust estate. If he buys them at a discount he cannot turn the purchase to his own advantage. *Green* v. *Winter*, 1 Johns. Ch. 26 ; *Holridge* v. *Gillespie*, 2 Id. 30.

If the property is purchased in the name of a third person, or if the trustee has conveyed away the property to a purchaser in good faith, so that a resale cannot be ordered, the trustee may be charged with the value of the property. *Ames* v. *Downing*, 1 Bradf. 321.

The fact that the assignment is subsequently set aside as fraudu-

lent, does not affect the duty or the liability of assignees who have made an unlawful purchase of the property conveyed to them under the assignment, and upon an accounting by the assignee upon a decree declaring the assignment fraudulent and void, they must account for the difference between the sum paid by them and the value of the property purchased. *Colburn* v. *Morton*, 3 Keyes, 296; s. c. 1 Abb. Dec. 378; s. c. 5 Abb. Pr. N. S. 308.

If there are circumstances under which it becomes necessary or proper that the trustee should be permitted to become a bidder, as where he has a personal interest which may otherwise be sacrificed, the court will substitute the master or other person to conduct the sale. *De Caters* v. *De Chaumont*, 3 Paige, 178. See *Scholle* v. *Scholle*, 101 N. Y. 167, 172; *Matter of Black*, 13 Daly, 21.

§ 391. **Sale of uncollectible claims.**—By an amendment to the general assignment act (Laws of 1885, c. 464, amending Laws of 1877, c. 466, § 23) it is provided that "the county judge where the assignment is recorded may, upon the application of the assignee and for good and sufficient cause shown, and upon such terms as he may direct, authorize the assignee to sell, compromise or compound any claim or debt belonging to the estate of the debtor. But such authority shall not prevent any party interested in the trust estate from showing upon the final accounting of such assignee that such debt or claim was fraudulently or negligently sold, compounded or compromised. The sale of any debt or claim heretofore made in good faith by any assignee shall be valid, subject, however, to the approval of the county judge, and the assignee shall be charged with and be liable for, as part of the trust fund, any sum which might or ought to have been collected by him."

Under the authority of this section the assignee may sell the uncollectible outstandings for the purpose of closing up his trust, but on his petition to the court for leave to make such sale he should particularize as to each of the claims, stating the character of the claim and the efforts which have been made to collect it, and the reasons which render it proper that it should be sold.

By rules of court a receiver may, by leave of court, sell des-

perate debts and all other doubtful claims to personal property, giving at least ten days' public notice of the time and place of such sale. (Rule 84.)

§ 392. **Sales in contravention of the trust.**—It is provided by the Revised Statutes (1 R. S. 730, § 65 ; 4 R. S. 8th ed. 2439), that, "where the trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees, in contravention of the trust, shall be absolutely void." In *Briggs* v. *Davis* (20 N. Y. 15 ; s. c. 21 N. Y. 574), where the assignees of land in trust for the payment of debts, reconveyed to the grantor, reciting that the trusts had been executed, and in fact, the debts had not all been paid, and the debtor then mortgaged the land to one having no actual notice of the trust, it was held that the reconveyance being in contravention of the trust, was void, and that the legal estate remained in the trustees.

In *Flint* v. *Bell* (34 Supm. Ct. [27 Hun], 155), where, after an assignment, all the debts of the assignor but one were settled, and the assignee retained certain assigned real estate for fifteen years with the assent of the remaining creditor, and then sold it to one who had notice of the trust, it was held that the purchaser took the land subject to the trust. See also *Shriver* v. *Shriver*, 86 N. Y. 575 ; *Harrington* v. *Erie Co. Savings Bank*, 16 Weekly Dig. 294.

And before the statute the rule was, that if a conveyance was made in breach of trust the grantees who took land with knowledge of the trust became chargeable with the trusts. *Shepherd* v. *McEvers*, 4 Johns. Ch. 136 ; see *Partridge* v. *Havens*, 10 Paige, 618 ; and see also *Fitzgerald* v. *Topping*, 48 N. Y. 438 ; *Russell* v. *Russell*, 36 N. Y. 581.

§ 393. **Conveyance by attorney.**—It has been thought that an assignee for the benefit of creditors might convey land by attorney, though there be no special authority given in the assignment to delegate his power (Burrill on Assignments, 6th ed. § 373), but inasmuch as the relation of the assignee is one of personal trust and confidence, it would appear that in analogy to the principles applicable to executors and testamentary trustees,

the assignee could not delegate his authority. *Berger* v. *Duff*, 4 Johns. Ch. 368 ; *Newton* v. *Bronson*, 13 N. Y. 587.

The assignee cannot be required to assume any risk as to the title to the property. He passes it over in the same plight in which he received it, and can be expected to make no covenants, except against his own acts. 2 Perry on Trusts, 4th ed. § 786.

§ 394. **Resale.**—The county court has no power to set aside, on motion, a sale made by an assignee for the benefit of creditors, on the ground that the price paid was insufficient and that a better one can be obtained. *Matter of Rider*, 30 Supm. Ct. (23 Hun), 91. A court of equity would have jurisdiction in an action properly brought for that purpose, to set aside a fraudulent and collusive sale made by the assignee.

§ 395. **Trustees of insolvent debtors appointed under Revised Statutes—Right to sue—Penalty for concealing property.**—The trustees of insolvent debtors are required to give notice to persons indebted to the insolvent, to render an account of the sums due, and to pay over the money, but, "notwithstanding any such notice, the trustees may sue for and recover, any property or effects of the debtor, and any debts due to him, at any time, before the day appointed for the delivery or payment thereof." 2 R. S. 43, § 10 ; 4 R. S. 8th ed. 2528 ; 2 Edm. St. 44.

"Every person indebted to such debtor, or having the possession or custody of any property or thing in action belonging to him, who shall conceal the same, and not deliver a just and true account of such indebtedness, or not deliver such property or thing in action, to the trustees or one of them, by the day for that purpose appointed, shall forfeit double the amount of such debt, or double the value of such property so concealed ; which penalties may be recovered by the trustees." 2 R. S. 43, § 11 ; 4 R. S. 8th ed. 2528 ; 2 Edm. St. 44.

CHAPTER XXIV.

LIABILITY OF ASSIGNEES.

§ 396. **In general.**—The general rule in reference to the obligations of assignees for creditors is stated in *Matter of Cornell*, 110 N. Y. 351, 357, as follows: "The obligations of an assignee for creditors are those which appertain to voluntary trustees, not acting gratuitously, without compensation. They are bound to exercise that degree of diligence which persons of ordinary prudence are accustomed to use in their own affairs. This duty extends to all the interests committed to his charge, and his whole conduct in the management of the trust, when called in question, is to be considered in view of the powers which may exercise in the collection, recovery and application of the assets and the general management of the trust. He may be chargeable with a *devastavit* as well by reason of his neglect as his intentional omission or actual misappropriation or positive fraud. The law exacts not only good faith but reasonable care and due diligence (*Litchfield* v. *White*, 7 N. Y. 438; *Matter of Dean*, 86 Id. 398; 2 Pom. Eq. Jur. § 1066), and he is liable for any loss resulting from a breach of duty to those interested in the assignment."

Trustees are in general accountable for the discharge of their duties under the trust only to a court of equity. That court is as solicitous to protect a faithful as it is to punish a faithless trustee. *Minuse* v. *Cox*, 5 Johns. Ch. 441, 448. While trustees are held to great strictness in their dealings with the interests of their beneficiaries, the court will regard them leniently when it appears that they have acted in good faith, and if no improper motive can be attributed to them the court has even excused an apparent breach of trust, unless the negligence is very great. Ruger, C. J., in *Crabb* v. *Young*, 92 N. Y. 56, 66. "Where trustees act in good faith and with due diligence they receive the favor and protection of the court, and their acts are re-

garded with the most indulgent consideration ; but where they betray their trust, or grossly violate their duty, or when they have been guilty of unreasonable negligence, their acts are inspected with the severest scrutiny, and they are dealt with according to the rules of strict if not rigorous justice." Burrill on Assignments, 6th ed. § 412.

§ 397. Extent of liability.—An assignee is not bound to accept the office, but if he accept he is bound to discharge its duties, and he cannot escape liability, except by performance, or upon being duly relieved from further performance.

The measure of his liability is the measure of his duty. It is not demanded of him that he act with all the prudence and sagacity that might have been used. *Franklin* v. *Osgood*, 14 Johns. 527. It is enough if he act upon the same principles which actuate cautious and prudent men in the transaction of their own affairs. *Higgins* v. *Whitson*, 20 Barb. 141 ; *Litchfield* v. *White*, 7 N. Y. 438 ; affi'g 3 Sandf. 545 ; *Jacobs* v. *Allen*, 18 Barb. 549 ; *Lansing* v. *Lansing*, 45 Barb. 182 ; s. c. 31 How. Pr. 55 ; s. c. 1 Abb. Pr. N. S. 280.

In regard to trust property in the hands of trustees, all that the *cestuis que trust* can claim of the trustees is : (1) What the trustees may have received for property, upon a fair sale, together with what they may have earned by its use ; or (2) the value of the property at the time it came into their hands.

When the trustees have not derived a profit from the use of property, and the property itself has been lost by the fault of the trustees, its value at the time of its loss is the measure of the liability of the trustees. *Duffy* v. *Duncan*, 32 Barb. 587 ; affi'd in 35 N. Y. 187. They will not be chargeable with imaginary values or more than they have received, unless there is evidence of gross negligence, amounting to willful default. *Osgood* v. *Franklin*, 2 Johns. Ch. 1. Trustees, acting with good faith, are treated with liberality and indulgence, and if there is no willful misconduct or fraud on the part of a trustee, he will not be held responsible for a loss, especially where he acts with the advice of counsel. *Thompson* v. *Brown*, 4 Johns. Ch. 619.

A criminal liability attaches to a trustee who secretes, withholds or otherwise appropriates to his own use or that of any

person other than the true owner or person entitled thereto any money, goods, thing in action, security, evidence of debt, or of property or other valuable thing, or any proceeds thereof, in his possession or custody, by virtue of his office, employment or appointment. Penal Code, § 541.

§ 398. **Breach of trust.**—But when the assignee is guilty of any breach of trust, either by negligence in the performance of his duties, or by any wrongful act connected with the administration of the trust estate, he will be chargeable with all losses that may result therefrom, and may be charged with interest, whether any is realized by him or not. Thus, if trustees deposit money in bank to their own credit, or mingle the trust funds with their own funds (*Duffy* v. *Duncan*, 35 N. Y. 187; affi'g 32 Barb. 587; *Mumford* v. *Murray*, 6 Johns. Ch. 1; *Hood's Estate*, 1 Tuck. 396; *Case* v. *Abeel*, 1 Paige, 393; *Utica Ins. Co.* v. *Lynch*, 11 Id. 520), or if they place their papers and receipts in the hands of their solicitor so that he can receive their money and misapply it (*Ghost* v. *Waller*, 9 Beav. 497; *Rowland* v. *Witherden*, 3 Macn. & G. 568), or if the money is so paid into bank that it may be drawn out upon the check of one trustee and misapplied (*Clough* v. *Bond*, 3 M. & Cr. 490; *Clough* v. *Dixon*, 8 Sim. 594), or if they neglect to sell property when it ought to have been sold (*Phillips* v. *Phillips*, Freem. Ch. 11), or suffer money to remain upon personal security (*Powell* v. *Evans*, 5 Ves. 839; *Tebbs* v. *Carpenter*, 1 Madd. 290), or upon an unauthorized security (*Hancom* v. *Allen*, 2 Dick. 498, and n.; *Howe* v. *Earl of Dartmouth*, 7 Ves. 137), or if the money is left improperly or unadvisedly in the hands of a co-trustee, so that he has an opportunity to misapply it, all the trustees will be responsible for any loss that may occur to the trust fund. *Langford* v. *Gascoyne*, 11 Ves. 333; *Shipbrook* v. *Hinchinbrook*, 11 Ves. 252; s. c. 16 Ves. 477; *Underwood* v. *Stevens*, 1 Mer. 712; *Hardy* v. *Metropolitan Land and Finance Co.* L. R. 7 Ch. 427, 429; Perry on Trusts, 4th ed., § 444.

He is liable for every loss sustained by reason of his negligence, want of caution or mistake, as well as for positive misconduct. Thus he is liable for neglecting to recover debts assigned (*Winn* v. *Crosby*, 52 How. Pr. 174; *Royall's Admr.* v. *McKen-*

zie, 25 Ala. 363), for omitting to recover assigned property from the debtor (*Pingree* v. *Comstock*, 18 Pick. 46), and for permitting the debtor to retain possession of assigned property and receive the proceeds. *Harrison* v. *Mock*, 16 Ala. 616.

If, through any misapprehension on the part of the trustee, he makes a payment to a person not authorized to receive it, he will be held personally responsible for the misapplication (Perry on Trusts, 2d ed. § 927 ; *Neff's Appeal*, 57 Penn. St. 91 ; *Miller* v. *Proctor*, 20 Ohio St. 442), for the reason that he is not bound to make such payment in any case of doubt, except under the order of the court.

If the assignee make an unauthorized sale of the property or purchase it himself (*ante*, § 390), a resale may be ordered, when that can be done without prejudice to the rights of innocent persons, or he may be charged with the value of the property so sold. *Colburn* v. *Morton*, 1 Abb. Dec. 378 ; s. c. 3 Keyes, 296 ; s. c. 5 Abb. Pr. N. S. 308 ; *Matter of Rider*, 30 Supm. Ct. (23 Hun), 91 ; note to *Butler* v. *Butler*, 22 Moak's Eng. R. 300.

And it is a general principle that a trustee is not allowed to make any profit out of the trust fund for his own benefit. *Holridge* v. *Gillespie*, 2 Johns. Ch. 30.

So where an assignee used the funds of the assigned estate in the purchase of claims against the assignor for less than the estate would have yielded to creditors on an honest administration, it was held that he was not entitled to retain the profits derived from such purchases, but that creditors who had thus sold their claims might come in and prove them for the balance due upon their ratable proportion of the assets, and an opportunity was afforded them to do so. *Matter of Coffin*, 10 Daly, 27 ; s. c. as *Matter of Marquand*, 57 How. Pr. 477.

It seems that the same rule would apply if the assignee purchased the claims with his own funds. Ibid.

And if he employs the trust funds in trade, whereby he makes more than simple interest, he will be charged with the whole profits, either by making periodical rests and charging him with compound interest, or in such other manner as will best carry out the principle of giving to the *cestuis que trust* the benefit of all profits made beyond the simple interest. *Utica Insurance Co.* v. *Lynch*, 11 Paige, 520.

For this reason, if he compromise claims against the estate for less than their face, he can charge in his account only the amount actually paid, and not the face of the claim so satisfied. *Ireland* v. *Potter*, 16 Abb. Pr. 218 ; s. c. 25 How. Pr. 175 ; *Matter of Marquand*, 57 How. Pr. 477 ; s. c. 10 Daly, 27.

§ 399. **Liability for services.**—It is undoubtedly true, as a general rule, that where a trustee employs agents in the execution of his trust, they are to look to him individually, and have no lien upon the trust fund for their compensation. *Noyes* v. *Blakeman*, 6 N. Y. 567.

This principle has been frequently applied to executors and administrators. *Austin* v. *Munro*, 47 N. Y. 360 ; *Ferrin* v. *Myrick*, 41 N. Y. 315 ; *Bloodgood* v. *Sears*, 64 Barb. 71 ; *Mygatt* v. *Wilcox*, 45 N. Y. 306 ; *Bowman* v. *Tallman*, 2 Robt. 385.

To this rule there appears to be an exception. Where the trustee is without funds, and the necessity arises for expenditures in order to protect the estate from spoliation, he may either make them himself and be allowed for them in the passing of his accounts, or may engage others to do it on the credit of the fund, in which case he will bind the trust property by his contract. *Noyes* v. *Blakeman*, 6 N. Y. 567, 580 ; *Randall* v. *Dusenbury*, 39 Super. Ct. (7 J. & S.) 174 ; see *Chouteau* v. *Suydam*, 21 N. Y. 179.

In the case of *Davis* v. *Stover* (16 Abb. Pr. N. S. 225 ; affi'd 58 N. Y. 473), it was held that the reasonable value of services actually rendered by an agent upon the faith of an express agreement that the compensation is to be paid out of the estate may, the necessity for their rendition being conceded, constitute an equitable set-off to any claim or demand which the estate may have against the agent.

But although the assignee is liable personally to those whom he may employ to assist him in reference to the management of the affairs of the estate, yet he will be allowed all such disbursements, if proper and justifiable and for the benefit of the estate, upon the settlement of his accounts. *Mc Whorter* v. *Benson*, Hopk. 28 ; *Davis* v. *Stover*, *supra* ; see *post*, Chap. XXVII.

A trustee is responsible for the faithful conduct and competency

of all his subordinates and assistants, whether strangers, attorneys or contractors. *Brown's Accounting*, 16 Abb. Pr. N. S. 457, 466, citing *Chambers* v. *Minchin*, 7 Ves. 186; *Langford* v. *Gascoyne*, 11 Id. 333; *Robertson* v. *Armstrong*, 28 Beav. 123.

§ 400. Liability for failure to prosecute actions.—An assignee who knows that there is a debt due to the estate is bound to active diligence for its collection, and if by reason of his failure to act the debt becomes uncollectible in whole or in part he will be liable for the loss sustained. *Matter of Cornell*, 110 N. Y. 351; *Winn* v. *Crosby*, 52 How. Pr. 174; *Harrington* v. *Keteltas*, 92 N. Y. 40; *Hollister* v. *Burritt*, 21 Supm. Ct. (14 Hun), 291; *Schultz* v. *Pulver*, 11 Wend. 361. If the creditors require him to prosecute a claim which he has reasonable ground to believe to be uncollectible it seems that he may require them to indemnify him. *Harrington* v. *Keteltas*, 92 N. Y. 40, 45; *Matter of Mather*, 68 Supm. Ct. (61 Hun), 214, 217; *Hepburn* v. *Hepburn*, 2 Bradf. 74.

Before an assignee can be held liable for failure to proceed to enforce a claim it must be shown that a valid cause of action existed in favor of the assignor and that the assignee had knowledge of facts sufficient to put upon him inquiry or investigation as to the alleged claim. *Matter of Gerry*, 13 Daly, 373; *Matter of Mather*, 68 Supm. Ct. (61 Hun), 214; and it must further be made to appear that the collection has become impossible in whole or in part by reason of the neglect of the assignee to proceed. *Matter of Cornell*, 110 N. Y. 351, 361; *Matter of Mather*, 68 Supm. Ct. (61 Hun), 214, 217.

The assignee is bound to exercise the powers conferred upon him under the act of 1858 (*ante*, § 362), and his negligent omission to do so in a proper case would constitute a breach of trust. *Matter of Cornell*, 110 N. Y. 351, 360. *In re Cohn*, 78 N. Y. 248. But in such a case the assignee will be chargeable only with the actual loss which may be shown to have resulted from his misconduct or such as may reasonably be inferred. *Matter of Cornell, supra.*

§ 401. Liability for rent.—We have already had occasion to refer to the cases in which an assignee may reject onerous prop-

erty upon which he may be required to make payments. (See *ante*, § 292.) It remains to consider the instances in which he will be held in law to have accepted such property, and thereby become liable to meet the conditions and obligations with which the property is burdened. Among these, that which most frequently arises is the obligation of the assignee to pay rent of leasehold property held by the assignor.

As has been pointed out in another section, the assignee has a right to reject the lease and thus escape the liability upon its covenants. He will not be presumed to have accepted, and to have charged himself or the assigned estate with the conditions attached to it, unless the lease is specifically mentioned in the assignment, or he has acted in such a way in respect to the leasehold premises as to show that he has elected to take the interest which the insolvent lessee had in them. *Journeay* v. *Brackley*, 1 Hilt. 447, 453 ; *Smith* v. *Wagner*, 9 Misc. 122 ; s. c. 29 N.Y. Supp. 284.

What acts on the part of the assignee will amount to such acceptance has given rise to much discussion. See McAdam's Landlord and Tenant, 2d ed. p. 281, and Supplement to 2d ed., p. 86.

The assignee has the right to enter the demised premises for the purpose of taking possession of the assigned property, and the fact that he does so, and takes an inventory of the property, and removes the assigned goods, staying no longer than is necessary for that purpose, will not render him liable for the rent. *Lewis* v. *Burr*, 8 Bosw. 140 ; *Johnston* v. *Merritt*, 10 Daly, 308.

But where the assignee remained in possession of the premises and used them for the purposes of the trust for two months and then wrote to the landlord that he would not assume the lease, it was held that the election evidenced by his previous conduct could not be recalled. *Myers* v. *Hunt*, 8 State R. 338. The assignee, however, is not put to his election until he can take possession. Thus where the sheriff was in possession of the premises when the assignment was made it was held that the assignee was not called upon to elect whether or not he would take the term until the sheriff vacated, and having then made a new arrangement with the landlord which abrogated the previous

lease with the assignors the assignee was not liable for the time the sheriff was in possession. *Stephens* v. *Stein*, 30 State R. 391.

The fact that the assignee collects of the sub-tenants certain sums which were due from them really for rent of the premises, but which were inserted in the schedules as due on open account, does not fix a liability upon him for rent. *Dennistoun* v. *Hubbell*, 10 Bosw. 155.

But where he enters upon the premises and collects the rent from the sub-tenants, and the entry is not limited merely to the purpose of taking possession of the assigned goods, he will be held to have accepted the lease. *Jones* v. *Hausmann*, 10 Bosw. 168.

And if the assignee enter upon the premises, and occupy them until removed by summary proceedings, and the occupation is not shown to have been for the temporary purpose of taking possession of and removing the assigned goods, he will be deemed to have accepted the lease. *Astor* v. *Lent*, 6 Bosw. 612 ; see *Muir* v. *Glinsman*, cited in *Journeay* v. *Brackley*, 1 Hilt. 447, 455 ; *Young* v. *Peyser*, 3 Bosw. 308.

So when a stock of goods transferred to the assignee remains in his possession in the store before occupied by the assignor, the possession by the assignee will presumably be the same as the assignor's was, and he will be presumed to be in possession under the assignor's lease. *Powers* v. *Carpenter*, 15 Weekly Dig. 155.

The assignee may take a reasonable time to ascertain whether the lease is valuable ; he may even offer it for sale at auction as an experiment without becoming liable. *Turner* v. *Richardson*, 7 East, 335 ; *Wheeler* v. *Bramah*, 3 Camp. 340 ; *Lindsay* v. *Limbert*, 12 Moore, 209. But if he finds a purchaser and receives a deposit, and then permits the sale to fall through, he will be liable. *Hastings* v. *Wilson*, 1 Holt, 290. He may go himself, or place persons temporarily upon the premises to take charge of the goods of the insolvent, and dispose of them there. *How* v. *Kennett*, 3 Adol. & El. 659.

But intermeddling with and assuming the management of the premises will amount to an election to accept. *Thomas* v. *Pemberton*, 7 Taunt. 206.

Thus, in an early case, where the assignees of a bankrupt who was lessee of a pasture land, being chosen on the 8th of the month, allowed his cows to remain upon the demised premises until the 10th, and ordered them to be milked there, it was held that the assignees thereby became tenants to the lessor. *Welch* v. *Myers*, 4 Camp. 368.

And where the assignee kept the bankrupt in possession of the premises, carrying on the business for the benefit of the creditors, and afterward disclaimed the lease by letter to the landlord, it was held that the assignee, notwithstanding such disclaimer, had elected to accept the lease, and was liable for the rent. *Clark* v. *Hume*, Ry. & M. 207. So entering and taking possession was held to bind the assignees, though the bankrupt's effects were on the premises, and the keys were given up immediately after the effects were sold. *Hanson* v. *Stevenson*, 1 B. & Ald. 303 ; see also *Hastings* v. *Wilson*, 1 Holt's N. P. 290.

But even where the assignee is held by his acts to have accepted the lease, yet, in the absence of an express agreement to apportion the rent, he will not be liable for rent which became payable before he entered. Thus, where the rent was payable monthly in advance, and the assignee entered in the middle of the month, it was held that he was not liable for any portion of the rent of the current month, but only under the covenants of the lease for rent subsequently falling due. *Pilzemayer* v. *Walsh*, 2 City Ct. R. 244 ; *Anderson* v. *Hamilton*, 16 Daly, 18 ; s. c. 8 N. Y. Supp. 858.

And where there is an outstanding lease under seal, and the assignee is not held as assignee of the lease, he cannot be chargeable for use and occupation of the premises. So long as the relation of landlord and tenant exists between the landlord and the assignor under the lease, the same relation cannot exist between the assignee and the landlord in reference to the same premises. *Kiersted* v. *Orange & A. R. R. Co.* 69 N. Y. 343 ; see also *Journeay* v. *Brackley*, 1 Hilt. 447, 460.

In *Smith* v. *Wagner*, 9 Misc. 122, it was held that when the assignee entered into possession it was immaterial whether the relation of landlord and tenant existed between the assignee and the lessor, the assignee might be held liable for use and occupation. To the same effect is *Foster* v. *Oldham*, 4 Misc.

(C. P.) 201. These cases do not seem to be reconcilable with the doctrine laid down in *Kiersted* v. *Orange & A. R. R. Co.*, *supra*, inasmuch as an action for use and occupation can only be sustained on the ground of a subsisting tenancy between the parties.

In *Weil* v. *McDonald*, 21 W'kly Dig. 440 (Supm. Ct. First Dept.), when the assignee declined to accept the lease, and so notified the landlord, but offered to rent the domiciled premises at $50 a month, which the landlord refused to accept, demanding a larger sum, and threatening to depose the assignee if it were not paid, held that the assignee was not liable for rent under the lease for a continued possession of the premises, but was liable as a tenant by sufferance, and was chargeable for rent at the sum demanded by the landlord.

In *Knickerbocker Life Ins. Co.* v. *Patterson* (75 N. Y. 589), where a lease for five years had been made by the plaintiff to a corporation which afterward assigned it to the defendant, who went into possession on February 20th, 1875, and continued in possession until May 1 following : in an action brought by plaintiff to recover the quarter's rent falling due on May 1st, 1875, it appeared that the assignment of the lease by the corporation was made when it was insolvent and under an agreement with the plaintiff and other creditors of the corporation, that the rent in the lease up to May 1st should be deemed a valid claim against the company, and should be paid *pro rata* under the assignment. It was held that the assignee could not be charged personally with the rent, and also that the fact that the assignment was set aside as void did not impose such a liability, as it would be in contravention of the agreement.

The assignee cannot defend himself from liability for rent under a lease which he has accepted, on the ground that the lease was non-assignable, or by showing that the assignment to him was ineffectual because he had failed to comply with the statute. *Powers* v. *Carpenter*, 15 Weekly Dig. 155.

Where an assignee incurs liability for rent by retaining possession of the premises, the question whether he will be permitted to charge such liability against the estate, or must bear it personally, will depend upon whether he acted as a cautious and prudent man would have acted in his own affairs. *Matter of Edwards*, 10 Daly, 68.

The rent which accrues after the assignment is not a claim payable under the assignment out of the assets of the assigned estate. *Matter of Link*, 14 Daly, 148; *Matter of Risley*, 10 Daly, 44; *Matter of Adams*, 15 Abb. N. C. 61; *Matter of May*, 47 How. Pr. 37; *Johnston* v. *Merritt*, 10 Daly, 308. So when the landlord presented a claim against the assigned estate for the difference between the amount of the rent agreed to be paid for the unexpired term and the amount which the landlords were able to rerent the premises for, the claim was rejected as not being a "debt due and owing," and so payable under the terms of the assignment. *Matter of Willis*, 44 State R. 470. See *Matter of May & Berwin*, 47 How. Pr. 37; *People* v. *Nat'l Trust Co.*, 82 N. Y. 283.

§ 402. **When chargeable with interest.**—In an early case it was laid down by Chancellor Kent, as a general proposition, that executors and all other trustees are chargeable with interest, if they have made use of the trust money themselves, or have been negligent either in not paying it over or in not investing it or loaning it so as to render it productive. *Dunscomb* v. *Dunscomb*, 1 Johns. Ch. 508; see also *Manning* v. *Manning*, 1 Id. 527. And in another case, where an executor had employed the trust money in trade for his own benefit, he held him properly chargeable with compound interest. *Schieffelin* v. *Stewart*, 1 Johns. Ch. 620; *Matter of Spencer*, 5 Redf. 425. In a later case, Chancellor Walworth held a receiver, who had mingled the trust funds with his own, chargeable with simple interest, although the profits he had made on the trust fund were not equal to simple interest. *Utica Insurance Co.* v. *Lynch*, 11 Paige, 520.

In *Cook* v. *Lowry*, 36 Supm. Ct. (29 Hun), 20, a trustee was charged with interest at seven per cent. with annual rests. See *King* v. *Talbot*, 40 N. Y. 76, 96; *Micon* v. *Lamar*, 7 Fed. R. 180; s. c. 12 Reporter, 39; *Matter of Myers*, 131 N. Y. 409.

In the *Matter of Barnes*, 140 N. Y. 468, rev'g 4 Misc. 136, it appeared that the assignee deposited certain moneys of the assigned estate in a national bank in his individual account. An action was afterward brought to set aside the assignment which was pending for upward of three years. Upon a reference to

state the assignee's account he was charged at special term with interest at the rate of two per cent. per annum on this fund. The general term increased the interest charge to six per cent. The increased interest was disallowed by the Court of Appeals upon the ground that it was not the duty of the assignee to invest the fund, but simply to keep it in safety, and that while it might have been his duty to deposit it in some responsible financial institution which would have paid interest subject to withdrawal, it did not appear that he could have so deposited it at a larger rate than two per cent. It was further held that the assignee was not guilty of a breach of trust in depositing the money to his individual account so long as his account contained a sum equal to the deposit. It was laid down as a rule of duty that the assignee should deposit the money to his credit as assignee, and in omitting to do so the risk was his; but since no loss occurred to the estate he was not chargeable with interest, citing *Price* v. *Holman*, 135 N. Y. 124, 134; *Beard* v. *Beard*, 140 N. Y. 260.

In *Duffy* v. *Duncan* (32 Barb. 587; affi'd, 35 N. Y. 187) the assignees were charged with interest at the rate of seven per cent. on moneys remaining in their hands after the expiration of eighteen months, although the trustees testified that they were ready at all times to have paid the plaintiff. See also *Brown* v. *Rickets*, 4 Johns. Ch. 303; *Tomlinson* v. *Smallwood*, 15 N. J. Eq. 286.

As a general rule executors and administrators are chargeable with interest after the expiration of six months. *Dunscomb* v. *Dunscomb*, 1 Johns. Ch. 508; *Jacot* v. *Emmett*, 11 Paige, 142; *Burtis* v. *Dodge*, 1 Barb. Ch. 77.

But compound interest will not be charged except upon the ground of gross delinquency or intentional violation of duty. *Ackerman* v. *Emott*, 4 Barb. 626; *Lansing* v. *Lansing*, 45 Id. 182; s. c. 1 Abb. Pr. N. S. 280; s. c. 31 How. Pr. 55.

Where there is no affirmative proof of wrongdoing or the use of funds for his personal benefit the assignee will not be charged with the full rate of legal interest. In *Bruen* v. *Gillet*, 115 N. Y. 10, five per cent. was thought to be the most he should be charged in such a case, following *Wilmerding* v. *McKesson*, 103 N. Y. 329, 341, and *Underwood* v. *Stevens*, 1 Mer. 712.

And unless there is proof of culpable neglect, a trustee will not be charged with interest where interest has not been received. *Minuse* v. *Cox*, 5 Johns. Ch. 441 ; see *Clark* v. *Craig*, 29 Mich. 398.

§ 403. **Suits by creditors against the assignee.**—The assignee cannot be sued at law by a creditor to recover his proportionate part of the proceeds of the estate. Such an action may be maintained after a dividend has been declared, and after a refusal on the part of the assignee to pay it. *Peck* v. *Randall*, 1 Johns. 165 ; *Brown* v. *Bullen*, Doug. 407.

So a creditor cannot maintain an action against an assignee to recover for a debt due him, on the ground that the assignee has been guilty of a breach of trust in neglecting to collect and apply in discharge of the trust an amount due him upon the sale of the assigned property. *Bishop* v. *Houghton*, 1 E. D. Smith, 566.

A covenant in the assignment, on the part of the assignee, to discharge the trusts, is not made to individual creditors so as to enable them to bring an action at law upon it. *Reed* v. *Allerton*, 3 Robt. 551, 562.

The creditor's remedy is to compel an accounting and determination of his proportionate share.

§ 404. **Remedy against assignee for breach of trust—Arrest.**—If an assignee has been guilty of a breach of trust, the proper remedy is by a suit in the names of or for the benefit of all the parties beneficially interested, to compel the assignee to account for and pay over the funds in his hands, and proceed to execute the trust ; or replace him by a new trustee ; or to apply for a receiver with power to collect the outstanding debts, and apply them as provided in the assignment ; or if the fund has been impaired by the assignee's neglect, to require him to make good the loss. *Bishop* v. *Houghton*, 1 E. D. Smith, 566.

Money received by an assignee is received not as his own, but in a fiduciary capacity. Hence, when assignees have money in their possession which they refuse to apply proportionately to the payment of a creditor who is entitled to a share, there arises a cause of action authorizing their arrest under the Code—*i.e.*,

for money received by a person in a fiduciary capacity, and upon a judgment in such an action, execution against the person of the judgment-debtor may be issued. The fact that an accounting is necessary in such an action, to ascertain the amount to which plaintiff is entitled, affords no excuse for the non-payment of the money, when ascertained. *Roberts* v. *Prosser*, 53 N. Y. 260.

§ 405. **Assignees, when protected.**—Assignees are entitled to indemnity for all liabilities and expenditures made by them in good faith under an assignment which is subsequently set aside by judicial decree (*ante*, § 278), and where they have paid over money to *bona fide* creditors of the assignor in pursuance of the assignment, they will be allowed for such payments. *Wakeman* v. *Grover*, 4 Paige, 23, 24; and see *ante*, § 278, and cases cited.

So also, when they have made sales of the assigned property in good faith, provision will be made for the ratification of such sales. *Barney* v. *Griffin*, 4 Sandf. Ch. 552; affi'd, 2 N. Y. 365.

§ 406. **Liability of co-assignee.**—It was determined, as early as the case of *Townley* v. *Sherborne* (J. Bridg. 35), that a trustee was not liable for the acts or defaults of his co-trustee, unless there was some practice, fraud or evil dealing between them to the prejudice of the trust. In the same case it was decided that, if the trustees join in signing a receipt for money, they should each be responsible for it; but this rule has been qualified, for since all the trustees must join in a receipt, while any one of the joint trustees may receive the money, it would be unjust to punish a trustee for doing that which the law compels him to do. Hence, where a trustee joins in a receipt merely for conformity, and without receiving any of the money, he will not be answerable for the misapplication of the money by his co-trustee who receives it. *Monell* v. *Monell*, 5 Johns. Ch. 283; *Kip* v. *Deniston*, 4 Johns. 23; *Banks* v. *Wilkes*, 3 Sandf. Ch. 99; Perry on Trusts, 4th ed., § 416; *Paulding* v. *Sharkey*, 88 N. Y. 432.

But the receipt will be presumptive evidence that the moneys

came into the hands of both trustees, and the burden is upon the trustee who seeks to escape liability to show that he signed the receipt merely for conformity, and that, in point of fact, he received none of the money. *Monell* v. *Monell*, 5 Johns. Ch. 283 ; *Manahan* v. *Gibbons*, 19 Johns. 427.

But whenever either a trustee or an executor, by his own negligence or laches, suffers his co-trustee or co-executor to receive and waste the trust fund or assets of the testator, when he has the means of preventing such receipt and waste by the exercise of reasonable care and diligence, then and in such case such trustee or executor will be held personally responsible for the loss occasioned by such receipt and waste of his co-trustee or co-executor." *Earle* v. *Earle*, 93 N. Y. 104 ; affi'g 48 Super. Ct. (14 J. & S.) 18 ; *Clark* v. *Clark*, 8 Paige, 152 ; *Mumford* v. *Murray*, 6 Johns. Ch. 1 ; *White* v. *Bullock*, 20 Barb. 91 ; *Mesick* v. *Mesick*, 7 Barb. 120 ; *Brown's Accounting*, 16 Abb. Pr. N. S. 457 ; *Banks* v. *Wilkes*, 3 Sandf. Ch. 99 ; *Bates* v. *Underhill*, 3 Redf. 365.

For a *devastavit* of a co-executor or trustee an executor or trustee is not liable unless it appears that he had knowledge or assented to the acts done or had notice which would excite his suspicion. *Wilmerding* v. *McKesson*, 103 N. Y. 329 ; *Croft* v. *Williams*, 88 N. Y. 384 ; *Ormiston* v. *Olcott*, 84 N. Y. 339 ; *McCabe* v. *Fowler*, Id. 314.

And where a trustee turns over the fund to his co-trustee, he will be answerable for the latter in the same manner as he would have been for a stranger. *Clark* v. *Clark*, *supra* ; *Mesick* v. *Mesick*, *supra* ; *Monell* v. *Monell*, 5 Johns. Ch. 283.

So a trustee who suffers funds to pass improperly into the hands of his co-trustee is chargeable with any loss arising from such negligence or breach of trust. *Mumford* v. *Murray*, 6 Johns. Ch. 1.

Where trust funds were deposited to the joint account of two assignees and were drawn on the joint check to the order of one of them who was carrying on business as an individual banker and who afterward failed in business, it was held that the other assignee was presumptively liable for any loss sustained by his having placed the funds in the individual control of his co-assignee, but upon its appearing that the assignee to whom the

money was intrusted had paid out for the purposes of the trust a portion of the amount so received, it was held that the co-assignee was liable only for such portion of said funds as it appeared had not been properly applied. *Bruen* v. *Gillet*, 115 N. Y. 10; rev'g 51 Supm. Ct. (44 Hun), 298, where the authorities are collated and discussed.

It is the duty of a trustee to protect the estate from any misfeasance by his co-trustee; therefore, when any such intended purpose comes to his knowledge, he should seek promptly to prevent it by injunction, if necessary; and when the act has already been committed, he should take the necessary measures to compel the restitution of the property, and the application of it to the purposes and objects of the trust, and a failure to do this will make him liable for a breach of his duty. Tif. & Bul. on Trusts, 573; *Mumford* v. *Murray*, 6 Johns. Ch. 1; *Bowman* v. *Rainetaux*, Hoffm. Ch. 150.

And a trustee may maintain an action against his co-trustee to restrain a violation of duty, and even succeed in obtaining his removal. *Bartlett* v. *Hatch*, 17 Abb. Pr. 461; see *Wood* v. *Brown*, 34 N. Y. 337.

One of two assignees cannot relieve himself of the responsibility of the trust by simply leaving the exclusive possession and management of the whole business to the other. If he do so he will be responsible for the misconduct and violation of duty of the other. *Bowman* v. *Rainetaux*, *supra*.

CHAPTER XXV.

DEATH, REMOVAL, RESIGNATION, OR DISABILITY OF ASSIGNEE.

§ 407. **In general.**—Courts of equity have a general jurisdiction of trusts and trustees, and as part of this jurisdiction, they have power to remove and appoint trustees. In this State this power is expressly conferred by the Revised Statutes, in the case of express trusts, upon the Supreme Court under the provisions cited below. In addition to these provisions applicable to trustees generally, the general assignment act has made special provision for proceedings upon the removal or death of assignees for the benefit of creditors, and express provision is also made by the Revised Statutes for the removal and appointment of trustees of insolvent debtors. It will be convenient, in the first place, to consider the provisions applicable to trustees generally, then those which relate specifically to general assignees for the benefit of creditors, and lastly those which refer exclusively to trustees of insolvent debtors.

§ 408. **Survivorship.**—In this State, every estate vested in trustees is held by them as a joint tenancy. 1 R. S. 727, § 44; 4 R. S. 8th ed. 2435, § 44. The rule is, as we have already seen (*ante*, § 347), that the trusts vests in all the trustees as an unit, and they must all act. Upon the death of any one of the trustees, the trust property and the right to act devolves upon the survivors. *Shook* v. *Shook*, 19 Barb. 653.

Upon the death of the surviving trustee, at common law, a trust in land, with the legal title, devolved upon the heirs of the trustee; but if it were a trust of personal property, it passed to the executor of the trustee, not as assets, but the executor took as trustee. *Dias* v. *Brunell's Exr.* 24 Wend. 9; *ante*, § 373, and cases there cited.

But the Revised Statutes have changed this rule by declaring

that the trust shall not descend to the real or personal representatives of the surviving trustee, but shall be vested in the Court of Chancery (now Supreme Court), to be executed under its discretion. 1 R. S. 730, § 68 ; 4 R. S. 8th ed. 2440, § 68.

Some doubt arose as to whether this provision was applicable to trusts of personal property. Thus Mr. Justice Hunt, in *Emerson* v. *Bleakley* (2 Abb. Dec. 22, 27), said : "I understand the law to be that personal estate held in trust, upon the death of the trustee descends to, and the title vests in, the personal representatives of the trustee, and that the provisions of the statute giving the title to a trustee to be appointed by the court, apply to trusts in real estate only." Citing *Savage* v. *Burnham*, 17 N. Y. 561 ; *Kane* v. *Gott*, 24 Wend. 641 ; *Bunn* v. *Vaughan*, 1 Abb. Dec. 253.

But in *Hawley* v. *Ross* (7 Paige, 103), this precise point appears to have been before the chancellor, and he there decided that personal property held in trust did not pass to the personal representatives, but that it was the duty of those interested in the trust to obtain the appointment of a new trustee, and such was the ruling in *Curtis* v. *Smith* (60 Barb. 9), and in *Bowman* v. *Rainetaux* (Hoffm. Ch. 150), Vice-Chan. Hoffman, assuming that the title to the trust property passed to the administrator, said : "I think it would be going too far to hold that it is incumbent upon the administrator of an assignee to assume the supervision of the trust property, or to be legally responsible for its administration. It seems to me the creditors, or *cestui que trust* provided for, should see that an active trustee was appointed."

By the act of 1882, c. 185, which is entitled "An act in relation to trustees of personal estates," it is provided, that "upon the death of a surviving trustee of an express trust, the trust estate shall not descend to his next of kin or personal representatives, but the trust, if unexecuted, shall vest in the Supreme Court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose under the direction of the court. But no person shall be appointed to execute said trust, until the beneficiary thereof shall have been brought into court by such notice and in such manner as the court may direct."

In *Boone* v. *Citizens' Savings Bank*, 84 N. Y. 83 and *Wet-*

more v. *Hegeman*, 88 N. Y. 69, both of which cases were prior to the act of 1882, it was held that a trust of personal property upon the death of the trustee devolved upon the personal representative, and the same rule was applied in *Schluter* v. *Bowery Savings Bank*, 117 N. Y. 125; but the statute of 1882 was not brought to the attention of the court. In *Steinhouser* v. *Mason*, 135 N. Y. 635, it was held that an executor of an assignee for the benefit of creditors was not entitled to be substituted as plaintiff in an action brought by the decedent as such assignee, unless the executor had been substituted as the assignee. In *Matter of Magnus*, 2 Misc. 347, it was held by the Court of Common Pleas that the special provisions of the General Assignment Act (cited in full, *ante*, p. 373) that the personal representatives of the deceased assignee must be brought in and substituted in the proceedings under the assignment, and that under the statute the personal representative of the deceased assignor had the right to be appointed assignee in every case except where the assignee dies subsequent to the filing of his bond and before any proceedings have been had thereunder, in which case the surety on the bond may apply for the appointment of another assignee and the release of the surety. There seems to be reason to doubt whether this section of the assignment act which was enacted previously to the act of 1882 was intended to effect the rule with reference to the devolution of the trust upon the death of the assignee. It seems rather to provide a rule for the substitution of the successor to the trust, whether personal representative or new trustee, in pending proceedings. *Matter of Grove*, 64 Barb. 526; affi'd 53 N. Y. 645. Since the Supreme Court has concurrent jurisdiction with the county court of proceedings under the assignment act, it would seem to be the safer course, upon the death of the assignee, to proceed in the Supreme Court for a substitution.

§ 409. **Resignation and removal.**—In reference to the resignation and removal of trustees the statute provides that, "upon the petition of any trustee, the Supreme Court may accept his resignation and discharge him from his trust, under such regulations as shall be established by the court for that purpose, and upon such terms as the rights and interests of the persons inter-

ested in the execution of the trust may require." 1 R. S. 730, § 69 ; 4 R. S. 8th ed. 2440.

"Upon the petition or bill of any person interested in the execution of a trust, and under such regulations as for that purpose shall be established, the Court of Chancery (now Supreme Court) may remove any trustee who shall have violated or threatened to violate his trust, or who shall be insolvent, or whose insolvency shall be apprehended, or who, for any other cause, shall be deemed an unsuitable person to execute the trust." 1 R. S. 730, § 70 ; 2 R. S. 8th ed. 2440.

"The chancellor (Supreme Court) shall have full power to appoint a new trustee, in place of a trustee resigned or removed ; and when, in consequence of such resignation or removal, there shall be no acting trustee, the court, in its discretion, may appoint new trustees, or cause the trust to be executed by one of its officers, under its direction." 1 R. S. 730, § 71 ; 4 R. S. 8th ed. 2440.

"The three last sections shall extend only to cases of express trust." 1 R. S. 730, § 72 ; 4 R. S. 8th ed. 2440.

The general assignment act, in the sixth section (cited, § 413), provides also for the removal of the assignee on his own petition showing sufficient reason therefor. Previous to this enactment, the resignation of an assignee could be made only to the Supreme Court. *Keiley* v. *Dusenbury*, 42 Super. Ct. (10 J. & S.) 238 ; affi'd, 77 N. Y. 597.

§ 410. **Renunciation.**—If a trustee once accepts the office, he cannot, by his sole action, be discharged from its duties. Having once entered upon the management of the trust, he must continue to perform its duties until he is discharged in one of three ways : First, he may be removed and discharged, and a new trustee substituted in his place by proceedings before a court having jurisdiction over the trust ; second, he may be discharged and a new trustee appointed by the agreement and concurrence of all the parties interested in the trust ; and, third, he may be discharged and a new trustee appointed in the manner pointed out in the instrument creating the trust, if it makes any provision upon that subject.

The provisions of the statute (*ante*, § 409) in reference to the

resignation of a trustee apply only to those cases where the trustee has become vested with the estate, or has made himself answerable as trustee by accepting the trust, or by doing some act in his character as trustee; if he has renounced and not accepted the trust no judicial proceeding is necessary to make the renunciation complete. *Matter of Stevenson*, 3 Paige, 420.

But after he has once accepted, he cannot renounce or discharge himself from liability by resignation without an order of the court or the consent of all the parties. *Thatcher* v. *Candee*, 4 Abb. Dec. 387; s. c. 3 Keyes, 157; *Shepherd* v. *McEvers*, 4 Johns. Ch. 136; *Cruger* v. *Halliday*, 11 Paige, 314, 319; *Ridgeley* v. *Johnson*, 11 Barb. 527; *Diefendorf* v. *Spraker*, 10 N. Y. 246; *Bowman* v. *Rainetaux*, Hoffm. 150. Nor will his refusal or failure to act empower the other trustees to act without him. *Brennan* v. *Willson*, 4 Abb. N. C. 279.

Where, after the assignor has failed to file the required inventory of his estate, the assignee also neglects to file such inventory and to give a bond, the assignee should not, on his own motion, be permitted to re-assign the assigned property to the assignor and be discharged. The proper course is to remove him and hold him to account for the assigned estate. *Matter of Parker*, 10 Daly, 16; s. c. 5 Abb. N. C. 334.

Previous to the Revised Statutes it appears that the proceeding was by bill in equity, upon notice to all persons interested in the trust. *Matter of Van Wyck*, 1 Barb. Ch. 565; *Matter of Wadsworth*, 2 Id. 381. When the application is on the part of the trustee to be allowed to resign, and for the appointment of his successor, or for the appointment of a successor on the death of the trustee, it appears that the application need not be on notice to all parties, but that the matter of notice rests in the discretion of the court. *Matter of Robinson*, 37 N. Y. 261; *Reed* v. *Allerton*, 3 Robt. 551. Although it is otherwise when the application is for the removal of a trustee and the passing and settling of his accounts. *Matter of Robinson*, *supra*.

A trustee cannot resign as a matter of course. He must show sufficient cause. *Craig* v. *Craig*, 3 Barb. Ch. 76, 100.

And where a trustee resigns without any reason other than his own wish, he will be compelled to pay the costs of the proceed-

ing, and will be allowed no commission. *Matter of Jones*, 4 Sandf. Ch. 615.

Where an assignee is removed without any proof of fraud or misconduct on his part, and simply because his relation to the parties has become such that his feelings might conflict with his duty as assignee, he will be allowed his commissions and the costs of his accounting. *Matter of Rauth*, 10 Daly, 52; s. c. *sub nom. Matter of Schlang*, 66 How. Pr. 199.

Where one of two or more joint trustees refuses to accept, and executes a formal renunciation of the trust, he cannot afterward accept and execute the trust unless it be under a new appointment as trustee. *Matter of Van Schoonhoven*, 5 Paige, 559.

It is not obligatory on the court to appoint a new trustee in the place of a trustee who resigns, when there are other trustees. It may leave the other trustees to execute the trust or appoint another as may be thought best. In the *Matter of Bull*, 45 Barb. 334; *King* v. *Donnelly*, 5 Paige, 46.

§ 411. **Removal of assignee for misconduct.**—A Court of Chancery has general jurisdiction of all cases of trust, and had the power by its general authority, independent of any statute, to displace a trustee on good cause shown, and to substitute another in his stead. *People* v. *Norton*, 9 N. Y. 176. It has been said that independent of the statute this power can be exercised only on a bill filed, and the presence or consent of all parties. *Reed* v. *Allerton*, 3 Robt. 551; *Matter of Van Wyck*, 1 Barb. Ch. 565; *Matter of Wadsworth*, 2 Id. 381.

But whatever may be the form of procedure, there can be no question as to the authority of the Supreme Court to remove a trustee for any misconduct which endangers the trust property. Story's Eq. Jur., 13th ed., § 1289. And this jurisdiction exists and will be equally enforced whether the instrument creating the trust does or does not contain a power to appoint new trustees. Hill on T. 191. The court will adapt its relief to the exigencies of the case, and having first removed the trustees, will then proceed to supply the vacancy, if necessary. *Wood* v. *Brown*, 34 N. Y. 337.

The assignee may also be removed under the assignment act (see *post*, § 413), by petition addressed to the county court,

showing misconduct or incompetency. The words "misconduct" and "incompetency," as used in the statute, have no technical meaning. They were intended to embrace all the reasons for which an assignee ought to be removed, and the power of the court under the statute is as broad as that possessed by a court of equity. Hence when it appeared that just prior to the making of the assignment the assignor's wife obtained a judgment against him under circumstances which were suspicious of fraud, and the assignee was the counsel and adviser of the wife in obtaining the judgment, and under his direction an execution was issued five days before the assignment, which was levied on a large amount of property which was sold after the assignment and the proceeds paid to the wife, it was held that the assignee was presumed to have knowledge of the facts, and that his omission to make any effort to arrest the sale or proceeds was misconduct within the meaning of the act, and that the relation of the assignee as counsel for the wife was inconsistent with his position as assignee, and that he was properly removed. *Matter of Cohn*, 78 N. Y. 248; *Matter of Kaughran*, 13 Daly, 526; *Matter of Mellen*, 45 St. R. 349.

In the *Matter of Kaughran*, 13 Daly, 526, it appeared that the assignor, just before making the assignment, permitted judgments to be taken upon offer with the design of securing a priority to certain creditors. With one of these creditors the assignee was on peculiar business relations, such as would embarrass him in undertaking to defeat the priority of the judgments. It was held that this presented a proper case for the removal of the assignee under the statute.

And when the assignee was a non-resident, and it appeared that he was seeking to further interests of the assignor and of his wife, who had claims on the assigned estate which other creditors disputed, and he had employed her counsel, and had been guilty of prevarication and obstruction of the creditors in the investigation of the affairs of the insolvent estate, it was held that these circumstances required the removal of the assignee. *Matter of Mellen*, 45 State R. 349. So in the *Matter of Henlein*, Daily Reg., July 21st, 1884, the assignee was removed on the ground that he was administering the assigned estate in the interest of the assignors.

And where an assignee, in order to obtain sureties, paid out money of the assigned estate nominally as counsel fees, this was held to be a good ground for removal. *Matter of Robinson*, 10 Daly, 148. See Code. Civ. Pro., § 3320, *ante*, § 326.

Where an assignee drew out of the funds of the estate in bank sums of money which were entered in the cash book as charges against himself, and after a demand to see the checks and his official check book he added to the entries in the cash book the words "special deposit," and afterward explained the transaction by stating that for the purpose of obtaining interest he had loaned the money on collateral security of government bonds, but the dates of such alleged loans did not appear, it was held that the conduct of the assignee in concealing from creditors the purpose for which the money was drawn, and in withholding from the court evidence as to the times at which he made the loans, though he had promised to produce it, was such misconduct within the meaning of the assignment act as called for his removal. *Matter of Mayer*, 10 Daly, 143.

But the fact that the assignee has sold the assigned estates in bulk when there is a fair question whether the price received was not a good one, is not ground for removal. The question may properly be raised in an accounting. *Matter of Smith*, 10 Daly, 106.

A trustee may be removed when he refuses to perform the duties of his trust (*Matter of Mechanics' Bank*, 2 Barb. 446); or if he mingle the trust funds with his own funds (*Deen* v. *Cozzens*, 7 Robt. 178), though this may not be enough if it is not alleged that the fund is in danger. *Orphan Asylum Society* v. *McCartee*, 1 Hopk. 429.

So an assignee may be removed if he refuses to give proper information to the creditors in regard to their rights or the value of the assets, or if he suppress information in the interest of particular creditors. *In re Perkins*, 8 N. B. R. 56.

So where the assignee refused the creditors access to the debtor's books, and there was other suspicious transactions between the assignor and assignee, this was regarded as ground for the appointment of a receiver, on an application for his removal. *Manning* v. *Stern*, 1 Abb. N. C. 409.

So when an assignee in bankruptcy neglected to take proper

measures to secure the bankrupt's property, and had, under the advice of counsel, refused to pay taxes on the bankrupt's estate and allowed it to be sold, it was regarded as proper ground for his removal. *In re Morse*, 7 N. B. R. 56.

And when the assignee is guilty of a breach of trust or misconduct in the discharge of his duties. *Exp. Townshend*, 15 Ves. 470; *Exp. Perryer*, 1 Mont. D. & D. 276; *Exp. Reynolds*, 5 Ves. 707; *Exp. Ashmore*, 3 Mont. D. & D. 461; see *In re Sacchi*, 6 N. B. R. 398; *In re Perkins*, 8 N. B. R. 56; *Van Epps* v. *Van Epps*, 9 Paige, 237.

The mere fact of non-residence will not disqualify the assignee. *Ante*, § 133; but see *Chamberlain* v. *Greenleaf*, 4 Abb. N. C. 92; *Exp. Grey*, 13 Ves. 274.

The insolvency of the assignee has in a number of cases been regarded as a sufficient disqualification. *Keyes* v. *Brush*, 2 Paige, 311; *Haggarty* v. *Pittman*, 1 Paige, 298; *Reed* v. *Emery*, 8 Id. 417; *Connah* v. *Sedgwick*, 1 Barb. 210. And the statute cited above (§ 409) expressly provides for the removal of any trustee "who shall be insolvent, or whose insolvency shall be apprehended." Still it is believed that the mere fact of insolvency, unaccompanied by other reasons, where the assignee has given a bond as required by the act (*ante*, § 326), would not be regarded by the court as sufficient ground for removal (see *ante*, § 133).

The common law has made no provision for the execution of a joint trust by one of the trustees, when the co-trustee becomes incompetent to execute the trust, though still alive. In such a case the court may remove the incompetent trustee, and the trust may be executed either by the remaining trustee or by him and such other person as may be substituted. *Matter of Wadsworth*, 2 Barb. Ch. 381.

§ 412. **Appointment of receiver.**—During the pendency of the proceedings for the removal of a trustee, the court may appoint a receiver to take charge of the trust property. Such is the proper course whenever it is shown that the fund is in danger by reason of the insolvency of the assignee, (*Haggarty* v *Pittman*, 1 Paige, 298; *Connah* v. *Sedgwick*, 1 Barb. 210), or when the assignee has been guilty of any act which renders it necessary

that he should be enjoined while the assigned estate requires to be actively cared for. *Manning* v. *Stern*, 1 Abb. N. C. 409; *Lent* v. *McQueen*, 15 How. Pr. 313.

§ 413. Removal under general assignment act.—The general assignment act provides that any person interested in the estate may apply for the removal of the assignee if he neglects, in case of a failure on the part of the assignor, to file an inventory and schedule of the assigned estate within thirty days after the date of the assignment. *Ante*, §§ 315, 317.

The statute also provides that:

"The county judge shall, in the case provided in section three (*supra*), and may also, at any time, on the petition of one or more creditors, showing misconduct or incompetency of the assignee, or on petition of the assignee himself, showing sufficient reason therefor, and after due notice of not less than five days to the assignor, assignee, surety and such other person as such judge may prescribe, remove or discharge the assignee, and appoint one or more in his place, and order an accounting of the assignee so removed or discharged, and may enjoin such assignee from interfering with the assignor's estate, and make provision by order for the safe custody of the same, and enforce obedience to such injunction and orders by attachment; and, upon his discharge upon his own application, such assignee's bond shall be cancelled and discharged. The new assignee shall give a bond, to be approved as above required." Laws of 1877, c. 466, § 6, as amended by Laws of 1878, c. 318, § 2.

Some of the causes which have been held sufficient to warrant the removal of assignees and trustees have just been referred to. § 411.

The failure of the assignee to make and file a bond for the faithful discharge of his duties, as required by the act, would undoubtedly furnish a sufficient ground for his removal. *Barbour* v. *Everson*, 16 Abb. Pr. 366; *Hardmann* v. *Bowen*, 39 N. Y. 196; *Read* v. *Worthington*, 9 Bosw. 617; *Von Hein* v. *Elkus*, 15 Supm. Ct. (8 Hun), 516; *Brennan* v. *Willson*, 7 Daly, 59. Indeed, until such bond is filed, the assignee is incompetent to perform the principal duties of his trust. *Ante*, § 329.

§ 414. **Practice on removal under the act.**—The proceeding for the removal of an assignee under the general assignment act is by petition setting out the grounds and reasons for which the assignee desires to resign, or upon which creditors seek to have him removed.

Whether the assignee can be removed on petition of the assignor, under the assignment act, was discussed but not decided in the *Matter of Horsfall*, 5 Abb. N. C. 289, 295. It is there said (Van Hoesen, J.), that, independently of the assignment act, there is no doubt of the power of the court to remove the assignee for good cause shown at any time, by judgment in an action brought by the assignor or any other person interested in the assigned estate. The opinion was also expressed, that the assignee might be removed on petition of the assignor. See *Livingston's Petition*, 2 Abb. Pr. N. S. 1.

The application must be on notice of not less than five days to the assignor, assignee, surety and such other person as the judge may prescribe. The question of the parties and notice is one left by the statute to the discretion of the court.

But, on the authority of *Matter of Robinson*(37 N. Y. 261), it would seem that when the application is for the removal of the assignee and for the passing and settling of his accounts, all persons interested in the trust property and estate should be notified and made parties to the proceeding in the absence of an excuse for the omission, and by the 11th section of the act (Laws of 1877, c. 466, § 11 ; see *post*, Chap. XXVII.), the county court may issue a citation for a general accounting when an assignee has been removed and ordered to account under the section cited above.

The court may order a reference to inquire into the facts and circumstances under which the resignation is ordered, or the removal sought. *Matter of Miller*, 15 Abb. Pr. 277. The special provisions of the order in an analogous proceeding are given in this case.

And when the assignee is removed for any cause, an accounting will be ordered, in order that it may be ascertained with what amounts the incoming assignee will be chargeable.

The costs of such accounting should be borne by the estate ; but if the assignee, to serve his own ends or to suit his own con-

venience, refuses to act, he and not the estate must pay the costs. *Matter of Edwards*, 10 Daly, 68, citing *Forshaw* v. *Higginson*, 20 Beav. 485 ; *Howard* v. *Rhodes*, 1 Keen, 581 ; *Greenwood* v. *Wakeford*, 1 Beav. 576.

An order of reference to take proof as to charges made by creditors against an assignee is not reviewable in the Court of Appeals, because not a final order. *Matter of Friedman*, 82 N. Y. 609.

And a final order, removing an assignee because of failure to comply with the statute and because of incompetency and misconduct in office, if there is evidence to sustain a finding to that effect, cannot be reviewed in the Court of Appeals. *Matter of Bailey*, 85 N. Y. 629.

The 24th Rule of the Court of Common Pleas provides as follows :

Substituted assignee.—Whenever an assignee shall have been removed, either on his own petition or on the petition of any person interested in the estate, and another person appointed as assignee in his place and stead, a certified copy of the order made on such petition shall be filed and recorded in the clerk's office of the county wherein the original assignment was recorded, and the clerk of the county shall make such suitable entry on the margin of the record of the original assignment as will show the appointment of such substituted assignee, and the said certified copy of the order shall be attached to the original assignment.

§ 415. Continuance of proceedings on death of assignee. —" In case an assignee shall die during the pendency of any proceeding under this act, or at any time subsequent to the filing of any bond required herein, his personal representative or successor in office, or both, may be brought in and substituted in such proceeding on such notice (of not less than eight days), as the county judge may direct to be given ; and any decree made thereafter shall bind the parties thus substituted as well as the property of such deceased assignee, provided, however, that if such assignee die subsequent to the filing of his bond and before any proceedings may have been had thereunder, then the surety on such bond may apply to the county judge for an accounting, who may, on such terms as to him seem just and proper, appoint another assignee and release such surety." Laws of 1877,

c. 466, § 10. See this section referred to commented upon, *ante*, § 373.

Compare Laws of 1872, c. 838. A similar provision in the act of 1872 (*supra*) was held to operate retroactively, enabling a party to revive a proceeding for an accounting when the assignee had died previously to the enactment. See *Matter of Grove*, 64 Barb. 526.

If the court have jurisdiction of the subject-matter, mere irregularity in the proceedings, or in the appointment, will not make it void in a collateral proceeding; nor can the irregularity of the appointment be inquired into in a collateral proceeding. *People* v. *Norton*, 9 N. Y. 176; *Curtis* v. *Smith*, 60 Barb. 9; *Howard* v. *Waters*, 19 Md. 529.

§ 416. **Trustees of insolvent debtors appointed under Revised Statutes—Removal from State.**—"Whenever any assignee or trustee appointed under any authority conferred by any of the provisions of title one, chapter five and part two of the Revised Statutes, or of any previous statute relating to insolvent or imprisoned debtors, shall have removed from and shall have continued to reside out of this State for one year, or shall hereafter remove from and continue to reside out of this State for one year, it shall be lawful for the officer who originally appointed such assignee or trustee, or in case of his absence, death, or removal, his successor in office, or any other officer residing in the county where such assignee or trustee was resident, who by law would originally have been authorized and empowered to make an appointment of such assignee or trustee, after giving notice and an opportunity to the creditors to propose proper persons, to appoint another person in the place of such assignee or trustee so removed, or to remove as aforesaid." Laws 1846, c. 158, § 1; 4 R. S. 8th ed. 2536, § 1.

"The assignee or trustee appointed in the place of the assignee or trustee so removed, or to remove as aforesaid, shall in all respects have the like powers and authority, and be subject to the same control, obligations and responsibilities as the assignee or trustee originally appointed; and the appointment of an assignee or trustee under the provisions of this act shall be certified and recorded as the original appointment was required to be recorded." Laws 1846, c. 158, § 2; 4 R. S. 8th ed. 2536, § 2.

§ 417. Trustees of insolvent debtors—Removal of.—"Such trustees shall be subject to the order of the Supreme Court, and of the Court of Common Pleas of the county in which they were appointed, upon the application of any creditor, or of any debtor in respect to whom they were appointed, in relation to the execution of any of the powers and duties confided to them; and they may be removed by the Supreme Court, for cause shown." 2 R. S. 49, § 46; 4 R. S. 8th ed. 2533, § 46; 2 Edm. St. 50.

"Whenever any trustee shall be removed, or shall die, or become incapacitated to perform his duties, the officer who originally appointed such trustee, or in case of his absence, death, or removal, any other officer residing in the county where such trustee was resident, who by law would have been empowered to make such appointment, after giving notice, and an opportunity to the creditors to propose proper persons, may appoint another in the place of such trustee, who shall, in all respects, have the like powers and authority, and be subject to the same control, obligations and responsibilities; and the said appointment shall be certified and recorded, as the original appointment was required to be recorded." 2 R. S. 49, § 48; 4 R. S. 8th ed. 2533, § 48; 2 Edm. St. 51.

§ 418. Trustees of insolvent debtors—Renunciation, and proceedings thereon.—"Any trustee appointed pursuant to the provisions of this title, who shall be desirous of renouncing the trust vested in him, may apply to the officer, or court from whom his appointment was received, for an order to all persons interested, to show cause why such renunciation should not be accepted." 2 R. S. 49, § 49; 4 R. S. 8th ed. 2534, § 49; 2 Edm. St. 51.

"If the officer who made such appointment shall not then be in office, such application may be made to a Circuit judge, Supreme Court commissioner, or the first judge of the county, residing in the same county where the appointment of such assignee was made." 2 R. S. 50, § 50; 4 R. S. 8th ed. 2534, § 50; 2 Edm. St. 51.

"Such application shall be accompanied by a full, true, and just account of all the transactions of such trustee, in that char-

acter, and particularly of the property, moneys and effects received by him; of all payments made, whether to creditors or otherwise; and of the remaining effects and estate of the debtor, in respect to whom, or whose estate, he was appointed trustee, within his knowledge, and the situation of the same." 2 R. S. 50, § 51; 4 R. S. 8th ed. 2534, § 51; 2 Edm. St. 51.

"To such account shall be annexed the affidavit of the trustee, that the said account is in all respects just and true, according to the best of his knowledge and belief; which affidavit shall be subscribed and sworn to, before the officer or court, to whom the application is made, and shall be certified by him, or by the clerk of the court." 2 R. S. 50, § 52; 4 R. S. 8th ed. 2534, § 52; 2 Edm. St. 51.

"Such officer, or court, shall thereupon grant an order, directing notice to be given to all persons interested in the estate of the debtor, in respect to whom or whose estate such trustee was appointed, to show cause on a day, or at a term and at a place therein to be specified, why he should not be permitted to renounce his appointment." 2 R. S. 50, § 53; 4 R. S. 8th ed. 2534, § 53; 2 Edm. St. 51.

"Such notice shall be published, once in each week, for six weeks successively, in the State paper, and in such other newspapers, as such officer or court shall direct." 2 R. S. 50, § 54; 4 R. S. 8th ed. 2534, § 54; 2 Edm. St. 51.

"On the day appointed for such hearing, and on such other days as shall from time to time be appointed, if it shall appear that notice was duly published, the officer or court shall proceed to hear the proofs and allegations of the parties." 2 R. S. 50, § 55; 4 R. S. 8th ed. 2534, § 55; 2 Edm. St. 52.

"If it shall appear that the proceedings of such trustee in relation to his trust have been fair and honest, and particularly in the collection of the property and debts vested in him; and if such court or officer be satisfied, that for any reason, it is inexpedient for such trustee to continue in the execution of the duties of his appointment, and that such duties can be executed by another trustee, without injury to the estate of the debtor, or to the creditors; and if no good cause to the contrary appear, such officer or court shall grant an order, allowing such trustee to renounce his appointment, and to assign the property and effects

of the debtor." 2 R. S. 50, § 56 ; 4 R. S. 8th ed. 2534, § 56 ; 2 Edm. St. 52.

"Such assignment shall be executed by such trustee, to such person, or persons, as the court or officer shall appoint for that purpose ; and in the appointment, such persons as shall have been named to be assignees by the creditors of such debtor, or by the major part of them, shall be preferred, if approved by such court or officer." 2 R. S. 50, § 57 ; 4 R. S. 8th ed. 2535, § 57 ; 2 Edm. St. 52.

"Such assignment shall transfer to the persons to whom it shall be made, all the remaining estate and effects, vested in the trustee so renouncing ; and such new assignee shall have the same powers, be subject to the same duties, and be entitled to the same compensation, as the original trustee ; and shall continue any suit that may have been commenced by such original trustee, in his name, or in that of such new assignee." 2 R. S. 51, § 58 ; 4 R. S. 8th ed. 2535, § 58 ; 2 Edm. St. 52.

"Upon producing to the officer or court allowing such assignment, the certificate of the assignee, duly proved by the oath of a subscribing witness, that such assignment has been duly made, and the property capable of delivery belonging to such debtor, together with all the books, vouchers, and documents, relating to the estate of such debtor, has been duly delivered ; and also a certificate of the county clerk, that such assignment has been recorded ; such court or officer shall grant to the trustee so applying an order that he be discharged from his trust." 2 R. S. 51, § 59 ; 4 R. S. 8th ed. 2535, § 59 ; 2 Edm. St. 52.

"Upon such order being granted, such trustee shall be discharged from the trust reposed in him, and his power and authority shall thereupon cease ; but he shall, notwithstanding, remain subject to any liability he may have incurred, at any time previous to the granting of such order, in the management of his trust." 2 R. S. 51, § 60 ; 4 R. S. 8th ed. 2535, § 60 ; 2 Edm. St. 52.

"Such new assignment, upon being duly proved or acknowledged, shall be recorded in the office of the clerk of the county where such order was granted ; and the petition of the trustee, the affidavit and proceedings thereon, with the certificate of the new assignee, shall be filed in the same office where the

original papers and proceedings in respect to such debtor were filed." 2 R. S. 51, § 61 ; 4 R. S. 8th ed. 2535, § 61 ; 2 Edm. St. 52.

" The expense of all proceedings in effecting such renunciation and assignment shall be paid by the trustee making the application." 2 R. S. 51, § 62 ; 4 R. S. 8th ed. 2535, § 62 ; 2 Edm. St. 53.

CHAPTER XXVI.

CLAIMS AGAINST THE ASSIGNED ESTATE.—NOTICE TO CREDITORS.—PROOF OF DEBT.

§ 419. **Debts to be paid.**—A general assignment for the benefit of creditors differs materially from an assignment under the insolvent or bankrupt law as to the persons having the right to claim under the assignment. In the latter case, only those creditors whose debts are provable under the terms of the statute can share in the distribution of the estate, and every creditor who comes in to prove his debt under such an assignment must be prepared to prove it in the manner pointed out by the statute. A general assignment for the benefit of creditors by its own terms devotes the debtor's property to the payment of some or all of the assignor's debts, and the debts provided for may be specified in the instrument itself, or they may be left to be otherwise determined. When the assignment provides for the payment of specific debts, neither the assignee nor any creditor claiming under the assignment can dispute their validity. *Pratt* v. *Adams*, 7 Paige, 615 ; *Jewett* v. *Woodward*, 1 Edw. Ch. 195 ; *Green* v. *Morse*, 4 Barb. 332 ; *Maynard* v. *Maynard*, 4 Edw. Ch. 711 ; *Matter of Ward*, 10 Daly, 66 ; *Matter of Lewis*, 81 N. Y., 421, 424.

The question is one of intent, to be gathered from a fair construction of the deed of assignment. If the assignee is directed to pay certain persons upon certain specified amounts, either with priorities or proportionally, the assignee who accepts the trust, and all the creditors who come in and share under it, are bound by the provisions of the deed and cannot dispute them. This proposition, which rests on the doctrine of election, that he who accepts a benefit under an instrument cannot dispute the validity of its provisions, is abundantly sustained by the authorities cited above, and also by the following cases in other States. *Adlum* v.

Yard, 1 Rawle, 163 ; *Gutzwiller* v. *Lackman*, 23 Mo. 168 ; *Burrows* v. *Alter*, 7 Mo. 424 ; *Lanahan* v. *Latrobe*, 7 Md. 268 ; *Lemay* v. *Bibeau*, 2 Minn. 291 ; *Scott* v. *Eides*, 3 Minn. 377 ; *Geisse* v. *Beall*, 3 Wis. 367, 391 ; *Moale* v. *Buchanan*, 11 Gill & J. 314 ; *Swanson* v. *Tarkington*, 7 Heisk. (Tenn.) 612 ; *Irwin* v. *Tabb*, 17 S. & R. 419, 422 ; *Busby* v. *Finn*, 1 Ohio St. 409 ; see notes to *Streatfield* v. *Streatfield*, 1 Lead. Cases in Eq., 4th Am. ed., 541.

The Maryland cases are the other way. *Mackintosh* v. *Corner*, 33 Md. 598 ; *Starr* v. *Dugan*, 22 Id. 58 ; *Sixth Ward Building Assoc.* v. *Willson*, 41 Id. 506.

If the claims so provided for are fictitious or fraudulent or such as for any reason ought not to be paid, that will be a ground for setting the assignment aside as fraudulent and void, but it will not furnish a ground upon which a creditor claiming under the assignment as a valid instrument can dispute the claim of another creditor provided for in the same manner in the same instrument. *Pratt* v. *Adams*, 7 Paige, 615, 641 ; *Green* v. *Morse*, 4 Barb. 332, 342 ; *Roberts* v. *Vietor*, 130 N. Y. 585, 598 ; *Nicholson* v. *Leavitt*, 6 N.Y. 510, 519 ; *Knower* v. *Central Nat. Bank*, 124 N. Y. 552–558 ; *Maack* v. *Maack*, 56 Supm. Ct. (49 Hun), 507.

In *Matter of Dawson*, 66 Supm. Ct. (59 Hun), 239, the assignors in the assignment directed the payment of the indebtedness of a prior firm which they had assumed ; the assignee upon final accounting objected to the payment of these debts. It was held that he was precluded by the direction in the assignment from disputing the right of the claimants upon the debts to share in the assignment ; but see *Brown* v. *Halsted*, 17 Abb. N. C. 197, 203.

There is a wide difference between a case where the assignor directs a specific debt to be paid and where he assigns generally for the benefit of creditors. *Green* v. *Morse*, 4 Barb. 332, 342. In the latter case the assignees are bound to pay only such debts as the assignor was legally liable to pay at the date of the assignment, and as to such debts the law may and does provide the method of their ascertainment. Thus, when the terms of the assignment were to pay " the debts due or to grow due from the assignor, or for which he is *liable*, to the following persons," and

then followed a specification of creditors and the debts due them, in which the debt of one creditor was set down at an amount more than was justly due ; it was held that the requirement was to pay only the amount for which the assignor was liable, and that the assignees might require proof as to the amount, and it was their duty to do so if they believed the amounts were not correctly stated in the assignment. *Kavanagh* v. *Beckwith*, 44 Barb. 192.

And when the assignment is made generally for the payment of the assignor's debts and liabilities, either the assignee or any creditor may dispute the validity of a claim presented by a creditor.

§ 420. **Ascertaining debts to be paid.**—The assignee is not required to assume the slightest risk in paying out the trust funds, and if, without the order of the court, he make a payment to a person not authorized by the terms of the trust to receive it, he will be held personally responsible for the misapplication to the persons who can establish a better right, and the advice of counsel will not protect him in making a money payment. Perry on Trust, 4th ed., § 927 ; see *Turner* v. *Maule*, 3 De G. & S. 497 ; *Boulton* v. *Beard*, 3 De G. M. & G. 608 ; *In re Knight's Trusts*, 27 Beav. 45. In any case of doubt or uncertainty the assignee should, upon the final accounting, require that the validity of all claims should be settled and determined by the court, and, to that end, that creditors be required to make proof of the validity of their claims.

The statute provides for the publication of notice to creditors to present their claims, and provides a method of determining the validity both before and at the time of the assignee's final accounting.

§ 421. **Notice to creditors to present claims.**—The general assignment act has provided a method for ascertaining the creditors entitled to share in the distribution of the estate. It provides that "the county judge may, upon the petition of the assignee, authorize him to advertise for creditors to present to him their claims, with the vouchers therefor, duly verified, on or before a day to be specified in such advertisement, not less than

thirty days from the last publication thereof, which advertisement or notice shall be published in two newspapers, to be designated by the county judge, as most likely to give notice to the persons to be served, not less than once a week for six successive weeks, and, if it appears that any of such creditors reside out of the State, then in like manner in the State paper." Laws of 1877, c. 466, § 4; see Laws of 1874, c. 600, § 1.

It is also provided by the 30th Rule of the Court of Common Pleas, that "a copy of the notice or advertisement, requiring creditors to present their claim, must be mailed to each creditor whose name appears on the books of the assignor, with the postage thereon prepaid, at least thirty days before the day specified in such advertisement or notice, and proof of such mailing must be required on the application for a final decree, unless personal service thereof is made upon such creditors."

Rule 21 of the same court also provides as follows: "When any notice is served on the creditors of the insolvent, pursuant to the provisions of the statute, or these rules, by mail, every envelope containing such notice shall have upon it a direction to the postmaster at the place to which it is sent to return the same to the sender within ten days unless called for. Upon every application made to the court upon such service, an affidavit shall be presented showing whether any such notices have been returned."

In the *Matter of Gilbert*, 9 Daly, 479; s. c. as *Matter of Cook*, 12 Weekly Dig. 158, it was held that the court had the power to make this rule, and an order denying the assignee's application for a reference on an accounting, on the ground that there was no proof of compliance with this rule, was affirmed.

It is further provided by Rule 23, that no discharge will be granted to an assignee who has not advertised for claims pursuant to the above-cited section of the act and the 30th Rule. And in many instances discharges have been refused to assignees for want of proof of compliance with this section. *Matter of Merwin*, 10 Daly, 13; *Matter of Lewenthal*, Id. 14; *Matter of Groencke*, Id. 17.

A similar provision in reference to executors and administrators (2 R. S. 88, § 34; 4 R. S. 8th ed., 256) furnishes the authorities which are of assistance in the construction of this section.

The order will be granted *ex parte*. The petition or affidavit upon which it is obtained should state facts enough to enable the judge to designate the newspapers "most likely to give notice to the creditors," and it should also be made to appear whether any of the creditors reside out of the State. If any of the creditors do reside out of the State, the notice should, as it appears, be published in three newspapers, to wit, the State paper and two newspapers designated by the judge.

The place where claims are to be presented may be named by the executor, and need not be his actual residence or place of business. *Hoyt* v. *Bonnett*, 58 Barb. 529; *contra*, *Murray* v. *Smith*, 9 Bosw. 689. But the notice must require presentment to be made to the executor himself, and not to his attorney. *Hardy* v. *Ames*, 47 Barb. 413. All the requirements of the statute must be strictly complied with. *Broderick* v. *Smith*, 3 Lans. 26. Contingent liabilities may be presented. *Hoyt* v. *Bonnett*, 50 N. Y. 538.

The statute is silent as to the mode in which claims are to be presented to the assignee. It has been held that they may be presented by mail, *Matter of Wiltse*, 5 Misc. 105, 112, following the practice in reference to the estates of decedents. A claim may be presented to an executor by letter or any other way which deals fairly with him and the interests which he represents, and the creditor is not bound to exhibit the evidence of his claim or make oath of the justice thereof, unless required to do so by the executor. *Gansevoort* v. *Nelson*, 6 Hill, 389. And the claim need not be presented to each of two executors. *Genet* v. *Binsse*, 3 Daly, 239. When the claim has been presented before notice it need not be repeated. *Johnson* v. *Corbett*, 11 Paige, 265.

The form of the proof of claim is not prescribed. It is proper that claims should be verified as claims against the estates of deceased persons are verified. But a claim improperly verified will not be rejected without notice to the claimant. *In re Ranger*, 26 N. Y. Supp. 866.

When an action for an accounting is brought in the Supreme Court, a special rule of the first department provides as follows:

"In all actions or proceedings in which the accounts of an assignee are settled or passed upon, a notice, or a copy of an adver-

tisement requiring creditors to present their claims to the referee, must be mailed to each creditor whose name appears on the books of the assignor, with the postages thereon prepaid, at least twenty days before the day specified in such advertisement, or notice for presenting claims, and proof of such mailing must be required on the application for a final decree, unless proof is furnished that personal service thereof has been made upon such creditors."

When claims have once been presented under notice given in compliance with the provisions of the Assignment Act (*supra*), it is not necessary that the claim should be presented again under the notice in the action for accounting.

§ 422. Effect of presenting claims and omitting to present.—The fact that a creditor presents his claim to the assignee entitles him to notice of all proceedings of which creditors are entitled to notice, but the claims so presented do not necessarily furnish the basis of distribution of the estate. Before a distribution is ordered, the court may require the creditors to make proof of their claims, and this may be done under an order of reference on an accounting. See *post*, Chapter XXVII.

A failure to present his claim may, however, prove disastrous to the creditor, for unless his claim is presented within the time limited, the creditor need not be served with a citation for a final accounting of the assignee, and thus he may fail to obtain notice in time to share in the distribution ; but he may appear on the accounting, and present his claim then, notwithstanding he has failed to present his claim to the assignee within the required time. Laws of 1877, c. 466, §§ 13, 19 ; *post*, Chapter XXVII.

A creditor who fails to present proof of his claim to the assignee is not entitled to a distributive share of the estate. The fact that he is mentioned as a creditor in the schedule will not authorize a payment to be made to him. *Matter of Burdick*, 10 Daly, 49 ; s. c. as *Matter of Bailey*, 58 How. Pr. 446 ; rev'g *Matter of Currier*, 8 Daly, 119.

§ 423. Trial of disputed claims.—The general assignment act also provides for the trial of disputed claims against the estate as follows :

" The court, in its discretion, may order a trial by jury or before a referee, of any disputed claim or matter arising under the

provisions of this act, or the acts hereby amended. It may in its discretion award reasonable counsel fees and costs, determine which party shall pay the same, and make all necessary rules to govern the practice under this act." Laws of 1877, c. 466, § 26 ; as amended by Laws of 1878, c. 318, § 7.

This section is supplemental to the twentieth section of the same act, by which it is provided that, in a proceeding for an accounting, the county court shall have power "to settle and adjudicate upon the account and the claims presented." It appears to be the object of the section first cited to permit the court to direct a trial before the court, or before a referee, of a disputed claim before the accounting, when its determination on the accounting would occasion delay, or when the nature of the claim is such that it should properly be presented to a jury.

Under this section an order of reference to a referee to hear and determine the issues is proper, and the decision of the referee under such an order can be reviewed only by the general term. *Matter of Fairchild*, 10 Daly, 74 ; *Matter of Feigelstock*, 5 M. L. B. 71 ; see *Matter of Risley*, 10 Daly, 44. But where on a proceeding for an accounting the account is referred to a referee, with directions to the referee to take proofs and report what persons are entitled to share in the distribution of the estate, a creditor who is not named in the schedule must present and make proof of his claim before the referee, and the report of the referee comes properly before the special term for confirmation. *Matter of Jeselson*, 10 Daly, 104.

On proceedings for an accounting, disputed claims may be determined, *post*, Chap. XXVII. *Cheever* v. *Brown*, 128 N. Y. 670 ; s. c. 40 St. R. 610.

On a reference of a disputed claim, under § 26 of the General Assignment Act, the prevailing party will be allowed costs as on the trial of an action, and if an extra allowance is granted it will be based upon the amount of the claim in dispute. *Matter of Barr*, 56 State R. 742 ; s. c. 6 Misc. 526 ; *Matter of Risley*, *supra* ; *Matter of Fairchild*, *supra* ; *Matter of Schaller*, 62 How. Pr. 40, 51, where the bill of costs as taxed is set out.

§ 424. **Preferred debts.**—As has been stated above, whenever the assignee is directed specifically by the instrument of assignment to pay a certain debt, he must comply with the directions

of the assignment. Hence when a debt is preferred in an assignment in terms which direct its absolute payment, the assignee must pay the same, although no proof of claim be presented to him by the preferred creditor. *Matter of Finck*, 10 Daly, 100; *Matter of Brown*, Id. 115; *Matter of Gouy*, 13 Daly, 413.

So where the assignment directs the payment of a specific debt, neither the assignor nor the assignee can resist its payment out of the assigned fund by proof that the claim is usurious. *Chapin* v. *Thompson*, 89 N. Y. 270; s. c. 80 N. Y. 275; *Green* v. *Morse*, 4 Barb. 332; *Pratt* v. *Adams*, 7 Paige, 615; *Matter of Brown*, 10 Daly, 115; *Matter of Finck*, 10 Daly, 100; *Matter of Thompson*, 37 Supm. Ct. (30 Hun), 195. Nor can the assignee refuse to pay a preferred claim on the ground that it is fictitious or fraudulent. *Matter of Ward*, 10 Daly, 66.

But he can show that such preferred debts have been released or paid since the making of the assignment. *Matter of McCallum*, 10 Daly, 72; *Matter of Schaller*, Id. 57.

But a discharge in bankruptcy obtained by the assignor after the making of the assignment, when the assigned property did not come to the assignee in bankruptcy, will not affect the rights of the creditors in the assigned estate. *Smith* v. *Tighe*, 1 Am. Insol. R. 344; s. c. 46 Super. Ct. (14 J. & S.) 270.

Taxes due to the State are not preferred. *In re Ranger*, 26 N. Y. Supp. 866.

§ 425. **Wages and salaries.**—The General Assignment Act as amended (Laws of 1884, c. 328; Laws of 1886, c. 283) provides that in the distribution of assets under an assignment, the wages or salaries actually owing to the employees of the assignor at the date of the assignment shall be preferred, and if the assigned assets are not sufficient to pay such claims in full they are to be applied to their payment *pro rata*. These amendments have been fully considered in another place (*ante*, § 175), and the decisions bearing upon the character of the claims thus preferred are there considered.

§ 426. **Priority of United States.**—It is provided by the Revised Statutes of the United States (§§ 3466, 3467), incorporating the provisions of the statutes of March 3d, 1797 (1 Stat. at

Large, 515), and March 2d, 1799 (1 Stat. at Large, 676), that "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 insufficient 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." U. S. R. S. § 3466.

"Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid." U. S. R. S. § 3467.

And when the principal in any bond given to the United States is insolvent, and his estate and effects are insufficient to pay the United States, the money due on the bond, any surety or his representative who pays to the United States the money due on the bond, has a like priority for the recovery and receipt of the money out of the estate of the insolvent as is secured to the United States, and may bring and may maintain a suit upon the bond, in law or equity in his own name for the recovery of all moneys paid thereon. U. S. R. S. § 3468.

The insolvency contemplated by these statutes is not a mere inability to pay, but a notorious or legal insolvency evidenced by some notorious act by which the debtor's property comes into the hands of an assignee or other officer for distribution. *Prince* v. *Bartlett*, 8 Cranch, 431; s. c. *sub nom. Bartlet* v. *Prince*, 9 Mass. 431; *Thelluson* v. *Smith*, Pet. C. C. 195; s. c. 2 Wheat. 396; *Conard* v. *Atlantic Ins. Co.* 1 Pet. 386, 439. And the assignment must be a general one of all the debtor's property. *U. S.* v. *Munroe*, 5 Mason, 572; *U. S.* v. *Howland*, 4 Wheat. 108; *U. S.* v. *Clark*, 1 Paine, 629; *U. S.* v. *Hunter*, 5 Mason, 229; *U. S.* v. *Hooe*, 3 Cranch, 73; *Conard* v. *Atlantic Ins. Co.*

1 Pet. 386, 439; *U. S.* v. *McLellan*, 3 Sumn. 345; *U. S.* v. *Bank of U. S.*, 8 Rob. (La.) 262; *Dias* v. *Bouchaud*, 10 Paige, 445; s. c. *sub nom. Bouchaud* v. *Dias*, 1 N. Y. 201.

An assignment of a portion, however large, without fraud, is not sufficient. *U. S.* v. *Munroe*, 5 Mason, 572. But if only a trifling portion of the assignor's estate be omitted or reserved, whether by mistake or for the purpose of evading the statute, such omission or reservation will not make the assignment a partial one, so as to defeat the priority. *U. S.* v. *Hooe*, 3 Cranch, 73; *U. S.* v. *Langton*, 5 Mason, 280, 289; *U. S.* v. *McLellan*, 3 Sumn. 345.

Nor can the debtor, by assigning all his property by different acts, defeat the priority of the United States, under the pretext of the assignment being partial (*U. S.* v. *Bank of U. S.*, 8 Rob. [La.] 262); but an assignment by a debtor who is insolvent, of his property in trust for the benefit of a single creditor or surety, containing no provision for the benefit of creditors generally, is not within the statute. *Bouchaud* v. *Dias*, 1 N. Y. 201; rev'g 10 Paige, 445.

If the assignment does not, on its face, appear to be general, the *onus probandi* is on the United States. *U. S.* v. *Clark*, 1 Paine, 629; *U. S.* v. *Langton*, 5 Mason, 280, 289; *U. S.* v. *Howland*, 4 Wheat. 108; see *Mott* v. *Maris' Assignees*, 2 Wash. C. C. 196.

The nature of the priority established in favor of the United States does not constitute a lien upon the property in favor of the United States (*Forsyth* v. *Clark*, 3 Wend. 637, 655), but simply a right of prior payment out of the general funds of the debtor in the hands of the assignee. *Conard* v. *Atlantic Ins. Co.* 1 Pet. 386, 439; *U. S.* v. *Hack*, 8 Pet. 271.

The statute does not prevent the transmission of the property, but merely creates a preference in payment; and before this preference has attached, the debtor may convey or mortgage his property, or transfer it in the ordinary course of business. The statute does not affect any lien, general or specific, existing when the event takes place, giving the United States a claim of priority. *Brent* v. *Bank of Washington*, 10 Pet. 596; *U. S.* v. *Fisher*, 2 Cranch, 358; *U. S.* v. *Hooe*, 3 Id. 73.

But the moment the assignee takes the property he becomes a

trustee for the United States, and is bound to pay its debt first out of the proceeds. *Beaston* v. *Farmers' Bank of Del.* 12 Pet. 102.

The United States is entitled to priority of payment out of the effects of a bankrupt or insolvent debtor, whether he be principal or surety, or be solely or only jointly with others liable, and it is immaterial when the debt was contracted. *Lewis, Trustee* v. *U. S.* 92 U. S. 618.

And the form of the indebtedness, or the mode in which it was incurred, is immaterial. Thus, where a paymaster in the army fraudulently intrusted certain moneys of the United States with a firm of bankers, who knew that the money belonged to the United States, upon the insolvency of the bankers of the United States became entitled to a priority of payment out of its assets. *Bayne* v. *U. S.* 93 U. S. 642.

The debtor cannot defeat the priority by any provision of the assignment by giving a priority to another creditor, although that creditor may have parted with security in order to obtain the preference. *U. S.* v. *Mott*, 1 Paine, 188.

The right of priority attaches only on the residue of the fund in the assignee's hands, after payment of the expenses incurred in its collection. *U. S.* v. *Hunter*, 5 Mason, 229.

And the same right of priority which belongs to the Government attaches to the claim of an individual who, as surety, has paid money to the Government. *Hunter* v. *U. S.* 5 Pet. 173.

A surety on a custom-house bond, who has paid it, has the same priority as the United States against the estate of his principal in the hands of his assignee. *U. S.* v. *Hunter*, 5 Mason, 62. But he has no priority in a case where the United States would have none. *Bouchaud* v. *Dias*, 1 N. Y. 201. Nor does it give him a right to maintain an action against an insolvent after his discharge. *Aikin* v. *Dunlap*, 16 Johns. 77.

§ 427. **Secured creditors.**—The assignment may provide for the payment of secured claims, and if it be the manifest intent of the assignor that the secured creditor shall be paid on the face of his claim, the creditor's right to payment is fixed by the assignment, and cannot be determined upon any notion of equity or equality, for the court has no power to create or order a new trust. *Midgeley* v. *Slocomb*, 2 Abb. Pr. N. S. 275, 278. But

where the provision is for the payment of debts generally, some question has been made as to whether the creditor is to receive a dividend upon his whole claim or only upon the deficiency after deducting the proceeds or value of the security.

It is undoubtedly a settled rule of equity, that where one creditor has two funds of his debtor to which he can resort for payment, and another creditor has a specific or general lien upon one of those funds only for the payment of his debt, equity will compel the first creditor to resort to that fund to which the lien of the other does not extend. *Besley* v. *Lawrence*, 11 Paige, 581 ; *Halsey* v. *Reed*, 9 Paige, 446.

While this rule is not to be doubted, the inquiry still remains, whether, after the secured creditor has thus resorted to his security and found it inadequate, the deficiency then remaining on his original debt will constitute the basis of his claim against the remaining fund. The statutory rule in bankruptcy is that he will be admitted as a creditor only for the balance of the debt after deducting the value of the security. U. S. R. S. § 5075. But the security referred to in the bankrupt act is security on the property of the bankrupt, and does not refer to property of third persons, or guarantees or indorsements of third persons. *In re Anderson*, 12 N. B. R. 502 ; *In re Dunkerson*, Id. 413 ; *In re Cram*, 1 Id. 504 ; *In re Broich*, 15 Id. 11 ; *Ex parte Bennet*, 2 Atk. 527 ; *Ex parte Parr*, 18 Ves. 65 ; *Ex parte Goodman*, 3 Madd. Ch. 373 ; *Ex parte Plummer*, 1 Atk. 103.

And where the creditor holds securities of third persons, he may prove his whole debt against the bankrupt's estate and resort to the security for any deficiency, not receiving, however, more than his claim in full. In case he realizes on the security before proving, he can only prove for the balance remaining unpaid. Blumenstiel's Bankcy. 287.

These rules of the bankrupt law have not been uniformly applied in distributions under general assignments or under State insolvent laws.

In this State it may not be regarded as settled that a secured creditor is entitled to prove his debt and have dividends upon the full amount of his claim irrespective of the securities held by him. *People* v. *Remington*, 121 N. Y. 328 ; affi'g 61 Supm. Ct. (54 Hun), 505 ; *Matter of Ives*, 25 Abb. N. C. 63 ; *Jer-*

vis v. *Smith*, 7 Abb. Pr. N. S. 217; s. c. 1 Sheldon, 189; *Midgeley* v. *Slocomb*, 2 Abb. Pr. N. S. 275. So far as it holds any other doctrine may be regarded as annulled. What the creditor holds as security is so much additional to the personal obligation of the debtor. In order that the secured may retain the entire benefit of his security, he must be permitted to prove upon the entire debt, otherwise some part, either of the debt or of the security, is destroyed without his consent. It is upon these grounds that the rule, as stated above, has finally prevailed. This view is supported by the decisions of other States. *Allen* v. *Danielson*, 15 R. I. 480, overruling *Petition of Knowles*, 13 R. I. 90; *Miller's Appeal*, 35 Pa. St. 481; *Graeff's Appeal*, 79 Pa. St. 146; *Putnam* v. *Russell*, 17 Vt. 54; *West* v. *Bank of Rutland*, 19 Vt. 403; *Walker* v. *Barker*, 26 Id. 710; *Moses* v. *Ranlet*, 2 N. H. 488; *Findlay* v. *Hosmer*, 2 Conn. 350; *Logan* v. *Anderson*, 18 B. Mon. (Ky.) 114; *In re Bates*, 118 Ill. 524. But in Massachusetts, Iowa, and Maryland a different rule prevails.

Thus, in Massachusetts, the rule that the creditor can share only on the deficiency of his debt after exhausting the security is recognized. *Amory* v. *Francis*, 16 Mass. 308. But the distinction between securities upon the debtor's estate and securities of third persons does not appear to be recognized. *Richardson* v. *Wyman*, 4 Gray, 553; *Lanckton* v. *Wolcott*, 6 Met. 305; see *Cabot Bank* v. *Bodman*, 11 Gray, 134.

In Iowa it has been held that a creditor could claim a dividend under a general assignment only upon the amount remaining unpaid after exhausting the property upon which he has a special lien. *Wurtz* v. *Hart*, 13 Iowa, 515.

In *Bell* v. *Fleming's Exrs.* (12 N. J. Eq. 490), the question is left open. In *Third Nat. Bank* v. *Lanahan*, 66 Md. 461, the Maryland Court of Appeals decided that securities belonging to the debtor should be first applied, and dividends paid only on the deficiency, and see *First Nat. Bank* v. *Eastern R. R. Co.*, 124 Mass. 524; *Matter of Bates*, 118 Ill. 524; s. c. *sub nom. Bates* v. *Paddock*, 9 N. East. R. 257.

The fact that a claim has been proved in composition proceedings in bankruptcy is not a waiver of right which a creditor has under a general assignment previously made by the bank-

rupt. *Matter of the Objections of Woodward*, 67 How. Pr. 359.

When the assignment preferred the payment of a note held by a bank, and also the accommodation maker of another note for a similar amount held by the bank as collateral security for the first note, and a portion of the collateral note was paid, it was held that the bank was entitled to a dividend only on the amount of the principal not unpaid, and the maker of the accommodation note was entitled to a dividend on the amount paid by him. *Reubens* v. *Drake*, 20 State R. 46.

In *Fullerton* v. *Nat. B. & T. Ins. Co.*, 100 N. Y. 76, the insurance company assigned the Farmers' Loan & Trust Company certain bonds and mortgages with the moneys due or to grow due thereon as principal, reserving to themselves the right to collect and receive the interest which should grow due on the principal. The insurance company subsequently made an assignment for the benefit of creditors. The mortgages having been foreclosed, and having realized less than the amount then due for interest, the question was presented whether the sum realized should be received by the trust company or by the party claiming through the insurance company. It was held that the reservation as to interest applied only to interest paid by the debtor under the terms of the obligation, and not to moneys realized out of a sale of the principal, and that the fund should thereupon go to the trust company as principal.

When a creditor held two notes, one of which was preferred in the assignment and the other not, but both of which were secured by a mortgage on the debtor's property to the extent of $6000, it was held that a subsequent purchaser of the mortgaged premises could not compel the holder of the mortgage to apply moneys paid to him by the assignee in reduction of the preferred note to the unpreferred note so as to reduce the obligation under the mortgage. *Morris* v. *Fales*, 50 Supm. Ct. (43 Hun), 393.

§ 428. Judgments against the assignor recovered after assignment.—The question has arisen whether a judgment recovered against the assignor after the assignment furnishes evidence in support of the creditor's claim against the assigned estate. This question is not altogether free from doubt (see

article in *University Law Review*, Vol. 1, p. 74). In *Pittsburg & Steubenville R. R. Co.'s Appeal*, 3 Grant (Pa.), 68, and *Ludington's Petition*, 5 Abb. N. C. 323. In the former of these cases it was held that a judgment thus recovered was, in the absence of collusion or fraud, *prima facie* evidence to establish the creditor's claim, under the assignment, and in the latter case it was conclusive on the assignee as to the fact and amount of the indebtedness. In *Pringle* v. *Woolunth*, 90 N. Y. 502, will be found a dictum of Judge Andrews to the same effect. In *Aeker* v. *Leland*, 109 N. Y. 5, 15, in an action to set aside an a signment, it was held that judgments recovered by preferred creditors after the assignment were competent evidence to establish the validity of the preferred debts. The difficulty in yielding assent to the conclusion of these cases arises from the want of priority between the assignor and the assignee as to the assignor's debts, and the want of right on the part of the assignee to defend suits brought against the assignor. In the absence of the power of the assignee to defend such suits, questionable claims may be established by the neglect of the assignor to defend, and the burden of proof that the claim is invalid, even if the judgment be regarded merely as *prima facie* evidence, will be cast on the assignee. It was accordingly held in *Walerman* v. *Sprague Mfg. Co.*, 14 R. I. 43, that the assignee could not be permitted to come in and defend actions brought against the assignor, and that judgments recovered against the assignor after the assignment were not binding upon the assignee.

§ 429. Unliquidated and unaccrued claims.—It was held, in the *Matter of Adams* (15 Abb. N. C. 61 ; s. c. 67 How. Pr. 284 [1884]), that an unliquidated claim for damages for a breach of contract is not provable as a debt against the assigned estate. It that case it appeared that there was a contract for the manufacture of goods by the assignor, which was to run through a period of years. The assignor having made an assignment the other parties to the contract set up a claim for profits, which they asserted would have been realized on the manufactured goods during the remainder of the term after the assignment.

They also made claim for damages arising from the refusal of the assignee to deliver the goods which were finished and on

hand at the date of the assignment. The determination of the court was upon the ground that unliquidated claims were not to be regarded as debts within the language of the assignment. In the *Matter of Ives*, 25 Abb. N. C. 63, 73, where the direction in the assignment was to pay "all debts and liabilities" of the assignor, it was held that the use of the word "liabilities" extended the character of the claims provided for in the assignment, and it is intimated, in the opinion of the referee reported, that a claim for damages arising for a breach after the assignment of a contract of the assignor, if proved before the accounting, might be allowed against the assigned estate, but that on accounting the proceedings would not be delayed to allow such proof to be given. The decision, however, seems to have gone upon the ground that the claimant, by reason of the peculiar facts of the case, could not make proof of damages.

Where the assignment provided for the payment by the assignee for "debt due and owing by the assignor" it was held that this provision did not include a claim made by a landlord who had re-entered demised premises after the assignment for the difference between the rent reserved on the lease and the amount which he was able to obtain for the rental of the property during the remainder of the term. *Matter of Willis*, 44 State R. 470. And it has been held that rent accruing subsequent to the assignment is not a provable claim against the assigned estate. *Matter of Link*, 14 Daly, 148. Where, after the assignment sureties upon a lease made by the assignor paid the rent for a time and then on payment by them to the landlord of a bonus, the lease was surrendered, it was held that the sureties had no provable claim against the assigned estate for the rent and bonus so paid. *Matter of Risley*, 10 Daly, 44.

Where the trust is for the payment of the grantor's debts generally, it will extend only to debts which existed at the time when the deed was made. A debt subsequently originating is not entitled to payment out of the trust estate. If contingent liabilities are provided for, they must be such as existed when the conveyance was executed, and should be at least such as would entitle a party, under the provisions of the English bankrupt act or our insolvent laws, to a share in the insolvent or bankrupt estate. *Rome Ex. Bank* v. *Eames*, 4 Abb. Dec. 83.

And provision in an assignment for the payment of future debts and liabilities will, as we have heretofore seen (*ante*, § 212), render the assignment invalid.

And where a note was made the day after the assignment was executed and delivered, it was held that it could not be included in the assignment, nor could the assignor, by antedating the note, vary the effect of the instrument. *Sheldon* v. *Smith*, 28 Barb. 593, 600 ; see *Power* v. *Alger*, 13 Abb. Pr. 284, 475.

So a partner after the execution of a firm assignment cannot create a claim against the assigned estate by accepting a deed in which the firm assumes the payment of a mortgage upon the conveyed property. *Payne* v. *Smith*, 35 Supm. Ct. (28 Hun), 104.

§ 430. **Debts due partners.**—Where a partner is a creditor of the firm he cannot be paid his claim until after all the other creditors of the copartnership are paid in full. *Matter of Rieser*, 26 Supm. Ct. (19 Hun), 202 ; and see *ante*, § 195.

§ 431. **Interest.**—In distributing an insolvent's estate the interest on all debts upon which interest is recoverable should be computed up to the assignment, and the interest should be discounted on such of the debts as are not then due or which are not upon interest. And where the whole amount is not paid at the date of the assignment, if assets afterward come to the hands of the assignee more than sufficient to pay the several amounts as thus ascertained, interest should be computed on such amounts from the date of the assignment, so as to give a ratable distribution to the creditors. *In re Murray*, 6 Paige, 204.

It has been held that where the assignment directed the payment of the preferred claims in full the preferred creditors were entitled to interest on their claims. *In re Fay*, 6 Misc. 462 ; s. c. 27 N. Y. Supp. 910.

In *Clift* v. *Moses*, 82 Supm. Ct. (75 Hun), 517, an action to set aside fraudulent conveyances where it was held that the grantee was properly allowed for certain sums for which she held the property as security and that she was entitled to interest computed under the rule of partial payments ; but in *Peyser* v. *Myers*, 135 N. Y. 599, 606, where a preferred debt was computed with compound interest the preference to the extent of

the interest compounded was held invalid. See *Young* v. *Hill*, 67 N. Y. 162.

And when the individual estate of one partner is more than sufficient to pay his individual debts, such debts must be paid with interest to date of payment before the balance will be transferred to the partnership creditors. *Matter of Duncan*, 10 Daly, 95.

§ 432. Trustees of insolvent debtors appointed under Revised Statutes—Notice.—"The trustees, immediately upon their appointment, shall give notice thereof; and therein shall require:

"1. All persons indebted to such debtor, by a day and at a place therein to be specified, to render an account of all debts and sums of money owing by them respectively, to such trustees, and to pay the same.

"2. All persons having in their possession any property or effects of such debtor, to deliver the same to the said trustees by the day so appointed.

"3. All the creditors of such debtor to deliver their respective accounts and demands to the trustees or one of them, by a day to be therein specified, not less than forty days from the first publication of such notice." 2 R. S. 42, § 8; 4 R. S., 8th ed., 2527.

"In the case of an insolvent or imprisoned debtor, such notice shall be published for at least three weeks in a newspaper printed in the county where application was made; and in the case of non-resident, absconding or concealed debtors, it shall be published, for the same time, in the newspapers in which the notice of an attachment having issued, is directed to be printed." 2 R. S. 43, § 9; 4 R. S., 8th ed., 2528.

CHAPTER XXVII.

ACCOUNTING.

§ 433. In general.—The proceedings of the parties upon an accounting under a general assignment are, to a certain extent, prescribed by the general assignment act of 1877, and jurisdiction is by that act conferred upon the county judge, including the judges of the Court of Common Pleas, to entertain proceedings under that statute, but the jurisdiction conferred by that act is not exclusive (*ante*, § 312), and a court of equity still has jurisdiction of the trust under a general assignment, and of proceedings for an accounting either by or against an assignee. Moreover, the general assignment act has not attempted to detail the practice on an accounting, except so far as it prescribes the manner of bringing the parties before the court, and the powers which may be exercised by the county court in such matters. The method in which the powers so conferred are to be practically applied is to be determined by analogous proceedings in an action for accounting. For these reasons an outline of the proceedings on an action for an accounting will not be out of place in this connection. To this we shall now proceed, and shall afterward consider the special statutory proceedings under the general assignment act relating to accountings, and shall then take up by themselves the provisions of the Revised Statutes relating to trustees of insolvent debtors.

§ 434. Jurisdiction of the subject-matter.—A court of equity has inherent jurisdiction of all matters of account by a trustee. *Ludlow* v. *Simond*, 2 Caines' Cas. 1; *Post* v. *Kimberly*, 9 Johns. 470, 493; *Christy* v. *Libby*, 2 Daly, 418; *Rathbone* v. *Warren*, 10 Johns. 587, 595; *Duncan* v. *Lyon*, 3 Johns. Ch. 351. The Supreme Court, as the successor of the court of chancery, has general jurisdiction of the subject, and this jurisdiction has been extended by statute to all the superior city

courts. *Christy* v. *Libby*, 2 Daly, 418 ; s. c. 5 Abb. Pr. N. S. 192. But, as has just been stated, the county court, under the general assignment act, has also jurisdiction to compel an assignee to account. In like manner a concurrent jurisdiction to compel an executor or administrator to account exists, in a court of equity in some instances, and also in the surrogate's court, under the Revised Statutes.

The power granted by statute to the county court to order assignees to account and to make distribution among creditors is not exclusive, but concurrent only. *Schuehle* v. *Reiman*, 86 N. Y. 270 ; *Converseville Co.* v. *Chambersburg Co.*, 21 Supm. Ct. (14 Hun), 609 ; *Hurth* v. *Bower*, 37 Supm. Ct. (30 Hun), 151 ; *Noyes* v. *Wernberg*, 15 W'kly Dig. 72 ; *Ludington's Petition*, 5 Abb. N. C. 307 ; *Matter of Cromien*, 10 Daly, 41. If the statute had undertaken to take this jurisdiction from the Supreme Court it would probably have been unconstitutional. *Hurth* v. *Bower*, *supra* ; *Converseville Co.* v. *Chambersburg Co.*, *supra*. But the Supreme Court has no jurisdiction to entertain a proceeding by petition. The entire original jurisdiction by petition under the act of 1877 is vested in the county court and Court of Common Pleas for the city of New York, and an order made in a proceeding instituted by petition for an accounting in the Supreme Court is void. *Matter of Nicholas*, 22 Supm. Ct. (15 Hun), 317.

§ 435. **Proceedings by different creditors.**—It is said by Mr. Justice Danforth in *Schuehle* v. *Reiman* (86 N. Y. 270, 273), that when the object of two legal proceedings is the same, convenience, as well as a proper regard for the rights of debtor and creditor, require, if possible, that the fund in which both are interested should be subjected to diminution by one litigation only, and the parties themselves spared the unnecessary labor and expense of conducting two controversies over the same matter. It would seem also, that if both tribunals whose interference is invoked have equal or concurrent jurisdiction, it should continue to be exercised by that one whose process was first issued. *Garlock* v. *Vandevort*, 128 N. Y. 374, 379 ; *Brower* v. *Baucus*, 39 State R. 25 ; *Rogers* v. *King*, 8 Paige, 210 ; *Groshon* v. *Lyon*, 16 Barb. 461 ; *Travis* v. *Myers*, 67 N. Y. 542. It is

well settled that to secure this end an order may be made by the Supreme Court restraining proceedings in all but one action, whether they are pending in that court or before other tribunals.

Thus, when different actions have been brought by creditors, in behalf of themselves and the other creditors, against an assignee for the benefit of creditors, for an accounting and closing of the trust, the court has power to make an order to compel all the creditors to come in and prove their claims in the first suit brought, or wherein interlocutory judgment is first obtained, and to stay all proceedings in the other actions. *Travis* v. *Myers*, 67 N. Y. 542.

While the Supreme Court will not compel the assignee to account after proper proceedings have been instituted in the County Court, yet it will entertain an action which will be in aid of an accounting. Thus in *Niagara County Nat. Bank* v. *Lord*, 40 Supm. Ct. (33 Hun), 557, after a proceeding for an accounting had been commenced in the County Court, a judgment-creditor brought an action in the Supreme Court asking to have it adjudged that certain mortgages or pledges upon the assigned property were not liens thereon.

Where actions have been brought by creditors to set aside the assignment, and a receiver has been appointed by the final judgment, in such actions the receiver takes only so much of the assigned estate as is needful to satisfy the judgments of such creditors, and other creditors who continue to claim under the assignment may compel the assignee to account for any surplus remaining in his hands. *Matter of Ginsberg*, 9 Misc. 650; *Heywood* v. *Kingman*, 29 Abb. N. C. 75.

§ 436. **Parties to an action for account.**—An action to compel an accounting and distribution of the trust fund may be instituted by any creditor provided for in the assignment, whether he be a judgment-creditor or not (*Goncelier* v. *Foret*, 4 Minn. 13; and see *Matter of Farnum*, 21 Supm. Ct. [14 Hun], 159; affi'd, 75 N. Y. 187); or by the assignor (*Armstrong* v. *Byrne*, 1 Edw. Ch. 79); or the assignee may himself bring an action for the settlement of his accounts and a distribution. *Ludlow* v. *Simond*, 2 Caines' Cas. 1, 39, 52; 1 Van Sant. Eq. Pr., 3d ed., 161.

In an action for an accounting, all persons interested in obtaining the account must be parties. All the creditors, therefore, are necessary parties. *Egberts* v. *Wood*, 3 Paige, 517; *Wakeman* v. *Grover*, 4 Id. 23; *Brooks* v. *Peck*, 38 Barb. 519; *Petrie* v. *Petrie*, 7 Lans. 90; *McKenzie* v. *L'Amoureux*, 11 Barb. 516; *Garner* v. *Wright*, 28 How. Pr. 92. The assignors (*Noyes* v. *Wernberg*, 15 W'kly Dig. 72) and all the assignees must be parties. 2 Perry on Trust, 4th ed., § 876.

If the assignor be dead and no legal representative has been appointed, the action may nevertheless proceed to judgment. The absence of a legal representative of the assignor in such a case is not ground of demurrer by the assignee. *Wells* v. *Knox*, 62 Supm. Ct. (55 Hun), 245. Where one of a firm of assignors dies pending the accounting, the accounting will not be suspended. *Pope* v. *Briggs*, 50 State R. 742. If one of the assignees be dead, it is proper, and in some instances necessary, that his representatives be made parties. *Haines* v. *Hollister*, 64 N. Y. 1; *King* v. *Talbot*, 40 N. Y. 76; *Sortore* v. *Scott*, 6 Lans. 271; see *In re Grove*, 64 Barb. 526. But it is not necessary that all the creditors be named as parties on the record.

The Code of Civil Procedure (§ 448) provides, that "where the question is one of a common or general interest of many persons, or where the persons, who might be made parties, are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." In such a case the action may be brought by one of the creditors in behalf of himself and all other creditors similarly situated. *Petree* v. *Lansing*, 66 Barb. 357; *Kerr* v. *Blodgett*, 48 N. Y. 62; *Brooks* v. *Peck*, 38 Barb. 519; *Brooks* v. *Gibbons*, 4 Paige, 374; *Wakeman* v. *Grover*, Id. 23.

And an action may be maintained by a preferred creditor in behalf of himself and other creditors, for an accounting, since the rights of preferred creditors under an assignment are not antagonistic to rights of other creditors claiming under the same instrument, so as to render it improper for the preferred creditor to maintain an action as representative of all the creditors. *Brooks* v. *Peck*, 38 Barb. 519.

But it seems that a surety on the assignee's bond cannot maintain an action on behalf of himself and the creditors, and bring

the creditors into the action under the section cited, for the reason that there is no community of interest between the surety and the creditors. *Schuehle* v. *Reiman*, 86 N. Y. 270.

Where an action is brought by one creditor on behalf of himself and others, to compel an assignee to account and distribute, an order requiring creditors who desire to come in and prove their claims, as a condition to contribute their proportion of the plaintiff's costs and expenses, is unauthorized. *Matter of Lewis* v. *Hake*, 49 Supm. Ct. (42 Hun), 542.

It is not necessary, or proper, that other creditors should be joined as plaintiffs in an action brought for an accounting by one creditor on behalf of himself and others. The judgment in such action provides for bringing in all creditors. *Douglas* v. *Smith*, 50 State R. 808.

§ 437. **Complaint.**—The proper averments of a complaint in an action instituted by a creditor, in behalf of himself and all other creditors, to compel an accounting by an assignee under a general assignment and a distribution of the estate, are: (1) The execution of the assignment by the assignor; (2) the acceptance and entry upon the discharge of his duties and the receipt of the assigned property by the assignee; (3) the fact (if it be so) that the inventory and schedules have been filed, and that the assignee has qualified by giving the bond required by the statute; (4) the facts showing that the plaintiff is interested in the trust property, to wit, a cause of action for an indebtedness of the assignor provided for in the assignment; (5) that the assignee has not accounted or paid the plaintiff's proportionate share under the assignment.

When the object of the action is also to remove or restrain the assignees on the ground of misconduct, the complaint must set out the specific charges of misconduct upon which the plaintiff relies. 2 Van Sant. Pl., 2d ed., 175, *et seq.*

§ 438. **Defenses.**—Where a suit is brought by creditors to enforce the trust against an assignee who has received the property of the debtor, he cannot set up the defense of fraud in making and receiving the transfer for the benefit of such creditors without showing that the fund has been recovered from him by the

parties intended to be defrauded. *Seaman* v. *Stoughton*, 3 Barb. Ch. 344; and see *Matter of Farnam*, 75 N. Y. 187; *Ludington's Petition*, 5 Abb. N. C. 307; *Matter of Ward*, 10 Daly, 66.

Where another action is pending to effect the same accounting, that will be a bar to the suit, but the objection must be taken by the answer. *Hertell* v. *Van Buren*, 3 Edw. Ch. 21; *Weed* v. *Smull*, 7 Paige, 573; *Christy* v. *Libby*, 2 Daly, 418; see *ante*, § 435.

The fact that actions are pending in another court against an assignor and assignee to set aside the assignment is not a bar to a proceeding for an accounting, nor does it present a reasonable excuse for delaying the account. *Matter of Dare*, 13 Daly, 220.

As a general rule of equity, an assignee in trust cannot set up the statute of limitations against his *cestui que trust*. But this proposition must be received with its appropriate qualifications. As long as the relation of trustee and *cestui que trust* is acknowledged to exist between the parties, and the trust is continued, lapse of time can constitute no bar to an account or other proper relief for the *cestui que trust*. *Flint* v. *Bell*, 34 Supm. Ct. (27 Hun), 155. But where this relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief upon the ground of lapse of time, and its inability to do complete justice. 2 Story's Eq. Jur., 13th ed., § 1520*a*.

In accordance with the principle thus laid down, it has been frequently held that a long delay would defeat the right to an accounting. *Kingsland* v. *Roberts*, 2 Paige, 193; *Ellison* v. *Moffatt*, 1 Johns. Ch. 46; *Mooers* v. *White*, 6 Id. 360; *Rayner* v. *Pearsall*, 3 Id. 578; *Ray* v. *Bogart*, 2 Johns. Cas. 432; *Phillips* v. *Prevost*, 4 Johns. Ch. 205; and see *Lyon* v. *Chase*, 51 Barb. 13; *Matter of Darrow*, 10 Daly, 141.

By statute in this State it is provided, that "when the purposes for which an express trust shall have been created shall have ceased, the estate of the trustees shall also cease, and where an estate has been conveyed to trustees for the benefit of creditors and no different limitation is contained in the instrument creating the trust, such trust shall be deemed discharged at

the end of twenty-five years from the creation of the same ; and the estate conveyed to trustee or trustees, and not granted or conveyed by him or them shall revert to the grantor or grantors, his or their heirs or devisees, or persons claiming under them, to the same effect as though such trust had not been created." 1 R. S. 730, § 67 (4 R. S., 8th ed., 2440), as amended by Laws 1875, c. 545.

It was at one time held that this statute applied only to assignments made after its passage (*McCahill* v. *Hamilton*, 27 Supm. Ct. [20 Hun], 388) ; but this decision has since been overruled. *Kip* v. *Hirsh*, 103 N. Y. 565, 572 ; *N. Y. Steam Co.* v. *Stern*, 53 Supm. Ct. (46 Hun), 206, 209.

Where there has been a full and final adjustment by the parties, that will be a bar to a subsequent action for an account, unless there be fraud or error distinctly specified and proved. *McIntyre* v. *Warren*, 3 Abb. Dec. 99 ; s. c. 3 Keyes, 185 ; *Lockwood* v. *Thorne*, 11 N. Y. 170 ; *Chubbuck* v. *Vernam*, 42 N. Y. 432 ; *Bruen* v. *Hone*, 2 Barb. 586. But it must be pleaded. *Derby* v. *Yale*, 20 Supm. Ct. (13 Hun), 273.

And where an assignee for the benefit of creditors has received assets, it is no defense to an action for an accounting brought against him by the creditors to allege that since the execution of the assignment the assignor has been discharged from the debts secured by the assignment under proceedings in bankruptcy instituted after the assignment. The creditors have a vested interest in the assigned property, and its proceeds to the extent of their respective claims. *Smith* v. *Tighe*, 46 Super. Ct. (14 J. & S.) 270.

§ 439. Order of reference.—If defenses are interposed, the issues must be brought to trial ; and if the issue is made upon the question whether the assignee should be required to account, that question must be first determined. *Mitchell* v. *Stewart*, 3 Abb. Pr. N. S. 250. If the assignee admits his liability to account, or it be determined that he should account, or if no defense is interposed, the long-established practice is to send the matter to a referee to take and state the account, and to take proof of such other matters as the court may require, in order to render final judgment ; and this is likewise the practice under

the Code. Code of Civ. Pro. § 1015; *Palmer* v. *Palmer*, 13 How. Pr. 363; *Ketchum* v. *Clark*, 22 Barb. 319.

The order of reference should specify the duties of the referee. These are, in general, to take and state the assignee's account, and when necessary for the purposes of a final distribution, to ascertain what creditors are entitled to share in the distribution, and in what amounts or proportions. When the action is brought by a creditor for the collective benefit of all the creditors, the Code provides for the publication of a notice to creditors to come in and exhibit their claims before the referee. Code of Civ. Pro. § 786; *Hurth* v. *Bower*, 37 Supm. Ct. (30 Hun), 151; *post*, § 441. The order of reference in such case should contain a direction for the publication of such notice, together with the designation of the paper in which it is to be published in addition to the State paper. In addition to these matters, the order should specify the principles upon which the account is to be taken (*Remsen* v. *Remsen*, 2 Johns. Ch. 495); should direct the referee to make all just allowances to the assignee, together with his commissions, and should direct him to produce before the referee all books and writings relating to the estate. It is the better practice, also, for the order of reference to specify the time and place of the first hearing and what notice shall be given to parties to appear before the referee.

§ 440. Notice of hearing.—All the parties to the action who have appeared are entitled to notice of the hearing. The referee, upon being served with the order of reference, should fix the time and place of hearing, if not specified in the order, and, if required, should issue a summons to the several parties to attend before him at the time and place so named. But, instead of a summons issued by the referee, the parties may be brought before the referee on notice. *Stephens* v. *Strong*, 8 How. Pr. 339; *Sage* v. *Mosher*, 17 How. Pr. 367. When the reference is for the trial of the action, fourteen days' notice must be given. *Mohrmann* v. *Bush*, 9 Supm. Ct. (2 Hun), 674.

No express provision is made for notice of hearing in references other than those to hear and determine. It has been said that the ordinary notice is eight days (1 Van Sant. Eq. Pr., 3d ed., 524), unless the referee by summons fixes a shorter time. By

the rules of the former practice the time fixed could not have been less than two days when the solicitor of the adverse party resided in the place where the hearing was had; not less than four days when he resided elsewhere not exceeding fifty miles from the place of hearing; nor less than six days if over fifty and not exceeding one hundred miles; and when he resided more than one hundred miles from the place of hearing, not less than eight days, unless a shorter time is fixed in the order of reference. 1 Van Sant. Eq. Pr., 3d ed., 524; 3 Wait's Pr., 351.

§ 441. Notice to creditors to present claims.—When the order of reference directs the referee to ascertain what creditors are entitled to share in the distribution of the estate, and in what amounts, it will also direct him to publish notice of the time and place where such claims are to be presented in accordance with the following provision of the Code of Civil Procedure:

"Where an action is brought for the collective benefit of the creditors of a person, or of an estate, or for the benefit of a person or persons, other than the plaintiff, who will come in and contribute to the expense of the action, notice of a direction of the court, contained in a judgment or order, requiring the creditors, or other person or persons to exhibit their demands, or otherwise to come in, must be published, once in each week, for at least three successive weeks, and as much longer as the court directs, in the newspaper published at Albany, in which legal notices are required to be published, and in a newspaper published in the county where the act is required to be done." Code of Civ. Pro., § 786.

But this section applies only to an action brought by one of several persons entitled to sue collectively. In an action brought by a surety on the assignee's bond to compel the assignee to account, there is no authority to bring in creditors by the notice provided for in this section. *Schuehle* v. *Reiman*, 86 N. Y. 270.

By a special rule of the first department a notice must be mailed to each creditor whose name appears on the books of the assignor, at least twenty days before the day specified for presenting claims. See *ante*, § 421.

If creditors have presented claims to the assignee pursuant to

notice given under the assignment act, it is not necessary to present them anew when notice is given under the section cited above. In such a case it is the duty of the assignee to present the claims to the referee. *Hurth* v. *Bower*, 37 Supm. Ct. (30 Hun), 151, 153.

If a creditor fails to come in and prove his claim after such notice he will be barred, although the assignees have knowledge of the claim. *Kerr* v. *Blodgett*, 48 N. Y. 62. But at any time before final judgment, and even before the distribution of the fund, creditors may be permitted to come in and file their claims. *Wilder* v. *Keeler*, 3 Paige, 164 ; *Lashley* v. *Hogg*, 11 Ves. 602 ; *Hartwell* v. *Colvin*, 16 Beav. 140 ; *Pratt* v. *Rathbun*, 7 Paige, 269 ; *Brooks* v. *Gibbons*, 4 Paige, 374.

After the referee's report has been filed, the proper course for a creditor who has failed to file his claim is by petition, addressed to the court, praying to be permitted to come in and establish his claim. The petition must be supported by the affidavit of the claimant, and must be served on the parties to the cause. 2 Dan. Ch. Pr. 1205. He must also explain the delay. The terms and conditions upon which he will be allowed to come in will, of course, depend upon the circumstances of each particular case, and if it be a proper one the court will make an order referring it back to the referee to make the inquiry. 3 Wait's Pr. 364.

§ 442. **Proceedings before the referee.**—The method of taking and stating an account is still that which prevailed under the practice of the old court of chancery ; no other manner of accounting has been adopted by the Code. *Wiggin* v. *Gans*, 4 Sandf. 646 ; *Fraser* v. *Phelps*, Id. 682 ; *Ketchum* v. *Clark*, 22 Barb. 319 ; *Palmer* v. *Palmer*, 13 How. Pr. 363 ; *Brevoort* v. *Warner*, 8 Id. 321.

The practice will be found detailed in Daniels' Ch. Pr. 1221 ; 2 Barb. Ch. Pr., 2d Am. ed., 505 ; 1 Van Sant. Eq. Pr., 3d ed., 531 ; 5 Wait's Pr. 662.

The proceedings in the reference are regulated by the 107th Chancery Rule.[1]

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[1] The 107th Rule of the Court of Chancery, as adopted in 1829, was in these words : " All parties accounting before a master shall bring in their accounts

§ 443. Form of the account.—The rule of chancery referred to (*ante*, § 442) required the parties to bring in their accounts in the form of debtor and creditor, verified by affidavit that the account, including both debits and credits, is correct, and that the party accounting does not know of any error or omission therein to the prejudice of any of the other parties. *Story* v. *Brown*, 4 Paige, 112 ; *Wiggin* v. *Gans*, 4 Sandf. 646.

The inventory and schedules, made and filed as required by the statute, constitute a convenient if not a necessary basis for preparing the account. In the case of administrators and executors the inventory of the estate furnishes presumptive evidence of the amount and value of the property coming into their hands. *Hasbrouck* v. *Hasbrouck*, 27 N. Y. 182 ; rev'g 37 Barb. 579.

In the case of a general assignee, if the inventory was made by the assignor, being regarded as a part of the assignment (*Terry* v. *Butler*, 43 Barb. 395) accepted by him, it would furnish at least presumptive evidence of the property which he had received. If, on the other hand, the inventory was made by the assignee, it would constitute an admission of liability on his part for the property enumerated in it.

Following, then, the rules applicable to executors and administrators, so far as they apply, the assignee, in making up his account should charge himself with the property contained in the inventory at the values there given.[1] *Matter of Wolff*, 13 Daly,

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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 upon interrogatories, as the master may direct." In the revision of the rules in 1837, the following was added to the 107th Rule, viz. . " On any reference to take or state an account, the master shall be at liberty to allow interest as shall be just and equitable, without any special directions for that purpose, unless a contrary direction is contained in the order of reference. And every charge, discharge, or state of facts, brought in before a master shall be verified by oath as true, either positively, or upon information and belief." The Rule continued in this form until the Court of Chancery was abolished. *Wiggin* v. *Gans*, 4 Sandf. 646, note.

[1] In *Willcox* v. *Smith* (26 Barb. 316, 346), Mr. Justice Balcom made the following statement of the form in which the accounts of executors and administrators should be prepared, which is serviceable in the preparation of an assignee's account :

" Executors and administrators, in making up their accounts, are, first, to charge themselves with the amount of the property of the deceased contained

481. He is then to charge himself with any property belonging to the estate which has come into his hands not included in the inventory; next, with any increase to the estate, either by way of interest on overdue claims or by sales of property at more than the inventoried value. These items constitute the debtor side of the account. *Willcox* v. *Smith*, *supra*; *Matter of Jones*, 1 Redf. 263. He may then credit himself with the amount of uncollected claims; next, for the difference between the inventoried value and the actual amount received on a sale of property when the property has been sold for less than its inventoried value. Third, for property if any which has been lost, or which was included in the inventory but was not delivered to him, and which he was unable to obtain. Fourth, for actual expenses and disbursements made in the administration of the estate; and, fifth, for any sums paid to creditors under the assignment and dividends rendered.

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in the inventory, at the appraised value. (Kirtland's Surrogate, 197, 392.) They are then to make themselves debtor for the increase to the same; such as interest that has accrued on debts owing to the deceased, and property and demands which have been discovered subsequent to the taking of the inventory; next, sums for which they have sold property, exceeding its appraised value; and then all other increase to the inventory, and the items thereof. The whole increase being added to the value of the property, as shown by the inventory, constitutes the debtor side of their accounts. The credit side of their accounts consists, first, of debts marked bad or doubtful, which have not been paid, to them, at the amounts thereof set down in the inventory; secondly, of sums for which they have necessarily sold property at less prices than its appraised value, with a list of the articles so sold; thirdly, the articles of property lost without their fault, and the cause of such loss, with the appraised value of such articles; fourthly, the particular debts, appraised as good, which they have been unable to collect by the exercise of ordinary diligence, and the reasons why they could not collect them, with the amounts of such debts, as noted in the inventory; fifthly, the debts paid by them, to whom paid and when, and the amounts thereof; sixthly, the items of their actual and necessary expenses paid in the execution of the trusts reposed in them. The sum total of such credits is then to be subtracted from the amount of the debtor side of their accounts. Following the remainder the articles of property yet unsold are to be mentioned, with the appraised value thereof, and also the reasons why they have not sold the same. And afterwards they are to set forth all other facts which are pertinent and proper to be considered by the surrogate in making up his decree. It is not absolutely necessary that the accounts of executors and administrators should in all cases be made out in the manner above stated, but such method ought to be substantially adopted."

This form of account is suggested as convenient, and as following that rendered by executors and administrators, but it has nowhere been judicially determined that the account must be rendered in this or in any other specified form, except that it must be brought in the form of debtor and creditor (*ante*, § 442.)

§ 444. **Verification.**—The account must be verified. The substance of the verification is that the account, according to the best of the knowledge, information and belief of the assignee, contains a full and true account of all his receipts and disbursements on account of the estate, and of all sums of money belonging to the estate which have come into his hands, or which have been received by any other person by his order or authority for his use, and that he does not know of any error or omission in the account to the prejudice of any of the parties interested in the estate. *Gardner* v. *Gardner*, 7 Paige, 112, 114.

If there is any item of the account for disbursements not exceeding twenty dollars, for which the assignee produces no voucher, he must, either in the affidavit annexed to the account or on the hearing, make oath to these items, to whom paid, for what, and when, and he must swear positively to the fact and not as to belief only, and the whole of the items so established must not exceed the sum of five hundred dollars. If so verified the items will be presumptively proven. *Remsen* v. *Remsen*, 2 Johns. Ch. 495 ; *Kellett* v. *Rathbun*, 4 Paige, 102 ; *Williams* v. *Purdy*, 6 Id. 166 ; *Gardner* v. *Gardner*, 7 Id. 111 ; *Westervelt* v. *Gregg*, 1 Barb. Ch. 469.

§ 445. **Examination of the account.**—If any party is dissatisfied with the account so brought in, the ancient practice was to file written interrogatories for the examination of the party, to which he put in his answers in writing (2 Daniels' Chan. Pr., 6th Am. ed., 1223 ; 2 Barb. Ch. Pr., 2d ed., 507) ; the modern practice is to examine both parties and witnesses orally before the referee. *Benson* v. *Le Roy*, 1 Paige, 122.

Chan. Kent lays down the practice before the referee as follows (*Remsen* v. *Remsen*, 2 Johns. Ch. 495, 501) : " The master ought, in the first instance, to ascertain from the parties, or their counsel, by suitable acknowledgments, what matters or

items are agreed to or admitted; and then, as a general rule, and for the sake of precision, the disputed items claimed by either party ought to be reduced to writing by the parties, . . . and the requisite proofs ought then to be taken."

Mr. Surrogate Bradford states substantially the same practice. He says: "The proper practice is to state the objections in the form of distinct and specific allegations and give proof thereof. Such allegations may of course cover every possible ground of objection, such as a want of proper vouchers, or that payments have been made, or debts entered, which are not properly to be charged against the estate, or that fraudulent charges have been made, or that assets not included in the inventory have come into the hands of the administrator." *Metzger* v. *Metzger*, 1 Bradf. 265, 266.

The objections should be taken to the specific items of the account which are contested, and the grounds of objection should be stated. *Matter of Mather*, 68 Supm. Ct. (61 Hun), 214. But a distinction is to be made between objections to items which the assignee seeks to have allowed as credits, in which case the objection may be simply to the allowance of the item. *Dorney* v. *Thacher*, 83 Supm. Ct. (76 Hun), 361, and cases in which the objector seeks to charge the assignee with losses occasioned by neglect, in which case the objections should specifically state the grounds. *Matter of Mather*, *supra*. A general objection to the account is not enough. *Heywood* v. *Kingman*, 29 Abb. N. C. 75. It is within the province of the referee even when specific objections are not made to scrutinize the account and disallow items seemingly fraudulent or objectionable on their face; but in such a case the assignee should be apprized of the items which the assignee deems objectionable, and he should be afforded an opportunity to justify them. *Heywood* v. *Kingman*, 29 Abb. N. C. 75.

In the *Matter of May*, 13 Daly, 24, the duties of the referee when there are no objections filed by creditors are stated, and it was there held that a referee who of his own motion proceeded to examine the referee as to his management of the estate and as to disbursements he had made which were not objected to, would not be allowed for the expense of such an examination.

The burden of proof in proceedings for an accounting in the

surrogate's court is upon the contesting party where proper vouchers for payments objected to are presented. *Boughton* v. *Flint*, 74 N. Y. 476, and such is also the rule in accountings generally. But see Common Pleas Rule 27, *post*, § 465.

A party may be charged with costs who makes objections which, upon subsequent investigation of the accounts, it is found he had no reasonable or probable ground for making. *Gardner* v. *Gardner*, 7 Paige, 112, 115.

A party is not precluded by the objections first made to the account, as it frequently is discovered, in the course of the investigation, that charges have been improperly inserted in the account, or credits to the estate have been omitted which the adverse party had no means of knowing at the time the account was first presented. *Gardner* v. *Gardner*, *supra*.

The account is said to be *surcharged* for omission for which credit ought to have been given or *falsified* for wrong debits. *Metzger* v. *Metzger*, 1 Bradf. 265, 267.

The assignee may now be called and give evidence on his own behalf, although the rule was formerly otherwise. *Benson* v. *Le Roy*, 1 Paige, 122 ; see *Wiggin* v. *Gans*, 4 Sandf. 646 ; 3 Wait's Prac. 358.

In all cases where the referee is directed to take the proofs, the depositions of the witnesses should be reduced to writing by the referee, and subscribed by the witnesses, and the depositions returned with the report to the court. *Remsen* v. *Remsen*, 2 Johns. Ch. 495 ; Rule 30, Supm. Ct. But this rule does not apply to proceedings for accounting under the general assignment act. *In re Harris' Estate*, 3 N. Y. Supp. 621.

§ 446. **Vouchers.**—The established rule of practice on accountings in equity requires that the account should be sustained by vouchers whenever the payment exceeds, in England, forty shillings ; in this country, twenty dollars. *Remsen* v. *Remsen*, 2 Johns. Ch. 495, 501. This rule has been embodied in the statute in reference to accounts by executors and administrators (Code of Civ. Pro. § 2734), and has been frequently applied. *Willcox* v. *Smith*, 26 Barb. 316, 342 ; *Kellett* v. *Rathbun*, 4 Paige, 102 ; *Gardner* v. *Gardner*, 7 Id. 112.

What constitutes a proper voucher is for the judge to decide,

but it seems that all the assignee can be required to do is to produce his receipts to vouch his payments, and where any party in interest doubts their genuineness he may proceed to impeach them. Bennet's Master in Ch. 85 ; *Metzger* v. *Metzger*, 1 Bradf. 265, 267.

There are cases in which a party has been permitted to discharge himself by other means than the ordinary vouchers. Thus, where an account is of long standing, the court will sometimes permit the accounting party to discharge himself upon oath of all such matters as he cannot prove by vouchers by reason of their loss. 2 Barb. Ch. Pr., 2d ed., 501, 502 ; see *Willcox* v. *Smith*, 26 Barb. 316, 342.

It is no excuse for a failure to produce vouchers that the payments were made for wages to persons some of whom could not write, and that it was not customary in the business to take and give receipts for wages. *Matter of Marklin*, 10 Daly, 122.

§ 447. **Allowances to assignee.**—In taking any account directed by a decretal order, the referee is empowered to allow the parties such disbursements as may appear to have been fairly and properly made by them. But the assignee must specify the items of such expenses and disbursements. A party on accounting will not be allowed anything under the head of general expenses without specifying the particulars. *Meth. Epis. Ch.* v. *Jaques*, 3 Johns. Ch. 77, 116.

" While the assignee, as trustee for the benefit of creditors, is entitled to indemnity and reimbursement, out of the assigned estate, for all *necessary* expenses incurred by him in the execution of his trust, his right to incumber the trust estate or involve it in the expense of litigations and the employment of professional advisers, or other expenses, is limited to such cases as reasonably call for professional advice, or the incurring of the expense which '*one of ordinary prudence and caution would undertake in the management of his own affairs.*' " Robinson, J., in *Levy's Accounting*, 1 Abb. N. C. 177, 182.

Necessary expenses for clerk hire and office rent will be allowed. *Vanderheyden* v. *Vanderheyden*, 2 Paige, 287 ; *Duffy* v. *Duncan*, 35 N. Y. 187.

If the assignee employs an attorney at law to render services

which do not require professional skill, such as attending at an auction sale of the assigned property, preparing the inventory and schedules, he will not be allowed for such services out of the assigned estate.

In the Court of Common Pleas, it is held that the assignee will not be allowed for payments made to counsel for preparing the assignment (unless such charge is specifically provided for in the deed itself), nor for services in preparing the inventory and schedules or the assignee's bond, nor for a retainer, nor for services of an attorney on the removal of an assignee. *Matter of Carrick*, 13 Daly, 181; *Matter of Wolff*, 13 Daly, 481. But see *Sullivan* v. *Miller*, 106 N. Y. 635, 643.

Where the assignee carries on the former business of the assignor and it does not appear that such continuance was a benefit to the estate, he will not be allowed the expenses thereby incurred. In such a case he should be charged with the value of the assets as they came into his hands, and should be allowed the ordinary expenses of administering his trust. *Matter of Marklin*, 13 Daly, 105.

"The rules which prevail in regard to allowances to trustees to reimburse them for expenses necessarily incurred in the execution of their trust apply to assignees in these proceedings. Like other trustees, they are allowed reasonable fees paid for legal advice or assistance in the discharge of their duties, such allowances for legal expenses being always, however, within the discretion of the court, and they will be reduced if, in the judgment of the court, they are unreasonable. So also they may, like other trustees, employ agents, collectors, accountants and other persons, where such services are necessary, and an allowance will be made for such expenditure. 2 Perry on Trusts, 4th ed., §§ 910, 912." *Matter of Burbank*, 65 How. Pr. 129, 131; s. c. as *Matter of Johnson*, 10 Daly, 123.

But whether he will be allowed for rent, for the payment of which he has become liable by reason of accepting a lease, will depend upon whether in that matter he acted as a cautious and prudent man would have acted in his own affairs. *Matter of Edwards*, 10 Daly, 68.

The assignee will not be allowed the expenses of carrying on the former business of the assignor unless it appear that such con-

tinuance was a benefit to the estate. *Matter of Dean*, 86 N. Y. 398; *Matter of Marklin*, 10 Daly, 122; *Matter of Rauth*, 10 Daly, 52; and see cases cited, *ante*, § 387.

But a trustee cannot charge, in addition to his commissions, for services rendered by himself to the estate. Thus, if he be an attorney, he cannot recover of the estate for professional services rendered, however beneficial. *Matter of Maxwell*, 73 Supm. Ct. (66 Hun), 151; *Green* v. *Winter*, 1 Johns. Ch. 26; *Vanderheyden* v. *Vanderheyden*, 2 Paige, 287; *Collier* v. *Munn*, 41 N. Y. 143; *Matter of Felt & Bell*, 59 Supm. Ct. (52 Hun), 60; *Nichols* v. *McEwen*, 17 N. Y. 22. But an assignee will be allowed for all such expenses as he incurs in taking possession of and caring for the trust property, and in its collection and sale, and will be allowed proper fees of counsel for services in suits, and for advice in the management of the trust. *Van Slyke* v. *Bush*, 123 N. Y. 47; *Hynes* v. *Campbell*, 67 Supm. Ct. (60 Hun), 391; *Matter of Aplington*, 26 Abb. N. C. 69; *Noyes* v. *Blakeman*, 3 Sandf. 513; *Jewett* v. *Woodward*, 1 Edw. Ch. 195; *Matter of Rauth*, 10 Daly, 52, 55; see also *In re Noyes*, 6 N. B. R. 277; *In re Davenport*, 3 Id. 77; *In re Tulley*, Id. 82; *In re Warshing*, 5 Id. 350. And this applies to responsibilities which they have properly incurred as well as to actual disbursements. *Matter of Bunch*, 12 Wend. 280. But when the assignee makes a charge against the estate, he must prove that the estate was in some manner benefited by such payment, before the payment becomes a proper credit to the assignee. *Duffy* v. *Duncan*, 35 N. Y. 187.

And as to what charges for counsel fees have been allowed in various cases, see *Matter of Van Horn*, 10 Daly, 131; *Matter of Johnson*, 10 Daly, 123; *People ex rel. Olin* v. *Lockwood*, 9 Daly, 68; *Matter of Sweeny*, 2 Mon. L. B. 82; *Matter of Aplington*, 45 State R. 640. Costs collected in an action brought against the assignee belong to the attorney and not to the estate, and the assignee will not be charged with them on accounting. *Matter of Barnes*, 140 N. Y. 468, 473.

The assignee will not be allowed a charge for a general retainer of counsel. *Matter of Van Horn*, *supra*. Nor for a special retainer to counsel who is acting for him regularly in the business of the assignment. *Matter of Schaller*, 10 Daly, 57. The

value of such professional services must be shown by other proof than the estimate of the attorney who rendered them. *Matter of Johnson*, 10 Daly, 123.

The court will not authorize the assignee to make payment of a counsel fee upon application before the final accounting. The assignee may make such payments at any time subject to his obligation to show their necessity and reasonableness, when he asks to be allowed for them on his accounting as disbursements. *Matter of Thomas*, 5 Abb. N. C. 354; *Matter of Youngs*, Id. 355, note. Allowances for counsel fees when made are made to the assignee and not to counsel. *Matter of Worthley*, 10 Daly, 12.

In the absence of bad faith, all necessary costs and disbursements incurred by the assignee upon the accounting are chargeable to the trust fund. *Hynes* v. *Campbell*, 67 Supm. Ct. (60 Hun), 391. And when the necessity for the employment of counsel by an assignee arises after his accounts have been filed, he may be allowed to make proof of the reasonableness of the counsel fee for such services at special term by affidavit. *Matter of Littell*, 16 Daly, 379.

§ 448. Commissions.—The amendment of 1878 (Laws of 1878, c. 318, § 7) to section 26 of the general assignment act provides, that "the assignee or assignees named in any assignment shall receive for his or their services a commission of five per centum on the whole sum which will have come into his or their hands." The assignor cannot by an agreement outside of the assignment bind the estate for the payment to the assignee of any sum for his services in excess of the commission allowed by the statute. *Boegler* v. *Eppley*, 47 Supm. Ct. (40 Hun), 523; *Matter of Hulburt*, 89 N. Y. 259. Such an agreement expressed in the assignment would probably render it invalid. *Boegler* v. *Eppley*, *supra*; see *ante*, § 222.

Commissions under the statute should be allowed only upon the sum of money which comes into the hands of the assignee, and not upon the value of the estate which was assigned to him. *Matter of Hulburt*, 89 N. Y. 259; *Matter of Dean*, 86 N. Y. 398; see *Bruce* v. *Lorillard*, 69 Supm. Ct. (62 Hun), 416. So when an assignee sells mortgaged property he will be entitled

to commissions only upon the amount of money actually received —that is, the purchase price less the mortgage. *Matter of Fulton*, 37 Supm. Ct. (30 Hun), 258 ; distinguishing *Cox* v. *Schermerhorn*, 25 Supm. Ct. (18 Hun), 16.

But where the assignee has turned over to a preferred property of the assigned estate which he has accepted in lieu of cash, the assignee will be allowed commissions on the property so turned over. *Matter of Bassford*, 13 Daly, 22. The right of the assignee to commissions where the assignment has been set aside has been already considered. See *ante*, § 279.

The court may refuse to allow commissions where the assignee has been guilty of grave misconduct. *Matter of Wolff*, 13 Daly, 481 ; *Matter of Coffin*, 10 Daly, 27. But where the assignee is removed for causes other than his personal misconduct, he will be allowed commissions. *Matter of Rauth*, 10 Daly, 52.

Where a compromise is effected by the assignor with his creditors before the whole estate is turned into money by the assignee, and the assignee is discharged and the property restored to the assignor, the assignee can charge commissions only on the moneys which he has received. *Matter of Hulburt*, *supra*, overruling 9 Abb. N. C. 132 ; see also *Matter of Woven Tape Skirt Co.*, 85 N. Y. 506. Although it seems that if the compromise is effected before the assignee has received any money upon which his commissions could be computed, the court might, before compelling him to turn over the estate on a compromise, order a suitable and reasonable compensation to be made him as a condition of returning the property. *Matter of Hulburt*, *supra*.

Previous to the statute it was held, that where no rate of compensation was fixed in the assignment itself, or the direction was to pay reasonable counsel fees, the assignee would be compensated at the rate allowed to executors and administrators (*Meacham* v. *Sternes*, 9 Paige, 398 ; *Duffy* v. *Duncan*, 35 N. Y. 187 ; see *Matter of Schell*, 53 N. Y. 263 ; *Keteltas* v. *Wilson*, 36 Barb. 298 ; *Matter of Shaw*, 25 Supm. Ct. [18 Hun], 195), though in *Duffy* v. *Duncan* (*supra*) it was intimated that the rate of compensation allowed to the trustees of insolvent debtors under the Revised Statutes would furnish a proper limit, and in the *Matter of Schell* (*supra*) the court fixed the value of the services of a trustee, on a *quantum meruit*.

But it seems that the assignor may, on the assignment itself, fix any rate of compensation he sees fit, subject to the limitation that if it be excessive and indicate an intent to defraud creditors, it will render the assignment fraudulent and void as against creditors. See *Wynkoop* v. *Shardlow*, 44 Barb. 84; *Campbell* v. *Woodworth*, 24 N. Y. 304; *Eyre* v. *Bebee*, 28 How. Pr. 333.

§ 449. Referee's report.—The referee's report must conform to the order of reference. If the referee is directed to take and state the account of the assignee, it will ordinarily be convenient to report the account as filed, and then if any items have been disallowed, or if the assignee has been charged with any items not contained in the account, to specify them, and annex as a separate schedule the account as finally allowed. If the referee is also directed to ascertain and report the creditors and the amounts in which they are entitled to share in the estate, the referee should report and annex proof of publication of notice as required by the order, and should report the claims presented to him, separately, and his findings in reference to each claim, and if he is authorized to adjudicate upon disputed claims, he must also present his findings of fact and law upon each of such claims. He must also find such facts as he is directed to find for the information of the court (Code of Civ. Pro. § 1015), and the testimony taken by him and signed by the witnesses must be filed with the report. Rule 30, *post*, § 465.

The practice in chancery in such cases was for the master to prepare a draft of his report and deliver it to such parties as desired, and for the parties then to come in and file objections to such draft, and after argument thereon the master made his final report. In this report either party who had filed objections could take exceptions based upon such objections. These exceptions could be brought on before the court for argument, and nothing else in the account came up for review or argument. *Ketchum* v. *Clark*, 22 Barb. 319; *Remsen* v. *Remsen*, 2 Johns. Ch. 495; *Meth. Epis. Ch.* v. *Jaques*, 3 Id. 77. But it has been said that the former practice of carrying in objections to the draft of the master's (referee's) report is abolished. It is enough if the objections be taken on the hearing, and entered by the referee on his minutes as in a case of trial before him, and, after

notice of filing the report, specific exceptions be filed and served within the eight days, and substantially in the form of the chancery practice. 1 Van Sant. Eq. Pr., 3d ed., 568; 3 Wait's Pr. 386; *Evertson* v. *Givan*, 16 How. Pr. 25.

It does not seem to be necessary, therefore, that requests to find should be presented to the referee, either orally or in writing. *Evertson* v. *Givan*, 16 How. Pr. 25. Although under § 1023 of the Code of Civ. Pro. it may be proper for a party who desires to do so to present such requests to the referee.

§ 450. **Exceptions to the report.**—By the 30th Rule of Court, it is provided: "In references other than for the trial of the issues in an action, or for computing the amount due in foreclosure cases, the testimony of the witnesses shall be signed by them, and the report of the referee shall be filed with the testimony, and a note of the day of the filing shall be entered by the clerk in the proper book, under the title of the cause or proceeding, and the said report shall become absolute, and stand as in all things confirmed, unless exceptions thereto are filed and served within eight days after service of notice of the filing of the same. If exceptions are filed and served within such time, the same may be brought to a hearing at any special term thereafter, on the notice of any party interested therein."

This rule applies to reports of referees on passing accounts. *Matter of Guardian Savings Inst.*, 16 Supm. Ct. (9 Hun), 267.

Creditors who have established their claims before the referee are also permitted to except to the report, although not parties to the suit. *Wilson* v. *Wilson*, 2 Molloy, 328. So also are creditors who have preferred claims which have been rejected by the referee. It is necessary, however, before they do so, to first obtain permission of the court, which they may do upon motion of course. 2 Dan. Ch. Pr. 1311.

If a party neglect to except to a referee's report for eight days after notice of its filing, it becomes absolute under Rule 30, although it is defective on its face. *Catlin* v. *Catlin*, 9 Supm. Ct. (2 Hun), 378.

Forms of exceptions to a referee's report on taking an assignee's account will be found in a note to *Levy's Accounting*, 1 Abb. N. C. 177.

§ 451. **Final hearing and decree.**—If exceptions are filed and served within the time limited, they may be brought to hearing at any special time thereafter, on the notice of any party interested therein. Rule 30, *ante*, § 450. This may be done in the form of a motion to confirm the report. But the motion should be made at special term and not at chambers. *Empire B. & M. L. Assoc.* v. *Stevens*, 15 Supm. Ct. (8 Hun), 515. The cause is usually placed regularly on the calendar, the date of issue being the date of the original trial issue. *Gregory* v. *Campbell*, 16 How. Pr. 417. The cause then proceeds to hearing upon the exceptions and proof reported by the referee. If the exceptions are overruled, the report is confirmed, and judgment is entered accordingly. 3 Wait's Pr. 390. If the exceptions, or any part of them, are sustained, the case may or may not be sent back to the referee, dependent upon whether further testimony is necessary to enable the court to render judgment. Where, after default, a reference was ordered to take and state an account, with leave to either party to apply to the court for a confirmation of the report, and the referee made his report in accordance with the order, to which the defendant excepted, and, on motion of the plaintiff, the exceptions were overruled and judgment entered, from which the defendant appealed without taking an appeal from the order overruling the exceptions, it was held that the appeal from the judgment brought up the question whether the facts reported were sufficient to sustain the judgment, and upon a case and exceptions errors of law on the part of the referee might be reviewed. *Darling* v. *Brewster*, 55 N. Y. 667; *Kirby* v. *Fitzpatrick*, 18 N. Y. 484; *Kirby* v. *Fitzgerald*, 31 Id. 417; *Marshall* v. *Smith*, 20 Id. 251.

§ 452. **Proceedings for accounting under the general assignment act.**—Thus far the proceedings in an action for an accounting in equity have been given in outline. These will be found serviceable in considering further the statutory proceedings for an accounting prescribed by the general assignment act. That act provides as follows:

"A citation may be issued to all parties, interested in the estate assigned, as creditors or otherwise, requiring them to appear in court on some day therein to be specified, and to show cause

why a settlement of the account of proceedings of the assignee should not be had, and if no cause be shown, to attend the settlement of such account. The county court must issue all citations mentioned in this act which must be returnable in court. It may issue a citation on the petition of an assignee, at any time after the assignment or on petition of a creditor, or an assignee's surety, or an assignor, at any time after the lapse of one year from the date of such assignment, or where an assignee has been removed and ordered to account as hereinbefore provided." Laws of 1877, c. 466, § 11 ; as am'd by Laws of 1878, c. 318. See Laws of 1860, c. 348 ; Laws of 1867, c. 860 ; Laws of 1870, c. 92 ; Laws of 1872, c. 838 ; Laws of 1875, c. 56. Compare similar provision in reference to executors and administrators, Code of Civ. Pro. § 2517, *et seq.*

"A citation issued on the petition of a creditor may be addressed to and served on the assignee alone, but on or after the return of such citation the assignee may have a general citation issued to all parties interested." Laws of 1877, c. 466, § 12.

Under the statute, as it stood previous to the act of 1877, a creditor might apply, after the lapse of a year, for a summons or citation compelling the assignee to appear and show cause why an account of the trust fund should not be made and why payment of such creditor's just proportionate part of such fund should not be ordered. Under this provision there appeared to be no method for compelling a final accounting and distribution of the estate among all the parties interested, and the judges were unwilling to make partial distributions of the estate to petitioning creditors without notice to all who were interested in the estate. *In re Nelson*, 11 Abb. Pr. 352.

In practice, therefore, unless the assignee himself applied upon the return of the summons issued to him for a final settlement of the estate there was no method by which the court could proceed to a final determination of the interests of all the parties.

The act of 1877 provided, that "the county judge may issue a citation requiring the parties to show cause why an accounting and settlement should not be had, on petition of an assignee at any time after the assignment, or on petition of a creditor, or an assignee's surety, or an assignor, at any time after the lapse of one year from the date of such assignment, or on his own

motion, on the removal of an assignee as hereinbefore provided." Laws of 1877, ch. 466, § 11. See amendment to this section above.

Under this section, taken in connection with the twelfth section cited above, there still appeared to be some doubt whether it was the intention of the statute that there should be a final accounting on notice to all parties on the petition of a creditor merely. Whatever uncertainty existed has been removed by the amendment of 1878, and there can now be no question but that an accounting in which all persons interested in the estate may be made parties, and in which a final settlement of the assignee's accounts can be had, may be obtained upon the petition of any of the parties mentioned in the section.

§ 453. **Partial accountings.**—The twelfth section of the act cited above, provides that a citation, issued on the petition of a creditor, may be addressed to and served on the assignee alone. It has been held that this section, taken in connection with section eleven, provides for requiring the assignee to account on petition of a creditor, without the necessity of bringing in all the parties or proceeding to a final settlement of the accounts. *Matter of Cowing*, 33 Supm. Ct. (26 Hun), 214.

In such a case, however, a citation should not issue in the first instance, but an order should be obtained directing the assignee to show cause why he should not account. *Matter of Cowing*, *supra.*

On such partial accounting the court is authorized, by fourth subdivision of section 20 of the act (see *post*, § 462), to decree payment of so much of the creditor's claim as the circumstances of the case render just and proper. Under these provisions it is discretionary with the court to order or not the payment to be made. *Matter of Ward*, 10 Daly, 66.

It is believed, that, unless special reason be shown why a final accounting cannot be had, and why an immediate accounting is necessary for the safety of the estate, the court will not burden the estate with the expense of a partial accounting, and that it will not direct the payment of any creditor's proportion of the estate until all parties interested have been heard, unless it be in the case of a preferred creditor when the assignee concededly has

funds sufficient to pay all expenses and all prior preferences. Upon the return of a citation addressed to the assignee alone, he may apply for and obtain a general citation issued to all the parties interested. *Matter of Ward, supra.*

§ 454. **The petition.**—The proceeding for an accounting is based upon a petition. The petition should set out the execution of the assignment, the fact that the assignee has entered upon the execution of the trust and taken possession of the assigned property. It should state when and where the assignment was recorded, when and where the inventory, schedules and bond were filed. If the petitioner be not the assignee, it should also show that more than a year has elapsed since the date of the assignment. It should also show that the assignee has not accounted, and that a demand has been made upon him to do so. It should be verified by the petitioner.

If the assignee be the petitioner, he should also set out the fact that he has been authorized to advertise for claims to be presented to him, and should show a compliance with the order so authorizing him to advertise, and also a compliance with Rule 31 requiring him to mail notices to creditors, and he should also state the names of the persons by whom claims have been presented.

An application for a citation is a motion, and when the application is denied motion costs may be imposed. *Matter of Thorn*, 10 Daly, 71.

There is no authority for a proceeding by an assignee for an accounting, except upon the issuing of a citation to all parties. Where the citation was served upon the assignor and the sureties merely, it was held that the proceeding should have been dismissed, and the decree granted on such a proceeding did not bind the parties served. *Matter of O'Brien*, 16 Weekly Dig. 435.

§ 455. **Who may petition.**—The assignee may bring his petition at any time after the assignment, and a creditor or assignee's surety, or an assignor, at any time after the lapse of one year from the date of the assignment, or an accounting may be ordered by the court when the assignee has been removed.

No judgment is rendered necessary to warrant the proceeding

on the part of a creditor (Daniels, J., *People* v. *Chalmers*, 8 Supm. Ct. [1 Hun], 683, 687); all that is necessary is that the creditor should be entitled to a proportional part of the trust fund provided by the assignment for his benefit (*People* v. *Chalmers*, *supra*); and if he verifies his claim, that will be enough to warrant the inquiry. The validity of the petitioner's claim can be determined on the accounting. *Matter of Farnum*, 21 Supm. Ct. (14 Hun), 159; affi'd, 75 N. Y. 187.

When the assignors, after the assignment, effect a composition in bankruptcy, a creditor who did not appear in the bankruptcy proceedings or accept a dividend under the composition, may compel the assignee to appear and render an account, even though he was directed by the order in bankruptcy to hand over to the assignor all the assets remaining in his hands. *Matter of Stowell*, 33 Supm. Ct. (26 Hun), 258; s. c. 53 Supm. Ct. (46 Hun), 342; see *Matter of Backer*, 2 Abb. N. C. 379.

A stipulation by a creditor by which the accounting is to take place at a time discretionary with the assignee does not amount to a release, and if the assignee neglects to account for an unreasonable time, the creditor may institute proceedings. *Matter of Townsend*, 14 Daly, 76.

So the fact that a creditor has joined in a composition agreement which has not been performed on the part of the debtor, and has consented that the assignee turn over the assigned property to the assignor, does not authorize the entry of an order discharging the assignee and his sureties without an accounting. Before a discharge can be granted without an accounting, there must be an express waiver by the creditors of the accounting. *Matter of Horsfall*, 8 Daly, 190.

And the well-settled rule is, that in no case will a discharge be granted to the assignee, except after notice has been given to creditors to present their claims as required by the statute and the rules and regular proceedings for an accounting. *Matter of Groencke*, 10 Daly, 17; *Matter of Merwin*, Id. 13; *Matter of Yeager*, Id. 7; *Matter of Dryer*, Id. 8; *Matter of Lewenthal*, Id. 14.

In the *Matter of Wiltse*, 5 Misc. 105, it appeared that proceedings for an accounting were had without notice to certain creditors who had presented their claims to the assignee, and a

decree of distribution was made which did not provide for such creditors; these creditors subsequently applied for a citation, and the assignee also presented a petition asking for a redistribution of the fund, and that creditors who had received excessive payments should be required to refund, and the application was granted.

§ 456. **When an account will not be ordered.**—It is in the discretion of the judge to refuse an application by a single creditor to compel an assignee to account under the statute. When proceedings are pending to test the validity of the assignment, and also to seek to obtain the trust property by an assignee in bankruptcy, and there is no collusion, the accounting should be postponed until a definite result is reached. *Matter of Bowery National Bank*, 1 Abb. New Cas. 404.

So when the assignor has been adjudged bankrupt, and his assignee in bankruptcy has brought suit to set aside the general assignment, in which suit a receiver has been appointed and an injunction issued restraining the State assignee from interfering with or disposing of the property, the assignee will not be compelled to account in the State court. *Matter of Ransom*, Daily Reg. July 20, 1878.

But it is no answer on the part of an assignee called upon to account, that he has not qualified by giving the bond required by statute. *Matter of Farnum*, 21 Supm. Ct. (14 Hun), 159; affi'd, 75 N. Y. 187; *Matter of Davis*, 10 Daly, 31; *Matter of Ward*, Id. 66.

The fact that actions are pending in another court against the assignor and assignee to set aside the assignment is not a bar to a proceeding to compel the assignee to account, nor does it present a reasonable excuse for delay. *Matter of Dare*, 13 Daly, 220.

The court will refuse an application to compel an assignee to account where the assignor and creditors have slumbered for many years upon their rights, and the assignee, by reason of the loss of papers and the death of many persons with whom transactions in the settlement of the estate were had, would be put to great disadvantage in accounting. *Matter of Darrow*, 10 Daly, 141.

§ 457. **What creditors are barred by proceedings.**—There

are three classes of persons barred by the discharge of the assignee on an accounting. First, creditors who have appeared; secondly, creditors who have been duly cited but who have failed to appear; and, thirdly, those who after due advertisement have not presented their claims. *Matter of Dryer*, 10 Daly, 8; *Matter of Wiltse*, 5 Misc. 105, 113.

Creditors who have joined in a composition with the debtor, and who have consented to the transfer of the assigned property back to him, do not thereby waive their right to an accounting, nor are they barred by an order discharging the assignee without accounting. *Matter of Horsfall*, 8 Daly, 190; and see cases cited, *post*, § 467.

§ 458. Assignee's account.—It is provided by the 22d Rule of the Court of Common Pleas, that "upon an application made for a general citation, the assignee shall file with his petition his account with the vouchers."

It is also provided (Rule 25), that "the account of the assignee shall be in the nature of a debit and credit statement; he shall debit himself with the assets as shown in the schedules as filed, and credit himself with any decrease as well as expenses."

"The statement of expenditures shall be full and complete, and the vouchers for all payments other than trivial expenses, shall be attached to the account." Rule 26. As to vouchers, see *ante*, § 446.

The clearest and most satisfactory form of account is that fully described in a previous section (see *ante*, § 443).

§ 459. Citation.—The petition having been duly presented and the account filed, the court will thereupon make an order that a citation issue to all the parties interested in the estate assigned, requiring them to appear in court on some day therein to be specified, and to show cause why a settlement of the account of proceedings of the assignee should not be had, and if no cause be shown, to attend the settlement of such account. The citation must be issued by the court, and made returnable in court.

The citation issues upon the order and is in the general form of a citation in use in the surrogate's court. It is attested by the judge and signed by the clerk, under the seal of the court. See Rule 6.

The omission of the name of the chief justice of the court from the teste of such a citation, is not a material defect when the citation bears the signatures of the clerk and of the attorney from the petitioner, and is under the seal of the court. *Matter of Davis*, 10 Daly, 31.

The citation should require the parties to "appear in court." A citation which requires them to appear before "one of the judges of this court at chambers," is irregular and confers no jurisdiction. *Matter of Davis, supra.*

It need not be and usually is not addressed to the persons to be served individually, but is addressed in general terms to all persons interested in the trust estate created by the general assignment described, by the names of the parties and the date of its execution.

§ 460. **Who must be served.**—If the accounting is to be general and final, the citation must be served upon "all parties other than the petitioner, who are interested in the fund, including assignors, assignees, and their sureties, except that if the time limited by due advertisement for presentation of claims has expired before the issue of the citation, creditors who have not duly presented their claims need not be served." Laws of 1877, c. 466, § 13. The assignee must see to it that all the creditors who are entitled thereto are served with the citation, otherwise he will not be protected in his payments upon the decree. *Matter of Wiltse*, 5 Misc. 105; *Ætna Nat. Bank* v. *Shotwell*, 37 State R. 253.

If the accounting is but partial the assignee alone need be served.

But the order in that case should in the first instance be an order to show cause and not an order absolute. *Matter of Cowing*, 33 Supm. Ct. (26 Hun), 214.

§ 461. **Service of citation.**—"In case the creditors of such assignor, who have proved their claims, exceed twenty-five in number, then the county judge, upon proof by affidavit that such creditors exceed such number, may by order direct such citation to be served on each creditor who has proved his claim, by depositing a copy of the same, at least thirty days prior to the re-

turn day thereof, in the post office at the place where the assignee or assignees, or either of them, reside, duly inclosed and directed to each of such creditors, at his last known post-office address, with the postage prepaid ; and by publishing such citation once a week for at least four weeks prior to such return day in one or more newspapers, to be designated by such county judge as most likely to give notice to such creditors." Laws of 1877, c. 466, § 13 ; amended by Laws of 1878, c. 318, § 4.

A service by mail when no order has been obtained is unauthorized and of no effect. If parties have not been served previously to the granting of the order of reference there is no authority on the part of the assignee to bring them in in such a way that they will be bound by the decree. *Matter of Schaller*, 10 Daly, 57.

" A citation personally served within the county of the judge or an adjoining county must be so served at least eight days before the return thereof ; if in any other county, at least fifteen days before the return thereof." Laws of 1877, c. 466, § 14.

" The county judge may direct service to be made by publication when he is satisfied by affidavit or verified petition either that the person to be so served is unknown, or that his residence cannot, after diligent inquiry, be ascertained, or that he cannot, after due diligence, be found within the State. The order for such service must direct service of the citation upon such person to be made by publication thereof in one newspaper to be designated by the county judge as most likely to give notice to the person to be served, and also, if it appear that any such person resides without the State, then in the State paper for such length of time as he may deem reasonable, not less than once a week for six weeks, and that a copy of the citation be forthwith deposited in the post office duly inclosed and directed to each person so served, at his last known place of residence or post office address, and the postage paid thereon ; at least thirty days before the return day thereof." Laws of 1877, c. 466, § 15 ; see Code of Civ. Pro. § 440.

As to publication of notices in State paper, see Laws of 1884, c. 133.

" When publication has been ordered, personal service without the State made if within the United States at least thirty days, or without the United States, at least forty days before the

return day is equivalent to publication and mailing." Laws of 1877, c. 466, § 16.

"Personal service upon minors and persons incompetent shall be made in the manner prescribed by law for the service of citations issued by a surrogate, in cases of final accounting." Laws of 1877, c. 466, § 17.

As to manner of service of citation on final accounting in surrogate's court, on minors, lunatics, etc., see Code Civ. Pro. §§ 426, 431, 2526.

"Personal service upon one of two or more creditors who claim as copartners, or otherwise as joint creditors, shall be equivalent to personal service on all, and voluntary appearance either in person or by attorney shall be equivalent to personal service." Laws of 1877, c. 466, § 18.

§ 462. Powers of county court on accounting.—The twentieth section of the general assignment act provides that:

"On a proceeding for an accounting under this act, the county court shall have power (as amended by Laws of 1878, c. 318):

"1. To examine the parties and witnesses on oath in relation to the assignment and accounting and all matters connected therewith and to compel their attendance for that purpose and their answers to questions, and the production of books and papers.

"2. To require the assignee to render and file an account of his proceedings, and to enforce the same in the manner provided by law for compelling an executor or administrator to comply with a surrogate's order for an account.

"3. To take and state such account, or to appoint a referee to take and state it; and such referee shall have the powers enumerated in subdivision one of this section.

"4. To settle and adjudicate upon the account and the claims presented, and to decree payment of any creditor's just proportional part of the fund, or, in case of a partial accounting, so much thereof as the circumstances of the case render just and proper.

"5. To discharge the assignee and his surety at any time, upon performance of the decree, from all further liability upon matters included in the accounting, to creditors appearing and to creditors not having appeared after due citation, or not having presented their claims after due advertisement.

"6. On proof of a composition between the assignor and his creditors, to discharge the assignee and his sureties from all further liability to the compounding creditors appearing or duly cited, and to authorize the assignee to release the assets to the assignor; provided, however, that if there be any creditors not assenting to the composition, the court shall determine what proportion of the fund shall be paid to or reserved from creditors not assenting, which shall not be less than the sum or share to which they would be entitled if no composition had been made, and may decree distribution accordingly.

"7. To adjourn the proceedings from time to time, issue further citations if necessary, and amend the petition and proceedings thereon before decree in furtherance of justice.

"8. To punish as for a contempt any disobedience or violation of any order made or process issued in pursuance of this act, or the acts hereby amended, and to restrain by arrest and imprisonment any party or witness when it shall satisfactorily appear that such party or witness is about to leave the jurisdiction of the court, and to take bail to secure the attendance of such party or witness, to be prosecuted under the order of the court in case of forfeiture by and for the benefit of the party in whose interest such examination shall be ordered.

"9. To exercise such other or further powers in respect to the proceedings and the accounting therein as a surrogate may by law exercise in reference to an accounting by an executor or administrator." Laws of 1877, c. 466, § 20; as amended Laws of 1878, c. 318.

§ 463. **Proceedings on return of citation.**—Upon the return of the citation, proof should be presented to the court of the service of the citation upon all the parties entitled to notice, and if it does not appear by the petition what claims have been presented to the assignee, so as to determine who are entitled to notice, proof of that fact should then be presented and proof of the publication of notice to creditors should also be presented to the court upon the return day.

"On the return of a citation to all parties interested, any person claiming an interest, although not served, may appear and become a party on duly presenting his claim." Laws of 1877, c. 466, § 19.

The assignee may then show cause why he should not proceed to account. There may be, and frequently are, circumstances which render it proper that the accounting should be delayed. Some of these are referred to in a previous section (*ante*, § 456).

The estate should be subjected to the expense of but one accounting. If the condition of the estate, or of the claims against it, is such that the whole matter cannot be disposed of until the expiration of further time, it is in the discretion of the court to postpone the accounting.

The assignee may also present any defenses to the petition for accounting which would be available to him in an action (*ante*, § 438). If the proceeding is brought by a creditor the assignee may then be ordered to file his account, or the proceeding may be adjourned to enable him to do so (*ante*, § 462, para. 7). The statute follows the proceedings for an accounting in the surrogate's court (*ante*, § 462, para. 9). After the account is filed, creditors will be afforded an opportunity to examine it and file their objections. *Van Vleck* v. *Burroughs*, 6 Barb. 341; *Disosway* v. *Bank of Washington*, 24 Id. 60.

Objections to the account may be reduced to writing and filed, or they may be presented to the referee in writing or be brought out on cross-examination. Rule 27.

§ 464. **Reference.**—The county court is also empowered to appoint a referee to take and state the account, and the referee may also be authorized to examine the parties and witnesses on oath in relation to the assignment and accounting and all matters connected therewith, and to compel their attendance for that purpose, and their answers to questions, and the production of books and papers (*ante*, § 462, para. 1 and 3). This power did not exist under the previous act prior to the amendment of 1875. *Matter of Morgan*, 56 N. Y. 629. And subsequent to that act the referee had no power to hear and determine any controverted matter. *Levy's Accounting*, 1 Abb. N. C. 177.

It is a rule of the Court of Common Pleas that in all cases the assignee must file an account, and that it must be referred for examination. Rule 23.

§ 465. **Proceedings before the referee.**—The proceedings

before the referee upon taking and stating an account are not prescribed by the statute.

The referee must, before proceeding, take the oath prescribed by § 1016 of the Code of Civil Procedure unless it is waived as provided in that section. *Matter of Vilmar*, 10 Daly, 15.

He must take proof upon all the matters upon which he is required to report. These matters are specified in the twenty-ninth Rule of the Court of Common Pleas (see *post*, § 468).

The proper execution and acknowledgment of the assignment and its recording, and the filing of the schedule and bond must be made to appear before him. He must also take proof of the due publication of notice to creditors to present claims, and of the mailing of notices to creditors as provided by the thirtieth Rule. The issuing and service of the citation upon all creditors whose claims were presented to the assignee must also be shown. It must be shown also that due notice of the hearing before the referee has been given to all creditors who appeared on the return of the citation. It is the duty of the referee to take and examine the account and vouchers, and to take proof of the reasonableness of the allowances claimed by the assignee. *Matter of Manahan*, 10 Daly, 39; *Matter of Johnson*, Id. 123. The affirmative on the accounting is with the assignee, and objections to his account may be presented to the referee in writing, or be brought out on a cross-examination. Rule 27.

§ 466. Proof of claims of creditors before referee.—When the order of reference directs the referee to take proof and report what persons are entitled to share in the distribution of the assigned estate, and contains a provision that any party to the proceeding may object to any claim presented before the referee, and that the referee should take proof and report as to the validity of such contested claim, it appears that claims mentioned in the schedule, and which have been duly presented to the assignee and verified as provided by the notice which is required to be given will, unless objected to, be allowed by the assignee, but claims which are not mentioned in the schedule must be presented to the referee and proved before him. *Matter of Jeselson*, 10 Daly, 104.

The authority conferred upon the county court by subdivision

4 of § 20 of the general assignment act "to settle and adjudicate upon the account and claims presented" confers upon the court the power on such proceedings to determine who are the creditors and to pass upon the validity of claims presented. *Matter of Farnum*, 21 Supm. Ct. (14 Hun), 159; affi'd, 75 N. Y. 187; *Cheever* v. *Brown*, 128 N. Y. 670. When the order of reference contains a direction to the referee to try a disputed claim, the parties cannot object to proceeding under it. *Matter of Jeselson*, 10 Daly, 104; see *Matter of Risley*, 10 Daly, 44; *Matter of Fairchild*, Id. 74.

When a claim is established by satisfactory evidence, it should not be rejected because the creditor does not show how much should be deducted by way of credit. *Cheever* v. *Brown*, 128 N. Y. 670.

The claims of third parties upon the assigned estate cannot be determined upon proceedings for an accounting. *Matter of Marklin*, 13 Daly, 105. Such claims must be made the subject of an action or must be determined by trial, as provided in § 26 of the assignment act. *Matter of Macklin*, *supra*; see *Bertha Zinc & Min. Co.* v. *Clute*, 7 Misc. 123.

§ 467. Compositions.—The statute, by the sixth subdivision of the twentieth section (cited *ante*, § 462), provides that, in proceedings for an accounting, the court shall have power, on proof of a composition between the assignor and his creditors, to discharge the assignee and his sureties from all further liability to compounding creditors, and to authorize the assignee to release the assets to the assignor.

It is the well-settled practice in the Court of Common Pleas not to grant a discharge under this section until after proof of advertisement and mailing of notice to creditors, and due proceedings for an accounting (*Matter of Yeager*, 10 Daly, 7; *Matter of Dryer*, Id. 8; s. c. *sub nom. Matter of Weinholtz*, 1 Am. Insol. R. 65; *Matter of Merwin*, Id. 13; *Matter of Lewenthal*, Id. 14; *Matter of Groencke*, Id. 17), unless there is an undoubted waiver of an accounting by every creditor who could in any way be affected by the assignee's discharge. *Matter of Horsfall*, 8 Daly, 190; s. c. 1 Am. Insol. R. 156; appeal dismissed, 77 N. Y. 514; 1 Am. Insol. R. 350.

Under the provisions of the statute cited above, when a composition has been effected with a part of the assignor's creditors, the non-assenting creditors are entitled, upon proceedings, for an accounting to receive only so much as they would have received out of the assets had no composition been effected. *Matter of Orsor*, 10 Daly, 26.

Where a composition has been effected by an assignor with his creditors, and before performance of the composition agreement on the part of the assignor has been completed, the assignor dies, his legal representatives, upon completing the payment under the composition, will be entitled to be subrogated to the rights of the creditors. It is no objection to this that so much of the performance as was effected during the life of the assignor was brought about by dividends paid by the assignee while continuing the assignor's business with consent of the creditors. *Matter of Leslie*, 10 Daly, 76.

Creditors who are induced to sell their claims to the assignee, who pays for them out of the assigned estate at less than would have been received under a proper administration of the estate, are not bound by such transfers, but may repudiate them and hold the assignee to an accounting. *Matter of Coffin*, 10 Daly, 27; *Matter of Hyman*, 14 Daly, 375.

When, after a general assignment for the benefit of creditors has been executed by a debtor, proceedings are afterward had under the bankrupt act for a composition, and a decree is entered in that court discharging the debtor from his debts upon compliance with the terms of the composition, this will not discharge the assets in the hands of the assignee, nor furnish any reason why he should not account in the State court for the assigned property, and pay to creditors the shares to which they are entitled thereunder. Before such effect can be given to a proceeding for a composition in bankruptcy, it must be shown that the bankrupt court acquired jurisdiction over the assignee and the assigned estate. *Matter of Stowell*, 33 Supm. Ct. (26 Hun), 258; *Matter of Allen*, 31 Supm. Ct. (24 Hun), 408; s. c. *sub nom. Matter of Straus*, 61 How. Pr. 243.

Creditors will lose their rights in the assigned property, when a composition is effected in bankruptcy, only when they expressly consent to a discharge of the assignee without an accounting,

or when on an accounting it appears that they are parties to a composition which has been performed, so that their debts have been released, and that they have released their rights in the assigned property. *Matter of Herman*, 53 How. Pr. 377; *Matter of Leipziger*, 8 Daly, 78; *Matter of Backer*, 2 Abb. N. C. 379.

No power is conferred under the statute to determine upon a final accounting that the compounding creditor has released the assignor from liability on his debt, and an adjudication to that effect is not within the jurisdiction of the court upon such proceedings, and is not, therefore, *res adjudicata* in an action subsequently brought by the creditor. *Halstead* v. *Ives*, 80 Supm. Ct. (73 Hun), 56. The power of the court is limited to the discharge of the assignee and his sureties upon proof of composition, and the releasing of the assets to the assignor upon the payment or reservation for creditors not assenting of the sum to which they would have been entitled upon the accounting if no composition had been made and the making of a decree to carry out these purposes.

§ 468. **Referee's report.**—It is provided by the 29th Rule of the Court of Common Pleas, that "the report of the referee shall show all the jurisdictional facts necessary to confer power on the court, such as the proper executing and acknowledging of the assignment, the recording of the same, the filing of the schedules and bond, the advertising for creditors, the issuing of the citation, the presenting of the account, and where any items may be disallowed in the account of the assignee, the same shall be fully set out in the report." The report must show that notices have been mailed to creditors as provided by the 30th Rule (see *ante*, § 421); it should also show what creditors appeared on the return of the citation, for those so appearing are entitled to notice of the hearing before the referee. *Matter of Phillips*, 10 Daly, 47; *Matter of Schaller*, Id. 57.

It should also show what creditors are entitled to share in the assigned estate, setting out the preferred creditors and the claims due to them, and the unpreferred creditors whose claims have been presented and allowed, with the amounts due to each of them. It should also contain a *résumé* of the gross receipts and

should specify the person to whom payments are to be made by him, and the amounts of such payments. *Matter of Worthley*, 10 Daly, 12; *Matter of Cleflin*, 20 State R. 465.

It may and usually does prescribe for the discharge of the assignee and his sureties, upon compliance by the assignee with the directions of the decree, and for the entry of an order to that effect upon the foot of the decree upon the presentation to the court by the assignee of such due compliance. See *post*, § 477.

§ 469. **Appeals.**—An appeal from a decree of the county judge, made upon the final accounting of an assignee, is subject to the rules governing appeals from final judgments rendered by the county court under § 1340 of the Code of Civil Procedure, and to be effectual the security required by § 1341 must be given. *Matter of Beckwith*, 22 Supm. Ct. (15 Hun), 326; see *Matter of Horsfall*, 77 N. Y. 514; s. c. 1 Am. Insol. R. 350.

An assignee will not be permitted, as to different creditors, to take separate appeals from the same decree settling his account. *In re Maxwell*, 81 Supm. Ct. (74 Hun), 307; s. c. 26 N. Y. Supp. 216.

§ 470. **Enforcement of decree.**—An amendment of § 22 of the general assignment act (Laws of 1894, c. 134) put the statute into the following form: "All orders or decrees in proceedings under this act shall have the same force and effect, and may be entered, docketed and enforced, and appealed from the same as if made in an original action brought in the county court; provided, however, that a final decree, directing the payment of money, may be enforced by serving a certified copy thereof personally upon the assignee for the benefit of creditors, and if said assignee willfully neglects to obey said decree, by punishing him for a contempt of court. The imprisonment of said assignee, by virtue of proceedings to punish for contempt as prescribed in this section, or a levy upon his property by virtue of an action, shall not bar, suspend, or otherwise affect an action against the sureties on his final bond." Previously to this enactment it had been held that an assignee could not be proceeded against, as for a contempt of court, for a failure to pay over moneys directed to be paid by a final decree in pro-

ceedings for an accounting under the general assignment act. *Matter of Stockbridge*, 10 Daly, 33 ; *Matter of Radtke*, Id. 119. A later decision in the same court (*Matter of Brick*, 13 Daly, 312) held that under § 2268 of the Code of Civil Procedure an assignee might be proceeded against as for a contempt in such instances, and the statute as amended is in harmony with this ruling.

The statute does not relate to a decree in an action for an accounting. It appears that the remedy for the enforcement of a decree in action directing the payment of a specific sum to a creditor is by execution only. *Matter of Heis*, 55 Supm. Ct. (48 Hun), 586 ; *Meyers* v. *Becker*, 95 N. Y. 486 ; *People ex rel. Borst* v. *Grant*, 48 Supm. Ct. (41 Hun), 351 ; *People ex rel. Fries* v. *Riley*, 31 Supm. Ct. (25 Hun), 587 ; *Jacquin* v. *Jacquin*, 43 Supm. Ct. (36 Hun), 378 ; *Pulchard* v. *Pulchard*, 4 Abb. N. C. 298 ; *O'Gara* v. *Kearney*, 77 N. Y. 423 ; *Ross* v. *Butler*, 64 Supm. Ct. (57 Hun), 110.

§ 471. Compelling the assignee to account.—The court may (*ante*, § 462, par. 2) compel the assignee to account in the same manner provided by law for compelling an executor or administrator to comply with a surrogate's order for an account. Obedience to such order may be enforced in the manner of compelling the return of an inventory by attachment and commitment. Code of Civ. Pro. § 2715.

So also an executor's letters may be revoked if he abscond or conceal himself so that the order cannot be personally served, or in case of neglect to render an account within thirty days after being committed. Redf. Sur. Pr., 5th ed., 347.

But it seems that, without proceeding to compel the assignee to bring in his account, if he refuses to do so the referee may proceed to make up the account, and if sufficient appears from the admissions of the party to be charged in any proceeding in the cause to enable the account against him to be properly made out, the party conducting the proceeding may immediately bring in his charge, without waiting for any account under the rule (*ante*, § 442 n.). 2 Dan. Chan. Pr. 1223 ; 1 Van Sant. Eq. Pr. 533.

§ 472. Accounting by trustees of insolvent debtors ap-

pointed under the Revised Statutes.—The assignees of insolvent debtors appointed under the proceedings considered in Parts I and II of this work, are required to keep a regular account of all moneys received by them as trustees, to which every creditor or other person interested therein shall be at liberty, at all reasonable times, to have recourse. 2 R. S. 45, § 26; 4 R. S., 8th ed., 2530.

It is further provided, that "the trustees, within fifteen months from the time of their appointment, shall call a general meeting of the creditors of such debtor, by a notice to be published in the same manner as hereinbefore directed respecting the publication of the notice of their appointment; in which notice, they shall specify the place and time of such meeting, which time shall not be more than three months, nor less than two months after the first publication of such notice. Every such notice shall be published at least once in each week, until the time of such meeting." 2 R. S. 46, § 27; 4 R. S., 8th ed., 2530, § 27; 2 Edm. St. 47.

"At such meeting, or other adjourned meeting thereafter, all accounts and demands, for and against the estate of such debtor, shall be fairly adjusted, as far as the same can be ascertained, and the amount of moneys in the hands of the trustees declared." 2 R. S. 46, § 28; 4 R. S., 8th ed., 2531, § 28; 2 Edm. St. 47.

The method of making distribution will be considered in the succeeding chapter (*post*, Chap. XXVIII).

"Within ten days after any dividend made by any trustees, they shall render on oath, and file with the clerk of the Court of Common Pleas of the county in which they reside, or with a clerk of the Supreme Court, an account in writing of all their proceedings in the premises, stating:

"1. Their disbursements, commissions, and the dividends made by them.

"2. The names and residences of the creditors to whom dividends were made, and the names of those actually receiving them.

"3. The property, moneys and effects of the debtor remaining in their hands, and the value and situation of such property.

"And such trustees may at any time be compelled by a rule of the Supreme Court or of the Court of Common Pleas of the county in which they reside, to render such account on oath, on

the application of the debtor, or of any creditor." 2 R. S. 49, § 45 ; 4 R. S., 8th ed., 2533, § 45 ; 2 Edm. St. 50.

The trustees are made subject to the order of the Supreme Court and of the county court or Court of Common Pleas of the county in which they were appointed, upon the application of any creditor or of any debtor in respect to whom they were appointed, in relation to the execution of any of the powers and duties confided to them (*ante*, § 416).

CHAPTER XXVIII.

TERMINATION OF THE TRUST.—DISCHARGE OF THE ASSIGNEE AND HIS SURETIES.—DISTRIBUTION.

§ 473. **Termination of the trust.**—The trusts under an assignment may be terminated and the assignee discharged in several ways.

The accomplishment of the purposes for which the trust was created will terminate it. Thus, where the assignee has performed all his duties under the assignment, and distributed the proceeds, that is a discharge; and if, after the payment of all the debts provided for, any balance remains in the hands of the assignee, that will revert, by operation of law, to the assignor. A trust to sell real estate for the payment of debts ceases when the debts are in any mode paid or discharged. Thus where a debtor conveyed lands to a trustee upon trust to sell the same for the benefit of certain specified creditors, and to reconvey to himself such parts of the property as should remain unsold after satisfying the trusts, and afterward conveyed his residuary interest in the property to the same trustees for the same creditors in satisfaction for their demands, the creditors on their part accepting the trust fund as a satisfaction of their claims, it was held that the original trust was determined, and that the whole legal and equitable title to the property became vested under the statute in the creditors. *Selden* v. *Vermilya*, 3 N. Y. 525.

But though the trust has not ceased, and its purposes have not been performed, yet if all the parties who are interested in the trust fund consent and agree thereto, the court may decree the determination of the trust and discharge the trustee. This is illustrated by the case of a composition and discharge of the assignee under the act (*ante*, § 467).

The trust may also terminate by lapse of time. Thus under the statute cited (*ante*, § 438), if no different limitation is contained in the instrument creating the trust, it will be deemed

discharged after the end of twenty-five years, and the estate will revert to the grantor. See *Kip* v. *Hirsh*, 103 N. Y. 565; *N. Y. Steam Co.* v. *Stern*, 53 Supm. Ct. (46 Hun), 206; *McCahill* v. *Hamilton*, 27 Supm. Ct. (20 Hun), 388.

The assignee may be discharged, though the trust continue, as in the case of the death, removal or resignation of the assignee.

§ 474. Payment of dividend does not take the debt out of the statute of limitations.—The payment of a dividend does not revive the debt. *Pickett* v. *Leonard*, 34 N. Y. 175; affi'g *Pickett* v. *King*, 34 Barb. 193; disapproving *Barger* v. *Durvin*, 22 Barb. 68; *Roosevelt* v. *Mark*, 6 Johns. Ch. 266, 292; see *contra*, *Letson* v. *Kenyon*, 31 Kas. 301; s. c. 18 Rep. 302.

Such payment cannot amount to an acknowledgment or new promise on the part of the assignor, because the assignee has no authority to bind the assignor by such a promise. The acts of the assignee are beyond the control of the assignor. The assignor is not at liberty to accompany a payment by the assignee with a qualification or disclaimer as when made by himself. Hunt, J., in *Pickett* v. *Leonard*, *supra*. So payments by an assignee in bankruptcy do not revive the debt. *Brandram* v. *Wharton*, 1 B. & Ald. 463; *Davies* v. *Edwards*, 7 Ex. 22; *Ex parte Topping*, 34 L. J. Bank. 44; *Roosevelt* v. *Mark*, 6 Johns. Ch. 266, 292.

§ 475. Payments, how made.—The assignees must not only ascertain the proper parties to be paid, but they must see to it that the money reaches the hands of the persons entitled to receive it, for if they make any mistake in the person to whom they pay the money, they are still liable to pay it to the proper person. 2 Perry on Trusts, 4th ed., § 926. And if they pay to an agent of the party entitled, they must see to the genuineness of the authority of the agent to whom they pay or transfer the money. If there is forgery or fraud or want of authority in the person receiving it, the trustee will be responsible. 2 Perry on Trusts, 4th ed., § 929; *Ashby* v. *Blackwell*, 2 Eden, 299. The final decree should provide for the case of persons who are abroad, or who refuse or neglect to receive their dividend after notice. In such case the court will direct that the money be deposited to the order of the party.

In a proper case, however, dividends may be declared by the assignee before the final accounting. He should be careful to reserve enough to meet all possible claims against the estate which may be brought in on a final accounting.

The assignee should always give notice to the creditors of the payment of any dividend under the assignment, otherwise he will become liable to the payment of interest.

§ 476. Discharge of assignee by consent.—An assignee will, of course, be discharged by the consent of all persons interested in the assigned property, but no order to that effect can be obtained from the court unless it is made to appear that the persons consenting constitute all the persons in any way interested. *Matter of Field*, 1 Mon: L. B. 13. And even in that event an accounting must first be had unless it is unequivocally waived by all the parties. *Matter of Horsfall*, 8 Daly, 190.

When the assignee undertakes to settle the estate without a final decree obtained in an action or proceeding on notice to all persons, he should, for his own protection, before he pays over the money, require a release from all claims against him. Such a requirement is not unreasonable, and though the release may be impeached for fraud, accident or mistake, yet it is *prima facie* evidence, and throws the burden of proof upon those seeking to impeach it. 2 Perry on Trusts, 4th ed., § 922. See *Matter of Potter*, 10 Daly, 133.

§ 477. Discharge of assignee and his sureties on final accounting.—The general assignment act expressly provides for the discharge of the assignee and his surety at any time upon performance of the decree, from all further liability, upon matters included in the accounting, to creditors appearing and to creditors not having appeared after due citation, or not having presented their claims after due advertisement. Laws of 1877, c. 466, § 20, par. 5. *Ante*, § 462, par. 5.

As we have heretofore seen (§ 421) creditors can be barred by the discharge thus obtained only when notice to present claims to the assignee has been duly given by advertisement and mail, and when creditors who have presented their claims have been duly served with the citation in the final accounting, or when they

have voluntarily appeared in the proceedings for a final accounting.

The decree may provide that, upon presenting proper vouchers and proofs that he has made the payment directed therein to be made, the assignee may apply to the court for an order discharging himself and the sureties on his bond from further liability.

There are three classes of persons barred by the discharge of an assignee: Firstly, creditors who have appeared; secondly, creditors who have been duly cited but have failed to appear; and, thirdly, those who, after due advertisement, have not presented their claims. *Matter of Dryer*, 10 Daly, 8.

§ 478. Distribution by trustees of insolvent debtors appointed under the Revised Statutes.—"Out of the moneys in their hands, the trustees may first deduct all the necessary disbursements made by them in the discharge of their duty, and a commission at the rate of five per cent. on the whole sum which shall have come into their hands." 2 R. S. 46, § 29; 4 R. S., 8th ed., 2531, § 29; 2 Edm. St. 47. See *Matter of Bunch*, 12 Wend. 280.

"If they shall have been appointed trustees under the first article of this title, they shall pay to every attaching creditor the amount of any recovery which may have been had against him, on any bond he may have executed for the purpose of retaining any property or any vessel, for the benefit of all the creditors, and his costs for defending any such suit." 2 R. S. 46, § 30; 4 R. S., 8th ed., 2531, § 30; 2 Edm. St. 47.

"Whenever any bond shall have been executed by an attaching creditor for the purpose in the last section specified, the trustees shall retain a sufficient sum from the moneys in their hands to indemnify such creditor, until a final determination be had, respecting his liability." 2 R. S. 46, § 31; 4 R. S., 8th ed., 2531, § 31; 2 Edm. St. 48. The article referred to in the last two sections has been repealed. Laws of 1877, c. 417.

"They shall pay all debts due by such debtor to the United States, and all debts due by him to persons who, by the laws of the United States, have a preference in consequence of having paid money as sureties of such debtor." 2 R. S. 46, § 32; 4 R. S., 8th ed., 2531, § 32; 2 Edm. St. 48.

"The trustees appointed under and in pursuance of the fifth chapter of the second part of the Revised Statutes, shall, out of the moneys in their hands, after deducting all the necessary disbursements made by them in the discharge of their duty and their commission, pay to the attaching creditor his costs and disbursements to be taxed." Laws of 1833, c. 52, § 1.

"They shall distribute the residue of the moneys in their hands, among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained, in proportion to their respective demands, and without giving any preference to debts due on specialties, as follows :

"1. In the case of proceedings under the first article of this title, among those who were creditors at the time of issuing the first warrant of attachment.

"2. In proceedings under the third and fifth articles of this title, among those who were creditors at the time of the execution of the assignment by the insolvent.

"3. In proceedings under the fourth article, where an assignment was executed by any officer as therein directed among those who were creditors at the time of the first publication of notice to creditors to appear and determine whether they will unite in a petition ; and when the assignment was voluntary, among those who were creditors at the time of the execution thereof.

"4. In proceedings under the sixth article, among those creditors, at whose suit the debtor was imprisoned on execution at the time of his discharge." 2 R. S. 46, § 33 ; 4 R. S., 8th ed., 2531, § 33 ; 2 Edm. St. 48.

The first and sixth articles referred to in paragraphs 1 and 4 were repealed by Laws of 1877, c. 417. The third, fourth, and fifth articles, referred to in paragraphs 2 and 3, were repealed by Laws of 1880, c. 245.

"In making such distribution, the trustees shall first pay all debts that may be owing by the debtor, as guardian, executor, administrator or trustee ; and if there be not sufficient to pay all debts of the character above specified, then a distribution shall be made among them, in proportion to their amounts respectively." 2 R. S. 47, § 34 ; 4 R. S., 8th ed., 2531, § 34 ; 2 Edm. St. 48.

"Every person to whom a debtor (except one proceeding

under the sixth article,) shall be indebted on a valuable consideration, for any sum of money not due at the time of such distribution, but payable afterwards, shall receive his proportion with other creditors, after deducting a rebate of legal interest upon the sum distributed, for the time unexpired of such credit." 2 R. S. 47, § 35 ; 4 R. S. 8th ed. 2531, § 35 ; 2 Edm. St. 48. The sixth article referred to above was repealed by Laws of 1877, c. 417.

" If, at the time any dividend is made, any prosecution be pending against the trustees, in which a demand against such debtor may be established, the trustees may retain in their hands, the proportion which would belong to such demand if established, and the necessary costs and expenses of such suit or proceeding, to be applied according to the event of such proceeding or suit, or to be distributed in a second or other dividend." 2 R. S. 47, § 38 ; 4 R. S. 8th ed. 2532, § 38 ; 2 Edm. St. 49.

" All penalties which shall be recovered by any trustees, pursuant to the provisions of this title, shall be deemed a part of the estate of the debtor, and shall be distributed as such among his creditors." 2 R. S. 48, § 39 ; 4 R. S. 8th ed. 2532, § 39 ; 2 Edm. St. 49.

" If the whole of such debtor's estate be not distributed on the first dividend, the trustees shall, within the year thereafter, make a second dividend of all the moneys belonging to the estate of the debtor, then in their hands, among the creditors entitled thereto as hereinbefore specified ; and in the same manner from year to year, so long as any moneys belonging to the estate of such debtor shall remain in the hands of the trustees, they shall make a dividend thereof among the creditors entitled thereto." 2 R. S. 48, § 40 ; 4 R. S. 8th ed. 2532, § 40 ; 2 Edm. St. 49.

" Any creditor who shall have neglected to deliver to the trustees an account of his demand, before the first, second, third, or other dividend, and who shall deliver his account to them before the second, or other subsequent dividend, shall receive the sum he would have been entitled to, on any former dividend, before any distribution be made to other creditors." 2 R. S. 48, § 41 ; 4 R. S. 8th ed. 2532, § 41 ; 2 Edm. St. 49.

" If any dividend that shall have been declared, shall remain unclaimed by the person entitled thereto for one year after the

same was declared, the trustees shall consider it as relinquished, and shall distribute it, on any subsequent dividend, among the other creditors." 2 R. S. 48, § 42 ; 4 R. S. 8th ed. 2532, § 42 ; 2 Edm. St. 49.

"If after settling the estate of any debtor, and after discharging his debts, entitled to a dividend, any surplus shall remain in the hands of his trustees, the same shall be paid to such debtor or his legal representatives." 2 R. S. 48, § 43 ; 4 R. S. 8th ed. 2533, § 43 ; 2 Edm. St. 50.

"Every debtor who shall be discharged under the third, fourth or fifth articles of this title, shall be allowed the sum of five per cent. on the nett produce of all his estate, that shall be received by the assignees, to be paid to him by them, in case such nett produce, after such allowance made, shall be sufficient to pay the creditors of such debtor, entitled to a dividend, the sum of seventy cents on the dollar, on the amount of their debts respectively, as the same shall have been ascertained ; but the said allowance shall not exceed in the whole, the sum of five hundred dollars." 2 R. S. 48, § 44 ; 4 R. S. 8th ed. 2533, § 44 ; 2 Edm. St. 50. The third, fourth, and fifth articles referred to above have been repealed. See Laws of 1880, c. 245.

PART V.

COMPOSITIONS.

CHAPTER XXIX.

COMPOSITIONS AND COMPOSITION DEEDS.

§ 479. **In general.**—A consideration of the general subject of the relation of insolvent debtors to their creditors, would be incomplete without some reference to the private and amicable attempts of debtors and their creditors to arrange their affairs by means of compositions and composition deeds. Such arrangements may be made and enforced under the sanction of the common law. And since 1849, in England, compositions and amicable settlements with creditors have also been provided for under the provisions of the bankrupt law. Such was the case also under the late bankrupt law in this country. This chapter, however, has no reference to such proceedings, but deals only with arrangements between debtors and their creditors, which rest solely in contract. Such arrangements are not regulated by statute, and their validity and effect must be determined by reference to the general principles of law. A valuable collection of authorities on this subject will be found in two articles by the late Mr. Bump, published in the Southern Law Review, Vol. IV, N. S. pp. 639, 805 ; and also in an article in 14 Alb. L. J. 436.

§ 480. **Smaller sum not satisfaction for a larger.**—It is a familiar rule of law that the acceptance of a lesser sum does not bar a demand for a greater, and *a fortiori* an agreement to accept a less sum will be no such bar.

So in *Pinnel's Case* (5 Rep. 117 [3 Coke, 238]), "it was resolved by the whole court, that payment of a lesser sum on the day in

satisfaction for a greater, cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." And in the leading case of *Cumber* v. *Wane* (1 Strange, 426 ; s. c. 1 Smith's L. C. 8th ed. 357), it was decided that a security of equal degree for a smaller sum, if it present no easier or better remedy, cannot be pleaded in an action for the larger one. And the reason of this rule is more fully stated by Lord Ellenborough, in *Fitch* v. *Sutton* (5 East, 230, 232) : " There must be some consideration for the relinquishment of the residue ; something collateral, to shew a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum.*" See *Down* v. *Hatcher*, 10 Ad. & El. 121 ; *Thomas* v. *Heathorn*, 2 B. & C. 477 ; *Acker* v. *Phœnix*, 4 Paige, 305 ; *Fellows* v. *Stevens*, 24 Wend. 294 ; *Dederick* v. *Leman*, 9 Johns. 333 ; *Seymour* v. *Minturn*, 17 Id. 169 ; *Moss* v. *Shannon*, 1 Hilt. 175 ; *Bliss* v. *Shwarts*, 65 N. Y. 444 ; *White* v. *Kuntz*, 107 N. Y. 518, 524.

But this rule must be taken with its qualifications. The payment of a less sum than the demand is a satisfaction when the debt is unliquidated. *Longridge* v. *Dorville*, 5 B. & Ald. 117 ; *Wilkinson* v. *Byers*, 1 Ad. & El. 106 ; *Palmerton* v. *Huxford*, 4 Den. 166 ; *Pierce* v. *Pierce*, 25 Barb. 243 ; *Farmers' Bank* v. *Blair*, 44 Barb. 641 ; see *Allen* v. *Borum*, 47 Id. 22 ; *Morton* v. *Ostrom*, 33 Id. 256 ; *Russell* v. *Cook*, 3 Hill, 504 ; *Stewart* v. *Ahrenfeldt*, 4 Den. 189 ; *McDaniels* v. *Lapham*, 21 Vt. 222, 234 ; *Donohue* v. *Woodbury*, 6 Cush. (Mass.) 148, 150. A release under seal will import a sufficient consideration for the satisfaction of a greater sum, although but a less sum be in fact paid. *Knight* v. *Cox*, Bull. N. P. 153 ; *Harrison* v. *Close*, 2 Johns. 448 ; *Stearns* v. *Tappin*, 5 Duer, 294 ; *Noble* v. *Kelly*, 40 N. Y. 415. But not a receipt in full. *Skaife* v. *Jackson*, 3 B. & C. 421 ; *Fitch* v. *Sutton*, 5 East, 230 ; *Farrar* v. *Hutchinson*, 9 Ad. & El. 641 ; *Ryan* v. *Ward*, 48 N. Y. 204.

An agreement by a creditor with a third person to accept from him less than the demand against the debtor in satisfaction of it is valid and may be enforced. *Lewis* v. *Jones*, 4 B. & C. 506 ; *Babcock* v. *Dill*, 43 Barb. 577 ; *Goldenbergh* v. *Hoffman*, 69 N. Y. 322 ; affi'g 14 Supm. Ct. (7 Hun), 324 ; *Le Page* v. *McCrea*,

1 Wend. 164, 172. So the acceptance of a note of a third person for a less sum than the debt due, in full payment, is a bar to an action to recover any portion of the debt beyond the sum secured by the note. *Kellogg* v. *Richards*, 14 Wend. 116; *Webb* v. *Goldsmith*, 2 Duer, 413; *Roberts* v. *Brandies*, 51 Supm. Ct. (44 Hun), 468.

And, in general, if there be any benefit or even legal possibility of benefit to the creditor thrown in, so as to work an accord and satisfaction, the reason upon which the technical rule of law rests will cease, and with it the rule will cease to apply. *Cumber* v. *Wane*, 1 Smith's L. Cas., 8th ed., 357.

§ 481. Composition with creditors an exception.—An apparent exception to the general rule of law stated in the foregoing section is found in the case of a composition by a debtor with several or all of his creditors, by which they agree to accept less than their entire demand. Such an agreement, if entered into with the debtor by a number of creditors, each acting on the faith of the engagement of the others, will be binding upon them, for each, in that case, has the undertakings of the rest as a consideration for his own undertaking. *White* v. *Kuntz*, 107 N. Y. 518, citing the text; *Fellows* v. *Stevens*, 24 Wend. 294; *Blair* v. *Wait*, 69 N. Y. 113; *Steinman* v. *Magnus*, 2 Camp. 124; *Boothbey* v. *Sowden*, 3 Id. 175; *Good* v. *Cheesman*, 2 B. & Adol. 328; *Norman* v. *Thompson*, 4 Exch. 755; *Greenwood* v. *Lidbetter*, 12 Price, 183; *Anstey* v. *Marden*, 1 Bos. & P. N. R. 124; *Way* v. *Langley*, 15 Ohio St. 392; *Perkins* v. *Lockwood*, 100 Mass. 249.

"The law with respect to defenses founded on compositions," says Mr. Justice Williams, in *Boyd* v. *Hind* (1 Hurl. & N. 938, 947), "between a debtor and his creditors appears not to have been distinctly defined until the case of *Good* v. *Cheesman*, 2 B. & Adol. 328. It used to be sometimes laid down that a right of action once vested could only be barred by a release, or by accord and satisfaction. But since the decision of that case, the law has been regarded as settled, that a composition agreement, by several creditors, although by parol, so as to be incapable of operating as a release, and although unexecuted, so as not to amount in strictness to a satisfaction, will be a good answer to an action by a

creditor for his original debt, if he accepted the new agreement in satisfaction thereof; and that for such an agreement there is a good consideration to each creditor, viz.: the undertaking of the other compounding creditors to give up a part of their claim. But no such agreement can operate as a defense, if made merely between the debtor and a single creditor; the other creditors, or some of them, must also join in the agreement with the debtor and with each other, for otherwise it would be a bare contract to accept a less sum in satisfaction of a greater, which would be invalid by reason of want of consideration for relinquishing the residue."

"Where creditors thus mutually agree with each other," says Mr. Justice Daly, in *Williams* v. *Carrington* (1 Hilt. 515, 519), "the beneficial consideration to each creditor is the engagement of the rest to forbear. A fund is thereby secured for the general advantage of all; and if any one of the parties were allowed afterwards to enforce his whole claim, it would operate to the detriment of the other creditors who have relied upon his agreement to forbear, and might even deprive them of the sum it was mutually agreed they should receive, by putting it out of the power of the debtor to carry out the composition."

§ 482. **Composition, how effected.**—No special formalities are requisite to effect a composition. It is not essential that the compromise agreement should be in writing; each creditor may make a separate parol agreement for the purpose of carrying the compromise into effect, and after the agreement is once made no creditor can withdraw without the consent of the debtor. *Chemical Nat. Bank* v. *Kohner*, 85 N. Y. 189; see also *Mellen* v. *Goldsmith*, 47 Wisc. 573; s. c. 1 Am. Insol. R. 298.

"Their effect as a discharge," says Mr. Justice Cowen in *Fellows* v. *Stevens* (24 Wend. 294, 297), "is based not so much upon the sort of instruments or other acts by which they are effected, as upon there being an agreement upon sufficient consideration among the several parties, the debtor on the one side, his creditors on the other, and the latter among themselves. . . . There need not, that I can see, be a seal, or any other formal solemnity. To do the whole by parol would be exceedingly loose, and often unavailable for want of adequate proof; but

where the debts reside in simple contract, I see no reason, if clearly proved, why an oral composition would not be equal to any other."

In that case, the court remarked, that if the debts were due by specialty the composition might perhaps require a seal, but in *Van Bokkelen* v. *Taylor* (62 N. Y. 105), which was an action to foreclose a bond and mortgage, the defendant relied upon a release signed by the holder of the bond and mortgage, and other creditors, to each of whose signatures an internal revenue stamp had been affixed. The court, in the absence of evidence that these stamps were not used as seals, refused to disturb a finding of the court below, but Mr. Justice Rapallo, in delivering the opinion of the court, remarked that the release being a composition by creditors, in which several united, would have been operative without a seal. And in a number of instances agreements by creditors to compromise, expressed by acts and words and not by writing, have been held valid and binding upon them. Thus in *Fawcett* v. *Gee* (3 Anst. 910), the mode of settling with the creditors was merely by cancelling the notes held by each of them, without any deed or release. So in *Bradley* v. *Gregory* (2 Camp. 383), the creditor was held bound by the terms of a resolution accepted at a meeting of all the creditors, and afterward ratified orally by him. See *Williams* v. *Carrington*, 1 Hilt. 515.

Although the mutuality of the promises is the consideration which supports the instrument as to each creditor who signs, it does not follow that as to the last creditor who signs there is no such mutuality. The execution is to be deemed contemporaneous under one general influence and one general consideration. *Hall* v. *Merrill*, 9 Abb. Pr. 116. And where in a composition deed, in which the creditors bound themselves "severally and each for himself," it was claimed that the contract of each creditor was several and therefore without consideration, the court held that the agreement was mutual and mutually binding upon all who signed it, and that it was not necessary that the agreement should express the mutuality, since it was sufficiently implied from the nature of the agreement. *Horstman* v. *Miller*, 35 Super. Ct. (3 J. & S.) 29.

A composition by which a debtor undertakes to settle with his

creditors at a *pro rata* payment less than the sum due them, is to be distinguished from a transaction where a third person steps in and purchases from the creditors of a failing debtor his debts at a stipulated per centum and takes an assignment to himself. If he is acting purely as the agent of the debtor, and takes the assignment for the benefit of the debtor, and that fact clearly appears, the assignment may doubtless be considered as in substance a compromise made by the debtor himself, but if he takes the title of the debt to himself for a valuable consideration paid by himself, so that he is at liberty to enforce it himself against the original debtor, the transaction is one of purchase and sale, wherein the liability of the debtor passes from the original creditor to the purchaser. *Goldenburg* v. *Hoffman*, 14 Supm. Ct. (7 Hun), 324 ; affi'd, 69 N. Y. 322.

§ 483. **Power of partner to compound.**—Although it is sometimes said that one partner has no authority by the mere partnership relation to bind the partnership by seal, yet this rule applies only to grants and not to releases. *Perry* v. *Jackson*, 4 T. R. 516, 519 ; *Gibson* v. *Winter*, 5 B. & Ad. 96. Hence one of two partners may release for both (*Beach* v. *Ollendorf*, 1 Hilt. 41 ; *Bruen* v. *Marquand*, 17 Johns. 58 ; *Smith* v. *Stone*, 4 G. & J. (Md.) 310 ; *Halsey* v. *Whitney*, 4 Mason, 206), and as he may give a release personally so he may delegate this power by seal to another. *Wells* v. *Evans*, 20 Wend. 251 ; rev'd on other grounds, 22 Id. 324.

§ 484. **Composition with a portion of the creditors.**—It seems to be fully settled by the authorities, that a composition agreement between a debtor and a portion of his creditors is valid and binding. The consideration of the relinquishment of a part of their claim by the others is sufficient to make the promise and discharge of each of those who join obligatory. *Renard* v. *Tuller*, 4 Bosw. 107 ; *Hall* v. *Merrill*, 9 Abb. Pr. 116 ; *Norman* v. *Thompson*, 4 Exch. 755 ; *Good* v. *Cheesman*, 2 B. & Ad. 328 ; *Boyd* v. *Hind*, 1 H. & N. 938 ; *Brown* v. *Dakeyne*, 11 Jur. 39 ; *Continental Nat. Bank* v. *Koehler*, 4 State R. 482. In order, therefore, that the agreement should be inoperative unless all the creditors sign it, such a condition should be ex-

pressly declared or be clearly deducible from unambiguous language. *Renard* v. *Tuller*, *supra*.

Thus where a composition deed recited that, "Whereas C. G. Harger & Son, bankers, are indebted to the undersigned, their several creditors, in divers amounts; but by reason of sundry losses and disappointments are unable to pay and satisfy our demands in full," it was held that the words "their several creditors" were not synonymous with all their creditors, and did not imply that the compromise was not to become binding until all had signed, and that there was no ambiguity which rendered parol evidence admissible to show that the deed was intended to be inoperative unless signed by all creditors. *Strickland* v. *Harger*, 23 Supm. Ct. (16 Hun), 465; affi'd, 81 N. Y. 623.

And when it was expressly provided in the composition deed that it was not binding until all the creditors of the debtor had executed it, it was held that the debtor could not vary the terms of the written agreement by showing that there was a parol understanding that certain so called confidential creditors were not to execute it, but were to be paid in full. *Acker* v. *Phœnix*, 4 Paige, 305.

When the composition deed is general on its face, and there is nothing to show that it is a part of the agreement that all the creditors shall sign, and in the absence of fraud, the parties will be bound by the instrument they make, and cannot introduce verbal declarations made by the parties at the time when they executed it to show that it was to be void unless signed by all. *Lewis* v. *Jones*, 4 Barn. & Cress. 506.

An agreement for a composition ought to contain a clause that the instrument shall be void unless all the creditors sign. *Lewis* v. *Jones*, *supra*.

Indeed, in the case last cited, Mr. Justice Bayley says, that no man in his senses ought to sign such an instrument without such a clause, for otherwise the object of the instrument may be defeated.

And where the condition upon which a composition is based, is that all the creditors shall agree to a similar composition, this is a condition precedent to the legal operation of the composition as a discharge, and the burden is on the debtor to show that all the creditors have agreed to the composition. *Durgin* v. *Ireland*, 14 N. Y. 322; *Babcock* v. *Dill*, 43 Barb. 577.

So a creditor may limit the operation of a composition by writing after his signature, at the time of execution, that the execution of the instrument by him shall be null and void unless all the creditors sign within a given time. *Magee* v. *Kast*, 49 Cal. 141.

When the instrument of release stipulated that it should be void if not agreed to by *all* creditors in a given place, and it was signed by several, the party setting it up must show that those who assented comprised all the creditors designated. *Lower* v. *Clement*, 25 Penn. St. 63.

Where certain execution creditors with other general creditors (but not all) of the debtor, agreed that they would stay proceedings for four months, and that if executions were issued upon the claims of any of the signers, those creditors who already had execution in the hands of the sheriff should have priority, and if the property was insufficient the proceeds should be distributed among them *pro rata*, and the debtor, to induce the creditors to sign, represented the claim of one of the creditors at less than the amount actually due him, and confessed judgment to that creditor to induce him to sign, and he issued an execution, and the property was sold, it was held that this was a fraud on the other creditors, and that the judgment so confessed was void as to them but not as to those who had not signed, and that as between the signers the agreement to distribute ratably must be carried out. *Loucheim's Appeal*, 67 Penn. St. 49.

An interesting question arises in the case of sureties who have indorsed composition paper which has been delivered so indorsed, on the supposition that all the creditors have joined, when in fact they have not. In *Whittemore* v. *Obear* (58 Mo. 280) it was held, that in such a case it was the duty of the surety to see to it that all the creditors had signed the agreement, and that his indorsement of the notes as to a creditor who was ignorant of any failure in the fulfillment of the condition, or its procurement by fraud, was a waiver of that condition, and that he could not avail himself of such failure or fraud against such creditor; and even if the creditor was aware of such failure or fraud and chose to waive the objection, it did not lie in the mouth of the surety to set it up as a defense. But in *Doughty* v. *Savage* (28 Conn. 146) it was held, that the agreement and notes were

part of one transaction, and that the surety was not liable on the notes.

In *Harvier* v. *Guion* (3 E. D. Smith, 76), where the composition was payable in installments of six, twelve and eighteen months, with the condition annexed that unless three-fourths of the non-preferred creditors executed the composition deed it should be void and of no effect, the court held, upon a construction of the whole instrument, that the defendant had the full eighteen months to obtain the signatures of the three-fourths of his creditors, and that the instrument was a good defense to an action brought by the plaintiff within the stipulated time, if the installments were paid as they became payable by the terms of the composition deed.

§ 485. Agreement to join in composition deed.—Where a creditor consents to accept a composition of his debt, on the strength of which other creditors are induced to join in the composition, or relying upon which the debtor, in conformity with the agreement, makes over his property to a trustee, the creditor so assenting, if he afterward refuse to execute the composition, will be held to the terms of the agreement. Thus, where the defendants were insolvent but possessed of a large quantity of property, and it was agreed between them and their creditors, including the plaintiffs, that the defendants should assign their property to a trustee, and the creditors agreed to release the defendants from their debts, and the defendants performed the agreement on their part, and executed the assignment, it was held that the agreement was thereby executed, and the plaintiffs could not maintain an action against the defendants upon their indebtedness. *Therasson* v. *Peterson*, 4 Abb. Dec. 396.

So where the creditor of an insolvent had consented to accept a composition of his debt, and ordered a draft of the deed of assignment to be sent to his attorney for perusal, who approved of it, and the deed was executed by the debtor and the rest of the creditors, but the above-mentioned creditor afterward refused to execute the same, it was held that he could not sue for the original debt. *Butler* v. *Rhodes*, 1 Esp. 236. Lord Kenyon said in the case cited, that "the principle upon which the action could not be maintained was, that in consequence of this act of

the plaintiff's, the defendant had parted with all his property, and the other creditors had been induced to execute the deed." And in another case, where the administratrix of an insolvent, finding his effects insufficient to pay all the creditors fully, had called a meeting and proposed a ratable distribution, to which they at first all unanimously assented, but afterward, when a deed of assignment to trustees, with covenants not to sue, etc., was prepared, one of the creditors refused to sign it, although the rest did so, it was held that this, if made out by evidence, would be a good defense to an action of assumpsit brought by the creditor who refused, against the administratrix. *Brady* v. *Sheil*, 1 Camp. 147.

But it does not appear to be necessary that the debtor should have parted with anything if other creditors have altered their relations to him by accepting the composition, being induced thereto by the assent of a creditor.

So where a debtor, who was in difficulties, undertook to procure the acceptance of a third person for 7*s.* in the pound to give his notes for 3*s.* more to prepare a composition deed, with a clause of release, and to procure the other creditors to execute it, and a creditor undertook to accept the composition and to sign the deed, but afterward refused to do so, it was held that an action by him against the debtor could not be maintained. *Bradley* v. *Gregory*, 2 Camp. 383.

And on another occasion, where there had been a meeting of the creditors of A., who was in embarrassed circumstances, at which B., one of the creditors, was present, and it was agreed that if the statement then made by the insolvent was correct they would accept a composition and give him a release, and B. subsequently promised to come into the composition and execute the deed, but afterward, when the deed had been executed and a tender of certain acceptances made to B., he refused to accept them or execute the deed, he was not allowed to recover in an action brought for his original debt. *Bradley* v. *Gregory*, 2 Camp. 383.

Lord Ellenborough said: "It is said this agreement is executory, and therefore cannot be a bar. I think it is executed. Everything on the defendant's part was performed. As far as depended upon him, there has been satisfaction as well as accord.

It is the plaintiff's own fault that he has not enjoyed the full benefit of all that he stipulated for. Accord is no bar without satisfaction; but a party is not to be permitted to say there is no satisfaction, to whom satisfaction has been tendered according to the terms of the accord." *Bradley* v. *Gregory*, 2 Camp. 383, 385.

In conformity with the same principle, when the plaintiffs signed an agreement to accept a composition of 5*s*. in the pound, but afterward threw obstacles in the way of settling the amount of debt due to them, and after a release from the creditors to the defendant had been prepared and signed by all the creditors except the plaintiffs, refused to accept the composition of the debt which he claimed, and which was offered them by the defendant's attorney, it was ruled that they could not recover more than the composition on their debt. *Reay* v. *White*, 1 Cr. & M. 748; see also *Butler* v. *Rhodes*, 1 Esp. 236; *Cork* v. *Saunders*, 1 B. & Ald. 46; *Wood* v. *Roberts*, 2 Stark. 417.

But a mere assurance on the part of a creditor, that he will unite in any arrangement which the other creditors might make, looking to a future period for the making of such an agreement, and reserving a *locus penitentiæ*, is not evidence of an accord of creditors which supplies the valuable consideration upon which alone rests the validity of a composition. *Hartell* v. *Morgan*, 1 Pitts. (Pa.) 354.

But a creditor who has signified his assent to a composition may openly withdraw with the consent of the debtor, and in that event the agreement for a composition is not a bar to an action for the recovery of the original indebtedness. *Fellows* v. *Stevens*, 24 Wend. 294. And in *Reay* v. *Richardson* (2 Cr. M. & R. 422, 430), Lord Abinger said: "I am by no means prepared to say, that, if several creditors were to sign an agreement for a composition, on the faith of the others coming in, and they afterwards repented before the others came into the arrangement, it would still be binding on them, and that there could be no *locus pœnitentiæ* for them.

§ 486. Fraudulent representations by debtor.—In effecting a composition agreement, the policy of the law demands the utmost good faith on the part of the debtor. If he makes a

statement of his affairs as the basis of the agreement, he is answerable for the truth of the statement. If a debtor fraudulently leads his creditors to believe that he is insolvent, and thus induces them to enter into a composition, the fraud will vitiate the composition. He cannot be permitted, by pretending to be insolvent, to induce a creditor to accept one half of a debt in lieu of the whole, when, in fact, his property is ample to pay the creditors in full. *Hefter* v. *Cahn*, 73 Ill. 296 ; *Monger* v. *Kett*, 12 Mod. 558 ; *Smith* v. *Salomon*, 7 Daly, 216. So if the debtor fraudulently suppress the fact of his having property, and knowingly leaves his creditors to act under a false impression. *Vine* v. *Mitchell*, 1 Moody & R. 337. And where the information given by the debtor to his creditors respecting his property and debts is in any material respect untrue, the misrepresentation will vacate the compromise. *Irving* v. *Humphrey*, Hopk. 284 ; *Smith* v. *Salomon*, 7 Daly, 216.

So a willful understatement of the amount of a particular debt, or, what is the same thing, keeping back one or more demands, is an attempt at fraud on the part of the creditor, and he cannot recover on the amount suppressed. *Holmer* v. *Viner*, 1 Esp. 131, 134 ; *Britten* v. *Hughes*, 5 Bing. 460 ; see *Tabram* v. *Freeman*, 2 Cr. & M. 451 ; overruling *Howard* v. *Bartolozzi*, 4 B. & Ad. 555 ; but see *Huntington* v. *Clark*, 39 Conn. 540 ; *Almon* v. *Hamilton*, 100 N. Y. 527.

But this principle does not apply where the other creditors are not kept in ignorance of the fact. *Payler* v. *Homersham*, 4 M. & S. 423.

Where there is a misrepresentation on the part of the debtor, to the effect that other creditors have agreed to accept a composition of their debts, the agreement is not binding ; the creditor having been imposed upon when he entered into it. *Cooling* v. *Noyes*, 6 T. R. 263.

But where the composition is effected by a third person who advances his money to accomplish it, it seems that fraudulent representations made by the debtor to induce creditors to become parties will not invalidate the compromise ; at all events, if the creditor desires to rescind he must restore to the third party the amount he has received under the agreement. *Babcock* v. *Dill*, 43 Barb. 577.

Where a creditor is induced, by false and fraudulent representations, to enter into a composition, he may upon discovering the falsity of the representations maintain an action to recover the damages sustained by reason thereof. *Whiteside* v. *Hyman*, 17 Supm. Ct. (10 Hun), 218.

In *Smith* v. *Salomon* (7 Daly, 216) the debtor was guilty of misrepresentations as to the value of his property, and resorted to artifice to conceal a portion of it. It was held that a creditor might bring an action for the balance of his original claim, and that it was neither necessary to bring an action to set aside the composition agreement, nor to restore the amount received under it, before bringing suit for such balance.

§ 487. What debts are included.—If a creditor execute a composition deed and does not set the amount of his debt opposite his name, but leaves a blank, he will be bound by the terms of the composition to the amount of his then existing debt. *Harrhy* v. *Wall*, 1 B. & Ald. 103.

A composition agreement should be limited in its effect to such matters as were within the contemplation and intention of the parties at the time of its execution. *Butcher* v. *Butcher*, 1 Bos. & Pull. N. R. 113. Hence, where a debtor had given to his creditor four promissory notes, one of which the creditor had indorsed and discounted, and the creditor then entered into a composition with the debtor, by which the creditors agreed to accept a percentage in full discharge and satisfaction of the several debts and sums of money that the debtor "does owe or stand indebted unto us," it was held that this applied only to the sums then due, and where the creditor was subsequently compelled to take up the discounted note, he was not precluded by the composition from suing the debtor for the amount expended to take up the note. *Lipman* v. *Lowitz*, 78 Ill. 252.

A creditor who signs and inserts the amount as due to him in a composition deed, cannot subsequently maintain an action against the debtor for a demand existing at the time of the composition, but not then taken into account. *Russell* v. *Rogers*, 10 Wend. 474; *Van Brunt* v. *Van Brunt*, 3 Edw. 14.

In *Zoebisch* v. *Von Minden* (54 Supm. Ct. [47 Hun] 213) it is held that where a debtor is voluntarily discharged, after a compo-

sition with creditors, a subsequent promise to pay one of the creditors his entire claim is void as a fraud on other creditors and as without consideration. This decision was reversed by the Court of Appeals (120 N. Y. 406), but upon an entirely different proposition, and view of the essential feature of the case. There were several creditors secured by mortgage who were not asked to and did not participate in the composition agreement. The plaintiff was also secured by mortgage to the extent of $2500; but he was an unsecured creditor for $777.59. He signed the composition agreement, writing the latter sum opposite his signature. Thirty per cent. in notes payable at different dates was the basis of the composition. Subsequently a general release was executed and delivered by the creditors joining in the composition, including the plaintiff. Nothing was said about the plaintiff's mortgage for $2500, either in the release or elsewhere, and no provision was made for it. It was found by the referee, however, that it was neither the intention of the plaintiff nor of Von Minden, the debtor, that the $2500 secured by mortgage should be affected by the composition. The other composition creditors do not seem to have had any knowledge that the release was not intended to cover the $2500 secured by mortgage. (See 47 Hun, 215.) Plaintiff and Von Minden continued their dealings after the composition, and a dispute arose as to the balance due plaintiff *on the whole account* between them, including the $2500 mortgage and the thirty per cent. on $777.59 provided for by the composition agreement. Von Minden never gave or tendered to plaintiff the notes for his percentage as provided by the composition agreement. The dispute as to the amount due plaintiff on the whole account and dealings between him and Von Minden was finally adjusted at $1752.53. For $1500 of this sum a mortgage was given by Von Minden and wife on part of the same premises covered by the $2500 mortgage, which was discharged by plaintiff. The action was to foreclose the $1500 mortgage. The Court of Appeals held that Von Minden, having wholly failed to execute the composition agreement with plaintiff, the original debt was revived. This disposed of the case. But that court also said that the $1500 mortgage, having been given without duress or fraud in settlement of a disputed claim preferred in good faith, was upheld by a good consideration and was en-

forceable notwithstanding the dispute ; in fact, concerned the rights of the immediate parties to it under the composition agreement. And see *Almon* v. *Hamilton*, 100 N. Y. 527.

But where the agreement was to accept ten per cent. of the *amount due*, and the ten per cent. was to be paid within thirty days, and a creditor held a note and account then due, and a note which would not become due until after the expiration of the thirty days, it was held that the last note was not included in the composition deed. *Hamblen* v. *Ratigan*, 119 Mass. 153.

And where a creditor who joined in the composition held three notes, two of which he had previously sold and taken back under false representations by the purchaser, and at the time of signing the agreement was, with the knowledge of the debtor, endeavoring to force the purchaser to take back, which was done before the date at which the composition notes began to carry interest, it was held in an action by the creditor upon the note not sold that the creditor, not being in possession or control of the two notes sold the debtor, was not obliged as to them to tender the composition notes, and that as to the note in suit the debtor was not obliged to tender the composition notes, after the transfer of the other two notes which the debtor had paid to the purchaser. *Farrington* v. *Hodgdon*, 119 Mass. 453.

Where a creditor signs off for a demand which he has previously transferred to another, he impliedly undertakes to protect the debtor against such demand, and if the debtor is compelled to pay such demand he can recover of the creditor. *Harloe* v. *Foster*, 53 N. Y. 385 ; *Hawley* v. *Beverley*, 6 Scott's N. R. 837 ; s. c. 6 Man. & G. 221.

Where a party deliberately includes a person as a creditor in a composition, and pays him the amount of the composition agreement, he cannot afterward repudiate the compromise and recover back the money on the ground of an alleged mistake. *Jones* v. *Wright*, 71 Ill. 61.

If a creditor has a claim against the debtor, a release of the debt will only discharge the balance that may remain after deducting the counterclaim. *Fazakerly* v. *McKnight*, 6 El. & Bl. 795.

§ 488. Reservations against sureties.—The general rule of

law is that if the principal is released by the creditor without reservation, the surety is thereby discharged, and the same result follows when the time of payment is, without the consent of the surety by a binding agreement between the principal and creditor, extended for a definite time. A composition deed releasing the debtor should reserve any right or remedy which the creditors may have against any other person or persons in respect to any debt due by the debtor. If the creditor, at the time he releases the debtor, does so reserve his remedies, the release will be construed as a covenant not to sue only and not as an absolute discharge, and the surety will still be held. As against the debtor the debt is gone under a covenant not to sue, but as against any other person the debt is not gone but is still extant. *Kirby* v. *Taylor*, 6 Johns. Ch. 242; *Hubbell* v. *Carpenter*, 5 N. Y. 171; *Green* v. *Wynn*, L. R. 4 Chan. App. 204; affi'g s. c. L. R. 7 Eq. Cas. 28; *Richardson* v. *Pierce*, 119 Mass. 165; Brandt on Suretyship, 2d ed., § 147; *Ex parte Glendinning*, Buck, 517, 519; *Ex parte Gifford*, 6 Ves. 805; *Lewis* v. *Jones*, 4 B. & C. 506, 515, note.

§ 489. **The debtor must perform strictly.**—The debtor is bound to a strict performance of the agreement upon his part, and a court of equity will not relieve him from the consequences of his failure upon the ground of forfeiture. *Haggerty* v. *Simpson*, 1 E. D. Smith, 67.

If he makes default in performing any of the conditions imposed upon him as his part of the agreement, he remits his creditors to their original rights and may be sued by them for the full amount of their respective debts. *Penniman* v. *Elliott*, 27 Barb. 315; *Haggerty* v. *Simpson*, *supra*; *Mackenzie* v. *Mackenzie*, 16 Ves. 372; *Hadley Falls Nat. Bank* v. *May*, 36 Supm. Ct. (29 Hun), 404; affi'd, 99 N. Y. 671; *Sun Mutual Ins. Co.* v. *Hubbell*, 6 Weekly Dig. 82. See *Zoebisch* v. *Von Minden*, 120 N. Y. 406; *Clews* v. *Reilly*, 6 N. Y. Supp. 640.

It was held in *Hadley Falls Nat. Bank* v. *May* (36 Supm. Ct. [29 Hun], 404) that a failure of the debtor to perform the composition agreement restores the creditor to his original rights. This case was affirmed on the opinion below in 99 N. Y. 671.

When no time is specified within which the composition notes

are to be given, the debtor has a reasonable time to tender them. *Oughton* v. *Trotter*, 2 Nev. & Man. 71. But if a time is specified he must tender them within the time.

Where the creditors agreed to accept a composition of 6*s*. in the pound, and that promissory notes for the amount should be given within fourteen days, the creditors assenting thereto within that time, unless the debtor can show a delivery or tender of the notes within the specified time he will be liable on his original indebtedness to the creditors who have assented. *Oughton* v. *Trotter*, 2 Nev. & M. 71.

So where creditors agreed to accept an assignment of all the debtor's property to a trustee, in full of all demand, and to execute releases as soon as the property should realize a specified sum, and the property did not realize that sum, it was held that the agreement was no bar to an action by one of the creditors. *Wiglesworth* v. *White*, 1 Stark. 218.

And where the creditors agreed to take a composition secured by promissory notes payable on days certain, and the defendant was to assign to the creditors certain debts upon which the creditors were to execute a general release, and the assignment was executed, and all the creditors except the plaintiff received their composition and executed the release, and the plaintiff might have received his promissory notes if he had applied for them, but it did not appear that the defendant had ever tendered them or that the plaintiff had ever applied for them, and the plaintiff, after the day of payment of the notes, sued the defendants on the original indebtedness, it was held that he was not precluded by the agreement from recovering. *Cranley* v. *Hillary*, 2 M. & S. 120.

Although a debtor compounding with his creditors gives them the security fo a third person for payment of a part of the stipulated dividend, he is not discharged on payment of that part only if the residue continues unpaid. *Walker* v. *Seaborne*, 1 Taunt. 526.

But when the composition agreement was that the debtors were to pay a certain sum on their notes, at six, nine and twelve months from February 1, 1857, and the debtor tendered notes dated January 1st, 1857, for seven, ten and thirteen months, this was held to be an immaterial variation. *Renard* v. *Tuller*,

4 Bosw. 107. And where the composition notes were to be dated January 1st, 1858, but no time for their delivery was expressed, and the notes were not in fact tendered until the middle of February, this was not regarded as such a breach of the composition deed as to exempt the plaintiff from its obligation. *Hall* v. *Merrill*, 9 Abb. Pr. 116.

Though a creditor is not bound to accept payment under a composition deed, unless it is tendered when due, yet if he do accept payment after default, that will be a waiver of the delay, and so if the money is paid to an agent and the creditor ratifies the agent's act by receiving and retaining the money. *Penniman* v. *Elliott*, 27 Barb. 315.

And it seems that the fact that the debtor notifies his creditors that the composition notes will not be paid, if in fact the money is deposited to pay them at the place where they are payable, will not excuse the creditors from presenting their notes for payment, nor will it revive the original indebtedness. *Green* v. *McArthur*, 34 Barb. 450.

§ 490. **Private stipulation with particular creditor.**— "Every composition deed," says Mr. Justice Duer, in *Breck* v. *Cole* (4 Sandf. 79, 83), "is in its spirit, if not in its terms, an agreement between the creditors themselves, as well as between them and the debtor. It is an agreement that each shall receive the sum or the security which the deed stipulates to be paid or given, and nothing more, and that upon this consideration the debtor shall be wholly discharged from all the debts then owing to the creditors who signed the deed." It follows that every agreement made by one creditor for some advantage to himself over other creditors who unite with him in a composition of their debts, is fraudulent and void. *Lawrence* v. *Clark*, 36 N. Y. 128; *Townsend* v. *Newell*, 22 How. Pr. 164; *Hughes* v. *Alexander*, 5 Duer, 488; *Russell* v. *Rogers*, 10 Wend. 473; *Williams* v. *Carrington*, 1 Hilt. 515; *Eldridge* v. *Strenz*, 34 N. Y. Super. Ct. (2 J. & S.) 491; *Carroll* v. *Shields*, 4 E. D. Smith, 466; *Pinneo* v. *Higgins*, 12 Abb. Pr. 334; *Bliss* v. *Matteson*, 45 N. Y. 22; *Cockshott* v. *Bennett*, 2 T. R. 763; *Eastabrook* v. *Scott*, 3 Ves. 456; *Higgins* v. *Pitt*, 4 Exch. 312; *Geere* v. *Mare*, 2 H. & C. 339; *Clay* v. *Ray*, 17 C. B. N. S. 188. Jus-

tice Story, referring to this principle of law, says (1 Story's Eq. Jur., 13th ed., § 379): "There is great wisdom and deep policy in the doctrine; and it is founded in the best of all protective policy, that which acts by way of precaution rather than by mere remedial justice; for it has a strong tendency to suppress all frauds upon the general creditors by making the cunning contrivers the victims of their own illicit and clandestine agreements. The relief is granted, not for the sake of the debtor, for no deceit or oppression may have been practised upon him, but for the sake of honest and humane and unsuspecting creditors. And hence the relief is granted equally whether the debtor has been induced to agree to the secret bargain by the threats or oppression of the favored creditors, or whether he has been a mere volunteer, offering his services and aiding in the intended deception."

The doctrine that, if a body of creditors join in accepting a composition, any underhand agreement made by a particular creditor with the debtor for some private advantage to himself is void and cannot be enforced, as being a fraud upon the rest, was established in equity some time before it obtained admission into courts of law, and the course there was to grant injunctions either for delivering up the securities or for restraining parties from proceeding upon them at law. *Jackman* v. *Mitchell*, 13 Ves. 581; *Middleton* v. *Onslow*, 1 P. Wms. 768; *Constantien* v. *Blache*, 1 Cox Eq. 287; *Spurret* v. *Spiller*, 1 Atk. 105.

But in *Cockshott* v. *Bennett* (2 T. R. 763), where Lord Kenyon applied the same doctrine in a court of law, he expressly disclaimed founding his opinion upon grounds of equity as contradistinguished from grounds of law, and the doctrine has since that time been recognized as fully at law as in equity.

The effect of such a fraudulent agreement is to render the composition deed utterly unavailing as a protection to the debtor so far as innocent creditors are concerned. *White* v. *Kuntz*, 107 N. Y. 518; *Hanover Nat. Bank* v. *Blake*, 142 N. Y. 404. The fraud avoids it from the beginning, and the creditor's debts are, therefore, wholly unaffected by it. Hence a creditor, even though he may have received from the debtor the amount provided by the assignment, may retain that sum and still sue for the unpaid balance of his original debt. *Hefter* v. *Cahn*, 73 Ill. 296; *Beach* v. *Ollendorf*, 1 Hilt. 41; *Stuart* v. *Blum*,

28 Penn. St. 225 ; *Wiggin* v. *Bush*, 12 Johns. 306 ; *Pierce* v. *Wood*, 23 N. H. 519 ; *Spooner* v. *Whiston*, 8 Moore, 580 ; s. c. 17 Eng. C. L. 112. In such a case the payment is not to be referred to the void contract, but to the original indebtedness. *Stuart* v. *Blum*, *supra*. But where the composition is effected by a third person who pays his money to the creditors under the composition, creditors who seek to avoid the composition by showing the fraud of the principal debtor, must offer to restore to the third party what they have received from him, *Babcock* v. *Dill*, 43 Barb. 577, but it has been held that no restitution is necessary as to the debtor himself. *Smith* v. *Salomon*, 7 Daly, 216.

A secret agreement by a creditor party to a composition deed, by which he is to receive a sum over and above the dividend stipulated for in the deed, is void, and it is immaterial that all other creditors had executed the deed before such creditor agreed to become a party on receiving a security for the additional sum. *Patterson* v. *Boehm*, 4 Penn. St. 507 ; *Howden* v. *Haigh*, 11 Ad. & El. 1033 ; *Steinman* v. *Magnus*, 11 East, 390.

The ground of this doctrine is not only that the preferred creditor diminishes the fund which by the implied assent of the parties is to be distributed ratably among those who join in the composition. If the advantage the creditor secures is one that does not impair the debtor's resources, nor affect the means available for the creditors, it may nevertheless be a deception and fraud upon them, because they are induced to enter into the composition by the supposition that all the creditors are to suffer equally. Best, J., in *Knight* v. *Hunt*, 5 Bing. 432.

In the case last cited the debtor offered a composition of 10*s.* in the pound. The debtor's brother, to induce the plaintiff to sign voluntarily, proposed to give him coals to the amount of £150. In an action by the plaintiff to recover for the amount stipulated under the composition, it was held that he could not recover.

So, in *Howden* v. *Haigh* (11 Ad. & El. 1033), where the debtor, to induce the plaintiff to join in the composition, indorsed to him a bill accepted by a third party in addition to the composition notes, it was held that the plaintiff could not recover upon

the composition notes, although it did not appear that the acceptance so indorsed had been paid or enforced.

And in *Pfleger* v. *Browne* (28 Beav. 391), where the debtor, in addition to the composition, agreed to keep up a policy on his life for the benefit of one of his creditors, it was held that the agreement was void without the assent of all the creditors, and that the debtor's legal representatives were entitled to the policy.

In that case Sir John Romelly, Master of the Rolls, stated the law and the reason of it very clearly. He says (p. 394): "It is no consideration for the release of a debt to take a portion of it. But one of the exceptions is the case of composition with creditors. It is an exception for this reason, that if a person makes a composition with his creditors, it is always assumed that each creditor acts upon the belief and assumption that the others will accept exactly the same amount as he takes, and nothing more. If it could be proved that one creditor who takes more had entered into an agreement, not merely with his debtor but with every other creditor, that he should be allowed to do so, then no doubt it would be sufficient. But if any one creditor who has accepted the composition . . . has not also agreed that one should take a larger benefit than the rest, then the consideration fails. because the assumed principle upon which the composition proceeds is that every creditor is to be treated alike in the arrange, ment." And on this point see also *Smith* v. *Bromley*, Doug. 696, n.; *Jones* v. *Burkley*, Id. 684; *Middleton* v. *Onslow*, 1 P. Wms. 768.

Nor can it make any difference that the favored creditor receives no more than other creditors, but only a better security. This point was ruled in *Leicester* v. *Rose* (4 East, 372), and was approved in *Ex parte Sadler* (15 Ves. 52); *Pfleger* v. *Browne* (28 Beav. 391); *Williams* v. *Carrington* (1 Hilt. 515); *Bean* v. *Amsinck* (10 Blatch. 361).

"So scrupulous are courts in compelling creditors to the observance of good faith toward one another in cases of this kind, that any *security* taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, if unknown at the time to the other creditors, is void and inoperative," and cannot be enforced. Earl, J., delivering opinion in *White* v. *Kuntz*, 107 N. Y. 518, 525.

§ 491. **Effect of private stipulation on claim of creditor.** — The principle requiring the observance of scrupulous good faith by creditors toward one another in composition agreements has very recently been before the Court of Appeals for consideration. In *Hanover National Bank* v. *Blake* (142 N. Y. 404, reversing 73 Supm. Ct. [66 Hun] 33) the authorities bearing on the principle, both in New York and in England, were reviewed; and the extent of the operation of the principle, as well as the consequences resulting from its violation, were defined and limited. In April, 1888, F. D. Blake & Co., being insolvent, made a general assignment of all their property for creditors. Subsequently, in the following June, the creditors executed composition agreement, by which they agreed to take forty per cent. of their respective claims, to be paid by four notes, each for ten per cent. of the claim, payable in six, twelve, eighteen and twenty-four months. The notes at eighteen and twenty-four months were to be indorsed by Sarah F. Blake. The plaintiff was one of the creditors executing the composition agreement, and received notes for forty per cent. of its claim the same as the others; but it asked Sarah F. Blake to indorse the first two notes as well as the last two, which she did. This was an advantage over the other creditors in obtaining security for *all* four notes instead of the last two only, and was obtained secretly. The action was brought on the *third* note in the series—namely, the one at eighteen months. It did not appear what became of the notes at six and twelve months, the endorsement of which was fraudulently obtained by plaintiff (see p. 416); and the court observed that it was only concerned with the question whether plaintiff should have the amount of the composition notwithstanding the secret agreement by which it secretly obtained better security for some of the composition installments. The question was answered in the affirmative, and the rule declared that such private agreements do not avoid the entire transaction, but that they fall within the rule which allows the severance of the illegal from the legal part of a covenant. Gray, J., delivered the opinion of the court, and Andrews and Peckham, JJ., dissented. So far as this State is concerned, this case settles the rule; but the right of innocent creditors to avoid the composition is not lessened or limited by the decision.

In case cited the indorser, Sarah F. Blake, was the only defendant so far as the report of the case reveals; but in *Hanover National Bank* v. *Blake* (67 Supm. Ct. [60 Hun], 428; s. c. 39 St. Rep. 335; s. c. 14 N. Y. Supp. 913), apparently arising out of the same composition agreement, both the debtors, who were makers of the note, and Sarah F. Blake, the indorser, were made defendants. The complaint was dismissed as to the *indorser*, and judgment directed against the makers. At General Term the Court laid stress on the fact that the fraudulent procuration of Sarah F. Blake was *after* the composition agreement had taken effect. The case in 60 Hun, 428, seems to have been *on one of the notes which was not to be endorsed by the terms* of the composition agreement; while in the case bearing the same title in 66 Hun, 33, reversed in 142 N. Y. 404, the suit was on one of the notes properly endorsed as agreed on.

In *Martin* v. *Adams* (38 St. Rep. 397; s. c. 14 N. Y. Supp. 626), an insolvent firm made a composition agreement with creditors. The creditors were to be paid fifty-five per cent. secured by mortgage. One of the partners further agreed to make an additional payment out of the net profits of his future business enterprises not exceeding ten per cent. of the claims respectively. Before the composition agreement was made the son of this partner, with the partner's knowledge, agreed with one of the creditors to purchase his interest in the ten per cent. contingent payment for a sum certain. It was held to avoid the composition because it was a fraud on the other creditors, who had no knowledge of it.

The principle is equally applicable when the composition calls for payment of the entire indebtedness, but in installments on an extension of time—as where a debtor who by composition had obtained an extension from all his creditors, gave one creditor a bond as additional security to induce him to join in the composition. *Cecil* v. *Plaistow*, 1 Anst. 202.

§ 492. Securities for an undue advantage to one creditor void.—Not only does a fraud, such as we have referred to in the last section, invalidate the composition as a defense to a creditor's claim, but the creditor who undertakes to obtain an undue advantage over other creditors will be unable to enforce any

such advantage. "So scrupulous are courts," says Mr. Justice Nelson in *Russell* v. *Rogers* (10 Wend. 474), "in compelling creditors to the observance of good faith towards one another in cases of this kind, that any security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, if unknown at the time to the other creditors, is void and inoperative." So no contract to pay money, or do any other valuable thing, and no security given upon any such promise, whereby a creditor obtains an advantage peculiar to himself, can be enforced, and however formal the instrument may be by which it is expressed, parol evidence is always admissible to show the fraud and thus avoid it. *Cockshott* v. *Bennett*, 2 T. R. 763; *Carroll* v. *Shields*, 4 E. D. Smith, 466; *Lawrence* v. *Clark*, 36 N. Y. 128; *Bruce* v. *Lee*, 4 Johns. 410; *Waite* v. *Harper*, 2 Id. 386; *Wiggin* v. *Bush*, 12 Id. 306; *Payne* v. *Eden*, 3 Caines, 213; *Russell* v. *Rogers*, 10 Wend. 474; *Higgins* v. *Mayer*, 10 How. Pr. 363; *Townsend* v. *Newell*, 22 How. Pr. 164; *Eldridge* v. *Strenz*, 34 Super. Ct. (2 J. & S.) 491; *Pinneo* v. *Higgins*, 12 Abb. Pr. 334; *Crandall* v. *Cochran*, 3 T. & C. 203; *Breck* v. *Cole*, 4 Sandf. 79; *Harvey* v. *Hunt*, 119 Mass. 279.

Of course, the advantage received by the creditors refers to something additional to what is received by other creditors, and not to something additional to the creditor's claim. *Townsend* v. *Newell*, 22 How. 164. And it makes no difference what devise is resorted to, if the object is to gain an advantage for one creditor over others. *Eldridge* v. *Strenz*, 34 Super. Ct. (2 J. & S.) 491.

And the creditor guilty of such fraud will suffer not only to the extent of the amount which he has attempted to obtain unduly, but he may lose the amount due under the composition also. The agreement is not void for the excess merely; if at all it is void *in toto*. *Howden* v. *Haigh*, 11 Ad. & El. 1033; *Moses* v. *Katzenberger*, 1 Handy (O.) 46; *Clay* v. *Ray*, 17 C. B. N. S. 188; *Hughes* v. *Alexander*, 5 Duer, 488.

And so money paid by the debtor under such a fraudulent agreement, may be recovered back from the creditor in an action for money had and received. *Smith* v. *Cuff*, 6 M. & S. 160; *Horton* v. *Riley*, 11 M. & W. 492; *Atkinson* v. *Denby*,

7 H. & N. 934; *Smith* v. *Bromley*, 2 Doug. 696, n.; see *Bean* v. *Amsinck*, 10 Blatch. 361. To this doctrine it has been objected that both parties being in *pari delicto*, the law ought to favor neither. The parties, however, do not stand upon an equality; one has the power to dictate, the other no alternative but to submit. Cockburn, Ch. J., in *Atkinson* v. *Denby*, *supra*.

But in *Solinger* v. *Earle* (82 N. Y. 393; affi'g 45 Super. Ct. [13 J. & S.] 80), where the plaintiffs had given a note to the defendant for the balance of their debt against him after deducting the amount of the composition in pursuance of a secret agreement, and to induce them to enter into the composition, and was obliged to pay the note—it having come into the hands of *bona fide* holder before maturity—it was held that he could not recover from the defendant the amount he was compelled to pay. This case overrules *Gilmour* v. *Thompson*, 49 How. Pr. 198, and *Pinneo* v. *Higgins*, 12 Abb. Pr. 334. See *Lawrence* v. *Clark*, 36 N. Y. 128.

Nor does it make any difference that the security was given after the composition was executed, if it was a part of the agreement upon which the composition was based. *Carroll* v. *Shields*, 4 E. D. Smith, 466; *Way* v. *Langley*, 15 Ohio St. 392; *Patterson* v. *Boehm*, 4 Penn. St. 507.

Where, after the making of a composition agreement and the payment and distribution of the money and notes in pursuance of the agreement, the debtor voluntarily executes to one of his creditors other notes for the balance of his indebtedness, which by their terms become due before the composition notes, the notes so given for the balance are void as being in fraud of the rights of other composition creditors. *Way* v. *Langley*, 15 Ohio St. 392.

§ 493. **New promise.**—In *Stafford* v. *Bacon* (1 Hill, 532; s. c. 2 Id. 353, reported erroneously in 25 Wend. 384) it was held, that where a debt has been discharged by an accord and satisfaction, there remains no moral obligation to pay the balance which will support a new promise. The question was raised but not passed upon in *Crans* v. *Hunter*, 28 N. Y. 389, 394.

It was held in *Coon* v. *Stoker* (2 St. Rep. 626), that a com-

position creditor who has received the amount of the compromise, and executed a release, cannot enforce a subsequent parol agreement to pay the balance out of the reassigned estate, as it is without consideration. See *Zoebisch* v. *Von Minden* (120 N. Y. 406), where, though not essential to the decision, it was said, in substance, that a dispute, where there was no duress or fraud, might form a good consideration for a contract, even though the dispute between the parties to it arose out of a composition agreement.

In *Smith* v. *Zeigler* (44 St. Rep. 50 ; s. c. 17 N. Y. Supp. 338), it is held that a voluntary payment made by a debtor to a creditor of the amount to which he was unlawfully preferred, cannot be recovered back.

The prevailing doctrine appears to be, that a moral obligation to pay money is a good consideration only in cases where the original right of action is extinguished by some rule of law, and not in cases where it is extinguished by the act of the parties. *Warren* v. *Whitney*, 24 Me. 561 ; *Shepard* v. *Rhodes*, 7 R. I. 470 ; *Snevily* v. *Read*, 9 Watts (Pa.), 396 ; *Montgomery* v. *Lampton*, 3 Met. (Ky.) 519 ; 1 Pars. on Cont., 8th ed., 434 ; but see *Goulding* v. *Davidson*, 26 N. Y. 604.

ADDENDA.

THE GENERAL ASSIGNMENT ACT OF 1877, AS AMENDED,

AND

THE RULES OF THE COURT OF COMMON PLEAS RELATING TO GENERAL ASSIGNMENTS.

THE

GENERAL ASSIGNMENT ACT OF 1877.

Laws of 1877, Chapter 466.

AN ACT in relation to assignments of the estates of debtors for the benefit of creditors.

PASSED June 16, 1877; three-fifths being present.

As amended by Laws of 1878, Chapter 318; Laws of 1885, c. 464; Laws of 1886, c. 283; Laws of 1887, c. 503; Laws of 1888, c. 294; Laws of 1894, c. 134.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Title of act.—§ 1. This act may be cited for all purposes as "The general assignment act of eighteen hundred and seventy-seven."

Form of assignment — Acknowledgment — Record — Assent of assignee.—§ 2. Every conveyance or assignment made by a debtor of his estate, real or personal, or both, to an assignee for the creditors of such debtor, shall be in writing, and shall specifically state therein the residence and the kind of business carried on by such debtor at the time of making the assignment, and the place at which such business shall then be conducted, and if such place be in a city, the street and number thereof, and if in a village or town such apt designation as shall reasonably identify such debtor. Every such conveyance or assignment shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds and shall be recorded in the county clerk's office in the county where such debtor shall reside or carry on his business at the date thereof. An assignment by copartners shall be recorded in the county where the principal place of business of such copartners is situated. When real

property is a part of the property assigned, and is situated in a county other than the one in which the original assignment is required to be recorded, a certified copy of such assignment shall be filed and recorded in the county where such property is situated. The assent of the assignee, subscribed and acknowledged by him, shall appear in writing, embraced in or at the end of, or indorsed upon the assignment, before the same is recorded, and, if separate from the assignment, shall be duly acknowledged. As amended by Laws of 1888, c. 294. See *ante*, § 135.

Inventory and schedules.—§ 3. A debtor making an assignment shall, at the date thereof or within twenty days thereafter, cause to be made, and delivered to the county judge of the county where such assignment is recorded, an inventory or schedule containing:

1. The name, occupation, place of residence, and place of business, of such debtor.

2. The name and place of residence of the assignee.

3. A full and true account of all the creditors of such debtor, stating the last known place of residence of each, the sum owing to each, with the true cause and consideration therefor, and a full statement of any existing security for the payment of the same.

4. A full and true inventory of all such debtor's estate at the date of such assignment, both real and personal, in law and in equity, with the incumbrances existing thereon, and of all vouchers and securities relating thereto, and the nominal as well as actual value of the same according to the best knowledge of such debtor.

5. An affidavit made by such debtor, that the same is in all respects just and true. But in case such debtor shall omit, neglect or refuse to make and deliver such inventory or schedule within the twenty days required, the assignee named in such assignment shall, within thirty days after the date thereof, cause to be made, and delivered to the county judge of the county where such assignment is recorded, such inventory or schedule as above required, in so far as he can, and for such purpose said county judge shall, at any time, upon the application of such assignee, compel by order such delinquent debtor and any other person to appear before him and disclose, upon oath, any knowledge or information he may possess, necessary to the proper making of such inventory or schedule. The assignee shall verify the inventory and schedule so made by him, to the effect that the same is in all respects just and true to the best of his knowledge and belief. But in case the said assignee shall be unable to make and file such inventory or schedule, within said thirty days, the county judge may, upon application upon oath, show-

ing such inability, allow him such further time as shall be necessary, not exceeding sixty days. If the assignee fail to make and file such inventory or schedule within said thirty days, or such further time as may be allowed, the county judge shall require, by order, the assignee forthwith to appear before him, and show cause why he should not be removed. Any person interested in the trust estate may apply for such order and demand such removal. The books and papers of such delinquent debtor shall at all times be subject to the inspection and examination of any creditor. The county judge is authorized by order to require such debtor or assignee to allow such inspection or examination. Disobedience to such order is hereby declared to be a contempt, and obedience to such order may be enforced by attachment. The inventory or schedule shall be filed by said county judge in the office of the clerk of said county in which said assignment is recorded. As amended by Laws of 1878, c. 318, § 1. See *ante*, § 315.

Notice to present claims.—§ 4. The county judge may, upon the petition of the assignee, authorize him to advertise[1] for creditors to present to him their claims, with the vouchers therefor, duly verified, on or before a day to be specified in such advertisement, not less than thirty days from the last publication thereof, which advertisement or notice shall be published in two newspapers, to be designated by the county judge, as most likely to give notice to the persons to be served, not less than once a week for six successive weeks, and, if it appears that any of such creditors reside out of the State, then in like manner in the State paper. See *ante*, § 421.

Assignee's bond.—§ 5. The assignee named in any such assignment shall, within thirty days after the date thereof, and before he shall have any power or authority to sell, dispose of or convert to the purposes of the trust any of the assigned property, enter into a bond to the people of the State of New York, in an amount to be ordered and directed by the county judge of the county where such assignment is recorded, with sufficient sureties to be approved of by such judge, and conditioned for the faithful discharge of the duties of such assignee and for the due accounting for all moneys received by him, which bond shall be filed in the clerk's office of the county where such assignment is recorded, but in case the debtor shall fail to present such inventory within the twenty days required, then the assignee, before the ten days thereafter shall have elapsed, may apply to

[1] So in the original.

said county judge by verified petition for leave to file a provisional bond, until such time as he may be able to present the schedule or inventory as hereinbefore provided. See *ante*, § 326.

Removal of assignee—Amendment of schedules.—§ 6. The county judge shall, in the case provided in section three, and may also, at any time, on the petition of one or more creditors, showing misconduct or incompetency of the assignee, or on petition of the assignee himself, showing sufficient reason therefor, and after due notice of not less than five days to the assignor, assignee, surety and such other person as such judge may prescribe, remove or discharge the assignee, and appoint one or more in his place, and order an accounting of the assignee so removed or discharged, and may enjoin such assignee from interfering with the assignor's estate, and make provision by order for the safe custody of the same, and enforce obedience to such injunction and orders by attachment; and, upon his discharge upon his own application, such assignee's bond shall be canceled and discharged. The new assignee shall give a bond, to be approved as above required. The county judge shall have power, by order, to require or allow any inventory or schedule filed to be corrected or amended, and also to require and compel, from time to time, supplemental inventories or schedules to be made and filed within such time as he shall prescribe, and to enforce obedience to such orders by attachment. As amended by Laws of 1878, c. 318, § 2. See *ante*, § 413.

Additional security.—§ 7. The county judge may, upon his own motion or upon the application of any party in interest, and on such notice as he may direct to be given to the assignor, assignee and surety, require further security to be given whenever in his judgment the security afforded by the bond on file is not adequate. See *ante*, § 335.

Failure to file bond.—§ 8. A failure to file any bond required by or under this act or the acts hereby amended, within the specified time will not deprive the county judge of his power over the assignee or the trust estate. See *ante*, § 328.

Prosecution of assignee's bond.—§ 9. Any action brought upon an assignee's bond may be prosecuted by a party in interest by leave of the court; and all moneys realized thereon shall be applied by direction of the county judge in satisfaction of the debts of the assignor, in the same manner as the same ought to have been applied by such assignee. See *ante*, § 334.

Continuance of proceedings on death of assignee.—§ 10. In case an assignee shall die during the pendency of any proceeding under this act, or at any time subsequent to the filing of any bond required herein, his personal representative or successor in office, or both, may be brought in and substituted in such proceeding on such notice (of not less than eight days), as the county judge may direct to be given; and any decree made thereafter shall bind the parties thus substituted as well as the property of such deceased assignee, provided, however, that if such assignee die subsequent to the filing of his bond and before any proceedings may have been had thereunder, then the surety on such bond may apply to the county judge for an accounting, who may, on such terms as to him seem just and proper, appoint another assignee and release such surety. See *ante*, § 415.

Citation for accounting.—§ 11. A citation may be issued to all parties, interested in the estate assigned, as creditors or otherwise, requiring them to appear in court on some day therein to be specified, and to show cause why a settlement of the account of proceedings of the assignee should not be had, and if no cause be shown, to attend the settlement of such account. The county court must issue all citations mentioned in this act which must be returnable in court. It may issue a citation on the petition of an assignee, at any time after the assignment or on petition of a creditor, or an assignee's surety, or an assignor, at any time after the lapse of one year from the date of such assignment, or where an assignee has been removed and ordered to account as hereinbefore provided. As amended by Laws of 1878, c. 318, § 3. See *ante*, § 459.

Service of citation on accounting.—§ 12. A citation issued on the petition of a creditor may be addressed to and served on the assignee alone, but on or after the return of such citation the assignee may have a general citation issued to all parties interested.

§ 13. A citation to all persons interested must be served on all parties other than the petitioner who are interested in the fund, including assignors, assignees and their sureties, except that if the time limited by due advertisement for presentation of claims has expired before the issue of the citation, creditors who have not duly presented their claims need not be served. In case the creditors of such assignor, who have proved their claims, exceed twenty-five in number, then the county judge, upon proof by affidavit that such creditors exceed such number, may by order direct such citation to be served on each creditor

who has proved his claim, by depositing a copy of the same, at least thirty days prior to the return day thereof, in the post office at the place where the assignee or assignees, or either of them, reside, duly inclosed and directed to each of such creditors, at his last known post office address, with the postage prepaid ; and by publishing such citation once a week for at least four weeks prior to such return day in one or more newspapers, to be designated by such county judge as most likely to give notice to such creditors. As amended by Laws of 1878, c. 318, § 4. See *ante*, § 461.

§ 14. A citation personally served within the county of the judge or an adjoining county must be so served at least eight days before the return thereof ; if in any other county, at least fifteen days before the return thereof. See *ante*, § 461.

§ 15. The county judge may direct service to be made by publication when he is satisfied by affidavit or verified petition either that the person to be so served is unknown, or that his residence cannot, after diligent inquiry, be ascertained, or that he cannot, after due diligence, be found within the State. The order for such service must direct service of the citation upon such person to be made by publication thereof in one newspaper to be designated by the county judge as most likely to give notice to the person to be served, and also, if it appear that any such person resides without the State, then in the State paper for such length of time as he may deem reasonable, not less than once a week for six weeks, and that a copy of the citation be forthwith deposited in the post office duly inclosed and directed to each person so served, at his last known place of residence or post office address, and the postage paid thereon ; at least thirty days before the return day thereof. See *ante*, § 461.

§ 16. When publication has been ordered, personal service without the State made if within the United States at least thirty days, or without the United States, at least forty days before the return day is equivalent to publication and mailing. See *ante*, § 461.

§ 17. Personal service upon minors and persons incompetent shall be made in the manner prescribed by law for the service of citations issued by a surrogate, in cases of final accounting. See *ante*, § 461.

§ 18. Personal service upon one of two or more creditors who claim as copartners or otherwise as joint creditors shall be

equivalent to personal service on all, and voluntary appearance either in person or by attorney shall be equivalent to personal service. See *ante*, § 461.

Appearance without service.—§ 19. On the return of a citation to all parties interested, any person claiming an interest, although not served, may appear and become a party on duly presenting his claim. See *ante*, § 463.

Proceedings on accounting.—§ 20. On a proceeding for an accounting under this act the county court shall have power :

1. To examine the parties and witnesses on oath in relation to the assignment and accounting and all matters connected therewith and to compel their attendance for that purpose and their answers to questions, and the production of books and papers.

2. To require the assignee to render and file an account of his proceedings, and to enforce the same in the manner provided by law for compelling an executor or administrator to comply with a surrogate's order for an account.

3. To take and state such account, or to appoint a referee to take and state it ; and such referee shall have the powers enumerated in subdivision one of this section.

4. To settle and adjudicate upon the account and the claims presented, and to decree payment of any creditor's just proportional part of the fund, or, in case of a partial accounting, so much thereof as the circumstances of the case render just and proper.

5. To discharge the assignee and his surety at any time, upon performance of the decree, from all further liability upon matters included in the accounting, to creditors appearing and to creditors not having appeared after due citation, or not having presented their claims after due advertisement. See §§ 5, 10, 18 of this act.

6. On proof of a composition between the assignor and his creditors, to discharge the assignee and his sureties from all further liability to the compounding creditors appearing or duly cited, and to authorize the assignee to release the assets to the assignor ; provided, however, that if there be any creditors not assenting to the composition, the court shall determine what proportion of the fund shall be paid to or reserved for creditors not assenting, which shall not be less than the sum or share to which they would be entitled if no composition had been made, and may decree distribution accordingly. As amended by Laws of 1878, c. 318, § 5.

7. To adjourn the proceedings from time to time, issue further citations if necessary, and amend the petition and proceedings thereon before decree in furtherance of justice.

8. To punish as for a contempt any disobedience or violation of any order made or process issued in pursuance of this act or the acts hereby amended, and to restrain by arrest and imprisonment any party or witness when it shall satisfactorily appear that such party or witness is about to leave the jurisdiction of the court, and to take bail to secure the attendance of such party or witness, to be prosecuted under the order of the court in case of forfeiture by and for the benefit of the party in whose interest such examination shall be ordered.

9. To exercise such other or further powers in respect to the proceedings and the accounting therein as a surrogate may by law exercise in reference to an accounting by an executor or administrator. See *ante*, § 462.

Examination of witnesses and production of books.—§ 21. The county judge may also, at any time, on petition of any party interested, order the examination of witnesses and the production of any books and papers by any party or witness before him or before a referee appointed by him for such purpose, and the evidence so taken, together with books and papers, or extracts therefrom, as the case may be, shall be filed in the county clerk's office, and may be used in evidence by any creditor or assignee in any action or proceeding then pending, or which may hereafter be instituted. No witness or party as above provided, shall be excused from answering on the ground that his answer may criminate him, but such answer shall not be used against him in any criminal action or proceeding. See *ante*, § 367.

Orders and decrees—Recording orders—Fees.—§ 22. All orders or decrees in proceedings under this act shall have the same force and effect, and may be entered, docketed and enforced and appealed from the same as if made in an original action brought in the county court; provided, however, that a final decree, directing the payment of money, may be enforced by serving a certified copy thereof personally upon the assignee for the benefit of creditors, and if said assignee willfully neglects to obey said decree, by punishing him for a contempt of court. The imprisonment of said assignee, by virtue of proceedings to punish for contempt, as prescribed in this section, or a levy upon his property by virtue of an action, shall not bar, suspend or otherwise affect an action against the sureties on his final bond. All proceedings under this act shall be deemed to be had in court. The said court shall always be open for proceedings under this act. The county judge, when named in this act, shall, in such proceedings, be deemed to be acting as the court. The clerk of the court shall keep a separate book, in which shall be en-

tered, in each case, the date and place of record of the assignment, and a minute of all proceedings therein, under this act, with such particularity as the court shall direct by general order. He shall record therein at length the orders and decrees of the court, settling, rejecting, or adjusting claims, and directing the payment of money, or releasing assets by the assignee, and removing or discharging the assignee and his sureties, and such other orders as the court shall direct by general order. The said clerk shall securely keep the papers in each case in a file by themselves, and shall be entitled to a fee of one dollar for filing all the papers in each case, and entering the proceedings in the minute book, and fifty cents to be paid by the assignee, unless otherwise directed, for recording each order or decree required by this act or the general order of the court. As amended by Laws of 1894, c. 134. See *ante*, §§ 308, 313.

Authority to compound claims—Liability of assignee.—§ 23. The county judge where the assignment is recorded may, upon the application of the assignee and for good and sufficient cause shown, and upon such terms as he may direct, authorize the assignee to sell, compromise or compound any claim or debt belonging to the estate of the debtor. But such authority shall not prevent any party interested in the trust estate from showing upon the final accounting of such assignee that such debt or claim was fraudulently or negligently sold, compounded or compromised. The sale of any debt or claim heretofore made in good faith by any assignee shall be valid, subject, however, to the approval of the county judge, and the assignee shall be charged with and be liable for, as part of the trust fund, any sum which might or ought to have been collected by him. As amended by Laws of 1885, c. 464. See *ante*, § 378.

Jurisdiction of the court of common pleas—Filing and recording papers in New York city.—§ 24. In the city and county of New York all papers, except assignments, which by this act are required to be hereafter filed or recorded in the county clerk's office shall be filed or recorded in the office of the clerk of the court of common pleas of said city and county; and any judge of said court may exercise all the powers of a county judge for said county for the purposes of this act, and any act or proceeding commenced or returnable before, or instituted or ordered by, one of the judges of said court, may be heard, continued or completed, by or before any other of them. See *ante*, §§ 311, 313.

Jurisdiction of county court.—§ 25. Any proceeding under

this act shall be deemed for all purposes, including review by appeal or otherwise, to be a proceeding had in the court as a court of general jurisdiction, and the court shall have full jurisdiction to do all and every act relating to the assigned estate, the assignees, assignors and creditors, and jurisdiction shall be presumed in support of the orders and decrees therein unless the contrary be shown; and after the filing or recording of an assignment under this act, the court may exercise the powers of a court of equity in reference to the trust and any matters involved therein. See *ante*, § 308.

Trial of disputed claims.—§ 26. The court, in its discretion, may order a trial by jury or before a referee, of any disputed claim or matter arising under the provisions of this act, or the acts hereby amended. It may in its discretion award reasonable counsel fees and costs, determine which party shall pay the same, and make all necessary rules to govern the practice under this act. The assignee or assignees named in any assignment shall receive for his or their services a commission of five per centum on the whole sum which will have come into his or their hands. As amended by Laws of 1878, c. 318, § 7. See *ante*, § 423.

Construction of terms.—§ 27. Whenever words in this act importing the plural number are used in describing or referring to any matters, parties or persons, any single matter, party or person shall be deemed to be included, although distributive words may not be used; and when any singular matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals shall be deemed to be included, unless otherwise specially provided or unless there be something in the subject or context repugnant to such construction.

Repealing clause.—§ 28. Chapter three hundred and forty-eight of the laws of eighteen hundred and sixty, entitled "An act to secure to creditors a just division of the estates of debtors, who convey to assignees for the benefit of creditors," and the several acts amendatory thereof, are hereby repealed, but this shall not affect any proceedings had; and any proceedings pending under the acts hereby referred to may be continued under this act.

Wages owing employees to be preferred.—§ 29. In all distributions of assets under all assignments, made in pursuance of this act, the wages or salaries actually owing to the employees

of the assignor or assignors at the time of the execution of the assignment shall be preferred before any other debt; and should the assets of the assignor or assignors not be sufficient to pay in full all the claims preferred, pursuant to this section, they shall be applied to the payment of the same *pro rata* to the amount of each such claim. As amended by Laws of 1886, c. 283. See *ante*, § 175.

§ 30. In all general assignments of the estates of debtors for the benefit of creditors hereafter made, any preference created therein (other than for the wages or salaries of employees under chapter three hundred and twenty-eight of the laws of eighteen hundred and eighty-four, and chapter two hundred and eighty-three of the laws of eighteen hundred and eighty-six) shall not be valid except to the amount of one-third in value of the assigned estate left after deducting such wages or salaries, and the costs and expenses of executing such trust; and should said one-third of the assets of the assignor or assignors be insufficient to pay in full the preferred claims to which, under the provisions of this section, the same are applicable, then said assets shall be applied to the payment of the same *pro rata* to the amount of each said preferred claims. Added by Laws of 1887, c. 503. See *ante*, § 176, *et seq.*

LAWS OF 1885—CHAP. 380.

AN ACT to confer additional powers upon the supreme court of the state of New York and the justices thereof.

PASSED May 29, 1885; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. All powers, rights and duties conferred upon county courts and county judges by chapter four hundred and sixty-six of the laws of eighteen hundred and seventy-seven, entitled "An act in relation to assignments of the estates of debtors for the benefit of creditors," and by acts amendatory thereof and additional or supplemental thereto, are hereby also conferred upon and shall be exercised by the supreme court and the justices of the supreme court of the state of New York, concurrently with county courts and county judges. All applications under said acts made in the supreme court shall be made to the court, or a justice thereof, within the judicial district where the assignment is recorded, and all proceedings and hearings under said acts had in the supreme court upon the return of a citation shall be had at a special term of said court held in the county where the judgment debtor resided at the time of the assignment, or in case of an assignment by copartners, in the county where the principal place of business of such copartners was at the time of such assignment.

§ 2. This act shall take effect immediately.

RULES

OF THE

COURT OF COMMON PLEAS,

RELATING TO

GENERAL ASSIGNMENTS.

[The following Rules, adopted by the Court of Common Pleas pursuant to section 7 of chapter 318 of the Laws of 1878, take effect from and after the first day of January, 1879.]

Register and Docket.

RULE 1. The clerk, in addition to the books now kept by him, shall provide a Register and Docket.

In the Register shall be entered in full every decree and final order made in these proceedings, according to date, and the Docket shall contain a brief memorandum of each day's proceedings according to the respective titles.

The Register and Docket shall be, at all times during court hours, open for public inspection.

Files and Filing Papers.

RULE 2. Each petition, or order, or decree, filed, shall be endorsed with the day and date of such filing, and the papers in each case shall be kept in a file by themselves.

RULE 3. No paper shall be permitted to be taken off of the files of the court for any purpose, except on an order of the court.

RULE 4. Every paper filed shall have a brief memorandum endorsed on the outside cover, showing the nature thereof.

Copies of Papers.

RULE 5. Copies of any and all papers in these proceedings shall be furnished to any person applying for the same, upon the payment of the legal fees.

Process—How Attested.

RULE 6. All process, citations, summons and subpœnas shall issue out of the court under the seal thereof, and be tested by the clerk.

Appearances.

RULE 7. Any party may appear in these proceedings either in person or by attorney—if by attorney the name of such attorney, with his place of business and residence, shall be endorsed on each and every paper filed by him, and his name shall be entered in the Docket.

Schedules—Nominal and Actual Value.

RULE 8. The schedule of liabilities and assets required to be filed by the assignor or assignee shall fully and fairly state the nominal and actual value of the assets, and the cause for the difference, and a separate affidavit will be required which shall fully explain the cause of such difference. If required, the affidavits of disinterested experts as to such value, must be furnished.

Schedules—How Signed and Endorsed.

RULE 9. Where there may be more than one sheet of paper necessary to contain the schedules, each page shall be signed by the person, or persons, verifying the same. The sheets of paper on which the schedules are written shall be securely fastened before the filing thereof, and shall be endorsed with the full name of the assignor and assignee, and, when filed by an attorney, shall also be endorsed with his name and business address.

Affidavit to Schedules.

RULE 10. Should the schedules be filed by the assignee, there must be a full affidavit made by such assignee and some disinterested expert, showing the nature and value of the property assigned.

Name and Residence of Parties.

RULE 11. The name, residence, occupation, and place of business of the assignor, and name and place of residence of the assignee, may be incorporated in the affidavit, or annexed to the schedules.

Recapitulation.

RULE 12. There shall be a recapitulation at the end of the schedules as follows :

Debts and liabilities amount to $

Assets nominally worth $

Assets actually worth $

Contingent Liabilities.

RULE 13. Contingent liabilities shall appear on a separate sheet of paper.

Amendment of Schedules.

RULE 14. Application to amend the schedules shall be made by verified petition in which the amendments sought to be made shall appear in full, and such amendments shall be verified in the same manner as the original schedules were verified.

Form of Bond.

RULE 15. The bond shall be joint and several in form and must be accompanied by the affidavit prescribed by section 812 of the Code of Civil Procedure and also by the affidavit of each surety setting forth his business and where it is carried on, the amount of his debts and liabilities and the description and value of property, real or personal, owned by him, so that it may appear that he is worth the amount in which he is required to justify over and above his debts and liabilities.

Justification of Sureties.

RULE 16. The court may in its discretion require any surety to appear and justify.

Qualification of Sureties.

RULE 17. At least one of such sureties shall be a freeholder. If the penalty of the bond be twenty thousand dollars or over, it may be executed by two sureties justifying each in that sum, or by more than two sureties the amount of whose justification united is double the penalty of the bond.

Affidavit for Provisional Bond.

RULE 18. The affidavit on which application is made for leave to file a provisional bond, must show fully and fairly the nature and extent of the property assigned, and good and sufficient

reason must be shown why the schedules cannot be filed, and it must appear satisfactorily to the court that a necessity exists for the filing of such provisional bond, and for the purposes of this act the affidavit so filed shall be deemed a schedule of the assigned property until such time as the regular schedules shall be filed.

Upon the filing of the schedules the amount of the bond will be determined finally, and should the provisional bond already filed be deemed sufficient, an order will be granted making such bond as approved the final bond.

Assignee to keep Books.

RULE 19. Every assignee shall keep full, exact and regular books of account of all receipts, payments and expenditures of money by him, which said books shall always, during business hours, be open to the inspection of any person interested in the trust estate.

Sales by Assignee—How made.

RULE 20. In making sales at auction of personal property the assignee shall give at least ten days notice of the time and place of the sale and of the articles to be sold by advertisement in one or more newspapers, and he shall give notice of the sale at auction of any real estate at least twenty days before such sale. Upon such sales the assignee shall sell by printed catalogue in parcels and shall file a copy of such catalogue, with the prices obtained for the goods sold, with his final account.

Notice by Mail—Direction to Return.

RULE 21. When any notice is served on the creditors of the insolvent, pursuant to the provisions of the Statute, or these rules, by mail, every envelope containing such notice shall have upon it a direction to the postmaster at the place to which it is sent to return the same to the sender within ten days unless called for. Upon every application made to the court upon such service an affidavit shall be presented, showing whether any such notices have been returned.

Assignee's Account—When to be Filed.

RULE 22. Upon an application made for a general citation, the assignee shall file with his petition his account, with the vouchers.

Reference on Account—Discharge of Assignee.

RULE 23. The assignee must file an account in all cases, which shall be referred for examination.

No discharge shall be granted an assignee who has not advertised for claims pursuant to section 4 of the statute and the 30th Rule.

No discharge can be granted an assignee and his sureties in any case whether the creditors have been paid or have released or have entered into composition or not, except in a regular proceeding for an accounting, under section 20 of the act commenced by petition for citation and citation thereon to all persons interested in the estate.

Order Substituting Assignee—Copy when Filed.

RULE 24. Whenever an assignee shall have been removed, either on his own petition or on the petition of any person interested in the estate, and another person appointed as assignee in his place and stead, a certified copy of the order made on such petition shall be filed and recorded in the clerk's office of the county wherein the original assignment was recorded, and the clerk of the county shall make such suitable entry on the margin of the record of the original assignment as will show the appointment of such substituted assignee, and the said certified copy of the order shall be attached to the original assignment.

Assignee's Account—Form of.

RULE 25. The account of the assignee shall be in the nature of a debit and credit statement; he shall debit himself with the assets as shown in the schedules as filed, and credit himself with any decrease as well as expenses.

Vouchers.

RULE 26. The statement of expenditures shall be full and complete, and the vouchers for all payments other than trivial expenses, shall be attached to the account.

Proceedings on Accounting.

RULE 27. The affirmative on the accounting shall be with the assignee, and objections to the account may be presented to the referee in writing, or be brought out on a cross-examination, and in the latter case they must be specifically taken and entered in the minutes.

RULE 28. The testimony taken shall be signed by the several witnesses, and attached to and filed with a report of the referee.

Referee's Report.

RULE 29. The report of the referee shall show all the jurisdictional facts necessary to confer power on the court, such as the proper executing and acknowledging of the assignment, the recording of the same, the filing of the schedules and bond, the advertising for creditors, the issuing of the citation, the presenting of the account, and where any items may be disallowed in the account of the assignee, the same shall be fully set out in the report.

Notice to Present Claims.

RULE 30.[1] A copy of the notice, or advertisement, requiring creditors to present their claims, must be mailed to *each* creditor whose name appears on the books of the assignor, with the postage thereon prepaid, at least thirty days before the days specified in such advertisement, and proof of such mailing must be required on the application for a final decree, unless personal service thereof is made upon such creditors. As amended Jan. 26, 1881.

RULE 31. All final orders entered in pursuance of conditions or provisions contained in a prior order shall be signed by the judge making the prior order. This provision is adopted in order that no more than one judge shall be disqualified from sitting in review of a single decision.

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[1] Rule formerly numbered 30 was abrogated, February, 1879.

FORMS.

FORMS.

FORMS IN PROCEEDINGS UNDER THE TWO-THIRDS ACT.

(*Ante*, Chapters II, III and IV.)

No. 1.

PETITION FOR DISCHARGE FROM DEBTS.

(See Code C. P. § 2151, *ante*, § 12.)

To the County Court of the county of [*or*, Court of Common Pleas for the city and county of New York].

The petition of , an insolvent debtor, respectfully shows:

I. That your petitioner resides at No. , street, in , the county of , and State of New York.

II. That your petitioner is an insolvent debtor and is unable to pay all his debts in full.

III. That he is willing to assign his property for the benefit of all his creditors, and, in all other respects, to comply with the provisions of article first of title first of chapter seventeen of the Code of Civil Procedure, for the purpose of being discharged from his debts.

Wherefore your petitioner prays, that, upon his so doing, he may be discharged accordingly.

[*Date.*] [*Signature.*]

[*Venue.*]

———, being duly sworn, says, that he is the petitioner named in the annexed petition, and signed the same, and that the said petition is in all respects true in matter of fact.

[*Jurat.*[1]]

[1] The affidavit must be taken on the day of the presentation of the petition. § 2151, *ante*, § 12.

No. 2.

CONSENT OF CREDITORS.

[See Code C. P. §§ 2152 to 2158, *ante*, §§ 13 to 19.)

I,[1] the undersigned, residing at , in the Sfate of , a creditor of A. B., an insolvent debtor, having debts owing to me by the said A. B., in good faith, now due [*or*, hereafter to become due], which amount to dollars;

Do hereby consent to the discharge of the said A. B. from his debts, upon his complying with the provisions of article first of title first of chapter seventeenth of the Code of Civil Procedure.

[When the consenting creditor is secured, add :][2] And whereas the undersigned has, in his own name [*or*, the, &c., is held by , in trust for him] a mortgage [*or*, judgment, or other security—*describing it*] which is a lien upon, or otherwise affects, real or personal property belonging to said insolvent [*or*, transferred by him since the lien was created], and which is held as security for the aforesaid debt. Now, therefore, I, the undersigned, do hereby relinquish the said mortgage [judgment or other security], so far as it affects the property of said insolvent, to the trustee to be appointed pursuant to the petition of said A. B. for the benefit of all his creditors.

[When the consenting creditor is a non-resident,[3] add :] That hereto annexed are the original accounts [*or*, sworn copies thereof, and the original specialties or other written securities] upon which the demands of the undersigned arose or depends.

[When the consenting creditor is a purchaser[4] of the debt, add :] That the undersigned [*or*, if the consenting creditor be an executor, trustee, or receiver of the original creditor—the person from whom he derives title], purchased the said debt from ——— [the original creditor], and that the undersigned [*or*, the person from whom he derives title] actually and in good faith paid therefor the sum of dollars.[5]

[When the creditor desires to nominate a trustee,[6] add :] I hereby nominate , of the county of , as trustee of the property and estate of said insolvent.

[*Date.*] [*Signature.*]

[*Acknowledgment.*]

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[1] Several creditors may join in the consent. Code C. P. § 2152, *ante*, § 13.
[2] See Code C. P. § 2158, *ante*, § 19. [3] See Code C. P. § 2161, *ante*, § 22.
[4] See Code C. P. § 2157, *ante*, § 18.
[5] If the debt was put in judgment after the assignment, costs may be added to the amount. See Code C. P. § 2157, *ante*, § 18.
[6] See Code C. P. § 2176, *ante*, § 37.

No. 3.

AFFIDAVIT OF CREDITOR.

(See Code C. P. § 2160, *ante*, § 21.)

[*Venue.*]

M. N., being duly sworn, says:

I. That he is [one of the firm of M. N.[1] & Co.—*or*, the executor,[2] &c.—*or*, administrator, trustee, receiver, of the estate of Y. Z.—*or*, officer of a corporation[3]] the creditor so named in the accompanying consent to the discharge of A. B., of , an insolvent debtor.

II. That deponent resides at No. , street, in , in the State of [and that the said firm of corporation have their principal place of business at No. , street, in , in the State of].

III. That said A. B. is justly indebted to deponent [*or*, to said firm or corporation—*or*, to deponent as such executor, trustee, reeeiver, &c.—*or*, will become indebted to deponent—*or*, to said firm, &c. on the day of , 18 ,] in the sum of dollars.

IV. That the said debt arose upon the following facts:

[State the nature of the demand and whether it arose upon written security, or otherwise, with the general ground or consideration of the indebtedness.]

[Where the consenting creditor is a purchaser[4] of the demand, add:] That deponent, or said Y. Z., purchased said debt of E. F., of , on the day of , 18 , and actually and in good faith, paid therefor the sum of dollars.

V. That neither deponent [nor his partner—*or*, nor said corporation—*or*, nor said Y. Z.] nor any person to his [*or*, their] use has received from said A. B., or from any other person, payment of such demand, or any part thereof, in money or in any other way, or any gift or reward of any kind, upon an express or implied trust, confidence, or understanding, that he [*or*, they] should consent to the discharge of the said A. B.

[Where the creditor is a non-resident, add:][5] That the accounts [*or*, specialties—*or*, other written securities] attached to the consent of the discharge of A. B., signed by deponent, are the original accounts [*or*, sworn copies thereof—*or*, the original specialties—*or*, other written securities] upon which his demand arose or depends.

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[1] See Code C. P. § 2155, *ante*, § 16.
[2] See Code C. P. § 2153, *ante*, § 14.
[3] See Code C. P. § 2154, *ante*, § 15.
[4] See Code C. P. § 2157, *ante*, § 18.
[5] See Code C. P. § 2161, *ante*, § 22.

[Where the affidavit is made by an administrator, trustee, receiver, or assignee, or an executor, briefly allege that, by an order duly made, he has been authorized to become a consenting creditor, and annex and refer to a certified copy (if the case is within § 2153) of the order.]

[Where a consenting creditor is an executor or administrator, trustee, receiver, or assignee, he may state the necessary facts in his affidavit upon information and belief, setting forth therein the grounds of his belief; but, in that case, the consent must also be accompanied with the affidavit of the insolvent, to the effect that all the matters of facts stated in the affidavit of the consenting creditor are true.]

No. 4.

SCHEDULE OF CREDITORS.

(See Code C. P. § 2162, *ante*, § 23.)

A full and true account of all the creditors of , an insolvent debtor, with the place of residence of each; the sum owing to each of them by the said insolvent; the nature of each debt and demand, and whether arising on written security on account or otherwise, with the true cause and consideration thereof, and the place where the same accrued, and the existing judgments, mortgages or collateral or other security for the payment of the same.

Creditors.	Residence. State and County.	Sum Owing.		Nature of debt or demand, with the true cause and consideration thereof, and whether arising on written security, on account, or otherwise.	Accrued at	Statement of any existing judgment mortgage, or collateral or other security for its payment.
		Dolls.	Cts.			

No. 5.

Inventory of Property Annexed to and Forming Part of Schedule.

(See Code C. P. § 2162, *ante*, § 23.)

A full and true inventory of all the property of , an insolvent debtor, in law or in equity, and of all the incumbrances

existing thereon, and of all the books, vouchers, and securities relating thereto [and the value of such estate according to the best knowledge of[1]].

No. 6.

AFFIDAVIT OF PETITIONER.

(See Code C. P. § 2163, *ante*, § 24.)

[*Venue.*]

I, , do swear [or affirm, as the case may be], that the matters of fact stated in the schedule hereto annexed, are, in all respects, just and true; that I have not, at any time or in any manner whatsoever, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property, in order to defraud any of my creditors; that I have not, in any instance, created or acknowledged a debt for a greater sum than I honestly and truly owed; and that I have not paid, secured to be paid, or in any way compounded with, any of my creditors, with a view fraudulently to obtain the prayer of my petition.

[*Signature.*]

[*Jurat.*]

No. 7.

ORDER TO SHOW CAUSE.[2]

(See Code C. P. § 2164, *ante*, § 25.)

At a Special Term, &c.

In the Matter of the Application of , an Insolvent Debtor, for his Discharge from his Debts.

On reading and filing the petition of , an insolvent debtor, verified on this day of , 18 , the consents and affidavits of the creditors [name them], and the relinquishments of and , the affidavits of , verified the day of , 18 , and the schedules and affidavits

[1] The statute does not require that the inventory shall specify value. The Forms used under the Revised Statutes, as well as those in use under the Code, contain this clause.

[2] This Form is adopted from Abbott's Forms.

thereto annexed, verified before the above named , this day of , 18 , and on motion of , attorney for said petitioner,

ORDERED, 1. That all the creditors of the said show cause before this court, at a [special] term thereof, to be held at the [court house] in the of , on the day of , 18 , at o'clock in the noon, why an assignment of said insolvent's property should not be made, and he thereupon discharged from his debts as prescribed in article first of title first of chapter seventeenth of the Code of Civil Procedure.

2. That a copy of this order be published in the newspaper printed at Albany, in which legal notices are required by law to be published, and in , a newspaper published in the county of , and in the , a newspaper published in the city of [New York], at least once in each of the ten [*or*, six] weeks immediately preceding the said day of .

3. That the petitioner also cause to be served upon each creditor of said , residing within the United States, whose place of residence is known to him, a copy of this order, either personally at least twenty days before the said day of , or by depositing it at least forty days before that day in the post office, inclosed in a post-paid wrapper addressed to the creditor at his usual place of residence.

[If the State is a creditor direct service on the Attorney-General.]

No. 8.

AFFIDAVIT AS TO RESIDENCE OF CREDITORS.[1]

(See Code C. P. § 2165, *ante*, § 26.)

[*Venue.*]

A. B., being duly sworn, says, that he is the petitioner above named; that the places of residence of the creditors of this deponent residing in the United States, whose places of residence are known to deponent, are as follows:

Names of Creditors.	*Places of Residence.*

[*Jurat.*] [*Signature.*]

[1] This affidavit is usual but appears to be unnecessary, since the schedule and the affidavit accompanying it furnish evidence of the place of residence of each creditor if it is known.

No. 9.

AFFIDAVIT OF PUBLICATION OF ORDER TO SHOW CAUSE.

(See Code C. P. § 2165, *ante*, § 26.)

[*Venue.*]

———, being duly sworn, says, that he is, and during the whole time hereinafter mentioned was, the printer [*or*, foreman —*or*, principal clerk of the printer] of the , a newspaper published in the county of , and that a copy of an order to show cause, of which a printed copy is hereto annexed, was published once in each of the six [*or*, ten] weeks immediately preceding the day of , 18 [the day on which cause is to be shown], which said publication commenced on the day of , 18 , and terminated on the day of , 18 .

[*Signature.*]

[*Jurat.*]

No. 10.

AFFIDAVIT OF SERVICE OF ORDER TO SHOW CAUSE.

(See Code C. P. §§ 2165, 2166, *ante*, §§ 26, 27.)

[*Venue.*]

———, being duly sworn, says, that he is upwards of twenty-one years of age, and resides at ; that on the day of , 18 , at No. , street, in the , in the county of , State of New York, he served upon , a copy of the order to show cause hereto annexed, by delivering to and leaving with the said , personally, a true copy thereof.

[If the service was made by depositing in the post office say :] That on the day of , 18 , he served upon the following named persons, creditors of the said A. B., to wit [here insert names and residences of creditors], a copy of the order to show cause hereto annexed, by depositing a true copy thereof in the United States post office in , inclosed in a post-paid wrapper and addressed to each of said creditors respectively, at the place of residence set after each of said names respectively.

No. 11.

SPECIFICATION OF OBJECTIONS AND DEMAND FOR A JURY.

(See Code C. P. §§ 2167, 2168, *ante*, §§ 28, 29.)

[*Title of proceedings.*]

To the County Court of the county of [*or*, Court of Common Pleas for the city and county of New York] :

I, , one of the creditors of said A. B.,[1] do hereby object to the discharge of said A. B. as an insolvent debtor, and specify the following grounds of my objections to such discharge [specify the grounds of objection fully]. And I demand that the questions of fact arising thereon be tried by a jury.

[*Date.*] [*Signature.*]

No. 12.

ORDER FOR TRIAL OF ISSUES BY A JURY.

(See Code C. P. § 2168, *ante*, § 29.)

At a Special Term, &c.

[*Title.*]

The above entitled matter coming on to be heard before this court on the order to show cause herein, made on the day of , 18 , and the papers therein recited, and , one of the creditors of the said A. B. an insolvent debtor, having filed specifications of his objection to the discharge of the said A. B. as an insolvent debtor, and having demanded that the questions of fact arising thereon be tried by a jury.

It is ordered, that the questions of fact arising upon the said order to show cause, and the papers recited therein, and that the said specifications of objections to the discharge of the said A. B., be tried by a jury at a term of this court, to be held at on the day of , 18 , or as soon thereafter as may be in the due course of business.

No. 13.

ORDER FOR ASSIGNMENT.

(See Code C. P. § 2174, *ante*, § 35.)

At a Special Term, &c.

[*Title.*]

It appearing to the court, from the verdict of the jury rendered herein on the day of , 18 , [*or*, from the proofs of the respective parties to this proceeding,] that the petitioner is justly and truly indebted to the consenting creditors in sums which amount, in the aggregate, to two-thirds of all the debts which the said petitioner owed at the time of presenting his petition to creditors residing within the United States: that said petitioner has honestly and fairly given a true

[1] If the creditor is not named in the schedule he must also file an affidavit as required by Code C. P. § 2169, *ante*, § 30.

account of his property, and has in all things conformed to the matters required of him by article first of title first of chapter seventeenth of the Code of Civil Procedure; it is now, on [the verdict of the jury rendered herein on the day of , 18], and on all the papers and proceedings herein, and on proof of due publication and service of the order requiring creditors to show cause granted herein on the day of , 18 , and on motion of , of counsel for the petitioner,

Ordered, that the petitioner execute to said , of No. , street, in , county of , as trustee, who is hereby designated a trustee for that purpose, an assignment of all his (said petitioner's) property at law or in equity in possession, reversion, or remainder, excepting only so much thereof as is exempt by law from levy and sale by virtue of an execution.

No. 14.

ASSIGNMENT.

(See Code C. P. § 2175, *ante*, § 36.)

Know all men by these presents, That I, , of , an insolvent debtor, did present to the [county court of the county of .], a petition to be discharged from my debts, pursuant to the provisions of article first of title first of chapter seventeenth of the Code of Civil Procedure, to which said petition were annexed the consents of so many of my creditors residing in the United States as have debts owing to them by me, which amount to not less than two-thirds of all the debts owing by me, to creditors residing within the United States, whereupon the said [county court of the county of] ordered all of my creditors to show cause, if any they had, before it at a specified time and place, why an assignment of my property should not be made, and I thereupon discharged from my debts as prescribed in said article, which order to show cause was duly published and served upon each of my creditors residing within the United States; and no good cause appearing to the contrary, and it satisfactorily appearing to said court that I was justly and truly indebted to the consenting creditors as aforesaid, that I had honestly and fairly given a true account of my property, and had in all things conformed to the matters required of me by said article, and said court having thereupon directed me to execute to , Esq., as trustee, an assignment of all my property not exempt from execution:

Now, therefore, know ye, that, in conformity to the said

direction, I have granted, released, assigned, and set over and by these presents do grant, release, assign, and set over unto of , the trustee designated therein, all my property at law or in equity, in possession, reversion, or remainder, excepting only so much thereof as is exempt by law from levy and sale by virtue of an execution, and all the books, vouchers, and papers relating thereto, to hold the same unto the said trustee to and for the use and benefit of all my creditors.

In Witness Whereof, I have hereunto set my hand and seal, this day of , 18 .

[*Signatures of witnesses.*]

[*Acknowledgment.*]

[The assignment must be recorded in the clerk's office of the county, and if it passes real estate, also in the proper office for recording deeds.]

No. 15.

CERTIFICATE OF TRUSTEE.

(See Code C. P. § 2178, *ante*, § 39.)

I, , do hereby certify that , an insolvent debtor, has this day, by an instrument in writing, duly acknowledged [*or*, proved] and certified, granted, conveyed, assigned, and delivered to me for the benefit of all his creditors, all his property at law or in equity, in possession, reversion, or remainder, excepting only so much thereof as is exempt by law from levy and sale by virtue of an execution, and all his books, vouchers, and papers relating thereto, and has delivered so much thereof as is capable of delivery.

In Witness Whereof, &c.

[*Acknowledgment.*]

No. 16.

CERTIFICATE OF COUNTY CLERK.

(See Code C. P. § 2178, *ante*, § 39.)

I, , clerk of the county of , do hereby certify that the assignment above mentioned was duly recorded in the clerk's office of said county on the day of , 18 .

In Witness Thereof, I have hereunto subscribed my name and affixed my official seal this day of , 18 .

[SEAL.]

[*Signature of*], Clerk.

No. 17.

DISCHARGE.

(See Code C. P. § 2180, *ante*, § 43.)

To all whom these presents shall come or may concern, greeting:

WHEREAS, , an insolvent debtor residing at , on the day of , 18 , presented to this court his petition, duly verified on that day, to be discharged from his debts pursuant to the provisions of article first of title first of chapter seventeenth of the Code of Civil Procedure, to which petition was annexed the schedule required by law, duly verified on said day, and the proper consents of so many of his creditors residing in the United States as have debts owing to them by said insolvent which amount to not less than two-thirds of all the debts owing by said insolvent to creditors residing within the United States, which said consents were accompanied by the affidavits [and declarations, accounts, and written securities] of said creditors required by law:

Whereupon the court duly ordered all the creditors of said insolvent to show cause before it, at a specified time and place, why an assignment should not be made and said insolvent thereupon discharged from his debts as prescribed in said article, and which order to show cause was, by direction of this court, duly published and served upon each of said insolvent creditors as prescribed by law, and due proof of such publication and service having been made; and whereas, upon the hearing on said petition [and by the verdict of the jury] it appeared satisfactorily to this court that said insolvent was justly and truly indebted to the consenting creditors as aforesaid, and had honestly and fairly given a true account of his property, and had in all things conformed to the matters required of him by said article [and no good cause appearing to the contrary], an order was made by this court directing an assignment to be made by said insolvent, for the benefit of all his creditors, of all his property at law or in equity, in possession, reversion or remainder, except such as is exempt from execution to , the trustee designated; and whereas, said insolvent has, on the day of , 18 , made such an assignment, and produced to this court, a certificate of said trustee, duly acknowledged [*or*, proved] and certified, that said insolvent has assigned to him, for the benefit of all his creditors, all his property so directed to be assigned, and all the books, vouchers and papers relating thereto, and has delivered so much thereof as is capable of delivery; and also a certificate of the county clerk of said county that such assignment has been duly recorded in this office:

Now, therefore, know ye, that said insolvent, , is hereby

discharged from all his debts, and from imprisonment therefor, pursuant to the provisions of said article, and subject to the exception therein prescribed.

FORMS IN PROCEEDINGS FOR EXEMPTION FROM ARREST OR DISCHARGE FROM IMPRISONMENT OF AN INSOLVENT DEBTOR.

(*Ante*, Chapter V.)

No. 18.

Petition of Insolvent to Obtain Exemption from Arrest or Discharge from Imprisonment.

(See Code C. P. § 2189, *ante*, § 71.)

To the County Court of the County of [1] [*or*, Court of Common Pleas for the City and County of New York].

The petition of A. B. respectfully shows to this Court:

I. That your petitioner resides at No. street, in , in the county of [and if he is imprisoned state the county in which he is imprisoned and the cause of the imprisonment.

II. That your petitioner has become and is insolvent and is unable to pay all his debts in full.

III. That your petitioner is willing to assign his property for the benefit of all his creditors, and in all other respects to comply with the provisions of article second of title one of chapter seventeenth of the Code of Civil Procedure, for the purpose of being exempted from arrest and imprisonment as prescribed therein.

Wherefore your petitioner prays, that upon his so doing he may be exempted from arrest by reason of any debt arising upon a contract previously made [and if he is imprisoned, that he may be discharged from his imprisonment].

[*Date.*]

[*Venue.*]

A. B., being duly sworn, says, that he is the petitioner above named, and signed the above petition, and that the same is in all respects true in matter of fact. [*Signature.*]

[*Jurat.*[2]]

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[1] The application must be made to the County Court of the county in which the insolvent resides or is imprisoned. Code C. P. § 2188, *ante*, § 70.

[2] The affidavit must be taken on the day of the presentation of the petition. Code C. P. § 2189, *ante*, § 71.

No. 19.

SCHEDULE AND INVENTORY.

(See Code C. P. § 2190, *ante*, § 72.)

The Form is the same as that under the Two-Thirds Act. See Form No. 4.

No. 20.

PETITIONER'S AFFIDAVIT.

(See Code C. P. § 2191, *ante*, § 73.)

[*Venue.*]

I, , do swear [or "affirm" as the case may be], that the matters of fact stated in the schedule hereto annexed, are, in all respects, just and true; that I have not, at any time or in any manner whatsoever, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property in order to defraud any of my creditors; and that I have not paid, secured to be paid, or in any way compounded with, any of my creditors, with a view that they or any of them should abstain from opposing my discharge. [*Signature.*]

[*Jurat.*]

No. 21.

ORDER TO SHOW CAUSE.

(See Code C. P. § 2192, *ante*, § 74.)

In the Matter of the Application of A. B., An Insolvent Debtor, for Exemption from Arrest and Discharge from Imprisonment.

On reading and filing the petition of A. B., an insolvent debtor, verified on the day of , 18 , and the schedule and inventory thereto annexed; and the affidavit of A. B., said insolvent debtor, verified on the day of , 18 ; and

upon application of , counsel for said petitioner; It is ordered, that all the creditors of said A. B., the petitioner aforesaid, show cause at a special term of this court, to be held at the County Court House in , on the day of , at o'clock, M., why the prayer of the petitioner should not be granted, and why the said A. B. should not be exempt from arrest from any debt arising upon contract previously made, and why he should not be discharged from imprisonment.

No. 22.

ORDER FOR ASSIGNMENT.

(See Code C. P. § 2194, *ante*, § 76.)

At a Special Term, &c.

[*Title.*]

It appearing to the court, from the verdict of the jury rendered herein on the day of , 18 , [*or*, from the proofs of the respective parties to this proceeding,] that the petitioner, , is unable to pay his debts, and that the schedule annexed to his petition is true, and that he has not been guilty of any fraud or concealment in violation of the provisions of article second of title one of chapter seventeenth of the Code of Civil Procedure, and that he has in all things conformed to the matters required of him by said article:

Now, on the verdict of the jury herein, and on all the papers and proceedings herein, and on proof of due publication and service of the order requiring the creditors of said petitioner to show cause granted herein, on the day of , 18 , and on motion of , counsel for said petitioner, .

It is ordered, that the petitioner execute to , of , as trustee, who is hereby designated as trustee for that purpose, an assignment of all his property at law or in equity, in possession, reversion, or remainder, excepting only so much thereof as is exempt by law from levy and sale by virtue of an execution.

No. 23.

ASSIGNMENT.

(See Code C. P. §§ 2194, 2195, *ante*, §§ 76, 77.)

Know all men by these presents, that I, A. B., an insolvent debtor, did present to the court a petition to be exempted from arrest [*or*, discharged from imprisonment], pursuant to the provisions of article second of title one of chapter seventeenth of

the Code of Civil Procedure, with the schedules and inventory and affidavit required by said statute, whereupon the said court made an order requiring all of my creditors to show cause, if any they had, before it, at a specified time and place, why an assignment of my property should not be made and I be exempted from arrest and discharged from imprisonment, as provided by said article, which said order to show cause was duly published and served upon each of my creditors residing in the United States; and no good cause appearing to the contrary, and it satisfactorily appearing to said court that I was unable to pay my debts and that the schedule annexed to my petition was true, and that I had not been guilty of any fraud or concealment in violation of the provisions of the said article, and that I had in all things conformed to the matters required of me by said article, and said court having thereupon directed me to execute to , as trustee, an assignment of all my property not exempt by law from levy and sale by virtue of an execution: Now, therefore [proceed as in Form No. 14].

No. 24.

DISCHARGE.

(See Code C. P. § 2195, *ante*, § 77.)

[*Title of proceeding.*]

To all to whom these presents shall come or may concern, Greeting. Whereas, , an insolvent (and imprisoned) debtor, on the day of , 18 , presented to this court his petition, duly verified on that day, praying that his estate might be assigned for the benefit of all his creditors, and that he might thereafter be exempted from arrest by reason of any debt arising upon a contract previously made [and also that he might be discharged from his imprisonment], pursuant to the provisions of article second title first of chapter seventeenth of the Code of Civil Procedure, to which petition was annexed the schedule required by law, duly verified on said day, and this court having thereupon made an order requiring all the creditors of said petitioner to show cause before it, at a time and place specified, why the prayer of the said petitioner should not be granted, which order was by the direction of this court duly published and served upon each of said insolvent's creditors, and proof thereof duly made;

Whereas, upon hearing on said petition (and by the verdict of the jury), it appeared satisfactorily to this court that the said petitioner was unable to pay his debts, that the schedule annexed to his petition was true, that he had not been guilty of any fraud

or concealment in violation of the provisions of the aforesaid article, and that he had in all things conformed to the matters required of him thereby, and no good cause appearing to the contrary, an order was made by this court directing an assignment to be made by said insolvent for the benefit of all his creditors, of all his property at law or in equity, in possession, reversion or remainder, except such as is exempt from execution to , of , the trustee designated; and, Whereas, said insolvent has, on the day of , 18 , made such an assignment and produced to this court a certificate of said trustee, duly acknowledged [*or*, proved] and certified that said insolvent has assigned to him, for the benefit of all his creditors, all his property so directed to be assigned, and all the books, vouchers and papers relating thereto, and has delivered so much thereof as is capable of delivery, and also a certificate of the county clerk of said county that such an assignment has been duly recorded in his office:

Now, therefore, know ye, that , the said insolvent [and imprisoned] debtor, is hereby granted a discharge from imprisonment, pursuant to the provisions of the aforesaid article, and it is hereby declared that the said petitioner is forever hereafter exempted from arrest or imprisonment by reason of any debt due at the time of making said assignment or contracted before that time, though payable afterwards, or by reason of any liability incurred by him by making or indorsing a promissory note, or by accepting, drawing, or indorsing a bill of exchange before the execution of such assignment, or in consequence of the payment by any party to such a note or bill of the whole or any part of the money secured thereby, whether the payment be made before or after the execution of such assignment, pursuant to the provision of said article and subject to the exceptions therein prescribed.

FORMS IN PROCEEDINGS UNDER THE "FOURTEEN DAYS ACT."

(See Chapter VI.)

No. 25.

PETITION FOR DISCHARGE FROM IMPRISONMENT ON EXECUTION.

(See Code C. P. §2203, *ante*, § 86.)

To the [court from which the execution issued, or the County Court, or, in the city of New York, the Court of Common Pleas].[1]

The petition of A. B. respectfully shows:

I. That your petitioner resides at No. , street, in , in the county of , and is a prisoner confined in [*or*, within the jail liberties of] the jail of the county of , on an execution in a civil action [here set forth a copy of the substance of the execution, or, if there are two or more executions, of each of them].

That the sum of dollars is now due and unpaid on said execution [*or*, executions; and if the aggregate exceeds $500 add, and your petitioner has been imprisoned on said executions for more than three months].

That hereto annexed is a schedule containing a just and true account of all his property, and of all charges affecting the same, as the property and charges existed at the time when he was first imprisoned, and also as they exist at the present time, together with a just and true account of all deeds, securities, books, vouchers and papers relating to the property, and to the charges thereupon.

WHEREFORE, your petitioner prays the order of this court directing the sheriff of said county to bring your petitioner before it on a day designated for that purpose, and that your petitioner may be discharged from imprisonment upon a compliance with the provisions of article third of title one of chapter seventeenth of the Code of Civil Procedure.

[*Signature.*]

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[1] See Code C. P. § 2201, *ante*, § 84.

No. 26.

SCHEDULE REFERRED TO IN THE FOREGOING PETITION.

(See Code C. P. § 2203, *ante*, § 86.)

A just and true account of all the property of A. B., an imprisoned debtor, and of all charges affecting the same, as the property and charges existed at the time when he was first imprisoned, and also as they exist at the time when the foregoing petition was prepared, together with a just and true account of all deeds, securities, books, vouchers and papers relating to the property, and to the charges thereupon.

No. 27.

AFFIDAVIT TO BE ANNEXED TO THE PETITION AND SCHEDULE.

(See Code C. P. § 2204, *ante*, § 87.)

[*Venue.*]

I, , do swear [or "affirm," as the case may be], that the matters of fact stated in the petition and schedule hereto annexed, are in all respects just and true; and that I have not, at any time or in any manner whatsoever, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property, with intent to injure or defraud any of my creditors.

[*Jurat.*] [*Signature.*]

No. 28.

NOTICE TO CREDITORS.

(See Code C. P. § 2205, *ante*, § 88.)

[*Title.*]

To [the judgment creditor].

Please to take notice, that I shall present the petition and schedules, of which copies are hereto annexed, to the Court, at a [special] term thereof to be held at the County Court House in , in the county of , on the day of , 18 , at o'clock in the noon, and I shall there and then apply to said court that the prayer of said petition be granted.

[*Date.*] [*Signature.*]

No. 29.

ORDER TO BRING PRISONER BEFORE THE COURT.

(See Code C. P. § 2208, *ante*, § 91.)

At a Special Term, &c.

[*Title.*]

A. B., having presented his petition, with the schedule required by law, to this court, praying for an order directing the sheriff of the county of to bring him, the said A. B., before this court on a day assigned for that purpose, and that the said A. B. be discharged from imprisonment upon an execution issued out of this court [*or*, the], in an action wherein is plaintiff, and the said A. B. is defendant, and due proof having been made of the service of the said petition and schedules annexed thereto, with due notice of the time and place of presentation of the same:

IT IS ORDERED, that the sheriff of the county of bring the said A. B. before this court, at a [special] term thereof to be held at the County Court House in , on the day of , 18 , at o'clock in the noon.

No. 30.

RDER DIRECTING ASSIGNMENT.

(See Code C. P. § 2208, *ante*, § 91.)

At a Special Term, &c.

[*Title.*]

A. B., having presented his petition, with the schedule required by law, to this court, praying for an order directing the sheriff of the county of to bring the said A. B. before this court on a day assigned for that purpose, and that the said A. B. be discharged from his imprisonment upon an execution issued out of this court [*or*, the], in an action wherein is plaintiff and said A. B. is defendant, and having also made affidavit as required by law; and the said order having been duly issued, and the said A. B. having been brought before this court in pursuance thereof, and the court having heard the allegations and proofs of the parties, and being satisfied that the said petition and schedule are correct, and that the petitioner's proceedings are just and fair:

IT IS ORDERED, that the said A. B. execute to , of , as trustee, who is hereby designated as trustee for that purpose, an assignment of all his property not expressly exempt by law

from levy and sale by virtue of an execution, or of so much thereof as is sufficient to satisfy the execution [*or*, executions] by virtue of which he is imprisoned.

No. 31.

DISCHARGE.

(See Code C. P. § 2212, *ante*, § 96.)

At a Special Term, &c.

[*Title.*]

It appearing to the satisfaction of the court that , the petitioner herein, is imprisoned in the county of New York, by virtue of execution in civil cause in his petition and hereinafter specified; ["and that there is due upon the said execution(s) a sum not exceeding five hundred dollars," *or*, "and that before petitioning for his discharge the said debtor had been so imprisoned under said execution(s) for three months;"] and that the said debtor had petitioned this court for his discharge from such imprisonment, under the provisions of article three title one of chapter seventeenth of the Code of Civil Procedure, on his compliance with the provisions of said article; and that due previous notice of the time and place at which such petition was presented, together with a copy of such petition and the schedule of his property, in said statute directed, were duly personally served by such debtor on ["the attorney(s) for," *or*, "the personal representative(s) of,"] the creditors, at whose suit he is imprisoned as aforesaid; and that such petition sets forth the cause of the imprisonment of the applicant, and has annexed to it a just and true schedule of all his property, and of all charges affecting the same, both as such property and charges existed at the time when he was first imprisoned, and as they existed at the time of preparing such petition, together with a just and true account of all deeds, securities, books and vouchers and papers relating to the said property, and the charges thereon; and that at the time of presenting such petition there was annexed thereto, and sworn to by the said applicant, the affidavit required by section 2204 of the said article, to the effect that the matters of fact stated in the petition and schedule of his property are in all respects just and true; and that he has not at any time or in any manner whatsoever disposed of or made over any part of his property [not exempt by express provision of law from levy and sale by virtue of an execution] for the future benefit of himself or his family, or with an intent to injure or defraud any of his creditors; and that the said affidavit is true; and that upon the presenting of such petition and due proof being made of the

service of a copy thereof and of the schedule thereto annexed, with the notice in said statute required, the court did duly order the applicant to be brought before it on a day assigned; and that the said applicant was accordingly brought before the court on that day; and that on such day, and such other days as the court did duly appoint, the court proceeded in a summary way to hear and determine the allegations and proofs of the parties; and that the court, being satisfied that the petition and schedule of the applicant were correct, and that his proceedings were just and fair, did order an assignment to be made of all his property [except the articles which were by law exempt from execution]; and that the court did appoint an assignee, and that the assignment was duly made to the person so appointed; and that said assignment was also recorded by the clerk of the county of New York [in which county said assignment was executed] upon its having been acknowledged and proved in the same manner as deeds of real estate; and such application having ["furnished satisfactory evidence of the actual delivery to the assignee so appointed of all the property so directed to be assigned," *or*, as the case may be, "given security for the future delivery to the assignee so appointed of all the property so directed to be assigned, which the court has approved,"] and the said petitioner having in all things complied with the provisions of the said article, and it further appearing that the said debtor is not barred from obtaining his discharge under the said execution:

Now, after hearing , on behalf of the said petitioner, and , on behalf of said judgment-creditors; and on motion of , Esq., attorney for said petitioner, it is,

ORDERED, that the applicant be discharged from his imprisonment, by virtue of the said execution, issued in the said civil cause, specified in said petition, to wit, the execution issued out of the , wherein the said , judgment-debtor, and , judgment-creditor.

FORMS OF GENERAL ASSIGNMENTS, AND PROCEEDINGS THEREUNDER.

No. 32.

Assignment by Individual (without Preferences, except Wages).

This indenture, made this day of , in the year one thousand eight hundred and , between , residing at No. in the of in the State of , now carrying on the business of , at No. in the of , in the State of , part of the first part, and part of the second part, Witnesseth, That whereas the part of the first part indebted to divers persons in sundry sums of money, which unable to pay in full, and desirous of providing for the payment of the same, so far as is in power, by an assignment of all property for that purpose:

Now, therefore, the said part of the first part, in consideration of the premises, and of the sum of one dollar to paid by the part of the second part, upon the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over, unto the part of the second part successors and assigns, all and singular the lands, tenements, hereditaments, appurtenances, goods, chattels, stock, promissory notes, claims, demands, property and effects of every description belonging to the part of the first part, wherever the same may be, *except* such property as is exempt by law from levy and sale under an execution. To have and to hold the same, and every part thereof, unto the said part of the second part, successors and assigns:

In trust, nevertheless, to take possession of the same, and to sell the same with all reasonable dispatch, and to convert the same into money, and also to collect all such debts and demands hereby assigned as may be collectable, and with and out of the proceeds of such sales and collections: (1) First to pay and discharge all the just and reasonable expenses, costs and charges of executing this assignment, and of carrying into effect the trust hereby created, together with the lawful commission of the part of the second part for services in executing said trust; (2) then, before the payment of any other debt of the part of the first part, to pay the wages or salaries actually owing to the employees of the part of the first part at the time of the execution of this assignment, in full; and should the assets of the assignor

not be sufficient to pay in full all these claims, said assets shall be applied to the payment of the same pro rata to the amount of each of such claims; (3) then to pay and discharge in full, if the residue of said proceeds is sufficient for that purpose, all the debts and liabilities now due or to grow due from the said part of the first part, with all interest moneys due or to grow due thereon; and if the residue of said proceeds shall not be sufficient to pay the said debts and liabilities and interest moneys in full, then to apply the said residue of said proceeds to the payment of said debts and liabilities ratably and in proportion.

And if, after the payment of all the said debts and liabilities in full, there shall be any remainder or residue of said property or proceeds, to repay and return the same to the said part of the first part, executors, administrators or assigns.

(4) And, in furtherance of the premises, the said part of the first part do hereby make, constitute and appoint the said part of the second part true and lawful attorney irrevocable, with full power and authority to do all acts and things which may be necessary in the premises to the full execution of the trust hereby created, and to ask, demand, recover and receive of and from all and every person or persons, all property, debts and demands due, owing and belonging to the said part of the first part, and to give acquittances and discharges for the same; to sue, prosecute, defend and implead for the same; and execute, acknowledge and deliver all necessary deeds, instruments and conveyances. And the said part of the first part hereby authorize the said part of the second part to sign the name of the said part of the first part to any check, draft, promissory note or other instrument in writing, which is payable to the order of the said part of the first part, or to sign the name of the part of the first part to any instrument in writing, whenever it shall be necessary so to do, to carry into effect the object, design and purpose of this trust.

The said part of the second part do hereby accept the trust created and reposed in by this instrument, and covenant, and agree to, and with the said part of the first part that will faithfully and without delay execute the said trust, according to the best of skill, knowledge and ability.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

STATE OF..... }
COUNTY OF..... } *ss.*

On the day of , in the year one thousand eight hundred and , before me personally came to me known, and known to me to be the individuals described in, and who executed the foregoing instrument, and severally acknowledged that they executed the same.

No. 33.

Copartnership Assignment. Assignment by Copartners as a Firm and Individually (without Preference).

This indenture, made the day of , in the year of our Lord one thousand eight hundred and , between , residing at No. Street, in the city of , and , residing at No. Street, in the city of , who have hitherto composed the partnership of , hitherto doing business at , as (stating kind of business) parties of the first part, and , of , party of the second part: Witnesseth, that whereas the said parties of the first part are justly indebted to sundry persons in divers and sundry sums of money, and being unable to pay the same in full, are desirous of making an equitable distribution of their property and effects among their creditors: Now, therefore,

First, The parties of the first part, in consideration of the premises, and the sum of one dollar to them in hand respectively paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, delivered and conveyed, and by these presents do grant, bargain, sell, assign, deliver over and convey unto the party of the second part, his successors and assigns, all and singular the estate and property, real and personal, of every kind and nature, and wheresoever the same may be, of the said parties of the first part, which is held or owned by them as such copartnership firm as aforesaid. To have and to hold the same and every part and parcel thereof, with the appurtenances, to said party of the second part, his successors and assigns. In trust, nevertheless, for the following uses and purposes;

Second. The said party of the second part shall forthwith take possession of all and singular the estate, property and effects hereby above assigned, transferred and conveyed, and set over, or intended so to be, and shall, with all reasonable diligence, sell and dispose of the same, and convert the same into money; and shall collect any and all bills, promissory notes, bonds, accounts, choses in action, claims, demands, and money due or owing the said parties of the first part as such copartnership, so far as the same shall prove collectible.

Third. Out of the proceeds of such sales, collections, estate and property, the said party of the second part is authorized to pay and retain all reasonable costs, charges, and expenses of making, executing, and carrying into effect this assignment in this behalf, including a lawful commission to the party of the second

part for his services in executing and carrying out the trust created in this behalf in this assignment.

Fourth. The party of the second part is directed out of the residue of the said proceeds of such sales, collections, estate, and property, to pay before the payment of any other debts of the assignors any and all wages and salaries actually owing to the employees of the said parties of the first part at the time of the execution of these presents, and should the assets of the parties of the first part not be sufficient to pay in full all the said claims, then to apply the same to the payment of the said claims ratably and in proportion to the amount of each such claim, and after the payment of the same in full.*

Fifth. The said party of the second part is directed to pay out of the residue of the said proceeds of such sales, collections, estate and property, if there should be sufficient therefor, to each and every of the creditors of the said parties of the first part, as such partnership or firm, the full sum that may be justly due and owing to them respectively from such partnership or firm, without any priority or preference whatsoever, except as hereinbefore provided; and if the residue of the proceeds of such sales and collections, estate and property, shall not be sufficient to pay and satisfy the debts of each and all of the creditors of the said partnership or firm in full, then the said party of the second part is directed, out of the said residue of the proceeds, to pay the said creditors ratably and in proportion to the amount due and owing to each of them respectively.

Sixth. With and out of the residue and remainder of the said proceeds, if any shall remain after paying all the copartnership debts, the party of the second part is directed to pay and discharge all the private and individual debts of the parties of the first part, or either of them, whether due or to grow due, provided the respective amounts of the individual debts of each of said parties does not exceed his portion of the surplus that may remain after paying all the partnership debts; and if it should, then his interest in said surplus is to be divided *pro rata* among his individual creditors in proportion to their respective demands, it being understood that no part of the said surplus which will belong to each of said individual parties of the first part respectively after the payment of the copartnership debts, is to be made liable for the individual debts of the other of them.

Seventh. And whereas the said parties of the first part are respectively justly indebted to sundry persons in divers and sundry sums of money, and are respectively unable to pay the same in full, and are respectively desirous of making an equitable distribution of their property and effects among their creditors, now, therefore,

Eighth. The parties of the first part, in consideration of the premises and of the sum of one dollar to each of them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have respectively granted, bargained, sold, assigned, delivered over and conveyed, and by these presents do respectively grant, bargain, sell, assign, deliver over and convey unto the party of the second part, his successors and assigns, all and singular the estate and property, real and personal, of every kind and nature, and wheresoever the same may be, of the said parties of the first part, which is held and owned by them respectively as their separate and individual property, to have and to hold the same and every part and parcel thereof with the appurtenances, to the party of the second part, his successors and assigns, in trust nevertheless to and for the following uses and purposes:

Ninth. The party of the second part shall forthwith take possession of all and singular the estate, property and effects hereby lastly above assigned and conveyed or intended so to be, and shall with all reasonable diligence sell and dispose of the same, and convert the same into money, and shall collect any and all claims of every kind and nature hereby lastly above assigned, due or owing to the parties of the first part respectively, so far as the same shall prove collectible.

Tenth. Out of the respective estates, property and claims of the said parties of the first part hereby lastly above assigned, or the proceeds thereof, the said party of the second part is authorized to pay and retain all reasonable costs, charges and expenses of carrying into effect this assignment in this behalf out of the respective interests assigned, including a lawful commission to the party of the second part, for his services in executing and carrying out this trust in this behalf by this instrument.

Eleventh. The party of the second part is directed, out of the residue and remainder of said respective individual estates, property and proceeds, to pay before the payment of any other debts of said respective parties of the first part any and all wages and salaries actually owing to the employees of each of the said parties of the first part respectively, at the time of the execution of these presents, and should the respective assets of the said parties of the first part not be sufficient to pay in full all the said respective claims, then to apply the said respective assets to the payment of the said claims owing by the said parties of the first part respectively *pro rata* to the amount of each such claims, and after the payment of the same in full.

Twelfth. The party of the second part is directed, out of the residue and remainder of said individual estates, property and proceeds, to pay and discharge all the private and individual debts of the parties of the first part, or either of them, whether

due or to grow due, as follows: To apply and devote the estate, property and proceeds belonging to each of the said parties of the first part respectively, to the payment of his individual debts, so that no part of the estate, property or effects belonging to either of the parties of the first part, individually, shall be devoted or appropriated to the payment of the individual debts of the other of them.

Thirteenth. If the individual estate or property of either or any of the parties of the first part shall be insufficient to pay his unpreferred individual debts in full, then the party of the second part is directed to apply the same to the payment of said debts, ratably and in proportion to their respective amounts.

Fourteenth. If the individual property and estate of the parties of the first part, or any or either of them, shall be more than sufficient to pay their respective individual debts and liabilities, then any surplus that may remain is to be applied by the party of the second part to the payment and liquidation of any of the partnership debts or any balance thereof which may remain unpaid out of the aforesaid partnership property and effects, said surplus to be applied to the payment and liquidation of said partnership debts, as hereinbefore provided.

Fifteenth. The parties of the first part hereby except from the foregoing assignment, and from the effect thereof, all such property as is by the laws of the United States of America, or otherwise, exempt to them, or any or either of them, from levy and sale under execution, or otherwise, for payment of debts.

Sixteenth. And in furtherance of the premises the said parties of the first part do hereby make, constitute and appoint the said party of the second part their true and lawful attorney, irrevocable, with full power and authority to do all acts and things which may be necessary in the premises to the full execution of the trust hereby created, and to ask, demand, recover and receive of and from all and every person or persons, all property, debts and demands due, owing and belonging to the said parties of the first part, or each or any of them, and to give acquittances and discharges for the same, to sue, prosecute, defend and implead for the same, and to execute, acknowledge and deliver all necessary deeds, instruments and conveyances. And the said parties of the first part do hereby authorize the party of the second part to sign the copartnership name of the parties of the first part to any check, draft, promissory note or other instrument in writing for the payment of moneys, which is payable to the order of the parties of the first part in their copartnership name.

And to sign the copartnership name to any instrument in writing of any name, kind or nature which may be necessary to

more fully carry into effect the object, design and purpose of this trust: And the said parties of the first part respectively in their individual capacities do hereby make, constitute and appoint the party of the second part the attorney of each and every of them, and do hereby authorize him to sign the name of each or any of them to any check, draft, promissory note or other instrument in writing which is payable to the order of each or any of the parties of the first part, or to sign the name of each or any of the parties of the first part, to any instrument in writing whenever it shall be necessary so to do to carry into effect the object, design and purpose of this trust.

The party of the second part doth hereby accept the trusts and each of them created and reposed in him by this instrument, and covenants and agrees to and with the said parties of the first part, and each of them, that he will faithfully and without delay execute the trusts created according to the best of his skill, knowledge and ability.

In witness whereof, the parties to these presents have hereunto set their hands and seal the day and year first above written.

[Acknowledgment as in Form 32.]

No. 34.

ASSIGNMENT BY COPARTNERSHIP, WITH OR WITHOUT PREFERENCES.

This indenture, made this day of , one thousand eight hundred and ninety , between , residing at , in the city of New York, and , residing at No. Street, in the city of New York, heretofore carrying on business as , at No. , in the city of New York, under the firm name of , parties of the first part, and , of the city of , party of the second part: Witnesseth, That,

Whereas the said parties of the first part are indebted, as copartners, to sundry persons in various sums of money, which they are unable to pay at maturity; and

Whereas the said parties of the first part are desirous of applying all the firm property and assets belonging to them as such copartnership to the payment of the debts of said firm,

Now, therefore, the said parties of the first part, for and in consideration of the sum of one dollar to each of them in hand, paid by the party of the second part at or before the delivery of these presents, have sold, assigned, transferred, granted, bargained, and conveyed unto the said party of the second part, his successors and assigns, and by these presents do sell, assign, transfer,

grant, bargain, and convey unto the said party of the second part, his successors and assigns, all and singular, the estate and property, real and personal, of every kind and nature, and wheresoever the same may be, of the said parties of the first part, which is held or owned by them as such copartnership firm, as aforesaid. To have and to hold the same, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his successors and assigns, in trust nevertheless for the following uses and purposes:

(1) To receive and take possession of all and singular the estate and property above assigned, transferred and conveyed, and to collect and get in all bills, promissory notes, accounts, choses in action, claims, demands and moneys due or owing the said parties of the first part as such copartnership firm, and with all reasonable diligence to sell the real and personal property hereinbefore conveyed and assigned, and convert the said assigned property and estate into money.

(2) And out of the proceeds to pay and discharge all reasonable costs, charges, and expenses of carrying out the trust hereby created, including the lawful commission to the party of the second part for his services as assignee under the assignment.

(3) And out of the residue of the proceeds to pay the wages or salary actually owing to the employees of the parties of the first part as such copartnership firm at the time of the execution of this assignment before any other debts; and should the assets of the parties of the first part hereby assigned not be sufficient to pay all the said wages or salaries in full, then to apply the same to the payment of the said wages or salaries *pro rata* to the amount of each claim for wages or salaries.

(4) And * out of the residue of said proceeds, to pay in priority, so far as such priority is permitted by the laws of the State of New York, the amount due or to become due [here insert a brief description of the debt or debts preferred. If such debts are to be paid in priority, as between each other, the order of payment should be specified. If the intention is that the one-third of the assets which can be applied to the payment of preferred debts should be applied *pro rata*, if insufficient to pay them in full, then add].

[But should the said residue of the proceeds appliable thereto not be sufficient to pay in full the amount due or to become due on said debts so preferentially to be paid, then the said assignee shall apply the same to the payment of the said notes, ratably and in proportion]; but in no event shall the preference hereby created exceed the amount of one-third in full of the assigned estate left after deducting the wages or salaries and the costs and expenses of executing the trust; and should such one-third be in-

sufficient to pay the said preferred debts in full, the same shall be applied to the payment thereof *pro rata* in proportion to the amount due to each of said preferred creditors.

(5) After payment of the debts hereinbefore provided for in the manner hereinbefore stated, the residue of the said proceeds shall be applied by the party of the second part to the payment in full if all and singular the debts and liabilities now due, or to grow due from the said parties of the first part as co-partners, and if the residue of said proceeds shall not be sufficient to pay the said debts and liabilities in full, then to apply the said residue of said proceeds to the payment of said debts and liabilities ratably and in proportion.

(6) And in furtherance of said premises, the said parties of the first part do hereby make, constitute, and appoint the party of the second part their true and lawful attorney, irrevocable, with full power and authority to do all acts and things which may be necessary in the premises, to the full execution of the trust hereby created, and to ask, demand, recover, and receive of and from all and every person or persons all property, debts, or demands due, owing and belonging to said parties of the first part as such partners, and give acquittance and discharge for the same; to sue, prosecute, defend, and implead for the same, and to execute, acknowledge, and deliver all necessary deeds, instruments, and conveyances, and to sign the copartnership name of the parties of the first part to any check, draft, promissory note, or other instrument in writing for the payment of moneys which is payable to the order of the parties of the first part, and to sign the copartnership name to any instrument in writing of any name, kind, or nature which may be necessary to more fully carry into effect the object, design, and purpose of this trust.

(7) The party of the second part doth hereby accept the trust created and reposed in him by this instrument, and covenants and agrees to and with the said parties of the first part, and each of them, that he will faithfully and without delay execute the trust created according to the best of his skill, knowledge, and ability.

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

In the presence of

Seal.
Seal.
Seal.

CITY AND COUNTY OF NEW YORK } *ss.*

On the , before me personally came , to me severally known, and known to me to be the persons described

in and who executed the foregoing instrument, and severally acknowledged that they executed the same.

No. 35.

ASSIGNMENT WITH PREFERENCE.

[As in Forms Nos. 32, 33 and 34, to the *, and then insert:]

Out of the residue of said proceeds to pay in priority so far as such priority is permitted by law all and singular the debts set forth and enumerated in a schedule hereto annexed, marked Schedule "A," in full, if the residue of said proceeds applicable thereto shall be sufficient for that purpose, and if the same be not sufficient, then the said party of the second part shall apply such residue of said proceeds to and in the payment of the said debts set forth in said schedule, ratably and in proportion to the respective amounts thereof.

After payment in full of all the debts designated in Schedule A, as above directed, the said party of the second part shall pay all and singular the debts set forth and enumerated in a schedule hereto annexed, marked Schedule "B," in full, if the said remaining proceeds shall be sufficient for that purpose, and if the same be not sufficient, then the said party of the second part shall apply the said remaining proceeds to and in payment of the said debts so set forth and enumerated in Schedule B ratably and in proportion to the respective amounts thereof. [When there are other classes of preferred creditors, the same formula may be repeated, the various classes of creditors in their order of priority being designated by schedules. After stating preferences, the balance must be applied to the payment of the remaining debts.] And after fully paying and discharging all the aforesaid debts as above provided, the said party of the second part shall pay all and singular all other debts and liabilities of the party of the first part, and if such residue be not sufficient to pay and discharge all such debts and liabilities in full, then the said party of the second part shall distribute the said proceeds among all the aforesaid other creditors of the said party of the first part, ratably and in proportion. [Continue as in Form 32, from the **.]

SCHEDULE A.

Referred to and forming part of the foregoing assignment, containing a statement of creditors, preferred in the said assign-

ment, the general nature of the indebtedness to them, and the amount thereof, to wit:

To of , the sum of dollars, being the amount due him for money lent and advaneed by him to the assignors, , with interest on , from , 18 , and on thereof from , 18 ; the dates on which said sums were lent.

SCHEDULE B.

Referred to and forming part of the foregoing assignment, containing a statement of creditors, preferred in said assignment, the general nature of the indebtedness to them, and the amount thereof.

To of , the sum of dollars, being the amount due him for money lent and advanced on or about the day of , 18 , with interest from the day of , 18 , up to which date interest has been paid.

No. 36.

TITLE TO INVENTORY.

(See §§ 315–321.)

The following is a full and true inventory of all the estate, both real and personal, of the copartnership firm of C. B. & Co., in law and equity, and the incumbrances existing thereon, and all the vouchers and securities relating thereto, and the value of such estate, according to the best knowledge and belief of the individuals composing said copartnership:

No. 36.

Inventory.

Description of Property and Where Situated.	Incumbrances.	Estimated Market Value Above All Incumbrances.	Vouchers and Securities.

No. 36.

Claims and Accounts due.

Name of Debtor.	Amount of Claim.	Good.	Doubtful.	Bad.	Remarks.

No. 36.

Schedules.

Name of Creditor.	Residence.	Amount Due to Creditor and Nature Thereof.	Consideration of Indebtedness, and When Contracted.	Judgment, Mortgage, Collateral or Other Security for Indebtedness.

No. 37.

AFFIDAVIT TO INVENTORY AND SCHEDULES.

(See § 320.)

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } *ss.*

A. B., of , and C. D., of , copartners, members of the copartnership firm of A. B. & Co., doing business in the city of New York, being severally sworn, say, and each of them for himself says, that he has read the foregoing inventory and schedules, and that the same are in all respects just and true according to the best of his knowledge and belief.

Sworn to before me this day of , 18 .

The rules of the court of common pleas for the city of New York in reference to the making and filing of the schedules are as follows:

8 *Schedules.* The schedule of liabilities and assets required to be filed by the assignor or assignee shall fully and fairly state the nominal and actual value of the assets, and the cause for the difference, and a separate affidavit will be required which shall fully explain the cause of such difference. If required, the affidavits of disinterested experts as to such value may be furnished.

9. *Signing of.* Where there may be more than one sheet of paper necessary to contain the schedules, each page shall be signed by the person or persons, verifying the same. The sheets of paper on which the schedules are written shall be securely fastened before the filing thereof, and shall be indorsed with the full name of the assignor and assignee, and, when filed by an attorney, shall also be indorsed with his name and business address.

10. *Filing by Assignee.* Should the schedules be filed by the assignee, there must be a full affidavit made by such assignee and some disinterested expert, showing the nature and value of the property assigned.

11. *Name and Residence.* The name, residence, occupation and place of business of the assignor, and name and place of residence of the assignee, may be incorporated in the affidavit, or annexed to the schedules.

12. *Recapitulation.* There shall be a recapitulation at the end of the schedules as follows:

Debts and liabilities amount to $
Assets nominally worth $
Assets actually worth $

13. *Contingent.* Contingent liabilities shall appear on a separate sheet of paper.

No. 38.

ASSIGNEE'S BOND ON ASSIGNMENT.

(See § 326.)

Know all men by these presents, that we, , residing at No. , in the , and , residing at No. , in the

, and , residing at No. , in the , are held and firmly bound unto the people of the state of New York, and their assigns, in the sum of dollars, lawful money of the United States of America, to be paid to the said people or their assigns; for which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals.

Dated the day of , one thousand eight hundred and

Whereas, ha made an assignment of property, in trust to the above bounden , for the benefit of creditors, dated the day of , one thousand eight hundred and , recorded on the day of , 18 , in the office of the clerk of the county of .

Now, therefore, the condition of this obligation is such that if the above bounden shall faithfully execute and discharge the duties of such assignee, and duly account for all moneys received by him as such assignee, then this obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of .

County of , *ss.:*

, one of the sureties to the foregoing bond, being duly sworn, says, that he is a resident and holder within this State, and is worth the sum of dollars over all his debts and liabilities, and exclusive of property exempt by law from execution.

Sworn to before me, this day of , 18 .

County of , *ss.:*

, one of the sureties to the foregoing bond, being duly sworn, says, that he is a resident and holder within this State, and is worth the sum of dollars over all his debts and liabilities, and exclusive of property exempt by law from execution.

Sworn to before me, this day of , 18 .

, *ss.:*

I certify that on this day of , 18 , before me personally appeared the within named , known to me to be the individuals described in and who executed the within bond, and severally acknowledged that they executed the same.

I hereby approve of the within bond, and of the sufficiency of the sureties therein. (Signature of judge.)

No. 39.

PETITION FOR LEAVE TO FILE PROVISIONAL BOND.

(See § 331.)

In the matter of the general assignment of to for the benefit of creditors.

To Hon. ,

The petition of [*assignee*], respectfully shows, that on the day of , 18 , A. B., of the city and county of New York, executed a general assignment for the benefit of creditors to your petitioner as assignee, which said general assignment was dated on the day of , 18 , and was, on the day of , 18 , duly recorded in the office of the clerk of the city and county of New York, where the said [*assignor*], then resided [*or*, carried on business, or, if a firm, where the principal place of business of said copartnership was situated]. That more than twenty days have elapsed since the date of said assignment, and that [*assignor*], therein named, has failed to present an inventory or schedule as required by law, nor has any inventory or schedule of the said assigned estate been made or delivered, or filed herein.* That your petitioner is unable to prepare and present such inventory and schedule at the present time, for the reasons [here state the reasons which have prevented the preparation of the inventory and schedule]. That your petitioner is desirous of fully qualifying as such assignee by giving a bond for the faithful discharge of his duties as required by law, and that it is desirable that he should give said bond and proceed to the further execution of his trust before the said inventory and schedule can be properly prepared and filed, for the reasons [here state the reasons]. That your petitioner has made diligent inquiry to ascertain the extent and character of said assigned property, and that the property covered by said assignment is, as far as your petitioner has been able to ascertain the same, as follows [here state the general character of the property, with such detail as the assignee has been able to obtain], and that the said property, according to your petitioner's information and belief, is of the actual value of dollars.

That the outstanding amounts due to the said assignor, as appears from his books, are of the nominal amount of dollars, and that the actual value thereof is, as your petitioner is informed and believes, not to exceed the sum of dollars. That the cause of the difference between the actual and nominal value of said claims is as follows [here state the character of the

claims regarded doubtful or bad]. That the total value of the assets so assigned to your petitioner, as your petitioner is informed and believes, will not exceed the sum of dollars. That no previous application has been made in the matter of this assignment for leave to file a bond.

Wherefore your petitioner prays, that he may have leave to file a provisional bond for the faithful discharge of his duties as such assignee, until such time as he may be able to present the schedule or inventory of said assigned estate, pursuant to the statute in such cases made and provided.

[Verification in usual form.]

Affidavits of experts as to value should also be presented.

No. 40.

ORDER GIVING LEAVE TO FILE BOND PROVISIONALLY.

[Title of the matter as in Form 39.]

On reading and filing the petition of , verified on the day of , 18 , and the affidavit of , verified on the day of , 18 , by which it appears that the actual value of the assets that will come to the hands or control of the petitioner by virtue of the assignment therein mentioned, is dollars, and on motion of M. N., of counsel for said petitioner.

It is ordered, That the prayer of said petition be granted; that the said petitioner have leave to file a provisional bond to the People of the State of New York for the faithful discharge of his duties as assignee, and for the due accounting for all moneys received by him as assignee of the estate of C. D., under the general assignment executed by the said C. D. to the said A. B., and dated on the day of , 18 , in the penal sum of dollars, and with sufficient sureties to be approved by [one of the judges of this court]; and that, upon the filing of the inventory and schedule of said assigned estate, the said assignee do make and file a bond, with like condition, in such amount as may be then ordered or directed.

No. 41.

Petition Extending Time to File Inventory and Schedule by Assignee.

(See § 324.)

To Hon.

[As in Form No. 39, to the asterisk, continuing:]

That thirty days from the date of said assignment will expire on the day of , 18 , and that your petitioner has

been unable to make and deliver the inventory and schedule required by law, for the reasons [here state the reasons which have prevented the preparation of the inventory and schedule].

[That your petitioner has given a provisional bond as assignee pursuant to an order made in this proceeding on the day of , 18 .]

That no previous application has been made in the matter of this assignment for leave to extend the petitioner's time to make and deliver such inventory and schedule.

Wherefore, your petitioner prays that he may be allowed days further time within which to make and file the inventory and schedule required by law in this matter.

[Verification.]

No. 42.

Order Extending Time for Assignee to Make and Deliver Inventory and Schedules.

[Title of proceeding.]

On the annexed affidavit of , the assignee herein, verified the day of , 18 , whereby it appears that, on the day of , 18 , made and executed, in due form of law, a general assignment of all his property to said , and that the time within which said assignor should have filed the inventory and schedules of his said estate according to law has expired, and that he has not filed the same. And it further appearing thereby that the time within which said assignee should by law make and file said inventory and schedule will expire this day, and that the said assignee has been unable to make and file the same.

Now, upon motion of , Esq., of counsel for said assignee,

It is Ordered, that the said assignee herein be, and he hereby is, allowed days, from date hereof, further time within which to make and file the inventory and schedule of said assigned estate.

Dated, New York, , 18 .

No. 43.

Assignee's Petition for Examination of Assignor or Third Person to Enable Petitioner to Prepare Inventory and Schedules.

[Title of the matter as in Form 39.]

I. That on the day of , 18 , [name of assignor] then residing [*or*, doing business at —*or*, if a firm, where

principal place of business was] at , made and executed in due form of law a general assignment to your petitioner for the benefit of his creditors, which said assignment was, on the day of , 18 , duly recorded in the office of the clerk of the county of , and that your petitioner has accepted the trust in said assignment created, and has entered upon the discharge of his duties as such assignee.

II. That the said [assignor] has wholly omitted and neglected [*or*, refused, although duly requested on the day of , 18 , by your petitioner] to make and deliver an inventory of his said assigned estate, and a schedule of his creditors as required by the statute.

[If an examination of a third person is desired, add circumstances, for instance, thus:]

III. That your petitioner is informed and believes that E. F., residing at , who was connected in business with the said C. D. as book-keeper, is possessed of information in reference to the extent and value of the stock in trade of said C. D., and as to the amounts due to him, and has in his possession or under his control the books kept by the said C. D. in his business as , which information is material to the preparation of said inventory and schedules, and that a production of said books is likewise essential for the preparation of the same.

IV. That no previous application herein has been made for any order such as is asked below.

Wherefore your petitioner prays, that an order may be issued directing that said [name of assignor] and [E. F.] appear and submit to an examination on oath and disclose upon oath any knowledge or information that he [*or*, they—*or*, either of them] may possess necessary to the proper making of the inventory and schedule required by law, and that the said may be required to produce, upon such examination, any and all books containing entries relating to the business of said C. D. and now in his possession or under his control, and especially [here insert a description of the particular books so far as known].

[Signature.]

[Date.]

[Verification.]

No. 44.

ORDER FOR EXAMINATION OF ASSIGNOR OR THIRD PERSON.

[Title of the matter of, as in Form 39.]

On reading and filing the petition of , verified on the day of , 18 [and the affidavit of C. D., verified

the day of , 18], and on application of M. N., of counsel for said petitioner.

Ordered, that [name of assignor] and [E. F.] be and appear before me [*or*, one of the judges of the Court of Common Pleas for the city and county of New York] at the court house in the , on the day of , 18 , at o'clock in the noon, and submit to examination then and there to disclose, on oath, any knowledge or information they or either of them may possess necessary to the proper making, as required by law, of an inventory and schedule of the estate assigned by the said [assignor] to the said [assignee] by general assignment dated on the day of , 18 , and of the creditors of said [assignor].

[If a production of books and papers is required, add :]

And the said is hereby directed to produce before me [*or*, before such judge], at said time and place, all the books and papers of said assignor [or either of them], in his possession or under his control, containing any entries in relation to the business or property of said assignor [or either of them], and especially [here designate the books and papers as in the petition].

No. 45.

Affidavit to Obtain Order Authorizing Assignee to Advertise for Claims.

(See § 421.)

COURT OF COMMON PLEAS

FOR THE CITY AND COUNTY OF NEW YORK.

In the Matter of the General Assignment of A. B. to C. D., for the Benefit of Creditors.

CITY AND COUNTY OF NEW YORK, *ss.*

C. D., being duly sworn, says that on the day of , 18 , A. B., above named, made and executed, in due form of law, a general assignment of all his property to deponent, as assignee, for the benefit of his creditors, which said assignment was, on the day of , duly recorded in the office of the clerk of the city and county of New York, where said A. B. then resided and still resides ; that a bond on the part of deponent as such assignee, approved by one of the judges of this court, was on the day of duly filed, and that deponent has accepted said trust, and entered upon the discharge of his duties as such assignee.

Deponent further says [that none of the creditors of the said

A. B., entitled to share in the distribution of the said trust estate, reside out of the State of New York], *or* [that deponent has reason to believe that certain of the creditors of the said A. B., entitled to share in the distribution of said estate, reside out of the State of New York].

Sworn to before me this day of , 18 .

C. D.

No. 46.

ORDER OF PUBLICATION OF NOTICE TO CREDITORS.

COURT OF COMMON PLEAS.

FOR THE CITY AND COUNTY OF NEW YORK.

[*Title as above.*]

On the annexed affidavit of C. D., and on application of C. D., assignee of the estate of A. B., in trust for the benefit of the creditors of said A. B., and it appearing to my satisfaction [that none of the creditors of the said A. B., entitled to share in the distribution of the said trust estate, reside out of the State of New York], *or* [that certain of the creditors of the said A. B. entitled to share in the distribution of the said trust estate reside out of the State of New York] :

Ordered, that the said C. D., assignee of the said trust estate, be and he hereby is authorized and empowered to advertise by publication for creditors to present to him their claims against the said A. B., with the vouchers duly verified, on or before a day to be specified in said advertisement or notice, not less than thirty days after the date of the last publication of such notice, which said advertisement or notice shall be published once in each week, for six successive weeks, in the newspaper, published in the county of , where said assignment was made; [*and where creditors reside out of the State, add :*] and also once in each week, for six successive weeks, in the , the official newspaper of this State.

[This order should be signed by the county judge or judge of Court of Common Pleas, and filed in the office of the clerk of the county where the assignment is recorded.]

No. 47.

NOTICE TO CREDITORS.

In pursuance of an order of Hon. , county judge of county [*or*, one of the judges of the Court of Common Pleas for the city and county of New York], notice is hereby

given to all persons having claims against [*assignors*], lately doing business in the city of New York under the firm name of , to present the same, with the vouchers thereof duly verified, to the subscriber [*assignee*], who has been duly appointed assignee of said [*assignors*], for the benefit of their creditors, at his office, No. street, in the city of New York, on or before the day of , 18 .

Dated New York, the day of , 18 .

———————, *Assignee.*

[*The day named in the notice must be not less than thirty days after the date of the last publication.*]

No. 48.

PROOF OF DEBT.

STATE OF , County of , *ss.*

, being duly sworn, doth depose and say: That he is ; that the annexed statement of the account of , lately doing business at , in the State of , is just, true and correct; that there is now due the sum of dollars; that no part thereof has been paid or satisfied, and that there are no set-offs or counter-claims thereto to the knowledge or belief of deponent.

Sworn to before me this day of , 18 .

No. 49.

Petition for Leave to Compromise a Debt Due the Estate.

(See § 377.)

[*Title.*]

To Hon.

The petition of A. B., of , respectfully shows:

That on the day of , 18 , C. D., residing at [*or*, who carried on business at —*or*, if a firm, whose principal place of business was at], made and executed, in due form of law, a general assignment to your petitioner for the benefit of his creditors, which said assignment was, on the day of , 18 , duly recorded in the office of the clerk of county.

That your petitioner accepted said assignment and entered upon the execution of said trust.*

That among the property so assigned to your petitioner is a certain claim against the firm of E., F. & Co., of ,

amounting, as appears by the schedules filed by the said C. D., and from his books, to the sum of dollars.

That on or about the day of , 18 , the said firm of E., F. & Co. failed and suspended business, and have proposed to their creditors a settlement of forty cents on the dollar; that your petitioner has examined into the statement and affairs of said firm; that the total liabilities of said E., F. & Co. amount to $, and their assets, to the best of deponent's knowledge, do not exceed the sum of $, and that the said proposition of settlement appears to your petitioner to be just and fair.

Wherefore your petitioner prays your Honor's instruction and direction in the premises, as to whether your petitioner shall accept the said offer of composition, and shall compound the said indebtedness upon the terms hereinbefore stated, etc.

Dated,

No. 50.

Order for Leave to Compromise a Debt Due the Estate.

(See § 377.)

At a Term, etc.

[*Title.*]

Upon reading and filing the petition of A. B., verified on the day of , 18 , and on application of X. Y., of counsel for said petitioner, It is Ordered, that the said A. B. be and he is hereby authorized to settle and compound the indebtedness of E., F. & Co. due to the assigned estate of C. D., upon receipt of 40 per cent. of the said indebtedness [or direct reference to take testimony and report].

No. 51.

PETITION FOR CITATION FOR FINAL ACCOUNTING.

(See § 454.)

PETITION BY ASSIGNEE.

In the Matter of Final Accounting of , as Assignee of the Estate of A. B., under a General Assignment for Benefit of Creditors.

To the Court of Common Pleas for the City and County of New York:

The petition of the above-named assignee respectfully shows :

I. That on the day of , A.D. 18 , A. B., residing in the city, county, and State of New York, at No. , Street, executed in due form a general assignment to your petitioner for the benefit of creditors, and that the petitioner duly accepted said assignment and trust.

II. That said assignment was recorded in the office of the clerk of the city and county of New York on the day of its execution, and petitioner qualified as such assignee and entered upon the execution of his trust.

III. That the inventory and schedules, as required by law, were made and filed by your petitioner on the day of , 18 , in the office of the clerk of New York ; and that thereafter petitioner gave a bond as such assignee in the form, for the sum and approved as required by the statutes of New York.

IV. That upon the prayer of this petitioner an order was made by Hon. , one of the judges of this court, on the day of , 18 , authorizing the petitioner to advertise for creditors to present their claims to him against said assignor on or before a day to be therein specified ; that said notice was published as provided by said order, and that a copy thereof was duly mailed to each creditor whose name appears on the books of the assignor, postage prepaid, at least thirty days before the day specified in said advertisement or notice, as appears by the affidavit of said mailing hereunto annexed.

V. That the time within which claims were to be presented to petitioner as specified in said notice expired on the day of , 18 ; and that creditors, exceeding twenty-five in number, have presented claims against the assignor to your petitioner, and are interested in the trust fund in the hands of petitioner by virtue of the assignment.

VI. That the names and address of creditors who have presented claims are as follows :

And your petitioner therefore prays that a citation may issue out of, and under the seal of, this court, to all persons interested in said estate, requiring them to appear in court upon some day to be specified therein, and to show cause why a settlement of the account of the assignee, your petitioner, should not be had, and, if no cause be shown, to attend the settlement of said account.

[*Verification.*]

No. 51a.

ASSIGNEE'S ACCOUNT.

(See §§ 443, 558.)

[*Title.*]

To the Hon. the Court of Common Pleas for the city and county of New York:

I, A. B., of , do render the following account of my proceedings as assignee of C. D.:

On the day of , 18 , the said C. D, then residing or carrying on business at , made and executed in due form of law a general assignment of his property and estate to me in trust for the benefit of his creditors, which said assignment was, on the day of , 18 , duly recorded in the office of the clerk of the county of . I accepted said assignment and entered upon the execution of the trust thereunder, and took possession of the said assigned property.

On the day of , 18 , an inventory of the said assigned property, and a schedule of creditors, as required by law, was made and delivered by said C. D. [*or*, by me], and was on said day duly filed in the office of the clerk of the Court of Common Pleas, for the city and county of New York, by which it appears that the debts and liabilities of the above-named C. D. amount to the sum of dollars, and his nominal assets to the sum of dollars, and that the actual value of the same was dollars.

Schedule "A," hereto annexed, contains a statement of all the property contained in said inventory, sold by me at public or private sale, with the prices and manner of sale; which sales were fairly made by me at the best prices that could then be had, with due diligence, as I then believed; it also contains a statement of all the debts due the said estate and mentioned in said inventory, which have been collected, and also of all interest for moneys received by me, for which I am legally accountable.

Schedule "B," hereto annexed, contains a statement of all property belonging to the estate which have come into my hands not included in the said inventory.

Schedule "C," hereto annexed, contains a statement of all debts in said inventory mentioned, not collected or collectible by me, together with the reasons why the same have not been collected and are not collectible, and also a statement of any property mentioned in said inventory unsold, and the reasons of the same being unsold. No other assets than those in said inventory, or herein set forth, have come to my possession or knowledge, and all the increase or decrease in the value of any assets of said estate is allowed or charged in said schedules "A" and "B."

Schedule "D," hereto annexed, contains a statement of all moneys paid by me for all necessary expenses for said estate, together with the reasons and object of such expenditure.

That on the day of , 18 , an order was duly made by Hon. , judge of , authorizing the publication of a notice to creditors to present claims, and that such notice was duly published as required by said order, and that a copy of said notice was duly mailed to each of the creditors whose names appear in the books of the assignor as required by the rules of this court, as will

appear by the order, notice and due proof of publication and mailing herewith filed.

Schedule "E," hereto annexed, contains a statement of all the claims of creditors presented to me in pursuance of said notice, together with the names of the claimants, the general nature of the claim, with the amount and the date thereof, and also a statement of all moneys paid by me on account of said claims, with the names and the time of such payment.

Schedule "F," hereto annexed, contains a statement of all other facts affecting my administration of said insolvent's estate, my rights and those of others interested therein.

I charge myself:

Amount as per inventory .....$
Increase as shown by schedule "A" .....$
Property not included in inventory as per schedule "B".$

I credit myself:

Amount of debts not collected as per schedule "C" .....$
Amount of schedule "D" .....$
Amount of schedule "E" .....$
Leaving a balance of .....$

To be distributed according to the provisions of said assignment, subject to the deductions of the amount of my commissions and the expenses of the accounting.

The said several schedules which are signed by me, are part of this account.

[*Signed.*]

Dated, New York, , 18 .

, *Assignee.*

No. 51b.

ASSIGNEE'S OATH.

CITY AND COUNTY OF NEW YORK, *ss.:*

I, A. B., being duly sworn, says, that the charges made in the foregoing account of proceedings and schedules annexed, for moneys paid by me to creditors, and for necessary expenses, are correct; that I have been charged therein all the interest for moneys received by me and embraced in said account, for which I am legally accountable; that the moneys stated in said account as collected, were all that were collectible, according to the best of my knowledge, information and belief, on the debts stated in such account at the time of this settlement thereof; that the allowances in said account for the decrease in the value of any assets, and the charges therein for the increase in such value, are correctly made, and that I do not know of any error in said account, or anything omitted therefrom, which may in anywise prejudice the rights of any party interested in said estate. And deponent further says, that the sums under twenty dollars, charged in the said account, for which no vouchers or other evidences of payment are produced, or for which he may not be able to produce vouchers or other evidences of payment, have actually been paid and disbursed by him as charged.

Sworn to this day of
, 18 , before me,

No. 52.

ORDER FOR CITATION.

At a Special Term of the Court of Common Pleas for the City and County of New York, on the day of , 18 .

Present, Hon. , Judge.

In the Matter of the Final Accounting of , as Assignee of the Estate of A. B. under a General Assignment for Benefit of Creditors.

On reading and filing the verified petition of the above-named assignee [*or*, of , a creditor of said assignor], dated the day of , 18 , and on motion of , attorney for said assignee [*or*, creditor]:

It is ordered that a citation issue herein to all parties interested in the estate assigned by A. B. to the above-named assignee by a general assignment for the benefit of creditors, dated the day of , 18 , and recorded in the office of the clerk of the city and county of New York, to appear in court on a day therein to be specified, and to show cause why a settlement of the account of the proceedings of the assignee should not be had, and, if no cause be shown, to attend the settlement of such account.

[*When more than twenty-five creditors have proved claims add:*]

It is further ordered that said citation be served on each creditor who has proved his claim, by depositing a copy of the same, at least thirty days prior to the return day thereof, in the post-office at the place where the assignee resides, duly inclosed and directed to each of such creditors, at his last-known post-office address, with the postage prepaid; and by publishing such citation once a week, for at least four weeks prior to such return day, in the , a newspaper published in the city and county of New York.

No. 53.

CITATION FOR ACCOUNTING.

(See § 459.)

THE PEOPLE OF THE STATE OF NEW YORK, to all persons interested in the estate of A. B., assigned to for the benefit of creditors, send GREETING:

You and each of you are hereby cited and required personally to be and appear at a special term of the Court of Common

Pleas for the city and county of New York to be holden in the county court-house, in the city of New York, on the day of , 18 , at ten o'clock A.M., there and then to show cause why a final settlement of the accounts of , assignee of above-named A. B., insolvent debtor, should not be had, and, if no cause be shown, then to attend the final settlement of the assignee's accounts.

In testimony whereof I have hereunto caused the seal of [SEAL.] the said Court of Common Pleas for the city and county of New York to be hereunto affixed.

Witness Hon. , chief judge of the said court, this day of , 18 .

—— ——,
Clerk.

—— ——,
Attorney for Assignee.

No. 54.

ORDER OF REFERENCE.

(See §§ 439, 464.)

At a Term of, etc.

[*Title as in Form No.* 22.]

A. B., assignee for the benefit of creditors of C. D., under a general assignment made on the day of , 18 , and recorded in the office of the clerk of the county of , having made and filed an account of his proceedings as such assignee, filed herein on the day of , 18 , and a citation having been issued out of and under the seal of this court to all persons interested in said assigned estate to attend the final settlement of said account:

Now, on the said account and the petition of said A. B., filed herein on the day of , 18 , and the papers accompanying the same, and on said citation and proof of the due service of the same (and on the objections to said account filed by), and on application of , attorney for said assignee (with appearance for other parties):

It is ordered that it be referred to X. Y., counsellor at law, to take and state the accounts of the said A. B., of his proceedings as assignee of the said assigned estate, with authority to the said X. Y. to examine the parties and witnesses on oath in relation to the said assignment and accounting, and all matters connected therewith.

And it is further ordered that the said referee take proofs and report as to what persons are entitled to share in the distribution of said assigned estate, and in what priority and proportion.

And it is further ordered that any party to this proceeding, and any creditor, may object to any claim presented before said

referee, and that the said referee shall thereupon take the proofs and report as to the validity of such contested claims.

And it is further ordered that the said reference proceed at , and that days' notice of the time and place of the first hearing be given to all creditors who have presented their claims to said assignee, or who have appeared upon the return of said citation.

No. 55.

REFEREE'S REPORT.

(See §§ 449, 468.)

COURT OF COMMON PLEAS

FOR THE CITY AND COUNTY OF NEW YORK.

In the Matter of the Final Accounting of , Assignee of .

To the Court of Common Pleas for the City and County of New York:

I, , referee appointed herein, by order dated , to take and state the accounts of the above-named assignee, do respectfully report that, having taken and subscribed the oath required of a referee by section 1016 of the Code of Civil Procedure, I proceeded to take proofs, and from the evidence before me, which is hereto annexed and forms part of this report, I find the following:

I. That prior to the day of , 18 , the above-named engaged in business in the city of New York under the name of , and that the said then resided in .

II. That on the said last-mentioned date he executed and acknowledged an instrument in writing assigning all his property to the above-named in trust for the benefit of the creditors of said assignor. That the following preferences were created in and by said assignment—viz.:

[*Insert.*]

III. That the said assignee joined in the execution and acknowledgment of said assignment and accepted said trust. That said assignment was acknowledged by on , and was recorded in the office of the clerk of the city and county of New York on the day of , 18 .

IV. That schedules of the assigned estate and of the liabilities of the assignors, duly verified by on , were filed in the office of the clerk of this court on the day of , 18 , showing the liabilities of the assignors to be $, with $ nominal assets and $ actual assets; and on the

day of , 18 , Hon. , one of the judges of this court, ordered the assignee to file a bond in the penalty of $.

V. That on the day of , 18 , the said assignee presented to the Hon. , one of the judges of this court, his bond with , residing at , and , residing at , as sureties, in the penal sum of $, which bond was, on the said last-named day, approved by the said last-named judge, and was filed on said day in the office of the clerk of the court.

VI. That the said assignee having applied to this court upon petition, verified by him on the day of , 18 , for an order to advertise for creditors to present their claims, with the vouchers duly verified, an order was thereupon made on the day of , the Hon. presiding, authorizing such advertisement to be made in the newspaper, published in , and , once in each week for weeks.

VII. That the said advertisement was published as directed in each of said papers, commencing on the day of , 18 , and the following is a copy of such advertisement:

[*Insert copy.*]

VIII. That a copy of such advertisement, inclosed in a sealed envelope, on which was indorsed a direction that if the same was not delivered in ten days it should be returned to , and with the proper postage prepaid thereon, was deposited in the post-office in the city of New York, directed to each of the creditors whose names appear on the books of the said assignor. That the following and no others of said notices have been returned by the postmaster—viz., those addressed to .

IX. That the following persons have presented claims duly verified to the assignee—viz.:

NAME.	ADDRESS.	AMOUNT.	DUE.	FOR.

X. That on the day of , 18 , the said assignor presented to this court an account of his proceedings as assignee, verified by his oath thereto, made on the day of , 18 , stating his account as follows—viz. :

Dr.

Inventory of Stock	$——
Inventory of Accounts	——
Increase by	——

Cr.

Decrease	$——
Expenses	——
Dividends paid to	——
Balance	$——

XI. That upon petition of the said assignee, verified by him on the day of , 18 , this court, by order made by Hon. , one of the judges thereof, directed a citation to issue to all persons interested, requiring them to appear in this court and attend the final settlement of the accounts of said assignee. That such citation was thereupon issued out of and under the seal of this court, returnable on the day of , 18 . That by order of this court, duly made on the day of , 18 , the said citation was ordered served by publication in .

XII. That said citation was duly served in the following manner upon .

XIII. That on the return of said citation the following parties and none other appeared in this court :

[*Insert names.*]

XIV. That the following objections to said account were filed by the following parties :

[*Insert objections.*]

XV. That by order made by the Hon. , on the day of , 18 , this court referred the said account to me to take and state the same, and

XVI. That I issued a summons to attend the reference before me at my office, No. , street, on the day of , 18 , at o'clock. All which notice was duly served on .

XVII. That the following named persons appeared before me on said reference in person : [*Insert names*], and the following by counsel—viz. : [*Insert names*].

XVIII. That the said assignee, immediately after the approval and filing of this bond, entered upon his duties as such assignee ;

that he reduced to possession the assigned estate, consisting of ; that he sold , realizing therefrom $; that he collected $; that he paid out and expended for , $; that he has faithfully performed the duties of his said trust; that he should be allowed the following expenditures as necessary in the execution of said trust—viz. : [*Insert*], and that his accounts should be stated, and I do hereby state them as follows—viz. :

Dr.

To Inventory of Stock	$——
To Inventory of Accounts	——
To Increase (Schedule A)	——
Total	$——

Cr.

By decrease of Stock	$——
Accounts	——
Expenses	——
Payments to Creditors—viz. :	——

No. 56.

FINAL DECREE.

At a Term, etc.

[*Title of Proceedings.*]

A general assignment having been made by C. D. to A. B. for the benefit of creditors, dated the day of , and recorded in the office of the clerk of the county of on the day of , and the said A. B. having accepted the trust thereby created, and having on the day of filed his bond, duly approved, for the faithful discharge of his duties as such assignee, and having thereafter duly advertised for creditors to present their claims, duly verified, against said C. D. to him, and the time for the presentation of the same having expired, and the said A. B. having appeared and presented his account as such assignee to this court, and a citation dated on the day of having been duly issued herein to all persons interested in said assigned estate to attend the settlement of the said accounts, returnable on the day of , and proof of the due service of said citation upon [*here recite services and appearances*], (and objections having been presented to said report by), and it having been referred to , Esq., counsellor at law, to take and state said account (reciting provisions of order of reference), and the said referee having made and filed his report on the day of , and due notice of the filing of said report having been given to

, and exceptions thereto having been filed by

Now upon reading all the papers and proceedings hereinbefore recited, the said report and the testimony, exhibits and vouchers thereto annexed, and the objections to said report filed by the said , and after hearing , of counsel in behalf of , and [*recite appearances*], and due consideration thereupon having been had,

It is ordered, adjudged and decreed:

First. That the said report be and the same is hereby in all respects confirmed, and the account of said A. B., assignee as aforesaid, audited and allowed as therein stated.

Second. That out of the funds in the hands of the said A. B., assignee of the said estate of C. D., the said A. B. retain dollars as and for his lawful commission as such assignee; that he pay to , the attorney for said assignee, the sum of $, for his costs and allowances in this proceeding; and the further sum of $ to , referee aforesaid, for his fees as such referee; and out of the rest and residue of said funds remaining in the hands of said assignee, after deducting the costs and expenses aforesaid, said assignee is directed to make payment between the following-named creditors, preferred in said assignment, the amounts of their several preferences being the sums set opposite their names respectively as follows: in full; and out of the rest and residue of said funds remaining in the hands of said assignee, said assignee is directed to make payment between the following-named creditors, whose several claims are settled and adjusted at the sums set opposite their names respectively:

[*Here insert names of creditors and amounts due them.*]

Third. That the said assignee do take good and sufficient vouchers for each and every payment so made; and if, after reasonable diligence, any of the persons so entitled to share in said distribution cannot be found, or shall decline or neglect to accept their said share, then the share so belonging to such person shall be deposited in the Trust Company to the credit of such persons.

It is further ordered, adjudged and decreed, that upon compliance with the foregoing provisions the said assignee shall, upon presenting due proof of the same to this court, be entitled to an order relieving him of his liability as such assignee, and releasing the sureties upon the said bond filed by the said A. B., as assignee of said estate, from all liability upon matters included in the aforesaid accounting, to all creditors who have appeared, and to such creditors as have not appeared after due citation, and to such creditors as have not presented their claims after due advertisement; and that the said application may be made without further notice.

No. 57.

COMPOSITION DEED.

Whereas, A. B., of , does justly owe and is indebted unto us, his several creditors, in divers sums of money, but by reason of many losses, disappointments and other damages happened unto the said A. B., he has become unable to pay and satisfy us our full debts and just claims and demands, and therefore we, the said creditors, have resolved and agreed to undergo a certain loss and to accept of twenty-five cents for every dollar owing by the said A. B. to us the several and respective creditors aforesaid, to be paid in full satisfaction and discharge of our several and respective debts. Now, know all men by these presents, that we, the several creditors of the said A. B., do for ourselves severally and respectively, and for our several and respective heirs, executors and administrators, covenant, promise, compound and agree to and with the said A. B. and between ourselves, that we will accept, receive and take of and from the said A. B., for each and every dollar that the said A. B. does owe and is indebted unto us, the said several and respective creditors, the sum of twenty-five cents, to be paid in the manner following, that is to say: [in instalments to be secured by notes of debtor indorsed by third person, or as the case may be, and to be delivered by a day certain].

And we, the said creditors, do further covenant and agree, that neither we, the said several and respective creditors, nor either of us, shall or will, at any time or times hereafter [except upon default in the delivery or payment of said notes so indorsed as aforesaid, or either or any of them], sue, arrest, molest or trouble the said A. B., or his goods and chattels, for any debt or other thing [now due or owing to us or any of us—*or*, for any liability now existing against the said A. B., in favor of us or either of us], provided, however, that should default be made by the said A. B., in the delivery of the said notes indorsed as aforesaid, and within the time aforesaid [*or*, upon default in the payment of said notes, or any or either of them], these presents shall be void and of no effect, [provided always, and it is hereby agreed and declared, that these presents shall not in anywise prejudice or affect the right or remedies of any creditor against any surety or sureties, or any person or persons other than the debtor, his heirs, executors or administrators, nor any security which any creditor may have or claim for his debt or debts] [and it is further expressly understood and agreed, that unless the said composition shall be accepted by all the creditors of the said

A. B., on or before the expiration of days from the date of these presents, these presents shall be void and of no effect].

And all and every of the grants, covenants, agreements and conditions herein contained, shall extend to and bind our several executors, administrators and assigns, as well as ourselves.

In witness whereof, we, the said several creditors of said A. B., have hereunto set our hands and seals this day of , 18 .

[Other Forms of Composition Deeds and Letters of License may be found in Abbott's Clerk's and Conveyancer's Assistant, pp. 304, *et seq.*]

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GENERAL INDEX.

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