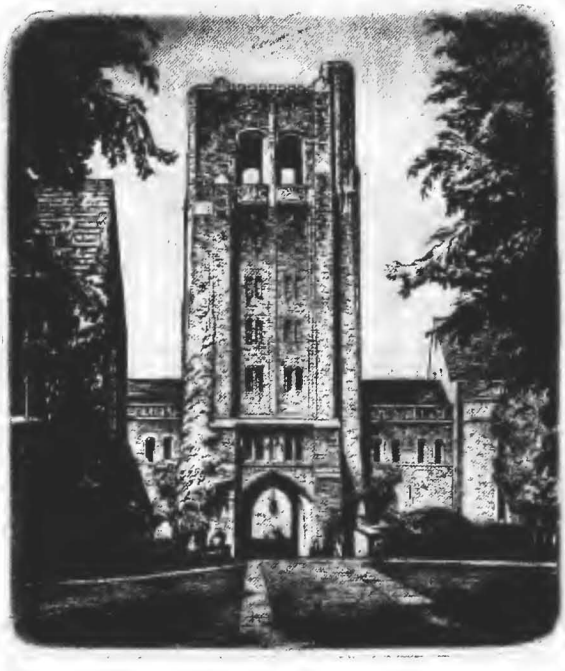

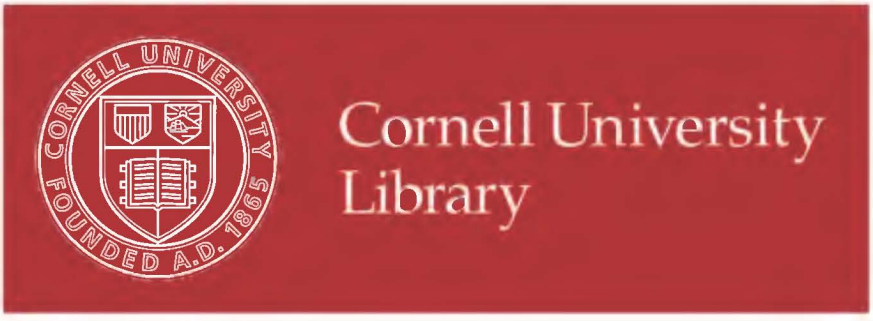

A TREATISE

ON THE

LAW AND PRACTICE

OF

BANKRUPTCY

UNDER THE ACT OF CONGRESS OF 1898
AND ITS AMENDMENTS

BY

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AUTHOR OF BLACK'S LAW DICTIONARY AND OF TREATISES ON
JUDGMENTS, CONSTITUTIONAL LAW, INTERPRETATION OF LAWS, JUDICIAL PRECEDENTS,
INCOME TAXES, RESCISSION OF CONTRACTS, ETC.

THIRD EDITION

KANSAS CITY, MO.
VERNON LAW BOOK COMPANY
1922

(BLK.BKR.3D ED.)

PREFACE TO THE THIRD EDITION

EIGHT years having passed since the publication of the former edition of this book, a very considerable expansion and development of the law and practice in bankruptcy having come about in the interval, and many demands for a new edition having been presented by members of the Bar, the author has subjected the entire work to a complete and systematic revision, giving full attention to the changes in the law and the applications of it to new states of fact, and incorporating at the same time the doctrines and principles of the decisions which have been rendered from the date of the last edition to the printing of the present volume. An idea of the amount of the new material thus added can be gathered from the fact that it covers the bankruptcy cases reported in the last sixty-seven volumes of the Federal Reporter. That this treatise, in its present form, may deserve, and may continue to receive, the very gratifying measure of favor which has hitherto been accorded to it by the Bench and Bar is the sincere hope of the author.

HENRY CAMPBELL BLACK.

WASHINGTON, D. C., January, 1922.

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LAW OF BANKRUPTCY

CHAPTER I

THE NATIONAL BANKRUPTCY ACT AND ITS EFFECT ON STATE LAWS

Sec.

§ 1. Constitutional and Statutory Provisions.—The Constitution of the United States provides that "the Congress shall have Power * * * To establish an uniform Rule of Naturalization and uniform Laws on the subject of Bankruptcies throughout the United States."[1] The first national bankruptcy act was passed in 1800 and repealed in 1803. It was modeled upon the British statute then in force, was directed against insolvent "traders," and provided only for involuntary or compulsory proceedings. The power of Congress was again exercised in this behalf in 1841, and the statute remained in force for two years when it was repealed. Again in 1867, a bankruptcy law was enacted, which, after being several times amended, was finally repealed in 1878. This act, as well as that of 1841, contained provisions for voluntary bankruptcy and was primarily intended for the benefit of insolvent debtors. Each was designed to relieve the conditions following a financial panic or period of severe industrial depression, and each was taken off

[1] Const. U. S., art. 1, § 8.

the statute book as soon as it was supposed to have accomplished its purpose. For twenty years after the repeal of the act of 1867, the power vested in the national legislature remained unexercised, and the settlement of the affairs of insolvent debtors was left to the incomplete and unsatisfactory regulation of the laws of the various states. During the most of this period, however, there was an insistent demand for the enactment of a national bankruptcy law, proceeding now chiefly from the creditor class, which became so urgent that at least one President (Harrison), in a message to Congress, recommended the passage of a law on the subject, no longer as a temporary expedient, but to become "a permanent part of our general legislation." Numerous bills on the subject were introduced in the two houses of Congress, and considerable attention given to it. Finally the statute now in force was adopted and was approved July 1, 1898.

Concerning the history of this enactment, it has been said from the bench: "This bankruptcy act was as carefully considered a piece of legislation as any given us for years by that body [Congress]. The Senate first passed what was known as the 'Nelson' bill on the subject. The House of Representatives, after long discussion, passed, as a substitute, the 'Henderson' bill, carrying out substantially the provisions of the Torrey measure, which had been for several years prior discussed in legal associations and journals. The matter was finally referred to a conference committee composed of Senators Hoar, Lindsay, and Nelson, on behalf of the Senate, and Representatives Henderson, Ray (now judge of the Northern District of New York) and Terry on behalf of the House, lawyers as able as the country could afford, who, after several months' deliberation, reported a compromise which was passed without amendment and became the existing act." [2]

Nevertheless, when brought to the test of practical experience, it was found that the statute was by no means free from ambiguities and inconsistencies. Questions of very grave import early arose, and the courts were put to the necessity of applying the processes of construction to the act with a view to harmonizing and explaining its various provisions. As the appellate jurisdiction of the Supreme Court was severely restricted, the solution of these problems was left to the circuit courts of appeals, for the most part, and while each has generally been consistent in adhering to its own former determinations, they have not usually deferred to each other, and hence it results that neither the interpretation of the law nor its application can truly be said to be "uniform throughout the United States." Moreover, the statute

[2] Per Dayton, Dist. J., in Re Henderson, 142 Fed. 588, 16 Am. Bankr. Rep. 91.

was found to be unsatisfactory in some particulars, and lacking in efficiency in others. To remedy these defects three amendatory acts have been passed, that of February 5, 1903 (32 Stat. 797), that of June 15, 1906 (34 Stat. 267), and that of June 25, 1910 (36 Stat. 838). The text of the act of 1898, as thus amended, is printed in an appendix to this book, where the reader may also find, for purposes of comparison, the text of the act of 1867.

§ 2. **Constitutionality of National Bankruptcy Law.**—Under the clause of the federal constitution from which the power of Congress in this behalf is derived, it is within the competence of the national legislature, untrammeled by any state laws, to enact any and all forms of legislation tending to promote the distribution of an insolvent's estate among his creditors and his discharge from their demands, providing only that its enactments are not wanting in the character of uniformity.[3] In particular, it has been decided that the authority of Congress over the subject of bankruptcy is not to be gauged or limited by the British statutes of bankruptcy which were in force at the time of the adoption of our constitution. Though those statutes, as then in force, applied only to persons engaged in trade, Congress is not obliged to limit its laws on the subject to merchants or traders.[4] Nor has any success attended the argument that the constitution contemplated only a law which would permit creditors to force an application of the debtor's property to the payment of their claims. On the contrary, the voluntary features of the bankruptcy law, allowing a debtor to present his own voluntary petition for adjudication and to obtain his discharge in the proceedings had thereon, have been amply vindicated by the de-

[3] Hurley v. Devlin, 151 Fed. 919, 18 Am. Bankr. Rep. 627; In re Silverman, 1 Sawy. 410, 2 Abb. U. S. 243, 4 N. B. R. 522, Fed. Cas. No. 12855; Keene v. Mould, 16 Ohio, 12; Rowan v. Holcomb, 16 Ohio, 463; Pope v. Title Guaranty & Surety Co., 152 Wis. 611, 140 N. W. 348. Though Congress may have no power to declare what shall constitute "property" passing to the trustee the section dealing with this subject is not invalid as attempting to make property out of things which are not such. Board of Trade of City of Chicago v. Weston, 243 Fed. 332, 156 C. C. A. 112, 40 Am. Bankr. Rep. 263.

[4] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, 8 Am. Bankr. Rep. 1; Kunzler v. Kohaus, 5 Hill (N. Y.) 317; In re Silverman, 1 Sawy. 410, 2 Abb. U. S. 243, 4 N. B. R. 522, Fed. Cas. No. 12,855. The bankruptcy act is not unconstitutional because it applies to corporations as well as to natural persons. In re California Pac. R. Co., 3 Sawy. 240, 11 N. B. R. 193, Fed. Cas. No. 2,315. The first bankruptcy act, that of 1800, applied only to merchants and to bankers, brokers, factors, underwriters, and marine insurers, and some doubt was expressed by the courts as to whether it would be within the power of Congress to extend the provisions of such an act to all citizens generally, without regard to the fact of their being merchants or traders. Adams v. Storey, 1 Paine, 79, Fed. Cas. No. 66. In its subsequent enactments, however, Congress took no note of such a distinction, the acts of 1841, 1867, and 1898 all applying in terms to other persons.

cisions of the courts.[5] The same is true of the provision relating to compositions in bankruptcy. It has been strongly urged that a law relating to compositions with creditors is not a "law on the subject of bankruptcies." But the courts hold that the grant of authority to Congress in the constitution carries unlimited power (save only for the requirement of uniformity) to pass such laws as Congress shall deem best to regulate the mutual rights of a debtor who does not pay his debts and his creditors, as to the person and property of the debtor.[6] Moreover, it is within the constitutional power of Congress to attach such conditions or limitations as it may see fit to the granting of a discharge in bankruptcy. It is not an indispensable element of a bankruptcy law that it should provide for the discharge of all persons against whom it may operate. Although the act may withhold a discharge from whole classes of debtors (as the act of 1867 refused a discharge to corporations), or may direct that a discharge shall be denied if the bankrupt has done certain unlawful acts, or may require the consent of a certain proportion of his creditors, yet it cannot be said that, for that reason, it is not a "law on the subject of bankruptcies," or that it is unconstitutional.[7] Further, the power to create a system of bankruptcy involves the authority to provide for its administration; and this implies the selection of the courts which are to have jurisdiction in bankruptcy and the regulation of the modes of procedure. "The power under that clause is sufficiently comprehensive to enable Congress to adopt a uniform system of bankruptcy, commit its administration to such of the courts of the United States as it might choose, and to provide the modes of procedure, special or otherwise, as they might, in their discretion, deem best adapted to secure and accomplish the objects of the act; and if such proceedings should differ from those in ordinary cases and suits, they would, notwithstanding, be obligatory upon the courts, as Congress has, by the constitution, plenary authority over that subject."[8] Thus, in a case in the Supreme Court, under the present act, it was urged that the statute operated to

[5] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, 8 Am. Bankr. Rep. 1; In re Klein, 1 How. (U. S.) 277, note; In re Klein, Fed. Cas. No. 7,865; State Bank v. Wilborn, 6 Ark. 35; Lalor v. Wattles, 8 Ill. 225; Loud v. Pierce, 25 Me. 233; Thompson v. Alger, 12 Metc. (Mass.) 428; Kunzler v. Kohaus, 5 Hill (N. Y.) 317; Morse v. Hovey, 1 Barb. Ch. (N. Y.) 404.

[6] In re Reiman, 12 Blatchf. 562, 13 N. B. R. 128, Fed. Cas. No. 11,675; In re Reiman, 7 Ben. 455, 11 N. B. R. 21, Fed. Cas. No. 11,673.

[7] In re California Pac. R. Co., 3 Sawy. 240, 11 N. B. R. 193, Fed. Cas. No 2,315.

[8] Goodall v. Tuttle, 3 Biss. 219, 7 N. B. R. 193, Fed. Cas. No. 5,533; Mitchell v. Great Works Mill & Mfg. Co., 2 Story, 648, Fed. Cas. No. 9,662; McLean v. Lafayette Bank, 3 McLean, 185, Fed. Cas. No. 8,885.

deprive creditors of their property without due process of law, and was therefore unconstitutional because it does not provide for notice to them of the filing of a voluntary petition, and also because it does not require personal service of notice of the application for the discharge in voluntary proceedings, and because the notice provided for is unreasonably short, and the right to oppose the discharge unreasonably restricted. But as to the first of these contentions, the court denied that it had any validity, saying that the facts set forth in a voluntary petition, and on which the adjudication was based, were not issuable facts in such sense as to require that creditors should have notice and an opportunity to contest the application; and besides, even in voluntary cases, ample provision is made by the law for notice of the first meeting of creditors and of each subsequent step in the administration and of the proceedings on the application for discharge. As to the second point, it was said: "Considering the plenary power of Congress, the subject-matter of the suit, and the common rights and interests of creditors, we regard this contention as untenable. Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with the fundamental law, and we cannot find anything in this act on that subject which would justify us in overthrowing its action. Nor is it possible to concede that personal service of notice of the application for a discharge is required." [9]

The validity of the penal and criminal provisions of the bankruptcy act has also been sustained by the Supreme Court of the United States, in a case where it was said that it is competent for Congress to enforce, by suitable penalties, all legislation necessary or proper to the execution of the powers with which it is intrusted, and any act committed with a view to evading such legislation, or fraudulently securing its benefits, may be made an offense against the United States.[10]

More particularly with reference to the constitutional requirement that bankruptcy laws shall be "uniform throughout the United States," it is held that the uniformity required is geographical and not personal, and that no limitation is imposed upon Congress as to the classification of persons who are to be affected by such laws, provided only that the laws shall have uniform operation throughout the United States. For this reason, the present bankruptcy act is not lacking in the "uniformity" required by the constitution, although it discriminates, in respect to the right to file a voluntary petition, between natural and arti-

[9] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, 8 Am. Bankr. Rep. 1.

[10] United States v. Fox, 95 U. S. 670, 24 L. Ed. 538.

ficial persons, withholding that right from all corporations. Neither is it invalid because, in respect to amenability to involuntary proceedings, it distinguishes between different classes of corporations, being made applicable only to those of a certain character or engaged in certain pursuits, and also between different classes of natural persons, exempting wage-earners and farmers. Nor is the classification actually adopted by Congress unreasonable or beyond the limits of its discretion.[11]

But objection has frequently been made to the validity of that clause of the bankruptcy law which adopts the exemption laws of the several states, or accords to the bankrupt the exemptions allowed him by the law of the state of his domicile. Since these laws vary to the widest possible extent, in respect to the character and amount of the exemption granted, it is contended that their recognition as the rule of exemption under the bankruptcy act robs that act of the "uniformity" required by the constitution. But the courts have never conceded any force to this argument. The system of bankruptcy, they say, is uniform throughout the United States in a relative sense, since the trustee takes in each state whatever would have been available to the recourse of execution creditors if the bankruptcy act had never been passed. Though the states vary in the extent of the exemptions which they allow, yet what remains the bankruptcy law distributes equally among the creditors; and a bankruptcy law which, by its terms, is made applicable alike to all the states, without distinction or discrimination, is not unconstitutional merely because its operation may be wholly different in one state from another. It may therefore be regarded as settled that this section of the act is not unconstitutional.[12] And the same remarks apply to the application, under the act, of the varying laws of the states with reference to such matters as the right of dower of the bankrupt's wife, the priority of claims, and the like. This does not deprive the act of the requisite uniformity, nor amount to an attempt by Congress unlawfully to delegate its legislative power to the states.[13]

Again, although the bankruptcy act invades and annuls vested rights,

[11] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, 8 Am. Bankr. Rep. 1; Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383.

[12] Stellwagen v. Clum, 245 U. S. 605, 38 Sup. Ct. 215, 62 L. Ed. 507, 41 Am. Bankr. Rep. 1; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, 8 Am. Bankr. Rep. 1; In re Deckert, 2 Hughes, 183, 10 N. B. R. 1, Fed. Cas. No. 3,728; Darling v. Berry, 4 McCrary, 470, 13 Fed. 659; In re Beckerford, 1 Dill. 45, 4 N. B. R. 203, Fed. Cas. No. 1,209; In re Jordan, 8 N. B. R. 180, Fed. Cas. No. 7,514; In re Duerson, 13 N. B. R. 183, Fed. Cas. No. 4,117; Dozier v. Wilson, 84 Ga. 301, 10 S. E. 743.

[13] Stellwagen v. Clum, 245 U. S. 605, 38 Sup. Ct. 215, 62 L. Ed. 507, 41 Am. Bankr. Rep. 1; Hanover Nat. Bank v.

and impairs or destroys the obligation of contracts, by releasing debtors from their obligations upon a partial payment or without any payment at all, even in respect to debts contracted before the enactment of the law, and making its provisions compulsory upon creditors, it is not for that reason unconstitutional.[14] The provision of the federal constitution relating to the obligation of contracts is a limitation upon the power of the legislatures of the states only, and does not affect the authority of Congress. "It has been repeatedly held that there is nothing in the Constitution of the United States which forbids Congress to pass laws impairing the obligation of contracts, although that power is denied to the states; and it is no longer controverted that Congress may, by the enactment of a uniform bankruptcy law, discharge debtors entirely from the obligation of their contracts."[15] Moreover, Congress is not prevented by anything contained in the constitution from destroying any lien upon the property of the bankrupt, if it shall be deemed necessary for the effective working of the law and for preserving the equal rights of creditors, whether such lien was created by contract, by statute, or by judgment.[16] But indeed, even if the prohibition against laws impairing the obligation of contracts could be construed as applying to Congress, the bankruptcy act would not be liable to this objection, in respect to that part of it which operates to dissolve liens acquired within four months prior to the proceedings; for such liens relate only to the remedy for the enforcement of the contract, and not to the obligation of the contract.[17]

§ 3. Policy and Purpose of Act.—The purpose of the bankruptcy law is twofold; first, to bring within the control and administration of the court absolutely the entire available property of the bankrupt and distribute it among those entitled, and second, to secure to the bankrupt immunity from further liability for his debts (except as to certain classes) by granting him a discharge which shall be a complete defense against all further proceedings. As to the distribution of the property, it is the intention of the act to divide the estate of the bankrupt between

Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, 8 Am. Bankr. Rep. 1; Thomas v. Woods, 173 Fed. 585, 97 C. C. A. 535, 23 Am. Bankr. Rep. 132.

[14] In re Kean, 2 Hughes, 322, 8 N. B. R. 367, Fed. Cas. No. 7,630; In re Smith, 8 N. B. R. 401, Fed. Cas. No. 12,986; Evans v. Eaton, Pet. C. C. 322, Fed. Cas. No. 4,559; In re Owens, 12 N. B. R. 518, Fed. Cas. No. 10,632; Keene v. Mould, 16 Ohio, 12; Morse v. Hovey, 1 Barb. Ch. (N. Y.) 404; In re Klein, Fed. Cas. No. 7,865; Loud v. Pierce, 25 Me. 233; Cutter v. Folsom, 17 N. H. 139.

[15] In re Owens, 6 Biss. 432, 12 N. B. R. 518, Fed. Cas. No. 10,632; In re Everitt, 9 N. B. R. 90, Fed. Cas. No. 4,579.

[16] In re Jordan, 8 N. B. R. 180, Fed. Cas. No. 7,514.

[17] In re Rhoads, 98 Fed. 399, 3 Am. Bankr. Rep. 380; Corner v. Miller (Md. Com. Pleas) 1 N. B. R. 403. See also Bank of Columbia v. Overstreet, 10 Bush (Ky.) 150.

himself, his wife, and his children on the one hand, and his creditors on the other hand, as the laws of the state of his domicile authorize its division under like circumstances,[18] saving to the bankrupt and his family every right and exemption which would have been theirs as against creditors enforcing claims by ordinary judicial process.[19] Thereupon it is the further purpose of the act to relieve an honest debtor, who shows himself entitled to its benefits, from any further legal prosecution for his debts, in order to enable him to start afresh in business life.[20] But it is said that the primary and principal purpose of the law regards the rights of creditors, and that it is its intent to secure an absolutely equal and impartial distribution of the assets among the creditors, as speedily as possible, preventing all preferences and favoritism, defeating all fraudulent attempts to secrete property, and providing a remedy against every act by which a failing debtor seeks an unequal distribution.[21] It is the duty of the courts to carry this purpose into effect to the extent which the language of the statute justifies, and not to tolerate any scheme or artifice to evade the letter and spirit of the law.[22]

Moreover, as the bankruptcy law is a high and important manifestation of public policy with reference to insolvent debtors, it is not in any way to be evaded or defeated. No state court, for example, has power to suspend the operation of the bankruptcy law, or to restrain a judgment debtor from availing himself of its provisions.[23] Nor can anyone be prohibited by law or ordinance from taking the benefit of the bankruptcy law, nor be in any way penalized or punished for so doing. On this ground a municipal ordinance which required members of the city's fire department to make prompt payment of all necessary personal and household expenses, and provided that the failure of a fireman to do so

[18] In re McKenzie, 142 Fed. 383, 73 C. C. A. 483, 15 Am. Bankr. Rep. 679; Hurley v. Devlin, 151 Fed. 919, 18 Am. Bankr. Rep. 627.

[19] In re Cohn, 171 Fed. 568, 22 Am. Bankr. Rep. 761.

[20] In re Swofford Bros. Dry Goods Co., 180 Fed. 549, 25 Am. Bankr. Rep. 282; In re Munford (D. C.) 255 Fed. 108, 43 Am. Bankr. Rep. 218; Schexnailder v. Fontenot, 147 La. 467, 85 South. 207.

[21] Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814; In re Blount, 142 Fed. 263, 16 Am. Bankr. Rep. 97; In re Swofford Bros. Dry Goods Co., 180 Fed. 549, 25 Am. Bankr. Rep. 282; Webb's Trustee v. Lynchburg Shoe Co., 107 Va. 807, 60 S. E. 130; Whitwell v. Wright, 115 N. Y. Supp. 48; Hewitt v. Boston Straw Board Co., 214 Mass. 260, 101 N. E. 424; Utah Ass'n of Credit Men v. Boyle Furniture Co., 43 Utah, 523, 136 Pac. 572. But it is also the purpose of the law to preserve, rather than to destroy, rights and advantages enjoyed by creditors under state laws, save to the extent they are repugnant to or inconsistent with the specific provisions of the bankruptcy law. Schexnailder v. Fontenot, 147 La. 467, 85 South. 207.

[22] In re Blount, 142 Fed. 263, 16 Am. Bankr. Rep. 97.

[23] In re Kepecs, 123 N. Y. Supp. 872; Brenen v. Dahlstrom Metallic Door Co., 189 App. Div. 685, 178 N. Y. Supp. 846.

should be ground for discharging him, was held to be superseded and invalidated by the bankruptcy law, in so far as it affected debts of a fireman which would be dischargeable in a bankruptcy proceeding pending against him.[24] No more can a debtor voluntarily engage himself in advance to renounce the benefit of the act. Thus, the maker of a judgment note containing a waiver of "all rights under the bankruptcy laws of the United States" is not thereby estopped from setting up a subsequent discharge in bankruptcy as a defense to his liability, since the waiver is void as contrary to public policy.[25]

§ 4. Interpretation and Construction of Bankruptcy Act.—The bankruptcy law is a remedial statute and should not be subjected to a narrow or illiberal interpretation; it should be construed reasonably and according to the fair import of its terms, with a view to effect its objects and to promote justice.[26] "It is true that laws relating to bankruptcy and insolvency operate with severity upon the debtor, since

[24] In re Hicks, 133 Fed. 739, 13 Am. Bankr. Rep. 654.

[25] May v. Merchants' & Mechanics' Bank, 109 Pa. St. 145.

[26] Botts v. Hammond, 99 Fed. 916, 40 C. C. A. 179, 3 Am. Bankr. Rep. 775; Blake, Moffitt & Towne v. Francis-Valentine Co., 89 Fed. 691, 1 Am. Bankr. Rep. 372; Norcross v. Nathan, 99 Fed. 414, 3 Am. Bankr. Rep. 613; Southern Loan & Trust Co. v. Benbow, 96 Fed. 514, 3 Am. Bankr. Rep. 9; In re Muller, Deady, 513, 3 N. B. R. 329, Fed. Cas. No. 9,912; In re Mallory, 1 Sawy. 88, Fed. Cas. No. 8,991, 6 N. B. R. 22; Mims v. Lockett, 20 Ga. 474; Campbell v. Perkins, 8 N. Y. 430. There is an English decision and there are some cases in the state courts holding that bankruptcy or insolvency laws must be strictly construed, but these cases are not authoritative upon the interpretation of the national bankruptcy law. See Calladay v. Pilkington, 12 Mod. 513; Salters v. Tobias, 3 Paige (N. Y.) 338; People v. Sutherland, 16 Hun (N. Y.) 192. In the case of In re Muller, supra, it was said by Judge Deady: "Counsel have insisted that this is a special proceeding, purely statutory, and that the act must be taken most strictly against the creditor and in favor of the bankrupt. In my judgment, this view of the matter is not supported by reason or authority. The act does not attempt to punish the bankrupt, but to distribute his property fairly and impartially between his creditors, to whom in justice it belongs. It is remedial, and seeks to protect the honest creditor from being overreached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life anew. The power to pass bankruptcy laws is one of the express grants of power to the national government; and history teaches that the want of a uniform law on this subject throughout the states was one of the prominent causes which led to the assembling of the constitutional convention and consequent formation and adoption of the federal constitution. Such a statute is not to be construed strictly, as if it were an obscure or special penal enactment, and this were the sixteenth instead of the nineteenth century. The act establishes a system and regulates, in all their details, the relative rights and duties of the debtor and creditor. Such an enactment must be construed—as indeed should all acts—according to the fair import of its terms, with a view to effect its objects and to promote justice." But at the same time the Act must receive a construction which will effectuate its purpose, and it must not be so interpreted as to permit debtors to retain their property free from the claims of creditors. In re Evans (D. C.) 235 Fed. 956, 38 Am. Bankr. Rep. 361.

they deprive him of the control and disposition of all his property and subject him to heavy penalties for any fraud, concealment, or false dealing. It is true also that they restrict the creditors to one particular mode of obtaining payment of their claims, and often compel them to accept less than the full amount in discharge and satisfaction of their debts; and in these respects, such statutes ought not to be enlarged by intendment or implication beyond the clear expression of the legislative meaning. But yet such laws are founded in a sound and wise public policy, and are designed to accomplish beneficent results, and it would be an abuse of the power of interpretation if they were subjected to so narrow and severe a construction as to defeat the very objects which they are intended to promote. The construction should be strict as to the imposition of penalties, liberal as to the powers of the trustee and as to the rights of the creditors, and liberal also as to the discharge of an honest debtor." [27]

Former bankruptcy acts may be resorted to as an aid in the construction of the present statute only in cases of doubt or ambiguity, not in any case where the present meaning of Congress is plain and free from doubt, as derived from the words employed. But in cases where the present act is vague, inexplicit, or general in its terms, while the former act, in relation to the same matter, gave minute and specific directions, it would appear that the earlier statute might be resorted to, as explaining more fully the mind of Congress, provided there is no inconsistency between the general terms of the new act and the specific language of the old. Of course, where words and phrases are used in the new act which had acquired a settled meaning as employed in the old statute, by the construction of the courts, they are to be taken as having been used in the same sense. This is in accordance with a well-known rule of statutory interpretation.[28]

[27] Black, Interp. Laws (2d edn.) p. 479. The earlier English statutes on this subject were not only extremely severe in their application to debtors, but their original design appears to have been to prevent and defeat the frauds of criminal debtors. "The bankrupt being deemed an offender and being completely divested of the disposition of his property, these statutes would naturally at the first be considered penal statutes; for this reason, I presume, the statute 21 Jac. I, c. 19, begins by declaring that 'the aforesaid statute shall be largely and beneficially construed and expounded for the aid and relief of the creditors.'" 2 Black. Comm. 472, Christian's note in loco. But it is now held that statutory provisions as to the conditions on which bankrupts may be discharged are remedial, and the strict rules of construction appropriate to retrospective laws are not applicable to them. In re Scott, 126 Fed. 981, 11 Am. Bankr. Rep. 327.

[28] First Nat. Bank v. Chicago Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, 14 Am. Bankr. Rep. 102; Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009, 5 Am. Bankr. Rep. 829; Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, 17 Am. Bankr. Rep. 483; In re Levin, 176 Fed. 177, 99 C. C. A. 531, 23 Am.

With reference to the construction of particular clauses of the bankruptcy act, it should be remarked, in the first place, that those provisions which confer jurisdiction and power upon the courts of bankruptcy are to be interpreted liberally, not narrowly, in order that the act may have the beneficial effect intended by Congress and be capable of harmonious execution.[29] But on the other hand, it has been held that the provisions of the act prescribing the requisites of a composition with creditors are to be strictly construed as against those who seek by this means to deprive non-assenting creditors of their right to have the debtor's property administered upon and distributed in the ordinary course of bankruptcy proceedings.[30] To a considerable extent, possible ambiguities in the act of 1898 are cleared up by the definitions contained in the first section. But this "interpretation clause," like all the other parts of the act, is itself subject to construction by the courts. And while the definitions and rules of construction contained in the first section are a part of the law and are binding on the courts, yet they will not be extended beyond their necessary import, nor will they be allowed to defeat the intention of the legislature otherwise clearly manifested in the act.[31] Thus, a provision in the first section that a given word shall "include" a certain thing does not necessarily exclude other meanings.[32] But on questions of the construction of the bankruptcy act, opinions expressed by individual members of Congress in the debates on the passage of the act, as to the object and effect of its particular clauses, are entitled to little or no weight.[33]

The proceeding contemplated by the bankruptcy act is not a mere personal action against the bankrupt for the collection of debts, but is also a proceeding in rem to impound all of his nonexempt property and to distribute it equitably among his creditors; and hence the court must, if possible, so construe the act as to secure uniformity in its administration.[34] Further the construction of the law ought in theory to be exactly the same throughout the United States. At any rate, it cannot be varied in each state of the Union by the local law. And therefore, in

Bankr. Rep. 845; Woolsey v. Cade, 54 Ala. 378, 25 Am. Rep. 711; Whitcomb v. Rood, 20 Vt. 49; Black, Interp. Laws (2d edn.) p. 607.

[29] Murray v. Beal, 97 Fed. 567, 3 Am. Bankr. Rep. 284; Southern Loan & Trust Co. v. Benbow, 96 Fed. 514, 3 Am. Bankr. Rep. 9; In re California Pac. R. Co., 3 Sawy. 240, 11 N. B. R. 193, Fed. Cas. No. 2,315.

[30] In re Rider, 96 Fed. 808, 3 Am. Bankr. Rep. 178.

[31] See Black, Interp. Laws (2d edn.) pp. 269–274, for a general discussion of "interpretation clauses," their legal effect, and their interpretation.

[32] In re Harper, 175 Fed. 412, 23 Am. Bankr. Rep. 918.

[33] Carter v. Hobbs, 92 Fed. 594, 1 Am. Bankr. Rep. 215. And see Black, Interp. Laws (2d edn.) p. 312, and cases there cited.

[34] Hills v. F. D. McKinniss Co., 188 Fed. 1012, 26 Am. Bankr. Rep. 329.

construing its terms giving or excluding its benefits, resort must be had to their meaning in the common law, rather than in the local law of the state where the proceedings are had.[35] In construing the bankruptcy law, the federal courts are not bound by decisions of state courts upon similar terms in the insolvency law of the state.[36] But on the other hand, the construction or interpretation of the various provisions of the bankruptcy act, as settled by the decisions of the federal courts, particularly the Supreme Court, will be accepted and applied by the state courts, in all cases before them arising under or involving that statute, without an independent consideration of the question presented, if applicable rulings of the federal courts are brought to their notice.[37] It may be here added that the forms prescribed by the General Orders in bankruptcy are not absolutely binding, but may be altered to suit circumstances. For instance, in making proof of a claim, if the creditor cannot make the deposition exactly as prescribed in the form, it does not follow that his claim must be rejected.[38]

§ 5. Time of Taking Effect.—The concluding section of the bankruptcy law of 1898 is as follows: "This act shall go into full force and effect upon its passage; Provided, however, that no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof. Proceedings commenced under state insolvency laws before the passage of this act shall not be affected by it." The act was approved on the first day of July, 1898. The bankruptcy act of 1867 provided: "This act shall commence and take effect, as to the appointment of officers and the promulgation of rules, from and after the date of its approval, provided that no petition or other proceeding under this act shall be filed, received, or commenced before the first day of June," which was three months after its passage. It was held that, as to its effect in suspending state insolvency laws and depriving state courts of jurisdiction to proceed under such laws, the federal statute took effect, not from the day of its approval, but from June 1st. Consequently, where a state court had acquired jurisdiction of a proceeding

[35] Austill v. Crawford, 7 Ala. 335.

[36] In re Knight, 2 Biss. 518, 8 N. B. R. 436, Fed. Cas. No. 7,880; In re Plotke, 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171.

[37] Rugely v. Robinson, 19 Ala. 404; Burnham v. Ft. Dodge Grocery Co., 144 Iowa, 577, 123 N. W. 220; Stewart v. Hoffman, 31 Mont. 184, 77 Pac. 689, 81 Pac. 3; Mount v. Manhattan Co., 41 N. J. Eq. 211, 3 Atl. 726; Wagner v. Burnham, 224 Pa. 586, 73 Atl. 990; Ferrell v. Madigan, 76 Va. 195; Bank of Garrison v. Malley, 103 Tex. 562, 131 S. W. 1064; Broadnax v. Bradford, 50 Ala. 270; Russell v. Cheatham, 8 Smedes & M. (Miss.) 703; Kreitz v. Egelhoff, 231 Mo. 694, 132 S. W. 1124.

[38] In re Strachan, 3 Biss. 181, Fed. Cas. No. 13,519.

in insolvency after the date of the passage of the bankruptcy act, but before the first of June, its jurisdiction to proceed with the case was not ousted.[39] But this rule does not apply under the present act. In view of its declaration that it "shall go into full force and effect upon its passage," and that proceedings under state insolvency laws commenced "before the passage of this act" shall be saved, it is held that its operation in suspending the insolvency laws of the states, and depriving the courts of jurisdiction thereunder, is to be dated from the day of its approval, July 1st, and not from November 1st, the day when petitions in involuntary cases could first be filed.[40]

It is also held under the present statute, as it was under the law of 1867,[41] that the statute took effect from the date of its approval, rather than from the date when proceedings under it might be commenced, as to all acts done in fraud of the purpose of the statute, such as the giving of preferences or the transfer or conveyance of property in fraud of creditors, or the commission of an act of bankruptcy.[42] Further, it was held under the former law that, for the purpose of dissolving liens acquired within four months before the commencement of proceedings in bankruptcy, the act of 1867 was to be considered as having gone into operation on the day of its passage, although the right to file petitions under it was postponed for three months thereafter,[43] and the same rule will apply under the present act.

Where the endeavor is made to save the validity of a transfer or mortgage of property recorded on the same day on which the bankruptcy act was approved, evidence is admissible to show that the instrument in question was actually placed on the record several hours before the President approved the act by his signature.[44] But in the absence of

[39] Martin v. Berry, 37 Cal. 208, 2 N. B. R. 629; Day v. Bardwell, 97 Mass. 246, 3 N. B. R. 455; Chamberlain v. Perkins, 51 N. H. 336; Augsbury v. Crossman, 10 Hun (N. Y.) 389. The same ruling was made under the bankruptcy act of 1841. Larrabee v. Talbott, 5 Gill (Md.) 426, 46 Am. Dec. 637.

[40] In re Bruss-Ritter Co., 90 Fed. 651, 1 Am. Bankr. Rep. 58, holding also that the postponement of the right to file petitions in involuntary cases until four months after the passage of the bankruptcy act did not authorize state courts, in the interval, to take jurisdiction of proceedings begun under state insolvency laws (on the ground that the creditor would otherwise be without a remedy), being a mere regulation of procedure, and not a denial or impairment of the rights of suitors. And see Parmenter Mfg. Co. v. Hamilton, 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258.

[41] Traders' Bank v. Campbell, 14 Wall. 87, 6 N. B. R. 353; In re Louis, 3 Ben. 153, 2 N. B. R. 449, Fed. Cas. No. 8,527; Perry v. Langley, 1 N. B. R. 559, Fed. Cas. No. 11,006.

[42] Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; Blake, Moffitt & Towne v. Francis-Valentine Co., 89 Fed. 691, 1 Am. Bankr. Rep. 372.

[43] Corner v. Miller (Md. Com. Pleas) 1 N. B. R. 403.

[44] In re Wynne, Chase, 227, 4 N. B. R. 23, Fed. Cas. No. 18,117.

evidence to show at what hour on the first day of July, 1898, the President signed his approval to the bankruptcy act, it will be presumed to have taken effect from the earliest moment of that day; and therefore, under the provision that "no petition for involuntary bankruptcy shall be filed within four months of the passage" of the act, such a petition, filed on the first day of November, 1898, was not premature.[45]

The amendments to the present statute, passed respectively on February 5, 1903, and June 25, 1910, are not retroactive in their operation.[46]

§ 6. **Validity of State Insolvency Laws.**—Insolvency laws may be passed by the several states, regulating the distribution of the estates of insolvent debtors, on their own petition or on compulsory proceedings against them, and authorizing the discharge of debtors from their obligations and liabilities on just and reasonable terms, and the same will be operative in the absence of a national bankruptcy law.[47] But these state laws are subject to three important limitations. First, they cannot have any effective operation while a national bankruptcy law is in force, except, perhaps, as to persons or cases not covered by the federal statute. Whether the federal law is enacted before or after the passage of the state law, it suspends all state statutes on the same subject so long as it continues in effect. Second, state laws of this kind cannot apply to citizens of other states having claims against the debtor, for the state has no jurisdiction over them, unless they voluntarily submit their claims to the jurisdiction and agree to participate in the distribution of the estate. Third, such state laws cannot apply to contracts entered into before their enactment, for that would impair the obligation of such contracts.[48] But the fact that the constitution vests in Congress the exclusive power to enact bankruptcy laws uniform throughout the United States does not deprive the states of authority to

[45] Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383.

[46] Holt v. Henley, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767, 32 Am. Bankr. Rep. 161; In re Docker-Foster Co., 123 Fed. 190, 10 Am. Bankr. Rep. 584; In re Gartman, 186 Fed. 349; In re Calhoun Supply Co., 189 Fed. 537, 26 Am. Bankr. Rep. 528; In re New Amsterdam Motor Co., 180 Fed. 943, 24 Am. Bankr. Rep. 757; Breck v. Brewster, 153 App. Div. 800, 138 N. Y. Supp. 821. But compare In re Farmers' Co-operative Co., 202 Fed. 1008, 30 Am. Bankr. Rep. 190.

[47] Butler v. Goreley, 146 U. S. 303, 13 Sup. Ct. 84, 36 L. Ed. 981.

[48] Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606; Baldwin v. Hale, 1 Wall. 223, 17 L. Ed. 531; Gilman v. Lockwood, 4 Wall. 409, 18 L. Ed. 432; Brown v. Smart, 145 U. S. 454, 12 Sup. Ct. 958, 36 L. Ed. 773; Hempsted v. Bank, 78 Wis. 375, 47 N. W. 627. That a discharge under a state insolvency law is no bar to an action by a citizen of another state who did not appear or take part in the insolvency proceedings, see Newton v. Hagerman, 22 Fed. 525; Roberts v. Atherton, 60 Vt. 563, 15 Atl. 159, 6 Am. St. Rep. 133. Compare Orr v. Lisso, 33 La. Ann. 476.

make and enforce insolvency laws until Congress acts. "It is well settled that the power granted to Congress by the constitution, to establish uniform laws on the subject of bankruptcies throughout the United States, does not, until the power is exercised and such laws are put into operation by Congress, exclude the right of the states to pass similar laws; and that the operation of state insolvency laws is therefore superseded and suspended, so far, at least, as the two are applicable to the same persons, as soon as a national bankruptcy law has taken effect, and not before." [49]

§ 7. State Insolvency Laws Suspended by National Bankruptcy Law.—It is well settled by a multitude of incontestible authorities that the passage of a national bankruptcy law by Congress renders it the supreme law of the land, binding alike upon state and federal tribunals. All state insolvency laws in force at the time must yield to it, and can no longer operate upon persons or cases within the purview of the federal statute. The latter does not, indeed, repeal or destroy the state laws on the same subject, but it supersedes them and suspends their operation for the time being.[50] Territories are included in this rule;

[49] Day v. Bardwell, 97 Mass. 246, 3 N. B. R. 455. See also Pettit v. Seaman, 2 Root (Conn.) 178; Pugh v. Bussel, 2 Blackf. (Ind.) 394.

[50] Sturges v. Crowninshield, 4 Wheat. 122, 4 L. Ed. 529; Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606; Baldwin v. Hale, 1 Wall. 223, 17 L. Ed. 531; In re Brinn (D. C.) 262 Fed. 527, 45 Am. Bankr. Rep. 74; In re Pickens Mfg. Co., 158 Fed. 894, 20 Am. Bankr. Rep. 202; In re F. A. Hall Co., 121 Fed. 992, 10 Am. Bankr. Rep. 88; Carling v. Seymour Lumber Co., 113 Fed. 483, 51 C. C. A. 1, 8 Am. Bankr. Rep. 29; In re Curtis, 94 Fed. 630, 36 C. C. A. 430, 2 Am. Bankr. Rep. 226; Torrens v. Hammond, 10 Fed. 900; In re Smith, 92 Fed. 135, 2 Am. Bankr. Rep. 9; In re John A. Etheridge Furniture Co., 92 Fed. 329, 1 Am. Bankr. Rep. 112; In re Bruss-Ritter Co., 90 Fed. 651, 1 Am. Bankr. Rep. 58; In re Richard, 94 Fed. 633, 2 Am. Bankr. Rep. 506; In re Langley, 1 N. B. R. 559, Fed. Cas. No. 11,006; In re Mallory, 1 Sawy. 88, 6 N. B. R. 22, Fed. Cas. No. 8,991; In re Atkinson, 7 N. B. R. 143, 3 Pittsb. 423, Fed. Cas. No. 606; In re Temple, 6 Sawy. 77, Fed. Cas. No. 13,826; Ex parte Eames, 2 Story, 322, Fed. Cas. No. 4,237; In re Barrow, 1 N. B. R. 481, Fed. Cas. No. 1,057; In re Bunster, 5 Ben. 242, 5 N. B. R. 82; Fed. Cas. No. 2,136; In re Merchants' Ins. Co., 3 Biss. 162, 6 N. B. R. 43, Fed. Cas. No. 9,441; In re Independent Ins. Co., Holmes, 103, 6 N. B. R. 260, Fed. Cas. No. 7,017; In re Safe-Deposit & Sav. Inst., 7 N. B. R. 392, Fed. Cas. No. 12,211; Freelander v. Holloman, 9 N. B. R. 331, Fed. Cas. No. 5,081; In re Green Pond R. Co., 13 N. B. R. 118, Fed. Cas. No. 5,786; Capital Lumber Co. v. Saunders, 26 Idaho, 408, 143 Pac. 1178; Harbaugh v. Costello, 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147; First Nat. Bank v. Ware, 95 Me. 388, 50 Atl. 24; Parmenter Mfg. Co. v. Hamilton, 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258; Foley-Bean Lumber Co. v. Sawyer, 76 Minn. 118, 78 N. W. 1038; Armour Packing Co. v. Brown, 76 Minn. 465, 79 N. W. 522; E. C. Wescott Co. v. Berry, 69 N. H. 505, 45 Atl. 352; Potts v. Smith Mfg. Co., 25 Pa. Super. Ct. 206; Hickman v. Parlin-Orendorf Co., 88 Ark. 519, 115 S. W. 371; Rosenfeld v. Siegfried, 91 Mo. App. 169; Mauran v. Crown Carpet Lining Co., 23 R. I. 324, 50 Atl. 331; Hoover v. Ober, 42 Pa. Super. Ct. 308; Martin v. Berry, 37 Cal. 208; Barber v. Rodgers, 71 Pa. St. 362; Hudson v. Bigham, 12 Heisk. (Tenn.) 58, 8 N. B. R. 494; Rowe v.

and under the Organic Act for Porto Rico, declaring that federal statutes not locally inapplicable shall be effective in Porto Rico, local laws relating to the distribution of insolvent estates are unavailing, in so far as the matter is governed by the Bankruptcy Act, and those provisions which are contrary to that act are of no effect.[51] The reason for this rule is found in the inevitable conflict between two statutes affecting, for similar purposes, the same subject-matter, the same property, the same rights, and the same persons. Since they could not subsist together without direct and positive collision, the federal enactment must prevail; for a valid act of Congress is declared by the constitution to be the "supreme law of the land."

We have said that the bankruptcy act, while it suspends the operation of state insolvency laws, does not repeal or destroy them. Several important consequences follow from this doctrine. In the first place, no legislation by the state is necessary to put its insolvency law into abeyance during the life of the bankruptcy act, or to justify its courts in refusing to take jurisdiction of cases under such law; the suspension is accomplished by the mere supremacy of the act of Congress and its paramount authority. Secondly, a state insolvency law which was in force at the time a national bankruptcy law was passed, or which has been enacted during the time the latter continues effective, is revived by the repeal of the federal statute, and at once resumes all its original force and operation, and this without any new legislation by the state. In other words, there is no necessity of re-enacting a state insolvency law; it did not cease to be a law of the state; and the repeal of the bankruptcy act suffices to remove the bar to its enforcement.[52] Nor does

Page, 54 N. H. 190, 13 N. B. R. 366; In re McKee (Ky.) 1 Nat. Bankr. News, 139; In re Reynolds, 8 R. I. 485, 9 N. B. R. 50, 5 Am. Rep. 615; Lavender v. Gosnell, 43 Md. 153, 12 N. B. R. 282; Steelman v. Mattix, 36 N. J. Law, 344; Fisk v. Montgomery, 21 La. Ann. 446; Van Nostrand v. Carr, 30 Md. 128; Boese v. Locke, 53 How. Prac. (N. Y.) 148; Commonwealth v. O'Hara, 6 Phila. (Pa.) 402. Contra, In re Scholtz, 106 Fed. 834, 5 Am. Bankr. Rep. 782.

[51] In re Vidal, 233 Fed. 733, 147 C. C. A. 499, 36 Am. Bankr. Rep. 783.

[52] Butler v. Goreley, 146 U. S. 303, 13 Sup. Ct. 84, 36 L. Ed. 981; Tua v. Carriere, 117 U. S. 201, 6 Sup. Ct. 565, 29 L. Ed. 855; In re Wright, 95 Fed. 807, 2 Am. Bankr. Rep. 592; Lothrop v. Highland Foundry Co., 128 Mass. 120; Ward v. Proctor, 7 Metc. (Mass.) 318, 39 Am. Dec. 782; Lavender v. Gosnell, 43 Md. 153, 12 N. B. R. 282; Orr v. Lisso, 33 La. Ann. 476. In some of the earlier cases there was a disposition to regard the effect of a national bankruptcy law upon state insolvency laws as that of an actual repeal. See Adams v. Storey, 1 Paine, 79, Fed. Cas. No. 66. In Meekins v. Creditors, 19 La. Ann. 497, 3 N. B. R. 511, it was said that the effect of the enactment of a bankruptcy law was to "repeal" the insolvency law of the state; and that this doctrine had been recognized by the legislature of Louisiana, which passed an act in 1843 to "revive" the insolvency law of the state, apparently considering that, when the federal bankruptcy act of 1841 was repealed, it was necessary to revive the state law by re-enactment. But as early as the case of Sturges v. Crowninshield, 4 Wheat.

the legislation of Congress annul that of the state in any such sense that the state law may not be amended without re-enactment after its operation is revived by the repeal of the national law. So also, where the court of bankruptcy refuses to grant a discharge to a bankrupt before it, his creditors, after the repeal of the bankruptcy law, may take proceedings against him under the state insolvency law and prove their claims against his estate.[53] And again, a state insolvency law, suspended during the operation of a national bankruptcy law and revived by its repeal, may take cognizance of all acts within its provisions done while it was so suspended, and will apply to contracts made during that time.[54] Moreover, it is competent for a state legislature to enact, amend, or repeal a state insolvency law while the bankruptcy act is in force. A state law of this character, passed while the federal act is operative, will not come into effect at once, but this does not make it void ab initio. The legislature has the power to make the time when its enactment shall take effect depend upon the happening of some future event. This event being the repeal of the bankruptcy law, the postponement of the efficiency of the state law until it occurs may be implied, and until that time the insolvency law will remain in abeyance.[55]

§ 8. Same; What State Laws Affected.—In connection with the question of the validity of national bankruptcy laws and of the insolvency laws of the several states, and the effect of the one upon the other, numerous attempts have been made (but without any marked

122, 196, 4 L. Ed. 529, Chief Justice Marshall had said: "It has been said that Congress has exercised this power, and by doing so has extinguished the power of the states, which cannot be revived by the repeal of the law of Congress. We do not think so. If the right of the states to pass a bankrupt law is not taken away by the mere grant of that power to Congress, it cannot be extinguished—it can only be suspended—by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the states, but it removes a disability to its exercise which was created by the act of Congress."

[53] Torrens v. Hammond, 4 Hughes, 596, 10 Fed. 900; Fisher v. Currier, 7 Metc. (Mass.) 424.

[54] Palmer v. Hixon, 74 Me. 447. A conveyance by way of preference, made by an insolvent debtor, in contravention of the provisions of the insolvency law of the state, while the federal bankruptcy act is in force, is a sufficient cause for instituting proceedings in insolvency against the debtor after the repeal of the bankruptcy act. Lothrop v. Highland Foundry Co., 128 Mass. 120.

[55] Tua v. Carriere, 117 U. S. 201, 6 Sup. Ct. 565, 29 L. Ed. 855; In re Wright, 95 Fed. 807, 2 Am. Bankr. Rep. 592; Damon's Appeal, 70 Me. 153; Boedefeld v. Reed, 55 Cal. 299; Lewis v. County Clerk, 55 Cal. 604; Seattle Coal Co. v. Thomas, 57 Cal. 197; In re Peckham's Assigned Estate, 35 Pa. Super. Ct. 330.

[56] In the case of Adams v. Storey, 1 Paine, 79 Fed. Cas. No. 66, will be found a detailed discussion of the nature of bankruptcy and insolvency laws and the differences between them, and the constitutional power of the states with ref-

success) to draw a sharp line of distinction between a bankruptcy law, properly so called, and an insolvency law.[56] But in truth, as regards the matter under discussion, the question is not whether a particular law of a state is a "bankruptcy" law or an "insolvency" law, but whether the statute, without regard to its being called by one or the other of those names, or by neither of them, is incompatible with the effective administration of the national bankruptcy act, by invading the special field which the latter covers, or by usurping for the courts of the state the exclusive province of the bankruptcy courts to collect and distribute the assets of an insolvent debtor who is amenable to the act of Congress. For example, the test of the validity of proceedings under a state law does not lie in the question whether or not it purports to release the insolvent from his obligations. "In so far as a state law attempts to administer on the effects of an insolvent debtor and distribute them among creditors, it is to all intents and purposes an insolvent law, although it may not authorize a discharge of the debtor from further liability."[57] Thus, a statute of Georgia which provides for the distribution of the assets of insolvents, is held to be in effect a bankruptcy law, and as such suspended by the act of Congress, although it only authorizes the chancellor to recommend to the creditors of the defendant that they should release him from further liability.[58] This distinction is further brought out by a consideration of the statute law of Louisiana with reference to "respite proceedings" and the "cessio bonorum." Under these statutes, where a debtor believes himself to be solvent or able to recover his solvency, he may ask a respite (or general extension of time for payment of his debts), and thereupon pending proceedings against him may be stayed and a meeting of his creditors convoked to vote on the question of accepting his proposition and granting the respite. If their action is affirmative, the proceedings are not in the nature of insolvency proceedings, and there is no conflict with the bankruptcy law. But if they reject the debtor's proposals and vote for the appointment of a syndic (or trustee) to collect and administer

erence to the enactment of such laws. But in fact, as pointed out in Martin v. Berry, 37 Cal. 208, 2 N. B. R. 629, the only substantial difference between a bankruptcy law and an insolvency law lies in the circumstance that the former affords relief upon the application of the creditor, and the latter upon the application of the debtor. In the general character of the remedy, there is no difference, however much the modes in which the remedy may be administered may vary. An act which (like the present act of Congress) embodies provisions for both voluntary and involuntary proceedings is in effect both a bankruptcy law and an insolvency law.

[57] In re Merchants' Ins. Co., 3 Biss. 162, 6 N. B. R. 43, Fed. Cas. No. 9,441. Compare Ex parte Rank, Crabbe, 493, Fed. Cas. No. 11,566. And see, contra, Greene v. Rice, 32 Idaho, 504, 186 Pac. 249.

[58] Carling v. Seymour Lumber Co., 113 Fed. 483, 51 C. C. A. 1, 8 Am. Bankr. Rep. 29.

his property under the state insolvency law, this is incompatible with the bankruptcy law, and the state law in such a case must give way.[59]

In regard to the winding-up of insolvent corporations, there has been some hesitation and some difference of opinion. But the rule has been finally settled by the Supreme Court of the United States, substantially as follows: The bankruptcy act does not interfere with the general equity powers of state courts to appoint receivers for corporations in that condition, nor does it actually suspend the operation of a state statute authorizing the appointment of receivers in such circumstances. But the nomination of a receiver "on the ground of insolvency" constitutes an act of bankruptcy,[60] and gives to creditors the opportunity of filing a petition in the proper federal court. And when proceedings begun under the state statute take the form of proceedings to dissolve the corporation or forfeit its charter, and to wind up its affairs and distribute its assets, then the attempt is made to cover the same ground and administer the same relief that would be obtained under the bankruptcy law. That this would be enough by itself to terminate the jurisdiction of the state court and make its further proceedings void has not been authoritatively decided. But it is settled that if a proceeding in bankruptcy against the corporation is thereupon commenced, in the proper federal court and on a proper petition, this will displace the proceedings in the state court and put an end to its jurisdiction. "The operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive." [61] It follows also that the persons whom the state court has placed in charge of the corporation for the purpose of winding it up, whether called receivers, commissioners, liqui-

[59] Duffy v. His Creditors, 122 La. 600, 48 South. 120, construing La. Civ. Code, art. 3098.

[60] Bankruptcy Act 1898, § 3a, clause 4, as amended by Act Congress Feb. 5, 1903, 32 Stat. 797.

[61] In re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, 10 Am. Bankr. Rep. 113. And see In re Standard Fuller's Earth Co., 186 Fed. 578, 26 Am. Bankr. Rep. 862; In re Standard Cordage Co., 184 Fed. 156, 30 Am. Bankr. Rep. 448; In re Storck Lumber Co., 114 Fed. 360, 8 Am. Bankr. Rep. 86; Chandler v. Siddle, 3 Dill, 477, 10 N. B. R. 236, Fed. Cas. No. 2,594; French v. O'Brien, 52 How. Prac. (N. Y.) 394; Barber v. International Co., 73 Conn. 587, 48 Atl. 758; Moody v. Port Clyde Development Co., 102 Me. 365, 66 Atl. 967; Watson v. Citizens' Sav. Bank, 5 Rich. (S. C.) 159; State v. Superior Court of King County, 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177; In re Weedman Stave Co., 199 Fed. 948, 29 Am. Bankr. Rep. 460; Continental Building & Loan Ass'n v. Superior Court, 163 Cal. 579, 126 Pac. 476; Lyon v. Russell, 41 App. D. C. 554; Carter, Carter & Meigs Co. v. Stewart Drug Co., 115 Me. 289, 98 Atl. 809.

dators, or by any other name, cannot successfully oppose its adjudication in bankruptcy on the ground of the pending proceedings in the state court; and indeed, if the state law is to be regarded as an insolvency law, their appointment must be treated as void by the bankruptcy court, and they have no standing in the latter court to be heard on the petition for adjudication in bankruptcy.[62]

Further, to determine the jurisdiction of a state court in all such cases, the real object of the proceeding must be regarded, rather than its mere form. Thus, there is nothing in the bankruptcy act to prevent a mortgage creditor from foreclosing his security, supposing that it is not impeachable as a preference or as given in fraud of other creditors; and clearly also he has the right to ask for the appointment of a receiver on alleging the inadequacy of the security and the insolvency of the mortgagor. Hence, where the main purpose of a suit is to foreclose a mortgage, and there is also an incidental prayer for relief appropriate to insolvency proceedings, a receiver's possession thereunder will not be affected by a subsequent adjudication in bankruptcy. But on the other hand, where the main purpose is to obtain relief appropriate only in insolvency proceedings, the fact that a mortgage may be foreclosed as an incident thereto will not save the case from the nullifying effect of bankruptcy proceedings on pending insolvency proceedings.[63]

But a state law which merely protects the person of a debtor from imprisonment, without affecting the debt or contract or the other means for its enforcement, or which provides only for the release of poor debtors arrested on civil process, is not of such a nature as to be suspended by the bankruptcy law.[64] And of course the latter act does not affect the general laws of the states providing for the settlement of the estates of insolvent persons deceased.[65] Nor, it is said, does the bankruptcy law suspend a state law enabling a creditor to prevent the departure of his debtor from the state,[66] or one which authorizes the arrest and imprisonment of a judgment debtor on a showing that he is about to remove or has concealed property with intent to defraud his creditors, although it also provides that he may be released on giving bond to apply for the benefit of the state insolvency law and comply with its requirements.[67] And a statute designed to prevent debtors, in

[62] Thornhill v. Bank of Louisiana, 1 Woods, 1, 5 N. B. R. 367, Fed. Cas. No. 13,992. And see In re Salmon & Salmon, 143 Fed. 395, 16 Am. Bankr. Rep. 122.

[63] Merry v. Jones, 119 Ga. 643, 46 S. E. 861. And see Virginia-Carolina Chemical Co. v. Rylee, 139 Ga. 669, 78 S. E. 27.

[64] Sullivan v. Heiskell, Crabbe, 525, Fed. Cas. No. 13,594; Ex parte Jacobs, 12 Abb. Prac. (N. Y.) N. S. 273; Jordan v. Hall, 9 R. I. 220, 11 Am. Rep. 245.

[65] Hawkins v. Learned, 54 N. H. 333.

[66] Gottschalk v. Meyer, 28 La. Ann. 885.

[67] Ex parte Crawford, 154 Fed. 769, 83 C. C. A. 474, 18 Am. Bankr. Rep. 618.

contemplation of insolvency, from giving preferences to favored creditors, is not a bankruptcy law and is not suspended by the act of Congress.[68] So also of a statute which confers on resident creditors priority in the distribution of the assets of foreign corporations doing business within the state.[69] And the opinion has been expressed that an action brought by a receiver in proceedings supplementary to execution is not a proceeding commenced under a state insolvency law, within the meaning of the saving clause of the bankruptcy act regarding such proceedings pending at the time of its taking effect.[70]

§ 9. Same; Cases Not Covered by Bankruptcy Law.—While the state insolvency laws are suspended by the enactment and administration of a national bankruptcy law, as to all matters and cases coming within the purview of the latter, it does not necessarily follow that they are wholly annulled. On the contrary, they remain operative within a limited range. The federal statute provides only for particular cases, and the state laws are suspended only in so far as they conflict with the act of Congress. But as to any cases not covered by the bankruptcy law, or expressly or impliedly omitted from its operation, it may be presumed that Congress did not intend to interfere with the laws of the several states, and they may therefore still be put into effect.[71] For example, the present bankruptcy law, in its original form and until the amendment of 1910, made no provision for the voluntary bankruptcy of corporations, but expressly excluded them from taking the benefit of the act in that form. Hence it was held that the act did not preclude a state court from taking jurisdiction of a stockholder's suit for the appointment of a receiver and for winding up the affairs of the corporation, at least in the absence of proceedings in involuntary bankruptcy begun by creditors.[72] Again, the compulsory features of the present act are not applicable to all classes of corporations, but only (under the amend-

[68] Stellwagen v. Clum, 245 U. S. 605, 38 Sup. Ct. 215, 62 L. Ed. 507, 41 Am. Bankr. Rep. 1; Irwin v. Maple, 252 Fed. 10, 164 C. C. A. 122, 41 Am. Bankr. Rep. 532; Grunsfeld Bros. v. Brownnell, 12 New Mex. 192, 76 Pac. 310.

[69] In re Standard Oak Veneer Co., 173 Fed. 103, 22 Am. Bankr. Rep. 883.

[70] In re Meyers, 1 Nat. Bankr. News, 293, per Hotchkiss, Referee.

[71] Johnson v. Crawford, 154 Fed. 761, 18 Am. Bankr. Rep. 608; In re Wilmington Hosiery Co., 120 Fed. 180, 9 Am. Bankr. Rep. 581; In re Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496; In re Reynolds, 8 R. I. 485, 9 N. B. R. 50, 5 Am. Rep. 615; Singer v. National Bedstead Mfg. Co., 65 N. J. Eq. 290, 55 Atl. 868; Appeal of Geery, 43 Conn. 289, 21 Am. Rep. 653; Pitcher v. Standish, 90 Conn. 601, 98 Atl. 93, L. R. A. 1917A, 105; Pugh v. Bussel, 2 Blackf. (Ind.) 394; Fisk v. Montgomery, 21 La. Ann. 446; Simpson v. City Sav. Bank, 56 N. H. 466, 15 N. B. R. 385, 22 Am. Rep 491; Steelman v. Mattix, 36 N. J. Law, 344.

[72] Roberts Cotton Oil Co. v. F. E. Morse & Co., 97 Ark. 513, 135 S. W. 334; Keystone Driller Co. v. Superior Court of San Francisco, 138 Cal. 738, 72 Pac. 398.

ment of 1910) to "any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation." Hence if proceedings under a state insolvency law, or under a law for the winding up of insolvent corporations, are commenced against a corporation which is not amenable to the bankruptcy law, but which is within the terms of the state law, it is difficult to see on what grounds they are to be held invalid, for there is no possibility of conflict between the two statutes. And in effect it is held that the states are left free to deal in their own courts with those classes of corporations which are expressly excepted from the operation of the bankruptcy law or which do not come within its general terms.[73] This would apply not only to railroads, insurance companies, and incorporated banks and savings institutions, but also to educational, charitable, benevolent, and religious corporations, and to any others coming within the terms of the state statute but not included in the class of "moneyed, business, or commercial corporations." Again, the act of Congress forbids the institution of involuntary proceedings against "a wage earner or a person engaged chiefly in farming or the tillage of the soil." As to such persons, therefore, the insolvency law of the state is not suspended, but may be put into effective operation, if they come within its terms.[74] Again, the bankruptcy act authorizes proceedings in involuntary bankruptcy against a debtor only in case he owes debts to the amount of $1,000 or over. But if the state insolvency law permitted compulsory proceedings against a person whose debts amounted to less than that sum (so that he would not at all be subject to the federal law, unless he chose voluntarily to apply for its benefits), it would certainly appear that the state law might be put in force in such a case; and it is generally so held.[75] Further, it is held that the act of Congress does not suspend state insolvency laws so far as concerns debts and claims of a nature not to be dischargeable in bankruptcy.[76] This is illustrated by a case in Pennsyl-

[73] State Nat. Bank v. Syndicate Co. of Eureka Springs, 178 Fed. 359; Dille v. People, 118 Ill. App. 426; Rogers v. Boston Club, 205 Mass. 261, 91 N. E. 321, 28 L. R. A. (N. S.) 743; R. H. Herron Co. v. Superior Court of San Franciso, 136 Cal. 279, 68 Pac. 814, 89 Am. St. Rep. 124; Simpson v. City Sav. Bank, 56 N. H. 466, 15 N. B. R. 385, 22 Am. Rep. 491.

[74] Old Town Bank v. McCormick, 96 Md. 341, 53 Atl. 934, 60 L. R. A. 577, 94 Am. St. Rep. 577; Hoover v. Ober, 42 Pa. Super. Ct. 308; Citizens' Nat. Bank v. Gass, 29 Pa. Super. Ct. 125; Miller v. Jackson, 34 Pa. Super. Ct. 31; In re Rittenhouse's Insolvent Estate, 30 Pa. Super. Ct. 468; Lace v. Smith, 34 R. I. 1, 82 Atl. 268; Pitcher v. Standish, 90 Conn. 601, 98 Atl. 93, L. R. A. 1917A, 105; Rockville Nat. Bank v. Latham, 88 Conn. 70, 89 Atl. 1117.

[75] Appeal of Shepardson, 36 Conn. 23; Corner v. Miller (Md.) 1 N. B. R. 403. Contra, Littlefield v. Gay, 96 Me. 422, 52 Atl. 925.

[76] Johnson v. Crawford, 154 Fed. 761, 766, 18 Am. Bankr. Rep. 608, citing Scully v. Kirkpatrick, 79 Pa. St. 324, 21 Am.

vania, where a debtor had gone through bankruptcy and obtained his discharge. Afterwards he was taken on a ca. sa. from a state court, issuing on a debt contracted in actual fraud, and therefore not affected by the discharge in bankruptcy, and on this process he was incarcerated. He applied for the benefit of the insolvency law of the state, whereby he could obtain his release from imprisonment. It was objected that, the national bankruptcy law being still in force, the state law was in suspense and could afford no relief to the debtor. But it was held that this was a case not covered by the act of Congress, but expressly excepted from it, and there being no possibility of conflict between the two statutes, the state law was not suspended quoad hoc, and the debtor might take the benefit of its provisions.[77] So also, the act of Congress does not supersede or suspend the operation of "poor debtor laws and those which provide for the release of insolvent convicts, the bankruptcy law having no provision adapted to these cases, and the parties to whom they apply being otherwise left without remedy." [78]

Another illustration of the point here in question is found in the effect of the bankruptcy act of the statute of Pennsylvania relating to domestic attachments. This law provides for the sequestration of the entire estate of an absconding or concealed debtor, on a writ of attachment, for the appointment of trustees to be vested with title to such estate, and for its distribution to creditors. Now the bankruptcy act of 1867 declared that it should be an act of bankruptcy if a debtor should depart from the state with intent to defraud his creditors, or should conceal himself to avoid service of legal process; and in view of this provision it was held that the state domestic attachment law was suspended while the federal act of 1867 remained in force.[79] But the bankruptcy act of 1898 does not contain any provision relating to absconding or concealed debtors, and the opinion is now advanced that it does not in any way conflict with the state law, and therefore does not suspend or supersede it,[80] although proceedings begun under the state statute might be superseded by an adjudication in bankruptcy against such a debtor.

Rep. 62; Hubert v. Horter, 81 Pa. St. 39; Ex parte Winternitz, 7 Phila. (Pa.) 380, 18 Pittsb. Leg. J. (N. S.) 61. And see Landis Machine Co. v. Cooper, 53 Pa. Super. Ct. 416.

[77] In re Winternitz, 7 Phila. (Pa.) 380, 18 Pittsb. Leg. J. (N. S.) 61.

[78] Johnson v. Crawford, 154 Fed. 761, 766, 18 Am. Bankr. Rep. 608, citing Jordan v. Hall, 9 R. I. 219, 11 Am. Rep. 245.

[79] Tobin v. Trump, 7 Phila. (Pa.) 123, 3 Brewst. 288.

[80] McCullough v. Goodhart (Pa. Com. Pleas) 1 Nat. Bankr. News, 512. And see Scully v. Kirkpatrick, 79 Pa. St. 324, 21 Am. Rep. 62.

§ 10. Same; Laws Regulating Assignments for Creditors.—In this branch of our subject, the most difficult questions arise in connection with the effect of the bankruptcy law upon state statutes which authorize or regulate assignments for the benefit of creditors. Notwithstanding a considerable difference of opinion, the following principles appear to be fairly well settled upon the authorities. First, the common law relating to such assignments is not a part of the state insolvency law, since it neither places the administration of the state under the control of the courts, nor exonerates the debtor from personal liability, nor releases him or his future acquisitions from the unpaid balance of his debts. And hence it is not suspended by the enactment of a bankruptcy law. That is, an assignment made as at common law will be valid unless it is impeached and overthrown by proceedings in bankruptcy begun within the statutory time.[81] In the next place, we are to consider the statutes, in force in several of the states, which are designed to prevent fraudulent assignments and strike down preferences. These laws provide that any assignment, mortgage, or deed of trust, made by a debtor in contemplation of insolvency and for the purpose of giving a preference, shall operate as an assignment and transfer of all his property and inure to the benefit of all his creditors pro rata, if proceedings for that purpose are begun within a limited time. It is held that these statutes are not insolvency laws in such sense as to be suspended or superseded by the bankruptcy law.[82] In the next place there are laws in many of the states which regulate the administration of estates voluntarily assigned for the benefit of creditors. Differing largely in details, these laws yet present the following usual features. They require such an assignment to be recorded and give to some court of the state the control of the settlement and administration of the estate. They require the assignee to give a bond, and to file an inventory of the property. They require creditors who wish to claim under the assignment to present their claims within a stated time. They authorize the

[81] In re Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117; Pogue v. Rowe, 236 Ill. 157, 86 N. E. 207; Danville Auburn Auto Co. v. National Trust & Credit Co., 212 Ill. App. 116; Thompson v. Shaw, 104 Me. 85, 71 Atl. 370; Cook v. Rogers, 31 Mich. 391, 13 N. B. R. 97; In re Hawkins, 34 Conn. 548, 2 N. B. R. 378; Haas v. O'Brien, 66 N. Y. 597, 16 N. B. R. 508; Von Hein v. Elkus, 15 N. B. R. 194. A creditor who does not assent to an assignment for the benefit of creditors is entitled to attack it in any appropriate proceeding, and is not required to resort to a petition in bankruptcy as a means of avoiding it. Moore v. Cushing, 116 Minn. 142, 133 N. W. 561, Ann. Cas. 1913A, 816.

[82] Bell v. Blessing, 225 Fed. 750, 141 C. C. A. 34, 35 Am. Bankr. Rep. 672; Linthicum v. Fenley, 11 Bush (Ky.) 131; Ebersole v. Adams, 10 Bush (Ky.) 83, 13 N. B. R. 141; Downer v. Porter, 116 Ky. 422, 76 S. W. 135; Louisville Dry Goods Co. v. Lanman, 135 Ky. 163, 121 S. W. 1042, 28 L. R. A. (N. S.) 363, 135 Am. St. Rep. 451. See Martin v. Hausman, 14 Fed. 160.

collection of assets by the assignee by suit, and his discharge upon the settlement of the trust. And they provide for the distribution of the proceeds of the assigned estate among the creditors pro rata. If the law of the state goes no further than this, it is not to be considered an insolvency law; and proceedings commenced under it are not absolutely void merely by reason of the existence of a national bankruptcy law, although they are liable to be avoided at the instance of a trustee in bankruptcy of the insolvent assignor subsequently appointed in bankruptcy proceedings in the proper federal court.[83] But there are laws in some of the states which are not confined to regulating the administration of an assigned estate on just and equitable principles, but embrace features characteristic of an insolvency law properly so called. Without compelling any debtor to make an assignment, they treat such an assignment as an act of insolvency, and direct the administration of the estate to proceed substantially as would be the case in voluntary proceedings under an insolvency act, and in particular, they provide that any creditor who has proved his claim shall be thereafter debarred from prosecuting an action on it; in other words, they grant the insolvent a discharge from his provable debts. As to statutes of this character, the authorities hold that their operation must be considered as suspended by the enactment of the national bankruptcy law.[84]

[83] Mayer v. Hellman, 91 U. S. 496, 13 N. B. R. 440, 23 L. Ed. 377; In re Gutwillig, 90 Fed. 475, 1 Am. Bankr. Rep. 78; In re Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117; In re Farrell, 176 Fed. 505, 100 C. C. A. 63, 23 Am. Bankr. Rep. 826; Peck v. Parker, 65 Pa. St. 262, 3 Am. Rep. 625; Strong v. Carrier, 17 Conn. 319; Duryea v. Guthrie, 117 Wis. 399, 94 N. W. 365; Binder v. McDonald, 106 Wis. 332, 82 N. W. 156; Patty-Joiner & Eubank Co. v. Cummins (Tex. Civ. App.) 59 S. W. 297. In the case of Mayer v. Hellman, supra, it was said: "In the argument of the plaintiff's counsel, the position is taken that the bankrupt act suspends the operation of the act of Ohio regulating the mode of administering assignments for the benefit of creditors, treating the latter as an insolvent law of the state. The answer is that the statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or even in terms authorize, assignments; it assumes that such instruments were conveyances previously known and only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustees for the discharge of their duties; it requires them to file statements showing what they have done with the property, and affords, in various ways, the means of compelling them to carry out the purposes of the conveyances. There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment; it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provision. The assignment in this case must therefore be regarded as though the statute of Ohio, to which reference is made, had no existence. There is an insolvent law in that state but the assignment in question was not made in pursuance of any of its provisions."

[84] First Nat. Bank of Bandon v. Manassa, 80 Or. 53, 150 Pac. 258; Pelton v. Sheridan, 74 Or. 176, 144 Pac. 410. See In re Curtis, 91 Fed. 737, 1 Am. Bankr. Rep. 440; In re Smith, 92 Fed. 135, 2

Under the former class of statutes certainly, and probably also under the latter, an assignment for the benefit of creditors, though voidable at the instance of a trustee in bankruptcy subsequently appointed, is not void ab initio. Though it constitutes an act of bankruptcy under the federal statute, and though it was made for the very purpose of giving preferences and otherwise evading the provisions of that law, it is not a mere nullity, in any such sense as to leave the title to the property in the assignor as if no assignment had been made. If no proceedings are instituted in a court of bankruptcy within the time limited, for the adjudication of the assignor as a bankrupt, and for the purpose of securing the administration of the property in that court, the assignment will be valid, at least for the purpose of securing an equal distribution of the estate among the creditors; that is, it will be valid as at common law, though not as an attempt to invoke the state insolvency law.[85] Nevertheless, a general assignment by an insolvent debtor, though made for the equal and common benefit of all his creditors, without preferences, and without any actual fraudulent intent, either as to creditors or as to the evasion of the bankruptcy law, is an act of bankruptcy, upon which the assignor may be adjudged bankrupt, if proceedings are begun within four months thereafter, and if the other requisites as to jurisdiction are found to exist.[86] Moreover, the complete jurisdiction

Am. Bankr. Rep. 9; In re McKee, 1 Nat. Bankr. News, 139; Lyman v. Bond, 130 Mass. 291. A decision of the supreme court of a state that a statute of that state regulating the administration and distribution of estates under general assignments for the benefit of creditors is an insolvency law, will be followed by the federal courts of bankruptcy in deciding upon the effect of the enactment of the national bankruptcy law upon the operation of such a statute. In re Curtis, 91 Fed. 737, 1 Am. Bankr. Rep. 440.

[85] Boese v. King, 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760; In re Romanow, 92 Fed. 510, 1 Am. Bankr. Rep. 461; Johnson v. Crawford, 154 Fed. 761, 18 Am. Bankr. Rep. 608; Ostrander v. Meunch, 2 McCrary, 267, 12 Fed. 562; Wald v. Wehl, 18 Blatchf. 495, 6 Fed. 163; Boese v. King, 78 N. Y. 471; Pogue v. Rowe, 236 Ill. 157, 86 N. E. 207; Armour Packing Co. v. Brown, 76 Minn. 465, 79 N. W. 522; Binder v. McDonald, 106 Wis. 332, 82 N. W. 156; Patty-Joiner & Eubank Co. v. Cummins, 93 Tex. 598, 57 S. W. 566; Hilliard v. Burlington Shoe Co., 76 Vt. 57, 56 Atl. 283; Hoague v. Cumner, 187 Mass. 296, 72 N. E. 956; Louisville Dry Goods Co. v. Lanman, 135 Ky. 163, 121 S. W. 1042, 28 L. R. A. (N. S.) 363, 135 Am. St. Rep. 451; Lucas v. Lucas' Assignee, 76 S. W. 371, 25 Ky. Law Rep. 822; Barnes v. Rettew, 8 Phila. (Pa.) 133, Fed. Cas. No. 1,019; Sparhawk v. Drexel, 12 N. B. R. 450, Fed. Cas. No. 13,204; Seaman v. Stoughton, 3 Barb. Ch. (N. Y.) 344; Strong v. Carrier, 17 Conn. 319; Cook v. Rogers, 31 Mich. 391; Bostwick v. Burnett, 74 N. Y. 317; Maltbie v. Hotchkiss, 38 Conn. 80, 5 N. B. R. 485, 9 Am. Rep. 364; Atkins v. Spear, 8 Metc. (Mass.) 490; Sadler v. Immel, 15 Nev. 265; Thrasher v. Bentley, 59 N. Y. 649; Williams v. Pitts, 55 How. Prac. 331; Sabin v. Chrisman, 79 Or. 191, 154 Pac. 908.

[86] Boese v. King, 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760; Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117; Cragin v. Thompson, 2 Dill. 513, 12 N. B. R. 81, Fed. Cas. No. 3,320; Perry v. Langley, 1 N. B. R. 559, Fed. Cas. No. 11,006; In re Pierce, 3 N. B. R. 258, Fed. Cas. No.

of the court of bankruptcy over the estate of the bankrupt is not affected by the fact that an assignment for the benefit of creditors under the state law had been made prior to the adjudication. The trustee in bankruptcy takes title to the whole of the estate, including that assigned; the assignment is voidable at his instance; and he may recover the property or its proceeds from the assignee.[87] The assignment, however, will be saved by the lapse of four months without the institution of bankruptcy proceedings. That is to say, if the debtor is adjudged bankrupt, and a trustee appointed, but not until more than four months from the making of the assignment, the latter will not have the right to set aside the assignment, nor will he be entitled to the possession and administration of the estate as against the voluntary assignee. In such a case, the trustee in bankruptcy, saving questions of fraud, will take only such rights as the bankrupt had and could himself claim at the time of the bankruptcy.[88]

§ 11. Practical Effect of Suspension of State Insolvency Laws.—Although there is no dispute as to the general rule above stated, that state insolvency laws are superseded or suspended in their operation by the enactment of a national bankruptcy law, yet there is much uncertainty as to the practical working of this principle, especially where the validity of proceedings under the state laws is questioned collaterally. If the bankruptcy law gives to the courts of the United States exclusive jurisdiction of all proceedings for winding up the estate of an insolvent debtor, and suspends the operation of all state laws having the same general character, it would seem that, such a federal statute being in existence, it is the right and duty of state courts to refuse to take juris-

11,141; In re Smith, 4 Ben. 1, 3 N. B. R. 377, Fed. Cas. No. 12,974; Barnes v. Rettew, 8 Phila. 133, Fed. Cas. No. 1,019; Barton v. Tower, Fed. Cas. No. 1,085; In re Burt, 1 Dill. 439, Fed. Cas. No. 2,210; In re Chamberlain, 3 N. B. R. 710, Fed. Cas. No. 2,574; In re Croft, 8 Biss. 188, 17 N. B. R. 324, Fed. Cas. No. 3,404; Jones v. Sleeper, Fed. Cas. No. 7,496; In re Kasson, 18 N. B. R. 379, Fed. Cas. No. 7,617; In re Romanow, 92 Fed. 510, 1 Am. Bankr. Rep. 461; Spicer v. Ward, 3 N. B. R. 512, Fed. Cas. No. 13,241; In re Randall, Deady, 557, 3 N. B. R. 18, Fed. Cas. No. 11,551.

[87] Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Gutwillig, 92 Fed. 337, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388; In re Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117; In re Gutwillig, 90 Fed. 475, 1 Am. Bankr. Rep. 78; In re Smith, 92 Fed. 135, 2 Am. Bankr. Rep. 9; In re Troth, 1 Fed. 405; Pool v. McDonald, 15 N. B. R. 560, Fed. Cas. No. 11,268; Cragin v. Thompson, 2 Dill. 513, 12 N. B. R. 81, Fed. Cas. No. 3,320; In re Temple, 4 Sawy. 92, 17 N. B. R. 345, Fed. Cas. No. 13,825; Macdonald v. Moore, 8 Ben. 579, 15 N. B. R. 26, Fed. Cas. No. 8,763; Boese v. Locke, 17 Hun (N. Y.) 270. Compare Morning Telegraph Pub. Co. v. S. B. Hutchinson Co., 146 Mich. 38, 109 N. W. 42; Scott v. Grinstead, 4 Ky. Law Rep. 614.

[88] Mayer v. Hellman, 91 U. S. 496, 13 N. B. R. 440, 23 L. Ed. 377; In re Arledge, 1 N. B. R. 644, Fed. Cas. No. 533; In re Kimball, 16 N. B. R. 188, Fed. Cas. No. 7,770.

diction of proceedings attempted to be instituted under the state law, and that when an insolvent files a petition in a state court seeking the benefit of that law, the court should dismiss the petition; and it has been so held.[89] But not all the state courts agree in this proposition. By some it is held that they will not be ousted of jurisdiction over an insolvency case unless proceedings in bankruptcy are instituted against the same debtor. But they concede that when such a conflict actually arises, then the state court must decline to proceed further with the action pending before it.[90] On the same line, the federal courts hold that in a case where proceedings are pending in the two courts under the two statutes, the federal court may stay the action in the state court, or, if an assignee has been appointed under the state law, he may be enjoined from taking possession of the property of the insolvent, or required to surrender it up to the trustee in bankruptcy.[91]

But the really difficult question arises when no proceedings under the bankruptcy act have been taken, so that there is no conflict between courts, but only the mere existence of the bankruptcy act stands in the way of the proceedings under the state law. Here we have to inquire whether any validity can be predicated of the action of the state court under the state law, or of the title of the assignee thereunder, or of the title of a purchaser at a sale made by such assignee. Are these proceedings valid, void, or voidable; and if the latter, at whose instance may they be avoided? Some cases have gone so far as to hold that all proceedings under a state insolvency law, the bankruptcy act being in force, are absolutely null and void for all purposes.[92] Thus, they rule that a discharge granted to the insolvent under the state law, as the result of proceedings had while the national bankruptcy law was operative and would have been applicable to his case, is entirely inoperative and constitutes no defense to an action subsequently brought against

[89] Closser v. Strawn (D. C.) 227 Fed. 139, 35 Am. Bankr. Rep. 864; Van Nostrand v. Carr, 30 Md. 128, 2 N. B. R. 485; Harbaugh v. Costello, 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147; Barber v. International Co. of Mexico, 73 Conn. 587, 48 Atl. 758. In Baxter County Bank v. Copeland, 114 Ark. 316, 169 S. W. 1180, it is held that a state court should not assume jurisdiction of a general assignment for creditors within four months after the date of the assignment, since within that time it may be invalidated by a proceeding in bankruptcy.

[90] In re McKee (Ky. County Ct.) 1 Nat. Bankr. News, 139. In this case, creditors applied for an order requiring the insolvent to appear before the state court and submit to an examination touching his estate, as authorized by the state law, but on his filing an affidavit setting forth the pendency of the bankruptcy proceedings against him, the state court denied the motion for examination.

[91] Ex parte Eames, 2 Story, 322, Fed. Cas. No. 4,237.

[92] Thornhill v. Bank of Louisiana, 1 Woods, 1, 5 N. B. R. 367, Fed. Cas. No. 12,992; Littlefield v. Gay, 96 Me. 422, 52 Atl. 925; Martin v. Berry, 37 Cal. 208, 2 N. B. R. 629; Comm. v. O'Hara, 1 N. B. R. 86.

him by a domestic creditor.[93] Decisions are to be found going much further even than this. A case in Massachusetts rules that an assignee under the state law has no title or claim to the property of the debtor such as will enable him to maintain an action for its recovery against a third person, the existence of the bankruptcy law, which would be applicable to the debtor, being a full defense to such an action; and this, although no proceedings under the federal statute are ever had against the insolvent.[94] So there is a decision in Connecticut to the effect that, in similar circumstances, the trustee in insolvency acquires no such interest in the insolvent's estate as will entitle him to maintain an action to set aside a fraudulent and preferential conveyance, although no adjudication of bankruptcy has been had against the insolvent in the federal courts.[95] Again, it is held that the invalidity of proceedings had under a state insolvency law, including the invalidity of the pretended title of the assignee under such law, by reason of the existence at the time of a national bankruptcy law, may be asserted, with effect, in a contest between attaching creditors and such assignee.[96]

But all these positions are controverted by authorities of equal importance. Numerous cases hold that proceedings may be had and jurisdiction exercised under the state laws until their authority is called in question by the bankruptcy courts; that judicial action taken, and titles accruing, under the insolvency laws are voidable at the most; and that they are not to be avoided unless proceedings in bankruptcy are instituted, and then only at the instance of the trustee in bankruptcy.[97] In one of the cases it was said: "So far as the state insolvency laws may prevent or even impede the operation of the bankruptcy law, they must yield to it in order that it may accomplish its object of establishing a uniform system of bankruptcy throughout the United States; but while the state laws thus yield, they are not entirely abrogated. They exist

[93] Shears v. Solhinger, 10 Abb. Prac. (N. Y.) N. S. 287; Cassard v. Kroner (Md.) 4 N. B. R. 569.

[94] Griswold v. Pratt, 9 Metc. (Mass.) 16. Compare Shryock v. Basehore, 82 Pa. St. 159, 15 N. B. R. 283.

[95] Ketcham v. McNamara, 72 Conn. 709, 46 Atl. 146, 50 L. R. A. 641.

[96] Rowe v. Page, 54 N. H. 190, 13 N. B. R. 366; Shryock v. Basehore, 82 Pa. St. 159, 15 N. B. R. 283. Compare Cook v. Rogers, 31 Mich. 391, 13 N. B. R. 97; Reed v. Taylor, 32 Iowa, 209, 4 N. B. R. 710, 7 Am. Rep. 180.

[97] Carling v. Seymour Lumber Co., 113 Fed. 483, 51 C. C. A. 1, 8 Am. Bankr. Rep. 29; Boston Mercantile Co. v. Ould-Carter Co., 123 Ga. 458, 51 S. E. 466; Patty-Joiner & Eubank Co. v. Cummins, 93 Tex. 598, 57 S. W. 566; State v. Superior Court of King County, 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177; Jensen-King-Byrd Co. v. Williams, 35 Wash. 161, 76 Pac. 934; Lavender v. Gosnell, 43 Md. 153, 12 N. B. R. 282; Steelman v. Mattix, 36 N. J. Law, 344; Reed v. Taylor, 32 Iowa, 209, 4 N. B. R. 710, 7 Am. Rep. 180; Cook v. Rogers, 31 Mich. 391, 13 N. B. R. 97; Ebersole v. Adams, 10 Bush (Ky.) 83, 13 N. B. R. 141; Maltbie v. Hotchkiss, 38 Conn. 80, 5 N. B. R. 485, 9 Am. Rep. 364; Shaw v. Standard Piano Co., 87 N. J. Eq. 350, 100 Atl. 167.

and operate with full vigor until the bankruptcy law attaches upon the person and property of the bankrupt, and that is not until it is judicially ascertained that the petitioner is a person entitled to the benefit of the bankruptcy law by his being declared a bankrupt by a decree of the court. Before that time, upon a sound construction of the bankruptcy act, it does not necessarily come in conflict with the insolvency laws of the state."[98] Notwithstanding the existence of a bankruptcy law which would be applicable to the case (it is held in another decision), the parties interested may, by consent, use the state law as a means of collecting and distributing the debtor's estate. Should proceedings in bankruptcy be instituted, and the federal court claim the administration of the estate, the state courts would yield; but in the absence of such a claim, the mere fact that a federal law is in existence, under which proceedings might be taken, is no objection to the jurisdiction of the state court.[99] And again, even as against an adjudication in bankruptcy, the state insolvency law may have a limited applicability and effect. Thus, where such a law gives priority of payment out of insolvents' estates to a certain class of debts, the same debts will be entitled to priority of payment out of bankrupts' estates.[100] And again, where the main purpose of a suit is to foreclose a mortgage, and there is also an incidental prayer for relief appropriate to insolvency proceedings, a receiver's possession of the property mortgaged will not be affected by a subsequent adjudication in bankruptcy.[101]

Finally, a case may arise where the debtor refuses to file his voluntary petition in bankruptcy, and yet refrains from committing any act of bankruptcy on which his creditors could proceed. Here there is no possibility of conflict between courts; and it is held that proceedings under the state law, even though compulsory in their nature, may be sustained, for the purpose of securing an equal distribution of the debtor's property among his creditors.[102]

§ 12. Pending Proceedings Under State Laws.—The concluding section of the bankruptcy act of 1898 provides as follows: "Proceedings commenced under state insolvency laws before the passage of this act shall not be affected by it." The effect of this is that the bankruptcy law does not deprive the state courts of the jurisdiction necessary to the final administration of the estate of an insolvent against whom, or

[98] Ex parte Ziegenfuss, 24 N. C. 463.

[99] Maltbie v. Hotchkiss, 38 Conn. 80, 5 N. B. R. 485, 9 Am. Rep. 364.

[100] In re Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496.

[101] Nelson v. Spence, 129 Ga. 35, 58 S. E. 697.

[102] Appeal of Geery, 43 Conn. 289, 21 Am. Rep. 653.

by whom voluntarily, proceedings under the state insolvency law had been instituted before the passage of the federal statute, but the state court may proceed with the case to its final conclusion, and its action in the matter will be as valid as if no national bankruptcy law had been enacted.[103] But it is only as to pending cases that the state law remains operative; as to all others it is suspended. Hence when such a law provides that the insolvent, on being convicted of fraud, shall be "forever" deprived of the benefit of laws passed in favor of insolvent debtors in the state, the most that can be adjudged against an insolvent in this situation is to deprive him of the benefit of the particular state law under which the proceedings are had, that is, to deny him a discharge.[104] It is held that the pendency of proceedings in insolvency under a state law, on the debtor's voluntary petition, begun before the passage of the bankruptcy act, will not be ground for dismissing the debtor's subsequent voluntary petition in bankruptcy, although he has contracted no new debts, where it appears that one or more of the creditors scheduled by the bankrupt are citizens of other states than that in which the insolvency proceedings were instituted, because in this case the bankruptcy law can afford the debtor a more extensive relief than he could obtain under the state law.[105] Where proceedings in insolvency against a partnership and the individuals composing it were begun in a state court, before the passage of the bankruptcy act, and remained pending at the time one of the partners was individually adjudged bankrupt, but no discharge had been granted or applied for under the state law, it was held that a debt of the partnership was provable in the bankruptcy proceedings, notwithstanding the fact that it had been proved and allowed in the insolvency proceedings and that there were assets of the firm for distribution in the state court; but such debt could not share in the individual assets of the bankrupt until his separate creditors had been paid.[106]

§ 13. **Nature and Effect of Proceedings in Bankruptcy.**—A proceeding against a debtor to have him adjudged a bankrupt is a civil proceeding and not a criminal proceeding.[107] And further it is a pro-

[103] First Nat. Bank v. Ware, 95 Me. 388, 50 Atl. 24; Hood v. Blair State Bank, 3 Neb. (Unof.) 432. 91 N. W. 701; Osborn v. Fender, 88 Minn. 309, 92 N. W. 1114; Meekins v. Creditors, 19 La. Ann. 497, 3 N. B. R. 511; Martin v. Berry, 37 Cal. 208, 2 N. B. R. 629; Lavender v. Gosnell, 43 Md. 153, 12 N. B. R. 282; Longis v. Creditors, 20 La. Ann. 15; In re Holmes, 5 Law Rep. 360. Fed. Cas. No. 6,633; In re Horton, 5 Law Rep. 462, Fed. Cas. No. 6,708.

[104] Longis v. Creditors, 20 La. Ann. 15.

[105] In re Mussey, 99 Fed. 71, 3 Am. Bankr. Rep. 592.

[106] In re Bates, 100 Fed. 263, 4 Am. Bankr. Rep. 56.

[107] In re De Forest, 9 N. B. R. 278, Fed. Cas. No. 3,745.

ceeding in rem, or at least quasi in rem. It is not a personal action against the debtor, but a proceeding to determine the question of his status, as bankrupt or not, and, upon his adjudication, to sequester his property and distribute it among those entitled. Hence the proceedings may be perfectly valid and effective although the bankrupt himself has no notice or knowledge of them. For it is held that an adjudication may be made against an absent and absconding debtor upon such notice by publication as the statute directs.[108] Hence, jurisdiction of the res having attached, an adjudication of the court in bankruptcy has all the effect of a judgment in rem, and is of itself notice to all concerned, and is binding and conclusive not only upon the parties immediately before the court but upon all the world.[109] Also, the further proceedings in a bankruptcy case are, generally speaking, in the nature of proceedings in rem, so that creditors may be bound by the proceedings for the distribution of the estate and for the discharge of the debtor, without personal service of notice on them, and on such notice by mail or by publication as may be prescribed by the statute.[110] Again, the adjudication is a judicial determination, not a mere administrative order, and has all the sanctity attaching to ordinary judgments at law, so that it cannot be set aside or recalled, or in any way modified, by the legislative department of the government.[111] The decree in bankruptcy also divests the bankrupt of his title to all his property, and the same is transferred by operation of law to his trustee.[112] Again, the proceeding in bankruptcy is equivalent to the general creditors' bill in chancery, and is a plenary proceeding, its practice being prescribed by the statute, and to that extent varying from the chancery practice obtaining in creditors' bills.[113] Bankruptcy proceedings are matters of record, though not required to be recorded at large, and copies of such records, duly certified by the clerk of the court under the seal of the court, are, in all cases and in all courts of the country, prima facie evidence of the facts therein stated.[114] The national bankruptcy law, as above stated,

[108] Sidney L. Bauman Diamond Co. v. Hart, 192 Fed. 498, 27 Am. Bankr. Rep. 632; In re Oldstein, 182 Fed. 409, 25 Am. Bankr. Rep. 138.

[109] Shawhan v. Wherritt, 7 How. 627, 12 L. Ed. 847; Michaels v. Post, 21 Wall. 398, 22 L. Ed. 520; Johnson v. United States, 163 Fed. 30, 89 C. C. A. 508, 20 Am. Bankr. Rep. 724; Whitney v. Wenman, 140 Fed. 959, 14 Am. Bankr. Rep. 591; In re Wallace, Deady, 433, 2 N. B. R. 134, Fed. Cas. No. 17,094; Morse v. Godfrey, 3 Story, 391, Fed. Cas. No. 9,856; Markson v. Heaney, 1 Dill. 497, Fed. Cas. No. 9,098; Downer v. Rowell, 25 Vt. 336.

[110] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, 8 Am. Bankr. Rep. 1.

[111] In re Raffauf, 6 Biss. 150, 10 N. B. R. 69, Fed. Cas. No. 11,525.

[112] May v. New Orleans & C. R. Co., 44 La. Ann. 444, 10 South. 769.

[113] In re Anderson, 23 Fed. 482.

[114] Turnbull v. Payson, 95 U. S. 418, 16 N. B. R. 440, 24 L. Ed. 437.

is the supreme law of the land, being enacted in pursuance of an express grant of power to Congress by the constitution, and state courts, being no less bound to follow and obey it than the courts of the United States, will take judicial notice of its existence and of its provisions.[115]

§ 14. **Foreign Bankruptcy.**—The American rule as to the effect of foreign bankruptcy proceedings on the property of the bankrupt, as stated by Story, is that an adjudication abroad is not regarded as vesting the trustee with title to the property of the debtor wihch may be without the jurisdiction of the country where the proceedings take place, or that, if it is recognized as having that effect (which is the case with some of our courts), at least it is universally held that we are not bound by comity to give effect to foreign bankruptcy laws to the extent of impairing the remedies, or lessening the securities, which our laws have provided for our own citizens.[116] "It seems to be the settled law of this state," says a court in New York, "that our courts will not recognize or enforce a right or title acquired under foreign bankrupt law or foreign bankrupt proceedings, so far as affects property within their jurisdiction or demands against residents of this state."[117] It was probably in view of this doctrine that Congress provided, in the present bankruptcy act, that the courts of bankruptcy shall have jurisdiction to adjudge persons bankrupt "who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions,"[118] and that "whenever a person

115 Mims v. Swartz, 37 Tex. 13, 10 N. B. R. 305.

116 Story, Confl. Laws (8th edn.) pp. 565, 575. And see Harrison v. Sterry, 5 Cranch. 289, 3 L. Ed. 104; Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed 606; Milne v. Moreton, 6 Binn. (Pa.) 353, 6 Am. Dec. 466; Merrick's Estate, 5 Watts & S. (Pa.) 9; Mosselman v. Caen, 34 Barb. (N. Y.) 66; Blane v. Drummond, 1 Brock. 62, Fed. Cas. No. 1,531; Chicago Lumbering Co. v. Powell, 120 Mich. 51, 78 N. W. 1022; Smith v. Eaton, 36 Me. 298, 58 Am. Dec. 746; Abraham v. Plestoro, 3 Wend. (N. Y.) 538, 20 Am. Dec. 738. The assignee of a bankrupt under the bankruptcy law of a foreign country is not entitled to an injunction in the courts of this country, to restrain the transfer of property by the bankrupt, before the recovery of judgment by such assignee. Abraham v. Plestoro, supra.

117 Mosselman v. Caen, 1 Hun (N. Y.) 647, 10 N. B. R. 512.

118 Bankruptcy Act 1898, § 2, cl. 1. This means that although a debtor has already been adjudicated a bankrupt by a foreign court, yet, if he has property within the jurisdiction of a United States court of bankruptcy, he may be adjudged bankrupt by the latter court also. In this case, it would seem that the jurisdiction of the United States court would in effect be ancillary only to that of the foreign court, and limited to the administration of the assets within its territorial jurisdiction. For although the statute also makes it the duty of a bankrupt to "execute to his trustee transfers of all his property in foreign countries" (§ 7a, cl. 5), yet the court of bankruptcy could not empower the trustee, or require the bankrupt, to act with reference to any assets already within the judicial control of the foreign court. Yet the law does not intend that, in such a case as this, the estate within the jurisdiction of the American court

shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors, before creditors who have received a dividend in such court shall be paid any amounts." [119]

Since bankruptcy laws have no ex-territorial operation, it follows that a discharge in bankruptcy, granted under the laws and by the courts of one country, cannot be effective against a creditor who is a citizen of another country or his claim.[120] But to this rule there are two well-recognized exceptions. First, if the contract in question was made and to be performed in the country where the bankruptcy proceedings take place, or the debt in question is payable there, it will be released by the discharge, being otherwise within its terms, without reference to the citizenship of the creditor in another country.[121] Second, a creditor who voluntarily appears in bankruptcy proceedings in a foreign state, and receives a dividend on his debt, thereby waives his exterritorial immunity from the operation of the bankruptcy law of such state and will be barred by the debtor's discharge.[122] Conversely, a discharge in bankruptcy granted by a court of the United States will not prevent an alien creditor from suing the bankrupt on his debt in the courts of his own country.[123] But a bankrupt within the United States

should be divided up among domestic creditors alone. For it appears from the statute (§ 65d) that foreign creditors may prove their claims and participate in the distribution of the estate here; for it is there provided that domestic creditors shall first be paid dividends equal in amount to any dividends paid in the foreign court to other creditors, before creditors who have received dividends in such foreign court shall be entitled to receive any sum whatever. This evidently means that if the foreign court has paid any dividends to creditors, whether foreign or domestic, domestic creditors who have not participated in the foreign proceedings, and therefore have not received anything from the foreign court, shall first be entitled to be made equal to those who have been partially paid, and that the American assets are to be used for this purpose; and if, after this is done, anything remains for distribution, it is to be divided equally among all creditors who have proved their claims.

[119] Bankruptcy Act 1898, § 65d.

[120] Munroe v. Guilleaume, 3 Abb. Dec. (N. Y.) 334; McMillan v. McNeill, 4 Wheat. 209, 4 L. Ed. 552; Green v. Sarmiento, 3 Wash. C. C. 17, Fed. Cas. No. 5,760; Long v. Hammond, 40 Me. 204. See Mansfield v. Andrews, 41 Me. 591; Philipe v. James, 1 Abb. Prac. (N. Y.) N. S. 311; Peck v. Hibbard, 26 Vt. 698, 62 Am. Dec. 605.

[121] Very v. McHenry, 29 Me. 206; Long v. Hammond, 40 Me. 204; May v. Breed, 7 Cush. (Mass.) 15, 54 Am. Dec. 700; Peck v. Hibbard, 26 Vt. 698, 62 Am. Dec. 605; Marsh v. Putnam, 3 Gray (Mass.) 551; Potter v. Brown, 5 East, 124.

[122] Clay v. Smith, 3 Pet. 411, 7 L. Ed. 723; Phelps v. Borland, 103 N. Y. 406, 9 N. E. 307, 57 Am. Rep. 755; Philipe v. James, 26 N. Y. Super. Ct. 720. See Morel v. Garelly, 16 Abb. Prac. (N. Y.) 269.

[123] Moore v. Horton, 32 Hun (N. Y.) 393; Ritchie v. Garrison, 10 Abb. Prac. (N. Y.) 246; Lizardi v. Cohen, 3 Gill (Md.) 430; McDougall v. Page, 55 Vt.

cannot, in violation of the provisions of our bankruptcy law, transfer to an alien creditor property within the United States. Although the bankruptcy law cannot be enforced as to an alien beyond the territorial limits of the United States, yet, for a violation of the law within the United States, the courts will enforce its provisions if jurisdiction of the violators of the law is obtained, even though they are aliens.[124]

187, 45 Am. Rep. 602; McMenomy v. Murray, 3 Johns. Ch. (N. Y.) 435.

[124] Olcott v. McLean, 50 How. Prac. (N. Y.) 455, 14 N. B. R. 379.

CHAPTER II

COURTS OF BANKRUPTCY, THEIR JURISDICTION AND POWERS

§ 15. Courts of Bankruptcy.—The courts of bankruptcy, as defined by the statute, include "the district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory and the District of Alaska."[1] To these must now be added the United States district courts in Hawaii and Porto Rico. The bankruptcy act, it has been ruled, intends and provides for only one court of bankruptcy within the territory prescribed, although there may be several district judges attached to, or authorized to hold, the court.[2] A district court does not cease to exist because of a vacancy in the office of judge, in such sense that proceedings in bankruptcy may not be instituted therein; but in such a case it is the duty of the clerk to receive and file the petition when offered, and it seems that he may also issue a subpœna thereon, tested in his own name.[3] It should further be observed that the term "court," as used throughout the act, is defined to mean "the court of bankruptcy in which the proceedings are pending, and may include the referee."[4] In actual practice, as will fully appear

[1] Bankruptcy Act 1898, § 2.

[2] In re Steele, 161 Fed. 886, 20 Am. Bankr. Rep. 446.

[3] In re Urban & Suburban Realty Title Co., 132 Fed. 140, 12 Am. Bankr. Rep. 687.

[4] Bankruptcy Act 1898, § 1, clause 7.

from the following pages in general, the referees in bankruptcy exercise most of the powers and perform most of the functions of the courts of bankruptcy, except as to certain matters specially reserved by the statute for the consideration and determination of the judge.

§ 16. General Jurisdiction of Courts of Bankruptcy.—A court of bankruptcy derives all its jurisdiction from the statute which creates it,[5] and its proceedings are open to collateral impeachment on questions of jurisdiction.[6] Though the district courts of the United States, on the bankruptcy side, are courts of record, and not inferior courts in any proper sense, yet they are courts of statutory and limited jurisdiction, and it has been held that the record of a bankruptcy court must disclose the facts necessary to confer jurisdiction in any particular case, but that, when its jurisdiction is shown to have attached, the subsequent proceedings are presumed to have been regular, and the decision of the court, whether correct or otherwise, upon every question properly arising in the case, is binding and conclusive on all other courts until reversed on appeal.[7] The strictness of the rule requiring jurisdiction to appear on the face of the record has been relaxed by the statute in one particular,[8] and has been seriously questioned, and indeed positively denied, in its application to the judgments and decrees of the courts of bankruptcy.[9]

[5] Jobbins v. Montague, 6 N. B. R. 509, Fed. Cas. No. 7,330; In re Williams, 120 Fed. 38, 9 Am. Bankr. Rep. 741; Houston v. Shear (Tex. Civ. App.) 210 S. W. 976. For the extent of the jurisdiction granted to the courts of bankruptcy, see Bankruptcy Act 1898, § 2. See also Federal Judicial Code 1911, § 24, as follows: "The district courts shall have original jurisdiction as follows: * * * Nineteenth. Of all matters and proceedings in bankruptcy."

[6] Adams v. Terrell, 4 Woods, 337, Fed. Cas. No. 796.

[7] Smith v. Engle, 44 Iowa, 265, 14 N. B. R. 481; In re Columbia Real Estate Co., 101 Fed. 965, 4 Am. Bankr. Rep. 411; In re Marion Contract & Construction Co., 166 Fed. 618, 22 Am. Bankr. Rep. 81; In re Williams, 120 Fed. 38, 9 Am. Bankr. Rep. 741. A court of bankruptcy has unlimited jurisdiction in respect of its powers over proceedings in bankruptcy, conferred by the Bankruptcy Act. Sabin v. Larkin-Green Logging Co. (D. C.) 218 Fed. 984, 34 Am. Bankr. Rep. 210.

[8] Bankruptcy Act 1898, § 21f, provides that "a certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made."

[9] In re Columbia Real Estate Co., 101 Fed. 965, 4 Am. Bankr. Rep. 411; Allen v. Thompson, 10 Fed. 116. In the case last cited, it was said: "It is sometimes, indeed very often, said loosely that it is never too late to take objection to the jurisdiction of a federal court; and there is not wanting a kind of judicial sanction for the notion that, in determining questions of jurisdiction in these courts, a more strict rule is to be applied than to other courts, and that they must be treated with that degree of scrutiny that is applied to jurisdiction obtained by extraordinary process, or that belonging to courts of extraordinary powers. I dissent entirely from this view; and while we are constrained by authority in that class of cases where jealousy of these courts has resulted in very strict

The grants of jurisdiction in bankruptcy are found in the second section of the act of 1898. In the nineteen clauses of this section are enumerated most of the steps which occur in the course of an ordinary proceeding in bankruptcy, from the adjudication of the bankrupt to the final discharge of the trustee. But the section also contains some comprehensive provisions, among which the most important are those which give to the courts of bankruptcy authority to "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy";[10] cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided; enforce obedience by bankrupts, officers, and other persons to all lawful orders by fine or imprisonment; and "make such orders, issue such process,[11] and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act." It will be observed that the bankruptcy law gives to courts of bankruptcy full power to enjoin all persons within their jurisdiction from doing any act that will interfere with or prevent its due administration, whether such persons are parties to the proceedings or not; and where they are litigants in a state

construction of their jurisdiction and the mode of obtaining it, the principle does not at all apply in bankruptcy, admiralty, and other proceedings of which they have exclusive cognizance, so far as pertains to jurisdiction over persons or res involved in the litigation." In the case of Reed v. Vaugn, 10 Mo. 447, it was held that, in a bill filed by a bankrupt to enjoin a judgment which had been included in his schedule, it was not necessary to plead the jurisdiction of the court which granted the discharge, as the district courts of the United States are not courts of inferior jurisdiction whose authority to render a judgment must be made to appear. And see In re Casey, 195 Fed. 322, 28 Am. Bankr. Rep. 359.

[10] Under the broad powers conferred by Bankruptcy Act 1898, § 2(7), when property has become subject to a bankruptcy court, jurisdiction exists to determine the extent and character of liens thereon and rights therein, and to bring in additional parties when necessary to a complete determination of a matter in controversy. In re National Boat & Engine Co. (D. C.) 216 Fed. 208, 33 Am. Bankr. Rep. 154. And see In re Baudouine (D. C.) 96 Fed. 536, 3 Am. Bankr. Rep. 55.

[11] This clause, taken in connection with the general grant of power to issue writs given by Rev. Stat. U. S. § 716, and Federal Judicial Code 1911, § 262, confers a very broad authority. The section of the Code referred to provides that "the Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." With particular regard to injunctions, it is provided that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Federal Judicial Code 1911, § 265; Rev. Stat. U. S. § 720.

court, no rule of comity requires the court of bankruptcy to compel persons whose rights under the bankruptcy law are jeopardized by such litigation to resort to the state court for protection.[12] The statute also provides that "nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."[13] The purpose of the bankruptcy law is to bring all the property of the bankrupt into the court of bankruptcy for administration, and that court is furnished with all the needful power to collect the assets, settle all conflicting claims or liens upon such property, and cause it to be distributed to those who are entitled to share in it.[14] All the property and estate of the bankrupt are considered as in custodia legis from the date of the adjudication,[15] if not from the time of filing the petition,[16] and are under the jurisdiction and control of the court of bankruptcy, in which court alone all persons who claim rights in the property so sequestrated or who seek to participate in its distribution, must assert their claims, the jurisdiction of the federal court in this particular being not only paramount but exclusive.[17]

The fact that a state is a creditor, and therefore in a certain sense a party to the proceeding, does not affect the jurisdiction of the bankruptcy court.[18] Where proceedings in bankruptcy affect property not embraced in the assets of the bankrupt, they can bind only such persons in interest as have actual notice of them; but in so far as the proceedings affect only the assets in bankruptcy, they are in the nature of proceedings in remand conclusive upon all persons, actual notice not being essential to the jurisdiction of the court.[19]

Even if there are technical defects in the jurisdiction of the court in

[12] In re Hornstein, 122 Fed. 266, 10 Am. Bankr. Rep. 308.

[13] Bankruptcy Act 1898, § 2.

[14] In re Sacchi, 10 Blatchf. 29, 6 N. B. R. 497, Fed. Cas. No. 12,200.

[15] Beekman Lumber Co. v. Acme Harvester Co., 215 Mo. 221, 114 S. W. 1087; In re Wells, 114 Fed. 222, 8 Am. Bankr. Rep. 75.

[16] In re Weinger, Bergman & Co., 126 Fed. 875, 11 Am. Bankr. Rep. 424; Zeigler v. Shomo, 78 Pa. St. 357.

[17] Carter v. Hobbs, 92 Fed. 594, 1 Am. Bankr. Rep. 215; Davis v. Anderson, 6 N. B. R. 145, Fed. Cas. No. 3,623; In re Anderson, 23 Fed. 482; In re Fisher, 98 Fed. 89, 3 Am. Bankr. Rep. 406; Zeigler v. Shomo, 78 Pa. St. 357; In re Smith, 92 Fed. 135, 2 Am. Bankr. Rep. 9; Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383. A fund in the hands of the bankruptcy court will be detained pending suits to determine adverse claims to its ownership. In re Sabin, 18 N. B. R. 151, Fed. Cas. No. 12,195. Custody of property by the bankruptcy court, though acquired by agreement of the person in possession, nevertheless confers jurisdiction to hear and determine claims to the ownership thereof. In re Traunstein (D. C.) 225 Fed. 317, 34 Am. Bankr. Rep. 462.

[18] In re Greenville & C. R. Co., Fed. Cas. No. 5,787.

[19] In re Judkins, 2 Hughes, 401, Fed. Cas. No. 7,560; Rayl v. Lapham, 27 Ohio St. 452; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, 8 Am. Bankr. Rep. 1.

a particular case, these may be waived by the conduct of parties concerned. Thus, an alleged bankrupt who files a motion to dismiss the petition against him, and appears in court to testify in support of allegations made therein, thereby waives any merely technical objection to the jurisdiction of the court over his person and estate.[20] So, in a proceeding in bankruptcy against stockholders of a corporation to compel the delivery of their stock to the bankrupt's trustee, the stockholders, by answering to the merits, will waive any objection to the jurisdiction of the court to determine the issue of title to the stock.[21]

The important subject of the jurisdiction of the court of bankruptcy over controversies between the trustee in bankruptcy and adverse claimants of the property alleged to belong to the estate may properly be reserved for discussion in another chapter. At present it may be sufficient to point out that the general policy of the act is to distinguish between matters and proceedings in bankruptcy and controversies arising in the course of the proceedings. The former include the ordinary steps in a bankruptcy case, and the court has jurisdiction of the settlement of all claims to property within its custody or which is in such a situation that it can summarily order its surrender. But the latter, being controversies between the trustee as the representative of the estate, on the one hand, and adverse claimants in good faith and with a colorable title, on the other hand, are generally remitted to the jurisdiction of the state courts, except in cases where the bankrupt and the adverse claimant are citizens of different states, and except in cases where the suit is brought in a federal court by the consent of the proposed defendant, and except in the case of suits by the trustee to avoid a preference or to recover property conveyed in fraud of creditors.[22]

§ 17. Jurisdiction of Bankruptcy Courts Exclusive.—The jurisdiction vested in the courts of the United States in all matters and proceedings in bankruptcy is expressly declared by law to be "exclusive of the courts of the several states."[23] In all matters, therefore, which properly concern the administration of an estate in bankruptcy, the jurisdiction of the proper federal court is exclusive and not to be shared with any state court, and is plenary and not to be interfered with.[24]

[20] In re Smith, 117 Fed. 961, 9 Am. Bankr. Rep. 98.

[21] In re Mills, 179 Fed. 409, 25 Am. Bankr. Rep. 278.

[22] Bankruptcy Act 1898, § 23, as amended by Act Cong. Feb. 5, 1903 (32 Stat. 797) and Act Cong. June 25, 1910 (36 Stat. 838). The Bankruptcy Act does not of itself confer upon the courts of bankruptcy any jurisdiction over independent suits at law or in equity. Maryman v. Dreyfus, 117 Ark. 17, 174 S. W. 549.

[23] Federal Judicial Code, 1911, § 256. And see Denison-Gholson Dry Goods Co. v. Simmons (Mo. App.) 227 S. W. 855; Norin v. Scheldt Mfg. Co., 297 Ill. 521, 130 N. E. 791.

[24] In re Mullings Clothing Co., 238 Fed.

"The jurisdiction of a district court of the United States sitting as a court of bankruptcy is superior and exclusive in all matters arising under the statute. The estate surrendered is placed in the custody of the court so sitting in bankruptcy, and the officer appointed to manage it is accountable to the court appointing him, and to that court alone. No court of an independent state jurisdiction can withdraw the property surrendered, nor determine, in any degree, the manner of its disposition." [25] Thus, all the property which is brought within the administration of the court is subject to its sole orders and disposition and so remains during the entire time the proceeding in bankruptcy is pending.[26] In general, an adjudication of bankruptcy vests the bankruptcy court with exclusive jurisdiction to administer the property of the bankrupt, as against any state court which may have obtained possession of such property through proceedings instituted within four months prior to the adjudication, and it is immaterial that the proceedings in the state court were for the enforcement of valid liens not affected by the bankruptcy act.[27] Thus, when the lien of an attachment from a state court is annulled by an adjudication in bankruptcy, such court loses jurisdiction of the property, which passes into the exclusive jurisdiction of the court of bankruptcy, and the question of comity cannot affect such jurisdiction.[28] So, when a general assignment for the benefit of creditors is made by a debtor, the same being an act of bankruptcy, the right immediately arises in his creditors to have the estate administered under the bankruptcy law; and where the enforcement of this right is demanded by a proper proceeding within four months after its inception, no action by any court in any suit brought after the commission of the act of bankruptcy can defeat it, without the consent of the

58, 151 C. C. A. 134, L. R. A. 1918A, 539, 38 Am. Bankr. Rep. 189; Commercial Trust & Savings Bank v. Busch-Grace Produce Co., 228 Fed. 300, 142 C. C. A. 592, 36 Am. Bankr. Rep. 385; In re Grafton Gas & Electric Light Co. (D. C.) 253 Fed. 668, 42 Am. Bankr. Rep. 567; In re Sage (D. C.) 224 Fed. 525, 35 Am. Bankr. Rep. 436; Greene v. Moore (Cal. App.) 184 Pac. 506; De Muth v. Faw, 103 Wash. 279, 174 Pac. 18; In re Barrow, 1 N. B. R. 481, Fed. Cas. No. 1,057; Newman v. Fisher, 37 Md. 259; In re Anderson (D. C.) 23 Fed. 482. Where the trustee of a bankrupt corporation had in his possession a fund claimed by corporate creditors, and also by creditors of an insolvent firm, the bankruptcy court has exclusive jurisdiction to decide conflicting claims. In re Cobb's Consol. Cos. (D. C.) 233 Fed. 458, 36 Am. Bankr. Rep. 812.

[25] In re Barrow, 1 N. B. R. 481, Fed. Cas. No. 1,057.

[26] In re McAusland (D. C.) 235 Fed. 173, 37 Am. Bankr. Rep. 519; Roszell Bros. v. Continental Coal Corp. (D. C.) 235 Fed. 343, 38 Am. Bankr. Rep. 31; Darrough v. First Nat. Bank of Claremore, 56 Okl. 647, 156 Pac. 191; Markson v. Haney, 47 Ind. 31.

[27] In re Knight (D. C.) 125 Fed. 35, 11 Am. Bankr. Rep. 1; State of Missouri v. Angle, 236 Fed. 644, 149 C. C. A. 640, 38 Am. Bankr. Rep. 394.

[28] In re Tune, 115 Fed. 906, 8 Am. Bankr. Rep. 285.

court of bankruptcy, whose jurisdiction is exclusive, and, on the making of the adjudication, relates back to the act of bankruptcy.[29]

§ 18. Territorial Limits of Jurisdiction.—Although the jurisdiction of a court of bankruptcy to take cognizance of a petition, whether voluntary or involuntary, and make an adjudication thereon, depends upon the residence of the debtor, or his having his principal place of business, within the limits of its district, yet, when jurisdiction has once attached, the authority of the court in respect to assets or claims is not territorially restricted to the boundaries of the judicial district or of the state. It was the intention of Congress to make the act operative throughout the United States; it does not stop at state lines. The bankruptcy court has jurisdiction of the debtor's entire estate. Property, wherever situated, which is not exempt, passes to and vests in the trustee, who is an officer of the court, and thus is in the custody or under the control of the court. So also debts, wherever payable, and creditors, wherever they reside, are subject to the jurisdiction of the court, and it has power and authority to determine all questions concerning liens upon the bankrupt's property or interests affecting it.[30] The court may also issue citations to persons in another jurisdiction to appear before it in respect to such matters.[31] It is true the act confers jurisdiction upon the several courts of bankruptcy "within their respective territorial limits," but this rather designates the place where the jurisdiction is to be exercised than the limits of the jurisdiction itself. There was a similar clause in the bankruptcy act of 1867, where original jurisdiction in bankruptcy was conferred upon the district courts "in their respective districts." But upon this language it was remarked by the Supreme Court of the United States: "Their jurisdiction is confined to their respective districts, it is true; but it extends to all matters and proceedings in bankruptcy without limit. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. Each court, within its own

[29] In re Knight, 125 Fed. 35, 11 Am. Bankr. Rep. 1.

[30] Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969, 23 Am. Bankr. Rep. 519; Wood v. Henderson, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046, 20 Am. Bankr. Rep. 1; Thomas v. Woods, 173 Fed. 585, 97 C. C. A. 535, 23 Am. Bankr. Rep. 132; Staunton v. Wooden, 179 Fed. 61, 102 C. C. A. 355, 24 Am. Bankr. Rep. 736; In re Dempster, 172 Fed. 353, 97 C. C. A. 51, 22 Am. Bankr. Rep. 751; In re Muncie Pulp Co., 151 Fed. 732, 81 C. C. A. 116, 18 Am. Bankr. Rep. 56; Guardian Trust Co. v. Kansas City Southern Ry. Co., 171 Fed. 43, 96 C. C. A. 285; In re Granite City Bank, 137 Fed. 818, 70 C. C. A. 316, 14 Am. Bankr. Rep. 404; Markson v. Heaney, 1 Dill. 497, 4 N. B. R. 510, Fed. Cas. No. 9,098; Whitridge v. Taylor, 66 N. C. 273.

[31] Staunton v. Wooden, 179 Fed. 61, 102 C. C. A. 355, 24 Am. Bankr. Rep. 736.

district, may exercise the powers conferred; but those powers extend to all matters of bankruptcy without limitation." [32] But according to the highest authority at present available, a court of bankruptcy cannot issue process to be enforced in another territorial jurisdiction, nor make a summary order for the delivery of property which must be there enforced. Such an order can only be obtained by ancillary proceedings by the trustee in the court of the district where it must be executed.[33]

§ 19. **Jurisdiction as Dependent on Residence or Domicile.**—The statute confers upon the courts of bankruptcy authority "to adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof." [34] This enactment must be understood as making an exception to the general provisions of the act of August 13, 1888 (25 Stat. 433) that "no civil suit shall be brought before either of said courts [circuit or district courts] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." For the "principal place of business" of a bankrupt may be in a district other than that where he resides or is an "inhabitant." But whether the jurisdiction is invoked on the ground of residence, domicile, or place of business, it must be within the judicial district where the petition is filed. It is not enough that it should be within the same state. Thus, if a debtor resides or has his principal place of business in the northern district of New York, he cannot file his petition in the southern district of New York.[35] Further, the residence or domicile of the bankrupt within the territorial jurisdiction of the court, or his having carried on business within the district, for the prescribed period of time before the filing of a petition by or against him, is an essential jurisdictional fact, without the existence of which the court will have no authority to proceed, as it is the fact which determines the court in which the proceedings are to be taken.[36] And this essential fact

[32] Lathrop v. Drake, 91 U. S. 516, 23 L. Ed. 414.

[33] Orinoco Iron Co. v. Metzel, 230 Fed. 40, 144 C. C. A. 338, 36 Am. Bankr. Rep. 247; Staunton v. Wooden, 179 Fed. 61, 102 C. C. A. 355, 24 Am. Bankr. Rep. 736; In re Waukesha Water Co., 116 Fed. 1009, 8 Am. Bankr. Rep. 715; In re Williams, 120 Fed. 38, 9 Am. Bankr. Rep. 741; In re Steele, 161 Fed. 886, 20 Am. Bankr. Rep. 446; In re Alphin & Lake Cotton Co., 131 Fed. 824, 12 Am. Bankr. Rep. 653. And see In re J. & M. Schwartz, 204 Fed. 326, 30 Am. Bankr. Rep. 344.

[34] Bankruptcy Act 1898, § 2, clause 1.

[35] In re Palmer, 1 N. B. R. 213, Fed. Cas. No. 10,680; Fogarty v. Gerrity, 1 Sawy. 233, 4 N. B. R. 450, Fed. Cas. No. 4,895. But see Clark-Herrin-Campbell Co. v. H. B. Claflin Co., 218 Fed. 429, 134 C. C. A. 229, 33 Am. Bankr. Rep. 414.

[36] Fogarty v. Gerrity, 1 Sawy. 233, 4 N. B. R. 450, Fed. Cas. No. 4,895; In re Leighton, 4 Ben. 457, 5 N. B. R. 95, Fed. Cas. No. 8,221; In re Little, 3 Ben. 25, 2

must appear affirmatively and distinctly and not be left to presumption or conjecture.[37] Nor can this requirement as to jurisdiction be waived by the bankrupt or the creditors. Neither consent nor failure to object can confer authority to proceed upon a court which would not have jurisdiction under the express language of the statute.[38] But a bankrupt who has procured the dismissal of involuntary proceedings against him, on his sworn plea denying his residence within the district and asserting it to be within another district which he names, may be estopped to object to the jurisdiction of the court in the latter district, when fresh proceedings are commenced against him there by the same creditors.[39]

"Residence" and "domicile" do not mean the same thing, and careful attention should be given to the difference in their signification in order to understand the full scope of this clause of the bankruptcy act. "The act of residence does not alone constitute the domicile of a party, but it is the fact of residence, accompanied by an intention of remaining, which constitutes domicile. The distinction between domicile and mere residence may be shortly put as that between residence animo manendi and residence animo revertendi. Mere residence may be for a transient purpose, as for business, for a fixed period, or limited by an expected future event, upon the happening of which there is a purpose to return or remove. The two elements of residence and the intention that such residence shall be permanent must concur to make citizenship [domicile]. It has consequently been held from the beginning that an averment of residence is not the equivalent of an averment of citizenship [domicile] for the purpose of supporting jurisdiction in the courts of the United States." [40] Hence a court of bankruptcy has jurisdiction of a petition filed by a debtor who has had his domicile within the dis-

N. B. R. 294, Fed. Cas. No. 8,391; In re Palmer, 1 N. B. R. 213, Fed. Cas. No. 10,680; In re Boston-Cerillos Mines Corp. (D. C.) 206 Fed. 794, 30 Am. Bankr. Rep. 739.

[37] In re Plotke, 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171.

[38] Finn v. Carolina Portland Cement Co., 232 Fed. 815, 147 C. C. A. 9, 37 Am. Bankr. Rep. 449; Fogarty v. Gerrity, 1 Sawy. 233, Fed. Cas. No. 4,895; In re Palmer, 1 N. B. R. 213, Fed. Cas. No. 10,680. But compare Clark-Herrin-Campbell Co. v. H. B. Claflin Co., 218 Fed. 429, 134 C. C. A. 229, 33 Am. Bankr. Rep. 414, in which an alleged bankrupt corporation, by pleading to the merits in its answer and otherwise submitting to the jurisdiction, was held to have waived its objection that the proceeding was not brought in that division of the federal district in which it had its domicile.

[39] Long v. Lockman (D. C.) 135 Fed. 197, 14 Am. Bankr. Rep. 172.

[40] Marks v. Marks, 75 Fed. 321. And see In re Watson, 4 N. B. R. 613, Fed. Cas. No. 17,272; Haskell v. Bailey, 63 Fed. 873, 11 C. C. A. 476; Danahy v. National Bank of Denison, 64 Fed. 148, 12 C. C. A. 75; Poppenhauser v. India Rubber Comb Co., 14 Fed. 707; McDonald v. Salem Flour Mills Co., 31 Fed. 577; Bartlett v. New York, 5 Sandf. (N. Y.) 44; In re Garneau, 127 Fed. 677, 62 C. C. A. 403, 11 Am. Bankr. Rep. 679; Anderson v. Anderson, 42 Vt. 350, 1 Am. Rep.

trict for the preceding six months, although, during the greater portion of that time he has resided elsewhere, either in another state or in foreign countries, provided there was no abandonment of the original domicile, nor acquisition of a new one, and the debtor returned to the district, before the filing of the petition, with the intention of making his permanent home there.[41] It should also be noted, as further emphasizing the distinction between residence and domicile, that whereas either may confer jurisdiction to make an adjudication of bankruptcy, yet the exemptions of the bankrupt are to be regulated by the laws of the state wherein he has had his domicile (not residence) for the six months or the greater portion thereof immediately preceding the filing of the petition.[42] Hence one may be adjudicated a bankrupt, as residing or doing business, in one state, and have his exemptions determined by the laws of another state.

Since adjudications are occasionally made against married women and infants, it is important to remark that the domicile of a wife follows that of her husband during the continuance of the marriage relation, but a divorce leaves the wife at liberty to choose and fix her own domicile.[43] A minor may acquire a separate domicile from that of his father during the latter's life-time. But that result can be accomplished only by the emancipation of the minor and a complete surrender of the parental control either to the minor himself or to some one standing in the place of the parent as to the choice of domicile.[44]

It is further requisite to give jurisdiction of proceedings in bankruptcy that residence within the district should be bona fide; and the removal of a person from one district to another for the express purpose of filing a petition in bankruptcy therein and with the intention of leaving the district as soon as he obtained a discharge, does not make him a resident so as to confer jurisdiction on the court.[45] In view of

334; Salem v. Lyme, 29 Conn. 74; In re Lemen, 208 Fed. 80, 30 Am. Bankr. Rep. 638.

[41] In re Williams, 99 Fed. 544, 3 Am. Bankr. Rep. 677; In re Walker, 1 Low. 237, 1 N. B. R. 386, Fed. Cas. No. 17,061.

[42] Bankruptcy Act 1898, § 6.

[43] Bennett v. Bennett, 1 Deady, 299, Fed. Cas. No. 1,318; Knickerbocker Life Ins. Co. v. Gorbach, 70 Pa. St. 150.

[44] Woolridge v. McKenna, 8 Fed. 650; Dresser v. Edison Illuminating Co., 49 Fed. 257. See In re Kingsley, 160 Fed. 275, 20 Am. Bankr. Rep. 427.

[45] In re Garneau, 127 Fed. 677, 62 C. C. A. 403, 11 Am. Bankr. Rep. 679. Yet if there is an actual intention to take up a permanent residence in the district to which the removal is made, it is no sufficient reason for refusing to take jurisdiction that the party was primarily actuated by a desire to file his petition in bankruptcy in that particular court, or, generally speaking, to get a case into a federal court which otherwise would not have had jurisdiction of it. See Gardner v. Sharp, 4 Wash. C. C. 609, Fed. Cas. No. 5,236; Robertson v. Carson, 19 Wall. 94, 22 L. Ed. 178; Catlett v. Pacific Ins. Co., 1 Paine, 594, Fed. Cas. No. 2,517; Briggs v. French, 2 Sumn. 251, Fed. Cas. No. 1,871; Case v. Clarke, 5 Mason, 70, Fed. Cas. No. 2,490; Johnson v. Mouell, Woolw. 390, Fed. Cas. No. 7,399.

the very comprehensive language of the statute, cases must be extremely rare in which it cannot be said that a person has either resided or had his domicile or had his principal place of business within any given district for the greater portion of the preceding six months. Yet such a case occurred, where the court refused to take jurisdiction of proceedings against an itinerant gambler who was shown to have resided within the district for only about two months before the filing of the petition, although admitting that the same conditions might be found to exist in any other district, so that the debtor might altogether escape from the law.[46]

Under the statute, proceedings in bankruptcy may be instituted in the district either of the debtor's residence or domicile or of his principal place of business,[47] and in the latter case, the place of his residence or domicile is immaterial.[48] But if he is not shown to have any place of business, or to have had a place of business within the district for the requisite length of time, then jurisdiction must depend upon either residence or domicile.[49] The "business" intended by the statute may be of almost any nature. One may have a place of business though the only business carried on there is that which he transacts as agent and attorney for another person,[50] or although he merely works there as clerk to the successors in the business in which he had previously failed.[51] Under the act of 1867 it was held that one whose only occupation was that of a book-keeper could not be said to be "carrying on business." [52] But the case is of very doubtful authority. If, as often happens, the same person is engaged in various occupations or pursuits, then it becomes necessary to determine as a question of fact which is his "principal" business, or that in which the major part of his capital is invested, which engages the chief part of his time and efforts, or on

[48] In re Williams, 120 Fed. 34, 9 Am. Bankr. Rep. 736. "It is true," said the court, "that in cases of this kind, where the debtor belongs to that roving class which never remains but for a short time in one place, as is the case in this proceeding, there can be no adjudication of bankruptcy. These considerations, not without weight so far as the policy of legislation is concerned, are properly to be addressed to Congress, but they cannot control the interpretation of the statute where its words are so plain and unambiguous as to exclude the consideration of extraneous circumstances."

[47] Ex parte Hall, 5 Law Rep. 269, Fed. Cas. No. 5,919.

[48] In re Alabama & C. R. Co., 9 Blatchf. 390, 6 N. B. R. 107, Fed. Cas. No. 124.

[49] In re Plotke, 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171; In re Lipphart, 201 Fed. 103, 28 Am. Bankr. Rep. 705. A traveling salesman has no place of business which gives jurisdiction of his petition in voluntary bankruptcy to a District Court of a district in which he does not reside. In re Price (D. C.) 231 Fed. 1001, 36 Am. Bankr. Rep. 656.

[50] In re Baily, 2 Ben. 437, 1 N. B. R. 613, Fed. Cas. No. 753.

[51] In re Belcher, 2 Ben. 468, 1 N. B. R. 666, Fed. Cas. No. 1,237.

[52] In re Magie, 2 Ben. 369, 1 N. B. R. 522, Fed. Cas. No. 8,951.

which he principally depends for his income.[53] Thus, where a petitioner in voluntary bankruptcy resides in one district and is there employed as a clerk in a store, but is engaged in trade on his own account, as a general merchant, in another district, the court in the latter district has jurisdiction of his petition, the bankrupt's principal place of business being within its territorial limits.[54] Though a corporation may have its "home office" in one state, where its officers are to be found, and where its directors meet, its records are kept, and its finances administered, this is not its principal place of business if its actual operations are conducted in another state, where its shops, factories, mills or other works are located.[55] But if a corporation shuts down its factory, or ceases to do any active business at the place where its plant is located, but still maintains a head office in another state or district, where its executive and financial business is transacted, the latter becomes its principal place of business, so as to give jurisdiction to the federal court there.[56]

In regard to the requirement that the residence or domicile of the debtor, or his maintenance of a principal place of business within the district, shall have continued for "the preceding six months or the greater portion thereof," it is logically necessary to understand that the period of six months must be referred to the time of the filing of the petition in bankruptcy. A strict construction would make it refer to the date of adjudication, since the language quoted occurs in a sentence beginning "to adjudge persons bankrupt," and no other point of time is there fixed. But practically the courts have proceeded on the assumption that the time of filing the petition was meant.

In the early days of the operation of the present statute, it was thought to mean that the debtor must have established his residence or domicile within the territorial jurisdiction at least six months before the filing of the petition, and that, during such period of six months, he should not have absented himself, unless it were for a time of less than three months. The requirement was thought to be similar to that in

[53] In re Mackey, 110 Fed. 355, 6 Am. Bankr. Rep. 577. See In re Foster, 3 Ben. 386, 3 N. B. R. 236, Fed. Cas. No. 4,962.

[54] In re Brice, 93 Fed. 942, 2 Am. Bankr. Rep. 197.

[55] In re E. & G. Theatre Co. (D. C.) 223 Fed. 657, 35 Am. Bankr. Rep. 255; In re Monarch Oil Corp. (D. C.) 272 Fed. 524, 46 Am. Bankr. Rep. 65; In re Devonian Mineral Spring Co. (D. C.) 272 Fed. 527, 47 Am. Bankr. Rep. 82; In re Alabama & C. R. Co., 9 Blatchf. 390, 6 N. B. R. 107, Fed. Cas. No. 124. As to jurisdiction of corporations depending on their residence or place of business, see more fully, infra, Ch. IX, § 132.

[56] In re Marine Machine & Conveyor Co., 91 Fed. 630, 1 Am. Bankr. Rep. 421; In re Munger Vehicle Tire Co., 159 Fed. 901, 87 C. C. A. 81, 19 Am. Bankr. Rep. 785. Compare In re Little, 3 Ben. 25, 2 N. B. R. 294, Fed. Cas. No. 8,391.

the divorce laws of most of the states, requiring the complainant to have resided within the state for a given period.[57] Also it was thought that the petition must be filed in the district where the debtor had made the longest residential stay during the preceding six months, no matter how short a time that might cover, the statute not intending that his residence in the district should necessarily have extended over three months.[58] This was in analogy to the decisions under the act of 1867, where it was held that the petition might be filed on the very day after the establishment of the debtor's residence in a given district, as in the case of an American citizen returning from abroad. "If a person resides within the United States, and no district can be shown in which he has had a longer residence (within six months) than that in which he petitions, he has chosen the proper district." [59] Both these views, however, have been abandoned, and it may now be regarded as settled, first, that it is not necessary that the residence or domicile should have begun six months before the petition in bankruptcy, but it is sufficient if it commenced at such a time that it may be said to have included "the greater portion thereof," that is, the greater portion of the preceding six months, and second, that it must have continued in the particular district for at least one or more days over three months, for it is not sufficient that the debtor should have resided within the district for a longer time than he has resided in any other district; in addition to that his residence must have continued more than three months; and if during the period of the preceding six months the debtor has neither resided, had his domicile, nor maintained a principal place of business in any one district for so long a period as three months, then there is no court in which a petition by or against him can be filed.[60] The case of a citizen returning from abroad will depend, not on residence, but on domicile, and the domicile of origin may have been preserved notwithstanding the residence abroad, so that the court at that place may have jurisdiction.[61]

This consideration is applicable to the case of a fugitive from justice, or an absconding debtor, whose present residence is unknown.

[57] In re Stokes, 1 Nat. Bankr. News, 106.

[58] In re Ray, 1 Nat. Bankr. News, 336.

[59] In re Goodfellow, 1 Low. 510, 3 N. B. R. 452, Fed. Cas. No. 5,536.

[60] In re Fackelman (D. C.) 248 Fed. 565, 41 Am. Bankr. Rep. 14; In re Plotke, 104 Fed. 964, 44 C. C. A. 282, 5 Am. Bankr. Rep. 171; In re Williams, 120 Fed. 34, 9 Am. Bankr. Rep. 736; In re Berner, 2 Nat. Bankr. News, 330; Longley Bros. v. McCann, 90 Ark. 252, 119 S. W. 268; In re Leighton, 4 Ben. 457, 5 N. B. R. 95, Fed. Cas. No. 8,221. And see In re Hurley, 204 Fed. 126, 29 Am. Bankr. Rep. 567.

[61] In re Williams, 99 Fed. 544, 3 Am. Bankr. Rep. 677.

Since the statute does not require the personal presence of the debtor in involuntary proceedings, nor personal service upon him, nor his residence within the district, but only his domicile there, an adjudication may be made against a person in this situation, upon a petition filed in the court of bankruptcy at the place where he was domiciled at the time of his departure, provided the domicile was established at least six months before the filing of the petition, unless there was an intention on his part to change his domicile and acquire a new one elsewhere, and the burden of proving that fact is on those who object to the jurisdiction.[62]

The act also confers jurisdiction upon the proper courts to adjudge persons bankrupt "who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions." [63] The latter of these two clauses was probably meant to apply to American citizens who have been adjudged bankrupts in foreign courts. But both clauses plainly apply to aliens. In this respect the present statute is wider than the act of 1867,[64] and in the case here contemplated jurisdiction depends solely upon the presence within the district of property available to the creditors through the instrumentality of proceedings in bankruptcy.

§ 20. **Jurisdiction Dependent on Amount of Debts.**—In the case of a voluntary petition in bankruptcy, the amount of the petitioner's indebtedness is immaterial. But when the proceedings are involuntary and instituted by creditors, it is made a jurisdictional requisite that the person or corporation proceeded against should "owe debts to the amount of one thousand dollars or over." [65] And the statute defines "debts" as including "any debt, demand, or claim provable in bankruptcy." [66] There must therefore be an aggregate of one thousand dollars of debts directly owing by the alleged bankrupt and provable against his estate. In one case, where a petition was filed against a partnership after its dissolution, and its indebtedness was not shown to reach

[62] Hills v. F. D. McKinniss Co., 188 Fed. 1012, 26 Am. Bankr. Rep. 329; In re Oldstein, 182 Fed. 409, 25 Am. Bankr. Rep. 138; In re Filer, 108 Fed. 209, 5 Am. Bankr. Rep. 332; Cobb v. Rice, 130 Mass. 231.

[63] Bankruptcy Act 1898, § 2, clause 1. Under this provision, bankruptcy courts have jurisdiction if there is property within the jurisdiction, though the bankrupt or his creditors, or both, are aliens; and a deposit in bank, to the credit of an alien, is property having its situs within the district where the bank is situated. In re Berthoud (D. C.) 231 Fed. 529, 36 Am. Bankr. Rep. 555.

[64] See In re Burton, 9 Ben. 324, 17 N. B. R. 212, Fed. Cas. No. 2,214.

[65] Bankruptcy Act 1898, § 4.

[66] Bankruptcy Act 1898, § 1, clause 11.

the required amount, except by including some debts which accrued after the dissolution and which became obligations of the firm only on the ground of estoppel in favor of such creditors as had no notice of the dissolution, the court refused to make an adjudication of bankruptcy.[67] The opinion was advanced (under the act of 1867) that the jurisdiction, in so far as it depended upon the amount of indebtedness, must exist at the time of the trial and adjudication, and that, although the debts might amount to the requisite sum at the time of filing the petition, yet if they were thereafter reduced by payments made, so as to amount to less than the jurisdictional sum, the court lost jurisdiction and could not make an adjudication.[68] But under the present statute, the opinion appears to prevail that it is enough if this jurisdictional fact, like others, exists at the time of filing the petition. And some courts have thought that the statute should be construed as having reference to the amount of indebtedness at the time of the commission of the act of bankruptcy charged, on the ground that, when a debtor commits an act of bankruptcy denounced by the statute, his creditors immediately acquire a vested right to avail themselves of it, to file a petition, and to have the estate administered by the court of bankruptcy.[69] At any rate, a payment made to a creditor after the commission of an act of bankruptcy would almost certainly amount to a voidable preference. And the authorities are unanimous in holding that, in computing the amount of indebtedness of the alleged bankrupt, the claims of preferred creditors must be included, if their preferences were given under such circumstances as to be voidable, since they will be entitled to prove their claims in the bankruptcy proceedings when they have surrendered their preferences or when the same have been voluntarily relinquished.[70] This doctrine was applied in a case where the act of bankruptcy charged was the making of a general assignment by a debtor who, at the time, owed much more than the required amount. Some of the creditors assented to the assignment and released the debtor on receiving their proportional part of the assets covered by the assignment. But other creditors, refusing to assent, filed a petition in bankruptcy. The settlement with assenting creditors had then reduced the amount of unreleased indebtedness below the sum of one thousand dollars. Nevertheless the court held that it had jurisdiction and that an adjudication should be

[67] In re Pinson & Co., 180 Fed. 787, 24 Am. Bankr. Rep. 804.

[68] In re Skelley, 3 Biss. 260, 5 N. B. R. 214, Fed. Cas. No. 12,921.

[69] In re Jacobson, 181 Fed. 870, 24 Am. Bankr. Rep. 927.

[70] In re McMurtrey & Smith, 142 Fed. 853, 15 Am. Bankr. Rep. 427; In re Tirre, 95 Fed. 425, 2 Am. Bankr. Rep. 493; In re Norcross, 1 Am. Bankr. Rep. 644, 1 Nat. Bankr. News, 257; In re Cain, 2 Am. Bankr. Rep. 379.

made, on the ground that the released debts should be regarded as still existing and unpaid, at least for the purpose of the present proceeding and in order to secure to the non-assenting creditors the rights and remedies with which they became vested upon the commission of the act of bankruptcy.[71]

§ 21. **Jurisdiction of Bankrupt's Person.**—In voluntary cases, the bankrupt submits himself to the jurisdiction of the court by filing his petition and asking an adjudication. In involuntary cases, jurisdiction of his person is acquired by the filing of the petition against him and the due service upon him of a copy of the petition and of a subpœna.[72] In either case, jurisdiction once attaching is retained until the bankrupt's application for a discharge is heard and determined. During all this period, he remains, as it were, in the custody of the court, and his obedience to all its lawful orders may be promptly and effectively enforced. He may be summarily ordered to pay over to his trustee money found to be in his possession or control and properly belonging to his estate in bankruptcy, and to transfer any other property to which the trustee is entitled.[73] His death or supervening insanity does not abate the proceedings, but the same are to be conducted, and concluded, so far as possible, in the same manner as if no such event had occurred.[74] Moreover, for the purpose of securing his attendance whenever it shall be necessary for the purpose of examining him touching his property and affairs, or for enforcing the other duties laid upon him by the act, the court is invested by the statute with full authority to protect him from arrest on civil process except in certain specified cases, to place him under arrest when it is shown that he is about to leave the district, and to procure his return to the district, when he has escaped therefrom, by extradition proceedings.[75]

§ 22. **Summary Jurisdiction.**—From the fact that they are invested with jurisdiction in equity as well as at law, and that this jurisdiction may be exercised in vacation in chambers, as well as during a stated term, and from the general purpose and policy of the bankruptcy law to settle up estates with expedition and without unnecessary expense, the courts of bankruptcy have deduced the doctrine that controversies arising in the course of a proceeding in bankruptcy may, in many in-

[71] In re Jacobson, 181 Fed. 870, 24 Am. Bankr. Rep. 927.

[72] In re Brett, 130 Fed. 981, 12 Am. Bankr. Rep. 492. As to service of process, and jurisdiction as dependent thereon, see infra, § 166.

[73] In re Pevear, 21 Fed. 121; In re Purvine, 96 Fed. 192, 2 Am. Bankr. Rep. 787.

[74] Bankruptcy Act 1898, § 8.

[75] Bankruptcy Act 1898, §§ 9, 10.

stances, be determined summarily, that is, upon petition and rule to show cause in the bankruptcy proceeding itself, instead of by plenary suit at law or bill in equity. It has, indeed, been broadly stated that the district courts in bankruptcy are authorized by summary proceedings to administer all the relief which a court of equity could administer under like circumstances upon regular proceedings.[76] It may not be necessary to accept this statement in its widest extent. And yet the nature of a bankruptcy case is such that most of the questions incidentally contested in its progress may be heard and determined summarily without injustice and without violating the requirement of due process of law. Thus, where persons have forcibly and unlawfully seized and taken out of the judicial custody of a court of bankruptcy property which had lawfully come into its possession as part of a bankrupt's estate, the court has power summarily to require them to restore the property,[77] and the possession of a receiver appointed by the court, or its marshal, or a trustee in bankruptcy is the possession of the court, for the purposes of this rule.[78] And it is held that property which is in the actual possession of the bankrupt at the time of the filing of the petition and the appointment of a receiver is constructively in the possession of the bankruptcy court, so that a stranger who thereafter takes the property on a writ of replevin from a state court may be cited before the referee and his rights determined in a summary proceeding.[79] So also, where a mortgage held by a creditor, and alleged to have been given by way of preference, is foreclosed, the property sold, and the proceeds deposited in the bankruptcy court, that court may determine the validity of the mortgage on a petition filed by the trustee.[80] Again, the court of bankruptcy has summary jurisdiction over all contracts made with itself respecting the bankrupt's property, and where a forthcoming bond has been given for the release of goods under seizure, the court may summarily order the goods, or their value, to be brought into court by the parties to the bond.[81] And the bankrupt himself is always sub-

[76] In re Wallace, Deady, 433, 2 N. B. R. 134, Fed. Cas. No. 17,094.

[77] White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, 4 Am. Bankr. Rep. 178.

[78] In re Landis, 151 Fed. 896, 18 Am. Bankr. Rep. 483. But where a receiver in bankruptcy delivered certain goods in the possession of the bankrupt to a claimant, on the ground that the title to the property was in the claimant and not in the bankrupt, the court's custody of the property was thereby surrendered, and the trustee was not thereafter entitled to recover the value of the property against the claimant in summary proceedings on an order to show cause. Hinds v. Moore, 134 Fed. 221, 67 C. C. A. 149, 14 Am. Bankr. Rep. 1.

[79] In re Briskman, 132 Fed. 201, 13 Am. Bankr. Rep. 57.

[80] In re Noel, 137 Fed. 694, 14 Am. Bankr. Rep. 715.

[81] Rosenbaum v. Garnett, 3 Hughes, 662, 19 N. B. R. 370, Fed. Cas. No. 12,053.

ject to the orders of the court, and a proceeding to compel him to surrender property or money which is claimed as assets of his estate need not be by a bill in equity; a summary petition is sufficient.[82] And the same is true where the property is held for him by an agent, trustee, or other representative, not setting up an independent claim of title thereto.[83] Again, the trustee in bankruptcy is an officer of the court, and his possession is that of the court, and hence any claimant may proceed, if he so chooses, by summary petition against the trustee in respect to any property or funds in the latter's hands.[84] This is true, not only of an application for the allowance of a claim against the bankrupt's estate which the trustee disallows, but also where property which has been seized as the property of the bankrupt, and has thus come to the trustee's hands, is claimed by a stranger as his own. In such case it is proper for the claimant to proceed for its recovery in specie by petition to the court of bankruptcy.[85] But the converse of this rule does not always hold good. Summary process of the court of bankruptcy may be invoked by the trustee where the property to which he lays claim, and which he seeks to recover in this manner is in the possession of the bankrupt himself or of some one who holds it as his agent or representative. And it is also true that the trustee cannot be compelled to resort to a suit to recover the possession of property where his right is not contested, but any one withholding the possession, while making no claim to the property for himself, may be dealt with summarily.[86] But where the trustee claims, as assets of the estate, property which is in the actual possession of a third person who asserts his own title thereto in opposition to the bankrupt or the trustee, whether such title

[82] In re Ettinger, 18 N. B. R. 222, Fed. Cas. No. 4,543. And see infra, § 227.

[83] In re Baudouine, 96 Fed. 536, 3 Am. Bankr. Rep. 55; Clay v. Waters, 178 Fed. 385, 101 C. C. A. 645, 24 Am. Bankr. Rep. 293.

[84] See Ex parte Christy, 3 How. 292, 11 L. Ed. 603; Ferguson v. Peckham, 6 N. B. R. 569, Fed. Cas. No. 4,741; In re Evans, 1 Low. 525, Fed. Cas. No. 4,551. Compare Hurst v. Teft, 12 Blatchf. 217, 13 N. B. R. 108, Fed. Cas. No. 6,939. Jurisdiction to foreclose a mortgage on the estate of the bankrupt, at the instance of the mortgagee or holder, is not included in the powers to be exercised summarily by the court of bankruptcy. In re Casey, 10 Blatchf. 376, 8 N. B. R. 71, Fed. Cas. No. 2,495. Where, pursuant to an offer of composition, the trustee executed a deed to the bankrupt's property to carry out a sale, contingent on confirmation of the composition, and the matter was referred to a special referee, after an increased offer, it was held, on exceptions to such referee's report, that the court had no jurisdiction to order the trustee's deed expunged from the records, it having been recorded without authority. In re Kligerman (D. C.) 253 Fed. 778, 42 Am. Bankr. Rep. 670.

[85] In re Clark, 9 Blatchf. 379, 6 N. B. R. 410, Fed. Cas. No. 2,802; In re Moses, 1 Fed. 845; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; In re Harthill, 4 Ben. 448, 4 N. B. R. 392, Fed. Cas. No. 6,161; Keegan v. King, 96 Fed. 758, 3 Am. Bankr. Rep. 79.

[86] In re Moore, 104 Fed. 869, 5 Am. Bankr. Rep. 151.

was derived from the bankrupt himself before the proceedings, or from an independent source, the rights of such adverse claimant cannot be adjudicated in a summary manner in the bankruptcy proceeding, but only in a plenary suit brought against him by the trustee.[87] On this subject it has been well and forcibly said: "If in a proceeding in bankruptcy proper the trustee could intrude a separate suit against every debtor of the bankrupt, no difference what the demand might be, we should have a conglomeration of issues of the most remarkable extent and character in a bankruptcy proceeding. Nothing of the sort was contemplated by Congress, nor provided for by the act. On the contrary, the trustee, if he succeeds to the rights of the bankrupt, must do as the latter would have been compelled to do, and if he have any claim to property or any right to recover upon any indebtedness alleged to be due from another person, he must, like every other litigant, institute his own separate and independent action in a court having jurisdiction of the subject-matter, and have his claim regularly adjudicated in due course of law. Being a trustee in bankruptcy gives him no special privileges in the courts. He stands there like other people. These general propositions seem to admit of no doubt. There are cases, however, which are exceptional, and in them summary proceedings may be resorted to, for example, in cases where property is in the possession of the trustee and therefore in custodia legis. If that possession is interfered with, summary action is admissible, and where the bankrupt refuses, or some agent of his refuses, to deliver to the trustee property belonging to the estate, a similar course is open. But these exceptions do not embrace cases where there are adverse claims to the property made in good faith, nor those in which there is an outstanding indebtedness of any character. Nor do they embrace a case where a third person has the property in his possession claiming it adversely, nor a case where a recovery on a contract is sought, for in respect to all such cases it cannot be said that the debtor is in possession of any property of the estate within the rule as to summary proceedings." [88]

[87] Marshall v. Knox, 16 Wall. 551, 21 L. Ed. 481; Smith v. Mason, 14 Wall. 419, 20 L. Ed. 748; In re Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266; Camp v. Zellars, 94 Fed. 799, 36 C. C. A. 501; In re Rockwood, 91 Fed. 363, 1 Am. Bankr. Rep. 272; In re Kelly, 91 Fed. 504, 1 Am. Bankr. Rep. 306; In re Brodbine, 93 Fed. 643, 2 Am. Bankr. Rep. 53; In re Cohn, 98 Fed. 75, 3 Am. Bankr. Rep. 421; In re Griffith, 1 Nat. Bankr. News, 546; In re Fowler, 1 Nat. Bankr. News, 215; In re Carter, 1 Nat. Bankr. News, 162; In re Staib, 3 Fed. 209; In re Waitzfelder, 18 N. B. R. 260, Fed. Cas. No. 17,048; In re Stevens, Fed. Cas. No. 13,390; In re Evans, 1 Low. 525, Fed. Cas. No. 4,551. And see infra, § 402.

[88] In re Howe Mfg. Co. (D. C.) 193 Fed. 524, 27 Am. Bankr. Rep. 477.

§ 23. Equitable Powers and Jurisdiction.—The act of Congress invests the courts of bankruptcy with "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings."[89] Within the limits of their own particular subject-matter they therefore possess the powers of courts of equity and may take cognizance of equitable rights and claims, follow equitable modes of procedure, and administer equitable relief.[90] "A proceeding in bankruptcy is a proceeding in equity, and for the purpose of enforcing and protecting its jurisdiction a court of bankruptcy has all the inherent powers of a court of equity. This being the case, it may be appealed to by supplemental and ancillary bill to enforce its orders, sustain its jurisdiction, and protect parties before it in the enjoyment of rights secured through and under it; and this is always true where jurisdiction is reserved or still retained, and even afterwards where the result would be a re-litigation of the same subject-matter between the same parties. A bill addressed to this power of the court is essentially supplemental and ancillary in its nature and inheres in the general equity jurisdiction of the court."[91] Although there was no provision in the act of 1867 authorizing the appointment of receivers by the bankruptcy court, yet it was held to be within the general equity powers of a court of bankruptcy, after the adjudication and before the appointment of a trustee, to appoint a receiver for the temporary care and custody of the estate, when special circumstances rendered it desirable.[92] This authority is

[89] Bankruptcy Act 1898, § 2.

[90] Grief Bros. Cooperage Co. v. Mullinix (C. C. A.) 264 Fed. 391; Bridgeton Nat. Bank v. Way, 253 Fed. 731, 165 C. C. A. 35, 4 Am. Bankr. Rep. 204; Clark v. Johnson, 245 Fed. 442, 157 C. C. A. 604, 40 Am. Bankr. Rep. 330; Ogden v. Gilt Edge Consol. Mines Co., 225 Fed. 723, 140 C. C. A. 597, 34 Am. Bankr. Rep. 893; In re Seal (D. C.) 261 Fed. 112, 44 Am. Bankr. Rep. 556; In re Connecticut Brass & Mfg. Corp., (D. C.) 257 Fed. 445, 43 Am. Bankr. Rep. 376; In re Association Dairy Co. (D. C.) 251 Fed. 749, 42 Am. Bankr. Rep. 321; In re Ohio Copper Mining Co. (D. C.) 241 Fed. 711, 39 Am. Bankr. Rep. 284; In re Syracuse Gardens Co. (D. C.) 231 Fed. 284, 37 Am. Bankr. Rep. 354; In re Gillaspie, 190 Fed. 88, 27 Am. Bankr. Rep. 59; In re Swofford Bros. Dry Goods Co., 180 Fed. 549, 25 Am. Bankr. Rep. 282; In re Appel, 163 Fed. 1002, 90 C. C. A. 172, 20 Am. Bankr. Rep. 890; In re Siegel-Hillman Dry Goods Co., 111 Fed. 980, 7 Am. Bankr. Rep. 351; In re Rochford, 124 Fed. 182, 59 C. C. A. 388, 10 Am. Bankr. Rep. 608; In re Fendley, 10 N. B. R. 250, Fed. Cas. No. 4,728; Fowler v. Dillon, 1 Hughes, 232, 12 N. B. R. 308, Fed. Cas. No. 5,000; Ex parte Foster, 2 Story, 131 Fed. Cas. No. 4,960; In re Wallace, Deady, 433, 2 N. B. R. 134, Fed. Cas. No. 17,094; In re Anderson, 23 Fed. 482. "In equity, and in bankruptcy, which is a branch of equity, names and forms are unimportant where the truth is evident." Swarts v. Siegel, 117 Fed. 13, 16, 54 C. C. A. 399, 8 Am. Bankr. Rep. 689. A court of bankruptcy is a court of equity, and ought not to permit itself to be used for the purpose of perpetrating a fraud or attaining an inequitable result which a state court is successfuly endeavoring to prevent. Martin v. Oliver, 260 Fed. 89, 171 C. C. A. 125, 43 Am. Bankr. Rep. 739.

[91] In re Swofford Bros. Dry Goods Co., 180 Fed. 549, 25 Am. Bankr. Rep. 282.

[92] Lansing v. Manton, 14 N. B. R. 127, Fed. Cas. No. 8,077.

now expressly given by the present statute, but it is also held that the court may exercise its general equity jurisdiction to protect its receivers and enforce contracts made by them.[93] So again, the court has full equity powers in dealing with partnership matters, and may do as a court of equity would do in marshalling partnership property for the benefit of firm creditors and so on.[94] So the jurisdiction of the courts of bankruptcy extends to bills in equity in behalf of the trustee, in regard to the recovery of assets, as well as to actions at law.[95] And such a court will have jurisdiction to entertain a suit in equity to establish a trust in funds claimed to belong to the bankrupt's estate.[96] And generally, "property in the custody of a court of equity for administration is always held by it in trust for those to whom it rightfully belongs. The jurisdiction to inquire and determine who are the lawful owners of it, and to that end to call before it all claimants by a reasonable notice or order to present their claims to the court within a reasonable time, or to be barred of any right or interest in the property, is a power inherent in every court of equity, incidental and indispensable to the authority to administer the property in its possession and to distribute its proceeds." [97] The plenary form of proceedings common to suits in equity is not always necessary in the exercise of the equity powers of a court of bankruptcy.[98] In many instances the more simple and expeditious procedure by petition and rule to show cause will be applicable, although, as stated in the preceding section, this is not a proper method of determining the rights of strangers to the proceeding in bankruptcy, who claim adversely to the bankrupt and the trustee. A court of bankruptcy, in virtue of the peculiar nature of its jurisdiction, may entertain proceedings in equity, although an action at law could have been maintained.[99] But when a distinct suit is brought in the court of bankruptcy, it must be determined whether it properly belongs on the law side or the equity side, and if the latter, it must proceed according to the proper practice of the federal courts in equity cases, and relief must be administered in accordance with the general principles and

[93] Mason v. Wolkowich, 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765, 17 Am. Bankr. Rep. 709.

[94] In re Filmar, 177 Fed. 170, 100 C. C. A. 632, 24 Am. Bankr. Rep. 194.

[95] Flanders v. Abbey, 6 Biss. 16, Fed. Cas. No. 4,851.

[96] Shainwald v. Davids, 69 Fed. 687.

[97] In re Rochford, 124 Fed. 182, 59 C. C. A. 388, 10 Am. Bankr. Rep. 608; Chauncey v. Dyke Brothers, 119 Fed. 1, 55 C. C. A. 579, 9 Am. Bankr. Rep. 444; Searle v. Mechanics' Loan & Trust Co., 249 Fed. 942, 162 C. C. A. 140, 41 Am. Bankr. Rep. 786.

[98] In re Wallace, Deady, 433, 2 N. B. R. 134, Fed. Cas. No. 17,094; International Agr. Corp. v. Cary, 240 Fed. 101, 153 C. C. A. 137, 38 Am. Bankr. Rep. 753.

[99] Chemung Canal Bank v. Judson, 8 N. Y. 254. But see Sessler v. Nemcof, 183 Fed. 656, 25 Am. Bankr. Rep. 618.

practices of equity. Thus, a proceeding by a trustee in bankruptcy to set aside a fraudulent conveyance or an illegal preference, when brought in a federal court, is a suit in equity, and must be governed by the rules of pleading and practice in equity which obtain in the United States courts, independently of the practice in the courts of the particular state.[100] But generally speaking, proceedings in bankruptcy proper are governed by the rules of practice in equity where the act of Congress and the general orders do not prescribe a specific course of procedure.[101] But it should not be forgotten, in this connection, that a court of bankruptcy, as such, does not possess the chancery powers of a court of unlimited jurisdiction, its equity jurisdiction being limited to that conferred by the act of Congress, namely, such as is necessary to "enable them to exercise original jurisdiction in bankruptcy proceedings." [102]

§ 24. **Ancillary Jurisdiction.**—As originally interpreted, the present bankruptcy act was thought to have made no provision for any ancillary or auxiliary proceedings in any district court other than that in which the bankruptcy proceeding was pending. But a clause was inserted in the amendatory act of 1910 which provides that the courts of bankruptcy may "exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy." (Act Cong. June 25, 1910, 36 Stat. 838, § 2.) Such ancillary jurisdiction carries with it power for the ancillary tribunal to decide questions of liens and priorities to property over which it exercises jurisdiction.[103] But a claim for attorney's fees for services rendered after the institution of the bankruptcy proceedings must be determined by the court having jurisdiction of the administration of the estate, and cannot be determined by a bankruptcy court exercising ancillary jurisdiction.[104] And a bankruptcy court of ancillary jurisdiction which has taken possession of mortgaged property, is without au-

[100] Westall v. Avery, 171 Fed. 626, 96 C. C. A. 428, 22 Am. Bankr. Rep. 673.

[101] In re Irwin, 177 Fed. 284, 22 Am. Bankr. Rep. 165; In re Gillaspie, 190 Fed. 88, 27 Am. Bankr. Rep. 59; In re Hawks, 204 Fed. 309, 30 Am. Bankr. Rep. 365.

[102] Nelson v. Svea Pub. Co. (D. C.) 178 Fed. 136. Thus, for instance, the general equity jurisdiction of the United States District Court for Alaska is not to be confounded with the equity jurisdiction of the United States District Court for Alaska in bankruptcy. These courts have one and the same name, but they are created by separate and distinct acts of Congress, passed in pursuance of constitutional powers entirely different from each other. Each court has its own jurisdiction and its own method of procedure. McKenna v. Randle, 5 Alaska, 590.

[103] Emerson v. Castor, 236 Fed. 29, 149 C. C. A. 239, 37 Am. Bankr. Rep. 719.

[104] In re A. Musica & Son (D. C.) 205 Fed. 413, 30 Am. Bankr. Rep. 555, affirmed, 211 Fed. 326, 127 C. C. A. 575, 31 Am. Bankr. Rep. 687.

thority, regardless of the court of primary jurisdiction, to release such property to the mortgagee for the purpose of an independent foreclosure suit.[105]

It is very doubtful whether a suit can be maintained by a trustee in bankruptcy, to recover assets or to set aside preferences or fraudulent conveyances, in any district court other than the one in which the proceedings in the particular bankruptcy are pending and from which he derives his authority. If the latter court has jurisdiction of an action of this kind against a stranger (which has been both affirmed and denied under the present statute) it can only be on the ground that the suit is an incident of the main proceeding and is drawn within the jurisdiction of the court by its relation to the general business of collecting the assets of the bankrupt. But if the trustee is obliged to go beyond the bounds of the district to seek his adversary, it would seem that he must have recourse to a state court of competent jurisdiction,[106] except in cases where a federal court would have cognizance of the action on account of the presence of jurisdictional facts, such as the diverse citizenship of the bankrupt and the defendant; but in that case of course, its jurisdiction would not be ancillary but original.

§ 25. Jurisdiction to Reverse or Set Aside Former Proceedings.—By the ordinary rules of law a court loses control over its judgments at the expiration of the term at which they were rendered and cannot thereafter revoke or modify them. But it is not so with the United States district courts sitting in bankruptcy. For the exercise of this jurisdiction they are considered as always open and as having no separate terms, and a case in bankruptcy is one continuous proceeding from its inception to the closing of the estate and discharge of the trustee. Therefore any order, decision, or decree made in the progress of such a cause remains subject to the control of the court until the final close of the case, and, saving only vested rights which may have accrued under it, may be corrected if found to be erroneous, modified to suit the facts, or vacated and set aside, without regard to the fact that one or more of the periods appointed for the stated terms of the court may have elapsed.[107] And an application for the re-examination of an order

[105] In re Patterson Lumber Co. (D. C.) 247 Fed. 578, 40 Am. Bankr. Rep. 545.

[106] See Jobbins v. Montague, 6 N. B. R. 509, Fed. Cas. No. 7,330; Lamb v. Damron, 7 N. B. R. 509, Fed. Cas. No. 8,014; Markson v. Heaney, 1 Dill. 497, 4 N. B. R. 510, Fed. Cas. No. 9,098. Compare Goodall v. Tuttle, 3 Biss. 219, 7 N. B. R. 193, Fed. Cas. No. 5,533; Sherman v. Bingham, 3 Cliff. 552, 7 N. B. R. 490, Fed. Cas. No. 12,762; Payson v. Dietz, 2 Dill. 504, 8 N. B. R. 193 Fed. Cas. No. 10,861.

[107] Sandusky v. Bank, 23 Wall. 289, 23 L. Ed. 155; In re Ives, 113 Fed. 911, 51 C. C. A. 541, 7 Am. Bankr. Rep. 692; In re Tucker, 153 Fed. 91, 18 Am. Bankr. Rep. 378; In re Henschel, 114 Fed. 968,

or decree in bankruptcy may be made by motion or petition, according to the circumstances of the case; and such a motion or petition will not have the effect of a new suit, but of a proceeding in an old one.[108] But this power of the court can only be exercised in the same bankruptcy case in which the previous order or decision was made. Each bankruptcy is a distinct proceeding from every other. And a decision or order made in one case is final and conclusive when the rights of the same parties to the same property, or growing out of the same transaction, shall come up for decision in a subsequent and distinct case. Though the court may, in the mean time, have changed its mind regarding the title to the property or the legal effect of the transaction in question, still it has no rightful authority, in the subsequent case, to make an order inconsistent with, or substantially vacating, its order made in the earlier case. This can only be done by a proceeding taken directly for the purpose in the same bankruptcy case in which the order was made.[109]

§ 26. **Conflicts of Jurisdiction with State Courts.**—The bankruptcy law provides that the courts of bankruptcy shall have authority to order a stay of proceedings in suits pending against a bankrupt in the state courts, and this power may be exercised, if need be, by the writ of injunction. Moreover, their jurisdiction is by law made exclusive in all matters and proceedings in bankruptcy. Hence "the jurisdiction of a district court of the United States, sitting as a court of bankruptcy, is superior and exclusive in all matters arising under the statute. The estate surrendered is placed in the custody of the court so sitting in bankruptcy, and the officer appointed to manage it is accountable to the court appointing him, and to that court alone. No court of an independent state jurisdiction can withdraw the property surrendered, nor determine in any degree the manner of its disposition."[110] And when the bankruptcy law cannot be properly administered by the court of bankruptcy, in consequence of the interference of a state court and its determination to adjudicate upon the rights of parties and property in

8 Am. Bankr. Rep. 201; Mahoney v. Ward, 100 Fed. 278, 3 Am. Bankr. Rep. 770.

[108] Sandusky v. Bank, 23 Wall. 289, 23 L. Ed. 155.

[109] In re Lemmon & Gale Co., 112 Fed. 296, 50 C. C. A. 247, 7 Am. Bankr. Rep. 291.

[110] Orinoco Iron Co. v. Metzel, 230 Fed. 40, 144 C. C. A. 338, 36 Am. Bankr. Rep. 247; In re Barrow, 1 N. B. R. 481, Fed. Cas. No. 1,057; Zeigler v. Shomo, 78 Pa. 357; Hall v. Chicago, B. & Q. R. Co., 88 Neb. 20, 128 N. W. 645; In re Ross, 11 R. I. 427. A bankruptcy court having first acquired jurisdiction of the bankrupt's estate by the filing of a petition in bankruptcy, such jurisdiction is exclusive of the right of a state court to entertain jurisdiction of an action in detinue by a claimant to recover property alleged to belong to the estate. Corbett v. Riddle, 209 Fed. 811, 126 C. C. A. 535, 31 Am. Bankr. Rep. 330.

the bankruptcy court, the latter ought not to hesitate to assert its authority; for in this matter they are not independent, but the federal court is the superior.[111]

It does not appear that the mere filing of a petition in bankruptcy is sufficient to withdraw from creditors and from the process of the state courts all the administrable property of the debtor. The statute provides that the trustee shall be vested with title to the bankrupt's property "as of the date he was adjudged bankrupt." [112] It is therefore the adjudication, and not the filing of a petition, which places the property in the custody or constructive possession of the bankruptcy court, and prevents the state courts from interfering with it. Hence a writ of replevin, issued from a state court and executed after the filing of a petition in bankruptcy, but before the federal court takes any action thereon, draws the property into the custody and control of the state court, which may proceed and determine the replevin suit free from the interference of the federal court.[113] But an adjudication of bankruptcy fixes the status of the bankrupt and brings both his person and his property under the jurisdiction and control of the bankruptcy court. Thereupon the property is to be considered as sequestrated and set apart for a specific purpose and a specific course of administration. "Such property is then brought into the bankruptcy court in its entirety and under its protection as fully as if actually brought into the visible presence of the court. No other court, and no person acting under process, can, without the permission of the bankruptcy court, interfere with it, and so to interfere is a contempt." [114] Even in the case of a third person who claims that particular items of property are his, and not the bankrupt's at all, a writ of replevin issuing from a state court is void process, and a seizure under it is unlawful and a contempt of the bankruptcy court, which has authority summarily to order the restoration of the property. These principles are fully and completely established by the authorities in cases where the property in question, at the time of its

111 In re Miller, 6 Biss. 30, Fed. Cas. No. 9,551.

112 Bankruptcy Act 1898, § 70. And it has been held that bankruptcy proceedings in which there has been no adjudication or appointment of a receiver do not deprive a state court of jurisdiction of a general creditors' bill. Morgan Bros. v. Dayton Coal & Iron Co., 134 Tenn. 228, 183 S. W. 1019, Ann. Cas. 1917E, 42.

113 In re Wells, 114 Fed. 222, 8 Am. Bankr. Rep. 75; McFarlan Carriage Co. v. Wells, 99 Mo. App. 641, 74 S. W. 878. But compare In re Iron Clad Mfg. Co., 193 Fed. 781. See, also, Austin v. Hayden, 171 Mich. 38, 137 N. W. 317; Texas Fidelity & Bonding Co. v. First State Bank of Channing (Tex. Civ. App.) 149 S. W. 779.

114 In re Cobb, 96 Fed. 821, 3 Am. Bankr. Rep. 129. Property in the possession of the bankrupt's trustee cannot be taken on replevin without the consent of the bankruptcy court. In re Brockton Ideal Shoe Co. (D. C.) 212 Fed. 764, 32 Am. Bankr. Rep. 377.

seizure, was in the actual or constructive possession of a receiver appointed by the bankruptcy court or of the trustee in bankruptcy.[115] And even in advance of the appointment of a receiver or trustee, if an adjudication has been made, and the court, through any of its officers, has made any motion towards taking possession of the property, its custody cannot rightfully be interfered with under color of process from any other court. This was ruled in a case where the referee, to whom the case had been referred after the adjudication, ordered the store which contained the bankrupt's stock of goods to be locked. It was considered that the property was then in the custody of the referee, as the representative of the court; and the action of a sheriff, armed with a writ of replevin from a state court, in breaking into the store and seizing the goods was held unlawful.[116]

Of course this does not mean that an adverse claimant in good faith must lose his property, or that he is without a remedy for its recovery. He has a simple and effective remedy by petition to the court of bankruptcy.[117] But it is to that court, and that alone, that he must apply. No state court can entertain his suit or petition. It has indeed been thought that such a claimant might maintain an action in a state court merely for the purpose of establishing his title to the property in question.[118] But its judgment could not be followed by any effective process; and even the right to maintain such an action is denied where its object (in addition to establishing title) is to restrain the trustee in bankruptcy from selling the property.[119] Thus, a state court may set aside a fraudulent conveyance in the trustee's suit therefor, but it cannot enter a personal judgment against the bankrupt, and it has no jurisdiction to order a sale of the property and an application of the proceeds on the bankrupt's debts.[120]

The rule is not restricted to actions of replevin, but applies equally to any proceeding or process from a state court which would involve

[115] White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, 4 Am. Bankr. Rep. 178; Murphy v. John Hofman Co., 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327, 21 Am. Bankr. Rep. 487; Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257; In re Endl, 99 Fed. 915, 3 Am. Bankr. Rep. 813; In re Cobb, 96 Fed. 821, 3 Am. Bankr. Rep. 129; Keegan v. King, 96 Fed. 758, 3 Am. Bankr. Rep. 79; In re Rosenberg, 3 Ben. 366, 3 N. B. R. 130, Fed. Cas. No. 12,055; Mishawaka Woolen Mfg. Co. v. Powell, 98 Mo. App. 530, 72 S. W. 723; John Hofman Co. v. Murphy, 116 N. Y. Supp. 506; Crosby v. Spear, 98 Me. 542, 57 Atl. 881, 99 Am. St. Rep. 424.

[116] White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, 4 Am. Bankr. Rep. 178.

[117] Keegan v. King, 96 Fed. 758, 3 Am. Bankr. Rep. 79.

[118] Crosby v. Spear, 98 Me. 542, 57 Atl. 881, 99 Am. St. Rep. 424.

[119] Keegan v. King, 96 Fed. 758, 3 Am. Bankr. Rep. 79.

[120] Douthat v. Roberts, 73 W. Va. 358, 80 S. E. 819.

taking property from the custody of the bankruptcy court or its officers, such as the writ of attachment,[121] or execution, although it is said that a mere threat by a judgment creditor of a bankrupt to levy execution on his property, pending the bankruptcy proceedings, does not constitute a contempt of the court of bankruptcy or its process, where there has been no actual levy made on such property, nor any interference with it by the creditor after the adjudication in bankruptcy.[122] Neither is the rule restricted to property in specie, but it extends also to the proceeds of its sale. Thus, dividends declared by a bankrupt's trustee, while still in his possession and unpaid to the claimants, are in the custody of the court, and cannot be reached by attachment, garnishment, or any other process from a state court.[123] So also as to the status of the bankrupt. After the institution of proceedings in involuntary bankruptcy against a corporation, the proceedings cannot be stayed or affected by a decree entered in a state court dissolving the corporation.[124]

On the other hand, the bankruptcy court will not attempt to seize property which was lawfully in the custody of a state court at the time of the adjudication.[125] But where property of a bankrupt is held adversely to his estate under a claim of seizure under process from a state court, the court of bankruptcy has jurisdiction to inquire and determine, summarily, whether the adverse claim has an actual basis or is merely colorable; and if it decides that the seizure was effected by an abuse of process it has power to order the surrender of the property by the person in possession to its own receiver or the trustee in bankruptcy.[126] It is no objection to the exercise of jurisdiction by a court of bankruptcy over specific property that it is already in course of administration by a probate court of a state as in the case of a proceeding in bankruptcy against a firm where one of the partners is dead.[127] And where a debtor has made an assignment for the benefit of his creditors and

[121] French v. White, 78 Vt. 89, 62 Atl. 35, 2 L. R. A. (N. S.) 804, 6 Ann. Cas. 479.

[122] In re McBryde, 99 Fed. 686, 3 Am. Bankr. Rep. 729.

[123] In re Argonaut Shoe Co., 187 Fed. 784, 109 C. C. A. 632, 26 Am. Bankr. Rep. 584; Gilbert v. Quimby, 1 Fed. 111; Cowart v. W. E. Caldwell Co., 134 Ga. 544, 68 S. E. 500, 30 L. R. A. (N. S.) 720.

[124] In re White Mountain Paper Co., 127 Fed. 180, 11 Am. Bankr. Rep. 491. The institution by a stockholder of a corporation of a suit for its dissolution in a state court does not deprive other stockholders of the right to institute proceedings in bankruptcy. In re Dressler Producing Corporation (C. C. A.) 262 Fed. 257, 44 Am. Bankr. Rep. 457.

[125] In re United Grocery Co. (D. C.) 239 Fed. 1016, 39 Am. Bankr. Rep. 501; S. Bartolotta & Co. v. Their Creditors, 144 La. 919, 81 South. 399.

[126] In re Weinger, Bergman & Co. (D. C.) 126 Fed. 875.

[127] In re Pierce (D. C.) 102 Fed. 977, 4 Am. Bankr. Rep. 489; E. R. Hawkins & Co. v. Quinette, 156 Mo. App. 153, 136 S. W. 246.

the assignee is proceeding under the orders or directions of a state court and the debtor is thereupon adjudged bankrupt, the assignee cannot retain the property and its custody, but must surrender the same to the trustee in bankruptcy on the order of the court of bankruptcy. This, it is said, is not a case of concurrent jurisdiction, where that court which first obtains possession of the estate is entitled to continue in its administration, but the jurisdiction of the federal court in bankruptcy is paramount to that of the state court and is exclusive.[128] And the jurisdiction of the state court over the property of an insolvent corporation, assumed in a creditors' suit more than four months before the petition in bankruptcy does not deprive the bankruptcy court of jurisdiction on a petition filed within four months after the commission of the act of bankruptcy relied on.[129]

But a judgment of a state court of competent jurisdiction, regular and valid on its face, must be accorded full faith and credit, and cannot be assailed in the bankruptcy court, but the trustee and creditors must resort to the state court to test its validity.[130] Thus, the validity of a decree of a state court, rendered in a suit by judgment creditors against their debtor and his assignee, setting aside the assignment as fraudulent and void, establishing the liens of the plaintiffs on the property, and ordering its sale, cannot be impeached by the debtor's trustee in bankruptcy, in a proceeding in the court of bankruptcy to obtain possession of the property and have it sold by the trustee, on the ground of fraud and collusion between the parties to the suit in the state court, at least where the trustee had opportunity to intervene in that suit and there allege such fraud.[131] Where particular property of a bankrupt is covered by a lien, not fraudulent or preferential, but valid and enforceable notwithstanding his bankruptcy, a state court has concurrent jurisdiction with the bankruptcy court to foreclose the lien and satisfy the debt. The trustee in bankruptcy may indeed elect and claim the right to sell the property, for the sake of saving for general creditors whatever may remain out of its proceeds after satisfying the lien claimant. But if he does not take this course, he is considered as abandoning the property to the lienor, and there is then nothing to prevent a

[128] Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; In re Scholtz, 106 Fed. 834, 5 Am. Bankr. Rep. 782; In re Smith, 92 Fed. 135, 2 Am. Bankr. Rep. 9. And see infra, Ch. XXI.

[129] Graham Mfg. Co. v. Davy-Pocahontas Coal Co., 238 Fed. 488, 151 C. C. A. 424, 38 Am. Bankr. Rep. 118.

[130] In re Burns, 1 N. B. R. 174, Fed. Cas. No. 2,182; In re Lodi Land & Lumber Co., 5 Sawy. 286, Fed. Cas. No. 8,461.

[131] Frazier v. Southern Loan & Trust Co., 99 Fed. 707, 3 Am. Bankr. Rep. 710.

state court from entertaining a foreclosure suit or other proper proceeding.[132]

§ 27. Same; Effect of Appointment of Receiver by State Court. —It is a well-settled general rule that, when property is seized and held under mesne or final process of either a state court or a court of the United States, it is in the custody of the law and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ, and the possession of the officer having it in custody cannot be disturbed by another court of co-ordinate jurisdiction, or its officers, by attachment, levy of execution, replevin, or otherwise; and also that, as between a federal and a state court, when the one court has appointed a receiver of property and he has taken possession, the other court will not interfere with his custody and control of the property, by the appointment of another receiver or otherwise.[133] But difficulty arises in the application of these rules when the contest for the possession of property is between a trustee in bankruptcy and a receiver appointed by a state court. In the first place, it is settled that although an insolvent corporation may be in the hands of a receiver appointed by a state court, or although such a court may have appointed a receiver to wind up the affairs of a partnership, or to foreclose a mortgage, this fact will not deprive the federal court of jurisdiction of proceedings in bankruptcy against the corporation or persons concerned, for any other rule would entirely defeat the operation of the bankruptcy act.[134] And indeed, since the amendment of

[132] In re Zehner, 193 Fed. 787, 27 Am. Bankr. Rep. 536; In re Pennell, 159 Fed. 500, 18 Am. Bankr. Rep. 909; In re Vogt, 163 Fed. 551, 20 Am. Bankr. Rep. 457; In re Kavanaugh, 99 Fed. 928, 3 Am. Bankr. Rep. 832. Proceedings in bankruptcy against a tenant are not a bar to an action in a state court by the landlord against one who purchased property of the tenant upon which the landlord had a landlord's lien. Boles v. Missouri Valley Elevator Co., 183 Iowa, 517, 166 N. W. 1057.

[133] Wallace v. McConnell, 13 Pet. 136, 10 L. Ed. 95; Taylor v. Carryl, 20 How. 583, 15 L. Ed. 1028; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390; Peale v. Phipps, 14 How. 368, 14 L. Ed. 459; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660.

[134] In re Grafton Gas & Electric Light Co. (D. C.) 253 Fed. 668, 42 Am. Bankr. Rep. 567; In re Yaryan Naval Stores Co., 214 Fed. 563, 131 C. C. A. 15, 32 Am. Bankr. Rep. 269; Bank of Andrews v. Gudger, 212 Fed. 49, 128 C. C. A. 505, 32 Am. Bankr. Rep. 11; In re McKinnon Co. (D. C.) 237 Fed. 869, 38 Am. Bankr. Rep. 727; Lea v. George M. West Co., 91 Fed. 237, 1 Am. Bankr. Rep. 261; In re C. Moench & Sons Co., 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240; In re Sterlingworth Ry. Supply Co., 164 Fed. 591, 21 Am. Bankr. Rep. 341; Scheuer v. Smith & Montgomery Book & Stationery Co., 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384; In re Kersten, 110 Fed. 929, 6 Am. Bankr. Rep. 516; In re Green Pond R. Co., 13 N. B. R. 118, Fed. Cas. No. 5,786; In re Safe Deposit & Sav. Inst., 7 N. B. R. 392, Fed. Cas. No. 12,211; In re Washington Marine Ins. Co., 2 Ben. 292, Fed. Cas. No. 17,246; In re Merchants' Ins. Co., 3 Biss. 162, Fed.

1903, the very fact of the appointment of a receiver "because of insolvency" is an act of bankruptcy and the starting point for the jurisdiction of the court of bankruptcy.[135] Even though the state court should thus have acquired possession of all the assets which would be administrable in bankruptcy, still it cannot be said that an adjudication in bankruptcy would be futile and unnecessary. On this point it has been said: "In opposition to the adjudication, it has been very vigorously insisted in this court that the adjudication in bankruptcy should not be rendered because the state chancery court, through its receiver and under the judgment of dissolution, has taken possession of all the property of the corporation, and that by reason of the comity which does and ought to prevail between courts of the states and courts of the United States, the adjudication in bankruptcy can result in no administration or other beneficial effect. For the purposes of this case we may concur with the learned counsel in his views on this matter of comity, but we are of opinion, notwithstanding, that the petitioning creditors have the right to have their insolvent debtor adjudged a bankrupt, if for no other reason, still for the purpose of insisting upon the application of the provisions of the bankruptcy law annulling preferences in certain cases." [136]

It is clear, therefore, that there is nothing in the situation supposed which should prevent the making of an adjudication of bankruptcy. If an undoubted act of bankruptcy is made out, and a petition is filed by a sufficient number of creditors having the requisite amount of provable claims, it is their right to have the relief demanded. But if the case is doubtful, and specially if the commission of an act of bankruptcy can be made out only by implication or by straining the construction of the statute, the fact of an existing receivership in a state court, which promises to work out all the equities in the case and result in benefit to the creditors may well incline the federal court to refrain from taking jurisdiction. This was the ground of the decision in a notable case in New York, where an insolvent corporation, engaged in the publishing business, had applied to a state court for a decree for its dissolution and the settlement of its affairs, and thereupon a receiver was appointed

Cas. No. 9,441; In re National Life Ins. Co., 6 Biss. 25, Fed. Cas. No. 10,046; In re Noonan, 3 Biss. 491, 10 N. B. R. 330, Fed. Cas. No. 10,292; In re Hathorn, 2 Woods, 73, Fed. Cas. No. 6,214; Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co., 206 Fed. 813, 30 Am. Bankr. Rep. 604.

[135] Bankruptcy Act 1898, § 3a, as amended by Act Cong. February 5, 1903, 32 Stat. 797.

[136] Scheuer v. Smith & Montgomery Book & Stationery Co., 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384; In re Maplecroft Mills (D. C.) 218 Fed. 659, 33 Am. Bankr. Rep. 815.

who took charge of the assets and entered upon the discharge of his duties. Ninety per cent. of the creditors, representing more than three million dollars, approved of the proceedings as the best possible course for the benefit of the creditors in general. The interests involved were very large and the administration of the property required exceptional care and competency. No actual fraud was shown, and the federal court entertained serious doubts as to whether the act of the corporation constituted an act of bankruptcy under the law as it then stood. For these reasons an adjudication of bankruptcy was refused.[137] It should also be remarked that if the appointment of a receiver by the court of bankruptcy is asked for, to be made at the same time with the adjudication, and the property is already in the possession of a receiver of a state court, notice of the application should be given to the latter.[138]

In the next place, the authorities sustain the doctrine that a court of bankruptcy is not prevented from taking jurisdiction of a petition against a debtor, and taking possession of his estate for the purpose of administration in bankruptcy, by the mere fact that proceedings are already pending in a state court, in which a receiver has been asked for, if no appointment has yet been made, nor even by the appointment of a receiver by the state court, if he has not reduced the property in question to his possession nor taken any steps to do so.[139] But the crucial question arises when a state court has appointed a receiver,—whether in proceedings supplementary to execution, or on a creditor's bill, or in a partnership or corporation case, or otherwise,—and he has obtained actual possession of the property committed to his charge, and thereafter the debtor is adjudged bankrupt, and a trustee in bank-

[137] In re Harper & Brothers, 100 Fed. 266, 3 Am. Bankr. Rep. 804. And see, as a somewhat similar case, In re Hudson River Electric Power Co., 173 Fed. 934, 23 Am. Bankr. Rep. 191.

[138] Sidney L. Bauman Diamond Co. v. Hart, 192 Fed. 498, 113 C. C. A. 104, 27 Am. Bankr. Rep. 632.

[139] Brown v. Crawford (D. C.) 254 Fed. 146, 42 Am. Bankr. Rep. 677; Southern Loan & Trust Co. v. Benbow, 96 Fed. 514, 3 Am. Bankr. Rep. 9; In re Bruss-Ritter Co., 90 Fed. 651, 1 Am. Bankr. Rep. 58; In re Nolan, 8 Ben. 559, Fed. Cas. No. 10,289. Where creditors have brought suit to set aside a fraudulent conveyance of property, and procured the appointment of a receiver, who has obtained possession of the property in question, but in the meantime the fraudulent grantee has voluntarily restored the title to the grantor, and the latter is afterwards adjudicated a bankrupt, the possession and administration of the property belongs to the court of bankruptcy, and the receiver cannot retain the custody thereof as against that court. In re Brown, 91 Fed. 358, 1 Am. Bankr. Rep. 107. A decree of bankruptcy overrides all rights sought to be acquired by the appointment of a receiver in a state court after the filing of the petition in bankruptcy. Smith v. Buchanan, 8 Blatchf. 153, 4 N. B. R. 397, Fed. Cas. No. 13,016. But contrary to the rule stated in the text, see Frazier v. Southern Loan & Trust Co., 99 Fed. 707, 40 C. C. A. 76, 3 Am. Bankr. Rep. 710, where it was held that the order of the state court appointing a receiver brought the property within the custody and control of that court.

ruptcy or a receiver appointed. Is it within the jurisdiction of a court of bankruptcy to order the state court receiver to surrender the property in his hands to such trustee or receiver in bankruptcy? Very few cases have answered this question in the affirmative.[140] Certain other decisions have maintained that where the very act of bankruptcy alleged is the appointment of a receiver by the state court, on the debtor's own application or "because of his insolvency," under the bankruptcy act as amended in 1903, the federal court should not be deterred from requiring the surrender of the entire estate by the receiver of the state court, since otherwise the purpose of Congress in adding the new act of bankruptcy to the existing list would be automatically defeated; that is, the appointment of a receiver would constitute an act of bankruptcy, but would at the same time prevent a court of bankruptcy from taking jurisdiction and administering the estate.[141] But aside from these cases, it may be considered as definitely settled, by a great preponderance of authority, that where property of an estate in bankruptcy is in the actual custody and control of a state court of competent jurisdiction, through its receiver, its possession of the property will not be interfered with, nor its disposition of the same restrained, by any process from the court of bankruptcy.[142] Further, if property has been

[140] In re Diamond's Estate, 259 Fed. 70, 170 C. C. A. 138, 44 Am. Bankr. Rep. 268. In re J. W. Zeigler Co., 189 Fed. 259, 26 Am. Bankr. Rep. 761; In re Lengert Wagon Co., 110 Fed. 927, 6 Am. Bankr. Rep. 535; In re Whipple, 6 Biss. 516, 13 N. B. R. 373, Fed. Cas. No. 17,512; Lea v. George M. West Co., 91 Fed. 237, 1 Am. Bankr. Rep. 261. In the case last cited it was held that, where a corporation has made a general assignment for the benefit of its creditors, and a state court, on a bill in equity, has appointed the assignee as receiver to take charge of the assigned estate and wind up the affairs of the assignor, and the corporation is afterwards adjudged bankrupt, jurisdiction to administer and distribute the entire estate belongs to the court of bankruptcy, to the exclusion of the state court, and the former court may enjoin all parties from further proceedings in the latter court. But this decision was based expressly on the ground that the assignment was an act of bankruptcy by the statute, and that the purpose of the bankruptcy law would be defeated if the assignment, the basis of the receiver's title, were allowed to stand.

[141] Pugh v. Loisel, 219 Fed. 417, 135 C. C. A. 221, 33 Am. Bankr. Rep. 580. In re Knight, 125 Fed. 35, 11 Am. Bankr. Rep. 1; Hooks v. Aldridge, 145 Fed. 865, 76 C. C. A. 409, 16 Am. Bankr. Rep. 658. In the latter case, while the authority of the bankruptcy court in such a situation was strongly maintained, the court found it unnecessary to make a ruling as to the propriety of imperatively commanding the surrender of the property by the receiver appointed by the state court, as the trustee and the receiver had mutually agreed to abide the decision, as to who was entitled to the possession, and both courts had approved their agreement.

[142] In re Williams (D. C.) 240 Fed. 788, 38 Am. Bankr. Rep. 762. In re Kavanaugh, 99 Fed. 928, 3 Am. Bankr. Rep. 832; Southern Loan & Trust Co. v. Benbow, 96 Fed. 514, 3 Am. Bankr. Rep. 9; In re Heckman, 140 Fed. 859, 72 C. C. A. 8, 15 Am. Bankr. Rep. 500; In re Bay City Irr. Co., 135 Fed. 850, 14 Am. Bankr. Rep. 370; Carling v. Seymour Lumber Co., 113 Fed. 483, 51 C. C. A. 1, 8 Am. Bankr. Rep. 29; In re Price, 92 Fed. 987, 1 Am. Bankr. Rep. 606; Alden

unlawfully taken from the custody of the receiver, the court of bankruptcy will not summarily order its sale by the trustee against the protest of the receiver,[143] and it has even been held that, if such a sale has been made, it will be set aside, at least as against one having notice of the illegality, and the purchase money ordered refunded.[144]

It is evident, therefore, that if the court of bankruptcy cannot aid the trustee, when he finds the assets in the possession of a receiver, his claims must be made in the state court which appointed the receiver. It is clearly open to the trustee to file his petition in the state court and ask for an order requiring the receiver to surrender to him the property in his possession,[145] and this course is approved by the authorities. But the course which the state court will take is by no means certain. So far as can be judged from the earlier cases, the state courts were disposed to regard applications of this kind with extreme disfavor, and invariably refused them.[146] More recent cases, however, show a strong tendency to recognize the jurisdiction of the bankruptcy court as paramount, although, as a rule, they hold only that the state court "should" direct its receiver to yield up the property to the trustee in bankruptcy, or that it "may" do so, or that "it is not error" for the court to make such an order.[147] But if the trustee has a legal right to

v. Boston, H. & E. R. Co., 5 N. B. R. 230, Fed. Cas. No. 152; Goodrich v. Remington, 6 Blatchf. 515, Fed. Cas. No. 5,546; Bradley v. Healey, Holmes, 451, Fed. Cas. No. 1,781; In re Clark, 4 Ben. 88, 3 N. B. R. 491, Fed. Cas. No. 2,798; Davis v. Railroad Co., 1 Woods, 661, 13 N. B. R. 258, Fed. Cas. No. 3,648; Sedgwick v. Menck, 6 Blatchf, 156, 1 N. B. R. 675, Fed. Cas. No. 12,616; Appleton v. Bowles, 2 Thomp. & C. 568, 9 N. B. R. 354.

[143] Frazier v. Southern Loan & Trust Co., 99 Fed. 707, 40 C. C. A. 76, 3 Am. Bankr. Rep. 710; In re Hulst, 7 Ben. 17, Fed. Cas. No. 6,863. But see Union Electric Co. v. Hubbard, 242 Fed. 248, 155 C. C. A. 88, 39 Am. Bankr. Rep. 529.

[144] Davis v. Railroad Co., 1 Woods, 661, 13 N. B. R. 258, Fed. Cas. No. 3,648.

[145] In re Price, 92 Fed. 987, 1 Am. Bankr. Rep. 606; In re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815; McGahee v. Cruickshank, 133 Ga. 649, 66 S. E. 776; Ex parte Waddell, Fed. Cas. No. 17,027; Loudon v. Blandford, 56 Ga. 150. But compare Southwell v. Church, 51 Tex. Civ. App. 547, 111 S. W. 969.

[146] State v. Superior Court of King County, 28 Wash. 35, 68 Pac. 170, 92 Am. St. Rep. 826; Porter v. Cummings, 108 Ga. 797, 33 S. E. 986; Myer v. Crystal Lake Pickling Works, 14 N. B. R. 9 (decision by an inferior court in Illinois); Freeman v. Fort, 52 Ga. 371, 14 N. B. R. 46; Watson v. Citizens' Sav. Bank, 5 S. C. 159, 9 N. B. R. 458. And see Carr v. Hardeman & Phinizy, 144 Ga. 54, 86 S. E. 215; State v. Sage, 267 Mo. 493, 184 S. W. 984; Lambert v. National Hog Co., 263 Pa. 354, 106 Atl. 541.

[147] Hanson v. Stephens, 116 Ga. 722, 42 S. E. 1028; McGahee v. Cruickshank, 133 Ga. 649, 66 S. E. 776; Davis v. Coe, 19 Ohio Cir. Ct. R. 639; I. Trager Co. v. Cavaroc Co., 123 La. 319, 48 South. 949; First Nat. Bank v. Zangwill, 61 Fla. 596, 54 South. 375; Bloch v. Bloch, 42 Misc. Rep. 278, 86 N. Y. Supp. 1047; Gay v. Ray, 195 Mass. 8, 80 N. E. 693; Mauran v. Crown Carpet Lining Co., 23 R. I. 324, 50 Atl. 331. And see Carter-Mullaly Transfer Co. v. Robertson (Tex. Civ. App.) 198 S. W. 791; Lambert v. National Hog Co., 72 Pa. Super. Ct. 378. But an order by the state court for the delivery, to the receiver in bankruptcy of the defendant corporation, of possession of land, the title to which was in

the property (as, where the title of the receiver is impeachable under the bankruptcy act) and this right is not regarded by the state court, he has a remedy by carrying the case to the highest court of the state, and thence to the Supreme Court of the United States.[148]

On the other hand, resistance by the state court and its officers to the jurisdiction of the court of bankruptcy may sometimes be proper. Thus, the state court may make an order directing its receiver to appear in the bankruptcy proceedings and oppose the adjudication of the defendant, and this is not a surrender by the state court to the bankruptcy court of its jurisdiction of the property.[149] So, where the officers and directors of a corporation filed a voluntary petition in bankruptcy for it, but this was in violation of the orders of a state court which had already appointed a receiver, but the referee in bankruptcy appointed a receiver on the petition, it was held that the receiver of the state court should be directed to apply to the judge of the federal court to vacate the order appointing the receiver.[150] And so, where a receiver appointed by a state court has voluntarily surrendered property to the receiver in bankruptcy, either through a mistake as to his rights in the matter or in pursuance of an order of the court which appointed him, but which order is afterwards revoked or overruled, he may be directed to apply to the bankruptcy court for restoration of the property,[151] though it seems that such an application may properly be denied by the court of bankruptcy.[152]

If the state court decides to yield to the jurisdiction of the court of bankruptcy and surrender the assets, its course is then to settle its receiver's accounts, order the transfer of the assets, and close its connection with the matter.[153] But there is an unsettled question as to the payment of the receiver's compensation and the other expenses. Some of the decisions maintain that it is in the rightful authority of the state court to deduct from the assets to be surrendered a sum sufficient to cover the commissions or fees of its receiver and the other expenses

issue in an insolvency action brought against the corporation in the state court by creditors, was held error, though an order for the delivery to the receiver of all assets clearly belonging to the bankrupt and not in controversy, would have been proper. Harris v. Luxury Fruit Co., 142 Ga. 67, 82 S. E. 447.

148 Johnson v. Bishop, Woolw. 324, 8 N. B. R. 533, Fed. Cas. No. 7,373.

149 Blair v. Brailey, 221 Fed. 1, 136 C. C. A. 524, 34 Am. Bankr. Rep. 12.

150 Cavagnaro v. Indian Tire & Rubber Co., 90 N. J. Eq. 532, 107 Atl. 643. And see Zeitinger v. Hargadine-McKittrick Dry Goods Co., 244 Fed. 719, 157 C. C. A. 167, 40 Am. Bankr. Rep. 324.

151 Luxury Fruit Co. v. Harris, 142 Ga. 866, 83 S. E. 1093.

152 Dure v. Wright, 228 Fed. 1021, 142 C. C. A. 654.

153 Loveless v. Southern Grocer Co., 159 Fed. 415, 86 C. C. A. 395, 20 Am. Bankr. Rep. 180; In re Board of Directors of Suburban Const. Co. (Sup.) 143 N. Y. Supp. 363.

of the proceeding before it.[154] Other cases are to the effect that such an order by the state court is coram non judice and void, and that the receiver must apply to the court of bankruptcy for an allowance for his fees, as that court alone has authority to dispose of the assets and no other court can incumber them with charges or expenses.[155]

Upon the whole matter, therefore, the course most generally approved by the authorities, and most likely to avoid an unseemly conflict between the courts of the two systems, is for the trustee in bankruptcy (or the receiver of the federal court), acting under the instructions of the court, to make a suitable application to the state court for the surrender to him of the assets of the bankrupt's estate, and pending such application, the court of bankruptcy may enjoin the receiver appointed by the state court from disposing of the property otherwise.[156] In one of the cases, where this course was taken, the bankruptcy court, speaking of its own receiver, said: "This officer will be directed to apply in terms of suitable respect to [the judge of the state court] and seek at his hands an order directing the receiver of the state court to turn over to the receiver of this court the assets of the alleged bankrupt in his hands. The time at which this application should be made will also be directed by order." [157]

But if the state court refuses to recognize the superior jurisdiction of the bankruptcy court, and refuses the trustee's or receiver's application for surrender of the assets, the federal court will not seek to compel it nor enter upon an unseemly scramble for the assets. Though the jurisdiction of the two courts in such cases is not concurrent, but that of the bankruptcy court is paramount, yet the proper principles of comity are not to be disregarded.[158] "It is said that, under the rules of comity, the possession of the property by the state court should not

[154] Shannon v. Shepard Mfg. Co., 230 Mass. 224, 119 N. E. 768; Wilson v. Parr, 115 Ga. 629, 42 S. E. 5; McGahee v. Cruickshank, 133 Ga. 649, 66 S. E. 776; State v. German Exchange Bank, 114 Wis. 436, 90 N. W. 570.

[155] In re Standard Fuller's Earth Co., 186 Fed. 578, 26 Am. Bankr. Rep. 562; In re Rogers, 116 Fed. 435, 8 Am. Bankr. Rep. 723; Bloch v. Bloch, 42 Misc. Rep. 278, 86 N. Y. Supp. 1047; Hanson v. Stephens, 116 Ga. 722, 42 S. E. 1028. Receiver of the property of a corporation, who was supplanted by a trustee in bankruptcy, cannot properly pay claims for wages incurred by the company before the receivership, no sale of corporate property having taken place. Appeal of Pramuk, 250 Pa. 45, 95 Atl. 326.

[156] In re Lengert Wagon Co., 110 Fed. 927, 6 Am. Bankr. Rep. 535; Ross-Meeham Foundry Co. v. Southern Car & Foundry Co., 124 Fed. 403, 10 Am. Bankr. Rep. 624; In re Electric Supply Co., 175 Fed. 612, 23 Am. Bankr. Rep. 647; In re Price, 92 Fed. 987, 1 Am. Bankr. Rep. 606; In re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815.

[157] In re Electric Supply Co., 175 Fed. 612, 23 Am. Bankr. Rep. 647.

[158] In re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, 10 Am. Bankr. Rep. 113.

be interfered with without its consent; that the decision of the state court not to surrender the property is controlling till it is reversed; that parties objecting to it should reserve the federal question, and obtain relief by appeal or writ of error, and finally by application to the United States Supreme Court if necessary. * * * At a proper time the federal courts, of course, may decree the enforcement of the supremacy of the constitution and laws of the United States. * * * But it is, without doubt, the duty of both the state and federal courts to exercise the greatest caution to avoid this necessity where it is possible. The orders of the state court and of the federal court in this case are in conflict, and if each court was attempting to enforce its own order as to the possession of the property, it would lead to a resort to physical force on the part of the executive officers of the respective courts." [159]

[159] Hooks v. Aldridge, 145 Fed. 865, 76 C. C. A. 409, 16 Am. Bankr. Rep. 658. The application of the various principles discussed in this section is well illustrated by the history of the litigation over the estate of the firm of Clark & Bininger in the federal and state courts in New York. This firm became insolvent and was dissolved, and one of the partners sued the other in a state court for an accounting and for the appointment of a receiver. The state court appointed a receiver who took possession. Pending this action, the firm was adjudged bankrupt, and the marshal was ordered to take the property, but the receiver refused to deliver it. The court of bankruptcy then held that the bankrupt's rights of action in suits pending in state courts vested in his assignee, and it ordered the bankrupt plaintiff to execute proper instruments to enable the assignee to represent him in his action in the state court, and enjoined further proceedings in respect thereof without its leave. But the assignee's prayer that the receiver be ordered to surrender the property was postponed, because, as the court said, "it is quite probable that, if the assignee be substituted as plaintiff in the action, it may be desirable that the possession of the receiver should not be disturbed until such substitution shall take place." In re Clark, 4 Ben. 88, 3 N. B. R. 491, Fed. Cas. No. 2,798. Meanwhile a motion was made in the state court to punish the assignee in bankruptcy for contempt in attempting to disturb the possession of the receiver appointed by the court. This motion was granted, and a nominal punishment inflicted. In deciding the question, the superior court of New York laid down the principle that where a state court, on a bill by one partner against another for a dissolution of the firm and the winding up of the partnership business, has appointed a receiver, who has taken possession of the partnership property, and the firm is afterwards adjudged bankrupt, the assignee has no right to the assets as against the receiver, and the federal court has no jurisdiction to interfere with the state court in its administration of the property, nor to oust the latter court of its jurisdiction to proceed with the case. Clark v. Binninger, 38 How. Prac. (N. Y.) 341, 3 N. B. R. 518. The assignee then applied to the state court to be substituted for the bankrupt partner in the pending suit. But before he had obtained a decision on this application, he came again into the federal court and renewed his application for an order commanding the marshal to take from the receiver the possession of the partnership property, and for an injunction forbidding the receiver to interfere further therewith. This application was now denied by the bankruptcy court. After pointing out that the jurisdiction of the state court in the case pending before it was not questioned, and that the transfer to its receiver was not impeached as fraudulent or as a preference, or otherwise as being in violation of the bankruptcy law, Judge Blatchford said: "When property is lawfully placed in

In this emergency, the approved course is for the trustee in bankruptcy to apply, by petition filed in the state court, for leave to intervene in the action there pending, in order that he may assert and protect the interests of the general creditors of the estate, and ask that the administration proceed in accordance with the provisions of the bankruptcy law, for the benefit of the creditors, as, by avoiding preferences, and the like.[160] This does not involve a dissolution of the receivership, but enables the trustee, as the representative of creditors, to secure their just rights in the working out of the estate through the receivership. To enable the trustee thus to intervene in the state court, the court of bankruptcy may temporarily order a stay of proceedings, or

the custody of a receiver, by the court which appoints such receiver, it is in the custody and under the protection and control of such court for the time being, and no other court has a right to interfere with such possession, unless it be some court which has a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." Citing Peck v. Jenness, 7 How. 612, 12 L. Ed. 841; Williams v. Benedict, 8 How. 107, 12 L. Ed. 1007; Wiswall v. Sampson, 14 How. 52, 14 L. Ed. 322; Peale v. Phipps, 14 How. 368, 14 L. Ed. 459; Taylor v. Carryl, 20 How. 583, 15 L. Ed. 1028; Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257. The court continued: "In the present posture of this case, it does not appear that this court has such superior jurisdiction in the premises, or such supervisory control over the state court in respect to the property in question, as to authorize it to take away from the state court the possession of such property, or to enjoin the receiver from further interfering with such property. This court will always be sedulous to enforce its just powers, but it will not demand from any other tribunal anything which it would not itself be willing to concede under like circumstances. In the case referred to, In re Vogel, 2 N. B. R. 427, Fed. Cas. No. 16,983, it compelled the restitution to an assignee in bankruptcy of property which had been taken away by process of a state court from the custody of this court, and its decision was affirmed by the circuit court on review. The principle on which such restitution was enforced would authorize the state court, in the present case, to compel restitution to its receivers of such property as this court should take away by force from the custody of such state court, and this court might then retaliate, and the confusion and endless strife would ensue which are so forcibly characterized by the supreme court in the opinion delivered in the case of Buck v. Colbath, before cited." In re Clark, 4 Ben. 88, 3 N. B. R. 524, Fed. Cas. No. 2,798. The final decision of the state court on the questions involved was that the assignee in bankruptcy might take upon himself the conduct of the action pending in the state court between the bankrupt and his partner, and might continue the prosecution of the same, and might, from time to time, as he should be advised, make such applications to the state court in such action as should be necessary for its determination. To this extent only the assignee would be deemed substituted in the place of the bankrupt. But it was firmly held that the assignee had no power to take possession of the property held by the receiver under the authority of the state court, and that if he attempted it he would be deemed in contempt. But after the termination of the proceedings there the state court would direct that any balance in the hands of the receiver should be paid over to the assignee. Clark v. Binninger, 39 How. Prac. (N. Y.) 363.

[160] Scheuer v. Smith & Montgomery Book & Stationery Co., 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384; In re Klein, 97 Fed. 31, 3 Am. Bankr. Rep. 174.

restrain all parties, for a reasonable length of time, from the further prosecution of the action in the state court.[161] Finally it is to be observed that a trustee in bankruptcy of a bankrupt whose property has been seized under a mortgage and is in possession of a receiver appointed in the mortgage foreclosure suit by a state court of competent jurisdiction, is entitled to the possession of any property not covered by the mortgage, and also to the excess of the proceeds of a sale of the mortgaged property over the mortgage debt and costs of foreclosure.[162]

When the trustee in bankruptcy recovers or receives the property from the hands of the state court's receiver, he cannot be prejudiced by anything the latter may have done in regard to it. Thus, the trustee is not bound by the receiver's repudiation of a lease entered into by the bankrupt corporation.[163]

§ 28. **Same; Property in Possession of Sheriff.**—Property in the hands of a sheriff under execution or attachment from a state court levied before the proceedings in bankruptcy were commenced cannot be taken out of the possession of the sheriff by the federal court at the instance of the trustee in bankruptcy. In such a case the possession of the sheriff is the possession of the court of which he is the officer, and while his possession as such officer continues, no other court can interfere with it.[164] But it must be understood that this rule, and the cases cited in support of it, apply only where the trustee seeks to impeach the validity of the levy on the ground of fraud or as a preference. If the case is one in which the lien is dissolved by mere force of the adjudication in bankruptcy, as provided by § 67f of the Bankruptcy Act, the situation is different. Here it cannot be said that the sheriff continues to hold possession under his writ, because the writ is abated, and the lien extinguished, by the adjudication in bankruptcy. Consequently the officer no longer holds the property in the character of an officer of the state court, but as a mere temporary custodian, and there is no longer any reason, founded on judicial comity or the rights of an inde-

[161] In re Klein, 97 Fed. 31, 3 Am. Bankr. Rep. 174.

[162] Carling v. Seymour Lumber Co., 113 Fed. 483, 51 C. C. A. 1, 8 Am. Bankr. Rep. 29.

[163] In re Mullings Clothing Co., 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918A, 539, 38 Am. Bankr. Rep. 189.

[164] Marshall v. Knox, 16 Wall. 551, 21 L. Ed. 481; Townsend v. Leonard, 3 Dill. 370, Fed. Cas. No. 14,117; Goddard v. Weaver, 1 Woods, 257, 6 N. B. R. 440, Fed. Cas. No. 5,495; In re Shuey, 9 N. B. R. 526, Fed. Cas. No. 12,821; Mollison v. Eaton, 16 Minn. 426 (Gil. 383), 10 Am. Rep. 150; State v. Taylor, 3 Mo. App. 351. Some cases go so far as to hold that this rule should apply even where the lien is dissolved by the adjudication in bankruptcy. See Johnson v. Bishop, Woolw. 324, 8 N. B. R. 533, Fed. Cas. No. 7,373. But compare the cases cited in the next note.

pendent tribunal, why he should not be required, like any other custodian, to surrender it to the person having a paramount right to it. Therefore, if an action is begun in a state court and a writ issued and levied on property of an insolvent debtor, within four months before the institution of proceedings in bankruptcy against him, the trustee is entitled to recover possession of such property from the sheriff holding the same under the levy; and the court of bankruptcy has jurisdiction to order the surrender of the property on a petition by the trustee.[165] But the section above referred to applies only to goods which are actually the property of the bankrupt. It does not profess to vest in the trustee title to any property which was in the hands of the bankrupt at the time of the adjudication, but to which a third person had a paramount right, as, for instance, property sold to the bankrupt under an uncompleted conditional sale reserving title in the vendor, or property which the bankrupt had procured by fraud and false representations. Hence if the claimant of such property has procured its seizure on a writ of replevin or in an action of claim and delivery, and it remains in the hands of the sheriff, the court of bankruptcy has no jurisdiction to compel him, by a summary order, to deliver it to a receiver or trustee in bankruptcy.[166]

The same principles apply where the sheriff has sold the property under his writ, but still has the proceeds in hand at the time the trustee in bankruptcy demands them. Although the Bankruptcy Act (§ 67f) provides that the title of a bona fide purchaser at the sheriff's sale, without notice, shall not be impaired or destroyed, this does not affect the disposition of the money paid by him and remaining in the hands of the officer; and it is held that this fund does not belong to the creditor suing out the writ, if the lien was dissolved by the adjudication in bankruptcy, but to the estate of the bankrupt, and may be recovered by the trustee.[167] There is, however, some difference of opinion as to

[165] In re Francis-Valentine Co., 94 Fed. 793, 36 C. C. A. 499, 2 Am. Bankr. Rep. 522; In re Fellerath, 95 Fed. 121, 2 Am. Bankr. Rep. 40; In re Richards, 95 Fed. 258, 2 Am. Bankr. Rep. 518; In re Francis-Valentine Co., 93 Fed. 953, 2 Am. Bankr. Rep. 188; In re Schnepf, 2 Ben. 72, 1 N. B. R. 190, Fed. Cas. No. 12,471; Goodnough Mercantile Co. v. Galloway, 48 Or. 239, 84 Pac. 1049; Lindner v. Brock, 40 Mich. 618. Where a sheriff levied a distress warrant and took possession of goods, and with consent of plaintiff's attorney delivered them to the receiver of the defendant bankrupt, who had been directed to take possession, the receiver will not be ordered to restore the possession to the sheriff. Covington v. Barber, 147 Ga. 804, 95 S. E. 705.

[166] In re L. Rudnick & Co., 160 Fed. 903, 88 C. C. A. 85, 20 Am. Bankr. Rep. 33; Rock Island Plow Co. v. Western Implement Co., 21 N. D. 608, 132 N. W. 351.

[167] In re Kenney, 95 Fed. 427, 2 Am. Bankr. Rep. 494, same case on rehearing, 97 Fed. 554, 3 Am. Bankr. Rep. 353; In re Richards, 95 Fed. 258, 2 Am. Bankr. Rep. 518; In re Fellerath, 95 Fed. 121, 2 Am. Bankr. Rep. 40; In re Franks, 95 Fed. 635, 2 Am. Bankr. Rep. 634.

the method in which the trustee should proceed to claim the fund. Certain cases hold that if the sale was made before the commencement of the bankruptcy proceedings, the proceeds, remaining in the hands of the sheriff, are beyond the jurisdiction of the court of bankruptcy, and that it has no power to enjoin him from paying over the fund to the creditor; also that the sheriff cannot be ordered to pay over the money to the trustee on a summary petition in the court of bankruptcy, but that the trustee must apply for such an order to the state court from which the writ issued, and if refused there, his remedy is to sue the sheriff for money had and received.[168] But these decisions are contrary to the weight of authority. The majority of the cases hold that, since the officer holds the proceeds of a sale merely in the place of the goods sold, and holds either the goods or the money as a mere custodian for the bankrupt, to whose estate they belong, and not by an independent and adverse title, there is no necessity for resorting to plenary proceedings for their recovery, but the same may be ordered by the court of bankruptcy upon the summary petition of the trustee.[169]

The pendency of proceedings in bankruptcy, unknown to any of the parties concerned or to the court, does not prevent a territorial court having the custody of perishable property through its receiver appointed under an attachment levied before the petition in bankruptcy was filed, from ordering a sale thereof, on finding that (in the words of the local statute) "the interests of both plaintiff and defendant will be promoted by the sale," but such sale is valid and the claim of the trustee in bankruptcy is transferred to the proceeds.[170]

§ 29. Power to Enjoin Proceedings in State Courts.—The federal statutes provide that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."[171] The present bankruptcy act directs that "a suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve

[168] In re Easley, 93 Fed. 419, 1 Am. Bankr. Rep. 715; In re Franks, 95 Fed. 635, 2 Am. Bankr. Rep. 634; People v. Brennan, 3 Hun (N. Y.) 666, 12 N. B. R. 567.

[169] In re Kenney, 97 Fed. 554, 3 Am. Bankr. Rep. 353; In re Fellerath, 95 Fed. 121, 2 Am. Bankr. Rep. 40; In re Francis-Valentine Co., 94 Fed. 793, 36 C. C. A. 499, 2 Am. Bankr. Rep. 522; Mills v. Davis, 3 Jones & S. (N. Y.) 355.

[170] Jones v. Springer, 226 U. S. 148, 33 Sup. Ct. 64, 57 L. Ed. 161, 29 Am. Bankr. Rep. 204.

[171] Rev. Stat. U. S. § 720; Federal Judicial Code 1911, § 265.

months after the date of such adjudication, or if, within that time, such person applies for a discharge, then until the question of such discharge is determined." [172] Moreover, the courts of bankruptcy are authorized to "make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act." [173] These statutory provisions amply support the jurisdiction of a court of bankruptcy to stay or suspend all proceedings in the state courts, founded on claims of the character mentioned (or, without reference to the nature of the claim, where the object of the proceeding is to withdraw from the custody and administration of the bankruptcy court any part of the assets of the bankrupt), either then pending or thereafter commenced by any creditor or any person having an adverse interest, to enforce his rights, or to obtain redress against the bankrupt or his assets after the bankruptcy,—not, indeed, by acting on the courts, over which it possesses no authority, but by acting on the parties through the instrumentality of an injunction or restraining order, upon due application made by the bankrupt or his trustee, and a proper case being laid before the court for such interference.[174] Thus, for instance, where proceedings supplementary to execution against the bankrupt, in a state court, begun within four months before the commencement of proceedings in bankruptcy, are pending at the time of the adjudication therein, the court of bankruptcy will, by injunction, stay all further proceedings in the action in the state court.[175]

A court of bankruptcy has jurisdiction to stay the prosecution of an action against the bankrupt in a state court, on a debt from which his discharge would be a release, pending the determination of the question of his discharge, although the action was begun after the filing of the petition. Although the act of Congress explicitly authorizes such a stay only in cases where the action is "pending at the time of the filing

[172] Bankruptcy Act 1898, § 11.

[173] Bankruptcy Act 1898, § 2, clause 15.

[174] Ex parte Christy, 3 How. 292, 11 L. Ed. 603; Roger v. J. B. Levert Co., 237 Fed. 737, 150 C. C. A. 491; Blake v. Francis-Valentine Co., 89 Fed. 691, 1 Am. Bankr. Rep. 372; Penny v. Taylor, 10 N. B. R. 200, Fed. Cas. No. 10,957; In re Mallory, 1 Sawy. 88, 6 N. B. R. 22, Fed. Cas. No. 8,991; Platt v. Archer, 9 Blatchf. 559, 6 N. B. R. 465, Fed. Cas. No. 11,213; In re Schwartz, 14 Fed. 787; Southern Loan & Trust Co. v. Benbow, 96 Fed. 514, 3 Am. Bankr. Rep. 9; In re Kimball, 97 Fed. 29, 3 Am. Bankr. Rep. 161; In re Kletchka, 92 Fed. 901, 1 Am. Bankr. Rep. 479; In re Jackson, 9 Fed. 493; In re Lady Bryan Min. Co., 6 N. B. R. 252, Fed. Cas. No. 7,980; In re Atkinson, 3 Pittsb. 423, 7 N. B. R. 143, Fed. Cas. No. 606; In re Citizens' Sav. Bank, 9 N. B. R. 152, Fed. Cas. No. 2,735; In re Duryea, 17 N. B. R. 495, Fed. Cas. No. 4,196; Samson v. Burton, 5 Ben. 343, 5 N. B. R. 459, Fed. Cas. No. 12,286; Fowler v. Dillon, 1 Hughes, 232, 12 N. B. R. 308, Fed. Cas. No. 5,000; Morehouse v. Giant Powder Co., 206 Fed. 24.

[175] In re Kletchka, 92 Fed. 901, 1 Am. Bankr. Rep. 479; In re Cefola (D. C.) 222 Fed. 171.

of the petition," yet the power to stay suits thereafter commenced is essential to the due administration of the law, and its exercise is justified by the consideration that the creditor could gain no lawful or proper advantage by being allowed to prosecute such a suit to judgment.[176] Nor is the power to stay pending suits confined to such as are in form against the bankrupt himself. It may be exercised in proper cases where the right of the bankrupt to certain property is involved in a suit pending in a state court between two parties who are not parties to the proceedings in bankruptcy, at least where the trustee cannot obtain leave to intervene in such suit.[177]

When it is desired to obtain an injunction from the court of bankruptcy to restrain creditors from levying execution on property of the estate or otherwise interfering with it, or from proceeding against the bankrupt in the state court, it is not necessary that resort should be had to the formal and plenary proceedings common to suits in equity in the federal courts. A petition stating the facts and praying for the order or relief sought for will be sufficient. Nor need notice be given of the application for an injunction unless directed by the court. For similar reasons, any party who desires to obtain the dissolution of an injunction so granted may apply therefor by motion.[178] But the power to enjoin pending suits should be exercised circumspectly, and only where it appears to be necessary for the conservation of the rights of parties in interest. In a case where a petition in involuntary bankruptcy charged that certain creditors of the alleged bankrupt had gained an unlawful preference by attachments on his property, and had procured the appointment of a receiver by a state court, who had sold the property and held the proceeds, and prayed for an injunction against such creditors and the receiver, forbidding them to take proceedings in the state court for the distribution of the fund so held, but it was not shown that such creditors were insolvent, or that, for any other reason, a suit against them by the trustee in bankruptcy, subsequently to be appointed, would not be an adequate remedy for the avoidance of the

[176] In re Basch, 97 Fed. 761, 3 Am. Bankr. Rep. 235.

[177] Wilkinson v. Barnard, 9 Ben. 249, Fed. Cas. No. 17, 669. A party who was denied leave to intervene in a bankruptcy proceedings but who on various occasions addressed the court, did not thereby become a "party" so as to authorize the bankruptcy court to restrain him from taking proceedings affecting the orders or decrees of the bankruptcy court in other courts, since the casual presence of a litigant or attorney in the bankruptcy court is not an "appearance." But such injunctions may be issued against one who has been permitted, on his own motion, to intervene in the bankruptcy proceedings. In re Ohio Copper Mining Co. (D. C.) 241 Fed. 711, 39 Am. Bankr. Rep. 284.

[178] In re Wallace, Deady, 433, 2 N. B. R. 134, Fed. Cas. No. 17,094; Ex parte Carlton, 5 Law Rep. 120, Fed. Cas. No. 2,415. Compare In re Ogles, 93 Fed. 426, 1 Am. Bankr. Rep. 671.

alleged preference and the recovery of its fruits, it was intimated that the injunction should be refused and the parties left to work out their rights through the trustee when appointed.[179]

But the power to stay actions against the bankrupt, by injunction, is vested only in that court in which the proceedings in bankruptcy are pending. A federal district court cannot enjoin proceedings in a state court on the ground that proceedings in bankruptcy are pending in some other court of bankruptcy.[180] Moreover, this species of control over the state courts can be exercised only in connection with some proceeding in bankruptcy and in aid thereof. Thus, where a petition in bankruptcy was filed against a defendant, and an injunction was issued to restrain a plaintiff from prosecuting a garnishment action against him in a state court, but no adjudication of bankruptcy was made and the proceedings for that purpose were abandoned, it was thereafter held that the injunction was not a bar to the action in the state court.[181]

It should also be remarked that the court of bankruptcy has ample authority to protect the estate of the bankrupt and keep it together, after the filing of the petition and pending the appointment of a trustee, or until the latter has opportunity to take possession, by enjoining all persons from attempting to get possession of particular assets by levy of execution or attachment, or from selling the property under such writs already levied.[182]

§ 30. Rules of Practice.—The thirtieth section of the Bankruptcy Act of 1898 provides that "all necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States." That court has performed the duty thus imposed upon it, and promulgated a series of thirty-eight "General Orders in Bankruptcy." These orders, being ordained by the Supreme Court in pursuance of an express grant of authority, are of binding force. They may be amended, in its discretion, by the same court which enacted them, or they might be superseded, in any particular, by a legislative amendment of the statute itself. But so long as they remain in force, they possess exactly the same imperative and binding effect as if incorporated in the statute, provided, of course, that there is no conflict between the statute and the rule. In case of disagreement or incon-

[179] In re Ogles, 93 Fed. 426, 1 Am. Bankr. Rep. 671.

[180] In re Richardson, 2 Ben. 517, 2 N. B. R. 202, Fed. Cas. No. 11,774; Markson v. Heaney, 1 Dill. 497, 4 N. B. R. 510, Fed. Cas. No. 9,098; In re Hirsch, 2 Ben. 493, 2 N. B. R. 3, Fed. Cas. No. 6,529.

[181] Beekman Lumber Co. v. Acme Harvester Co., 215 Mo. 221, 114 S. W. 1087.

[182] See infra, §§ 204–206.

sistency, the act of Congress must prevail and the general order give way.[183]

As to the authority of the courts of bankruptcy to adopt rules of practice for bankruptcy proceedings, it has been said that a district court has no power to make general rules in bankruptcy, such power being vested by the act in the Supreme Court alone.[184] But Rev. Stat. U. S. § 918, provides that "the several circuit and district courts may from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice, and the prevention of delays in proceedings." This would undoubtedly confer upon the district courts authority to make general rules of practice in bankruptcy,—general, in the sense of being applicable to all cases in bankruptcy instituted in such courts,—subject of course to the general orders prescribed by the Supreme Court and not inconsistent with any provision of the act itself. And indications of such an authority are not wanting in the act. Thus, section 38 declares that the referees in bankruptcy are to perform such duties as shall be prescribed "by rules or orders of the courts of bankruptcy of their respective districts." It is the evident intention of this section that the district courts should regulate the jurisdiction and duties of referees, in so far as the same are left undefined by the act itself and by the general orders.[185]

As to the forms in bankruptcy promulgated by the Supreme Court with the direction that "the several forms annexed to these orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case," [186] they are commended

[183] Sabin v. Blake-McFall Co., 223 Fed. 501, 139 C. C. A. 49, 35 Am. Bankr. Rep. 179; In re Jaffe (D. C.) 272 Fed. 899, 46 Am. Bankr. Rep. 714; In re Baker (D. C.) 96 Fed. 954, 3 Am. Bankr. Rep. 101; In re Gerber, 186 Fed. 693, 108 C. C. A. 511, 26 Am. Bankr. Rep. 608. In bankruptcy cases the proceedings are governed by the equity rules, except where prescribed by the statute. In re Fosgate (D. C.) 268 Fed. 985, 45 Am. Bankr. Rep. 596. But compare In re Hughes (C. C. A.) 262 Fed. 500.

[184] In re Kennedy, 7 N. B. R. 337, Fed. Cas. No. 7,699.

[185] Under the Act of 1867, it was held that the proceedings in bankruptcy, when not controlled by the statute and the rules of the Supreme Court, must be prescribed by the district courts sitting in bankruptcy. In re Kerosene Oil Co., 3 Ben. 35, Fed. Cas. No. 7,725. A rule of court fixing the fees in case of reference to the referee as a special master cannot be changed nunc pro tunc after reference so as to allow him greater fees. In re Growe Const. Co. (D. C.) 253 Fed. 981, 42 Am. Bankr. Rep. 654.

[186] General Order No. 38.

for their simplicity, and it is said that they should be followed, and that there should be no unnecessary departures from them by falling into a habit of using the more costly, prolix, and less suitable forms of special pleadings and procedure used in chancery cases.[187] When a rule made by a district court in bankruptcy is found to be in conflict with one of these official forms, the rule is void and must give way.[188]

§ 31. **Practice in Bankruptcy.**—It is directed that "in proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing."[189] "A review of the bankruptcy law as a whole, and of the general orders promulgated under and in pursuance of it, and to carry its provisions into effect, will show that, ample as are the powers vested in the courts and in the judges who are to administer it, these powers are to be exercised, so far as may be, and when no special provision is otherwise made, in accordance with settled and well-known forms of judicial procedure."[190] But state laws regulating practice have no reference to proceedings in bankruptcy and cannot control them.[191] The proceeding in bankruptcy, it is said, is equivalent to a general creditors' bill in chancery, and is a plenary proceeding, its practice being prescribed by the statute, and to that extent variant from the chancery practice obtaining in creditors' bills. So far as not varied by statute, the practice should be the same. The collateral proceedings incident to and arising in the course of a bankruptcy proceeding, in the form of petitions and motions nisi, against persons already parties to the bankruptcy proceeding, are of the same character as like collateral proceedings incident to and arising in a creditor's bill

187 W. A. Gage & Co. v. Bell, 124 Fed. 271, 10 Am. Bankr. Rep. 696.

188 In re Johnson, 158 Fed. 342, 19 Am. Bankr. Rep. 814.

189 General Order No. 37.

190 In re Hunt, 2 N. B. R. 539, Fed. Cas. No. 6,881. See Fitts v. Custer Slide Mining & Development Co. (C. C. A.) 266 Fed. 864, 46 Am. Bankr. Rep. 101. Jurisdiction of a bankruptcy court to grant an injunction on motion to vacate is not affected by the fact that an earlier restraining order was made without notice. Orinoco Iron Co. v. Metzel, 230 Fed. 40, 144 C. C. A. 338, 36 Am. Bankr. Rep. 247.

191 In re Baudouine, 96 Fed. 536, 3 Am. Bankr. Rep. 55.

in chancery, and are summary only where they would be so in a creditor's bill, except where allowed by the statute.[192] Also it is provided that the statutory jurisdiction of the courts of bankruptcy may be exercised "in vacation in chambers and during their respective terms." The effect of this clause is that there are no separate "terms" of a court of bankruptcy, and consequently the general rule that a court has no power to set aside or modify its judgments or decrees after the term at which they were rendered does not apply to orders and decrees in a bankruptcy proceeding.[193] On the contrary the courts of bankruptcy are always open for the transaction of bankruptcy business, and may at any time hear petitions and motions in bankruptcy proceedings proper. In fact, a proceeding in bankruptcy, from the filing of the petition until the final settlement of the estate, is but one suit; and the district court, for all purposes of its bankruptcy jurisdiction, is always open. Therefore proceedings in any pending suit are at all times open for re-examination upon proper application being made, and any order made in the progress of a cause may be subsequently set aside or modified upon cause shown, provided rights have not become vested under it which would be disturbed by such action.[194] For the same reason, it is not necessary for the clerk of a district court to make an entry showing the opening and closing of the court on days when he enters proceedings in bankruptcy cases.[195]

§ 32. **Powers and Authority of Judge.**—It is provided by the bankruptcy act that the word "judge," as used in the statute, "shall mean a judge of a court of bankruptcy, not including the referee."[196] And various specific duties are imposed by the act upon the judge, exclusive of the referee, such as appointing referees, making adjudications or dismissing petitions therefor, and hearing applications for discharge. And it has been held that where there are two judges in the same district, either may hold a court of bankruptcy and perform all the duties thereof, at the same place or a different place within the district, while the other judge is also holding a court of bankruptcy.[197] But the new Judi-

192 In re Anderson, 23 Fed. 482.

193 In re Burr Mfg. & Supply Co., 217 Fed. 16, 133 C. C. A. 126; In re Rochester Sanitarium & Baths Co., 222 Fed. 22, 137 C. C. A. 560, 34 Am. Bankr. Rep. 355; In re Barker Piano Co., 233 Fed. 522, 147 C. C. A. 408, 37 Am. Bankr. Rep. 271.

194 Sandusky v. First Nat. Bank, 23 Wall. 289, 12 N. B. R. 176, 23 L. Ed. 155; Boutwell v. Allderdice, 2 Hughes, 121, Fed. Cas. No. 1,708; In re Peabody, 16 N. B. R. 243, Fed. Cas. No. 10,886. And see Hume v. Myers, 242 Fed. 827, 155 C. C. A. 415, 39 Am. Bankr. Rep. 401.

195 Keatley v. United States, 45 Ct. Cl. 36.

196 Bankruptcy Act 1898, § 1, clause 16.

197 Ex parte Steele, 162 Fed. 694, 20 Am. Bankr. Rep. 575. But compare Ex parte Steele, 161 Fed. 886, 20 Am. Bankr. Rep. 446.

cial Code provides (§ 23) that, "in districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies shall make all necessary orders for the division of business and the assignment of cases for trial in said district."

A judge who was a creditor of the bankrupt at the time of his failure, but who has since sold and assigned his claim, and has taken no part in the proceedings other than to prove such claim, is not thereby disqualified from sitting in the bankruptcy case, although the motive on the part of the purchaser of the claim may have been to remove the disqualification and enable the particular judge to act.[198]

§ 33. Priority of Petitions and Transfer of Causes.—If two or more petitions in involuntary bankruptcy are filed against the same debtor in the same court of bankruptcy, and he appears and defends against them, that petition is to be first tried which alleges the commission of the earliest act of bankruptcy. If the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the petitions may be consolidated. If an adjudication is made on either petition, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings are taken by the debtor for the purpose of causing the adjudication to be annulled or vacated.[199] A similar rule obtains in the case of two or more voluntary petitions by the same debtor. If a bankrupt files two petitions setting forth the same debts, and the first is still pending, proceedings under the second will be stayed.[200] The Act of Congress also provides that, if two or more involuntary petitions are filed against the same debtor (or against different members of a partnership) in different courts of bankruptcy, each of which has jurisdiction, "the cases shall be transferred by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest."[201] And another clause gives to the courts of bankruptcy jurisdiction to "transfer cases to other courts of bankruptcy."[202] The general order framed by the Supreme Court for carrying these provisions into effect directs that, "in case two or more petitions shall be filed against the same individual in different dis-

[198] In re Sime, 2 Sawy. 320, 7 N. B. R. 407, Fed. Cas. No. 12,860.

[199] General Order in Bankruptcy, No. 7.

[200] In re Wielarski, 4 Ben. 468, 4 N. B. R. 390, Fed. Cas. No. 17,619.

[201] Bankruptcy Act 1898, § 32.

[202] Bankruptcy Act 1898, § 2, clause 19.

tricts, the first hearing shall be had in the district in which the debtor has his domicile * * * and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard * * * and in either case the proceedings upon the other petition may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. * * * But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court." [203] Although both the statute and the general order speak of petitions filed "against" the same debtor, thus implying that they relate only to compulsory proceedings, yet it is held, by analogy, that the provisions just quoted are equally applicable to a case where an involuntary petition is presented in one district and the debtor's own voluntary petition in another.[204] Under the act of 1867, it was generally held that, where petitions for adjudication were filed in two or more district courts, each having jurisdiction, the court in which the petition is first filed ought to be accorded exclusive jurisdiction over the case.[205] And some of the decisions under the present statute rule that priority of jurisdiction is determined by the date of the filing of the petition, rather than by the date of the adjudication.[206] But it will be observed that the general order apparently restricts this rule to petitions against a partnership, and directs that, in the case of an individual, the first hearing shall be had in the district where the debtor has his domicile, without regard to actual priority as between the petitions.

As to the provision of the general order that jurisdiction shall be retained by the court which makes the "first adjudication," the adjudication referred to must have been made in accordance with the other provision of the order as to the place of first hearing. Hence creditors, by filing a second petition against an individual in another district, and obtaining a first hearing and adjudication thereon, cannot thereby oust the jurisdiction of the court in the district of the bankrupt's domicile,

[203] General Order in Bankruptcy, No. 6. See Fogarty v. Gerrity, 1 Sawy. 233, 4 N. B. R. 450, Fed. Cas. No. 4,895.

[204] In re Waxelbaum, 98 Fed. 589, 3 Am. Bankr. Rep. 392.

[205] In re Boston, H. & E. R. Co., 9 Blatchf. 409, 6 N. B. R. 222, Fed. Cas. No. 1,678; In re Leland, 5 Ben. 168, 5 N. B. R. 222, Fed. Cas. No. 8,228; In re Brown, 19 N. B. R. 270, Fed. Cas. No. 1,982.

[206] In re Elmira Steel Co., 109 Fed. 456, 5 Am. Bankr. Rep. 484; In re Tybo Mining & Reduction Co., 132 Fed. 697, 13 Am. Bankr. Rep. 62; In re Continental Coal Corp., 238 Fed. 113, 151 C. C. A. 189, 38 Am. Bankr. Rep. 168.

in which a petition had been first filed by other creditors.[207] Where two petitions have been filed against the same person, one in the district in which he has resided for the greater portion of the preceding six months, and the other in a district to which he has recently removed and established his residence there, the former is the "district of his domicile," within the meaning of the general order.[208] It is also held that the word "individual" is used in the order in the sense of a single person, and as a corporation is a person under the statute, so it is also an individual under the order.[209] And where two petitions are filed against a corporation, one in the state by which it was incorporated, and one in a district in which it does business, the first hearing should be had at the former place, as that is the place of its domicile, and proceedings in the other court will be stayed to await such hearing and the decision thereon.[210] In case there is substantial doubt as to the domicile or place of residence of a debtor, against whom petitions are filed in different districts, the court having jurisdiction of the petition earliest in date should be allowed to hear and determine the question of jurisdiction as depending on domicile, and the other court, without dismissing the petition before it, will stay proceedings thereon to await the result.[211]

The provision of the statute which allows the transfer of causes to the court which can proceed therein with the greatest convenience to the parties in interest is of great importance. And the provision of the general order, that the court which makes the first adjudication shall "retain jurisdiction over all proceedings," is of course to be taken subject to the direction of the statute.[212] This provision is not to be read as narrowly restricted to the bankruptcy of single debtors, but it applies equally to cases where different petitions are filed against a partnership.[213] The "parties in interest" whose convenience is to be con-

[207] In re Elmira Steel Co., 109 Fed. 456, 5 Am. Bankr. Rep. 484. But compare In re Vanoscope Co., 233 Fed. 53, 147 C. C. A. 123, 36 Am. Bankr. Rep. 778.

[208] In re Isaacson, 161 Fed. 779, 20 Am. Bankr. Rep. 430.

[209] In re United Button Co., 137 Fed. 668, 13 Am. Bankr. Rep. 454; In re Globe Sec. Co., 132 Fed. 709.

[210] In re Globe Sec. Co., 132 Fed. 709; In re United Button Co., 132 Fed. 378, 12 Am. Bankr. Rep. 761. A court of bankruptcy may rightly take jurisdiction of a voluntary proceeding by a corporation having its domicile and residence in the district, notwithstanding the earlier filing of an involuntary petition in another district, in which it was claimed to have a place of business. In re R. H. Pennington & Co. (D. C.) 228 Fed. 388, 35 Am. Bankr. Rep. 832.

[211] In re Waxelbaum, 98 Fed. 589, 3 Am. Bankr. Rep. 392.

[212] In re Isaacson (D. C.) 161 Fed. 779, 20 Am. Bankr. Rep. 430. The question of the convenience of the parties should be determined by the court having preferred jurisdiction. In re New Era Novelty Co. (D. C.) 241 Fed. 298, 39 Am. Bankr. Rep. 80.

[213] In re Sears (D. C.) 112 Fed. 58, 7 Am. Bankr. Rep. 279.

sulted, are not limited to unsecured creditors of the bankrupt, but the term is intended to include all persons whose pecuniary interests may be directly affected by the bankruptcy proceedings.[214] The burden of proof, however, as to the place where the proceedings will be most convenient for parties in interest rests upon those who ask for a transfer. And where the applicants are a minority of the creditors, and represent only a small part of the indebtedness, a transfer will not be warranted by the single fact that the greater part or all of the bankrupt's property is in the other district, as the court has power to order its sale there if deemed best.[215] So a transfer will not be ordered where the request therefor is presented by creditors who have received preferences which they do not offer to surrender, and it is doubtful whether the transfer will be for the greater convenience of the creditors who have not been preferred.[216] Proximity of the place of business of a bankrupt to the court entertaining proceedings in bankruptcy, and proximity of a majority of the bankrupt's creditors in number or amount of claims, is persuasive, but not conclusive, in determining the court which shall assume final jurisdiction.[217] Thus, where a petition in involuntary bankruptcy against a debtor was filed in Georgia, and, pending a hearing thereon, he filed his voluntary petition in New York, alleging that he was a resident of the latter state, but it appeared that he had formerly been engaged in business in Georgia, that the debts to be affected were all contracted there, that his present business was as an agent or employé of the corporation which succeeded his former firm, that he was accustomed to spend a part of his time in Georgia, and that his creditors desired that the bankruptcy proceedings should be conducted in the latter state, it was held that it would be for the "greatest convenience of

[214] In re United Button Co. (D. C.) 137 Fed. 668. The term "parties in interest" includes not only general creditors, but also prior and secured creditors, and also the bankrupt and every other party whose pecuniary interest is affected by the proceedings, and the "greatest convenience" depends on all the circumstances—proximity of creditors of every kind to the court, proximity to the court of bankrupts and witnesses necessary to proper administration, the location of the assets, etc. And where, in the district of voluntary adjudication, there were practically all the assets of the bankrupt corporation, its official headquarters, its books and records, and there was pending in the state court in such district an action to foreclose mortgages on the bulk of its assets, it was held that the proceedings would not be transferred to the federal court in another state, where an involuntary petition in bankruptcy was pending against it, although a majority in amount and number of its general creditors lived there, and also the majority of stockholders and many witnesses as to claims. In re Devonian Mineral Spring Co. (D. C.) 272 Fed. 527, 47 Am. Bankr. Rep. 82.

[215] In re Tybo Mining & Reduction Co. (D. C.) 132 Fed. 978, 13 Am. Bankr. Rep. 68.

[216] In re Sears (D. C.) 112 Fed. 58, 7 Am. Bankr. Rep. 279.

[217] In re United Button Co. (D. C.) 137 Fed. 668, 13 Am. Bankr. Rep. 454.

the parties in interest" that the court in Georgia should proceed with the case.[218]

Relationship between the bankrupt and the deputy clerk of the district court in whose office the petition was filed will be cause for transferring the case to another seat of the court in the same district and division and ordering the record to be filed and docketed in the office of the clerk of the court at the latter place.[219]

[218] In re Waxelbaum, 98 Fed. 589, 3 Am. Bankr. Rep. 392. And see further as to considerations affecting question of "greatest convenience," In re Southwestern Bridge & Iron Co., 133 Fed. 568, 13 Am. Bankr. Rep. 304; In re General Metals Co., 133 Fed. 84, 12 Am. Bankr. Rep. 770; In re Okmulgee Producing & Refining Co. (D. C.) 265 Fed. 736, 45 Am. Bankr. Rep. 631.

[219] Bray v. Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153.

CHAPTER III

APPELLATE JURISDICTION AND PROCEDURE

§ 34. **Statutory Provisions.**—The Bankruptcy Act of 1898 provides (§ 24a) that "the Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the territories" shall have "appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases," and "the Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia." This jurisdiction may be exercised "in vacation in chambers and during their respective terms as now or as they may be hereafter held." The next clause of the same section, marking a sharp distinction between appellate and revisory jurisdiction, and conferring the latter only upon the circuit courts of appeals, provides that those courts "shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on

due notice and petition by any party aggrieved." Specifically as to appeals, the act provides (§ 25) that "appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over." Out of the three specific cases thus enumerated, in which the review may be had on an appeal proper, only one admits of being carried up to the Supreme Court. For the act provides (§ 25b) that "from any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had, under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other: (1) Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States; or (2) where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States." But another statute, not repealed by the Bankruptcy Act provides that "appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; * * * in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."[1] It is also provided by the Bankruptcy Act (§ 25d) that "controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in

[1] Federal Judicial Code 1911, § 238.

force or such as may be hereafter enacted."[2] As to the general appellate jurisdiction of the circuit courts of appeals, which may be sometimes invoked in regard to controversies which originate in a court of bankruptcy, it is provided that "the circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court."[3]

§ 35. Jurisdiction of United States Supreme Court.—The Bankruptcy Act of 1898, recognizing the policy and purpose of the act creating the circuit courts of appeals, has restricted the appellate jurisdiction of the Supreme Court of the United States, in bankruptcy matters, within very narrow limits. In the first place, that court is made the proper forum for appeals, in controversies arising in bankruptcy proceedings, "from courts of bankruptcy not within any organized circuit of the United States."[4] The obvious reason is that, in such a case, there is no circuit court of appeals in which a review could properly be sought. Under this provision, an appeal may be taken directly to the Supreme Court from the United States district court for Porto Rico.[5] But it should be noted that this appellate jurisdiction is restricted to "controversies" arising in the course of a proceeding in bankruptcy, as dis-

[2] For the general rule on this point, see Federal Judicial Code 1911, §§ 239, 240, where it is provided: "In any case within its appellate jurisdiction as defined in section 128, the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; and thereupon the Supreme Court may either give it instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal. In any case, civil or criminal, in which the judgment of the circuit court of appeals is made final by the provisions of this title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

[3] Federal Judicial Code 1911, § 128. These statutory provisions are exclusive. A federal District Court will not entertain a bill in equity to adjudicate any matter or review any proceeding in the course of administration in a bankruptcy court, since the jurisdiction of the latter is exclusive. Gibbons v. Dexter Horton Trust & Savings Bank (D. C.) 225 Fed. 424, 35 Am. Bankr. Rep. 632.

[4] Bankruptcy Act 1898, § 24a. Under the act of 1841, it was held that no appeal would lie, in a bankruptcy case, to the Supreme Court of the United States from a district court, although held in a district where no circuit court was established by law. Crawford v. Points, 13 How. 11, 14 L. Ed. 29.

[5] Tefft v. Munsuri, 222 U. S. 114, 32 Sup. Ct. 67, 56 L. Ed. 118, 27 Am. Bankr. Rep. 338. And see Munsuri v. Fricker, 222 U. S. 121, 32 Sup. Ct. 70, 56 L. Ed. 121, 27 Am. Bankr. Rep. 344.

tinguished from steps taken in the ordinary course of the bankruptcy proceeding. A ruling of the lower court allowing or rejecting a claim against the bankrupt's estate is not such a "controversy;" it is a "proceeding in bankruptcy," and therefore is not appealable.[6] The Supreme Court is also invested with appellate jurisdiction, under like restrictions, over the supreme court of the District of Columbia.[7]

In the next place, the bankruptcy statute does not repeal the fifth section of the act of 1891, by which it is enacted that appeals or writs of error may be taken from a district court direct to the Supreme Court "in any case in which the jurisdiction of the court is in issue, in any case that involves the construction or application of the Constitution of the United States, in any case in which the constitutionality of any law of the United States is drawn in question, and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."[8] Under this provision, the circuit courts of appeals have decided that they have no jurisdiction of a writ of error from the district court when the jurisdiction of that court is in question for review.[9] And the fact that the ruling of the district court, involving a question of jurisdiction, has been affirmed by the circuit court of appeals on a petition for revision, will not preclude a writ of error from the Supreme Court to the district court to review the final decision in the case.[10] But it is essential that the jurisdiction of the inferior court should be actually and necessarily in issue. Thus, the question whether the petition in a case of involuntary bankruptcy alleges an act of bankruptcy does not go to the jurisdiction of the court, and therefore the decision is reviewable by the circuit court of appeals

[6] Tefft v. Munsuri, 222 U. S. 114, 32 Sup. Ct. 67, 56 L. Ed. 118, 27 Am. Bankr. Rep. 338. And see Munsuri v. Fricker, 222 U. S. 121, 32 Sup. Ct. 70, 56 L. Ed. 121, 27 Am. Bankr. Rep. 344.

[7] Bankruptcy Act 1898, § 24a. The same rule obtained under the act of 1867. See Smith v. Mason, 14 Wall. 419, 20 L. Ed. 748. This provision appears to ignore the Court of Appeals of the District of Columbia, which otherwise has appellate jurisdiction over the Supreme Court of the District. But it cannot be thought to have been inserted through inadvertence, since the same language is repeated in the Federal Judicial Code of 1911, § 252. And see Sullivan v. Goldman, 38 App. D. C. 319. A decree adjudging a person not a bankrupt is not a controversy arising in those proceedings, within the provision for appellate jurisdiction over the Supreme Court of the District of Columbia. Swift & Co. v. Hoover, 242 U. S. 107, 37 Sup. Ct. 56, 61 L. Ed. 175, 36 Am. Bankr. Rep. 429.

[8] Act Cong. March 3, 1891, 26 Stat. 826, § 5; Federal Judicial Code 1911, § 238.

[9] In re Abbey Press, 134 Fed. 51, 67 C. C. A. 161, 13 Am. Bankr. Rep. 11; United States v. Sutton, 47 Fed. 129; Davis & Rankin Bldg. Co. v. Barber, 60 Fed. 465, 9 C. C. A. 79; Cabot v. McMaster, 65 Fed. 533, 13 C. C. A. 39.

[10] Frederic L. Grant Shoe Co. v. W. M. Laird Co., 212 U. S. 445, 29 Sup. Ct. 332, 53 L. Ed. 591, 21 Am. Bankr. Rep. 484.

rather than by the Supreme Court.[11] So also, the question whether a corporation against which a petition is filed comes within one of the classes of corporations made amenable to the bankruptcy law is a question upon which the jurisdiction may depend, but it is an issue which the district court has jurisdiction to determine, and hence an appeal cannot be taken direct to the Supreme Court.[12] So again, since the act confers upon courts of bankruptcy jurisdiction to determine all claims of bankrupts to their exemptions, the decision of such a court that it has authority to adjudicate the validity of an alleged equitable lien upon property which it decides to be assets of the estate in bankruptcy and not exempt property, does not create a question of jurisdiction which will sustain a direct appeal to the Supreme Court.[13] It has also been ruled that the acts of Congress do not authorize a district court to certify questions of its jurisdiction to the Supreme Court for decision, in order to obtain the instruction of that court for its guidance, before deciding the case; and such a certificate, made before the final judgment or decree in the case, will be dismissed.[14]

In the next place, although the statute provides in general terms that the Supreme Court of the United States, as well as the circuit courts of appeals, "are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases," this does not broaden the jurisdiction of the Supreme Court, and has no relation to appeals from the circuit court of appeals. This grant, in other words, does not give authority to entertain an appeal from every decision in bankruptcy rendered by the intermediate courts, the same being specifically limited by other provisions of the statute.[15]

As the Bankruptcy Act of 1898 stood originally, it gave the Supreme Court a considerable appellate jurisdiction over the final decisions of the circuit courts of appeals. But this was somewhat abruptly terminated by an Act of Congress approved January 28, 1915 (38 Stat. 804, ch. 22) which provides: "That the judgments and decrees of the circuit courts of appeals in all proceedings and cases arising under the Bankruptcy Act and in all controversies arising in such proceedings

[11] Exploration Mercantile Co. v. Pacific Hardware & Steel Co., 177 Fed. 825, 101 C. C. A. 39, 24 Am. Bankr. Rep. 216.

[12] Columbia Ironworks v. National Lead Co., 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645, 11 Am. Bankr. Rep. 340.

[13] Lucius v. Cawthon-Coleman Co., 196 U. S. 149, 25 Sup. Ct. 214, 49 L. Ed. 425, 13 Am. Bankr. Rep. 696.

[14] Bardes v. Hawarden Bank, 175 U. S. 526, 20 Sup. Ct. 196, 44 L. Ed. 262, 3 Am. Bankr. Rep. 680.

[15] Hutchinson v. Otis, 123 Fed. 14, 59 C. C. A. 94, 10 Am. Bankr. Rep. 275. And see Nelson v. Carland, 1 How. 265, 11 L. Ed. 126.

and cases shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such proceeding, case, or controversy unless the petition therefor is presented to the Supreme Court within three months from the date of such judgment or decree." This statute, it is declared by the Supreme Court, "manifested the purpose of Congress to relieve this court from the necessity of considering cases of this character, except when brought here by writ of certiorari." [16] The writ of certiorari, it will be remembered, is not a writ of right, but the granting of it is in the sound discretion of the court. The effect of this statute is therefore to make the judgments and decrees of the circuit courts of appeals absolutely final in all bankruptcy matters, except when the Supreme Court, in its discretion, will permit the bringing up of a case on certiorari.

§ 36. Same; On Certification of Questions.—A further provision of the bankruptcy act is that "controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted." [17] This is to be read in connection with the act creating the circuit courts of appeals, which directs that, "in any case within its appellate jurisdiction, the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal." [18] The latter of these two statutory provisions is a limitation upon the former. Although the former provides for certification of

[16] William R. Staats Co. v. Security Trust & Savings Bank, 243 U. S. 121, 37 Sup. Ct. 336, 61 L. Ed. 632.

[17] Bankruptcy Act 1898, § 25d; Federal Judicial Code 1911, § 252.

[18] Act Cong. March 3, 1891, 26 Stat. 826, § 6; Federal Judicial Code 1911, § 239.

questions "from other courts of the United States," the latter shows that only the circuit courts of appeals are intended. Hence a district court sitting in bankruptcy is not authorized to certify to the Supreme Court a question concerning its jurisdiction in the case before it, before deciding the case.[19] Certifications of questions under this provision have not been numerous, but an instance may be cited where a circuit court of appeals certified, with a request for instructions, the question whether the making of a general assignment for the benefit of creditors would constitute an act of bankruptcy notwithstanding the fact that the debtor was solvent at the time of the filing of the petition against him.[20]

But it is probable that this provision also is restricted if not repealed by the Act of January 28, 1915 (38 Stat. 804) which makes the decisions of the circuit courts of appeals final in all bankruptcy cases, "save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination." In other words, a case can now be certified for review only when the Supreme Court, on the petition of a party in interest, shall so "require."

§ 37. **Same; Certiorari.**—In connection with the provisions of the bankruptcy act (§ 25d) authorizing the Supreme Court to "issue writs of certiorari" pursuant to the laws of the United States, should be read the section of the Judicial Code (§ 240) which directs that, "in any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."[21] It is evident that, so far as concerns proceedings in bankruptcy, these provisions are meant to be supplementary to those which allow appeals to the Supreme Court in specified cases. Thus, a decree rendered by the circuit court of appeals in the exercise of its jurisdiction to "superintend and revise

[19] Bardes v. Hawarden Bank, 175 U. S. 526, 20 Sup. Ct. 196, 44 L. Ed. 262, 3 Am. Bankr. Rep. 680. Compare In re Jacobs, 99 Fed. 539, 39 C. C. A. 647, 3 Am. Bankr. Rep. 671.

[20] George M. West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, 2 Am. Bankr. Rep. 463.

[21] So far as concerns controversies and proceedings in bankruptcy, this language is repeated in the Act of Congress of January 28, 1915, 38 Stat. 804.

in matter of law" the proceedings of the inferior courts of bankruptcy, and not in the way of allowing or rejecting a claim, is not the proper subject for an appeal to the Supreme Court, but it may be reviewed by that court on writ of certiorari.[22]

§ 38. Same; Writ of Error to Supreme Court of State.—Nothing contained in the present bankruptcy act impairs or in any way affects the jurisdiction vested in the Supreme Court of the United States, by the original judiciary act, to review a final judgment or decree of the highest court of a state, by means of a writ of error, when the decision of such state court is against the validity of a statute of the United States or an authority exercised thereunder, "or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission, or authority."[23] This power of the Supreme Court may be exercised in cases where a decision is rendered against a title, right, or authority claimed under the national bankruptcy law. For example, where the only controversy in a case in a state court is as to the effect to be given to an order of a district court of the United States sitting in bankruptcy, for the sale of mortgaged property free from liens, a writ of error will lie from the federal supreme court to review a decision denying the right claimed by one of the parties.[24] So when a state court decides against the claim of a trustee in bankruptcy to certain property of the bankrupt, the decision is against a right or title claimed under a statute of the United States, within the meaning of the judiciary act, and the judgment of the court of last resort of the state is subject to review by the United States Supreme Court.[25] Again, where the issue is as to the validity of a transfer by a trustee in bankruptcy, and whether the suit is barred by the limitation of the bankruptcy act, the Supreme Court has jurisdiction on writ of error to the highest court of the state.[26] On the

[22] Holden v. Stratton, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116, 10 Am. Bankr. Rep. 786; Bryan v. Bernheimer, 175 U. S. 724, 21 Sup. Ct. 557, 44 L. Ed. 338, 5 Am. Bankr. Rep. 623; Louisville Trust Co. v. Comingor, 181 U. S. 620, 22 Sup. Ct. 293, 45 L. Ed. 1031, 7 Am. Bankr. Rep. 421; Kyle v. Hammond, 192 Fed. 559.

[23] Rev. Stat. U. S. § 709, Federal Judicial Code 1911, § 237. On the construction of this statute, see Black. Const. Law (3d edn.) pp. 177-179.

[24] Factors' & Traders' Ins. Co. v. Murphy, 111 U. S. 738, 4 Sup. Ct. 679, 28 L. Ed. 582; New Orleans, S. F. & L. R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. Ed. 244.

[25] Williams v. Heard, 140 U. S. 529, 11 Sup. Ct. 885, 35 L. Ed. 550.

[26] Traer v. Clews, 115 U. S. 528, 6 Sup. Ct. 155, 29 L. Ed. 467.

other hand, where the question actually decided by the state court was whether the bankrupt had title to certain property, and not whether the title would pass to the trustee in bankruptcy by operation of the bankruptcy law, this is not such a decision as can be reviewed on error.[27] Again, the United States Supreme Court has no jurisdiction to review the decision of a state court dismissing a bill brought by creditors against a bankrupt to set aside his discharge, and to which the defendant demurred on the ground of staleness; for if the state court made any decision on the bankruptcy act, it must have sustained, not denied, the privilege claimed by the bankrupt.[28]

§ 39. Rules Governing Appeal to Supreme Court.—It is ordered that an appeal to the Supreme Court of the United States under the bankruptcy act "shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from or by a justice of the Supreme Court of the United States." Further, "in every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law." [29]

As to the limitation of time prescribed by this order, it is held that it relates only to appeals taken expressly under the bankruptcy statute, and not to an appeal from a decision rendered on a formal appeal from the district court in a controversy arising in a bankruptcy proceeding.[30] But the fact that an appeal is allowed from a circuit court of appeals in a bankruptcy case, on the certificate of a justice of the Supreme Court, cannot operate as an adjudication that the appeal was taken in due time.[31] In regard to the requirement of a finding of facts and a separate statement of the conclusions of law, it is said that this does not require a circuit court of appeals, of its own motion, to ascertain and determine in advance of its decision, whether a question is raised on which a party is entitled to the allowance of an appeal to the Supreme Court, but such

[27] Scott v. Kelly, 22 Wall. 57, 22 L. Ed. 729.

[28] Calcote v. Stanton, 18 How. 243, 15 L. Ed. 348.

[29] General Order in Bankruptcy, No. 36.

[30] Hobbs v. Head & Dowst Co., 191 Fed. 811, 112 C. C. A. 325, 27 Am. Bankr. Rep. 484.

[31] Conboy v. First Nat. Bank, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. Ed. 128, 16 Am. Bankr. Rep. 773.

right, if claimed, should be called to the court's attention in advance of its decision, by a request for findings in the event of an adverse ruling on the question claimed to be appealable.[32] Further, this requirement as to findings does not apply where the appeal is from a "controversy arising in bankruptcy proceedings," as distinguished from a proceeding in the bankruptcy case proper, since, in such a case, the manner of review in the Supreme Court is not governed by the bankruptcy statute but by the act creating the circuit court of appeals.[33] When a party appeals from a decision of the circuit court (now the circuit court of appeals) to the Supreme Court of the United States, the allowance of the appeal is to relate back to the time when the original application was made for an appeal to the judge of the circuit court, and entitles a party to a stay of proceedings.[34] The provision of the bankruptcy act (§ 25c) that "trustees shall not be required to give bond when they take appeals or sue out writs of error," appears to be applicable to appeals to the Supreme Court.

§ 40. Jurisdiction of Circuit Court of Appeals on Writ of Error.—As a general rule, a proceeding in bankruptcy is in the nature of a proceeding in equity, and orders and decrees made therein cannot be reviewed by writ of error.[35] But there are some exceptional cases in which this is the appropriate and exclusive method of obtaining a revision of the judgments of the court of bankruptcy. One is the case where the defendant in a petition in involuntary bankruptcy demands as of right, and receives, a trial by jury. This is not like the trial of an issue sent out of chancery, but is a trial according to the course of the common law, and therefore, under the well-settled principles of the common law, as well as the constitution and laws of the United States, the judgment cannot be reviewed by what is technically known as an "appeal," but must be the subject of a writ of error, as that writ was known at the common law.[36] Now there is no provision of the present bankruptcy statute which authorizes the review of an adjudication of bankruptcy, or of a judgment dismissing the petition, following a trial by jury, by means of a writ of error. It is true that the twenty-fifth section gives jurisdiction to review "a judgment adjudging or refusing to adjudge

[32] Knapp v. Milwaukee Trust Co., 162 Fed. 675, 89 C. C. A. 467, 20 Am. Bankr. Rep. 671; Crucible Steel Co. v. Holt, 174 Fed. 127, 98 C. C. A. 101, 23 Am. Bankr. Rep. 302.

[33] Knapp v Milwaukee Trust Co., 216 U. S. 545, 30 Sup. Ct. 412, 54 L. Ed. ——.

[34] Thornhill v. Bank of Louisiana, 5 N. B. R. 377, Fed. Cas. No. 13,991.

[35] Lockman v. Lang, 128 Fed. 279, 62 C. C. A. 550, 11 Am. Bankr. Rep. 597.

[36] Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666, 6 Am. Bankr. Rep. 649; Elliott v. Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200, 9 Am. Bankr. Rep. 50.

the defendant a bankrupt;" but this is explicitly by means of an "appeal as in equity cases." So also, the superintending and revisory power of the circuit courts of appeals, granted by the twenty-fourth section, is confined to "matter of law," and is described as a "jurisdiction in equity." Besides, the seventh amendment to the federal constitution provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." The bankruptcy act, therefore, does not permit of a writ of error in this particular case.[37] But the sixth section of the act creating the circuit courts of appeals,[38] which is not repealed by the bankruptcy act,[39] provides that "the circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, unless otherwise provided by law." And it is held that the reviewing authority here conferred is wide enough to authorize a review of a judgment of the district court, entered on the verdict of a jury, upon a petition for adjudication in involuntary bankruptcy, and the granting of a writ of error therefor.[40] Accordingly it is now well settled that, in this specific case, a writ of error as at common law is not only a proper means of bringing up for review the judgment of the bankruptcy court, but is the exclusive remedy.[41]

Another instance is found in the case of an order of the district court in bankruptcy adjudging a defendant in contempt for disobeying a previous order whereby he was required to surrender certain property to the trustee in bankruptcy, and imposing a fine payable to the United States as a punishment, and not as compensation to the trustee for damages. This is in effect a criminal judgment, although made as a part of the proceeding in bankruptcy, and is therefore reviewable by a writ of error, and not by a petition for revision.[42] On the other hand, proceed-

[37] Elliott v. Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200, 9 Am. Bankr. Rep. 50.

[38] Act Cong. March 3, 1891, § 6, 26 Stat. 826; Federal Judicial Code 1911, § 128.

[39] Elliott v. Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200, 9 Am. Bankr. Rep. 50.

[40] Duncan v Landis, 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649.

[41] Frederick L. Grant Shoe Co. v. W. M. Laird Co., 203 U. S. 502, 27 Sup. Ct. 161, 51 L. Ed. 292, 17 Am. Bankr. Rep. 1; Elliott v. Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200, 9 Am. Bankr. Rep. 50; Knickerbocker Ins. Co. v. Comstock, 16 Wall. 258, 21 L. Ed. 493; Bower v. Holzworth, 138 Fed. 28, 70 C. C. A. 396, 15 Am. Bankr. Rep. 22; In re Neasmith, 147 Fed. 160, 77 C. C. A. 402, 17 Am. Bankr. Rep. 128; Lennox v. Allen-Lane Co., 167 Fed. 114, 92 C. C. A. 566, 21 Am. Bankr. Rep. 648; Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649.

[42] Brown v. Detroit Trust Co., 193 Fed. 622, 113 C. C. A. 490. So also of a suit brought by a trustee in bankruptcy against a third person to enjoin him

ings for contempt in a court of bankruptcy for refusal to obey an order to turn over property to a bankrupt's receiver or trustee, where no such fine or penalty is contemplated, but only enforcing obedience to the order, are for a civil and not for a criminal contempt, and are not reviewable on a writ of error, although, in such a case, the court may treat the writ of error as a "petition to revise" where the latter remedy would have been appropriate if taken in time.[43] A plenary action by a trustee in bankruptcy to recover money only, alleged to have been paid as a preference in favor of a surety and his principal, is an action at law, reviewable on writ of error instead of appeal.[44]

§ 41. Appellate Jurisdiction of Circuit Court of Appeals.—Appeals may be taken from the district courts, sitting as courts of bankruptcy, to the circuit courts of appeals, in three specified classes of cases. These are (1) "from a judgment adjudging or refusing to adjudge the defendant a bankrupt;" (2) "from a judgment granting or denying a discharge;" and (3) "from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."[45] In these particular cases, appeal is the proper and only method of obtaining a review of the judgment of the court of bankruptcy.[46] So far as regards "proceedings in bankruptcy," that is, the successive steps in the ordinary administration of an estate in bankruptcy, the specification of these three classes of appealable judgments implies an exclusion of all others, and in matters of this kind no appeal lies from any order or decree of the court of bankruptcy, unless it comes within one of the specified classes.[47] But the twenty-fourth section of the act invests the circuit courts of appeals with "appellate jurisdiction of controversies arising in bankruptcy proceedings

from interfering with the alleged possession by the trustee of property claimed by both parties. Stelling v. G. W. Jones Lumber Co., 116 Fed. 261, 53 C. C. A. 81, 8 Am. Bankr. Rep. 521. And so of a suit by the trustee to recover property alleged to have been transferred in fraud of creditors. Delta Nat. Bank v. Easterbrook, 133 Fed. 521, 67 C. C. A. 236, 13 Am. Bankr. Rep. 338.

[43] Freed v. Central Trust Co. of Illinois, 215 Fed. 873, 132 C. C. A. 7, 33 Am. Bankr. Rep. 64.

[44] Turner v. Schaeffer, 249 Fed. 654, 161 C. C. A. 564, 40 Am. Bankr. Rep. 829.

[45] Bankruptcy Act 1898, § 25a. Except as to this one matter of allowing or rejecting a claim, the right of appeal in bankruptcy proceedings given by § 24a of the act is not affected by the amount in controversy. Emerson v. Castor, 236 Fed. 29, 149 C. C. A. 239, 37 Am. Bankr. Rep. 719.

[46] Cook Inlet Coal Fields Co. v. Caldwell, 147 Fed. 475, 78 C. C. A. 17, 17 Am. Bankr. Rep. 136.

[47] Bank of Clinton v. Kondert, 159 Fed. 703, 86 C. C. A. 571, 20 Am. Bankr. Rep. 178; In re Whitener, 105 Fed. 180, 44 C. C. A. 434, 5 Am. Bankr. Rep. 198; Ogden v. Gilt Edge Consol. Mines Co., 225 Fed. 723, 140 C. C. A. 597, 34 Am. Bankr. Rep. 893. While doubtless the circuit court of appeals has power to revise even interlocutory proceedings in bankruptcy, such procedure is not favored when the matter can be raised by appeal or petition from the order or decree finally disposing of the matter. In re Horowitz, 250 Fed. 106, 162 C. C. A. 278, 41 Am. Bankr. Rep. 369.

from the courts of bankruptcy from which they have appellate jurisdiction in other cases." This is a different provision and relates to a different class of judgments. It is not revoked or limited by the subsequent enumeration of the three kinds of appealable orders, all of which are "proceedings in bankruptcy," as distinguished from "controversies arising in bankruptcy proceedings."[48] Under this grant, therefore, appellate jurisdiction may be exercised in other classes of cases, as, for instance, to review a decision on an application to transfer the bankruptcy proceeding from one district court to another.[49] So a decree in a suit by a bankrupt's trustee to set aside an instrument, in form a deed, from the bankrupt conveying certain described real estate is reviewable by appeal rather than by writ of error.[50] And a proceeding on a petition by the trustee to sell lands, on the theory that a warranty deed evidenced an equitable mortgage, opposed by the grantee, is a "controversy" arising in bankruptcy proceedings, rather than a "proceeding in bankruptcy," and hence an appeal to review the judgment therein lies under the general appellate jurisdiction of the circuit court of appeals.[51] And the appearance of the mortgagees, on notice of a petition by the mortgagor's trustee in bankruptcy, and their assertion of conflicting rights, may be held equivalent to an affirmative intervention in connection with the trustee's petition so as to raise an appealable controversy in bankruptcy.[52]

But the section under consideration must be read in connection with the act creating the circuit courts of appeals wherein is found a description of the judgments and decrees of the district courts from which an appeal may be taken.[53] In the first place, all cases are excluded in which an appeal may be taken direct to the Supreme Court of the United States. In the second place, there are a few exceptional cases (as shown in the preceding section) in which a writ of error, and not an appeal, is the appropriate remedy. And thirdly, an appeal lies only from a "final decision" of the district court. For this reason an order denying to a stranger the right to intervene in a bankruptcy proceeding,

[48] Dodge v. Norlin, 133 Fed. 363, 66 C. C. A. 425, 13 Am. Bankr. Rep. 176; In re Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. Bankr. Rep. 256.

[49] Kyle Lumber Co. v. Bush, 133 Fed. 688, 66 C. C. A. 592, 13 Am. Bankr. Rep. 535.

[50] Carey v. Donohue, 209 Fed. 328, 126 C. C. A. 254, 31 Am. Bankr. Rep. 210.

[51] Sauve v. M. L. More Inv. Co., 248 Fed. 642, 160 C. C. A. 542, 41 Am. Bankr. Rep. 281.

[52] Robert Moody & Son v. Century Sav. Bank, 239 U. S. 374, 36 Sup. Ct. 111, 60 L. Ed. 336, 36 Am. Bankr. Rep. 95.

[53] In re Columbia Real Estate Co., 112 Fed. 643, 50 C. C. A. 406, 7 Am. Bankr. Rep. 441; Act Cong. March 3, 1891, § 6, 26 Stat. 828. And see In re Strauss, 211 Fed. 123, 127 C. C. A. 521, 32 Am. Bankr. Rep. 237.

not being a final decision upon the merits of his case, is not appealable.[54] So an order enjoining the prosecution of an action of replevin, brought in a state court against a trustee in bankruptcy by a third person claiming goods in his possession, and referring the claim of such party to a referee in bankruptcy to ascertain and report the facts, is not a final decision nor appealable.[55] And so of an interlocutory order entered by a court of bankruptcy, reversing a ruling of the referee, made during the examination of the bankrupt, refusing to require him to produce his books.[56] An exception to this rule is created by the seventh section of the circuit court of appeals act,[57] in reference to an interlocutory order granting an injunction. Such an order, made by a district court in bankruptcy, is reviewable on appeal where the nature of the cause or proceeding is such that the final decree therein would be reviewable by appeal under the provisions of the act; but it is not appealable where the final decree or order would be one in a "proceeding in bankruptcy," reviewable only on petition to "revise in matter of law."[58] But an appealable controversy in bankruptcy was held not to have been initiated by an attempted intervention in a summary proceeding in a court of ancillary jurisdiction to restore certain property of the bankrupts, in the custody of those having no right to it, to the bankruptcy court, where the interveners claimed under an assignment made after the filing of the petition in bankruptcy.[59] And an order of the referee requiring the bankrupt to answer a petition for an order for the payment of money in his possession is not such an order as can be reviewed before final judgment.[60] The same is true of an order merely granting leave to the trustee in bankruptcy to institute a suit.[61] But in a bankruptcy proceeding, where stockholders are contesting the right to levy assessments against them, in which some were not formally made parties, the circuit court of appeals will nevertheless proceed to the merits, where both sides have assumed that the order of assessment was a final and appealable order.[62]

[54] In re Columbia Real Estate Co., 112 Fed. 643, 50 C. C. A. 406, 7 Am. Bankr. Rep. 441. A decree or order does not take effect, for the purpose of an appeal or a petition to revise, while a motion for rehearing is pending. Yaryan Rosin & Turpentine Co. v. Isaac (C. C. A.) 270 Fed. 710, 46 Am. Bankr. Rep. 421.

[55] In re Russell, 101 Fed. 248, 41 C. C. A. 323, 3 Am. Bankr. Rep. 658. And see In re Consumers' Packing Co. (C. C. A.) 268 Fed. 198, 46 Am. Bankr. Rep. 338.

[56] Goodman v. Brenner, 109 Fed. 481, 48 C. C. A. 516, 6 Am. Bankr. Rep. 470.

[57] Act Cong. March 3, 1891, § 7, 26 Stat. 828.

[58] O'Dell v. Boyden, 150 Fed. 731, 80 C. C. A. 397, 10 Ann. Cas. 239, 17 Am. Bankr. Rep. 751.

[59] Lazarus, Michel & Lazarus v. Prentice, 234 U. S. 263, 34 Sup. Ct. 851, 58 L. Ed. 1305, 32 Am. Bankr. Rep. 559.

[60] In re Graboyes (D. C.) 228 Fed. 574, 36 Am. Bankr. Rep. 29.

[61] Board of Road Com'rs of Monroe County v. Keil, 259 Fed. 76, 170 C. C. A. 144, 44 Am. Bankr. Rep. 259.

[62] Thoms & Brenneman v. Goodman,

§ 42. Same; Adjudication of Bankruptcy.—The provision of the bankruptcy act allowing an appeal from a "judgment adjudging or refusing to adjudge the defendant a bankrupt," is to be understood as applying to cases of involuntary bankruptcy, for the use of the word "defendant" implies that the proceeding is instituted against him by creditors. Hence it would appear that an order of the district court vacating (or refusing to vacate) an adjudication of bankruptcy made upon the voluntary petition of the debtor would not be subject to appeal.[63] Under the former statute, the rule was that if a petition in involuntary bankruptcy was tried by the district court without a jury, and an adjudication made, its decision might be reviewed by the appellate court under its superintending and revisory power, but not on appeal.[64] But this rule is exactly reversed by the express terms of the present act, and it is held that such an adjudication can be reviewed only on appeal, and not on a petition for revision.[65] But if the case is tried by a jury, the method of obtaining a review, both under the act of 1867 and the present statute, is not by appeal but by writ of error.[66] When an appeal is taken from such an adjudication, it is an "appeal as in equity cases," under the terms of the statute, that is to say, both the facts and the law are brought before the reviewing court.[67] An order of the district court dismissing a petition in involuntary bankruptcy, on the ground that it does not state facts sufficient to constitute an act of bankruptcy, is a judgment "refusing to adjudge the defendant a bankrupt," and is therefore appealable under the statute.[68] But it seems that an order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication in bankruptcy is not a judgment from which an appeal will lie under this provision of the statute.[69] And it may in fact be said to be the settled rule that an order made upon an application or motion to vacate or set aside an adjudication in bankruptcy, whichever way it is decided (whether, for instance, the court vacates

254 Fed. 39, 165 C. C. A. 449, 42 Am. Bankr. Rep. 688.

[63] See In re Hall, 1 Dill. 587, Fed. Cas. No. 5,920.

[64] In re Picton, 2 Dill. 548, 11 N. B. R. 420, Fed. Cas. No. 11,136; In re O'Brien, 1 N. B. R. 176, Fed. Cas. No. 10,397.

[65] In re Good, 99 Fed. 389, 39 C. C. A. 581, 3 Am. Bankr. Rep. 605; Cook Inlet Coal Fields Co. v. Caldwell, 147 Fed. 475, 78 C. C. A. 17, 17 Am. Bankr. Rep. 136.

[66] Supra, § 40. But appeal, and not a writ of error, is the proper remedy, though a jury was demanded, if the demand was withdrawn and a hearing had without a jury. Marine Nat. Bank v. Swigart (C. C. A.) 262 Fed. 854, 45 Am. Bankr. Rep. 162.

[67] In re Neasmith, 147 Fed. 160, 77 C. C. A. 402, 17 Am. Bankr. Rep. 128.

[68] Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 80 C. C. A. 25, 17 Am. Bankr. Rep. 609.

[69] In re Ives, 113 Fed. 911, 51 C. C. A. 541, 7 Am. Bankr. Rep. 692; B. R. Electric & Telephone Mfg. Co. v. Ætna Life Ins Co., 206 Fed. 885, 124 C. C. A. 545, 30 Am. Bankr. Rep. 424.

the adjudication and dismisses the petition for want of jurisdiction or for any other reason, or whether the order dismisses a creditor's petition to vacate the adjudication for fraud) is not appealable, though it may be reviewed on a petition to revise.[70] And an order that, if the alleged bankrupt shall appear and plead to the petition within five days, the adjudication will be set aside and the motion to quash service of subpœna granted, cannot be appealed, because it is conditional and therefore not final.[71] Nor does an order come within the description of appealable judgments which simply adjudges an individual to be a member of a bankrupt partnership and to be liable for its debts.[72]

§ 43. **Same; Decision on Discharge or Composition.**—The bankruptcy act provides that an appeal may be taken from an order granting or denying a discharge. This clause will of course apply equally to voluntary and involuntary cases, and the right of appeal may be claimed by the bankrupt when his application for discharge is denied, and by the creditors who have filed specifications in opposition to the discharge, when the same is granted.[73] An order of a court of bankruptcy dismissing an application for discharge on the ground of want of prosecution is, in substance and effect, one denying a discharge and is therefore appealable.[74] But where a creditor applies for an order to set aside the discharge of the bankrupt, and it is denied on the ground that, if all the facts claimed by the creditor were established, they would not warrant the court in refusing a discharge, this action of the court is more properly reviewable on a petition for revision.[75] Where a bank-

[70] Vallely v. Northern Fire & Marine Ins. Co., 254 U. S. 348, 41 Sup. Ct. 116, 65 L. Ed. ——, 46 Am. Bankr. Rep. 340; In re De Camp Glass Casket Co. (C. C. A.) 272 Fed. 558, 47 Am. Bankr. Rep. 1; Bank of Elberton v. Swift (C. C. A.) 268 Fed. 305, 46 Am. Bankr. Rep. 75; Hart-Parr Co. v. Barkley, 231 Fed. 913, 146 C. C. A. 109, 36 Am. Bankr. Rep. 540; In re Vanoscope Co., 233 Fed. 53, 147 C. C. A. 123, 36 Am. Bankr. Rep. 778; B-R Electric & Telephone Mfg. Co. v. Ætna Life Ins. Co., 206 Fed. 885, 124 C. C. A. 545, 30 Am. Bankr. Rep. 424.

[71] In re Sutter Hotel Co., 241 Fed. 367, 154 C. C. A. 247, 39 Am. Bankr. Rep. 620.

[72] Francis v. McNeal, 170 Fed. 445, 95 C. C. A. 168, 22 Am. Bankr. Rep. 337.

[73] Feder v. Goetz (C. C. A.) 264 Fed. 619, 45 Am. Bankr. Rep. 57. But an order simply affirming the report of a special master on a contested application for a discharge is not a "judgment granting or denying a discharge," and therefore is not appealable. Ragan, Malone & Co. v. Cotton & Preston, 195 Fed. 69, 115 C. C. A. 576, 28 Am. Bankr. Rep. 246; Id., 200 Fed. 546, 118 C. C. A. 640, 29 Am. Bankr. Rep. 597. And review of an order overruling objections to a bankrupt's discharge will be denied until the order is amended so as to show whether the objections were overruled on the merits, or under the impression that a proposed compromise had made them immaterial. In re Doyle, 220 Fed. 434, 137 C. C. A. 28, 34 Am. Bankr. Rep. 28.

[74] In re Kuffler, 127 Fed. 125, 61 C. C. A. 259, 11 Am. Bankr. Rep. 469. A denial of a motion to dismiss an application of a bankrupt for a discharge on undisputed facts presents a question of law reviewable by petition to revise. Lindeke v. Converse, 198 Fed. 618, 117 C. C. A. 322, 28 Am. Bankr. Rep. 596.

[75] In re White, 248 Fed. 115, 160 C.

rupt's application for discharge was dismissed for a technical error, but no order was entered on the judge's minutes, and new proceedings were instituted, in which the former denial was pleaded as res judicata, it was held that the bankrupt was still entitled to have an order entered on the prior decision and to appeal therefrom.[76] An order denying an application for discharge will be reversed on appeal where clearly inconsistent with the testimony in the case and the referee's report overruling the specifications of objection.[77]

Since the statute provides (§ 14c) that "the confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge," a judgment confirming a composition is in effect a judgment granting a discharge, and is therefore reviewable on appeal under this provision of the act.[78] On the same principle, an appeal lies from an order of the district court refusing to confirm a composition tendered by the debtor and accepted by the required number of creditors. The right of appeal given by this section, it is said, is reciprocal, and as the confirmation of a composition discharges the bankrupt, opposing creditors clearly have a right to appeal from such an order, and the bankrupt has an equal right to appeal from an order refusing the confirmation. Such an appeal, moreover, is within the spirit of the provisions for review, since the order in either case is a final termination of the composition proceedings which are provided for by the act as one of the methods for the settlement of the bankrupt's debts, and the effecting of his discharge from further liability thereon.[79]

C. A. 255, 41 Am. Bankr. Rep. 458; In re Louisville Nat. Banking Co., 158 Fed. 403, 85 C. C. A. 513, 19 Am. Bankr. Rep. 309. See Commercial Bank of Manchester v. Buckner, 20 How. 108, 15 L. Ed. 862. A petition to revise, and not an appeal, is the proper mode of reviewing an order setting aside a discharge. In re Jacobs, 241 Fed. 620, 154 C. C. A. 378, 39 Am. Bankr. Rep. 385.

[76] In re Elkind, 175 Fed. 64, 99 C. C. A. 86, 23 Am. Bankr. Rep. 166.

[77] Boyd v. Arnold, 149 Fed. 187, 79 C. C. A. 135, 17 Am. Bankr. Rep. 839.

[78] In re Friend, 134 Fed. 778, 67 C. C. A. 500, 13 Am. Bankr. Rep. 595; In re Bay State Milling Co., 223 Fed. 778, 139 C. C. A. 598, 35 Am. Bankr. Rep. 112; In re Gottlieb (C. C. A.) 262 Fed. 730, 44 Am. Bankr. Rep. 464, 45 Am. Bankr. Rep. 180.

[79] United States v. Hammond, 104 Fed. 862, 44 C. C. A. 229, 4 Am. Bankr. Rep. 736, reversing In re Adler, 103 Fed. 444, 4 Am. Bankr. Rep. 583. But see In re McVoy Hardware Co. (C. C. A.) 200 Fed. 949, 29 Am. Bankr. Rep. 322. Where an order dismissing a petition for confirmation of a composition was predicated wholly on the proposition of law that the proposed offer was not a "composition," and in no manner involved the question of the right of the bankrupt to be discharged, the order involves matter of law arising in bankruptcy proceedings and is reviewable on petition to revise and not on appeal. In re Graham & Sons, 252 Fed. 93, 164 C. C. A. 205, 42 Am. Bankr. Rep. 52.

§ 44. Same; Allowance or Rejection of Claim.—A judgment of the district court allowing or rejecting a debt or claim of a creditor against the estate of the bankrupt may be reviewed on appeal to the circuit court of appeals, provided the sum in controversy amounts to five hundred dollars.[80] In this case the remedy by appeal is exclusive, and the contested matters cannot be brought before the reviewing court on petition for the exercise of its power to "superintend and revise in matters of law."[81] Some of the circuit courts of appeals have thought that this latter power was properly invoked, instead of the remedy by appeal, where there was no dispute as to the validity or amount of the claim, but only a contention as to whether or not it was entitled to priority of payment out of the assets of the bankrupt estate.[82] But these rulings appear to be inconsistent with a late decision of the Supreme Court to the effect that, although the validity of the claim as a general claim against the estate is not denied, still an order of the district court establishing it as a lien against the estate is appealable, and is not the proper subject of a review under the revisory power of the circuit court of appeals. The court observed that "the fact that, after the adjudication of the claim, the trustee made no objection to its allowance as a valid claim, but intended only to contest its validity as a lien upon the bankrupt's estate, made no difference as to the appellate character of the controversy." And, speaking of section 24b of the bankruptcy act it was said: "We think this subdivision was not intended to give an additional remedy to those whose rights could be protected by an appeal under section 25 of the act. That section provides a short method by which rejected claims can be promptly reviewed by appeal in the

[80] Bankruptcy Act 1898, § 25a. And see Southern Cotton Oil Co. v. Elliotte, 218 Fed. 567, 134 C. C. A. 295, 33 Am. Bankr. Rep. 375; Keith v. Kilmer (C. C. A.) 272 Fed. 643, 47 Am. Bankr. Rep. 92; Duff v. Carrier, 55 Fed. 433, 5 C. C. A. 177; In re Place, 8 Blatchf, 302, 4 N. B. R. 541, Fed. Cas. No. 11,200; Morris v. Brush, 2 Woods, 354, 14 N. B. R. 371, Fed. Cas. No. 9,828.

[81] In re Dickson, 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349, 7 Am. Bankr. Rep. 186; Cooper v. Miller, 203 Fed. 383, 121 C. C. A. 567, 30 Am. Bankr. Rep. 194; Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725, 27 Am. Bankr. Rep. 852; First Nat. Bank v. Cooper, 20 Wall. 171, 22 L. Ed. 273; Pindel v. Holgate, 221 Fed. 342, 137 C. C. A. 158, 34 Am. Bankr. Rep. 600; King Lumber Co. v. National Exchange Bank of Roanoke, 253 Fed. 946, 165 C. C. A. 388, 42 Am. Bankr. Rep. 651. In re Thompson (C. C. A.) 264 Fed. 913, 45 Am. Bankr. Rep. 500; In re Craig Lumber Co. (C. C. A.) 266 Fed. 692, 46 Am. Bankr. Rep. 135; In re Place, 8 Blatchf. 302, 4 N. B. R. 541, Fed. Cas. No. 11,200. But the denial of an application by an individual creditor of a bankrupt member of a firm for an allowance of interest out of the individual estate, subsequent to the allowance of his claim, is reviewable on original petition to revise. In re Chandler, 184 Fed. 887, 107 C. C. A. 209, 25 Am. Bankr. Rep. 865.

[82] In re Rouse, Hazard & Co., 91 Fed. 96, 33 C. C. A. 356, 1 Am. Bankr. Rep. 234; In re Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496.

circuit court of appeals, and, in certain cases, in this court. The proceeding under section 24b, permitting a review of questions of law arising in bankruptcy proceedings, was not intended as a substitute for the right of appeal under section 25." [83]

In regard to the jurisdictional minimum of $500, it is held that the restriction has reference, not to the amount of the original claim, but to the amount of the allowance or rejection, and therefore to the amount which will be put in controversy by the appeal. Hence if a claim is reduced by the court and allowed for an amount smaller than that asserted by the creditor, or if a claim made up of various items is sifted, and some of the items disallowed and others allowed, it is necessary, in order to give a right of appeal, that the matter which will come before the appellate court, namely, the amount of the reduction or of the partial allowance or rejection, should reach the jurisdictional sum.[84] Thus, where a state filed a claim against a bankrupt corporation for the amount of a franchise tax alleged to be in arrear, and more than $500 of the claim was disallowed, the state was entitled to appeal.[85]

Where claims are made for the allowance of expenses, costs, and counsel fees, incurred by the petitioning creditors in involuntary cases, or by the trustee or by creditors who co-operate with him in contesting claims and prosecuting suits, it is held that an order of the court of bankruptcy allowing or disapproving such a claim is not a "judgment allowing or rejecting a debt or claim," but is an administrative order reviewable only on petition to revise.[86] But it is otherwise where the disputed item constitutes an integral part of the claim of a creditor. Thus, where a mortgage creditor of a bankrupt proves his claim as a secured debt, including the amount stipulated to be paid as an attorney's fee in case of foreclosure, and the district court reverses the action of

[83] Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725, 27 Am. Bankr. Rep. 852.

[84] Gray v. Grand Forks Mercantile Co., 138 Fed. 344, 70 C. C. A. 634, 14 Am. Bankr. Rep. 780, citing Hilton v. Dickinson, 108 U. S. 165, 2 Sup. Ct. 424, 27 L. Ed. 688; Dows v. Johnson, 110 U. S. 233, 3 Sup. Ct. 640, 28 L. Ed. 128. Where the allowed claim against the bankrupt is for $2,500, with specific liens as security, an appeal lies to the circuit court of appeals, although no one of the liens amounts to $500, and the contest is only as to them. Stuart v. Britton Lumber Co., 227 Fed. 49, 141 C. C. A. 597, 35 Am. Bankr. Rep. 719.

[85] In re Cosmopolitan Power Co., 137 Fed. 858, 70 C. C. A. 388, 14 Am. Bankr. Rep. 604.

[86] Ohio Valley Bank Co. v. Switzer, 153 Fed. 362, 82 C. C. A. 438, 18 Am. Bankr. Rep. 689; W. J. Davidson & Co. v. Friedman, 140 Fed. 853, 72 C. C. A. 553, 15 Am. Bankr. Rep. 489. And see Streeter v. Lowe, 184 Fed. 263, 106 C. C. A. 405, 25 Am. Bankr. Rep. 774. Compare In re Curtis, 100 Fed. 784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17.

the referee in rejecting the latter item, and orders its allowance, this constitutes an appealable judgment.[87]

The judgment must be one either "allowing or rejecting" a debt or claim, and this has reference to its right to share in the distribution of the estate.[88] Thus, an order allowing (or refusing to allow) a certain claim to be filed for the purpose of voting in the election of a trustee, is not of this character and therefore not appealable.[89] So of an order denying the right of a petitioner to participate in the individual assets of a member of a bankrupt firm, until after the individual creditors should have been paid.[90] But on the other hand, where a referee announces that, as the proofs stand before him, he declines to allow a creditor's claim as established, and the district court approves and affirms his decision, the creditor's claim has been "rejected" so as to give him a right of appeal.[91] And so there is an "allowance" where a creditor holding a note given by a bankrupt firm, and signed as surety by a member of the firm, also in bankruptcy, having proved the debt against the firm estate, also files it as an individual debt against the estate of the surety, and the court decides that it is provable against such individual estate.[92] And again, there is an appeal where the court of bankruptcy decides that the bankrupt is not entitled to a business homestead in certain property covered by a deed of trust, and orders that the incumbered property shall be applied to the claim of the creditor holding the security.[93] And so, where a creditor of a bankrupt, after the

[87] In re Roche, 101 Fed. 956, 42 C. C. A. 115, 4 Am. Bankr. Rep. 369.

[88] A decision of the court of bankruptcy in a contest between the trustee and an adverse claimant of property may be reviewed on appeal, but not under the provision here under consideration, but on the ground that it involves a "controversy arising in a bankruptcy proceeding." See Rode & Horn v. Phipps, 195 Fed. 414, 115 C. C. A. 316, 27 Am. Bankr. Rep. 827; Fidelity Trust Co. v. Gaskell, 195 Fed. 865, 115 C. C. A. 527, 28 Am. Bankr. Rep. 4; In re Hamilton Automobile Co., 198 Fed. 856, 117 C. C. A. 135, 29 Am. Bankr. Rep. 163; Kirkpatrick v. Harnesberger, 199 Fed. 886, 118 C. C. A. 334, 29 Am. Bankr. Rep. 439; Franklin v. Stoughton Wagon Co., 168 Fed. 857, 94 C. C. A. 269, 22 Am. Bankr. Rep. 63; Houghton v. Burden, 228 U. S. 161, 33 Sup. Ct. 491, 57 L. Ed. —, 30 Am. Bankr. Rep. 16; Kiskadden v. Steinle, 203 Fed. 375, 29 Am. Bankr. Rep. 346; Shea v. Lewis (C. C. A.) 206 Fed. 877, 30 Am. Bankr. Rep. 436.

[89] Duryea Power Co. v. Sternbergh, 218 U. S. 299, 31 Sup. Ct. 25, 54 L. Ed. 1047, 25 Am. Bankr. Rep. 66. An order expunging a claim filed on behalf of an estate, because not signed by both of the executors, is properly reviewable on petition to revise. In re Schaffner (C. C. A.) 267 Fed. 977, 45 Am. Bankr. Rep. 681.

[90] Euclid Nat. Bank v. Union Trust & Deposit Co., 149 Fed. 975, 79 C. C. A. 485, 17 Am. Bankr. Rep. 834.

[91] Hiscock v. Varick Bank, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945, 18 Am. Baukr. Rep. 1.

[92] In re Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. Bankr. Rep. 256.

[93] Burow v. Grand Lodge of Sons of Hermann, 133 Fed. 708, 66 C. C. A. 538, 13 Am. Bankr. Rep. 542.

filing of the petition, sold securities which he held, credited the proceeds on his debt, and filed a claim for the balance due, an order disallowing such sale and directing a resale of the securities at public auction is an order "rejecting" the claim and therefore appealable.[94]

Where the real contest is as to the right of a creditor who claims to occupy a favored position, either as being entitled to priority of payment or as entitled to assert a lien, the authorities are not entirely free from doubt on the right of appeal. But the better doctrine appears to be that, if there is no contest as to the validity of the claim as such, nor as to its amount, still, a decision of the district court either allowing or disallowing the creditor's claim to priority or to a lien is an appealable judgment under the statute.[95] At any rate, it is clear that, where the disallowance of a claim against the bankrupt's estate is properly before the circuit court of appeals on an appeal respecting the provability of the claim in general or respecting its amount, any question concerning an alleged lien, security, rank, or priority of the claim is an incident to its allowance or rejection and may therefore be reviewed by the appellate court, and such an appeal brings up both questions of law and of fact.[96]

Where a proof of debt is disallowed by the district court and an appeal taken to the circuit court of appeals, the cause of action prose-

[94] In re Mertens, 144 Fed. 818, 75 C. A. 548, 15 Am. Bankr. Rep. 362.

[95] Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, 22 Am. Bankr. Rep. 1; Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725, 27 Am. Bankr. Rep. 852; Bell v. Arledge, 192 Fed. 837, 113 C. C. A. 161, 27 Am. Bankr. Rep. 773; In re Doran, 154 Fed. 467, 83 C. C. A. 265, 18 Am. Bankr. Rep. 760; Nauman Co. v. Bradshaw, 193 Fed. 350, 113 C. C. A. 274, 27 Am. Bankr. Rep. 565; In re Streator Metal Stamping Co. (C. C. A.) 205 Fed. 280, 30 Am. Bankr. Rep. 55; Wuerpel v. Commercial Germania Trust & Savings Bank, 238 Fed. 269, 151 C. C. A. 285, 38 Am. Bankr. Rep. 223; In re Hartzell, 209 Fed. 775, 126 C. C. A. 499, 31 Am. Bankr. Rep. 356; Bernard v. Lea, 210 Fed. 583, 127 C. C. A. 219, 31 Am. Bankr. Rep. 436; Sterne v. Merchants' Nat. Bank, 216 Fed. 862, 133 C. C. A. 66, 33 Am. Bankr. Rep. 205; Home Bank for Savings v. Lohm, 223 Fed. 633, 139 C. C. A. 179, 34 Am. Bankr. Rep. 624; In re Lane Lumber Co., 217 Fed. 546, 133 C. C. A. 398, 33 Am. Bankr. Rep. 497; New Hampshire Savings Bank v. Varner, 216 Fed. 721, 132 C. C. A. 631, 33 Am. Bankr. Rep. 1. Compare Hutchinson v. Otis, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, 10 Am. Bankr. Rep. 135; Gaudette v. Graham, 164 Fed. 311, 90 C. C. A. 243; Emerson v. Castor, 236 Fed. 29, 149 C. C. A. 239, 37 Am. Bankr. Rep. 719. In re York, 1 Abb. U. S. 503, 4 N. B. R. 479, Fed. Cas. No. 18,139. It is very difficult to reconcile the rulings of the Supreme Court in the three cases above cited, but the doctrine stated in the text appears to be in accordance with its latest decisions.

[96] In re Cosmopolitan Power Co., 137 Fed. 858, 70 C. C. A. 388, 14 Am. Bankr. Rep. 604; Courier-Journal Job Printing Co. v. Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183; Cunningham v. German Ins. Bank, 103 Fed. 932, 43 C. C. A. 377, 4 Am. Bankr. Rep. 192; In re Hartzell, 209 Fed. 775, 126 C. C. A. 499, 31 Am. Bankr. Rep. 356; Morris v. Brush, 2 Woods, 354, 14 N. B. R. 371, Fed. Cas. No. 9,828.

cuted in the latter court must be the same one which was rejected by the former; and it is not permissible, under cover of an appeal, to transform the claim into a new and distinct cause of action.[97] The right of appeal in cases of this kind is not confined to the trustee and the creditor whose claim is in question, but may be exercised by a creditor who has opposed its allowance.[98] A trustee in bankruptcy may also appeal from an order denying his motion to expunge a claim allowed, unless further preferences were surrendered, and directing a return of a preference previously surrendered by the creditor.[99]

§ 45. **Revisory Jurisdiction of Circuit Court of Appeals.**—By the language of the statute, "the several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved." (Bankruptcy Act 1898, § 24b.) It will be observed that the proceeding thus authorized to be taken is not an appeal. The jurisdiction of the reviewing court is original and not appellate, and is to be invoked simply by a petition filed by the party seeking a review. In fact, as will be shown in the next section, many decisions hold that the provisions of the act relating to appeals and to petitions for review are mutually exclusive. And the two remedies are neither cumulative nor is one intended as a substitute for the other.[100]

The revisory jurisdiction, it is held, extends only to orders made in the bankruptcy proceedings proper, and does not embrace proceedings in plenary suits by the trustee against third parties which might have been maintained in a state court.[101] But it is otherwise as to orders made respecting funds or property in the control or custody of the court of bankruptcy, since these matters are subject to its summary jurisdiction. Thus, a petition lies under this clause of the act to review an order requiring the bankrupt to surrender to his trustee money or

[97] In re Jaycox, 12 Blatchf. 209, 13 N. B. R. 122, Fed. Cas. No. 7,237.

[98] In re Joseph, 2 Woods, 390, Fed. Cas. No. 7,532.

[99] Livingstone v. Heineman, 120 Fed. 786, 57 C. C. A. 154, 10 Am. Bankr. Rep. 39.

[100] Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725, 27 Am. Bankr. Rep. 852. And see In re Charles Knosher & Co., 197 Fed. 136, 116 C. C. A. 560, 28 Am. Bankr. Rep. 747.

[101] In re Rusch, 116 Fed. 270, 53 C. C. A. 631, 8 Am. Bankr. Rep. 518; In re Jacobs, 99 Fed. 539, 39 C. C. A. 647, 3 Am. Bankr. Rep. 671. Compare In re Bonesteel, 7 Blatchf. 175, 3 N. B. R. 517, Fed. Cas. No. 1,627. Where a court of bankruptcy has erroneously retained jurisdiction to adjudicate the rights of an adverse claimant, its judgment may be reviewed on petition to revise. Shea v. Lewis, 206 Fed. 877, 124 C. C. A. 537, 30 Am. Bankr. Rep. 436.

property alleged to be in his possession and to belong to his estate in bankruptcy,[102] an order adjudging him in contempt for disobeying an order requiring him to pay over money to his trustee,[103] an order requiring him to indorse a liquor license so that it may be transferred to the trustee,[104] an order requiring the surrender of property by the bankrupt's voluntary assignee for creditors, or by his alienee.[105] So also, the decision of a court of bankruptcy on a petition claiming ownership of funds in the hands of a bankrupt's trustee, may be reviewed on petition where the facts are not in dispute,[106] and where a mortgagee in possession of property of the bankrupt surrenders it to the trustee, reserving the right to assert his lien against the proceeds of its sale, the proceeds are held by the court as assets of the bankrupt estate, and in dealing with the fund it acts as a court of bankruptcy, and its action on the claim of the mortgagee is subject to review on petition.[107] And this is also the proper method of reviewing a decision as to the effect of the adjudication in bankruptcy upon a judgment lien acquired within four months prior thereto.[108] Generally speaking, any order made by the district court in the exercise of its summary jurisdiction may be reviewed in this manner,[109] as also the various steps taken in the ordinary and usual administration of estates. Thus, a petition lies to revise

[102] In re Purvine, 96 Fed. 192, 37 C. C. A. 446, 2 Am. Bankr. Rep. 787; In re Shidlovsky, 224 Fed. 450, 140 C. C. A. 654, 34 Am. Bankr. Rep. 861; Henkin v. Fousek, 246 Fed. 285, 159 C. C. A. 15, 40 Am. Bankr. Rep. 701.

[103] In re Cole, 163 Fed. 180, 90 C. C. A. 50, 23 L. R. A. (N. S.) 255, 20 Am. Bankr. Rep. 761; Henkin v. Fousek (C. C. A.) 267 Fed. 557, 46 Am. Bankr. Rep. 97.

[104] Fisher v. Cushman, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, 4 Am. Bankr. Rep. 646.

[105] In re Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266; Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Gutwillig, 92 Fed. 337, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388.

[106] Hutchinson v. Le Roy, 113 Fed. 202, 51 C. C. A. 159, 8 Am. Bankr. Rep. 20. A summary order adjudicating an adverse claim, of which the court was without jurisdiction in such proceeding, is reviewable by petition to revise. Charles H. Brown Paint Co. v. Rockhold (C. C. A.) 269 Fed. 139, 46 Am. Bankr. Rep. 246.

[107] In re Antigo Screen Door Co., 123 Fed. 249, 59 C. C. A. 248, 10 Am. Bankr. Rep. 359. And see In re Flatland, 196 Fed. 310, 116 C. C. A. 130, 28 Am. Bankr. Rep. 476.

[108] In re Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145; Moore v. Green, 145 Fed. 472, 76 C. C. A. 242, 16 Am. Bankr. Rep. 648.

[109] In re Casey, 10 Blatchf. 376, 8 N. B. R. 71, Fed. Cas. No. 2,495; Hurst v. Teft, 12 Blatchf. 217, 13 N. B. R. 108, Fed. Cas. No. 6,939; In re Goldstein, 216 Fed. 887. Orders upon the allowance of counsel fees in connection with a proposed composition are reviewable by petition to revise. In re Kinnane Co.'s Estate, 242 Fed. 769, 155 C. C. A. 357, 39 Am. Bankr. Rep. 593. And an order allowing fees to the counsel for the trustee is reviewable by petition to revise, and not by appeal. Yaryan Rosin & Turpentine Co. v. Isaac (C. C. A.) 270 Fed. 710, 46 Am. Bankr. Rep. 421.

in matter of law an order appointing a referee in bankruptcy,[110] an order removing or refusing to remove a trustee in bankruptcy from his office,[111] an order refusing to a bankrupt the right to amend his schedule in order to supply an accidental omission and claim his exemptions,[112] an order made on petition of a creditor directing the sale of property which had previously been set apart to the bankrupt as a homestead,[113] a decision upon an application to confirm a sale of the bankrupt's estate,[114] an order directing the distribution of the proceeds of a sale of real estate made by a trustee in bankruptcy,[115] a decision of the court of bankruptcy upon an application for the confirmation of a composition,[116] and an order directing that a set-off of mutual debts be allowed.[117] So also, where a proceeding in bankruptcy is dismissed for want of jurisdiction, the trustee, having duly excepted, is entitled to have the order of dismissal reviewed, for error in matters of law, on an original petition in the circuit court of appeals.[118] But the latter court will not ordinarily review a mere incidental question of practice in the district court.[119] And the reviewing court is not required to revise every interlocutory order in a bankruptcy proceeding, but only such decrees as have a certain degree of definiteness and finality.[120]

It should be remarked that the jurisdiction of the circuit court of appeals to review the proceedings of the district courts in bankruptcy, under this provision of the statute, is not limited by any measure of the amount in controversy or the value of the property involved.[121] But proceedings for review do not operate to transfer to the appellate court the entire bankruptcy proceeding, to be continued there as in a court of first instance. The proceeding is not a removal of the case to the appellate court, and the statute confers no power to execute the decrees

110 Ex parte Steele, 162 Fed. 694, 20 Am. Bankr. Rep. 575.

111 In re Briggs, 61 Fed. 498, 9 C. C. A. 585.

112 Goodman v. Curtis, 171 Fed. 644, 98 C. C. A. 398, 23 Am. Bankr. Rep. 504.

113 Ingram v. Wilson, 125 Fed. 913, 60 C. C. A. 618, 11 Am. Bankr. Rep. 192.

114 In re York, 1 Abb. U. S. 503, 4 N. B. R. 479, Fed. Cas. No. 18,139.

115 In re Groetzinger & Sons, 127 Fed. 124, 62 C. C. A. 124, 11 Am. Bankr. Rep. 467.

116 In re South Boston Iron Co., 4 Cliff. 343, Fed. Cas. No. 13,183.

117 Wilson v. National Bank of Rolla, 1 McCrary, 538, 3 Fed. 391.

118 In re New England Breeders' Club, 169 Fed. 586, 95 C. C. A. 84, 22 Am. Bankr. Rep. 124. And see In re Seebold, 105 Fed. 910, 45 C. C. A. 117, 5 Am. Bankr. Rep. 358.

119 In re Robinson, 6 Blatchf. 253, 2 N. B. R. 341, Fed. Cas. No. 11,939.

120 In re Chotiner, 218 Fed. 813, 134 C. C. A. 501, 33 Am. Bankr. Rep. 288. Thus, a mere order of the District Court, allowing the trustee to amend his specifications of objection to the discharge of the bankrupt, has not the finality necessary for review. In re Pechin, 227 Fed. 853, 142 C. C. A. 377, 35 Am. Bankr. Rep. 738.

121 In re Clark, 9 Blatchf. 379, 6 N. B. R. 410, Fed. Cas. No. 2,802; In re Rouse, Hazard & Co., 91 Fed. 96, 33 C. C. A. 356, 1 Am. Bankr. Rep. 234.

of the district court, or to assume primary exercise of the jurisdiction conferred on the latter as a court of bankruptcy.[122]

§ 46. Appellate and Revisory Jurisdiction Contrasted; Choice of Remedies.—Several of the circuit courts of appeals have held that the two grants of appellate jurisdiction to those courts contained in the bankruptcy act—that which gives them authority to review by appeal a controversy in bankruptcy, and that which gives them authority to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy—are not exclusive of each other, but are concurrent or cumulative grants, the former allowing a review of both questions of law and questions of fact, and the latter being restricted to the review of matters of law only, and that consequently an aggrieved party often has, and may exercise, a choice of remedy as between these two methods of bringing his contention before the appellate court.[123] And this view obtains some support from a decision of the Supreme Court of the United States on a question certified to it by the circuit court of appeals in the eighth circuit. A petition for revision had been filed in the latter court, bringing up for review an order of the district court dismissing an involuntary petition in bankruptcy. This was clearly a "judgment refusing to adjudge the defendant a bankrupt," and therefore certainly an appealable order under the statute. The circuit court of appeals requested the instruction of the Supreme Court on the question whether it had jurisdiction to review the order on original petition, and the question was answered in the affirmative. But the point actually decided by the Supreme Court was that the circuit court of appeals in the eighth circuit had jurisdiction to review on original petition the proceedings in bankruptcy in the district courts of Oklahoma (then a territory), although the appellate jurisdiction, properly so called, over those courts was vested in the supreme court of the territory.[124]

In accordance with this view of the statute, it has been held that the circuit court of appeals should not decline to take jurisdiction of a petition for revision, notwithstanding the fact that the controversy is one which ought to have been brought up by appeal, where no objection to the method of seeking a review is presented by the parties,

[122] In re Bininger, 7 Blatchf. 165, 3 N. B. R. 487, Fed. Cas. No. 1,418.

[123] In re McKenzie, 142 Fed. 383, 73 C. C. A. 483, 15 Am. Bankr. Rep. 679; In re Lee, 182 Fed. 579, 105 C. C. A. 117, 25 Am. Bankr. Rep. 436; In re Holmes, 142 Fed. 391, 73 C. C. A. 491, 15 Am. Bankr. Rep. 689; Dodge v. Norlin, 133 Fed. 363, 66 C. C. A. 425, 13 Am. Bankr. Rep. 176.

[124] Plymouth Cordage Co. v. Smith, 194 U. S. 311, 24 Sup. Ct. 725, 48 L. Ed. 992.

and where only questions of law are presented for its consideration.[125] So there is a decision that a party who has made a mistake in appealing from an order which is not appealable may be permitted, in lieu of his appeal, to file a petition for revision.[126] And several rulings may be noted to the effect that, where a party has duly taken an appeal from an order in bankruptcy, which is not appealable, the appellate court need not dismiss the appeal and put the party to the necessity of commencing anew with a petition for revision, but may simply treat the appeal as if it were a petition for revision, and proceed to decide the controversy, provided that questions of fact are not involved.[127] Further, the doubt and confusion which has hitherto prevailed as to the proper method of seeking a review of particular kinds of orders, increased by many conflicting decisions in different courts, has led counsel, in numerous instances, to take an appeal and at the same time file a petition for revision, in the same case and on the same question, in order to make sure of being heard by the appellate court. And several of the courts have held that taking this course does not defeat the right to have the matter determined on the merits in whichever proceeding is held to be appropriate, so that the circuit court of appeals, having both an appeal and a petition before it, may dismiss the one which it deems improper and retain and adjudicate upon the other, or, indeed, according to some of the authorities, it may retain both proceedings and hear both and grant relief upon either or both, according to its view of the justice and necessity of the case.[128]

But with the possible exception of the principle last stated, a generally contrary rule has come to prevail. In numerous cases it has been

[125] In re Endlar, 192 Fed. 763, 113 C. C. A. 48. And see Samson v. Blake, 6 N. B. R. 401, Fed. Cas. No. 12,284.

[126] In re Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266.

[127] Chesapeake Shoe Co. v. Seldner, 122 Fed. 593, 58 C. C. A. 261, 10 Am. Bankr. Rep. 466; Gaudette v. Graham, 164 Fed. 311, 90 C. C. A. 243; In re Williams' Estate, 156 Fed. 934, 84 C. C. A. 434, 19 Am. Bankr. Rep. 389; In re Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266. But this course cannot be taken where the questions presented for review all involve matters of fact. In re Whitener, 105 Fed. 180, 44 C. C. A. 434, 5 Am. Bankr. Rep. 198.

[128] In re Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496; Fisher v. Cushman, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, 4 Am. Bankr. Rep. 646; Nauman Co. v. Bradshaw, 193 Fed. 350, 113 C. C. A. 274, 27 Am. Bankr. Rep. 565; Hendricks v. Webster, 159 Fed. 927, 87 C. C. A. 107, 20 Am. Bankr. Rep. 112; In re Creech Bros. Lumber Co., 240 Fed. 8, 153 C. C. A. 44, 39 Am. Bankr. Rep. 487; Fourth Nat. Bank of Wichita v. Smith, 240 Fed. 19, 153 C. C. A. 55, 38 Am. Bankr. Rep. 771. If a claimant whose demand has been rejected by the District Court brings both an appeal and a petition to revise, and on the appeal obtains reversal of the judgment below, he has then exhausted his remedies, and the petition should be thereupon dismissed. Union Nat. Bank v. Neill, 149 Fed. 720, 79 C. C. A. 426, 17 Am. Bankr. Rep. 853.

held that the right of appeal and the right of review on petition to revise are mutually exclusive; that an appealable judgment cannot be brought up on petition, and a question properly subject to be reviewed on petition cannot be made the subject of an appeal; that an appeal erroneously brought cannot be heard and determined as if it were a petition, and vice versa; and consequently, that a party who has mistaken his remedy must be dismissed and put to the institution of a new proceeding in the proper form.[129] The rule as now established recognizes the distinction between questions of law and questions of fact as the criterion by which to determine whether a petition or an appeal is the proper remedy. If the order or decision of the bankruptcy court sought to be reviewed resulted from a consideration of disputed facts and depended on findings made thereon, it is reviewable only by appeal, and not by petition to revise.[130] Thus, for example, an order based on a finding that a certain deed of trust had been paid involves a question of fact and can be reviewed only on appeal.[131] So, questions of fact concerning the rejection of a claim offered as a preferred claim, the chattel mortgage relied on being declared fraudulent, cannot be reviewed on petition for revision, but only by appeal.[132] And the allowance by the bankruptcy court for the services of attorneys of the petitioning creditors instituting involuntary bankruptcy proceedings, involves questions of fact only, so that a petition to revise should be denied.[133] But on the other hand, if only questions of law arise, no dispute as to facts being involved, appeal is not the proper remedy, but a petition for revision will lie.[134] And this is the case also where the facts upon which

[129] Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725, 27 Am. Bankr. Rep. 852; In re Mueller, 135 Fed. 711, 68 C. C. A. 349, 14 Am. Bankr. Rep. 256; Brady v. Bernard, 170 Fed. 576, 95 C. C. A. 656, 22 Am. Bankr. Rep. 342; Dickas v. Barnes, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654, 15 Am. Bankr. Rep. 566; In re Kuffler, 127 Fed. 125, 61 C. C. A. 259, 11 Am. Bankr. Rep. 469; First Nat. Bank v. State Nat. Bank, 131 Fed. 430, 65 C. C. A. 414, 12 Am. Bankr. Rep. 440; In re Friend, 134 Fed. 778, 67 C. C. A. 500, 13 Am. Bankr. Rep. 595; Salsburg v. Blackford, 204 Fed. 438, 122 C. C. A. 624, 29 Am. Bankr. Rep. 320; In re Martin, 201 Fed. 31, 119 C. C. A. 363, 29 Am. Bankr. Rep. 935; Kirsner v. Taliaferro, 202 Fed. 51, 120 C. C. A. 305, 29 Am. Bankr. Rep. 832; Courtney v. Shea, 225 Fed. 358, 140 C. C. A. 382, 34 Am. Bankr. Rep. 753; Bothwell v. Fitzgerald, 219 Fed. 408, 135 C. C. A. 212, 34 Am. Bankr. Rep. 261; In re Thompson (C. C. A.) 264 Fed. 913, 45 Am. Bankr. Rep. 500; Feder v. Goetz (C. C. A.) 264 Fed. 619, 45 Am. Bankr. Rep. 57.

[130] In re Leigh (C. C. A.) 272 Fed. 678, 47 Am. Bankr. Rep. 72; In re Prudential Lithograph Co. (C. C. A.) 270 Fed. 469, 46 Am. Bankr. Rep. 345; T. E. Wells & Co. v. Sharp, 208 Fed. 399, 125 C. C. A. 615, 31 Am. Bankr. Rep. 348; Henderson v. Morse, 235 Fed. 518, 149 C. C. A. 64, 38 Am. Bankr. Rep. 22; Henkin v. Fousek, 246 Fed. 285, 159 C. C. A. 15, 40 Am. Bankr. Rep. 701.

[131] Rison v. Parham, 219 Fed. 176, 134 C. C. A. 550, 35 Am. Bankr. Rep. 571.

[132] In re Russell, 247 Fed. 95, 159 C. C. A. 313, 41 Am. Bankr. Rep. 234.

[133] Hall v. Reynolds, 224 Fed. 103, 139 C. C. A. 659, 34 Am. Bankr. Rep. 707.

[134] In re Hawley Down-Draft Furnace

the order of the bankruptcy court was based were stipulated by the parties, so that the order involves only questions of law.[135]

§ 47. "Controversies" and "Proceedings in Bankruptcy" Distinguished.—The present bankruptcy act, in its twenty-third, twenty-fourth, and twenty-fifth sections, establishes a clear distinction between "proceedings in bankruptcy" and "controversies at law and in equity arising in bankruptcy proceedings." The statute also, in connection with that creating the circuit courts of appeals, prescribes the manner in which judgments or orders in each class of cases are reviewable, and such particular mode is exclusive. A judgment or decree in a controversy at law or in equity arising in bankruptcy proceedings is reviewable by the circuit court of appeals under its organic act and under § 24a of the bankruptcy law by appeal or on writ of error, as may be appropriate, while a judgment or order in a proceeding in bankruptcy, if one of those specifically enumerated in § 25a, is reviewable only by appeal, and, if not within such excepted cases (save a judgment rendered on the verdict of a jury, which may be reviewed on writ of error), can only be reviewed on original petition for revision in matter of law, as provided in § 24b of the bankruptcy act.[136]

It therefore becomes important to ascertain the nature of the distinction between these two classes of cases. And first, it is said that the term "proceedings in bankruptcy" includes "all questions arising in the administration of the bankrupt's estate, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate in bankruptcy, orders requiring the bankrupt's voluntary assignee to surrender property of the estate, orders giving priority to the claim of a creditor, orders directing a set-off of mutual debts, and orders confirming a composition. These are questions which, with a view to the prompt administration and distribution of the assets of the bankrupt, the law permits to be summarily disposed of by revision." [137] Or as otherwise stated, proceedings in bankruptcy are con-

Co., 238 Fed. 122, 151 C. C. A. 198, 38 Am. Bankr. Rep. 219; Weidhorn v. Levy, 252 U. S. 268, 40 Sup. Ct. 534, 64 L. Ed. 898, 45 Am. Bankr. Rep. 493; Yaryan Rosin & Turpentine Co. v. Isaac (C. C. A.) 270 Fed. 710, 46 Am. Bankr. Rep. 421; Petition of Stuart (C. C. A.) 272 Fed. 938; Nelson v. Hecksher, 219 Fed. 682, 135 C. C. A. 354; In re Reilly, 258 Fed. 121, 169 C. C. A. 207, 43 Am. Bankr. Rep. 159. Where a decision of a district court involves both questions of law and questions of fact, it is reviewable by appeal, and not by petition to revise. In re Eilers Music House (C. C. A.) 270 Fed. 915, 46 Am. Bankr. Rep. 526.

[135] In re J. B. Judkins Co., 205 Fed. 892, 124 C. C. A. 205, 30 Am. Bankr. Rep. 529.

[136] In re Friend, 134 Fed. 778, 67 C. C. A. 500, 13 Am. Bankr. Rep. 595. And see In re O'Gara Coal Co., 260 Fed. 742, 171 C. C. A. 480, 44 Am. Bankr. Rep. 206.

[137] Morehouse v. Pacific Hardware & Steel Co., 177 Fed. 337, 100 C. C. A. 647,

fined to questions arising between the bankrupt and his creditors, and are the subject of administrative orders and judgments of the district court, from the petition for adjudication to the discharge, including intermediate administrative steps, and such controversies as arise between the parties to the bankruptcy proceedings as are involved in the allowing of claims and fixing their priorities, sales, allowances, and other matters which are disposed of summarily.[138] On the other hand, the "controversies" spoken of in the act are distinct and separable issues, raised between intervening parties, involving substantial rights, and such as might arise at common law or in equity, and of which the circuit courts of appeals would have had jurisdiction if those controversies had arisen in the federal courts in other cases outside of bankruptcy proceedings.[139] They are "those independent or plenary suits which concern the bankrupt's estate, and arise by intervention or otherwise between the trustees representing the bankrupt's estate and claimants representing some right or interest adverse to the bankrupt or his general creditors." [140]

24 Am. Bankr. Rep. 178; Barton Lumber & Brick Co. v. Prewitt, 231 Fed. 919, 146 C. C. A. 115, 36 Am. Bankr. Rep. 718; In re John W. Farley & Co., 227 Fed. 378, 142 C. C. A. 74, 36 Am. Bankr. Rep. 88. An order of the bankruptcy court refusing leave to intervene to stockholders of a corporation defendant in involuntary bankruptcy, is reviewable on petition to revise. Ogden v. Gilt Edge Consol. Mines Co., 225 Fed. 723, 140 C. C. A. 597, 34 Am. Bankr. Rep. 893. So of an order overruling objections to its jurisdiction of the parties and the matter set forth in a petition by the trustee in bankruptcy for instructions to begin a suit. Board of Road Com'rs of Monroe County v. Keil, 259 Fed. 76, 170 C. C. A. 144, 44 Am. Bankr. Rep. 259. And a petition to revise is the proper remedy for reviewing an order enjoining the prosecution of a suit involving a fund over which the bankruptcy court has exclusive jurisdiction. Orinoco Iron Co. v. Metzel, 230 Fed. 40, 144 C. C. A. 338, 36 Am. Bankr. Rep. 247. And so of an order fixing the fees of counsel for petitioning and intervening creditors. In re Jacobson, 239 Fed. 79, 152 C. C. A. 129, 38 Am. Bankr. Rep. 425.

[138] Thompson v. Mauzy, 174 Fed. 611, 98 C. C. A. 457, 23 Am. Bankr. Rep. 489; In re Monarch Acetylene Co., 245 Fed. 741, 158 C. C. A. 143, 39 Am. Bankr. Rep. 381, 818; J. M. Radford Grocery Co. v. Powell, 228 Fed. 1, 142 C. C. A. 457, 35 Am. Bankr. Rep. 790; In re Weidhorn, 253 Fed. 28, 165 C. C. A. 48, 41 Am. Bankr. Rep. 592. See Jones v. Ford, 254 Fed. 645, 166 C. C. A. 143, 43 Am. Bankr. Rep. 88; Emerson v. Castor, 236 Fed. 29, 149 C. C. A. 239, 37 Am. Bankr. Rep. 719. Compare In re Leterman, Becher & Co., 260 Fed. 543, 171 C. C. A. 327, 44 Am. Bankr. Rep. 115. An order fixing the compensation of a referee in bankruptcy is reviewable by petition to revise and not by appeal. Kinkead v. J. Bacon & Sons, 230 Fed. 362, 144 C. C. A. 504, 36 Am. Bankr. Rep. 390. And so of an order made by the court of bankruptcy directing a trustee to carry out a settlement previously made pursuant to authority given to him on his petition. Petition of Baxter (C. C. A.) 269 Fed. 344, 46 Am. Bankr. Rep. 453.

[139] In re Prudential Lithograph Co. (C. C. A.) 270 Fed. 469, 46 Am. Bankr. Rep. 345; Burleigh v. Foreman, 125 Fed. 217, 60 C. C. A. 109, 11 Am. Bankr. Rep. 74; Dodge v. Norlin, 133 Fed. 363, 66 C. C. A. 425, 13 Am. Bankr. Rep. 176; In re Breyer Printing Co., 216 Fed. 878, 133 C. C. A. 82. A question of liability of petitioning creditors for costs of a receivership had in a bankruptcy proceeding is a controversy arising in bankruptcy between such creditors and adverse interests, so that an appeal, and not a petition to revise, is the proper remedy to review an order relating thereto. In re Veler, 249 Fed. 633, 161 C. C. A. 543, 41 Am. Bankr. Rep. 736.

[140] Barnes v. Pampel, 192 Fed. 525,

Among the class of "proceedings in bankruptcy," which are of a summary nature and are reviewable by petition for revision, we may include an order of the court of bankruptcy requiring a bankrupt to assign and turn over to his trustee certain property of his estate,[141] an order similarly made requiring the members of a bankrupt partnership to schedule and surrender their individual property,[142] and an order, made in the exercise of the summary jurisdiction, directing the turning over of money or property by any third person to a trustee in bankruptcy,[143] as, for instance, one to whom the bankrupt had previously made a general assignment for the benefit of his creditors, and who has possession of the property,[144] or a receiver of a state court similarly in possession of assets of the estate.[145] This is also true of an order requiring a creditor of the bankrupt to return property which was mistakenly surrendered to him by a receiver in bankruptcy,[146] or one requiring such creditor to pay to the trustee the amount of an unlawful preference.[147] It may also be noted that orders of a court of bankruptcy relating to the sale of property of the bankrupt's estate are regular steps in the proceedings, and not "controversies" within the meaning of the act.[148] And so of decisions concerning the validity of mort-

113 C. C. A. 81, 27 Am. Bankr. Rep. 192. A petition asserting a lien on property in possession of the bankruptcy court presents a controversy in a bankruptcy proceeding, reviewable by appeal. In re Sola e Hijo (C. C. A.) 261 Fed. 822, 44 Am. Bankr. Rep. 372. But a question raised by the claimant of property adverse to a trustee in bankruptcy, whether the bankruptcy court had jurisdiction to determine that claim, is a question in a proceeding in bankruptcy, reviewable by petition to revise. Gibbons v. Goldsmith, 222 Fed. 826, 138 C. C. A. 252, 35 Am. Bankr. Rep. 40. An order made in a common-law action wherein the bankrupt was a defendant cannot, after bankruptcy, be reviewed on a petition to revise orders in bankruptcy. In re Vanoscope Co., 233 Fed. 53, 147 C. C. A. 123, 36 Am. Bankr. Rep. 778.

141 In re Mertens, 142 Fed. 445, 73 C. C. A. 561, 15 Am. Bankr. Rep. 701; Horton v. Mendelsohn, 240 Fed. 185, 161 C. C. A. 221, 41 Am. Bankr. Rep. 648. But see Galbraith v. Rosenstein, 250 Fed. 415, 162 C. C. A. 515, 42 Am. Bankr. Rep. 91. And compare Jones v. Blair, 242 Fed. 783, 155 C. C. A. 371, 39 Am. Bankr. Rep. 569.

142 Dickas v. Barnes, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654, 15 Am. Bankr. Rep. 566.

143 In re Rose Shoe Mfg. Co. (C. C. A.) 168 Fed. 39, 21 Am. Bankr. Rep. 725; O'Dell v. Boyden, 150 Fed. 731, 80 C. C. A. 397, 17 Am. Bankr. Rep. 751; Board of Education of Salt Lake City v. Leary, 236 Fed. 521, 149 C. C. A. 573, 38 Am. Bankr. Rep. 289.

144 In re Farrell, 176 Fed. 505, 100 C. C. A. 63, 23 Am. Bankr. Rep. 826; In re Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266. See Greey v. Dockendorff, 231 U. S. 513, 34 Sup. Ct. 166, 58 L. Ed. 339, 31 Am. Bankr. Rep. 407.

145 In re Hecox (C. C. A.) 164 Fed. 823, 21 Am. Bankr. Rep. 314; State of Missouri v. Angle, 236 Fed. 644, 149 C. C. A. 640, 38 Am. Bankr. Rep. 394.

146 In re Strobel (C. C. A.) 160 Fed. 916, 20 Am. Bankr. Rep. 22.

147 In re First Nat. Bank, 155 Fed. 100, 84 C. C. A. 16, 18 Am. Bankr. Rep. 766; Wuerpel v. Canal-Louisiana Bank & Trust Co., 231 Fed. 934, 146 C. C. A. 130, 36 Am. Bankr. Rep. 802.

148 Schuler v. Hassinger, 177 Fed. 119, 100 C. C. A. 539, 24 Am. Bankr. Rep. 184; First Nat. Bank v. Chicago Title & Trust Co., 198 U. S. 280, 25 Sup. Ct.

gages or deeds of trust on his property made by the bankrupt,[149] And an order allowing or rejecting the claim of a creditor offered for proof in the bankruptcy proceedings is not a "controversy" but a "proceeding in bankruptcy."[150] And so of the decision on objections by creditors to the accounts rendered by the trustee,[151] and of an order dismissing a petition for the revocation of the bankrupt's discharge.[152]

But on the other hand, a separate and independent litigation, whether instituted by petition in the bankruptcy court in the nature of a bill in equity or by intervention or by a plenary suit at law, concerning property alleged to belong to the estate in bankruptcy, and maintained between the trustee in bankruptcy, as representing the estate, and an adverse claimant representing some right or interest adverse to the bankrupt or his general creditors, is a "controversy arising in bankruptcy proceedings."[153] Thus, where a trustee instituted proceedings

693, 49 L. Ed. 1051, 14 Am. Bankr. Rep. 102; In re McMahon (C. C. A.) 147 Fed. 684, 17 Am. Bankr. Rep. 530; Pindel v. Holgate, 221 Fed. 342, 137 C. C. A. 158, Ann. Cas. 1916C, 983, 34 Am. Bankr. Rep. 600; In re Veler, 249 Fed. 633, 161 C. C. A. 543, 41 Am. Bankr. Rep. 736; Griffin v. Lenhart (C. C. A.) 266 Fed. 675, 46 Am. Bankr. Rep. 134. On petition to revise an order confirming a sale of a homestead, the allowance of a claim will be reviewable, where the necessity of a sale was mainly dependent upon the validity of such claim. Pindel v. Holgate, 221 Fed. 342, 137 C. C. A. 158, Ann. Cas. 1916C, 983, 34 Am. Bankr. Rep. 600. An order sustaining the referee's dismissal of a rule to compel the trustees to convey land to the highest bidder, is not reviewable by appeal. Untereiner v. Camors, 228 Fed. 890, 143 C. C. A. 288, 36 Am. Bankr. Rep. 122. An appeal cannot be taken from an order of sale of the bankrupt's real estate freed and discharged of the wife's right of dower, such order being reviewable only on petition to revise. Kelly v. Minor, 252 Fed. 115, 164 C. C. A. 227, 41 Am. Bankr. Rep. 275.

[149] Morgan v. First Nat. Bank, 145 Fed. 466, 76 C. C. A. 236, 16 Am. Bankr. Rep. 639; Ritchie County Bank v. McFarland, 183 Fed. 715, 106 C. C. A. 153, 24 Am. Bankr. Rep. 893. And so of an order determining the right to participate in the proceeds of admittedly valid securities. Snow v. Dalton, 203 Fed. 843, 29 Am. Bankr. Rep. 240. And see Hutting Sash & Door Co. v. Stitt, 218 Fed. 1, 133 C. C. A. 641, 33 Am. Bankr. Rep. 251; Luck v. Staples, 255 Fed. 637, 167 C. C. A. 13, 42 Am. St. Rep. 198; Whitney Central Trust & Savings Bank v. United States Const. Co., 250 Fed. 784, 163 C. C. A. 116, 41 Am. Bankr. Rep. 381. But appeal is the proper remedy to review an order in bankruptcy setting aside a deed as a voidable preference. Bridgeton Nat. Bank v. Way, 253 Fed. 731, 165 C. C. A. 325, 42 Am. Bankr. Rep. 204. And see City Nat. Bank v. Slocum (C. C. A.) 272 Fed. 11, 47 Am. Bankr. Rep. 47.

[150] Tefft v. Munsuri, 222 U. S. 114, 32 Sup. Ct. 67, 56 L. Ed. 118, 27 Am. Bankr. Rep. 338.

[151] In re Moore, 166 Fed. 689, 92 C. C. A. 285, 21 Am. Bankr. Rep. 651; In re Kuhn Bros., 234 Fed. 277, 148 C. C. A. 179.

[152] Thompson v. Mauzy, 174 Fed. 611, 98 C. C. A. 457, 23 Am. Bankr. Rep. 489. An order of a court of bankruptcy denying to a creditor a motion to set aside an order of adjudication is reviewable on petition to revise. Armstrong v. Norris, 247 Fed. 253, 159 C. C. A. 347, 40 Am. Bankr. Rep. 735. See Youtsey v. Niswonger, 258 Fed. 16, 169 C. C. A. 154, 44 Am. Bankr. Rep. 109.

[153] Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, 11 Am. Bankr. Rep. 709; Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 22 Am. Bankr. Rep. 1; Tefft v. Munsuri, 222 U. S. 114, 32 Sup. Ct. 67,

to set aside certain conveyances of real estate alleged to have been made in fraud of the bankrupt's creditors, and also to vacate the lien of a mortgage thereon as against the mortgagee, who was not a party to the bankruptcy proceedings and not a creditor of the estate, but a stranger thereto, asserting rights paramount to and independent of those of the estate, the proceeding was held to be a "controversy," as distinguished from a "proceeding in bankruptcy," within the meaning of the statute.[154] And so of a petition by a trustee to have certain adverse claims and liens on property belonging to the estate declared void, and for a sale of the property free and clear of the same,[155] and of a decision that a chattel mortgage on the property of the bankrupt is voidable by the trustee, and that the mortgagee has no lien and no preference in payment out of its proceeds.[156] So, where proceedings are instituted by the trustee to compel the payment to him of the proceeds of a sale of the bankrupt's assets, this is a controversy arising in bankruptcy proceedings,[157] and the same is true of a proceeding on a petition filed by an adverse claimant to recover property from a trustee in

56 L. Ed. 118, 27 Am. Bankr. Rep. 338; Barnes v. Pampel, 192 Fed. 525, 113 C. C. A. 81, 27 Am. Bankr. Rep. 192; Deroshow v. Ott, 134 Fed. 740, 67 C. C. A. 644, 14 Am. Bankr. Rep. 34; Hinds v. Moore, 134 Fed. 221, 67 C. C. A. 149, 14 Am. Bankr. Rep. 1; Mound Mines Co. v. Hawthorn, 173 Fed. 882, 97 C. C. A. 394, 23 Am. Bankr. Rep. 242; Loeser v. Savings Deposit Bank & Trust Co., 163 Fed. 212, 89 C. C. A. 642, 20 Am. Bankr. Rep. 845; Knapp v. Milwaukee Trust Co., 162 Fed. 675, 89 C. C. A. 467, 20 Am. Bankr. Rep. 671; Security Warehousing Co. v. Hand, 143 Fed. 32, 74 C. C. A. 186, 16 Am. Bankr. Rep. 49; Dodge v. Norlin, 133 Fed. 363, 66 C. C. A. 425, 13 Am. Bankr. Rep. 176; John Deere Plow Co. v. McDavid, 137 Fed. 802, 70 C. C. A. 422, 14 Am. Bankr. Rep. 653; In re First Nat. Bank, 135 Fed. 62, 67 C. C. A. 536, 14 Am. Bankr. Rep. 180; Walter Scott & Co. v. Wilson, 115 Fed. 284, 53 C. C. A. 76, 8 Am. Bankr. Rep. 349; Warren v. Tenth Nat. Bank, 9 Blatchf. 193, Fed. Cas. No. 17,201. But see In re Petronio, 220 Fed. 269, 136 C. C. A. 285, 34 Am. Bankr. Rep. 470. A decree rejecting a landlord's claim against a bankrupt, but allowing a lien covering a portion of the rent is reviewable by appeal. Courtney v. Fidelity Trust Co., 219 Fed. 57, 134 C. C. A. 595, 33 Am. Bankr. Rep. 400. An action on the bond of a trustee in bankruptcy is a plenary action, and the judgment therein is not reviewable by petition to revise. United States v. Ruggles, 221 Fed. 256, 137 C. C. A. 109, 34 Am. Bankr. Rep. 91.

154 Barnes v. Pampel, 192 Fed. 525, 113 C. C. A. 81, 27 Am. Bankr. Rep. 192. And see McCarty v. Coffin (C. C. A.) 150 Fed. 307, 18 Am. Bankr. Rep. 148. See Bassett v. Evans, 253 Fed. 532, 165 C. C. A. 202, 42 Am. Bankr. Rep. 587. Where, on a petition by the trustee to sell the property of the bankrupt, a lien claimant files an intervening petition asserting the priority of his lien over a deed of trust, and the trustee under the trust deed files an answer, the question of priority thus raised is a controversy arising in a bankruptcy proceeding, and reviewable only by appeal. Feick v. Stephens, 250 Fed. 191, 162 C. C. A. 327, 41 Am. Bankr. Rep. 333.

155 Thomas v. Woods, 173 Fed. 585, 97 C. C. A. 535, 26 L. R. A. (N. S.) 1180, 19 Ann. Cas. 1080, 23 Am. Bankr. Rep. 132. See In re Streator Metal Stamping Co., 205 Fed. 280, 123 C. C. A. 444, 30 Am. Bankr. Rep. 55.

156 Dodge v. Norlin, 133 Fed. 363, 66 C. C. A. 425, 13 Am. Bankr. Rep. 176.

157 Mason v. Wolkowich, 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765, 17 Am. Bankr. Rep. 709.

bankruptcy.[158] So also is a dispute between a receiver in bankruptcy and an outside person as to whether a contract was made between them for the sale and purchase of property of the estate, brought before the bankruptcy court for determination,[159] and an order of the court of bankruptcy requiring the bankrupt's attorney to account for a payment received in contemplation of bankruptcy,[160] and an order to show cause why petitioners should not be punished for contempt for violating an injunction of the court of bankruptcy in a collateral matter.[161] And where a claim to personal property sold by the claimant to the bankrupt under a conditional sale was denied, because not filed within a year after the adjudication in bankruptcy, and also because the state law regulating such sales had not been complied with, the decision of the district court may be reviewed on appeal, as being a "controversy arising in bankruptcy."[162]

§ 48. **Reviewing Discretionary Action of District Court.**—In the ordinary course of a proceeding in bankruptcy, there are many matters which are not governed by fixed and invariable rules, but are necessarily confided to the sound judicial discretion of the judge of the bankruptcy court, to be exercised upon a consideration of the peculiar facts and circumstances of the case and in accordance with equitable principles. His decisions upon these matters may be brought before the circuit court of appeals for review, either by appeal or petition for revision, according as the one procedure or the other is appropriate. But the appellate courts have established and will apply the rule that, in cases of this kind, they will not reverse the decision of the court below unless it is unmistakably wrong, or unless a plain abuse of discretion is

[158] Smith v. Means, 148 Fed. 89, 78 C. C. A. 10, 17 Am. Bankr. Rep. 433; Liddon & Bro. v. Smith, 135 Fed. 43, 67 C. C. A. 517, 14 Am. Bankr. Rep. 204; American Piano Co. v. Heazel, 240 Fed. 410, 153 C. C. A. 336, 38 Am. Bankr. Rep. 677; Howard D. Thomas Co. v. Beharrell, 229 Fed. 691, 144 C. C. A. 101, 36 Am. Bankr. Rep. 688; Gibbons v. Goldsmith, 222 Fed. 826, 138 C. C. A. 252, 35 Am. Bankr. Rep. 40; In re H. L. Herbert & Co. (C. C. A.) 263 Fed. 351, 45 Am. Bankr. Rep. 20; In re Gold, 210 Fed. 410, 127 C. C. A. 142, 31 Am. Bankr. Rep. 18; Scandinavian-American Bank v. Sabin, 227 Fed. 579, 142 C. C. A. 211, 36 Am. Bankr. Rep. 151; Petition of National Discount Co. (C. C. A.) 272 Fed. 570, 47 Am. Bankr. Rep. 12; In re Toole (C. C. A.) 270 Fed. 195, 46 Am. Bankr. Rep. 243. See In re Pierson, 233 Fed. 519, 147 C. C. A. 405, 37 Am. Bankr. Rep. 10. Denial of a petition filed by a claimant of money which had been turned over to the court of bankruptcy, asking to intervene against the trustee, was held reviewable only by petition to revise, and not by appeal. In re Consumers' Packing Co. (C. C. A.) 268 Fed. 198, 46 Am. Bankr. Rep. 338.

[159] In re J. Jungmann, Inc., 186 Fed. 302, 108 C. C. A. 380, 26 Am. Bankr. Rep. 401. And see Dalton v. Humphreys, 242 Fed. 777, 155 C. C. A. 365, 39 Am. Bankr. Rep. 360.

[160] In re Raphael (C. C. A.) 192 Fed. 874.

[161] Morehouse v. Pacific Hardware & Steel Co., 177 Fed. 337, 100 C. C. A. 647, 24 Am. Bankr. Rep. 178.

[162] Nauman Co. v. Bradshaw (C. C. A.) 193 Fed. 350, 27 Am. Bankr. Rep. 565.

shown.[163] Thus, a circuit court of appeals will not attempt to control the discretion of the district court in the matter of appointing and removing referees.[164] And where the trustee selected by the creditors has been approved by the district judge, the appointment will not be disturbed unless an abuse of discretion is shown.[165] Again, the bankruptcy act provides that suits pending against a bankrupt "may be stayed" for a period of twelve months or until the question of his discharge is determined. This invests the bankruptcy court with authority, but does not impose upon it an invariable duty; and the granting or refusing of an order staying a pending suit rests in the discretion of the district court, and its action will not be interfered with by the appellate court unless it is plain that such discretion has been abused.[166] So, in the examination of third persons as witnesses in bankruptcy proceedings and the scrutiny of their books and papers, the court of bankruptcy should see to it that the examination is confined to the legitimate objects of such an investigation, that is, the discovery of assets of the bankrupt or of grounds of opposition to his discharge. But in this matter it is invested with a wide discretion, and a manifest abuse of such discretion must be shown before the appellate court will interfere.[167] The same rule has been applied on review of the action of the court of bankruptcy in refusing to permit an amendment of a petition in involuntary bankruptcy for the purpose of inserting additional alleged acts of bankruptcy,[168] its denying to a creditor the right to amend his specifica-

[163] In re J. B. Judkins Co. (C. C. A.) 205 Fed. 892, 30 Am. Bankr. Rep. 529; Blackstone v. Everybody's Store (C. C. A.) 207 Fed. 752, 30 Am. Bankr. Rep. 497; Fallows v. Continental & Commercial Trust & Savings Bank, 235 U. S. 300, 35 Sup. Ct. 29, 59 L. Ed. 238; In re Graff, 250 Fed. 997, 163 C. C. A. 247, 41 Am. Bankr. Rep. 32; Babbitt v. Read, 240 Fed. 694, 153 C. C. A. 492, 39 Am. Bankr. Rep. 508; In re Margolies (C. C. A.) 266 Fed. 203, 45 Am. Bankr. Rep. 412. Thus, rejection of charges against a receiver in bankruptcy for expenses incurred under receiver's orders or contracts for the preservation or care of the bankrupt's estate is within the discretion of the bankruptcy court, and its action thereon will not be reviewed on appeal. O'Brien v. Ely (C. C. A.) 195 Fed. 64, 28 Am. Bankr. Rep. 247.

[164] Birch v. Steele, 165 Fed. 577, 91 C. C. A. 415, 21 Am. Bankr. Rep. 539.

[165] In re Merritt Const. Co., 219 Fed. 555, 135 C. C. A. 323, 33 Am. Bankr. Rep. 616.

[166] In re Lesser, 99 Fed. 913, 40 C. C. A. 177, 3 Am. Bankr. Rep. 758; New River Coal Land Co. v. Ruffner Bros., 165 Fed. 881, 91 C. C. A. 559, 20 Am. Bankr. Rep. 100; In re Guanacevi Tunnel Co. (C. C. A.) 201 Fed. 316, 29 Am. Bankr. Rep. 229. And the determination of the district judge as to whether administration of a mortgaged stock of merchandise shall be left to the state court, which had taken jurisdiction, or be brought into bankruptcy, will not be reviewed unless his discretion was clearly abused. Bank of Dillon v. Murchison, 213 Fed. 147, 129 C. C. A. 499, 31 Am. Bankr. Rep. 740.

[167] In re Horgan, 98 Fed. 414, 39 C. C. A. 118, 3 Am. Bankr. Rep. 253.

[168] Pittsburgh Laundry Supply Co. v. Imperial Laundry Co., 154 Fed. 662, 83 C. C. A. 486, 18 Am. Bankr. Rep. 756. And see Sabin v. Blake-McFall Co., 223

tions in opposition to the bankrupt's application for discharge,[169] its action in granting an alleged bankrupt more than the statutory five days in which to answer,[170] or in taking off the trustee's default in respect to opposing the bankrupt's discharge and allowing him to file objections,[171] the dismissal of a petition in involuntary bankruptcy for want of prosecution,[172] the refusal of a judge sitting in bankruptcy to sanction an arrangement between the bankrupt and certain of his creditors and persons who had received preferential transfers,[173] the refusal to allow a commission to a broker who had negotiated a sale of property of the bankrupt,[174] the action of the district court in fixing the time; terms, and conditions of a sale of the bankrupt's property,[175] and its adoption or rejection of a verdict of a jury which was taken as advisory only.[176] Even on the hearing of an application for discharge there may be room for the exercise of a judicial discretion which should not be interfered with on appeal. Thus, where the granting of a discharge to a bankrupt was objected to on the ground that he had fraudulently concealed the proceeds of property sold, and there was reasonable ground for the action of the district judge in discrediting his testimony given in explanation, the exercise of his discretion will not be reviewed.[177]

In view of the wide discretionary power of the court of bankruptcy over the allowance and fixing of fees to counsel, receivers, and others, its decisions on these matters will not be reversed on review unless a plain abuse of discretion appears.[178] Thus, on a petition to revise an order making certain allowances to a bankrupt's receiver and his counsel, where the record merely showed the receipts and disbursements and that nearly half of the assets were used for expenses of administration, this was held not sufficient to show an abuse of the discretion vested in the court of bankruptcy.[179]

Fed. 501, 139 C. C. A. 49, 35 Am. Bankr. Rep. 179.

[169] In re Carley, 117 Fed. 130, 55 C. C. A. 146, 8 Am. Bankr. Rep. 720.

[170] Blackstone v. Everybody's Store, 207 Fed. 752, 125 C. C. A. 290, 30 Am. Bankr. Rep.. 497.

[171] In re Horowitz, 250 Fed. 106, 162 C. C. A. 278, 41 Am. Bankr. Rep. 369.

[172] In re Levi & Klauber, 142 Fed. 962, 74 C. C. A. 132, 15 Am. Bankr. Rep. 294.

[173] Mulford v. Fourth Street Nat. Bank, 157 Fed. 897, 85 C. C. A. 225, 19 Am. Bankr. Rep. 742.

[174] Gold v. South Side Trust Co., 179 Fed. 210, 102 C. C. A. 476, 24 Am. Bankr. Rep. 578.

[175] Schuler v. Hassinger, 177 Fed. 119, 100 C. C. A. 539, 24 Am. Bankr. Rep. 184; In re Throckmorton, 196 Fed. 656, 116 C. C. A. 348, 28 Am. Bankr. Rep. 487. The discretion of the bankruptcy court in approving or setting aside a public sale of the bankrupt's property will not be disturbed or interfered with unless abused. Jacobsohn v. Larkey, 245 Fed. 538, 157 C. C. A. 650, L. R. A. 1918C, 1176, 40 Am. Bankr. Rep. 563.

[176] Oil Well Supply Co. v. Hall, 128 Fed. 875, 63 C. C. A. 343, 11 Am. Bankr. Rep. 738.

[177] Seigel v. Cartel, 164 Fed. 691, 90 C. C. A. 512.

[178] In re Grant, 238 Fed. 132, 151 C. C. A. 208, 38 Am. Bankr. Rep. 210; In re Kinnane Co.'s Estate, 242 Fed. 769, 155 C. C. A. 357, 39 Am. Bankr. Rep. 593.

[179] In re Cash-Papworth Grow-Sir, 210

§ 49. Time of Taking Appeal or Petition for Review.—As to appeals to the Supreme Court of the United States, it is provided by General Order No. 36 that an appeal to that court "from a circuit court of appeals, or from the supreme court of a territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree." But it is held that this limitation does not apply to a writ of error from the federal supreme court to a court of bankruptcy, presenting the question of the jurisdiction of the latter to make an adjudication of bankruptcy, but such proceeding is governed by the two-year limitation fixed by other statutes.[180] But where the limitation of thirty days is applicable, the time cannot be extended by filing a petition for rehearing after the thirty days have expired.[181] The same order requires that the court below, at or before the time of entering the judgment, shall make and file findings of fact and conclusions of law. A sufficient compliance with this direction is shown where, the appeal having been taken within the thirty days, the circuit court of appeals made its findings of fact and conclusions of law a part of the record by an order made within the thirty days, directing the same to be filed nunc pro tunc as of the date of the judgment.[182]

As to appeals from a court of bankruptcy to a circuit court of appeals, in the three cases specified in the twenty-fifth section of the bankruptcy act, the requirement is that "such appeal shall be taken within ten days after the judgment appealed from has been rendered." In connection with this provision is to be read another section of the act, which directs that "whenever time is enumerated by days in this act, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day

Fed. 24, 126 C. C. A. 604, 31 Am. Bankr. Rep. 709.

[180] Frederic L. Grant Shoe Co. v. W. M. Laird Co., 212 U. S. 445, 29 Sup. Ct. 332, 53 L. Ed. 591, 21 Am. Bankr. Rep. 484. So an appeal to the Supreme Court from a decree of a circuit court of appeals on a bill in equity brought by a trustee in bankruptcy to set aside a transfer of property by the bankrupt, alleged to have been made in fraud of creditors, need not be taken within the thirty days prescribed by the general orders, but as the appellate jurisdiction is under, or the same as that under, the circuit court of appeals act of 1891, the appeal is in time if taken within a year. Thomas v. Sugarman, 218 U. S. 129, 30 Sup. Ct. 650, 54 L. Ed. 967, 29 L. R. A. (N. S.) 250. In effect, the limitation of time in the bankruptcy act and in the general orders relates only to appeals taken expressly under the bankruptcy statute, and does not apply to an appeal from a decision rendered on a formal appeal taken under section 24a of the act in a "controversy" arising in a bankruptcy proceeding. Hobbs v. Head & Dowst Co. (C. C. A.) 191 Fed. 811, 27 Am. Bankr. Rep. 484.

[181] Conboy v. First Nat. Bank, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. Ed. 128, 16 Am. Bankr. Rep. 773.

[182] Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, 22 Am. Bankr. Rep. 1.

last included shall be the next day thereafter which is not a Sunday or a legal holiday." [183] A judgment of a court of bankruptcy is presumptively "rendered" on the date of its filing with the clerk, and the ten days for taking an appeal will begin to run from that time, notwithstanding the order bears an earlier date.[184] Where an appeal in a proper case is prayed and allowed within the ten days, as prescribed by the statute, the failure to file a bond and serve the citation until a few days after such period will not necessitate a dismissal of the appeal, no material prejudice being shown.[185] But the requirement as to the time of taking the appeal itself is imperative. If the appeal is not taken within the ten days limited, the appellate court will have no jurisdiction of the case and must dismiss the attempted appeal.[186] An appeal from an adjudication of bankruptcy does not stay further proceedings in the case (such as ruling the bankrupt to file his schedules), unless a supersedeas is also taken.[187]

The very short time allowed for taking an appeal in these cases has led to numerous attempts to obtain a review by some indirect method

[183] Bankruptcy Act 1898, § 31. See In re York, 1 Abb. U. S. 503, 4 N. B. R. 479, Fed. Cas. No. 18,139. The word "holiday" includes "Christmas, the fourth of July, the twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving." Bankruptcy Act 1898, § 1, clause 14.

[184] Peterson v. Nash Bros., 112 Fed. 311, 50 C. C. A. 260, 55 L. R. A. 344, 7 Am. Bankr. Rep. 181; First Nat. Bank of Paris v. Yerkes, 238 Fed. 278, 151 C. C. A. 294, 38 Am. Bankr. Rep. 136. The time for taking an appeal from a judgment entered nunc pro tunc as of an earlier date runs from the actual entry of the judgment, not from the earlier date. In re Stafford (D. C.) 240 Fed. 155, 39 Am. Bankr. Rep. 469. Where an order of adjudication was set aside on motion, from which no appeal was taken, and a subsequent independent order of adjudication was made after further hearing, the time for taking an appeal was held to run from the date of the second order. Cameron v. National Surety Co. (C. C. A.) 272 Fed. 874, 47 Am. Bankr. Rep. 67.

[185] Columbia Ironworks v. National Lead Co., 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645, 11 Am. Bankr. Rep. 340; Morris v. Brush, 2 Woods, 354, 14 N. B. R. 371, Fed. Cas. No. 9,828; Fellows v. Burnap, 14 Blatchf. 63, Fed. Cas. No. 4,721. Compare Norcross v. Nave & McCord Mercantile Co., 101 Fed. 796, 42 C. C. A. 29, 4 Am. Bankr. Rep. 317. An appeal is taken in time where the petition for appeal was filed within ten days and promptly presented, though allowed more than ten days after the decree. Robertson Banking Co. v. Chamberlain, 228 Fed. 500, 143 C. C. A. 82, 36 Am. Bankr. Rep. 198.

[186] Williams Bros. v. Savage, 120 Fed. 497, 56 C. C. A. 647, 9 Am. Bankr. Rep. 720; Nazima Trading Co. v. Martin (C. C. A.) 164 Fed. 838, 21 Am. Bankr. Rep. 159; Sedgwick v. Fridenberg, 11 Blatchf. 77, Fed. Cas. No. 12,611; In re Alexander, Chase, 295, 3 N. B. R. 29, Fed. Cas. No. 160; In re Kyler, 6 Blatchf. 514, 3 N. B. R. 46, Fed. Cas. No. 7,957; In re Place, 8 Blatchf. 302, 4 N. B. R. 541, Fed. Cas. No. 11,200; Ex parte Woollen, 104 U. S. 300, 26 L. Ed. 768; Wood v. Bailey, 21 Wall. 640, 12 N. B. R. 132, 22 L. Ed. 689. And see Rhame v. Southern Cotton Oil Co., 230 Fed. 403, 144 C. C. A. 545, 35 Am. Bankr. Rep. 732. But it seems that an appeal not taken in time may be treated as a petition to revise (which would be in time), where the only question raised is one of law. Graham v. Faith, 253 Fed. 32, 165 C. C. A. 52, 41 Am. Bankr. Rep. 590.

[187] In re Brady, 169 Fed. 152, 21 Am. Bankr. Rep. 364.

of proceeding after the expiration of the time. But the courts have generally disapproved such devices. Some have gone so far as to declare that the time limited by the statute cannot be extended or revived by any subsequent proceeding whatever.[188] Thus, when the right to appeal from an adjudication of bankruptcy has been lost by the expiration of the ten days, it cannot be revived by moving to vacate the adjudication,[189] nor by the subsequent entry of an alias adjudication.[190] But the favorite method of seeking to recover a right of appeal lost by the expiration of the limited time has been to move for a rehearing. In a case under the act of 1867, where the omission to take an appeal in due time arose from a mistake in the selection of the remedy (the appellant thinking that he should take a petition for review), the Supreme Court of the United States suggested that perhaps the district court would grant a review of its own decree, in order that a regular appeal might, if necessary, be taken.[191] And in one of the earlier decisions under the present statute this course was taken, the district court granting a rehearing to a trustee in bankruptcy who had lost his right of appeal by the expiration of the time prescribed, but without culpable neglect on his part, for the mere purpose of reviving such right.[192] But the general weight of opinion is against this practice. The doctrine is apparently established that, while the district court has power to grant a rehearing for the sole purpose of reviving a right of appeal, the effect is to nullify the explicit provisions of the statute, which, no doubt, were inserted for very good reasons, and therefore if the court is of opinion that there is no sufficient ground for a rehearing on the merits (aside from any question of appealing) it should not be granted on a mere pretense and for the real purpose of permitting an appeal to be taken.[193] But if a petition for rehearing is filed within ten days after the judgment or order complained of, an appeal taken within ten days after the court's ruling on the petition will be in time.[194]

[188] Brady v. Bernard, 170 Fed. 576, 95 C. C. A. 656, 22 Am. Bankr. Rep. 342.

[189] In re Billing, 145 Fed. 395, 17 Am. Bankr. Rep. 80; In re Goldberg, 167 Fed. 808, 21 Am. Bankr. Rep. 828.

[190] In re Berkebile, 144 Fed. 577, 75 C. C. A. 333, 16 Am. Bankr. Rep. 277.

[191] Stickney v. Wilt, 23 Wall. 150, 11 N. B. R. 97, 23 L. Ed. 50.

[192] In re Wright, 96 Fed. 820, 3 Am. Bankr. Rep. 184.

[193] Conboy v. First Nat. Bank, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. Ed. 128, 16 Am. Bankr. Rep. 773; In re Hudson Clothing Co., 140 Fed. 49, 15 Am. Bankr. Rep. 254; Morgan v. Benedum, 157 Fed. 232, 84 C. C. A. 675, 19 Am. Bankr. Rep. 601; In re Girard Glazed Kid Co., 129 Fed. 841, 12 Am. Bankr. Rep. 295; Rode & Horn v. Phipps (C. C. A.) 195 Fed. 414, 27 Am. Bankr. Rep. 827; In re Thompson (C. C. A.) 264 Fed. 913, 45 Am. Bankr. Rep. 500.

[194] Mills v. J. H. Fisher & Co., 159 Fed. 897, 87 C. C. A. 77, 20 Am. Bankr. Rep. 237. Where, after an order allowing a claim in bankruptcy, a rehearing is granted, the time for taking an appeal is extended and runs from the time the order is made final. Todd v.

In the three cases specified in the twenty-fifth section of the statute, viz., appeals from a judgment adjudging or refusing to adjudge the defendant a bankrupt, from a judgment granting or denying a discharge,[195] and from a judgment allowing or rejecting a debt or claim of five hundred dollars or over,[196] the ten-day limitation is imperative, and these cases cannot be otherwise appealed or after that time. But this limitation does not apply to appeals in "controversies arising in bankruptcy proceedings," or independent proceedings instituted for the recovery of assets of the estate, or to set aside alleged preferences, which are governed by the general provisions regulating appeals to the circuit courts of appeals, and may be brought within the time fixed by the statute creating those courts, which is six months.[197]

When the proceeding is by petition for revision, neither the statute nor the general orders prescribe any limitation of time. In the second circuit, Rule 38 of the circuit court of appeals directs that the petition for revision must be filed and served within ten days after the entry of the order sought to be reviewed, unless, before the expiration of that time, and for cause shown, the judge of the court of bankruptcy shall make an order enlarging the time. This rule is enforced, and it is held that stipulations by the parties cannot take the place of the discretionary order of enlargement by the bankruptcy court.[198] In the first and eighth

Alden, 245 Fed. 462, 157 C. C. A. 624, 40 Am. Bankr. Rep. 323.

[195] The same provision applies to an appeal from an order denying an application to revoke a bankrupt's discharge. Thompson v. Mauzy, 174 Fed. 611, 98 C. C. A. 457, 23 Am. Bankr. Rep. 489. And to an appeal from an order confirming a composition. In re Brookstone Mfg. Co., 239 Fed. 697, 152 C. C. A. 531, 39 Am. Bankr. Rep. 552.

[196] Postlethwaite v. Hicks, 165 Fed. 897, 91 C. C. A. 575, 21 Am. Bankr. Rep. 70.

[197] Massachusetts Bonding & Ins. Co. v. Kemper, 220 Fed. 847, 136 C. C. A. 593, 34 Am. Bankr. Rep. 80; Bank of Ragland v. Hudson, 247 Fed. 241, 159 C. C. A. 335, 41 Am. Bankr. Rep. 61; Youtsey v. Niswonger, 258 Fed. 16, 169 C. C. A. 154, 44 Am. Bankr. Rep. 109; Boonville Nat. Bank v. Blakey, 107 Feb. 891, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13; Steele v. Buel, 104 Fed. 968, 44 C. C. A. 287, 5 Am. Bankr. Rep. 165; In re Youngstrom, 153 Fed. 98, 82 C. C. A. 232, 18 Am. Bankr. Rep. 572; Kenova Loan & Trust Co. v. Graham, 135 Fed. 717, 68 C. C. A. 355, 14 Am. Bankr. Rep. 313; In re Martin, 201 Fed. 31, 119 C. C. A. 363, 29 Am. Bankr. Rep. 935.

[198] In re John M. Linck Const. Co., 225 Fed. 488, 140 C. C. A. 18, 34 Am. Bankr. Rep. 860; In re Vanoscope Co., 233 Fed. 53, 147 C. C. A. 123, 36 Am. Bankr. Rep. 778; In re Armann, 247 Fed. 483, 159 C. C. A. 537, 40 Am. Bankr. Rep. 666; Feder v. Goetz (C. C. A.) 264 Fed. 619, 45 Am. Bankr. Rep. 57; In re Tanenhaus, 211 Fed. 971, 128 C. C. A. 469, 33 Am. Bankr. Rep. 648; In re Strobel, 160 Fed. 916, 88 C. C. A. 98, 20 Am. Bankr. Rep. 22; In re Brown, 174 Fed. 339, 98 C. C. A. 211, 23 Am. Bankr. Rep. 93; In re Light, 174 Fed. 341, 98 C. C. A. 213. But where an extension of time for filing a petition to revise is obtained, the petition may be considered though not filed within the ten-day period prescribed by the rule of court. In re Armann, 247 Fed. 954, 160 C. C. A. 618, 41 Am. Bankr. Rep. 50; In re Grant, 238 Fed. 132, 151 C. C. A. 208, 38 Am. Bankr. Rep. 210. Where the rule of court requires a petition to revise to be filed within 20 days, but authorizes the District Judge to en-

circuits, the time has been fixed at six months,[199] that being the time allowed for appeals in cases other than bankruptcy proceedings. The reasoning of these courts is that the petition is in the nature of an appeal, and since the matter brought up is not within the three classes of cases in which the bankruptcy law imposes a limitation of ten days, it must be governed by the general law of appeals. Or else they proceed on the theory that a petition for revision more nearly resembles a bill of review than any other known proceeding, and it is the settled rule in equity in the federal courts that a bill of review must be filed within the time allowed by statute for appeal.[200] But elsewhere it is held, as it was held under the act of 1867, which also omitted to prescribe any particular time within which a petition for revision must be filed, that the application must be made within a reasonable time, in order that the purpose of the act to effect a speedy settlement of the bankrupt's affairs may not be thwarted, but that it should not be dismissed unless it appears that there has been an unreasonable delay, amounting to laches, and operating to the prejudice of parties in interest.[201] What is a reasonable time must of course depend upon the particular circumstances. But it has been held that a delay of thirty days is not too great a time,[202] that the lapse of more than six months is not necessarily an imperative reason for dismissing the petition,[203] but that (in view of the particular circumstances) a delay of six months and twelve days does not answer the requirement of reasonably prompt action,[204] that neglect to file the petition for over seven months amounts to laches,[205] and that a petition filed three years after the matter sought to be reviewed had been disposed of was clearly too late.[206]

large the time for such filing, it is not imperatively necessary that jurisdiction to extend the time should be exercised within the original 20 days. In re De Camp Glass Casket Co. (C. C. A.) 272 Fed. 558, 47 Am. Bankr. Rep. 1.

[199] In re Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496; In re Thomlinson Co., 154 Fed. 834, 83 C. C. A. 550, 18 Am. Bankr. Rep. 691; In re Holmes, 142 Fed. 391, 73 C. C. A. 491, 15 Am. Bankr. Rep. 689.

[200] Reed v. Stanley (C. C. A.) 97 Fed. 521.

[201] First Nat. Bank v. Cooper, 20 Wall. 171, 22 L. Ed. 273; In re Beck, 31 Fed. 554; In re New York Economical Printing Co., 106 Fed. 839, 45 C. C. A. 665, 5 Am. Bankr. Rep. 697; In re Groetzinger & Sons, 127 Fed. 124, 62 C. C. A. 124, 11 Am. Bankr. Rep. 467; In re Milgraum, 133 Fed. 802, 13 Am. Bankr. Rep. 337; In re Wink (D. C.) 206 Fed. 348, 30 Am. Bankr. Rep. 298. The bankruptcy court has power, upon cause shown, to suspend the rule requiring petitions for review to be set down within a limited number of days. In re Libby (D. C.) 253 Fed. 278.

[202] Littlefield v. Delaware & H. Canal Co., 3 Cliff. 371, 4 N. B. R. 257, Fed. Cas. No. 8,400.

[203] In re Groetzinger & Sons, 127 Fed. 124, 62 C. C. A. 124, 11 Am. Bankr. Rep. 467; In re Kinnane Co.'s Estate, 242 Fed. 769, 155 C. C. A. 357, 39 Am. Bankr. Rep. 593.

[204] In re Milgraum, 133 Fed. 802, 13 Am. Bankr. Rep. 337.

[205] First Nat. Bank v. Peavy, 133 Fed. 1019, 66 C. C. A. 125.

[206] Blanchard v. Ammons, 183 Fed. 556, 106 C. C. A. 102, 25 Am. Bankr. Rep. 590.

The right of review on petition can be claimed only in respect to some proceeding which is pending in the court of bankruptcy.[207] But the supervisory jurisdiction may be exercised by the circuit court of appeals before the district court has taken final or even interlocutory action on the matter in question, if it has been considered and an opinion rendered by the latter court.[208] And exceptions to a proposed distribution of the bankrupt's estate must be filed before the final decree of confirmation is entered; exceptions taken, and a petition for review based thereon, if not filed until after the confirmation and after the final dividend has been distributed in accordance with it, will not be considered.[209]

§ 50. Parties to Appeal or Review.—Where a single order or judgment is made by a district court in a bankruptcy proceeding, which determines a question affecting alike different claimants, they may unite in an appeal therefrom, although their interests are several and distinct,[210] and although some complain of one alleged error and some of another, since, on such an appeal, all prior rulings are reviewable.[211] And if necessary parties are not joined in an appeal, in due time, it will become inoperative in so far as it challenges or affects their rights.[212] Specially in regard to an appeal from a decree of the district court making an adjudication in involuntary bankruptcy, it is held that creditors who appear in opposition to the petition and contest the adjudication have a right to appeal from the decree.[213] So also in regard to opposition to a bankrupt's discharge.[214] But a bankrupt whose application to have a composition confirmed was not formally opposed by creditors cannot appeal from a decree of refusal, there being a want of parties.

[207] In re Alexander, Chase, 295, 3 N. B. R. 29, Fed. Cas. No. 160.

[208] In re Kyle (C. C.) 181 Fed. 617. The time to file a petition for review commences from the entry of orders directing payment to a trustee in bankruptcy and denying an application to open the case for additional testimony. In re Place (D. C.) 224 Fed. 778, 35 Am. Bankr. Rep. 426. But a petition to review a proceeding for the adjudication of a bankrupt must not be filed prematurely. It is necessary that the issues raised by the answer should first be tried, and that an adjudication should be granted or refused. In re Berthoud, 238 Fed. 797, 151 C. C. A. 647, 38 Am. Bankr. Rep. 440.

[209] In re Heebner, 132 Fed. 1003, 13 Am. Bankr. Rep. 256.

[210] Crim v. Woodford, 136 Fed. 34, 68 C. C. A. 584, 14 Am. Bankr. Rep. 302.

[211] Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 17 Am. Bankr. Rep. 609.

[212] Gray v. Grand Forks Mercantile Co., 138 Fed. 344, 70 C. C. A. 634, 14 Am. Bankr. Rep. 780.

[213] In re Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; In re Dandridge & Pugh, 209 Fed. 838, 126 C. C. A. 562, 31 Am. Bankr. Rep. 15. The bankrupt himself must be a party to an appeal from the adjudication, but though not originally joined, he may make himself a party by voluntary appearance and waiver of notice. Hill v. Western Electric Co., 214 Fed. 243, 130 C. C. A. 613, 32 Am. Bankr. Rep. 333.

[214] Bankruptcy Act 1898, §§ 14, 25a. A creditor's right to be heard on appeal with respect to the granting of the bankrupt's discharge cannot be prejudiced by the acceptance of a proposed compromise

as the question is merely between the bankrupt and the court.[215] But if a composition is confirmed, and the assenting creditors have received the amounts to which they are entitled, they are necessary parties to an appeal by another creditor.[216]

In the case where a creditor presents a claim against the estate of the bankrupt, and another creditor objects to and contests it, and it is allowed, the authorities are not agreed as to whether an appeal may be taken directly by the contesting creditor.[217] Some decisions maintain that, as his share of the estate will be increased or diminished by the decision of the question at issue, he is so directly affected by the ruling of the district court as to be entitled to appeal in his own name.[218] But other authorities hold the view that the contesting creditor is not the only person whose pecuniary interests will be affected, but the same is true of all the creditors of the estate alike, and consequently the appeal can only be taken by the trustee in bankruptcy, who is the representative of all the creditors.[219] However, if the trustee, in such a case, refuses to appeal, the objecting creditor may move the district court to direct the trustee to take an appeal or to permit the creditor to prosecute an appeal in the name of the trustee. The granting of such leave is in the discretion of the court, and may be conditioned on the payment of the costs of the litigation by the objecting creditor, if the appeal is unsuccessful.[220] In one case, the circuit court of appeals refused to dismiss an appeal taken by the objecting creditor, instead of by the trustee, where it appeared that the latter had refused to allow the use of his name for the purpose of an appeal, when the time for appealing

by a majority of the other creditors. In re Doyle, 220 Fed. 434, 137 C. C. A. 28, 34 Am. Bankr. Rep. 28.

215 Ross v. Saunders, 105 Fed. 915, 45 C. C. A. 123, 5 Am. Bankr. Rep. 350.

216 Marshall Field & Co. v. Wolf & Bro. Dry Goods Co., 120 Fed. 815, 57 C. C. A. 326, 9 Am. Bankr. Rep. 693. But see In re Gottlieb (C. C. A.) 262 Fed. 730, 44 Am. Bankr. Rep. 464, 45 Am. Bankr. Rep. 180, holding that, to an appeal from an order confirming a composition by a creditor who objected on grounds which go to the bankrupt's right to a discharge, other creditors are not necessary parties.

217 Where, after proof of a claim against a bankrupt's estate by an importer of wool, it was assigned to another, and later expunged, on a holding that the claim belonged to a bank, there was a sufficient controversy between the bank and the assignee of the claim to entitle the latter to appeal. Assets Realization Co. v. Sovereign Bank of Canada, 210 Fed. 156, 126 C. C. A. 662.

218 In re Roche, 101 Fed. 956, 42 C. C. A. 115, 4 Am. Bankr. Rep. 369; Gray v. Grand Forks Mercantile Co., 138 Fed. 344, 70 C. C. A. 634, 14 Am. Bankr. Rep. 780; In re Creech Bros. Lumber Co., 240 Fed. 8, 153 C. C. A. 44, 39 Am. Bankr. Rep. 487.

219 Chatfield v. O'Dwyer, 101 Fed. 797, 42 C. C. A. 30, 4 Am. Bankr. Rep. 313; Foreman v. Burleigh, 109 Fed. 313, 48 C. C. A. 376, 6 Am. Bankr. Rep. 230.

220 Chatfield v. O'Dwyer, 101 Fed. 797, 42 C. C. A. 30. And see In re National Pressed Brick Co., 212 Fed. 878, 129 C. C. A. 398; Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 89 C. C. A. 605, 20 Am. Bankr. Rep. 919.

had so nearly expired that it was impossible to obtain an order requiring him to consent in time, and that the district court had subsequently made an order that the appeal taken should be continued in the name of the trustee in connection with the appealing creditor.[221]

Where the proceeding is by petition for revision, instead of appeal, greater latitude is permissible, as this somewhat summary and exceptional procedure is not governed by the rules relating to appeals proper.[222] But still, there must be, in the language of the statute, a "party aggrieved," in order to sustain the petition.[223] A person who is not a party to the bankruptcy proceeding at all cannot file such a petition.[224] Nor will the appellate court review an order or decision at the instance of a petitioner who cannot be in any manner prejudiced by it,[225] or one who has no longer any interest in the particular matter to be determined.[226] So, where an order requiring a bankrupt to turn over to his trustee a life insurance policy which he had assigned to another person prior to the adjudication does not purport to affect the rights of the assignee, neither such assignee nor the bankrupt can be heard to complain of it, the former because his rights are not in jeopardy, the latter because his title, whatever it was, passed to the trustee by operation of law.[227] The bankrupt himself may bring a petition for revision. And the fact that he has accepted the benefit of a decision of the referee allowing him certain personal property exemptions, does not preclude him from appealing from so much of the same order as relates to his homestead exemption.[228] Any lien creditor may maintain a petition for revision of the proceedings of the court below,[229] including a judgment creditor who has proved his claim.[230] And on the other hand, where claims adverse or paramount to the rights of the estate in bankruptcy are put forward by attaching or other creditors, the trustee is a proper party to maintain a petition for revision, as the representative of creditors in general.[231] A statement by counsel that they are authorized by a cor-

[221] McDaniel v. Stroud, 106 Fed. 486, 45 C. C. A. 446, 5 Am. Bankr. Rep. 685.

[222] In re Jemison Mercantile Co., 112 Fed. 966, 50 C. C. A. 641, 7 Am. Bankr. Rep. 588.

[223] An alleged bankrupt is not a "party aggrieved" by an order for the examination of his wife, and he cannot maintain a petition to revise the same. In re Weidenfeld, 254 Fed. 677, 166 C. C. A. 175, 42 Am. Bankr. Rep. 425.

[224] Alabama & C. R. Co. v. Jones, 7 N. B. R. 145, Fed. Cas. No. 127.

[225] In re Shoe & Leather Reporter, 129 Fed. 588, 64 C. C. A. 156, 12 Am. Bankr. Rep. 248.

[226] In re Baker, 104 Fed. 287, 43 C. C. A. 536, 4 Am. Bankr. Rep. 778.

[227] In re Madden, 110 Fed. 348, 49 C. C. A. 83, 6 Am. Bankr. Rep. 614.

[228] In re Letson, 157 Fed. 78, 84 C. C. A. 582, 19 Am. Bankr. Rep. 506.

[229] In re Taliafero, 3 Hughes, 422, Fed. Cas. No. 13,736.

[230] Clark v. Pidcock, 129 Fed. 745, 64 C. C. A. 273, 12 Am. Bankr. Rep. 309.

[231] In re Glenn Iron Works, 20 Fed. 674; In re Utt, 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383.

poration to file such a petition, for a review of proceedings in bankruptcy against the corporation, and to appear for it in the appellate court, will be taken as conclusive evidence of their authority, in the absence of proof to the contrary.[232]

§ 51. Practice on Appeal.—Since a proceeding in bankruptcy is in the nature of a suit in equity, and since the statute provides that "appeals as in equity cases" may be taken in bankruptcy, the practice on an appeal in bankruptcy is governed by substantially the same rules as an appeal in equity, except where otherwise directed.[233] General Order No. 36 directs that "appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States."[234] The statute itself directs that "such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."[235]

Where a creditor desires to appeal from the rejection of his claim by the district court,—and generally speaking, where any party in interest desires a review of a judgment or order affecting his rights,—he must strictly comply with the requirements of the act and of the general order applicable to the case, and in default of such compliance, the appellate court must dismiss the attempted appeal.[236] Thus, if notice of the appeal is now necessary, as it was under the act of 1867, it is an indispensable requisite, and for want of it the appeal must be dismissed.[237] But the present statute makes no requirement as to notice, except in the case of a petition for revision, which is altogether a different proceeding from an appeal, and it is doubtful whether a notice or citation is now a jurisdictional requisite in an appeal proper, in the sense that it must issue within the time limited for taking the appeal, though it is clearly necessary in order to perfect the appeal, unless possibly

[232] Alabama & C. R. Co. v. Jones, 5 N. B. R. 97, Fed. Cas. No. 126.

[233] Cook Inlet Coal Fields Co. v. Caldwell, 147 Fed. 475, 78 C. C. A. 17, 17 Am. Bankr. Rep. 135; First Nat. Bank v. Abbott, 165 Fed. 852, 91 C. C. A. 538, 21 Am. Bankr. Rep. 436; In re Kaplan, 234 Fed. 866, 148 C. C. A. 464, 37 Am. Bankr. Rep. 104.

[234] As to allowance of appeal, see In re Black Diamond Copper Min. Co., 10 Ariz. 39, 85 Pac. 656.

[235] Bankruptcy Act 1898, § 25a.

[236] In re Coleman, 7 Blatchf. 192, 2 N. B. R. 671, Fed. Cas. No. 2,979.

[237] Ex parte Mead, 109 U. S. 230, 3 Sup. Ct. 129, 27 L. Ed. 914; Wood v. Bailey, 21 Wall. 640, 12 N. B. R. 132, 22 L. Ed. 689; Mead v. Platt, 17 Fed. 509; Hawkins v. Hastings Nat. Bank, 1 Dill. 453, Fed. Cas. No. 6,245.

where the appeal was prayed in open court; and the appellate court will not proceed to a hearing until citation has been issued and served.[238]

[238] See In re T. E. Hill Co., 148 Fed. 832, 78 C. C. A. 522, 17 Am. Bankr. Rep. 517, where it was said: "The general rule is established that no citation is required when an appeal is allowed in open court at the same term when the decree was rendered. In appeals in bankruptcy, however, this rule may not be applicable, for the reason that there are no stated terms of the bankruptcy court as such, but the jurisdiction is exercised by the district courts throughout the proceedings, in vacation, in chambers, and during their respective terms. The contention is that an appeal in such cases, not allowed instanter, is not 'taken' within the meaning of section 25a, unless a citation issue and bond is filed within the ten days. Whether a citation is needful, by way of notice to the parties, in any appeal in bankruptcy, may not be clear under the authorities; and the cases cited for and against the present motions are not harmonious in reference to citation or bond, as requisites to confer jurisdiction of any appeal. In Jacobs v. George, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127, and Mattingly v. Northwestern Virginia R. R., 158 U. S. 53, 15 Sup. Ct. 725, 39 L. Ed. 894, however, the general doctrine is established for appeals in equity that neither signing nor service of the citation is jurisdictional, its only office being to give notice to the appellees, and that failure or defects therein may be cured after the time limited for appeal. Under these decisions the circuit court of appeals of the sixth circuit so ruled in reference to appeal in bankruptcy in Columbia Iron Works v. National Lead Co., 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645, 11 Am. Bankr. Rep. 340; and as well the circuit court of appeals of the eighth circuit in Lockman v. Lang, 132 Fed. 1, 65 C. C. A. 621, 12 Am. Bankr. Rep. 497, and Gray v. Grand Forks Mercantile Co., 138 Fed. 344, 70 C. C. A. 634, 14 Am. Bankr. Rep. 780. We concur in the view that bankruptcy appeals are within the rule thus stated, so that citation and bond are not jurisdictional requisites." But although a citation may not be necessary to confer jurisdiction, it appears that it is necessary to perfect the appeal, and that the omission of it will be ground for dismissing the appeal. In Columbia Iron Works v. National Lead Co., cited supra, it was said: "The general rule is that, when an appeal is allowed within the time prescribed by law, it is sufficient for the purpose of removing the case, though it is necessary, in order to perfect the appeal, that a bond should be filed and that a citation should be issued and served, where, as in this case, the appeal is not prayed in open court." In the case of Lockman v. Lang, supra, it was said: "As there are no terms in bankruptcy it is conceded that a citation was necessary in this case, because the appeal cannot be said to be perfected at the term at which the judgment below was rendered. Nevertheless the appeal was perfected by the acceptance of the bond within the statutory time and by the docketing of the case in this court at the ensuing term. A citation to appear at the hearing in the appellate court is not jurisdictional in its nature. Its only purpose is to give notice to the appellees that the appeal will be prosecuted, so that they may appear and have a hearing if they desire. It is a part of the procedure prescribed, not to give jurisdiction to the appellate court, but to secure to the appellees a fair opportunity to present to that court their arguments in support of the decision below. If through accident or mistake the citation has been omitted, and no notice has been given to the appellees of the hearing, the appellate court has ample power to direct its issue and to continue the case until reasonable notice of the hearing has been given. But it may not dismiss an appeal, which is a matter of right, and which is duly allowed by the trial court by the mere acceptance of security for its prosecution, until an opportunity to give the requisite notice has been furnished, whether the application for the citation is made before or after the statutory time for the appeal has elapsed." And in Gray v. Grand Forks Mercantile Co., supra, it was held that, where an appeal to which necessary parties are omitted is seasonably docketed, but no application for an alias citation to them

As to appeals by trustees in bankruptcy, the statute provides (§ 25c) that "they shall not be required to give bond when they take appeals or sue out writs of error," probably on the theory that they are officers of the several courts of bankruptcy. But other appellants are not exempt from the necessity of giving a proper bond on appeal, and unless such an instrument is filed and is sufficient in form and substance, the appeal will be ineffective, the cases generally holding that, for want of a bond, it must be dismissed.[239] Compliance is also required with the rules in regard to entering and filing the appeal.[240]

§ 52. Practice on Petition for Revision.—The act of 1867 prescribed no particular form of proceeding to obtain a review of a decision of a court of bankruptcy by the appellate court; it was sufficient if some "proper process" was used; and it was held that a writ of error would serve the purpose.[241] The present statute, however, directs that the application for review shall be made by a "petition," which, of course, should be addressed to and filed in the proper circuit court of appeals.[242] In analogy to the rules governing the allowance of appeals and writs of error, a petition for review by the circuit court of appeals of a proceeding in the district court in bankruptcy may be presented to, and allowed by, a judge of the circuit court of appeals, though not, it seems, by the judge of the district court.[243] It should state specifically the

is made before the expiration of the first term at which the case can be heard, the appeal becomes inoperative, in so far as it challenges the rights of the omitted parties. And see also Ruby v. Atkinson, 93 Fed. 577, 35 C. C. A. 458; Norcross v. Nave & McCord Mercantile Co., 101 Fed. 796, 42 C. C. A. 29, 4 Am. Bankr. Rep. 317.

[239] In re Miller, 13 Okl. 557, 75 Pac. 1128; Hawkins v. Hastings Nat. Bank, 1 Dill. 453, Fed. Cas. No. 6,245; In re Alexander, Chase, 295, 3 N. B. R. 29, Fed. Cas. No. 160; Benjamin v. Hart, 4 Ben. 454, 4 N. B. R. 408, Fed. Cas. No. 1,302. But compare In re T. E. Hill Co., 148 Fed. 832, 78 C. C. A. 522, 17 Am. Bankr. Rep. 517. As to form and sufficiency of bond, see In re Barton's Estate, 144 Fed. 540, 16 Am. Bankr. Rep. 569; Flickinger v. First Nat. Bank, 145 Fed. 162, 76 C. C. A. 132, 16 Am. Bankr. Rep. 678. The bond on appeal must be approved by the judge, and authority to approve it may not be delegated to the clerk of the court. In re Black Diamond Copper Min. Co., 10 Ariz. 39, 85 Pac. 656. As to the effect of the bond on appeal as a supersedeas, the necessity of giving a supersedeas bond, and the practice in the case of an appeal by the trustee in bankruptcy, see T. E. Hill Co. v. United States Fidelity & Guaranty Co., 184 Ill. App. 528; Pacific Coast Casualty Co. v. Harvey, 250 Fed. 952, 163 C. C. A. 202, 42 Am. Bankr. Rep. 193; and as to granting leave to bankrupt to prosecute an appeal in forma pauperis, see Henkin v. Fousek (C. C. A.) 262 Fed. 957, 45 Am. Bankr. Rep. 172.

[240] In re Coleman, 7 Blatchf. 192, 2 N. B. R. 671, Fed. Cas. No. 2,979.

[241] Cleveland Ins. Co. v. Globe Ins. Co., 98 U. S. 366, 25 L. Ed. 201.

[242] In re Williams, 105 Fed. 906. A petition for review filed in a district court in a bankruptcy proceeding is ineffectual to remove the case for any purpose into the circuit court of appeals. Bridgeton Nat. Bank v. Way, 253 Fed. 41, 165 C. C. A. 665, 41 Am. Bankr. Rep. 498.

[243] In re Williams, 105 Fed. 906. Compare In re Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266. And see Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240, 14

question of law which was involved and ruled upon by the district court, and as to which a reversal of its action is sought, and should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question arose and its determination; and the question of law so presented is the only question which will be decided by the appellate court.[244] Thus, where petitioners in bankruptcy ask the court of appeals to review restraining and reference orders made by the district court, enjoining the prosecution of suits against the bankrupt in a state court, and referring the claims in suit to a special master for liquidation, they cannot obtain a review of the district court's jurisdiction of the entire bankruptcy proceeding.[245] Where the response to such a petition is not filed within the time prescribed by the applicable rule of court, the failure of the defendant to deny allegations of fact in such petition will be taken as an admission that they are true.[246] By the terms of the statute, "due notice" is a prerequisite to the exercise of the jurisdiction of the reviewing court. This means that proper and sufficient notice of the petition for review must be served upon the party occupying a position in the controversy adverse to that of the petitioner, or upon his attorney, within a reasonable time.[247]

The jurisdiction conferred upon the circuit courts of appeals by this section of the act is declared to be "either interlocutory or final," which probably means that they may review and revise interlocutory orders and decrees of the courts of bankruptcy, as well as their final judgments. But there must be something in the nature of an appealable decision to be brought before the reviewing court. Thus, an order of the district court setting aside a sale of the bankrupt's property and directing a re-

Am. Bankr. Rep. 477, holding that a petition for revision will not be dismissed because it was not allowed by a judge.

[244] Steiner v. Marshall, 140 Fed. 710, 72 C. C. A. 103, 15 Am. Bankr. Rep. 486; In re Taft, 133 Fed. 511, 66 C. C. A. 385, 13 Am. Bankr. Rep. 417; Courier-Journal Job Printing Co. v. Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183; In re Baker, 104 Fed. 287, 43 C. C. A. 536, 4 Am. Bankr. Rep. 778; In re Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145; In re Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266; Littlefield v. Delaware & H. Canal Co., 3 Cliff. 371, 4 N. B. R. 257, Fed. Cas. No. 8,400; In re South Boston Iron Co., 4 Cliff. 343, Fed. Cas. No. 13,183; In re Sutherland, 2 Biss. 405, Fed. Cas. No. 13,636; In re Grant, Fed. Cas. No. 5,690. The statements in a petition for review, like those in any other pleading, must be taken as true on demurrer, and if sufficient, the decree below will be reversed. Curran v. Munger, 6 N. B. R. 33, Fed. Cas. No. 3,487. A stipulation that two petitions to review orders in bankruptcy, with certified copies transmitted by the clerk of the district court, should be printed in one appeal book, is not sufficient to constitute a waiver of any legal objection to the petitions. In re Strobel (C. C. A.) 160 Fed. 916, 20 Am. Bankr. Rep. 22.

[245] In re New York Tunnel Co., 159 Fed. 688, 86 C. C. A. 556, 20 Am. Bankr. Rep. 25.

[246] In re Frank (C. C. A.) 182 Fed. 794, 25 Am. Bankr. Rep. 486.

[247] Alabama & C. R. Co. v. Jones, 5 N. B. R. 97, Fed. Cas. No. 126; In re Seebold, 105 Fed. 910, 45 C. C. A. 117, 5 Am. Bankr. Rep. 358. See In re Sweetser (C. C. A.) 168 Fed. 1018.

sale is not reviewable on petition until after the resale has been made and confirmed.[248]

§ 53. Assignment of Errors.—The eleventh rule of the circuit courts of appeals provides that "the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned." [249] This rule is applicable to appeals taken under the bankruptcy act, such as an appeal from a judgment making or refusing to make an adjudication, granting or denying a discharge, or allowing or rejecting a claim. If, on such an appeal, no assignment of errors is filed, the judgment of the district court will be affirmed.[250] And an assignment not conforming to the rule, in failing to point out the errors complained of, is not entitled to be considered, although, where a general assignment is made, the court is not without jurisdiction and may permit an amendment.[251] And where specific questions are raised by the assignment of errors, no others will be reviewed by the appellate court.[252] As a proceeding in bankruptcy is substantially a proceeding in equity, no bill of exceptions is ordinarily necessary,[253] except in the case of a trial by jury, and not then if the verdict of the jury was taken as merely advisory.[254] In the case of a petition for revision, as distinguished from an appeal, no formal assignment of errors is necessary. But the petition must set forth clearly and specifically the matter of law, or questions of law, de-

[248] Sturgiss v. Corbin, 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543.

[249] 150 Fed. xxvii.

[250] In re Dunning, 94 Fed. 709, 36 C. C. A. 437; Lloyd v. Chapman, 93 Fed. 599, 35 C. C. A. 474; In re Smith (C. C. A.) 203 Fed. 369, 29 Am. Bankr. Rep. 628; In re Federal Contracting Co., 212 Fed. 693, 129 C. C. A. 229.

[251] Flickinger v. First Nat. Bank, 145 Fed. 162, 76 C. C. A. 132, 16 Am. Bankr. Rep. 678. An error in adjudging a party bankrupt on the petition of creditors who were estopped to set up the act of bankruptcy relied on should be noticed though not properly assigned. Ohio Motor Car Co. v. Eiseman Magneto Co., 230 Fed. 370, 144 C. C. A. 512, 36 Am. Bankr. Rep. 237.

[252] Buckingham v. Estes, 128 Fed. 584, 63 C. C. A. 20, 12 Am. Bankr. Rep. 182.

[253] Dodge v. Norlin, 133 Fed. 363, 66 C. C. A. 425, 13 Am. Bankr. Rep. 176; In re Lane Lumber Co. (D. C.) 206 Fed. 780, 30 Am. Bankr. Rep. 749.

[254] In re Neasmith, 147 Fed. 160, 77 C. C. A. 402, 17 Am. Bankr. Rep. 128. Where the bankruptcy court on its own motion submitted to a jury the question of the alleged bankrupt's insolvency, the verdict of the jury is merely advisory, and error is not predicable on the court's

cided by the district court and as to which a reversal of its judgment is desired, so that the issue may be clearly defined before the appellate court, and only such errors of law as are thus plainly presented will be considered on the review.[255] But where there is no sufficient specification of legal error, presenting the questions sought to be reviewed, but the evidence is such as to raise a doubt as to the merits of the petitioner's claim, the revisory petition may be dismissed without prejudice to such further proceedings as the district court may consider to be proper.[256]

§ 54. **Record on Appeal.**—The rules of the circuit courts of appeals provide that "no case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed."[257] This rule is applicable to appeals in bankruptcy cases.[258] And if the record is not filed within the time allowed by law, nor any application made for an extension of the time, the appeal will be dismissed.[259] If it does not clearly set forth facts necessary to a determination of the questions involved, it will be remanded to the district court with directions to have the facts fully reported to it and to pass on the same.[260] In bankruptcy appeals, the "record" required to be certified and filed is the record of the case in the bankruptcy court,[261] and in the absence of a stipulation or agreement of the parties, the whole of the record, in the strict sense of the word, must be transmitted to the appellate court,[262] and the court of bankruptcy from which the appeal is taken has no jurisdiction to designate what records shall be certified on which the appellate court shall determine the appeal.[263] The parties to the appeal may agree as to the contents of the appeal record, but if they

remarks or on its charge to the jury. Morrison v. Rieman, 249 Fed. 97, 161 C. C. A. 149, 41 Am. Bankr. Rep. 325.

[255] Ross v. Stroh, 165 Fed. 628, 91 C. C. A. 616, 21 Am. Bankr. Rep. 644; In re Lans, 158 Fed. 610, 85 C. C. A. 432, 19 Am. Bankr. Rep. 458. And see supra, § 52. But compare Davis v. Crompton, 158 Fed. 735, 85 C. C. A. 633, 20 Am. Bankr. Rep. 53. See In re Witherbee (C. C. A.) 202 Fed. 896, 30 Am. Bankr. Rep. 314; In re Wood, 248 Fed. 246, 160 C. C. A. 324, 40 Am. Bankr. Rep. 810.

[256] Ross v. Stroh, 165 Fed. 628, 91 C. C. A. 616, 21 Am. Bankr. Rep. 644.

[257] Rule 14. See 150 Fed. xxviii.

[258] Cook Inlet Coal Fields Co. v. Caldwell, 147 Fed. 475, 78 C. C. A. 17, 17 Am. Bankr. Rep. 135. And see Synnott v. Tombstone Consol. Mines Co. (C. C. A.) 207 Fed. 544.

[259] In re Alden Electric Co., 123 Fed. 415, 59 C. C. A. 509, 10 Am. Bankr. Rep. 370.

[260] Devries v. Shanahan, 122 Fed. 629, 58 C. C. A. 482, 10 Am. Bankr. Rep. 518.

[261] Cook Inlet Coal Fields Co. v. Caldwell, 147 Fed. 475, 78 C. C. A. 17, 17 Am. Bankr. Rep. 135.

[262] In re A. L. Robertshaw Mfg. Co., 135 Fed. 220, 14 Am. Bankr. Rep. 341; Dodge v. Norlin, 133 Fed. 363, 66 C. C. A. 425, 13 Am. Bankr. Rep. 176. See In re Watkinson, 205 Fed. 145, 123 C. C. A. 377, 30 Am. Bankr. Rep. 48.

[263] In re A. L. Robertshaw Mfg. Co., 135 Fed. 220, 14 Am. Bankr. Rep. 341.

are unable to do so, it is the duty of the appellant to file a præcipe with the clerk pointing out specifically what records, in his judgment, should be certified, leaving the appellee, if he thinks the records certified are insufficient, to suggest a diminution of the record and ask for a certiorari.[264]

The appellate court will not travel outside the record, nor pass upon questions which it does not raise or which are not clearly defined by the facts and data included,[265] except in so far as it may be aided by the presumptions usual and proper in such cases.[266]

On a petition to superintend and revise in matter of law, the rules in some circuits require that a record shall be filed the same as in case of an appeal.[267] And at any rate the record brought up must contain a finding of facts, or so far disclose the facts as clearly to show the question of law which was raised and passed upon by the district court, and also show whether the particular question sought to be reviewed was decided by the district court as one of fact or of law.[268] The want of such findings or statements of the facts cannot be supplied by the mere opinion rendered by the district court in deciding the case.[269] But still the opinion may be looked to for the purpose of determining in a general way the propositions on which the case was disposed of, and especially the questions of law which were passed upon.[270]

Where questions of fact or of mixed law and fact are sought to be reviewed on an appeal in bankruptcy, the evidence must be brought up,[271] otherwise, it will be presumed that the facts disclosed were sufficient to sustain the decision of the court below, and only such matters of law as are apparent on the face of the record can be considered.[272]

[264] In re A. L. Robertshaw Mfg. Co., 135 Fed. 220, 14 Am. Bankr. Rep. 341.

[265] Buckingham v. Estes, 128 Fed. 584, 63 C. C. A. 20, 12 Am. Bankr. Rep. 171; In re Oakland Lumber Co., 174 Fed. 634, 98 C. C. A. 388, 23 Am. Bankr. Rep. 181; In re Myer, 14 N. M. 45, 89 Pac. 246; In re Grant, Fed. Cas. No. 5,690.

[266] Shaffer v. Koblegard Co., 183 Fed. 71, 105 C. C. A. 363, 24 Am. Bankr. Rep. 898; In re National Pressed Brick Co., 212 Fed. 878, 129 C. C. A. 398.

[267] Cook Inlet Coal Fields Co. v. Caldwell, 147 Fed. 475, 78 C. C. A. 17, 17 Am. Bankr. Rep. 135.

[268] Landry v. San Antonio Brewing Ass'n, 159 Fed. 700, 86 C. C. A. 568, 20 Am. Bankr. Rep. 226; Hegner v. American Trust & Sav. Bank, 187 Fed. 599, 109 C. C. A. 429, 26 Am. Bankr. Rep. 571; In re Pettingill & Co., 137 Fed. 840, 70 C. C. A. 338, 14 Am. Bankr. Rep. 757; In re Boston Dry Goods Co., 125 Fed. 226, 60 C. C. A. 118, 11 Am. Bankr. Rep. 97; In re Throckmorton, 196 Fed. 656, 116 C. C. A. 348, 28 Am. Bankr. Rep. 487; Johansen Bros. Shoe Co. v. Alles, 197 Fed. 274, 116 C. C. A. 636, 28 Am. Bankr. Rep. 299.

[269] In re Boston Dry Goods Co., 125 Fed. 226, 60 C. C. A. 118, 11 Am. Bankr. Rep. 97; In re Pettingill & Co., 137 Fed. 840, 70 C. C. A. 338, 14 Am. Bankr. Rep. 757.

[270] Samel v. Dodd, 142 Fed. 68, 73 C. C. A. 254, 16 Am. Bankr. Rep. 163; In re Pettingill & Co., 137 Fed. 840, 70 C. C. A. 338, 14 Am. Bankr. Rep. 757.

[271] In re Murphy, 229 Fed. 988, 144 C. C. A. 270, 36 Am. Bankr. Rep. 712; In re Myer, 14 N. M. 45, 89 Pac. 246.

[272] In re Baum, 169 Fed. 410, 94 C. C.

If the record does not contain all the evidence, a motion to include additional matter may be granted, reserving the right to determine which party shall ultimately bear the expense thereof.[273] But the failure to incorporate any evidence in the record on an appeal from an adjudication of bankruptcy will not be ground for dismissal where it does not appear from the record that any evidence was taken, but rather that the case was submitted on petition and answer.[274] As the testimony is ordinarily taken before referees in bankruptcy, it becomes important to notice that, when a referee has certified to the district judge the question presented before him and his decision thereon, with a "summary of the evidence relating thereto," as directed by General Order No. 27, and the matter has been heard and determined by the district judge on the record so made, it is that summary, and not the original evidence before the referee, which should be included in the record on appeal to the circuit court of appeals.[275] It has also been laid down that examiners, masters, referees, and the court taking evidence in bankruptcy in the absence of a jury, should record, and in case of appeal, return, all the evidence, so that, if the appellate court thinks that the evidence rejected should have been received, it may consider it and render a final decree without remanding the suit. But from this rule should be excepted evidence plainly privileged and evidence so clearly irrelevant or immaterial that it would be an abuse of process to compel its production.[276]

§ 55. Scope of Review; Law and Facts.—An appeal in bankruptcy (as distinguished from a petition for revision) is subject to the rules governing appeals in equity, and therefore, on such an appeal, the facts as well as the law are before the appellate court, if proper assignments of error have been filed, and it is its duty to review questions of fact as well as of law.[277] But since the statute explicitly provides that an

A. 632, 22 Am. Bankr. Rep. 295. And see Chestertown Bank v. Walker (C. C. A.) 163 Fed. 510, 20 Am. Bankr. Rep. 840.

[273] Herman Keck Mfg. Co. v. Lorsch, 179 Fed. 485, 103 C. C. A. 65, 24 Am. Bankr. Rep. 705. A court of bankruptcy in a proceeding on its equity side may allow and certify a bill of exceptions nunc pro tunc to bring on the record evidence introduced on a prior hearing. Freed v. Central Trust Co., 215 Fed. 873, 132 C. C. A. 7, 33 Am. Bankr. Rep. 64.

[274] C. C. Taft Co. v. Century Sav. Bank, 141 Fed. 369, 72 C. C. A. 671, 15 Am. Bankr. Rep. 534.

[275] Cunningham v. German Ins. Bank, 103 Fed. 932, 43 C. C. A. 377, 4 Am. Bankr. Rep. 192. And see In re French & Holmes, 13 Okl. 549, 75 Pac. 278.

[276] Missouri-American Electric Co. v. Hamilton-Brown Shoe Co., 165 Fed. 283, 91 C. C. A. 251, 21 Am. Bankr. Rep. 270; First Nat. Bank v. Abbott, 165 Fed. 852, 91 C. C. A. 538, 21 Am. Bankr. Rep. 436.

[277] Ross v. Stroh, 165 Fed. 628, 91 C. C. A. 616, 21 Am. Bankr. Rep. 644; Hatch v. Curtin, 154 Fed. 791, 83 C. C. A. 495, 19 Am. Bankr. Rep. 82; Rush v. Lake, 122 Fed. 561, 58 C. C. A. 447, 10 Am. Bankr. Rep. 455; Courier-Journal Job Printing Co. v. Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183; Simonson v. Sinsheimer, 100 Fed. 426, 40 C. C. A.

appeal may be taken from a "judgment adjudging or refusing to adjudge the defendant a bankrupt," such an adjudication may be reviewed on appeal, although only questions of law are presented for the consideration of the appellate court.[278]

But it is otherwise in the case of a petition for revision of the proceedings of the court of bankruptcy. Since jurisdiction for this purpose is given only as to "matter of law," it is held that the statute does not contemplate any review of the facts by the appellate court, and only questions of law decided by the court below can be brought up for revision in this mode.[279] Thus, for instance, the issue whether an order should be made requiring the bankrupt to turn over money or property to his trustee is purely of a civil character, determinable on a preponderance of evidence, and at least partially dependent on the question of fact whether the money or property is in the possession or under the control of the bankrupt, and the finding thereon cannot be reviewed by the circuit court of appeals on a petition for revision in matter of law, unless so wholly unsupported by the proofs that the court would be justified, on a writ of error, in setting aside a verdict of a jury for

474, 3 Am. Bankr. Rep. 824; In re Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145; Feder v. Goetz (C. C. A.) 264 Fed. 619, 45 Am. Bankr. Rep. 57; Marine Nat. Bank v. Swigart (C. C. A.) 262 Fed. 854, 45 Am. Bankr. Rep. 162.

[278] C. C. Taft Co. v. Century Sav. Bank, 141 Fed. 369, 72 C. C. A. 671, 15 Am. Bankr. Rep. 594.

[279] Feder v. Goetz (C. C. A.) 264 Fed. 619, 45 Am. Bankr. Rep. 57; In re De Ran, 260 Fed. 732, 171 C. C. A. 470, 44 Am. Bankr. Rep. 409; In re A. Bolognesi & Co., 254 Fed. 770, 166 C. C. A. 216, 42 Am. Bankr. Rep. 548; King Lumber Co. v. National Exchange Bank of Roanoke, 253 Fed. 946, 165 C. C. A. 388, 42 Am. Bankr. Rep. 651; Gardner v. Gleason, 259 Fed. 755, 170 C. C. A. 555; In re Canister Co., 252 Fed. 70, 164 C. C. A. 182, 42 Am. Bankr. Rep. 278; Sauve v. M. L. More Inv. Co., 248 Fed. 642, 160 C. C. A. 542, 41 Am. Bankr. Rep. 281; Hunter, Walton & Co. v. J. G. Cherry Co., 247 Fed. 458, 159 C. C. A. 512, 40 Am. Bankr. Rep. 732; In re Armann, 247 Fed. 954, 160 C. C. A. 618, 41 Am. Bankr. Rep. 50; In re Pierce, Butler & Pierce Mfg. Co., 246 Fed. 814, 159 C. C. A. 116, 40 Am. Bankr. Rep. 445; Wm. B. Moore Dry Goods Co. v. Brooks, 240 Fed. 943, 153 C. C. A. 629, 39 Am. Bankr. Rep. 617; Lott v. Salsbury, 237 Fed. 191, 150 C. C. A. 337, 37 Am. Bankr. Rep. 796; Kinkead v. J. Bacon & Sons, 230 Fed. 362, 144 C. C. A. 504, 36 Am. Bankr. Rep. 390; In re Stearns Salt & Lumber Co., 225 Fed. 1, 140 C. C. A. 461, 35 Am. Bankr. Rep. 264; Hall v. Reynolds, 224 Fed. 103, 139 C. C. A. 659, 34 Am. Bankr. Rep. 707; Synnott v. Tombstone Consol. Mines Co., 207 Fed. 544, 125 C. C. A. 596, 31 Am. Bankr. Rep. 124; Whitla & Nelson v. Boyd, 213 Fed. 587, 130 C. C. A. 167; Williamson v. Richardson, 205 Fed. 245, 123 C. C. A. 427, 30 Am. Bankr. Rep. 559; Stuart v. Reynolds, 204 Fed. 709, 123 C. C. A. 13, 29 Am. Bankr. Rep. 412; In re Witherbee, 202 Fed. 896, 121 C. C. A. 254, 30 Am. Bankr. Rep. 314; In re Holden, 203 Fed. 229, 121 C. C. A. 435, 29 Am. Bankr. Rep. 387; In re J. B. Judkins Co., 205 Fed. 892, 124 C. C. A. 205, 30 Am. Bankr. Rep. 529; In re Zinner, 202 Fed. 197, 120 C. C. A. 411, 29 Am. Bankr. Rep. 860; B-R Electric & Telephone Mfg. Co. v. Ætna Life Ins. Co., 206 Fed. 885, 124 C. C. A. 545, 30 Am. Bankr. Rep. 424; In re Donnelly, 187 Fed. 121, 109 C. C. A. 39; In re Stewart, 179 Fed. 222, 102 C. C. A. 348; Ryan v. Hendricks (C. C. A.) 166 Fed. 94, 21 Am. Bankr. Rep. 570; Ross v. Stroh, 165 Fed. 628, 91 C. C. A. 616, 21 Am. Bankr. Rep. 644; Lesaius v. Goodman, 165 Fed. 889, 91 C. C. A. 567, 21 Am. Bankr. Rep. 446;

want of any evidence whatever to sustain it.[280] As further illustrations of questions which are not reviewable on petition to revise, because wholly or partly depending on matters of fact, we may mention the following: The question whether money deposited by a bankrupt in a bank in his own name as attorney belonged to him or to his wife;[281] whether or not the bankrupt was guilty of fraud in a given transaction, where, so far as appears from the record, there may have been a conflict of testimony as to the facts;[282] whether a certain sum was a reasonable allowance for an attorney's fee in a case of voluntary bankruptcy;[283] whether a creditor of the bankrupt did or did not have reasonable ground to believe his debtor to be insolvent at the time he obtained security for his debt;[284] whether the lien claimed by a creditor of the bankrupt under a trust deed constituted a valid preference under the bankruptcy law;[285] and the question whether the court below erred in ordering a sale of property free from incumbrances, on the ground that it was covered by a mortgage which left no equity of redemption of value to the estate.[286]

The court will not undertake to decide issues which are, or have become, merely moot questions.[287] Nor will it reverse for error not prejudicial to the complaining party.[288]

§ 56. Same; Questions Not Raised Below.—On appeals in bankruptcy, as in other cases, the general rule obtains that the appellate court will review only those issues and questions which were raised in the court below and passed on and decided by it. In other words, par-

In re Graessler & Reichwald, 154 Fed. 478, 83 C. C. A. 304, 18 Am. Bankr. Rep. 694; In re Throckmorton, 149 Fed. 145, 79 C. C. A. 15, 17 Am. Bankr. Rep. 856; Kenova Loan & Trust Co. v. Graham, 135 Fed. 717, 68 C. C. A. 355, 14 Am. Bankr. Rep. 313; In re Antigo Screen Door Co., 123 Fed. 249, 59 C. C. A. 248, 10 Am. Bankr. Rep. 359; Courier-Journal Job Printing Co. v. Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183; In re Rosser, 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153; In re Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145; In re Purvine, 96 Fed. 192, 37 C. C. A. 446, 2 Am. Bankr. Rep. 787; In re Great Western Tel. Co., 5 Biss. 359, Fed. Cas. No. 5,739; In re Salkey, 6 Biss. 280, 11 N. B. R. 516, Fed. Cas. No. 12,254.

[280] In re Cole, 144 Fed. 392, 75 C. C. A. 330, 16 Am. Bankr. Rep. 302; Ellis v. Krulewitch, 141 Fed. 954, 73 C. C. A. 270, 15 Am. Bankr. Rep. 615; Frederick v. Silverman, 250 Fed. 75, 162 C. C. A. 247, 42 Am. Bankr. Rep. 24.

[281] In re Donnelly, 187 Fed. 121, 109 C. C. A. 39.

[282] In re Letson, 157 Fed. 78, 84 C. C. A. 582, 19 Am. Bankr. Rep. 506.

[283] In re Irwin, 174 Fed. 642, 98 C. C. A. 396, 23 Am. Bankr. Rep. 487.

[284] In re Eggert, 102 Fed. 735, 43 C. C. A. 1, 4 Am. Bankr. Rep. 449; Whitmore v. Swank, 252 Fed. 135, 164 C. C. A. 247, 41 Am. Bankr. Rep. 378.

[285] Kenova Loan & Trust Co. v. Graham, 135 Fed. 717, 68 C. C. A. 355, 14 Am. Bankr. Rep. 313.

[286] In re Union Trust Co., 122 Fed. 937, 59 C. C. A. 461.

[287] Ward v. Central Trust Co. of Illinois, 252 Fed. 127, 164 C. C. A. 239, 42 Am. Bankr. Rep. 65; Lawhead v. Monroe Bldg. Co., 252 Fed. 758, 164 C. C. A. 598, 41 Am. Bankr. Rep. 800.

[288] Bergdoll v. Harrigan, 217 Fed. 943, 133 C. C. A. 615, 33 Am. Bankr. Rep. 394.

ties will not be permitted to urge for the first time, on appeal, objections or contentions which they neglected to take advantage of in the court below when they might have done so.[289] Thus, on appeal from a district court's decree in a controversy arising in bankruptcy proceedings, the only objection as to a want of jurisdiction available to the appellant, when raised for the first time in the court of appeals, is that the district court had no jurisdiction to render the decree appealed from.[290] A court of bankruptcy, for instance, has jurisdiction of a suit in behalf of the bankrupt's estate to recover an alleged preference, if the defendant consents; and after a hearing on the merits, without any objection by the defendant on the ground of a want of jurisdiction, he cannot raise that objection for the first time on an appeal.[291] So on an appeal from an adjudication of bankruptcy, where creditors appeared and contested the adjudication solely on the ground that the occupation of the alleged bankrupt was such as to exempt him from the statute, and they appeal from the decree, they cannot be heard to raise the objection of a want of evidence or of findings as to the alleged act of bankruptcy.[292] So, where the capacity of a trustee in bankruptcy to sue, on account of alleged defects in the petition for adjudication and the proofs on which it was based, was not challenged at the trial, the question cannot be raised on appeal.[293] And where it was not objected in the court below that property of a bankrupt ordered to be sold had

[289] Dean v. Davis, 242 U. S. 438, 37 Sup. Ct. 130, 61 L. Ed. 419, 38 Am. Bankr. Rep. 664; Wartell v. Moore (C. C. A.) 261 Fed. 762, 44 Am. Bankr. Rep. 624; Feick v. Stephens, 250 Fed. 185, 162 C. C. A. 321; Moody-Hormann-Boelhauwe v. Clinton Wire Cloth Co., 246 Fed. 653, 158 C. C. A. 609, 40 Am. Bankr. Rep. 441; Sanborn-Cutting Co. v. Paine, 244 Fed. 672, 157 C. C. A. 120, 40 Am. Bankr. Rep. 525; Household Supply Co. v. Whiteaker, 236 Fed. 730, 150 C. C. A. 62, 38 Am. Bankr. Rep. 408; In re O'Gara Coal Co., 235 Fed. 883, 149 C. C. A. 195, 38 Am. Bankr. Rep. 131; Ohio Motor Car Co. v. Eiseman Magneto Co., 230 Fed. 370, 144 C. C. A. 512, 36 Am. Bankr. Rep. 237; In re Friedman (C. C. A.) 161 Fed. 260, 20 Am. Bankr. Rep. 37; In re Bacon, 159 Fed. 424, 86 C. C. A. 404, 20 Am. Bankr. Rep. 107; Love v. Export Storage Co., 143 Fed. 1, 74 C. C. A. 155, 16 Am. Bankr. Rep. 171; In re O'Connell, 137 Fed. 838, 70 C. C. A. 336, 14 Am. Bankr. Rep. 237; Buckingham v. Estes, 128 Fed. 584, 63 C. C. A. 20, 12 Am. Bankr. Rep. 182; In re Cale, 191 Fed. 31, 111 C. C. A. 89. But, see In re Cole (C. C. A.) 163 Fed. 180, 20 Am. Bankr. Rep. 761; Bramble v. Brett, 230 Fed. 385, 144 C. C. A. 527, 36 Am. Bankr. Rep. 526.

[290] Knapp v. Milwaukee Trust Co., 162 Fed. 675, 89 C. C. A. 467, 20 Am. Bankr. Rep. 671. On petition to revise an order in summary proceedings requiring the bankrupt's wife to turn over money to the trustee, it is too late to object that a plenary suit should have been brought. In re Hopkins, 229 Fed. 378, 143 C. C. A. 498, 36 Am. Bankr. Rep. 158.

[291] Boonville Nat. Bank v. Blakey, 107 Fed. 891, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13; In re Canfield, 193 Fed. 934, 113 C. C. A. 562.

[292] Armstrong v. Fernandez, 208 U. S. 324, 28 Sup. Ct. 419, 52 L. Ed. 514, 19 Am. Bankr. Rep. 746.

[293] Knapp v. Milwaukee Trust Co. 162 Fed. 675, 89 C. C. A. 467, 20 Am. Bankr. Rep. 671; Fairbanks Steam Shovel Co. v. Wills, 240 U. S. 642, 36 Sup. Ct. 466, 6 L. Ed. 841, 36 Am. Bankr. Rep. 754.

not been inventoried in the manner required by the statute, the objection will not be considered on a revisory petition.[294] The same rule prevails on appeals from orders granting or refusing a discharge to the bankrupt. An appeal from an order discharging a bankrupt will be dismissed on the motion of the appellee, when the record does not show that the question of law suggested in the assignment of errors on which the appeal is based was ruled by the court below.[295] Where a referee passed upon only one of a number of objections filed to the discharge of the bankrupt, which objection he sustained, and his report was confirmed by the district court, an appeal from the order denying the discharge brings only that specific objection before the appellate court for consideration.[296] So where creditors appear in opposition to the bankrupt's application for discharge and file their specifications of objection, as provided by the act, objections to the sufficiency of such specifications must be presented to and decided by the district court, and if no objection is there made, no criticism of the specifications will be heard on appeal.[297]

§ 57. Review of Evidence and Findings.—On an appeal in bankruptcy (as distinguished from a petition for revision), where the evidence is in the record, it is within the province of the appellate court to review the same and thereupon to scrutinize the correctness of the decisions of the court below on questions of fact or evidence, proper assignments of error having been made.[298] But it will not, of course, hear additional evidence.[299] Where the proceedings to be reviewed are had, in the first instance, before a referee, parties who desire a review of the evidence should either have the testimony before the referee taken down stenographically, and by him certified to the judge, or they should

[294] In re Shoe & Leather Reporter, 129 Fed. 588, 64 C. C. A. 156, 12 Am. Bankr. Rep. 248.

[295] Fidelity Trust Co. v. Robinson, 192 Fed. 562, 27 Am. Bankr. Rep. 784; Vehon v. Ullman, 147 Fed. 694, 78 C. C. A. 82, 17 Am. Bankr. Rep. 435.

[296] Shaffer v. Koblegard Co., 183 Fed. 71, 105 C. C. A. 363, 24 Am. Bankr. Rep. 898.

[297] Osborne v. Perkins, 112 Fed. 127, 50 C. C. A. 158, 7 Am. Bankr. Rep. 250; E. H. Godshalk Co. v. Sterling, 129 Fed. 580, 64 C. C. A. 148, 12 Am. Bankr. Rep. 302; In re Singer, 251 Fed. 51, 163 C. C. A. 301, 41 Am. Bankr. Rep. 503.

[298] Bernard v. Lea, 210 Fed. 583, 127 C. C. A. 219, 31 Am. Bankr. Rep. 436; In re Neasmith, 147 Fed. 160, 77 C. C. A. 402, 17 Am. Bankr. Rep. 128; In a suit by the trustee in bankruptcy to recover an alleged preferential payment, where the circumstances under which the payment was made were set out in the agreed statement of facts, and the parties proceeded in the submission of the facts upon the idea that the court should draw such inferences as were warranted and necessary, the court of appeals may dispose of the case by drawing such inferences as are necessary. Watchmaker v. Barnes, 259 Fed. 783, 170 C. C. A. 583, 43 Am. Bankr. Rep. 632.

[299] In re Great Western Tel. Co., 5 Biss. 359, Fed. Cas. No. 5,739. See Heyward v. Goldsmith (C. C. A.) 269 Fed. 946, 46 Am. Bankr. Rep. 722.

specifically point out to the referee the particular evidence which they wish summarized and should ask him to certify specific findings of fact.[300] Where the evidence is not in the record, the appellate court will presume that it was sufficient to establish the particular facts on which the decision was based,[301] and where an application for discharge was heard by the referee, and the court affirmed his report and ordered the discharge, it will be presumed in support of the order that the court investigated objections made thereto and overruled the same on the merits.[302] Where the decision complained of was based on the court's opinion of the weight and tendency of conflicting evidence, it will not be reversed on appeal unless some error of law has intervened, or unless a serious mistake of fact is plainly apparent.[303] The same rules apply on an appeal to the Supreme Court of the United States. Where the question is one of fact, as, concerning the existence of a partnership, the concurring decisions of the two courts below will not be reversed on appeal if the evidence fairly tends to support them.[304]

Generally speaking, when it is sought, on appeal to the circuit court of appeals, to reverse an order made by the district court on a question of fact, the appellant must very clearly satisfy the appellate court that the decision of the court below was erroneous; it will not be reversed unless plain and manifest error appears, or unless plainly contrary to the weight of the evidence.[305] On a parity of reasoning, findings of

[300] In re Cohen (D. C.) 131 Fed. 391, 11 Am. Bankr. Rep. 439.

[301] Gray v. Gudger, 260 Fed. 931, 171 C. C. A. 573, 44 Am. Bankr. Rep. 228; In re Stitt, 252 Fed. 1, 164 C. C. A. 113, 41 Am. Bankr. Rep. 777; International Agr. Corp. v. Cary, 240 Fed. 101, 153 C. C. A. 137, 38 Am. Bankr. Rep. 753; In re Vidal, 233 Fed. 733, 147 C. C. A. 499, 36 Am. Bankr. Rep. 783; Bunch v. Maloney, 233 Fed. 967, 147 C. C. A. 641, 37 Am. Bankr. Rep. 369; First State Bank v. Haswell, 174 Fed. 209, 98 C. C. A. 217, 23 Am. Bankr. Rep. 330.

[302] Kentucky Nat. Bank v. Carley, 127 Fed. 686, 62 C. C. A. 412, 12 Am. Bankr. Rep. 119.

[303] Peeples v. Georgia Iron & Coal Co., 248 Fed. 886, 160 C. C. A. 644; Lake View State Bank v. Jones, 242 Fed. 821, 155 C. C. A. 409, 40 Am. Bankr. Rep. 148; In re Kaplan, 234 Fed. 866, 148 C. C. A. 464, 37 Am. Bankr. Rep. 104; Flower v. Central Nat. Bank, 223 Fed. 323, 138 C. C. A. 585, 35 Am. Bankr. Rep. 79; Abele v. Beacon Trust Co., 228 Mass. 438, 117 N. E. 833; First Nat. Bank v. Abbott, 165 Fed. 852, 91 C. C. A. 538, 21 Am. Bankr. Rep. 436; In re Sullivan, 14 Okl. 400, 78 Pac. 85; In re Straschnow, 181 Fed. 337, 104 C. C. A. 167, 24 Am. Bankr. Rep. 948. See Walker Grain Co. v. Gregg Grain Co. (C. C. A.) 268 Fed. 510, 46 Am. Bankr. Rep. 121.

[304] Manson v. Williams, 213 U. S. 453, 29 Sup. Ct. 519, 53 L. Ed. 869, 22 Am. Bankr. Rep. 22.

[305] Cutler v. Nu-Gold Ring Co. (C. C. A.) 264 Fed. 836, 45 Am. Bankr. Rep. 505; Henkin v. Fousek, 246 Fed. 285, 159 C. C. A. 15, 40 Am. Bankr. Rep. 701; In re O'Gara Coal Co., 235 Fed. 883, 149 C. C. A. 195, 38 Am. Bankr. Rep. 131; In re Hopkins, 229 Fed. 378, 143 C. C. A. 498, 36 Am. Bankr. Rep. 158; Owens v. Farmers' Bank of Abbeville, 228 Fed. 508, 143 C. C. A. 90, 36 Am. Bankr. Rep. 324; Ft. Worth Heavy Hardware Co. v. Shapleigh Hardware Co., 221 Fed. 257, 137 C. C. A. 110, 34 Am. Bankr. Rep. 21; In re Schulman, 177 Fed. 191, 101 C. C. A. 361, 23 Am.

fact made by a referee in bankruptcy upon the testimony of witnesses examined before him, especially if the evidence was conflicting, have every reasonable presumption in their favor, and (particularly after they have been approved or confirmed by the district court) will not be disregarded or set aside on appeal, unless it very clearly appears that there was error or mistake on his part, but in the absence of such plain error, they will be accepted without review by the appellate court.[306] But

Bankr. Rep. 809; In re Noyes Bros., 127 Fed. 286, 62 C. C. A. 218, 11 Am. Bankr. Rep. 506; Osborne v. Perkins, 112 Fed. 127, 50 C. C. A. 158, 7 Am. Bankr. Rep. 250; In re D. Levy & Co., 142 Fed. 442, 73 C. C. A. 558, 15 Am. Bankr. Rep. 166; Adler v. Jones, 109 Fed. 967, 48 C. C. A. 761, 6 Am. Bankr. Rep. 245; In re Mooney, 14 Blatchf. 204, 15 N. B. R. 456, Fed. Cas. No. 9,748; In re Dorr, 196 Fed. 292, 28 Am. Bankr. Rep. 505.

[306] Page v. Rogers, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332, 21 Am. Bankr. Rep. 496; Dodge Sales & Engineering Co. v. First Nat. Bank (C. C. A.) 266 Fed. 364, 46 Am. Bankr. Rep. 36; Libby v. Beverly (C. C. A.) 263 Fed. 63, 44 Am. Bankr. Rep. 605; In re Morrison (C. C. A.) 261 Fed. 355, 44 Am. Bankr. Rep. 321; Rosenberg v. Semple, 257 Fed. 72, 168 C. C. A. 284, 43 Am. Bankr. Rep. 671; In re Lake Chelan Land Co., 257 Fed. 497, 168 C. C. A. 501, 5 A. L. R. 557, 44 Am. Bankr. Rep. 14; Dothan Nat. Bank v. Jones, 255 Fed. 332, 166 C. C. A. 502, 43 Am. Bankr. Rep. 251; Luck v. Staples, 255 Fed. 637, 167 C. C. A. 13; In re Model Incubator Co., 255 Fed. 76, 166 C. C. A. 404, 42 Am. Bankr. Rep. 743; Hagan v. McNiel, 253 Fed. 716, 165 C. C. A. 310, 41 Am. Bankr. Rep. 792; Manson v. Mesirov, 254 Fed. 799, 166 C. C. A. 245, 43 Am. Bankr. Rep. 115; Whitney Central Trust & Savings Bank v. United States Const. Co., 250 Fed. 784, 163 C. C. A. 116, 41 Am. Bankr. Rep. 381; In re Turpin Hotel Co., 248 Fed. 25, 160 C. C. A. 165; In re Johnson (D. C.) 247 Fed. 135, 40 Am. Bankr. Rep. 687; In re Fackler (D. C.) 246 Fed. 864, 39 Am. Bankr. Rep. 742; In re Nankin, 246 Fed. 811, 159 C. C. A. 113, 40 Am. Bankr. Rep. 459; Stephen Putney Shoe Co. v. Dashiell, 246 Fed. 121, 158 C. C. A. 347, 40 Am. Bankr. Rep. 375; International Trust Co. v. Myers, 245 Fed. 110, 157 C. C. A. 406, 40 Am. Bankr. Rep. 71; In re Shelley, 242 Fed. 251, 155 C. C. A. 91, 39 Am. Bankr. Rep. 519; Continental Coal Corp. v. Roszelle Bros., 242 Fed. 243, 155 C. C. A. 83, 39 Am. Bankr. Rep. 562; Sheinberg v. Hoffman, 236 Fed. 343, 149 C. C. A. 475, 38 Am. Bankr. Rep. 24; Henderson v. Morse, 235 Fed. 518, 149 C. C. A. 64, 38 Am. Bankr. Rep. 22; Wilson v. Continental Bldg. & Loan Ass'n, 232 Fed. 824, 147 C. C. A. 18, 37 Am. Bankr. Rep. 444; Walter A. Wood Mowing & Reaping Mach. Co. v. Croll, 231 Fed. 679, 145 C. C. A. 565, 36 Am. Bankr. Rep. 610; Aller-Wilmes Jewelry Co. v. Osborn, 231 Fed. 907, 146 C. C. A. 103, 36 Am. Bankr. Rep. 714; Schmid v. Rosenthal, 230 Fed. 818, 145 C. C. A. 128, 36 Am. Bankr. Rep. 548; Carroll v. Stern, 223 Fed. 723, 139 C. C. A. 253, 34 Am. Bankr. Rep. 570; Deupree v. Watson, 216 Fed. 483, 132 C. C. A. 543; In re Pennell, 214 Fed. 337, 130 C. C. A. 645, 32 Am. Bankr. Rep. 241; Wells v. Lincoln, 214 Fed. 227, 130 C. C. A. 641, 32 Am. Bankr. Rep. 620; Epstein v. Steinfeld, 210 Fed. 236, 127 C. C. A. 54, 32 Am. Bankr. Rep. 6; In re Bradley (C. C. A.) 269 Fed. 784; Canner v. Webster Tapper Co. (C. C. A.) 168 Fed. 519, 21 Am. Bankr. Rep. 872; Ellsworth v. Lyons (C. C. A.) 181 Fed. 55; Stephens v. Merchants' Nat. Bank, 154 Fed. 341, 83 C. C. A. 119, 18 Am. Bankr. Rep. 560; John Naylon & Co. v. Christiansen Harness Mfg. Co., 158 Fed. 290, 85 C. C. A. 522, 19 Am. Bankr. Rep. 789; Southern Pine Co. v. Savannah Trust Co., 141 Fed. 802, 73 C. C. A. 60, 15 Am. Bankr. Rep. 618; In re Sweeney, 168 Fed. 612, 94 C. C. A. 90, 21 Am. Bankr. Rep. 866; In re Caponigri, 183 Fed. 307, 105 C. C. A. 519, 25 Am. Bankr. Rep. 509; Sicard v. Buffalo, N. Y. & P. R. Co., 15 Blatchf. 525, Fed. Cas. No. 12,831; Lumpkin v. Foley (C. C. A.) 204 Fed. 372, 29 Am. Bankr. Rep. 673; Salisburg v. Blackford (C. C. A.) 204 Fed. 438, 29 Am. Bankr. Rep. 320; In re Coney Island Lumber Co., 199 Fed.

where the findings of fact of the bankruptcy court, which are in conflict with those of the referee, are based on deductions from uncontradicted evidence, the appellate court need not follow them, but may deduce its own conclusions, just as the trial court can disregard the findings of the referee.[307] And if there are no findings of fact by either the referee or the district court, the court of appeals, lacking the aid of the presumption which ordinarily attaches to such findings, must determine the questions of fact for itself upon a review of the evidence.[308]

On a petition for revision, the appellate court will not review findings of fact on which the order of the lower court was based, and the evidence will be considered only for the purpose of ascertaining whether the order complained of was wholly unsupported by the evidence.[309]

§ 58. Determination on Appeal or Review and Effect Thereof.— Where an appeal has been duly taken and perfected under the bankruptcy act, the district court is thereby deprived of jurisdiction to consider further or act upon any matters involved in the appeal.[310] But the proceeding is still pending in the court of first instance while the case stands on appeal in the appellate court, and the appeal bond does not operate to stay proceedings, unless a supersedeas is also taken, so that, as to other steps or proceedings in the cause, it is still competent for the court of bankruptcy to act.[311] It is indeed within the authority of the circuit court of appeals to order a stay of proceedings pending the appeal, on an application made to the court, not to a judge,[312] but it ought

803; In re San Miguel Gold Min. Co., 197 Fed. 126, 27 Am. Bankr. Rep. 901; In re J. Jungmann, 197 Fed. 159, 116 C. C. A. 596; In re Walden Bros. Clothing Co., 199 Fed. 315, 29 Am. Bankr. Rep. 80. Though a finding of facts in a proceeding in bankruptcy submitted to a special master was, in his report, stated as a conclusion of law, his method of statement cannot affect the binding nature of the finding as a finding of fact. In re Pierce, Butler & Pierce Mfg. Co., 246 Fed. 814, 159 C. C. A. 116, 40 Am. Bankr. Rep. 445.

307 Walter v. Atha (C. C. A.) 262 Fed. 75, 45 Am. Bankr. Rep. 150.

308 Burleigh v. Foreman, 130 Fed. 13, 64 C. C. A. 381, 12 Am. Bankr. Rep. 88.

309 Shea v. Lewis, 206 Fed. 877, 124 C. C. A. 537, 30 Am. Bankr. Rep. 436; Olmsted-Stevenson Co. v. Miller, 231 Fed. 69, 145 C. C. A. 257, 36 Am. Bankr. Rep. 816; Good v. Kane, 211 Fed. 956, 128 C. C. A. 454, 32 Am. Bankr. Rep. 19; In re Bean, 230 Fed. 405, 144 C. C. A. 547; Stuart v. Reynolds, 204 Fed. 709, 123 C. C. A. 13, 29 Am. Bankr. Rep. 412; In re Frank, 182 Fed. 794, 105 C. C. A. 226, 25 Am. Bankr. Rep. 486; In re Pettingill & Co., 137 Fed. 840, 70 C. C. A. 338, 14 Am. Bankr. Rep. 757. The appellate court may reverse an order on an application to punish the bankrupt for contempt, where the trial court made no sufficient examination of the bankrupt's ability to comply, but denied the application on an erroneous ground. In re Sobol, 242 Fed. 487, 155 C. C. A. 263, 39 Am. Bankr. Rep. 252.

310 First Nat. Bank v. State Nat. Bank, 131 Fed. 430, 65 C. C. A. 414, 12 Am. Bankr. Rep. 440.

311 In re Barton's Estate, 144 Fed. 540, 16 Am. Bankr. Rep. 569; In re Chandler, 135 Fed. 893, 13 Am. Bankr. Rep. 614.

312 In re Ironclad Mfg. Co. (C. C. A.) 190 Fed. 320; In re Oregon Bulletin Co.,

not to be granted where it does not appear that the rights of the party applying will be prejudiced or seriously endangered if the proceedings in the court below are allowed to continue in their ordinary course.[313] In a case arising under the bankruptcy act of 1867, where two partners had been jointly adjudged bankrupt in the district court, and one of them had brought the decree of adjudication before the circuit court for review, and was, at the same time, prosecuting suits in the state courts against his co-partner in respect to the firm property, the circuit court held that it had no authority to issue a writ of prohibition to the state court to forbid it from further entertaining such suits; for the power of the federal courts to issue the writ is limited to cases where it is necessary for the exercise of their jurisdiction, and in the present instance, that jurisdiction being merely revisory, the writ was not essential to its exercise.[314]

The appellate court is not bound to act upon the appeal where neither justice nor practical considerations require it to consider and decide the points presented.[315] Thus, the appeal will be dismissed where the same question has previously been fully determined in another appeal in the same case,[316] or where the question has become merely academic, as where, pending an appeal from an order dismissing a petition in involuntary bankruptcy, the defendant has been adjudged bankrupt in the district court of another district,[317] or where a person appeals from an order made in summary proceedings requiring him to indorse a liquor license, held by him jointly with the bankrupt, in order that it may be sold, with which order he has nevertheless complied.[318] But it was held under the former statute that if an order of the district court, removing a trustee in bankruptcy, was right when made, it cannot be reversed on appeal, notwithstanding the only creditors who were competent to move against the trustee have since withdrawn from the proceedings and are no longer in the case.[319] If the appellate court proceeds with the appeal, it is not bound to reverse on strictly legal

3 Sawy. 529, 14 N. B. R. 394, Fed. Cas. No. 10,560.

[313] In re Oregon Bulletin Co., 3 Sawy. 529, 14 N. B. R. 394, Fed. Cas. No. 10,560.

[314] In re Bininger, 7 Blatchf. 159, 3 N. B. R. 481, Fed. Cas. No. 1,417.

[315] Lawhead v. Monroe Building Co., 252 Fed. 758, 164 C. C. A. 598, 41 Am. Bankr. Rep. 800; In re Donnelly, 211 Fed. 118, 128 C. C. A. 20, 32 Am. Bankr. Rep. 232.

[316] In re Kehler, 162 Fed. 674, 89 C. C. A. 466, 20 Am. Bankr. Rep. 669; Beach v. Macon Grocery Co., 120 Fed. 736, 57 C. C. A. 150, 9 Am. Bankr. Rep. 762.

[317] In re Sears, Humbert & Co., 128 Fed. 275, 62 C. C. A. 623. A petition to revise an order setting a bankrupt's petition for discharge for hearing at a future date will be dismissed where that date has passed. Allen v. Sweeney, 238 Fed. 563, 151 C. C. A. 499, 38 Am. Bankr. Rep. 442.

[318] Fisher v. Cushman, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, 4 Am. Bankr. Rep. 646.

[319] In re Prouty, 24 Fed. 554.

grounds, if satisfied that the facts were correctly found and that no injustice has been done.[320] Thus, if an adjudication of bankruptcy is supported by a sufficient allegation and proof of an act of bankruptcy, it cannot be set aside on appeal because other acts alleged were neither properly pleaded nor sufficiently proved.[321] The motion of a bankrupt to dismiss an appeal from a judgment allowing certain exemptions, for want of jurisdiction, may be denied without consideration on the merits, when the bankrupt fails to take a cross appeal.[322] In disposing of the appeal, the court of appeals may reverse or modify the judgment of the court below, or remand the cause with specific instructions as to the further steps to be taken,[323] or may shortcut a situation where the rights of the parties are perfectly plain, by issuing its own order to a receiver or trustee in bankruptcy to perform the duty which it decides to be incumbent on him.[324]

It is of course, the duty of the district court to make such orders or take such action as may be directed by the mandate of the appellate

[320] In re Clark, 9 Blatchf. 379, 6 N. B. R. 410, Fed. Cas. No. 2,802; Lazarus, Michel & Lazarus v. Harding, 223 Fed. 50, 138 C. C. A. 414, 35 Am. Bankr. Rep. 271. That petitioner was denied the right to vote for trustee is harmless error where his claim was so small that had the right not been denied, the selection of the trustee could not have been affected. National Bank of San Francisco v. Continental Bldg. & Loan Ass'n, 232 Fed. 828, 147 C. C. A. 22, 37 Am. Bankr. Rep. 439.

[321] In re Lynan, 127 Fed. 123, 62 C. C. A, 123, 11 Am. Bankr. Rep. 466.

[322] McGahan v. Anderson, 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641.

[323] White v. Thompson, 119 Fed. 868, 56 C. C. A. 398, 9 Am. Bankr. Rep. 653. And see In re Medina Quarry Co., 197 Fed. 308, 117 C. C. A. 54; In re Franklin Brewing Co. (D. C.) 265 Fed. 301, 45 Am. Bankr. Rep. 719; In re Blum, 244 Fed. 417, 157 C. C. A. 43, 40 Am. Bankr. Rep. 365; In re Braun, 239 Fed. 113, 152 C. C. A. 155, 38 Am. Bankr. Rep. 651; In re Mossler Co., 239 Fed. 262, 152 C. C. A. 250, 38 Am. Bankr. Rep. 604. Dismissal of an appeal from so much of an order as disallowed a general claim, because not taken within ten days, does not require dismissal of an appeal from so much of the order as disallowed a claim of lien. Massachusetts Bonding & Ins. Co. v. Kemper, 220 Fed. 847, 136 C. C. A. 593, 34 Am. Bankr. Rep. 80. On petition to revise an order fixing compensation of referee, the appellate court cannot make or direct a complete apportionment of commissions between two referees in advance of action by the court below. Kinkead v. J. Bacon & Sons, 230 Fed. 362, 144 C. C. A. 504, 36 Am. Bankr. Rep. 390. The circuit court of appeals cannot, on petition to revise an order approving a compromise between the trustee in bankruptcy and stockholders of the bankrupt corporation, direct a modification of the order, so as to permit the petitioners for revision to obtain in the court below an adjudication of their claimed priorities over other creditors, based on the claim that petitioners were ignorant of the terms of the sale of stock, notwithstanding the defense that other stockholders had extended credit with knowledge of the terms of such sale. Petition of Stuart (C. C. A.) 272 Fed. 938.

[324] Sprague Canning & Machinery Co. v. Fuller, 158 Fed. 588, 86 C. C. A. 46, 20 Am. Bankr. Rep. 157. But where a claimant in bankruptcy did not appeal from an order allowing him only a small portion of his claim as filed, he cannot be allowed more on the appeal of objecting creditors. Spencer v. Lowe, 198 Fed. 961, 117 C. C. A. 497, 29 Am. Bankr. Rep. 876. See Empress Theater Co. v. Hor-

court in sending the case back.[325] But, except as so directed, it has no further power to deal with the judgment or order appealed from. If reversed, it is annulled for all purposes. If affirmed, it must stand as made. In neither case, has the district court any authority to change or modify or amend the judgment or order or to grant a rehearing.[326]

On an appeal in a bankruptcy proceeding, findings of fact and conclusions of law will not ordinarily be stated by the circuit court of appeals, unless notice is given of an intended appeal to the Supreme Court, or unless they are requested, and in that case the request should be made at the time of the argument.[327]

§ 59. Jurisdiction of Territorial Supreme Courts.—Appellate jurisdiction of "controversies arising in bankruptcy proceedings" is conferred by the twenty-fourth section of the act on the supreme courts of the territories, "from the courts of bankruptcy from which they have appellate jurisdiction in other cases." The following section gives these courts appellate jurisdiction in three specified classes of cases, which are regarded as "proceedings" in bankruptcy rather than "controversies" in bankruptcy, namely, judgments making or refusing an adjudication of bankruptcy, judgments granting or refusing a discharge, and judgments allowing or rejecting a debt or claim of five hundred dollars or over.[328] But the authority to "superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction," given by section 24b of the act, is explicitly confined to "the several circuit courts of appeal." The supreme courts of the territories, therefore, have no jurisdiction of these special proceedings for review on petition for revision,[329] but they must be brought in the proper circuit court of appeals. It may seem a curious anomaly that appellate jurisdiction over territorial district courts should thus be divided between a federal court and the territorial supreme court. But the United States Supreme Court has declared that the law must be taken as it is

ton (C. C. A.) 266 Fed. 657, 46 Am. Bankr. Rep. 80.

[325] Brown v. Persons, 122 Fed. 212, 58 C. C. A. 658, 10 Am. Bankr. Rep. 416; Ex parte First Nat. Bank of Chicago, 207 U. S. 61, 28 Sup. Ct. 23, 52 L. Ed. 103, 19 Am. Bankr. Rep. 542.

[326] In re Lesaius (C. C. A.) 181 Fed. 690, 25 Am. Bankr. Rep. 102; In re Lennox, 181 Fed. 428, 24 Am. Bankr. Rep. 922; In re Hudson River Electric Co., 184 Fed. 970, 25 Am. Bankr. Rep. 873.

[327] Washington v. Tearney, 197 Fed. 307, 117 C. C. A. 53, 28 Am. Bankr. Rep. 633; Lumpkin v. Foley (C. C. A.) 204 Fed. 372, 29 Am. Bankr. Rep. 673; In re Martin (C. C. A.) 201 Fed. 31, 29 Am. Bankr. Rep. 157.

[328] See In re McCasland, 16 Okl. 499, 85 Pac. 1118. An appeal does not lie from a judgment allowing or rejecting a debt or claim of less than five hundred dollars. Ex parte Stumpff, 9 Okl. 639, 60 Pac. 96.

[329] Ex parte Stumpff, 9 Okl. 639, 60 Pac. 96; In re American Copper Co., 11 Ariz. 36, 89 Pac. 516.

written, and that there is no reason for thinking that it does not, in this particular, express the real intention of Congress.[330] It was held, in the case cited, that jurisdiction to "superintend and revise in matter of law" the proceedings in bankruptcy in a district court of Oklahoma (then a territory) was vested in the circuit court of appeals of the eighth circuit, to which the territory had been judicially assigned, notwithstanding that jurisdiction on appeal or writ of error was vested in the territorial supreme court. But the circuit courts of appeals possess this revisory jurisdiction only over the inferior courts of bankruptcy "within their jurisdiction," and it is held that this phrase is meant to designate the inferior courts which were within their respective jurisdictions at the time of the passage of the bankruptcy act. For this reason, the circuit court of appeals of the eighth circuit holds that it has no revisory jurisdiction over the proceedings of the courts of bankruptcy in the Indian Territory, the court of appeals for the territory alone having appellate jurisdiction over such courts since its creation three years before the enactment of the bankruptcy law.[331]

[330] Plymouth Cordage Co. v. Smith, 194 U. S. 311, 24 Sup. Ct. 725, 48 L. Ed. 992.

[331] In re Blair, 106 Fed. 662, 45 C. C. A. 530, 5 Am. Bankr. Rep. 793; In re Crawford, 152 Fed. 169, 81 C. C. A. 419, 18 Am. Bankr. Rep. 258.

CHAPTER IV

REFEREES IN BANKRUPTCY, THEIR APPOINTMENT AND QUALIFICATIONS

§ 60. Appointment of Referees.—The office of "referee in bankruptcy," created by the bankruptcy act of 1898, corresponds to that of "register" under the act of 1867. The present statute provides that the several courts of bankruptcy, within their respective territorial limits, shall have power to appoint referees in bankruptcy, each for a term of two years. Such a number of referees are required to be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy; and those courts are given the authority to designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.[1] Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, it is provided that the judge himself may act, or he may appoint another referee, or designate another referee, holding his appointment from the same court, to fill the vacancy temporarily. Under this provision it is held that, when the referee to whom a case in bankruptcy would regularly be referred is absent or disqualified, the judge may appoint a special referee and send the case to him; and this may be done before the answer of the alleged bankrupt is filed, and does not require the consent or approval of the respondent or his attorney.[2]

Appointment to office is ordinarily an executive function, rather than legislative or judicial. But the Constitution authorizes Congress to vest the appointment of such inferior officers as they think proper in the

[1] Bankruptcy Act 1898, §§ 34, 37. "The word 'county' includes a parish, or any other equivalent subdivision of a state or territory of the United States." Rev. Stat. U. S. § 2. The state of Louisiana is divided into parishes. The District of Columbia might be considered a county within the meaning of this act, although it is not so denominated in law. A referee in bankruptcy, it has been held, cannot fulfill the duties of his appointment for any county in which the business in bankruptcy must wait upon his convenience, or in which he cannot hold sessions whenever business may require them, or cannot continue them at convenient intervals; nor can he fulfill the requirements of his official duty as to any county in which the books and papers of his office are not open to inspection at the local seat of justice. In re Sherwood, 1 N. B. R. 344, Fed. Cas. No. 12,774.

[2] Bankruptcy Act 1898, § 43; Bray v. Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153.

courts of law. (Art. 2, section 2.) This is held to justify the provision of the bankruptcy act which delegates to the several courts of bankruptcy the appointment of the necessary referees.[3] Where there are two district judges for the same federal judicial district, both authorized to hold the district court and sit in bankruptcy cases, either one of them, holding the court at the time, has power to appoint or remove a referee in bankruptcy, and such action does not require the concurrence of the two judges.[4] While probably the action of a district court in appointing a referee in bankruptcy may be subject to review by the circuit court of appeals on petition to revise, yet the latter court will not in any way attempt to control the discretion of the district court in making an appointment to an office so intimately connected with its own functions, and where the qualifications of the nominee are so peculiarly within its own knowledge.[5]

§ 61. **Qualifications, Oath, and Bond.**—The thirty-fifth section of the bankruptcy act provides that "individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any state other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public;[6] (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States,

[3] Birch v. Steele, 165 Fed. 577, 91 C. C. A. 415, 21 Am. Bankr. Rep. 539.

[4] Birch v. Steele, 165 Fed. 577, 91 C. C. A. 415, 21 Am. Bankr. Rep. 539. And see In re Steele, 161 Fed. 886, 20 Am. Bankr. Rep. 446; In re Steele, 156 Fed. 853, 19 Am. Bankr. Rep. 671; Ex parte Steele, 162 Fed. 694, 20 Am. Bankr. Rep. 575.

[5] Birch v. Steele, 165 Fed. 577, 91 C. C. A. 415, 21 Am. Bankr. Rep. 539.

[6] The term "office of profit" is frequently used to designate offices otherwise known as "lucrative" offices. It describes an office to which salary, compensation, or fees are attached, and the amount of the salary or compensation is not material. Baker v. Board of Crook County Com'rs, 9 Wyo. 51, 59 Pac. 797. "Emolument" is defined by Webster as the profit arising from office or employment; that which is received as a compensation for services or which is annexed to the possession of an office as salary, fees, and perquisites; advantage; gain, public or private." This definition is adopted in Apple v. Crawford Co., 105 Pa. St. 300, 51 Am. Rep. 205. The office of postmaster is an office both of profit and trust under the authority of Congress. McGregor v. Balch, 14 Vt. 434, 39 Am. Dec. 231; Foltz v. Kerlin, 105 Ind. 221, 4 N. E. 439, 5 N. E. 672, 55 Am. Rep. 197. A member of the state legislature holds an office of profit as well as of honor. State v. Valle, 41 Mo. 29. The offices of county recorder and county commissioner are lucrative offices within the meaning of the state constitution. Dailey v. State, 8 Blackf. (Ind.) 329. So is the office of inspector of customs. Crawford v. Dunbar, 52 Cal. 36. So is the office of surveyor general. People v. Whitman, 10 Cal. 38. An officer of the United States army on the retired list holds an office of "trust or profit" under the United States. State v. De Gress, 53 Tex. 387. And see In re Corliss, 11 R. I. 638, 23 Am. Rep. 538.

or of the justices or judges of the appellate courts of the districts wherein they may be appointed;[7] and (4) residents of, or having their offices in, the territorial districts for which they are to be appointed." It will be observed that the act does not require that a referee in bankruptcy should be an attorney at law, but only that he should be "competent" to perform the duties of the office; and probably this word is to be taken in a popular sense, and as involving a certain degree of intelligence and familiarity with affairs. But the duties of a referee, though partly clerical, and requiring a measurable degree of knowledge of book-keeping, accounts, and other business details, are, in their most important aspect, quasi-judicial. Difficult questions of law often come before them for solution, and though their determinations are subject to review by the court, the expeditious administration of estates in bankruptcy demands that referees should be men of legal training and experience.[8]

Referees in bankruptcy are required by law to take the same oath of office as that prescribed for judges of the United States courts, before proceeding to perform the duties of their office.[9] The referee must

[7] Consanguinity is the relationship between persons who are descended from the same stock or common ancestor. The method of determining degrees of relationship by the common law is the same as that prevailing in the canon law, and is as follows: To begin at the common ancestor and reckon downward, one degree for each person, until the computation reaches that one of the two persons whose relationship is to be determined who is the more remote from the common ancestor, or until they are both reached if they are equally distant from that ancestor; and the number of degrees thus reckoned will be the degree in which they are related. 2 Bl. Comm. 206. According to this method of computation, first cousins are related in the second degree, and second cousins in the third degree. The other method of computation is that of the civil (Roman) law, which is to count upward, from either of the persons related, to the common stock, and then downward to the other, reckoning a degree for each person both ascending and descending. In other words, the canon or common-law rule takes the number of degrees in the longest line; the civil law, the sum of the degrees in both lines. "Affinity" means the relationship or connection which arises from a marriage, between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband. Its degrees are reckoned in the same way as degrees of consanguinity. In this connection, see also Federal Judicial Code 1911, § 67, providing that "no person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to the judge of such court."

[8] It appears that there is nothing in the statute to prevent a woman from being appointed a referee in bankruptcy, if the requirements as to competence, residence, relationship to the judges, and the holding of other offices are met. Since women who are otherwise qualified may now be admitted to practice as attorneys before the Supreme Court of the United States (Federal Judicial Code 1911, § 255), there is apparently no reason why they might not hold the office in question.

[9] Bankruptcy Act 1898, § 36. This oath is as follows: "I do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in

also qualify by entering into a bond to the United States, in such sum as shall be fixed by the court, but not exceeding $5,000, with such sureties as the court shall approve, conditioned for the faithful performance of his official duties.[10] There must be at least two sureties upon the bond, and the court shall require evidence as to the actual value of their property, which, over and above their liabilities and exemptions, must at least equal the amount of the bond; but bonding or surety companies may be accepted as sureties by the court. The bond is to be filed of record in the office of the clerk of the court and may be sued on in the name of the United States for the use of any person injured by a breach of its condition; but suit on such bond shall not be brought subsequent to two years after the alleged breach of condition.[11] The court is to fix the time within which the referee must qualify by executing his bond, and it is provided that if any referee shall fail to give the bond within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in the office.[12]

§ 62. Disqualification by Interest.—If the referee to whom a case would ordinarily be referred is "disqualified to act," the judge may himself act, or appoint another referee, or send the cause to another referee holding his appointment under the same court.[13] The statute expressly declares that "referees shall not act in cases in which they are directly or indirectly interested," and that if a referee knowingly acts in such a case, it shall be a criminal offense, punishable by fine, and shall also vacate his office.[14] The object of statutory provisions disqualifying judicial officers from acting in causes in which they are interested is to secure the utmost fairness and impartiality, and hence they ought to be construed liberally to effect that object, and any doubt as to the qualification of the officer in a particular case should be resolved against his right to sit.[15] But the interest which disqualifies a judicial officer "is not the kind of interest which one feels in public proceedings or public measures. It must be a pecuniary or property interest, or one affecting his individual rights, and the liability or pecuniary gain or relief to the judge must occur upon the event of the suit, not result

bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States." Official Forms in Bankruptcy, No. 16; Rev. Stat. U. S. § 712. As to who may administer this oath, see Bankruptcy Act 1898, § 20.

10 The condition of the bond of a referee in bankruptcy is this; that he shall "well and faithfully discharge and perform all the duties pertaining to the office of referee in bankruptcy." Official Form No. 17.

11 Bankruptcy Act 1898, § 50.

12 Bankruptcy Act 1898, § 50k.

13 Bankruptcy Act 1898, § 43.

14 Bankruptcy Act 1898, § 39, clause b; § 29, clause 1.

15 Dodd v. Northrop, 37 Conn. 216.

remotely, in the future, from the general operation of laws and government upon the status fixed by the decision."[16] The statutory restriction as to referees acting in cases in which they are interested does not apply to the interest of a referee by way of commissions on sums paid to creditors as dividends. This is a necessary interpretation of the law, since a contrary construction would disqualify referees from acting in any cases at all, and would in fact abolish the office and put an end to all procedure under the present machinery of the act.[17] It has also been decided that a referee is not disqualified by interest from acting in a particular case because he is a debtor to the bankrupt. The interest which will disqualify is an interest either in the proceedings in bankruptcy or in the estate of the bankrupt; and the bankrupt's debtor cannot be said to be "interested" in this way, since his liability is not increased, diminished, or in any way changed by the proceedings. At the same time it is said that the judge, on being apprised of the fact that the referee is a debtor of the bankrupt, may, in his discretion, revoke the order of reference and send the case to another referee.[18]

§ 63. Removal of Referees.—It is provided in the law, that a court of bankruptcy may, in its discretion, remove from office the referees holding their appointment under such court, "because their services are not needed or for other cause."[19] No case is found in the reports in which a referee or register in bankruptcy was removed from office for causes affecting his character or competency, though in one case there is an intimation that a register who is habitually careless and negligent should be removed, and that if he makes a practice of signing and furnishing in blank certificates or other papers which are required to be issued by him in his official capacity, it will be cause for his removal.[20] Although the power of removal given to the judge in the language quoted above is discretionary and almost unlimited, and although the authority and control which a court possesses over its own officers may be exercised summarily, yet, on general principles of law and justice, an order removing a referee for "other cause" than his superfluity should not be entered without due notice to him nor without according him a full and fair opportunity to defend or exculpate himself. Still the

[16] Foreman v. Town of Marianna, 43 Ark. 324. And see Sjoberg v. Nordin, 26 Minn. 501, 5 N. W. 677; Ellis v. Smith, 42 Ala. 349; Pearce v. Atwood, 13 Mass. 324; State v. Sutton, 74 Vt. 12, 52 Atl. 116; Taylor v. Williams, 26 Tex. 583; City of Austin v. Nalle, 85 Tex. 520, 22 S. W. 668, 960; Higgins v. City of San Diego, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209; Bennett v. State, 4 Tex. App. 72.

[17] In re Abbey Press, 134 Fed. 51, 67 C. C. A. 161, 13 Am. Bankr. Rep. 11.

[18] Bray v. Cobb, 91 Fed. 162, 1 Am. Bankr. Rep. 153.

[19] Bankruptcy Act 1898, § 34.

[20] In re Jaycox, 7 N. B. R. 303, Fed. Cas. No. 7,240.

discretion of the district court in this particular will not be reviewed or controlled by the circuit court of appeals. In one case in which such relief was sought, it was said: "We find neither in the statute nor in the adjudged cases any authority conferred on this court to control the court of bankruptcy, on the facts alleged in the petition, in the exercise of its discretion in making the order of removal. Congress, exercising an authority conferred by the constitution, has vested the power to appoint referees exclusively in the courts of bankruptcy, and, when appointed, the referee holds the office at the discretion of the court that appointed him. It follows, we think, that this court can have no control over the appointment or removal, nor can it make inquiry into the grounds of removal." [21]

[21] Birch v. Steele, 165 Fed. 577, 587, 91 C. C. A. 415, 21 Am. Bankr. Rep. 539.

CHAPTER V

POWERS AND DUTIES OF REFEREES

§ 64. Reference and Transfer of Causes.—The jurisdiction of a referee in bankruptcy over a particular case is founded upon the order by which the case is referred to him. This order is to be made, in some cases, by the clerk of the court; in others, by the judge. The act provides, in the case of a petition in involuntary bankruptcy, that "if the judge is absent from the district, or the division of the district, in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee."[1] And when a petition in voluntary bankruptcy is filed, if the judge is absent from the district or division "at the time of the filing," the clerk shall forthwith refer the case to the referee.[2] When a petition is thus referred by the clerk, another part of the act confers upon the referee authority and jurisdiction to "make the adjudication or dismiss the petition," although in this respect his action is subject to review by the judge.[3] It has been ruled, under the present bankruptcy act, that the

[1] Bankruptcy Act 1898, § 18, clause f. The form to be used by the clerk in making this order of reference is Form No. 15. It is under the hand of the clerk and the seal of the court. See In re Murray, 96 Fed. 600, 3 Am. Bankr. Rep. 601.

[2] Bankruptcy Act 1898, § 18, clause g.

[3] Bankruptcy Act 1898, § 38. The referee has jurisdiction to consider a petition and make an adjudication or dismiss the petition only in the single case where the petition has been thus referred to him by the clerk in the absence of the judge. Section 18 of the act requires the "judge" to make the adjudication, unless he is absent from the district. This duty cannot be delegated by the judge to the referee, if the former is within the district; for the specific term "judge," used in this connection, is plainly defined in another part of the act as not including the referee. Section 1, clause 16. See In re De Ford, 18 N. B. R. 454, Fed. Cas. No. 3,744. Also it is held in some of the cases that the referee cannot act at all on a petition thus sent to him if it is contested, and issues

authority to refer a petition in bankruptcy to the referee, in the absence of the judge, has not been conferred upon a deputy clerk of the court, but can be exercised only by the clerk in person.[4]

If the judge is within the district, the case will take the more usual course; and "after a person has been adjudged a bankrupt, the judge may cause the trustee to proceed with the administration of the estate, or refer it generally to the referee, or specially with only limited authority to act in the premises or to consider and report upon specified issues, or to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district." [5]

This section of the act, it is held, does not permit of a reference of the case to a referee until after an adjudication has been made.[6] That is, if the judge is present in the district, it is his duty to hear the petition and make the adjudication or dismiss the petition, as the case may be, and it is only after an adjudication that the case can be sent to a referee. But the judge may then exercise his discretion as to which of the referees within his jurisdiction shall be placed in charge of the case, supposing none of them to be personally disqualified, and in so doing he should consider what will best subserve the convenience of the parties

are raised by the bankrupt or any of the creditors on the facts stated, but he must certify the case to the judge. In re L. Humbert Co., 100 Fed. 439, 4 Am. Bankr. Rep. 76; In re Murray, 96 Fed. 600, 3 Am. Bankr. Rep. 601.

[4] Bray v. Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153. The clerk, says the court, "has no judicial powers in bankruptcy, but is a ministerial officer subject to the orders of the district judge, and a deputy clerk is not mentioned in the act. The deputy's authority and power are confined to those conferred by Rev. Stat. § 558. An order signed by the judge and attested by the deputy clerk with the seal of the court is valid, but alone a deputy clerk cannot make an order of reference in bankruptcy. Whether he can do so in the name of the clerk, quære?" Notwithstanding the foregoing decision, however, it seems clear, from the terms of the bankruptcy act itself, that a deputy clerk may receive the petition for filing, and in a proper case refer it to the referee. This is shown by section 1, clause 20, where a petition is defined as a paper filed in a court of bankruptcy "or with the clerk or deputy clerk," and clause 18 of the same section, which provides that the imposing of a duty upon any officer "shall include any person authorized by law to perform the duties of such officer." And see Gilbertson v. United States, 168 Fed. 672, 94 C. C. A. 158, 22 Am. Bankr. Rep. 32.

[5] Bankruptcy Act 1898, § 22. The form to be used for a reference after adjudication is Form No. 14.

[6] In re Back Bay Automobile Co., 158 Fed. 679, 19 Am. Bankr. Rep. 835. But see In re Ruos, 164 Fed. 749, 21 Am. Bankr. Rep. 257. But where answers are filed to a petition in involuntary bankruptcy, it is proper for the court to refer the case to the referee (in the character of a special commissioner or master) to take and return the evidence and report upon the questions presented. Clark v. American Mfg. & E. Co., 101 Fed. 962, 42 C. C. A. 120, 4 Am. Bankr. Rep. 351; In re Lacov, 134 Fed. 237, 67 C. C. A. 19, 13 Am. Bankr. Rep. 400. But compare, as to this point, In re King, 179 Fed. 694, 103 C. C. A. 240, 24 Am. Bankr. Rep. 606.

interested in the estate.[7] But this section refers only to referees appointed within the district where the case is pending, and the court has no jurisdiction to refer a case, for any purpose whatever, to a referee appointed and residing in another district.[8] As to referring a case specially, it is stated to be the general practice, when petitions are presented for the reclamation of property by or from a trustee, or requiring the determination of questions respecting assets claimed as a part of the bankrupt's estate, to refer them to a special master, or to a referee in bankruptcy acting as special master, to take the testimony and report his conclusions of fact and law thereon.[9] The powers of a special referee, appointed on the petition of a receiver for the property of an alleged bankrupt pending a hearing on the petition, with authority to examine the bankrupt and other witnesses in relation to the property and assets of the bankrupt, and for that special purpose, with a view to discover what had become of the bankrupt's property, are superseded on the making of an adjudication and an order of general reference.[10] It should further be observed that, according to the provision of the statute, "the judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another." [11]

The general orders in bankruptcy (No. 12) provide that "the order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee." The fact that the order of reference designates a day "on" which the bankrupt shall attend before the referee does not prevent that officer from taking proper proceedings when the bankrupt appears within a reasonable time after the day fixed. His

[7] In re Western Inv. Co., 170 Fed. 677, 21 Am. Bankr. Rep. 367. Where the place of business of a bankrupt firm, and also the residence of one of its members, were in one of the counties comprised within the federal judicial district where the adjudication was made, but the other partners resided in two other counties in the same district, it was held to be within the discretion of the court of bankruptcy to send the case to the referee in either one of the three counties. In re Watkinson, 205 Fed. 145, 123 C. C. A. 377.

[8] In re Schenectady Engineering & Construction Co., 147 Fed. 868, 17 Am. Bankr. Rep. 279.

[9] In re Tracy, 179 Fed. 366, 102 C. C. A. 644, 24 Am. Bankr. Rep. 539; In re Thomas, 35 Fed. 337. And see U. S. v. Ward, 257 Fed. 372, 168 C. C. A. 412, 43 Am. Bankr. Rep. 711.

[10] In re Ruos, 164 Fed. 749, 21 Am. Bankr. Rep. 257.

[11] Bankruptcy Act 1898, § 22.

failure to appear on or before the appointed day will not make it necessary to obtain a new order of reference.[12]

§ 65. Jurisdiction and Powers of Referees.—Referees in bankruptcy, although they are not strictly speaking "judges," are by no means merely ministerial officers. They are commissioners or aides of the district court, clothed by law with extensive judicial powers, and invested with a large measure of judicial discretion.[13] "Referees are important officers in the administration of the bankrupt law, and great weight should be given to their decisions. * * * Referees are not only judicial officers charged with the performance of the duties prescribed in the statute, for the faithful performance of which they take and subscribe an official oath, but are also required to give bond to insure the observance of the oath. This is an unusual requirement of a quasi judicial officer." [14] Under the act of 1867, the jurisdiction of a register in bankruptcy (except as to administrative details) was expressly confined to such matters and cases as were not contested; upon the raising of a contested issue of law or fact in any case before a register, he was required to adjourn it into the court.[15] No such distinction is made by the present statute; and, as will more fully appear in the following sections, the jurisdiction of a referee in bankruptcy extends to almost every matter which is within the power of the court itself, save in a few specially excepted cases, and subject at all times to review by the judge.[16] The jurisdiction of referees, however, is territorially restricted; for the same section of the law which confers it provides that their powers shall be exercised "within the limits of their districts as established from time to time." [17] This

[12] In re Hatcher, 1 N. B. R. 390, Fed. Cas. No. 6,210. But if the petitioner does not appear before the referee at the time fixed in the order, or within a reasonable time thereafter, excusing his delay, the petition may be dismissed. Id.

[13] But the Supreme Court, in a recent decision, has rather pointedly called attention to the fact that the referee in bankruptcy is not a separate court, nor is he endowed with any independent judicial authority, but is merely an officer of the court of bankruptcy, with no power except as conferred by the order of reference. Weidhorn v. Levy, 253 U. S. 268, 40 Sup. Ct. 534, 64 L. Ed. 898, 45 Am. Bankr. Rep. 493.

[14] In re Covington, 110 Fed. 143, 6 Am. Bankr. Rep. 373.

[15] See In re Gettleston, 1 N. B. R. 604, Fed. Cas. No. 5,373; In re Lanier, 2 N. B. R. 154, Fed. Cas. No. 8,070; In re Bank of North Carolina, 19 N. B. R. 164, Fed. Cas. No. 896. And see Rev. Stat. U. S. §§ 4998, 5009.

[16] When a District Court has entertained ancillary proceedings in bankruptcy, a referee to whom the matter is referred to proceed under the order has no authority to determine that the court was without jurisdiction to make such order. In re Flaherty (D. C.) 265 Fed. 741, 45 Am. Bankr. Rep. 638.

[17] Bankruptcy Act 1898, § 38. See In re Schenectady Engineering & Construction Co., 147 Fed. 868, 17 Am. Bankr. Rep. 279. In an early decision by a referee it was held that such referee, after adjudication, has jurisdiction to enjoin a sale of the bankrupt's real estate on foreclosure of a mortgage in a state court, although such real estate is situated in another county than that for which the referee was appointed, pro-

is a different matter from the determination of jurisdiction by reference to the bankrupt's domicile. Ordinarily a case will be sent to that referee within whose district the bankrupt lives, but the judge may refer the case to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for other cause.[18]

§ 66. Specific Powers and Authorities of Referees.—The powers and duties of referees in bankruptcy are prescribed by the act, and still further defined by the general orders in bankruptcy.[19] Speaking generally, it may be said that a referee has jurisdiction and authority, in the cases referred to him, and within the limits of his district, and subject to a review by the judge, of all matters and proceedings in bankruptcy except, first, an adjudication of bankruptcy or other final action upon a petition when the judge is within the district;[20] second, the determination of questions arising out of an application for a discharge or for the confirmation of a composition; and third, certain matters which, by the terms of the law, are confided to the judge alone. The statute, it should be observed, in its grants of authority and directions as to detail, sometimes speaks of the "court" or "court of bankruptcy," and sometimes of

vided it is within the federal judicial district where the adjudication was made and the referee appointed. In re Sabine, 1 Nat. Bankr. News, 45, per Referee Hotchkiss.

[18] Bankruptcy Act 1898, § 22.

[19] Bankruptcy Act 1898, § 38, reading as follows: "Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the application of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings." As to the authority of a referee to administer oaths, see also § 20. And see In re Dean, 2 N. B. R. 89, Fed. Cas. No. 3,700. In regard to requiring the production of documents in cases before them, another part of the act provides that the term "document" shall include any book, deed, or instrument in writing. § 1, cl. 13. General Order No. 12 provides that, after the reference of the case, "all the proceedings, except such as are required by the act or by these general orders to be before the judge, shall be had before the referee."

[20] See Bankruptcy Act 1898, §§ 18, 38. And see In re De Ford, 18 N. B. R. 454, Fed. Cas. No. 3,744.

the "judge." And it is provided (section 1, clause 7) that the former term "may" include the referee, but that the word "judge" shall not include the referee. From the general policy of the act, and from its interpretation by the Supreme Court in the general orders, it is evident that the word "court" must be held to include the referee in every case where it occurs, unless the context plainly shows that only the judge is meant. The following are the principal occurrences of the word "court" and the word "judge" in the act, which are significant in this connection:

Section 3e provides that the bond to be given upon the seizure of the bankrupt's property before adjudication shall be approved by "the court or a judge thereof." But section 69, which is in pari materia with this clause, directs that a warrant to the marshal to seize the bankrupt's property may be issued by a "judge" only; and section 38 permits the referee to exercise the powers of the judge in this matter only upon a certificate from the clerk showing that the judge is absent, ill, or unable to act.

Section 7 provides that the bankrupt shall attend the first meeting of his creditors, if directed by "the court or a judge thereof" to do so, and that he shall then, and at such other times as "the court" shall order, submit to an examination. That an order for the examination of the bankrupt may be made by the referee appears from Form No. 28.

Section 9 provides for the arrest and detention of a bankrupt who is about to leave the district. The warrant for that purpose may be issued only by the "judge", not including the referee. But apparently an order to the marshal to keep the bankrupt in custody after his arrest upon such warrant and after a hearing, may be made either by the judge or the referee. And, on the other hand, by General Order No. 12, the bankrupt "may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court."

Section 11 provides that "the court" may order a trustee in bankruptcy to defend pending suits against the bankrupt or to prosecute suits commenced by him. Such orders may clearly be made by the referee.[21] But applications for "an injunction to stay proceedings of a court or officer of the United States or of a state shall be heard and decided by the judge; but he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts." General Order No. 12.

[21] The referee, in case there is delay in winding up the estate in bankruptcy, may properly inquire why a settlement has not been made, and suggest the propriety of making progress, and indicate what steps the trustee should take. In re Bank of North Carolina, 19 N. B. R. 164, Fed. Cas. No. 896.

By sections 12–15 jurisdiction to confirm or reject a composition, and to set it aside after confirmation, and to grant or refuse, or revoke, a discharge is vested in the judge alone. But he may refer an application for a discharge or for the confirmation of a composition, or any specified issue arising thereon, to the referee to ascertain and report the facts. General Order No. 12.[22]

Power to make the initiatory process in a proceeding in bankruptcy returnable later than fifteen days from its issue is given to the "judge," (section 18), for the obvious reason that the jurisdiction of the referee does not attach (except in the case where a petition is referred to him by the clerk in the judge's absence) until after adjudication.

By section 21, power to order persons other than the bankrupt to appear and be examined is vested in the "court of bankruptcy." The referee may clearly authorize the issuance of a summons to a witness (Form No. 30), and he is specially invested with power to examine the witness and require the production of documents; but has no authority to commit persons for disobedience to such process. Section 38.

Sections 26 and 27 provide that the trustee, in the course of settlement of the estate, may submit any controversy to arbitration pursuant to the direction of the "court," and may compromise any controversy with the approval of "the court." Undoubtedly the term must here be taken as including the referee.

As to the appointment of a trustee in bankruptcy by the "court" when the creditors fail to make an appointment, the approval of a trustee's bond, and the power to order that no trustee be appointed (in the case provided for in General Order No. 15), the forms promulgated by the Supreme Court show that these are all matters within the jurisdiction of the referee, though of course his action is subject to review by the judge. The same remark applies to the order allowing the final account of a trustee and discharging him, and to the order for the appointment of a new trustee upon the death, removal, or resignation of the former one.[23] But an order for the removal of a trustee for cause can be made by the judge only.[24]

Meetings of creditors are to be called by the "court."[25] This plainly includes the referee.

[22] The referee has power to make an order requiring the trustee to give the bankrupt a certificate of the names and addresses of the creditors who have proved their claims, to enable him to apply for his discharge. In re Blaisdell, 5 Ben. 420, 6 N. B. R. 78, Fed. Cas. No. 1,488.

[23] Forms 23, 26, 27, 51, and 55.

[24] General Order No. 13; Form No. 54.

[25] Bankruptcy Act 1898, § 55; General Order No. 25. The referee has authority to order notice to creditors of a meeting to authorize the trustee to oppose the bankrupt's application for discharge. In re Hockman, 205 Fed. 330.

By section 57 of the act it is provided that claims of creditors which have been duly proven may be allowed by the "court;" that thereafter the "court" may allow the withdrawal of the instrument on which the debt is founded; that the consideration of the allowance of a claim may be continued by the "court" for cause upon its own motion, and that the claims which have been allowed may be reconsidered for cause, and reallowed, reduced in amount, or expunged. In all these matters, the referee may be, and primarily is, the court.[26]

By the express terms of the statute, dividends are to be declared by the referee (section 39), but by a later section, if they are to be declared oftener or in smaller portions than the act directs, power to do this is given to the "judge" only. Section 65b.

Orders empowering the trustee to sell real estate at auction, to redeem property of the bankrupt from liens upon it, to sell the property subject to such liens, to dispose of property at private sale, or to sell perishable property immediately, are to be made by the referee.[27]

It may be added that, by the twentieth section of the act, referees have authority to administer all oaths required by the statute, except in the case of a hearing in court; and they may therefore administer the oath to witnesses appearing for examination or in any hearing before them.[28] In the case where a petition in involuntary bankruptcy is sent to a referee by the clerk of the court on account of the absence of the judge, the referee may either make an adjudication or, if the facts do not warrant it, may dismiss the petition. But this is the only instance in which he has power to take the latter course. He has no authority to dismiss the bankruptcy proceeding generally, or any particular matter in bankruptcy referred to him, after the adjudication.[29] It is also within the jurisdiction and the discretion of a referee in bankruptcy to order amendments to be made in the petition and schedules of a voluntary bankrupt referred to him, in particulars as to which he finds them defective or insufficient, and to refuse to call a first meeting of creditors

[26] Bankruptcy Act 1898, § 55, clause b; General Order No. 21, par. 6; Forms Nos. 38, 39.

[27] Forms Nos. 42, 43, 44, 45, 46. See In re Matthews, 109 Fed. 603, 6 Am. Bankr. Rep. 96; In re T. L. Kelly Dry Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528. By section 70 of the act, "all real and personal property belonging to bankrupts' estates shall be appraised by three disinterested appraisers; they shall be appointed by and report to the court." That the word "court" here means "referee" appears from Form No. 13. On a petition to sell mortgaged property free from the lien and transfer the same to the proceeds, there being no allegation in the petition nor in the notice that an attack was made on the validity of the mortgage, the referee has no jurisdiction to adjudge it void. In re Martin, 210 Fed. 620, 127 C. C. A. 256, 32 Am. Bankr. Rep. 29.

[28] United States v. Simon, 146 Fed. 89, 17 Am. Bankr. Rep. 41; In re Dean, 2 N. B. R. 89, Fed. Cas. No. 3,700.

[29] In re Elby, 157 Fed. 935, 19 Am. Bankr. Rep. 734.

until such amendments are made.[30] But he has no authority to collect or receive money belonging to an estate in bankruptcy.[31] And although courts of bankruptcy have jurisdiction and authority to authorize the business of the bankrupt to be continued for a limited time, when that is for the best interests of the estate, yet a referee in bankruptcy should not take it upon him to exercise such authority, where it involves transactions of considerable magnitude, especially since the amount of his own compensation may be directly involved, nor in any case should he authorize the issue of trustee's certificates to raise money to accomplish that end.[32]

§ 67. Same; Surrender or Reclamation of Property.—A referee in bankruptcy has jurisdiction of an application by a trustee in bankruptcy for an order requiring the bankrupt to surrender money or property of his estate alleged to be in his possession or control and to be withheld or concealed from the trustee, to cite the bankrupt before him to show cause, and to make an order in accordance with his findings.[33] His action is of course subject to review by the judge of the court of bankruptcy, but his decision will not be reversed unless plainly erroneous or based on clearly insufficient evidence.[34] If, however, the order of the referee requiring a surrender of property was based on a mistake of fact, the referee has power, on petition of the bankrupt, filed within the time limited for review of his decision, to reopen and reconsider the matter, and, the mistake being shown, to set aside the order.[35] If the bankrupt fails or refuses to obey an order of this kind, lawfully made, the referee may enter the fact on his record, and it is then his duty to certify the facts to the judge, as the latter alone has the authority to adjudge the bankrupt in contempt and impose a punishment therefor.[36]

Similarly, the referee has power in the first instance to enter an order against a third person to show cause why he should not be required

[30] In re Brumelkamp, 95 Fed. 814, 2 Am. Bankr. Rep. 318.

[31] In re Pierce, 111 Fed. 516, 6 Am. Bankr. Rep. 747.

[32] Bray v. Johnson, 166 Fed. 57, 91 C. C. A. 643, 21 Am. Bankr. Rep. 383.

[33] In re Oliver, 96 Fed. 85, 2 Am. Bankr. Rep. 783; In re Tudor, 96 Fed. 942, 2 Am. Bankr. Rep. 808; In re Mayer, 98 Fed. 839, 3 Am. Bankr. Rep. 533; In re Miller, 105 Fed. 57, 5 Am. Bankr. Rep. 184; Prather v. Prather, 4 Ky. Law Rep. 454; In re Kramer (D. C.) 209 Fed. 627, 31 Am. Bankr. Rep. 377. The referee has power to approve a compromise between the trustee and the bankrupt whereby the trustee accepts a less amount than the bankrupt was ordered by the court to pay as the amount the court found the bankrupt was concealing where such compromise is for the best interests of the estate. In re Goldman (C. C. A.) 241 Fed. 385, 39 Am. Bankr. Rep. 58.

[34] In re Tudor, 96 Fed. 942, 2 Am. Bankr. Rep. 808.

[35] In re Brenner, 190 Fed. 209, 26 Am. Bankr. Rep. 646.

[36] In re Miller, 105 Fed. 57, 5 Am. Bankr. Rep. 184.

to surrender or pay over to the trustee property or money in his hands, alleged to belong to the estate in bankruptcy, and, upon a hearing, to make an order requiring such surrender or payment within a limited time.[37] Thus he may compel a creditor to return money received from the bankrupt after the institution of the proceedings,[38] or order the officers of a bankrupt corporation to pay over the proceeds of sales of its stock alleged to belong to the corporation, and also to pay an amount assessed against them for unpaid shares.[39] But the referee has no power or jurisdiction to order third persons, in possession of property claimed by the trustee, to deliver it to the latter, where the possession of the third person is not admitted to be in subordination to the bankrupt's title, but is based on a bona fide adverse claim.[40] This is the rule which may now be regarded as definitely settled. For although there had been a disposition to enlarge the jurisdiction of referees in these matters, and some cases had gone so far as to hold that a referee in bankruptcy had jurisdiction of a bill in equity by the trustee to avoid a transfer alleged to have been in fraud of creditors,[41] yet in 1920 the Supreme Court of the United States, reversing the most important of the decisions so holding, took occasion to define rather sharply the powers of referees, and put a conclusive negative upon the claim for any such extensive jurisdiction. The court pointed out that "the referee is not in any sense a separate court, nor endowed with any independent judicial authority, and is merely an officer of the court of bankruptcy, having no power except as conferred by the order of reference, reading this of course in the light of the act; and that his judicial functions, however important, are subject always to the review of the bankruptcy court." And on the merits, it was said: "We find nothing

[37] Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, 7 Am. Bankr. Rep. 224; In re Famous Clothing Co., 179 Fed. 1015, 24 Am. Bankr. Rep. 780. Compare Woodward v. McDonald, 116 Ga. 748, 42 S. E. 1030. See also In re Logan, 196 Fed. 678, 28 Am. Bankr. Rep. 543. The referee has no jurisdiction of a suit by the trustee to collect a debt nor of a suit to enforce specific performance of a contract between the bankrupt and a third person. In re Ballou (D. C.) 215 Fed. 810, 33 Am. Bankr. Rep. 21.

[38] Knapp & Spencer Co. v. Drew, 160 Fed. 413, 87 C. C. A. 365, 20 Am. Bankr. Rep. 355.

[39] In re Kornit Mfg. Co., 192 Fed. 392, 27 Am. Bankr. Rep. 244. And see Bilder v. Ellis, 75 Misc. Rep. 255, 133 N. Y. Supp. 425.

[40] In re Blum (C. C. A.) 202 Fed. 883, 29 Am. Bankr. Rep. 332; In re Gill, 190 Fed. 726, 111 C. C. A. 454, 26 Am. Bankr. Rep. 883; In re Peacock, 178 Fed. 851, 24 Am. Bankr. Rep. 159; In re F. M. & S. Q. Carlile, 199 Fed. 612, 29 Am. Bankr. Rep. 373; In re Bacon, 196 Fed. 986, 28 Am. Bankr. Rep. 565. As to consent of defendant conferring jurisdiction in such cases, see Kilgore v. Barr, 114 Va. 70, 75 S. E. 762.

[41] Graham v. Faith, 253 Fed. 32, 165 C. C. A. 52, 41 Am. Bankr. Rep. 590; In re Weidhorn, 253 Fed. 28, 165 C. C. A. 48, 41 Am. Bankr. Rep. 592. And see In re Looschen Piano Case Co. (D. C.) 261 Fed. 93, 44 Am. Bankr. Rep. 190.

in the provisions of the Bankruptcy Act that makes it necessary or reasonable to extend the authority and jurisdiction of the referee beyond the ordinary administrative proceedings in bankruptcy and such controversial matters as arise therein and are in effect a part thereof, or to extend the authority of the referee under the general reference so as to include jurisdiction over an independent and plenary suit such as the one under consideration. * * * Reviewing the entire matter, we conclude that, under the language of the Bankruptcy Act and of the general orders in bankruptcy, a referee, by virtue of a general reference under Order XII (1), has not jurisdiction over a plenary suit in equity against a third party to set aside a fraudulent transfer or conveyance under section 70e, and affecting property not in the custody or control of the court of bankruptcy." [42]

But when property demanded by the trustee is in the possession of a third party, who claims it as his own, it is proper for the referee to hear the testimony, in order to determine whether the third person's claim is read or pretended. If he finds that the claim is made in good faith and is probably real, but of doubtful validity or questionable faith, it should then be determined in a plenary suit; but if he finds that the claim is without any actual merit or legal foundation, he should require a surrender of the property to the trustee.[43]

A referee also has jurisdiction to entertain and determine a claim set up by a third person, by intervening petition or otherwise, asserting a lien upon or interest in property which is lawfully in the possession of the trustee, or asserting that it is the property of the petitioner and not of the estate in bankruptcy.[44] And likewise he has jurisdiction to determine whether a preference has been received by a secured creditor.[45]

[42] Weidhorn v. Levy, 253 U. S. 268, 40 Sup. Ct. 534, 64 L. Ed. 898, 45 Am. Bankr. Rep. 493, reversing In re Weidhorn, 253 Fed. 28, 165 C. C. A. 48, 41 Am. Bankr. Rep. 592, and therefore sustaining the position originally taken in this case in the District Court, In re Weidhorn (D. C.) 243 Fed. 756, 39 Am. Bankr. Rep. 338. And see further, in support of the general proposition stated in the text, In re Continental Producing Co. (D. C.) 261 Fed. 627, 44 Am. Bankr. Rep. 216; Charles H. Brown Paint Co. v. Rockhold (C. C. A.) 269 Fed. 139, 46 Am. Bankr. Rep. 246; In re Vallozza (D. C.) 225 Fed. 334, 34 Am. Bankr. Rep. 409; In re Petronio, 220 Fed. 269, 136 C. C. A. 285, 34 Am. Bankr. Rep. 470.

[43] In re Holbrook Shoe & Leather Co., 165 Fed. 973, 21 Am. Bankr. Rep. 511.

[44] In re Rochford, 124 Fed. 182, 59 C. C. A. 388, 10 Am. Bankr. Rep. 608; In re Drayton, 135 Fed. 883, 13 Am. Bankr. Rep. 602. The referee in bankruptcy has power to fix a time limit for customers and creditors of a bankrupt stockbroker to file petitions for the reclamation of securities and claims to establish liens on cash in the possession of the trustee. In re Gay & Sturgis (D. C.) 224 Fed. 127, 35 Am. Bankr. Rep. 417.

[45] In re Keystone Press, 203 Fed. 710, 29 Am. Bankr. Rep. 715.

§ 68. Same; Grant of Injunction.—The General Orders provide that "applications for an injunction to stay proceedings of a court or officer of the United States or of a state, shall be heard and decided by the judge, but he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts." [46] In this particular case, therefore, it is clear that a referee in bankruptcy has no power to award an injunction. The provision has been assailed as invalid, because it is thought to put a limitation upon the powers of referees as defined and granted by the act itself; but this contention has not been sustained.[47] But aside from an application to stay proceedings, it may be stated as the general result of the authorities that it is within the power of a referee, in a proper case, to issue a restraining order or an order having the force of an injunction.[48] And this appears to accord well with the general purpose of the act to commit to the referee the judicial administration of the whole proceeding in bankruptcy, after the adjudication, with the exception of a very few specific matters reserved for the decision of the judge himself, and also to be necessary for the prompt and efficient working of the act. Thus in a case before the United States District Court in Connecticut, a trustee in bankruptcy was entitled to the possession of premises leased by the bankrupt, as against persons to whom the landlord had granted a lease after the adjudication, and it was held that the referee had power to enjoin those persons from interfering with the possession of the trustee. "In his injunctive order," said the judge, "I do not think that the referee exceeded the power which the act confers upon him. It would be a sad state of things if, in such emergencies, the referee should be compelled to discover the judge in time to save the situation. The matter in hand was peculiarly within the knowledge of the referee, and the court will, in advance, thank all like officers who shall relieve it from an unnecessary burden." [49] And whatever may be the limits of the referee's authority in such cases, the courts refuse to interfere with

[46] General Order No. 12, par. 3.

[47] In re Berkowitz, 143 Fed. 598, 16 Am. Bankr. Rep. 251; In re Siebert, 133 Fed. 781, 13 Am. Bankr. Rep. 348.

[48] In re Matthews, 109 Fed. 603, 6 Am. Bankr. Rep. 96, 5 Am. Bankr. Rep. 720; In re Booth, 96 Fed. 943, 2 Am. Bankr. Rep. 770; In re Steuer, 104 Fed. 976, 5 Am. Bankr. Rep. 209; In re Wilkes, 112 Fed. 975, 7 Am. Bankr. Rep. 574; In re Northrop, 1 Am. Bankr. Rep. 427; In re Adams, 1 Am. Bankr. Rep. 94, 1 Nat. Bankr. News, 167; In re Rogers, 1 Am. Bankr. Rep. 541, 1 Nat. Bankr. News, 211; In re Kilian, 1 Nat. Bankr. News, 267; In re Kerski, 2 Am. Bankr. Rep. 79. But a referee in bankruptcy has no jurisdiction to restrain the trustee from proceeding for the commitment of the bankrupt for failure to comply with an order for the surrender of assets. In re Epstein (D. C.) 219 Fed. 635, 33 Am. Bankr. Rep. 606.

[49] In re Adams, 134 Fed. 142, 14 Am. Bankr. Rep. 23.

his action in granting an injunction where the parties in interest have voluntarily appeared before him and submitted the questions at issue to his determination, as, for instance, where his decision is that incumbered property of the bankrupt estate shall be taken in charge by the trustee and sold free of liens, and the proceeds distributed among those entitled, and this includes an order enjoining the incumbrancer from making a sale.[50] But where a referee has already decided that certain property does not belong to the estate in bankruptcy, but to a third person, he has no further jurisdiction over it, and therefore cannot enjoin its seizure by a sheriff under a writ of replevin issued from a state court, in an action brought therein by the trustee against such third person.[51]

§ 69. **Same; Appointment of Receiver.**—The general grant to referees in bankruptcy of the powers and functions of the court, except in the few particulars where the decision of specific questions is reserved for the judge, is broad enough to include the authority to appoint a receiver to take charge of the property of a bankrupt until the appointment and qualification of a trustee, in the case provided for by the statute, viz., where it is absolutely necessary for the preservation of the estate. And this authority is not limited by the provision of the act which gives the referee power to exercise the functions of the judge in regard to taking possession of or releasing the bankrupt's property in the event of the judge's absence, sickness, or inability to act, to be shown by the certificate of the clerk of the court. But the referee's authority to appoint a receiver dates from the time the order of court referring the case to him is actually placed in his hands, and not from the time of its signing or filing. Hence the action of a referee in appointing a receiver before the delivery of the order of reference to him, and immediately upon his being informed by a telephone message that such an order had been made, would be improvident and unauthorized. All the foregoing points were ruled in the case cited in the margin.[52]

§ 70. **Duties of Referees.**—The duties of a referee in bankruptcy depend, in a large measure, upon the exigencies of the particular case, since it is committed to his general oversight and control. But there are certain specific duties imposed upon him by the act and the General Orders which must be noticed in this connection. In the first place, he is to send out all notices to creditors,[53] to call the first meeting of credi-

[50] In re Matthews, 109 Fed. 603, 6 Am. Bankr. Rep. 96; In re Benjamin, 140 Fed. 320, 15 Am. Bankr. Rep. 351.

[51] In re Berkowitz, 143 Fed. 598, 16 Am. Bankr. Rep. 251.

[52] In re Florcken, 107 Fed. 241, 5 Am. Bankr. Rep. 802.

[53] Bankruptcy Act 1898, §§ 39, 58.

tors and preside at such meeting,[54] to confirm the trustee chosen by the creditors, or, if they fail to make a choice, to appoint a trustee, or, in the case where the schedule of a voluntary bankrupt discloses no assets and no creditor appears at the meeting, to make an order that no trustee be appointed,[55] and further, "it shall be the duty of the referee immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond." [56]

It is also the business of the referee, in case the bankrupt complies with his duty and files a schedule of his property and a list of the creditors, to examine the same, and cause them to be amended if they are incomplete or defective; and if the bankrupt fails, refuses, or neglects to file the schedule or list, then it is made the duty of the referee to prepare and file these papers, or to cause it to be done.[57]

It is further the duty of the referee to transmit to the clerk of the court, "forthwith, a list of the claims proved against an estate, with the names and addresses of the proving creditors." [58] Also he is to transmit to the clerk "such papers as may be on file before him whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, to transmit certified copies thereof by mail," and upon the conclusion of each case in bankruptcy, to transmit to the clerk his record thereof.[59] The further duties of these officers are thus specified in the statute: "Referees shall declare dividends, and prepare and deliver to trustees dividend sheets showing the divi-

[54] Bankruptcy Act 1898, § 55, clause b.

[55] Bankruptcy Act 1898, § 44; General Orders Nos. 13 and 15; Official Forms Nos. 22, 23, 27.

[56] General Order No. 16.

[57] Bankruptcy Act 1898, § 39. It is within the jurisdiction and the discretion of a referee in bankruptcy to order amendments to be made in the petition and schedule of a voluntary bankrupt referred to him, in particulars as to which he finds them defective or insufficient, and to refuse to call a first meeting of creditors until such amendments are made. In re Brumelkamp, 95 Fed. 814, 2 Am. Bankr. Rep. 318. If the list of creditors is incomplete or imperfect in not giving their addresses, or giving them wrongly, it should be corrected by the referee in this respect, with the aid of such information as the creditors themselves furnish him; for all notices to creditors are to be sent "to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors." Bankruptcy Act 1898, § 58a. If the referee needs any further information as to the bankrupt's assets, the liens on his property, the state of the title, etc., to enable him to prepare or complete the schedule and list, he can cause a summons to be issued requiring any designated person to appear before him and be examined. Idem. § 21a.

[58] General Order No. 24.

[59] Bankruptcy Act 1898, § 39.

dends declared and to whom payable; furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings thereon, and transmit them to the judges; upon application of any party in interest, preserve the evidence taken, or the substance thereof as agreed upon by the parties, before them when a stenographer is not in attendance; and whenever their respective offices are in the same city or town where the court of bankruptcy convenes, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them." [60]

Three important prohibitions are laid upon the referees. They must not act in cases in which they are directly or indirectly interested. They may not practice as attorneys or counselors at law in any bankruptcy proceeding. They must not purchase, either directly or indirectly, any property of an estate in bankruptcy. If a referee violates this last prohibition, it is a punishable offense, and conviction thereof will vacate his office.[61]

§ 71. Proceedings Before Referees.—The proceedings before a referee in bankruptcy are, generally speaking, under his own regulation and control, and if there is any irregularity it should be complained of in due season. Thus, where the administrator of an estate appeared in bankruptcy proceedings in response to an order of the referee to show cause, and went to trial upon the merits without questioning the jurisdiction, it was considered that he had waived his right to insist that the referee should have proceeded against him by an action.[62] In pursuance of the general policy of the act, all proceedings before the referee should advance with reasonable expedition. There should be no unreasonable delays, nor any dilatory proceedings. In regard to allowing postponements and adjournments, no inflexible rule can be laid down; the referee must exercise a proper legal discretion; but it may be said that he should not grant adjournments except for good cause properly substantiated. "The common practice of granting adjournments for convenience only should not be imitated, but progress with diligence be enforced by short adjournments only, except for good cause." [63] With regard to petitions and other pleadings before referees, no special rules

[60] Bankruptcy Act 1898, § 39.

[61] Bankruptcy Act 1898, § 39b; Idem. § 29c (2).

[62] In re F. W. Hall & Sons (D. C.) 208 Fed. 578, 31 Am. Bankr. Rep. 434.

[63] In re Finkelstein, 93 Fed. 989; In re Morris, 154 Fed. 211, 18 Am. Bankr.

have been laid down, with the exception of such as may be found in the general orders and official forms. It is in the discretion of a referee to allow or refuse a proposed amendment to a pleading in a case before him, on the same terms and in the same circumstances as would ordinarily be operative in a court of justice,[64] and he should dismiss a petition presented to him by a trustee in bankruptcy but not filed in the office of the clerk of the court where such filing is necessary,[65] or one which is not supported by sufficient evidence to enable the referee to find the facts to sustain the order prayed for.[66] While the referee is to preside at the first meeting of the creditors, when a trustee is to be chosen, and the choice of the creditors is subject to his approval, it is highly improper for him to interfere in any way with their election of a trustee or to attempt to influence them in their choice, and on a petition by creditors alleging such interference the cause will be sent to another referee.[67] It is provided that, "in all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof, or that the order was made by consent, or that no adverse interest was represented at the hearing, or that the order was made after hearing adverse interests." [68] And where there is an appearance in a contest before a referee, the litigating parties should be notified of his decision; but where creditors do not appear, or they appear and their appearance is not noted, no duty rests upon the referee to give notice of his decisions, especially where claims are presented and no objection is made.[69]

§ 72. **Same; Taking and Preservation of Evidence.**—The General Order (No. 22) provides that "the examination of witnesses before

Rep. 828; In re Hyman, 3 Ben. 28, Fed. Cas. No. 6,984, 2 N. B. R. 333.

[64] Knapp & Spencer Co. v. Drew, 160 Fed. 413, 87 C. C. A. 365, 20 Am. Bankr. Rep. 355. Where part of the subject-matter of a petition filed by a trustee before a referee is within the jurisdiction of the court, and a part is not, it should be retained, and an amendment allowed limiting it to the matter within the jurisdiction. In re Newfoundland Syndicate, 196 Fed. 443, 28 Am. Bankr. Rep. 119.

[65] In re Gerdes, 102 Fed. 318, 4 Am. Bankr. Rep. 346.

[66] In re Canister Co. (D. C.) 248 Fed. 587, 41 Am. Bankr. Rep. 625.

[67] In re Smith, 2 Ben. 113, 1 N. B. R. 243, Fed. Cas. No. 12,971.

[68] General Order No. 23. An order of the referee, pursuant to a petition in the proceeding, affecting a third person, is not necessarily invalid because it was based on an order to show cause which was mailed to that person, instead of being personally served upon him. Courtney v. Youngs, 202 Mich. 384, 168 N. W. 441. In a proceeding before a referee to compel the delivery of property by a third person to the trustee, it was irregular to receive and hear the evidence before the trustee's petition was filed and before an order to show cause had been issued to the third person. In re Ballou (D. C.) 215 Fed. 810, 33 Am. Bankr. Rep. 21.

[69] In re Nichols, 166 Fed. 603, 22 Am. Bankr. Rep. 216.

the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just." It is clearly the duty of the referee to be present in person throughout the progress of an examination and hear the evidence, unless, perhaps, where his presence is waived by the parties. It is not at all a proper practice to administer the oath to a witness, and then leave the parties to proceed with a stenographer.[70] It is further the duty of the referee to take and preserve all the evidence offered upon the examination, and the remedy for his refusal to do so is by application to the district court, and, failing there, to the circuit court of appeals, for an order that it be taken and preserved.[71]

There has been some uncertainty as to the duty of a referee where formal objection is taken to a particular question or line of testimony, and, in his opinion, the objection is well founded. He is required, as above stated, to note upon the deposition any question objected to and his decision thereon. And some courts have thought that this gives him authority to exclude altogether any question or line of questions which he decides to be inadmissible.[72] But the better opinion, and that supported by the weight of authority, is otherwise. Expedition in the settlement of bankruptcy cases is the great purpose of the act, and it would be very ill served in this respect if it were necessary to remand a proceeding to the referee every time the judge differed from the referee in regard to the admissibility of evidence. Besides, upon a review of the referee's decision, the judge is not bound to reverse because of the erroneous admission or exclusion of evidence, but it is his duty to determine the issue do novo upon all the evidence in the record which he decides to be competent.[73] Therefore, when an objection is interposed, it is the duty of the referee to incorporate in the deposition

[70] In re Wilde's Sons, 131 Fed. 142, 11 Am. Bankr. Rep. 714.

[71] First Nat. Bank v. Abbott, 165 Fed. 852, 91 C. C. A. 538, 21 Am. Bankr. Rep. 436.

[72] In re Graves, 182 Fed. 443, 25 Am. Bankr. Rep. 372; In re Wilde's Sons, 131 Fed. 142, 11 Am. Bankr. Rep. 714.

[73] In re De Gottardi, 114 Fed. 328, 7 Am. Bankr. Rep. 723.

the question asked, the fact of objection and the reasons given for objection, and his ruling on the objection, and then, even though he decides the question to be improper, to allow and require it to be answered and the answer to be entered in the deposition.[74] From this rule, however, should be excepted evidence attempted to be extracted from a witness who is privileged against testifying, also particular items of evidence as to which privilege is claimed and where the claim should clearly be allowed, and further, evidence which is clearly and unmistakably incompetent, irrelevant, or immaterial, in so much that it would be an abuse of process or of the power of the court to compel its production or permit its introduction.[75]

§ 73. Same; Review and Reopening of Case.—Some of the authorities hold that the mode of reviewing an order or decision of a referee provided by the General Order No. 27, that is to say, by petition to the district court, is exclusive, and that a referee cannot review or revoke his own orders after the expiration of the time fixed for filing a petition for such review by the court.[76] Within that time, however, it is clear that an order is still within the control of the referee, and that he may set it aside, reconsider the case, and make a new order, for cause shown, as, for instance, that the original order was based on a mistake of fact.[77] And without special reference to the lapse of time, other authorities hold that a referee may revise and change his findings and orders on proper application and for sufficient reasons, such as mistake, misunderstanding of counsel, or new evidence, though in such a case it is the proper practice to give notice to counsel, so that they may be reheard on the question if they desire.[78] But where a party has had an opportunity to call and examine his witnesses in a proceeding before a referee, and the matter is closed, he should not be permitted to reopen the case for the purpose of introducing omitted evidence, unless there is a special reason therefor.[79] And it has been said that "referees, in their hear-

[74] Bank of Ravenswood v. Johnson, 143 Fed. 463, 74 C. C. A. 597, 16 Am. Bankr. Rep. 206; In re Sturgeon (C. C. A.) 139 Fed. 608, 14 Am. Bankr. Rep. 681; In re Harrison, 197 Fed. 320, 28 Am. Bankr. Rep. 293; In re Romine, 138 Fed. 837, 14 Am. Bankr. Rep. 785; In re De Gottardi, 114 Fed. 328, 7 Am. Bankr. Rep. 723; In re Lipset, 119 Fed. 379, 9 Am. Bankr. Rep. 32; Dressel v. North State Lumber Co., 119 Fed. 531, 9 Am. Bankr. Rep. 541; First Nat. Bank v. Abbott, 165 Fed. 852, 91 C. C. A. 538, 21 Am. Bankr. Rep. 436. And see In re Neuman (D. C.) 251 Fed. 667, 40 Am. Bankr. Rep. 427; In re Krug (D. C.) 218 Fed. 860.

[75] First Nat. Bank v. Abbott, 165 Fed. 852, 91 C. C. A. 538, 21 Am. Bankr. Rep. 436.

[76] In re Marks, 171 Fed. 281, 22 Am. Bankr. Rep. 568; In re Greek Mfg. Co., 164 Fed. 211, 21 Am. Bankr. Rep. 111.

[77] In re Brenner, 190 Fed. 209, 26 Am. Bankr. Rep. 646.

[78] In re Hawley, 116 Fed. 429, 8 Am. Bankr. Rep. 629; In re Porter, 14 Phila. 449.

[79] In re Booss, 154 Fed. 494, 18 Am. Bankr. Rep. 658.

ings, within the scope of their power, are clothed with the authority of judges, and their orders and decrees are to be reviewed, reversed, or annulled under the same rules and conditions as those governing other courts of equity, subject always to the express provisions of the bankruptcy act." And accordingly it was held that a petition filed before a referee to review an order previously entered by him after a hearing is in the nature of a bill of review in equity and governed by the same rules of procedure. It can only be filed for error of law apparent upon the face of the decree, or because of the discovery of new evidence since the hearing, and, when on the latter ground, it can only be filed by express leave, and the evidence relied on must be relevant, material, and such as would have produced a different result, and it must have been unknown to the petitioner at the time of the hearing and such as he could not have discovered by the exercise of due diligence.[80] Where a proceeding before a referee is dismissed by the court for want of jurisdiction, all that has been done in the proceeding is necessarily annulled, including the findings of the referee and the taking of evidence by him; and he cannot thereafter, in a new proceeding, base a determination of the same issues on the findings made in the prior proceeding, or consider the evidence taken therein, unless by stipulation of the parties.[81]

§ 74. **Certifying Questions for Review by Judge.**—The bankruptcy law provides that the exercise by referees of the jurisdiction conferred upon them shall be "subject always to a review by the judge." Courts of bankruptcy are invested with jurisdiction to "consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees." And by another section, for the purposes of such a review, it is made the duty of referees, whenever requested thereto by either of the parties, to make up the record in any contested matter and transmit it to the judge.[82] In addition, General Order No. 27 provides that "when a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of, and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the findings and order of the referee thereon." Compliance with the practice here prescribed is imperative. A party desiring the judge to review an order of the referee must file his petition as required by the General Order, in default of which the application for review will be

[80] In re McIntire, 142 Fed. 593, 16 Am. Bankr. Rep. 80.

[81] In re Rosenberg, 116 Fed. 402, 8 Am. Bankr. Rep. 624.

[82] Bankruptcy Act 1898, §§ 38, 2, 39.

dismissed.[83] On a similar principle, the decision of the referee on a contest between the bankrupt and one of his creditors cannot be certified to the judge for review when the referee's finding is not followed by any order made by him.[84]

In order to be properly certified to the judge, the question must arise regularly in the course of proceedings before the referee, and between parties having the legal right to raise it. No opinion can be asked, or will be given, upon merely abstract questions or hypothetical questions, nor upon such as are merely anticipated or likely to arise. The question must be one actually arising and existing on issues of law or fact in proceedings had. Questions stated by consent must be by parties in a particular case upon proceedings actually had.[85]

Under the bankruptcy act of 1867, the only "parties" who were entitled to have the register certify a question and decision for review by the judge were the bankrupt and the creditors; and it was held that a witness under examination was not a "party" in this sense, and could not have a review of the register's decision on the question of his being subject to examination.[86] But while the present statute speaks only of the "parties," it will be observed that the General Order gives this right of applying for review to "a bankrupt, creditor, trustee, or other person." But the review must be asked for by some person entitled. The referee should not certify any question to the court until requested to do so in a proper manner.[87] And where no party in interest has asked

[83] In re Avoca Silk Co. (D. C.) 241 Fed. 607, 39 Am. Bankr. Rep. 391; In re Zartman (D. C.) 242 Fed. 595, 39 Am. Bankr. Rep. 544; In re Petersen (D. C.) 252 Fed. 846, 40 Am. Bankr. Rep. 637; In re Home Discount Co., 147 Fed. 538, 17 Am. Bankr. Rep. 168; Craddock-Terry Co. v. Kaufman, 175 Fed. 303, 23 Am. Bankr. Rep. 724; In re Sharick, 1 Alaska, 398; In re Smith, 93 Fed. 791, 2 Am. Bankr. Rep. 190; In re Schiller, 96 Fed. 400, 2 Am. Bankr. Rep. 704. Specific questions arising in proceedings before a referee in bankruptcy, and upon which the opinion of the district judge is desired, should be presented on the certificate of the referee, or, in the case of orders entered, on petition for review, and not in the form of an assignment of errors. In re T. L. Kelly Dry-Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528. Counsel desiring to be heard by the court must file exceptions to the findings of the referee, as required by the rule of the court. In re Carolina Cooperage Co., 96 Fed. 604.

[84] In re Smith, 93 Fed. 791, 2 Am. Bankr. Rep. 190. An order of a referee denying a motion to dismiss a petition by the trustee to require the bankrupt to turn over property is not reviewable because not a final order. In re Schimmel, 203 Fed. 181, 29 Am. Bankr. Rep. 361.

[85] In re Pulver, 1 Ben. 381, 1 N. B. R. 46, Fed. Cas. No. 11,466; In re Wright, 1 N. B. R. 393, Fed. Cas. No. 18,069; In re Sturgeon, 1 N. B. R. 498, Fed. Cas. No. 13,564; In re Bray, 2 N. B. R. 139, Fed. Cas. No. 1,818; In re Peck, 3 N. B. R. 757, Fed. Cas. No. 10,887; In re Haskell, 4 N. B. R. 558, Fed. Cas. No. 6,191.

[86] In re Fredenberg, 2 Ben. 133, 1 N. B. R. 268, Fed. Cas. No. 5,075.

[87] In re Ruos, 159 Fed. 252, 20 Am. Bankr. Rep. 281; In re Clark Coal & Coke Co., 173 Fed. 658, 23 Am. Bankr. Rep. 273. But where other creditors were not parties to a petition by the trustee for leave to transfer a part of the bankrupt's property pursuant to a contract made before bankruptcy, such creditors, though they did not appeal

that an order of the referee be certified for review, it is not reviewable merely on a report by the referee of his proceedings in the case, including the order.[88] And the referee himself has no jurisdiction, of his own motion, to certify a question not raised by the parties to the bankruptcy proceeding, but which the referee anticipates may arise, and on which he desires to be advised.[89]

It is not necessary for the purpose of obtaining a review that formal exceptions should have been taken to the decision and ruling of the referee; the want of them will not prevent the court from reviewing the matter in question, unless they are required by a local rule of court.[90] But if exceptions are taken before a referee in bankruptcy, they must be specific, as required by the settled practice of the federal courts.[91] And in the absence of such exceptions, the specific errors of law complained of must be clearly and distinctly pointed out in the petition for review.[92]

The petition for review is not to be filed in the office of the clerk of the court, but with the referee, but if it is wrongly filed, by inadvertence, it rests within the discretion of the court, in the absence of any rule on the subject, to permit the mistake to be corrected, even though the time ordinarily limited for the filing of such petitions has elapsed.[93]

Since neither the statute nor the rules prescribed by the Supreme Court fix any particular time within which a party aggrieved by a ruling or order of a referee must file his petition for review, the time may be limited by a rule of the particular court, and if this is not done, the only limitation is that the petition must be filed within a reasonable time.[94]

from the decision of the referee wherein he found that one objecting to the order had a lien on the property, are not bound, and may subsequently question the objector's interest. In re Collins (D. C.) 235 Fed. 937, 37 Am. Bankr. Rep. 692.

[88] In re Kimmel, 183 Fed. 665, 25 Am. Bankr. Rep. 595.

[89] In re Reukauff, Sons & Co., 135 Fed. 251, 14 Am. Bankr. Rep. 344.

[90] In re Peoples' Department Store Co., 159 Fed. 286, 20 Am. Bankr. Rep. 244; In re Swift, 118 Fed. 348, 9 Am. Bankr. Rep. 237; In re Miner, 117 Fed. 953, 9 Am. Bankr. Rep. 100.

[91] Dressel v. North State Lumber Co., 119 Fed. 531, 9 Am. Bankr. Rep. 541.

[92] In re Carver, 113 Fed. 138, 7 Am. Bankr. Rep. 539; In re Covington, 110 Fed. 143, 6 Am. Bankr. Rep. 373.

[93] In re Nippon Trading Co., 182 Fed. 959, 25 Am. Bankr. Rep. 695.

[94] In re Verdon Cigar Co., 193 Fed. 813, 27 Am. Bankr. Rep. 56; In re Foss, 147 Fed. 790, 17 Am. Bankr. Rep. 439; In re Rome, 162 Fed. 971, 19 Am. Bankr. Rep. 820; Bacon v. Roberts, 146 Fed. 729, 77 C. C. A. 155, 17 Am. Bankr. Rep. 421; In re Grant, 143 Fed. 661, 16 Am. Bankr. Rep. 256; In re Sharick, 1 Alaska, 398; Crim v. Woodford, 136 Fed. 34, 68 C. C. A. 584, 14 Am. Bankr. Rep. 302; In re Nichols, 166 Fed. 603, 22 Am. Bankr. Rep. 216. But where a local rule of court requires a petition for review to be filed within a limited time (as, 10 days), it is imperative and must be complied with. In re Isert (D. C.) 232 Fed. 484, 36 Am. Bankr. Rep. 431; In re Kruse (D. C.) 234 Fed. 470, 37 Am. Bankr. Rep. 687; In re Stringer (D. C.) 244 Fed.

Whether or not this requisite has been complied with is a question to be determined by the district court in the exercise of a sound judicial discretion, having regard to the general policy of the act to expedite proceedings and to the circumstances of the case, especially such as may offer a good excuse for the delay, or, on the other hand, charge the party with laches. And its decision will not be reversed by the appellate court except for an abuse of discretion or manifest error.[95] Some of the courts have defined the term "reasonable time," for this purpose, as the same time fixed by law for taking an appeal from the same class of orders.[96] But, generally speaking, no arbitrary time has been limited, the courts preferring to decide each case on its own facts, but with a generally observable tendency to regard thirty days as the limit of a "reasonable time," unless there are special and peculiar circumstances to excuse a longer delay. Thus, it is said: "In view of the general aim and purpose of the bankruptcy act to facilitate and expedite the proceedings in the settlement of the estates of bankrupts, and in view of analogous provisions requiring prompt and speedy action, it may be stated with certainty that the circumstances and conditions must be extreme which will excuse a delay of more than thirty days in asking for a review of an order of the referee."[97] In one case, it was held that an order dismissing a petition for review filed fifty days after the making of the order sought to be reviewed, on the ground of unreasonable delay, was not an abuse of discretion, where no good reason for the delay was shown.[98] In another case, a petition filed more than three months after the order was made, and on the day fixed for the declaring of a dividend, was held to be unreasonably late, especially as the referee had repeatedly called the attention of counsel to the matter, and it was held that, on the objection of the trustee, the referee was justified in refusing to certify the matter to the court.[99] A petition filed six months after the date of the order complained of is clearly and certainly too late and should be dismissed.[100] But this rule does not apply to a motion to vacate an order made by a referee in bankruptcy, on the ground that he had no jurisdiction to make it. Such a motion should

629, 40 Am. Bankr. Rep. 474; In re El Sevilla Restaurant (D. C.) 253 Fed. 410, 41 Am. Bankr. Rep. 608.

[95] Bacon v. Roberts, 146 Fed. 729, 77 C. C. A. 155, 17 Am. Bankr. Rep. 421.

[96] In re Nichols, 166 Fed. 603, 22 Am. Bankr. Rep. 216; In re Nippon Trading Co., 182 Fed. 959, 25 Am. Bankr. Rep. 695.

[97] In re Verdon Cigar Co., 193 Fed. 813, 27 Am. Bankr. Rep. 56. And see In re Foss, 147 Fed. 790, 17 Am. Bankr. Rep. 439; In re Rome, 162 Fed. 971, 19 Am. Bankr. Rep. 820; In re Wink, 206 Fed. 348, 30 Am. Bankr. Rep. 298.

[98] Bacon v. Roberts, 146 Fed. 729, 77 C. C. A. 155, 17 Am. Bankr. Rep. 421.

[99] In re Grant, 143 Fed. 661, 16 Am. Bankr. Rep. 256.

[100] In re Sharick, 1 Alaska, 398.

be entertained at any time and disposed of on the merits, as the doctrine of laches does not apply in such a case.[101] It should also be remarked that a referee is not required to stop proceedings before him and certify to the court for decision questions raised on objections to evidence.[102]

In the absence of any provision in the statute or the rules of the court, a petition to review an order of a referee in bankruptcy does not of itself operate as a supersedeas, and whether or not it shall have that effect rests in the discretion of the reviewing or reviewed authority in the particular case; but the district court may provide by rule that such a petition for review shall not operate as a supersedeas, unless a bond be given to indemnify the opposite party in such sum as may be prescribed by the referee or the judge, or it may require the petitioner to give security for the costs of the review.[103]

The duty of the referee, on the filing of such a petition, is to "certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon." (General Order No. 27.) Referees should strictly observe these directions. In one case, where the referee transmitted to the clerk of the court the creditor's petition for review, the notes of the testimony, and his own opinion, it was held that this was not a compliance with the order. It was said: "There is no attempt to certify the precise question that was ruled upon, and there is no summary of the evidence relating thereto. Both these provisions are important and should be carefully observed. The certification of the question prevents disputes among counsel concerning the point presented and decided, and the summary of the evidence is required in order to save the judge the labor of examining what is often a mass of testimony on many different questions and of extracting so much as may be relevant to the point immediately in hand. The summary may also be valuable as showing what evidence has been considered by the referee before coming to a conclusion." [104] And where any matter is referred to a referee in bank-

[101] In re Willis W. Russell Card Co. 174 Fed. 202, 23 Am. Bankr. Rep. 300.

[102] Bank of Ravenswood v. Johnson, 143 Fed. 463, 74 C. C. A. 597, 16 Am. Bankr. Rep. 206.

[103] In re Home Discount Co., 147 Fed. 538, 17 Am. Bankr. Rep. 168.

[104] In re Kurtz, 125 Fed. 992, 11 Am. Bankr. Rep. 129; In re Turetz, 205 Fed. 400, 29 Am. Bankr. Rep. 752. And see Gardner v. Gleason, 259 Fed. 755, 170 C. C. A. 555, 43 Am. Bankr. Rep. 644. But in another case, where it appeared that the referee, instead of making a summary of the evidence, returned all the evidence that was taken, and the matter was determined by the judge without any motion having been made to require the evidence to be summarized, it was held that the proceeding for review was not invalidated, where it involved substantial matters, because the rule was not observed by the referee. Crim v. Woodford, 136 Fed. 34, 68 C. C. A. 584, 14

ruptcy to find the facts, it is proper for him in his report to state his conclusions on the facts found.[105]

§ 75. Review of Proceedings by Judge.—Jurisdiction to review the orders and rulings of referees in bankruptcy is confided exclusively to the district courts.[106] It is only after a decision by the district court that the matter can be brought before the circuit court of appeals, not by petition or appeal directly from the referee.[107] On such a petition, the district court is given authority to "consider records and findings certified to it by referees," and either to confirm the decision of the referee, to modify or overrule it, or to return the case to him with instructions for further proceedings.[108] This does not contemplate a general review of the entire proceeding before the referee,[109] nor a

Am. Bankr. Rep. 302. Where objections to evidence offered before a referee were sustained, the referee, at the request of the party offering the same, was not required to certify the objections made to the court for revision. In re Romine, 138 Fed. 837, 14 Am. Bankr. Rep. 785. An order of a referee in a matter in which there is a dispute of fact must be supported by a finding of the ultimate facts; the specific facts to be found depending on the particular case. In re Canister Co. (D. C.) 248 Fed. 587, 41 Am. Bankr. Rep. 625.

105 In re Baker (D. C.) 212 Fed. 765, 32 Am. Bankr. Rep. 378.

106 The judicial functions of a referee in bankruptcy, however important, are always subject to the review of the bankruptcy court. Weidhorn v. Levy, 253 U. S. 268, 40 Sup. Ct. 534, 64 L. Ed. 898, 45 Am. Bankr. Rep. 493.

107 Knapp & Spencer Co. v. Drew, 160 Fed. 413, 87 C. C. A. 365, 20 Am. Bankr. Rep. 355; In re Octave Mining Co. (D. C.) 212 Fed. 457.

108 Bankruptcy Act 1898, § 2, clause 10. Where a court of bankruptcy, on a petition for review of an order of a referee requiring a bankrupt to turn over certain property to his trustee, or to pay its value, made an order giving the bankrupt a stated time within which to comply with the order of the referee, it was impliedly an affirmance of such order, and it is not again subject to review in subsequent proceedings. In re Hershkowitz, 136 Fed. 950, 14 Am. Bankr. Rep. 86. But the fact that the court, in affirming such order, struck out a provision for the commitment of the bankrupt in case of his default, and gave him additional time, is not an adjudication that he should not be so punished, but leaves that matter to be brought up anew by motion in case the bankrupt fails to obey the order within the time allowed. Idem. As to remanding a case to the referee with instructions for further proceedings, see Knapp & Spencer Co. v. Drew, 160 Fed. 413, 87 C. C. A. 365, 20 Am. Bankr. Rep. 355. Where a referee's findings were not sufficiently definite to enable the court on a petition for review to determine the legal questions involved, the proceeding will be remanded to the referee for further hearing and additional findings. In re Hawley Down Draft Furnace Co. (D. C.) 214 Fed. 500, 32 Am. Bankr. Rep. 635.

109 In re T. L. Kelly Dry-Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528. In re Stokes, 185 Fed. 994, 26 Am. Bankr. Rep. 255. And see In re Tudor, 96 Fed. 942, 2 Am. Bankr. Rep. 808. Where the only matter certified to the district court for review by the referee was an order overruling a demurrer to and denying a motion to strike out portions of a motion filed by a trustee, a subsequent order made by the referee on such motion was not before the district court for review. Ellis v. Krulewitch, 141 Fed. 954, 73 C. C. A. 270, 15 Am. Bankr. Rep. 615. On a petition to review an order of a referee, the court will not review the order under which the matter was referred to the referee for hearing. In re Graff (D. C.) 255 Fed. 239, 43 Am. Bankr. Rep. 164.

trial de novo,[110] but only a consideration and review of the particular question certified up, in the light of the record and evidence transmitted. Still, the provision is very broad, and the courts are not disposed to be overstrict in limiting the scope of the review. It is said, for instance, that the court may properly consider any point presented by the record before it, whether or not such point was discussed before or by the referee.[111] And it has even been held that it is perfectly permissible for the judge to take new testimony if it is offered before him.[112] But generally speaking, on the analogy of appeals properly so called, the judge will restrict his consideration of the case to the specific errors complained of in the petition, and to such objections and exceptions as were raised in the proceedings before the referee, and matters not then pressed, or not mentioned in the petition, will be considered as waived.[113] Yet this rule will not be applied with inflexible severity. A proceeding in bankruptcy, as it is often remarked, is a proceeding in equity; and substantial rights will not be sacrificed to technicalities. Thus, on petition to review an order of the referee, the court is authorized to protect and secure to the bankrupt any substantial right of his which may have been overlooked by the referee, though there may be no specific assignment of error in relation thereto.[114]

In matters which are within the sound discretion of the referee, such as questions concerning the best interests of the estate as involved in the sale of the bankrupt's assets or the performance of his contracts, the referee's decision is either not subject to review at all, or if it is, will not be reversed unless clearly improvident.[115] As to the result of the review by the court, it is to be observed that creditors who petition for such a review and obtain a reversal of the referee's order are not

[110] In re Home Discount Co., 147 Fed. 538, 17 Am. Bankr. Rep. 168. Where the evidence before a referee is not in serious conflict, the court may hear the matter de novo and consider questions not raised by formal exceptions to the referee's decision. In re Elmore Cotton Mills (D. C.) 217 Fed. 810, 33 Am. Bankr. Rep. 544.

[111] In re Samuel Wilde's Sons, 144 Fed. 972, 75 C. C. A. 601, 16 Am. Bankr. Rep. 386; In re Mills Tea & Butter Co. (D. C.) 235 Fed. 815, 37 Am. Bankr. Rep. 711. See In re French, 250 Fed. 644. In a summary proceeding before a referee to enforce performance of the bankrupt's contract, it is not too late to question the referee's jurisdiction on a petition to review his order. In re Ballou (D. C.) 215 Fed. 810, 33 Am. Bankr. Rep. 21. But compare In re Goldman (C. C. A.) 241 Fed. 385, 39 Am. Bankr. Rep. 58.

[112] In re Leech, 171 Fed. 622, 96 C. C. A. 424, 22 Am. Bankr. Rep. 599.

[113] In re McCann Bros. Ice Co., 171 Fed. 265, 22 Am. Bankr. Rep. 555; In re Rome, 162 Fed. 971, 19 Am. Bankr. Rep. 820; In re Scott, 99 Fed. 404, 3 Am. Bankr. Rep. 625; In re Carolina Cooperage Co., 96 Fed. 604; In re Cohn, 171 Fed. 568, 22 Am. Bankr. Rep. 761; In re Rayford Truck & Tractor Co. (D. C.) 250 Fed. 634, 41 Am. Bankr. Rep. 616; In re Stucky Trucking & Rigging Co. (D. C.) 240 Fed. 427; In re Levy (D. C.) 261 Fed. 432, 44 Am. Bankr. Rep. 248.

[114] In re Monongahela Distillery Co., 186 Fed. 220.

[115] In re Knox Automobile Co. (D. C.) 210 Fed. 569, 32 Am. Bankr. Rep. 67; In

thereby placed in a position of any preference or priority over other creditors (with similar rights) who did not join in the petition for review.[116]

§ 76. Same; Effect of Referee's Findings of Fact.—On review of a ruling or order of a referee in bankruptcy, his decision upon a question of fact will be entitled to respectful consideration, but will not possess any conclusive or constraining force, where it is a deduction or inference from admitted or established facts, of which the judge may take a different view.[117] But if his findings of fact are based upon a review of conflicting evidence, or have involved the necessity of weighing the credibility of witnesses, they are entitled to very great weight, and will not be rejected or disregarded by the court unless clearly and manifestly erroneous.[118] It has indeed been said that the findings of

re Schilling (D. C.) 251 Fed. 966, 41 Am. Bankr. Rep. 705.

[116] In re Jamison Bros. & Co., 209 Fed. 541, 126 C. C. A. 363, 38 Am. Bankr. Rep. 972.

[117] In re McCrary Bros., 169 Fed. 485, 22 Am. Bankr. Rep. 161; Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 89 C. C. A. 605, 20 Am. Bankr. Rep. 40; In re Peoples' Department Store Co., 159 Fed. 286, 20 Am. Bankr. Rep. 244; In re Georgia Steel Co. (D. C.) 240 Fed. 473, 39 Am. Bankr. Rep. 426; In re Aboudara (D. C.) 246 Fed. 469, 40 Am. Bankr. Rep. 166; In re Blanchard (D. C.) 253 Fed. 758, 42 Am. Bankr. Rep. 177; Walter v. Atha (C. C. A.) 262 Fed. 75, 45 Am. Bankr. Rep. 150. The referee's findings of fact, while presumptively correct, are not as conclusive as the verdict of a jury, or as findings of fact made by a judge in an action at law, where a jury has been waived. In re Hawks, 204 Fed. 309, 30 Am. Bankr. Rep. 365.

[118] In re Booth, 96 Fed. 943, 2 Am. Bankr. Rep. 770; In re Rome Planing Mill Co., 99 Fed. 937, 3 Am. Bankr. Rep. 766; In re Waxelbaum, 101 Fed. 228, 4 Am. Bankr. Rep. 120; In re Stout, 109 Fed. 794, 6 Am. Bankr. Rep. 505; In re Covington, 110 Fed. 143, 6 Am. Bankr. Rep. 373; In re Miner, 117 Fed. 953, 9 Am. Bankr. Rep. 100; In re Williams, 120 Fed. 542, 9 Am. Bankr. Rep. 731; In re Shults, 135 Fed. 623, 14 Am. Bankr. Rep. 378; In re Benjamin, 140 Fed. 320, 15 Am. Bankr. Rep. 351; In re Simon & Sternberg, 151 Fed. 507, 18 Am. Bankr. Rep. 204; In re Kenyon, 156 Fed. 863, 19 Am. Bankr. Rep. 194; In re Littman, 159 Fed. 233, 20 Am. Bankr. Rep. 300; In re Hatem, 161 Fed. 895, 20 Am. Bankr. Rep. 470; Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 89 C. C. A. 605, 20 Am. Bankr. Rep. 40; In re Braselton, 169 Fed. 960, 22 Am. Bankr. Rep. 419; In re MacKissic, 171 Fed. 259, 22 Am. Bankr. Rep. 817; Fouche v. Shearer, 172 Fed. 592, 22 Am. Bankr. Rep. 828; In re Hoffman, 173 Fed. 234, 23 Am. Bankr. Rep. 19; In re C. K. Hutchins Co., 179 Fed. 864, 24 Am. Bankr. Rep. 647; In re Schwartz, 179 Fed. 767, 23 Am. Bankr. Rep. 37; In re Baumhauer, 179 Fed. 966, 24 Am. Bankr. Rep. 750; In re Boner, 189 Fed. 93, 26 Am. Bankr. Rep. 321; In re Brenner, 190 Fed. 209, 26 Am. Bankr. Rep. 646; In re American National Beverage Co., 193 Fed. 772; In re Silverman, 206 Fed. 960; Couts v. Townsend, 126 Fed. 249, 11 Am. Bankr. Rep. 126; In re Soloway & Katz, 195 Fed. 103, 28 Am. Bankr. Rep. 228; In re Charlestown Light & Power Co., 199 Fed. 846, 29 Am. Bankr. Rep. 721; In re Cox, 199 Fed. 952, 29 Am. Bankr. Rep. 456; In re Malschick & Levin (D. C.) 206 Fed. 71, 30 Am. Bankr. Rep. 237; In re Heffron Co. (D. C.) 216 Fed. 642, 33 Am. Bankr. Rep. 443; In re Cozatsky (D. C.) 216 Fed. 920, 33 Am. Bankr. Rep. 323; In re Kligerman (D. C.) 219 Fed. 758, 33 Am. Bankr. Rep. 608; In re Gay & Sturgis (D. C.) 224 Fed. 127, 35 Am. Bankr. Rep. 417; In re Rosenfeld-Goldman Co. (D. C.) 228 Fed. 921, 36 Am. Bankr. Rep. 520; In re Ylia (D. C.) 233 Fed. 476; In re Aronson (D. C.)

a referee have the same effect as if rendered by any court of general jurisdiction.[119] But it is probably a better statement of the rule to say that, while no arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a referee in bankruptcy, yet, as his position and duty are analogous to those of a special master, the rules applicable to a master's report apply to a referee's finding of facts, and if it is based on conflicting evidence, involving questions of credibility, and the referee has heard the witnesses, the District Judge should not disturb his findings unless there is most cogent evidence of mistake.[120]

Still, they are not absolutely conclusive, and if the judge reaches a different conclusion upon the whole record before him, it is certainly within his province to do so. This is explained by a circuit court of appeals in the following terms: "Although, in a loose sense, parties who are dissatisfied with the conclusions of the referee are said to appeal to the district court, yet the action of that court on the findings of the referee did not assume the formalities of an appellate tribunal. Neither, according to the usual practice, are the proceedings before the referee brought before the court on exceptions, and thus made a part of the record, as in the case of a master in chancery. The relations between the court and the referee are usually of an informal character." Section 38 of the Bankruptcy Act and General Order No. 27 "provide for review by the court of the orders of referees in the most general terms, and are far from limiting the court to the rules which govern a chancery suit. Therefore, according to the common practice, the district court was authorized to disregard the findings of the referee entirely if it saw fit so to do, and proceed de novo, or reject them for reasons of law, or refuse to accept them in whole or in part, without assigning reasons therefor. The position of the petitioner in this particular would require this court [the circuit court of appeals] to be

233 Fed. 1022, 37 Am. Bankr. Rep. 385; In re Farmers' Dairy Ass'n (D. C.) 234 Fed. 118, 37 Am. Bankr. Rep. 672; Chambers v. Continental Trust Co. (D. C.) 235 Fed. 441, 38 Am. Bankr. Rep. 78; In re Schultz & Guthrie (D. C.) 235 Fed. 907, 37 Am. Bankr. Rep. 604; In re Biehl (D. C.) 237 Fed. 720, 38 Am. Bankr. Rep. 150; In re Atkinson-Kerce Grocery Co. (D. C.) 245 Fed. 481, 39 Am. Bankr. Rep. 819, 40 Am. Bankr. Rep. 411; In re Golub (D. C.) 245 Fed. 512, 39 Am. Bankr. Rep. 810; In re Najour (D. C.) 246 Fed. 167; In re Association Dairy Co. (D. C.) 251 Fed. 749, 42 Am. Bankr. Rep. 321; In re Mullings Clothing Co. (D. C.) 252 Fed. 667, 41 Am. Bankr. Rep. 756; In re Campion (D. C.) 256 Fed. 902, 43 Am. Bankr. Rep. 625; In re Wilson-Nobles-Barr Co. (D. C.) 256 Fed. 966, 42 Am. Bankr. Rep. 252; In re Rosen's Estate, (C. C. A.) 263 Fed. 704, 45 Am. Bankr. Rep. 5; In re Prentice (D. C.) 267 Fed. 1019, 46 Am. Bankr. Rep. 38.

[119] McCulloch v. Davenport Savings Bank (D. C.) 226 Fed. 309, 35 Am. Bankr. Rep. 765.

[120] Sternburg v. M. Cohen & Co., 254 Fed. 1, 165 C. C. A. 411, 42 Am. Bankr. Rep. 456.

bound conclusively by the findings of the referee of the preliminary and ultimate facts, although the district court was not so bound, a position which defeats itself on its very face." [121] Moreover, there are exceptional cases in which the rule does not apply. Thus, on review by the district judge of an order made by the referee in bankruptcy, requiring the bankrupt to surrender to his trustee money or property alleged to be in his possession and to constitute assets of his estate, the ordinary rule as to the force of the referee's findings of fact is not applicable, because the determination is not governed by the weight of testimony, but it is the duty of the judge to ascertain that cause is shown for making such an order beyond a reasonable doubt.[122]

§ 77. Records and Accounts of Referees.—The Bankruptcy Act makes it the duty of the referee, when his office is in the same city or town where the court of bankruptcy convenes, to call upon and receive from the clerk all papers filed in the court which have been referred to him, and the duty of the clerk to deliver to the referee such papers on his application; but if the office of the referee is not in the same city or town as the office of the clerk, then the latter is to transmit such papers to the former by mail.[123] Among the papers referred to must be included the schedule of the bankrupt, for another clause of the act requires this document to be executed in triplicate, and provides that one copy thereof shall be "for the referee." [124] It is further the duty of the referee to "indorse on each paper filed with him the day and hour of filing, and a brief statement of its character." [125] He is to keep a record of the proceedings in each case in a separate book or books, and these shall, together with the papers on file, constitute the records of the case. The records of all proceedings before the referee are to be kept, as nearly as may be, in the same manner as records are kept in equity cases in the federal courts. And when a case is concluded before the referee, the book or books containing the record of it are to be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy, there to remain as a part of the records of that court.[126] The provisions of the statute do not constitute the referee the keeper of the records, or authorize

[121] In re Pettingill, 137 Fed. 840, 70 C. C. A. 338, 14 Am. Bankr. Rep. 757.

[122] In re Mayer, 98 Fed. 839, 3 Am. Bankr. Rep. 533. But where the referee has considered carefully the evidence on the issue of whether the bankrupt is concealing assets, his findings should not be disturbed in the absence of a demonstration that a plain mistake has been made. In re Bass (D. C.) 257 Fed. 137, 43 Am. Bankr. Rep. 280. And see In re Heyman (D. C.) 214 Fed. 491.

[123] Bankruptcy Act 1898, §§ 39, 51, clause 3.

[124] Bankruptcy Act 1898, § 7, clause 8.

[125] General Order No. 2.

[126] Bankruptcy Act 1898, § 42. See In re Graves, 182 Fed. 443, 25 Am. Bankr. Rep. 372.

him to certify records directly to a circuit court of appeals.[127] It is further provided that certified copies of proceedings before a referee, or of a paper issued by the referee, "shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence." [128] A referee must permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest. If he refuses to do so, application should be made to the court for an order requiring him thereto. If he refuses when directed by the court, it is a punishable offense, and conviction thereof will vacate his office.[129] But a referee, while he must permit inspection and furnish information, is not required to furnish copies of the papers or proceedings before him; and the jurisdiction of a referee to proceed with a hearing on a reference made by the court is not affected by his refusal to furnish to a party, on demand, a copy of the petition on which the hearing is based and of the order of reference.[130] Original papers referred to in the bankrupt's deposition and annexed thereto cannot be withdrawn from the files at the option of the bankrupt, but the court may order a withdrawal for good reason shown by a party interested.[131]

The provision as to the accounts of referees is that "every referee shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month." [132] Exceptions to the referee's charges against the estate in bankruptcy for his expenses therein will not be heard by the court, when the referee's account of such expenses has been duly kept and returned to the court under oath with vouchers, as required by law, and approved by the court, and especially when distribution of the estate has already been made before such exceptions are presented.[133] Finally, it is made the duty of "officers," including the referees,[134] to "furnish in writing and transmit by mail such information as is within their knowledge,

127 Cook Inlet Coal Fields Co. v. Caldwell, 147 Fed. 475, 78 C. C. A. 17, 17 Am. Bankr. Rep. 135.

128 Bankruptcy Act 1898, § 21, clause d.

129 Bankruptcy Act 1898, § 39, clause 3; § 29, clause c, 3.

130 In re Lewin, 103 Fed. 850, 4 Am. Bankr. Rep. 632.

131 In re McNair, 2 N. B. R. 343, Fed. Cas. No. 8,908.

132 General Order No. 26. And see Bankruptcy Act 1898, § 62.

133 In re Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235.

134 The term "officer" includes the clerk, marshal, receiver, referee and trustee. Bankruptcy Act 1898, § 1, clause 18.

and as may be shown by the records and papers in their possession, to the attorney general, for statistical purposes, within ten days after being requested by him to do so." [135].

§ 78. **Contempts before Referees.**—It is provided by the statute that no person, in proceedings before a referee, shall (1) "disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpœnaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law." The referee himself has no power to punish for contempt; but he "shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court." [136] Since it is the court alone that possesses the power of punishment for contempt, it is error to leave the question of commitment by way of punishment, or as a means of enforcing obedience, to the discretion of the referee.[137] At the same time, the contempts which are within the purview of this section are committed against the court as represented by the referee, not the court as represented by the judge. Hence, for example, in the case of disobedience to an order, it is the order as made by the referee, not the order as finally approved by the judge, which must be obeyed under penalty of punish-

[135] Bankruptcy Act 1898, § 54.

[136] Bankruptcy Act 1898, § 41. As to the general power of the federal courts to punish for contempts, the acts of Congress provide that they "shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of the said courts." Rev. Stat. U. S. § 725, Federal Judicial Code 1911, § 268. The provision of the Bankruptcy Act above referred to does not apply to a proceeding in contempt against a bankrupt for violation of an order of the court, which may be prosecuted in the usual form by his trustee. Biderman v. Cooper (C. C. A.) 273 Fed. 683.

[137] Smith v. Belford, 106 Fed. 658, 45 C. C. A. 526, 5 Am. Bankr. Rep. 291; In re Haring, 193 Fed. 168, 27 Am. Bankr. Rep. 285.

ment for contempt. In other words, if a party affected by an order of the referee, requiring him to take certain action forthwith, files a petition for review by the judge, but does not secure a supersedeas, the referee's order continues operative, and the failure to obey it is a contempt, which cannot be justified on the theory that it is not an offense to disobey the order until after it has been confirmed by the court.[138] All classes and kinds of orders made by referees fall within this rule, provided that they are not unlawful or entered without jurisdiction, but perhaps the most usual examples are found in the case of orders requiring the bankrupt or some third person to surrender money or property to the trustee in bankruptcy.[139] The case of misbehavior or contumacy on the part of witnesses summoned for examination in bankruptcy proceedings will be more fully considered in the chapter relating to examinations in bankruptcy.[140]

As to the procedure in cases of this kind, it is held that the directions of the statute must be strictly observed. "In order that the court may take cognizance of the offense and punish the offender, he must be proceeded against strictly in accordance with the mode pointed out by the bankruptcy act, and any deviation from that procedure the bankrupt [respondent] may take advantage of on a motion to dismiss the proceedings. The statutory procedure, being full and complete, must be strictly followed, and a failure to do so will be fatal." Accordingly, in the case from which this quotation is taken, the court dismissed a proceeding to punish a bankrupt for contempt because it was instituted by a petition filed by the trustee, for a rule on the bankrupt to show cause, instead of being based on a certificate of the referee, as the law

[138] In re Home Discount Co., 147 Fed. 538, 17 Am. Bankr. Rep. 168. But see Brown v. Detroit Trust Co., 193 Fed. 622, 113 C. C. A. 490, holding that where a third person was ordered by the referee to surrender property of the bankrupt in his possession within a limited time, and, before the expiration of such time, he took proceedings to review the order of the referee, those proceedings suspended the operation of the referee's order, and therefore a judgment imposing a fine on defendant for contempt in failing to comply with the order was erroneous.

[139] See In re Graessler & Reichwald, 154 Fed. 478, 83 C. C. A. 304, 18 Am. Bankr. Rep. 694; In re Home Discount Co. (D. C.) 147 Fed. 538, 17 Am. Bankr. Rep. 168; In re Soloway & Katz (D. C.) 195 Fed. 100, 28 Am. Bankr. Rep. 225. Where the referee ordered the trustee to make a demand upon his own attorney for money in the latter's hands, claimed to be assets of the estate, and the trustee obeyed the order, he cannot be charged with contempt for failing to secure the money, where the attorney refused to surrender it. In re Stemper (D. C.) 222 Fed. 690, 34 Am. Bankr. Rep. 806. Where the referee orders a private sale of property of the bankrupt, if the bankrupt and a creditor induce the bidder to withdraw his bid, in order that another may purchase at a lower price, they are punishable as for contempt. In re Boyd (D. C.) 228 Fed. 1003, 36 Am. Bankr. Rep. 497.

[140] The refusal to be examined, for which a bankrupt may be committed, in-

requires.[141] The referee may certify contumacious behaviour on the part of the bankrupt to the court for punishment as for contempt, without notice to him, as he will have notice and an opportunity to be heard in the proceedings before the court.[142] The proceedings in the court are to be "summary," and this applies to the pleadings. But while it is probable that no pleading on the part of the respondent is strictly necessary, yet it is said that it is often advantageous to set out the defense in a definite manner, with a view of bringing the issues clearly before the court.[143] But it has also been ruled that the statute does not invest courts of bankruptcy with broader powers in the matter of punishment for contempt than are possessed by other federal courts; and the mode of proceeding in such courts to determine whether a constructive contempt has been committed should conform to the established practice in like cases in other courts of the United States, as near as may be.[144] An order of commitment of a bankruptcy court is not invalid because it does not run in the name of the United States.[145]

As to the defenses available at the hearing before the court, it may be said, in the first place, that the referee's order must be based upon a sufficient finding of the facts to inform the party affected, fully and completely, of the action which he is required to take; otherwise he cannot be held in contempt.[146] But he will not ordinarily be heard to allege in defense matters which were set up and contested in the proceedings before the referee, as such contentions are res judicata.[147] And intentional and willful disobedience of an order clearly within the jurisdiction of the referee to make, persistently continued, cannot be justified as having been under the advice of counsel.[148] But it has been held that, in a proceeding to punish a bankrupt for failure or refusal to obey an order of the referee requiring him to surrender to his trustee property alleged to be in his possession and to constitute assets of his estate in bankruptcy, the order of the referee is not conclusive as to

volves contumaciousness, and must be distinguished from lack of candor, untruthfulness and perjury. In re Blitz (D. C.) 232 Fed. 276, 36 Am. Bankr. Rep. 863.

141 In re Gitkin, 164 Fed. 71, 21 Am. Bankr. Rep. 113.

142 In re Magen, 179 Fed. 572, 24 Am. Bankr. Rep. 63. But where the referee does not act on his own motion, in contempt proceedings against a bankrupt, but on the motion or petition of some one else, the bankrupt should be accorded notice and a hearing before the referee. Idem.

143 In re Goodrich, 184 Fed. 5, 106 C. C. A. 207, 25 Am. Bankr. Rep. 787.

144 Boyd v. Glucklich, 116 Fed. 131, 53 C. C. A. 451, 8 Am. Bankr. Rep. 393.

145 Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, 7 Am. Bankr. Rep. 224.

146 In re Rogowski, 166 Fed. 165, 21 Am. Bankr. Rep. 553.

147 In re Home Discount Co., 147 Fed. 538, 17 Am. Bankr. Rep. 168; In re Strobel, 163 Fed. 380, 20 Am. Bankr. Rep. 754.

148 In re Home Discount Co., 147 Fed. 538, 17 Am. Bankr. Rep. 168.

the existence of the facts which would justify it, or as to the ability of the bankrupt to comply.[149] In the case cited, in an opinion distinguished by much learning and by convincing reasoning, it was concluded that, in the case supposed, it is the imperative duty of the court to make an independent investigation of the facts disclosed by the entire evidence in the case, and to make its own independent decision as the result of such investigation.

[149] In re Haring (D. C.) 193 Fed. 168, 27 Am. Bankr. Rep. 285.

CHAPTER VI

ACTS OF BANKRUPTCY

§ 79. Acts of Bankruptcy Enumerated and Defined.—An act of bankruptcy is an act committed by a debtor which will render him liable to be proceeded against in involuntary bankruptcy by his creditors, and will warrant the court in adjudging him bankrupt on a proper petition in that behalf. Five acts of bankruptcy are enumerated by the present statute. It is declared by the third section of the statute that such an act shall be deemed to have been committed by a person who has:

1. "Conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them, or

2. Transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors, or

3. Suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference, or

4. Made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of

his property under the laws of a state, of a territory, or of the United States,[1] or

5. Admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."[2]

This provision of the statute, though remedial as to creditors is penal as to the bankrupt, and must be construed with a reasonable measure of strictness. No one can be adjudged bankrupt on the ground of his having committed an act which, though not among those enumerated by the statute, produces equivalent results. The acts of bankruptcy defined and classified by the statute cannot be enlarged by construction so as to include transactions similar or analogous to, but not identical with, those specified.[3]

In the present chapter we are concerned with the commission of acts of bankruptcy by individuals. Acts of bankruptcy committed by partnerships and by corporations will be separately considered in the chapters relating to the bankruptcy of those organizations.[4]

§ 80. Nature and Effect of an Act of Bankruptcy.—In this, as in many other cases, when the prohibited act has been done, ignorance of the law is no excuse. A debtor who has committed one of the enumerated acts of bankruptcy cannot save himself from the consequences by alleging that his action was taken unwarily or without any thought of the bankruptcy law, or without any contemplation of bankruptcy, or even that he did not know that there was any such law in existence as the bankruptcy statute.[5] Neither can the legal liability for an act of bankruptcy be discharged or evaded by a subsequent rescission of the transaction.[6] Nor is the motive or intention of the debtor material.

[1] The provision as to the making of an assignment for the benefit of creditors was in the act of 1898 as originally passed, but the provision making the appointment of a receiver, in the cases specified, an act of bankruptcy was added by an amendment passed February 3, 1903, 32 Stat. 797. Prior to this amendment, it was held that obtaining the appointment of a receiver by an insolvent partnership, through dissolution proceedings in a state court, was not an act of bankruptcy, though such action was taken for the very purpose of preventing the bankruptcy court from obtaining possession of the assets. In re Varick Bank, 119 Fed. 991, affirmed In re Burrell, 123 Fed. 414, 59 C. C. A. 508, 9 Am. Bankr. Rep. 625.

[2] The filing of a voluntary petition in bankruptcy is not of itself an act of bankruptcy, but simply institutes a proceeding in which the court acquires jurisdiction to adjudge bankruptcy if the facts warrant it. In re J. M. Ceballos & Co., 161 Fed. 445, 20 Am. Bankr. Rep. 459.

[3] In re Empire Metallic Bedstead Co. (C. C. A.) 98 Fed. 981, 3 Am. Bankr. Rep. 575. See McLean v. Brown, 4 N. B. R. 585, Fed. Cas. No. 8,880. Compare Continental Building & Loan Ass'n v. Superior Court of San Francisco, 163 Cal. 579, 126 Pac. 476.

[4] As to acts of bankruptcy by partnership, see infra, § 113. Acts of bankruptcy by corporation, see infra, § 144.

[5] In re Craft, 2 Ben. 214, 1 N. B. R. 378, Fed. Cas. No. 3,316.

[6] In re Ryan, 2 Sawy. 411, Fed. Cas. No. 12,183.

except where the law makes it an ingredient of the act. Thus, where the execution of a general assignment is proved or admitted, an adjudication of bankruptcy will follow although the respondent denies that he had any actual intention to defeat or delay the operation of the bankruptcy act.[7] So in the case of giving a preference, a payment of money by an insolvent debtor, made the basis of a petition on this ground, is none the less a preference because it was made in good faith, and was a judicious action and necessary to preserve valuable property.[8] And it is not sufficient ground for dismissing a petition in involuntary bankruptcy, against a debtor who has given a preference, that he only yielded to the pressure or urgent solicitation of the creditor, or to threats of legal process or arrest and to the fear of disgrace.[9] But a man cannot be made bankrupt for an act done by another which he did not authorize and in which he did not participate, except in the case of a copartnership. Thus, an act of bankruptcy by one of two persons who are jointly and severally liable for a debt, but are not partners, is no ground for an adjudication of bankruptcy against the other.[10]

§ 81. Insolvency as an Element in Acts of Bankruptcy.—In considering the question of a debtor's solvency or insolvency as bearing on his liability to be adjudged bankrupt, we are to remember that the term "insolvency" has been specially defined in the bankruptcy act. In the first section of the statute it is provided that "a person shall be deemed insolvent, within the provisions of this act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." It is in this sense that the word is used throughout the statute, and it is to be so understood in determining the question of the commission of an act of bankruptcy.[11]

A comparison of the first four paragraphs of the third section of the bankruptcy act will show that, in so far as the liability to be ad-

[7] In re Smith, 4 Ben. 1, 3 N. B. R. 377, Fed. Cas. No. 12,974.

[8] In re Merchants' Ins. Co., 3 Biss. 162, 6 N. B. R. 43, Fed. Cas. No. 9,441.

[9] Clarion Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542; In re Batchelder, 1 Low, 373, 3 N. B. R. 150, Fed. Cas. No. 1,098; In re Dibblee, 3 Ben. 283, 2 N. B. R. 617, Fed. Cas. No. 3,884; Campbell v. Traders' Nat. Bank, 2 Biss. 423, 3 N. B. R. 498, Fed. Cas. No. 2,370.

[10] James v. Atlantic Delaine Co., 11 N. B. R. 390, Fed. Cas. No. 7,179.

[11] Lansing Boiler & Engine Works, v. Joseph T. Ryerson & Son, 128 Fed. 701, 63 C. C. A. 253, 11 Am. Bankr. Rep. 558; In re Golden Malt Cream Co. (C. C. A.) 164 Fed. 326, 21 Am. Bankr. Rep. 36; Hewitt v. Boston Straw Board Co., 214 Mass. 260, 101 N. E. 424.

judged bankrupt depends upon the insolvency of the debtor at the time of the commission of an act of bankruptcy, or at the time a petition against him is filed, there are important differences between the several acts of bankruptcy enumerated. In respect to the first of these, viz., the transfer, concealment, or removal of property with intent to delay or defraud creditors, the test of liability to be adjudicated a bankrupt is insolvency at the time of the filing of the petition. If the debtor was insolvent at the time the fraudulent conveyance or concealment was made, yet regains a condition of solvency before a petition is filed, the petition must be dismissed. Conversely, if he was not insolvent at the time of the fraudulent transfer or concealment, yet becomes insolvent within the next four months, and is insolvent at the time creditors file a petition, he may be adjudged bankrupt.[12] In regard to the second and third acts of bankruptcy, (giving a preference by a conveyance or transfer, or suffering a creditor to obtain a preference through legal proceedings), these can be committed only "while insolvent," and further, the act declares that a petition may be filed against a person who is insolvent and who has committed an act of bankruptcy. Hence, as to these acts of bankruptcy, insolvency must have existed at the time of the preference and must have continued to the time of the filing of a petition, or, at any rate, must exist at these two particular times, though there might possibly be cases where a debtor, hovering on the verge of insolvency, and sometimes on one side of the line and sometimes on the other, might, in the interval, have periods of solvency. But he cannot be adjudged on these grounds if he was solvent at the time the preference was given, although insolvent at the time of the filing of the petition, nor, probably, when he is solvent at the date of the petition, though insolvent when the act of bankruptcy was committed, since the act is explicit in declaring that a petition may be filed only against a "person who is insolvent and who has committed an act of bankruptcy."[13] As to the fourth act of bankruptcy (making a general assignment for the benefit of creditors) the rule apparently settled is that it is not necessary to show that the debtor was insolvent either at the date of the assignment or at the time of the filing of the peti-

[12] George M. West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, 2 Am. Bankr. Rep. 463; Acme Food Co. v. Meier, 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550.

[13] In re Rome Planing Mill Co., 96 Fed. 812, 3 Am. Bankr. Rep. 123; George M. West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, 2 Am. Bankr. Rep. 463; In re Dunham, 2 Ben. 488, 2 N. B. R. 17, Fed. Cas. No. 4,143. But see Acme Food Co. v. Meier, 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550, holding that, if the act of bankruptcy charged is the giving or permitting a preference, insolvency must have existed at the time of the preference but that solvency or insolvency at the time of the

tion.[14] But as to the new or supplemental provision respecting the appointment of a receiver, it is clear that insolvency at the time of the act is necessary, since the statute makes it an act of bankruptcy if a person, "being insolvent," applies for a receiver, or if a court appoints a receiver "because of insolvency." As to the fifth act of bankruptcy, which is committed where a person makes a written admission of his "inability to pay his debts" and his willingness to be adjudged a bankrupt on that ground, the words quoted may be taken as equivalent to a confession of "insolvency," and it is scarcely conceivable that a person who was actually solvent would commit this act of bankruptcy.

To render a transfer of property void under the bankruptcy act, it is not necessary that the debtor should have known or believed himself to be insolvent. The act treats insolvency as a condition of fact, not of belief; and he is chargeable in law with the knowledge of it and of its consequences. Hence when a man, insolvent in fact, gives a mortgage to an existing creditor, he necessarily does so with a view to giving him a preference.[15]

§ 82. Fraudulent Conveyances.—It is an act of bankruptcy if a debtor shall have "conveyed or transferred any part of his property with intent to hinder, delay, or defraud his creditors, or any of them."[16] These words are clearly applicable to every conveyance which would be fraudulent at common law or under the state statutes relating to fraudulent conveyances. But they go beyond this. It is held that any conveyance is an act of bankruptcy which contravenes the provisions and objects of the bankruptcy law, though it would not be im-

filing of the petition can have only a reflex importance as evidence. Compare Johansen Bros. Shoe Co. v. Alles, 197 Fed. 274, 116 C. C. A. 636, 28 Am. Bankr. Rep. 299.

[14] George M. West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, 2 Am. Bankr. Rep. 463; Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; Bray v. Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153. The possibility of the commission of an act of bankruptcy by a perfectly solvent person, even under the oldest statutes, is shown by the following passage: "If any surplus remains after selling his estates and paying every creditor his full debt, it shall be restored to the bankrupt. This is a case which sometimes happens to men in trade, who involuntarily or at least unwarily commit acts of bankruptcy, by absconding and the like, while their effects are more than sufficient to pay their creditors. And if, any suspicious or malevolent creditor will take the advantage of such acts, and sue out a commission, the bankrupt has no remedy, but must quietly submit to the effects of his own imprudence, except that, upon satisfaction made to all the creditors, the commission may be superseded." 2 Bl. Comm. 488.

[15] Hall v. Wager, 3 Biss. 28, 5 N. B. R. 181, Fed. Cas. No. 5,951.

[16] Bankruptcy Act 1898, § 3a, clause 1. A conveyance or transfer of property by a debtor with intent to hinder, delay, or defraud his creditors, or any of them, constitutes an act of bankruptcy, although he may have been solvent at the time. In re Larkin, 168 Fed. 100, 21 Am. Bankr. Rep. 711.

peachable for fraud at common law or under the state statutes. The reason is that the bankruptcy law confers certain peculiar rights and privileges upon creditors, which were unknown to the common law and are not recognized by the state statutes, such as the right to choose their own trustee, to examine the bankrupt, to have notice of all important steps in the administration of the estate, and to have the assets converted into money and distributed under the supervision and control of a court of bankruptcy; and a conveyance by the debtor which would defeat these rights of the creditors (such as a deed of trust directing the trustee to convert all the debtor's property into money and pay his debts according to the state law) must be considered as made with the intent to "hinder, delay, and defraud" them, and is therefore an act of bankruptcy.[17]

The bankruptcy act provides that the word "transfer" shall "include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." [18] Hence a gift by an insolvent debtor of all his property to his wife is an act of bankruptcy.[19] So is a deed of valuable property to any person made without consideration.[20] So is a conveyance of property by a father to his sons in consideration of their agreement to support him.[21] So is the giving of a mortgage of the whole of a debtor's estate and effects to one creditor, with intent to hinder and delay the others.[22] But on the other hand, a conveyance made in good faith and intended only as security for an existing debt, or to secure the grantee as a surety for the grantor, does not constitute an act of bankruptcy.[23] So, where a

[17] Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co., 99 Fed. 699, 3 Am. Bankr. Rep. 704; In re Gutwillig, 92 Fed. 337, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388; Gassett v. Morse, 21 Vt. 627, Fed. Cas. No. 5,264. But see Githens v. Shiffler, 112 Fed. 505, 7 Am. Bankr. Rep. 453.

[18] Bankruptcy Act 1898, § 1, clause 25. Where property conveyed by an alleged bankrupt largely exceeded the debts assumed or discharged by the grantee, the conveyance must be deemed an act of bankruptcy, and intended to hinder and delay the petitioning creditor, whose claim was not assumed. Morrison v. Rieman, 249 Fed. 97, 161 C. C. A. 149, 41 Am. Bankr. Rep. 325.

[19] In re Alexander, 1 Low. 470, 4 N. B. R. 178, Fed. Cas. No. 161; In re Hughes, 183 Fed. 872, 25 Am. Bankr. Rep. 556.

[20] In re Leland, 185 Fed. 830, 25 Am. Bankr. Rep. 209. And see In re Donnelly, 193 Fed. 755, 27 Am. Bankr. Rep. 504.

[21] Avery v. Johann, 3 N. B. R. 144, Fed. Cas. No. 675.

[22] Baldwin v. Rosseau, Fed. Cas. No. 803; In re Cowles, 1 N. B. R. 280, Fed. Cas. No. 3,297; In re McKibben, 12 N. B. R. 97, Fed. Cas. No. 8,859.

[23] Acme Food Co. v. Meier, 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550. Paying a bonus to secure a loan on chattel mortgage, the proceeds of which are used to pay off a prior mortgage, is not an act of bankruptcy. In re Hallin, 199 Fed. 806, 28 Am. Bankr. Rep. 708.

bill in equity asking for the appointment of a receiver is brought against a corporation, and the defendant makes no opposition to the suit, but tacitly permits the receiver to be appointed and to take charge of its property, this cannot be said to be a transfer or conveyance within the meaning of the bankruptcy law,[24] though it may, under the amendment of 1903, constitute an act of bankruptcy on another and independent ground. Again, the exchange of goods covered by a warehouse receipt in the warehouse of the vendor for others of equal or less value is not an act of bankruptcy,[25] nor is the transfer of firm property from one member of a solvent firm to another.[26] And a transfer of property by an individual member of a firm, although with intent to defraud individual and firm creditors, is not an act of bankruptcy on the part of the partnership which will sustain a petition in bankruptcy against it.[27] So, where a retail merchant had ordered goods for a customer, but the latter, on inspection, refused to accept them, whereupon the merchant returned them to the seller, it was held that this was not an act of bankruptcy, not being done with a view of giving a preference or defrauding his creditors, but as a prudent and proper business transaction.[28]

An actual wrongful or fraudulent intent to hinder and delay creditors, or to defraud them, is an essential element of this act of bankruptcy.[29] And an intent to hinder and delay creditors involves a purpose wrongfully or unjustifiably to prevent, obstruct, embarrass, or postpone them in the collection or enforcement of their claims.[30] And

[24] In re Baker-Ricketson Co., 97 Fed. 489, 4 Am. Bankr. Rep. 605; In re Henry Zeltner Brewing Co., 117 Fed. 799, 9 Am. Bankr. Rep. 63; In re Harper & Bros., 100 Fed. 266, 3 Am. Bankr. Rep. 804. An instrument appointing trustees to wind up a corporation's affairs was held not a conveyance or transfer with intent to defraud creditors within the Bankruptcy Act, in In re Ambrose Matthews & Co. (D. C.) 229 Fed. 309, 36 Am. Bankr. Rep. 501.

[25] Sharp v. Philadelphia Warehouse Co., Fed. Cas. No. 12,709a.

[26] In re Munn, 3 Biss. 442, 7 N. B. R. 468, Fed. Cas. No. 9,925. But the withdrawal of money from an insolvent firm by one of the partners, and its secret transfer to a third person, in connection with other concurrent transactions between the partners, was held a conveyance and transfer of property with intent to hinder and delay creditors, by both partners, which constituted an act of bankruptcy. In re Shapiro, 106 Fed. 495, 5 Am. Bankr. Rep. 839.

[27] In re Stovall Grocery Co., 161 Fed. 882, 20 Am. Bankr. Rep. 537.

[28] Doan v. Compton, 2 N. B. R. 607, Fed. Cas. No. 3,940.

[29] In re Wilmington Hosiery Co., 120 Fed. 180, 9 Am. Bankr. Rep. 581; In re McLoon, 162 Fed. 575, 20 Am. Bankr. Rep. 719. Creditors of an alleged bankrupt cannot complain of the transfer of a homestead interest of the bankrupt and a dower interest of his wife, to a corporation organized by him, and the fraudulent intent necessary to render such a transfer an act of bankruptcy could not be predicated thereon. Marine Nat. Bank v. Swigart (C. C. A.) 262 Fed. 854, 45 Am. Bankr. Rep. 162.

[30] In re Wilmington Hosiery Co., 120 Fed. 180, 9 Am. Bankr. Rep. 581.

it is to be noted that, as the language of the statute is in the disjunctive, an intent either to hinder or to delay or to defraud creditors is enough. Hence an act of bankruptcy is committed by the making of a transfer or conveyance with the intention of obstructing creditors in their endeavor to collect their claims, or of putting the property temporarily out of their reach, although there is no intention to defraud them, and although it is the intention of the debtor that, ultimately, all creditors shall receive full satisfaction of their claims.[31] But it is not necessary to show that any creditor actually was hindered or delayed by the debtor's proceedings.[32] Under the former act, the intent required was an intent to delay or defraud creditors generally; but it was held that, if the conveyance was made with the intent to delay one particular creditor, but its necessary effect was to delay all, it was an act of bankruptcy.[33] But it will be observed that the present law is satisfied with an intent to hinder or defraud "his creditors or any of them." But a conveyance of property by a debtor to certain creditors cannot be charged as an act of bankruptcy, where he had at the time no other creditors.[34]

The intent with which the transfer or conveyance was made is seldom susceptible of explicit proof, but it may be made out by inference from the circumstances of the transaction, attention being given to all the acts done and all the circumstances surrounding the transaction;[35] and an intention to delay or defraud creditors may be inferred from the fact that that is the natural and necessary result of the transfer in question.[36] But conversely, the presumption of a wrongful intent may also be rebutted by inferences drawn from the facts and circumstances. Thus, where a partnership is dissolved, and the whole stock in trade transferred to the only solvent partner, for the purpose of settling the affairs of the firm, a sale of the whole stock by such partner is not an act of bankruptcy, for the circumstances rebut any presumption of fraud.[37] So again, the sale of a stock of goods will not be considered an act of bankruptcy where there is no evidence of the seller's insolvency at the time of the sale, and it appears that his only object in making the sale was to change his

[31] In re Hughes, 183 Fed. 872, 25 Am. Bankr. Rep. 556. And see In re Muir, (D. C.) 212 Fed. 495, 31 Am. Bankr. Rep. 528.

[32] Williams v. Nunn, 1 Taunt. 270.

[33] In re Williams, 1 Low, 406, 3 N. B. R. 286, Fed. Cas. No. 17,703.

[34] Brake v. Callison, 129 Fed. 201, 63 C. C. A. 359, 11 Am. Bankr. Rep. 797.

[35] In re Larkin, 168 Fed. 100, 21 Am. Bankr. Rep. 711; In re Minard, 156 Fed. 377, 19 Am. Bankr. Rep. 485; Merchants' Nat. Bank v. Cole, 149 Fed. 708, 79 C. C. A. 414, 18 Am. Bankr. Rep. 44.

[36] Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co., 131 Fed. 215, 65 C. C. A. 201, 12 Am. Bankr. Rep. 610.

[37] In re Weaver, 9 N. B. R. 132, Fed. Cas. No. 17,307.

business.[38] An indorsement of a bill of lading to a third person, to protect the property from attachment and save it for the benefit of all the creditors, is not an act of bankruptcy.[39] Nor is it an act of bankruptcy for a person to transfer property, after he has become involved, in pursuance of an agreement made while he was in prosperous circumstances, to transfer specific property as collateral security for advances made.[40] Again, an intent to prefer is not to be confounded with an intent to defraud, nor a preferential transfer with a fraudulent one. Hence, while a man may not connive with others to get his property out of the way by sale or otherwise, yet a fair and open disposition of it on a full consideration cannot be given a fraudulent character, although it may incidentally have the effect of leaving nothing which creditors can reach, and even though the debtor does this in order to meet some of his obligations rather than others.[41] Finally the statute nowhere denounces a mere intent on the part of an insolvent debtor not to become a bankrupt; and the doing or permitting of any of the things specified in this section of the act, for the purpose and with the intention of escaping being thrown into bankruptcy, is not necessarily doing or permitting them with an intent to hinder, delay, or defraud creditors.[42]

§ 83. Concealment or Removal of Property.—The bankruptcy act of 1867 made it an act of bankruptcy for a debtor to "conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process."[43] The present statute uses the words "concealed or removed or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors or any of them."[44] This language is plainly more comprehensive than that of the earlier act; and a secreting of goods by an insolvent debtor, to prevent their being seized on an attachment, would certainly be held to be a concealment of them with intent to delay or defraud his creditors generally, or at least the attaching creditors.[45] On the other hand, where a debtor sells his property for the purpose of investing the proceeds in

[38] In re Valliquette, 4 N. B. R. 307, Fed. Cas. No. 16,823.

[39] Ex parte Potts, Crabbe, 469, Fed. Cas. No. 11,344. And see In re McLoon, 162 Fed. 575, 20 Am. Bankr. Rep. 719.

[40] Ex parte Potts, Crabbe, 469, Fed. Cas. No. 11,344.

[41] Githens v. Shiffler, 112 Fed. 505, 7 Am. Bankr. Rep. 453. The execution of a chattel mortgage by the debtor, where the only intent as to hindering, delaying, or defrauding creditors was to give the chattel mortgagee a priority, does not constitute an act of bankruptcy as a conveyance in fraud of creditors, this clause of the Bankruptcy Act having the same construction as the Statute of Elizabeth. Johnson-Baillie Shoe Co. v. Bardsley, Elmer & Nichols, 237 Fed. 763, 150 C. C. A. 517, 38 Am. Bankr. Rep. 492.

[42] In re Wilmington Hosiery Co., 120 Fed. 180, 9 Am. Bankr. Rep. 581.

[43] Rev. Stat. U. S. § 5021.

[44] Bankruptcy Act 1898, § 3a, clause 1.

[45] See Anonymous, 1 Pac. Law Rep. 173, Fed. Cas. No. 466.

a legitimate business enterprise, into which he expects to enter, and shows good faith in respect to the care of the money received therefor, he is not to be adjudged bankrupt simply because he kept the proceeds in cash in his own hands, instead of converting the fund again into tangible property such as could have been levied on under legal process; for this is not a "concealment" of his property with intent to defraud creditors.[46] But consigning property to a person out of the district, by one who contemplates bankruptcy, and with the intent to keep the property from the trustee, amounts to removing it from the district with intent to defraud his creditors.[47] A more serious question is whether the words of the statute must be restricted to a physical concealment or removal of property, or may be made to extend to a concealment of the actual title and possession of the property.[48] Under the former statute it was held that, if the debtor procured an attachment to issue upon a fictitious debt and to be levied on the property, for the purpose of preventing the levy of an attachment by a genuine creditor, this amounted to a concealment of the property.[49] But there are also decisions to the effect that the concealment or removal of property, as distinct from a fraudulent conveyance of it, must be actual and not constructive, that is, must involve an actual or physical change in the position or locality of the property;[50] and hence the mere taking possession of property by a receiver appointed by competent authority is not such a "removal" of it as constitutes an act of bankruptcy, and the failure of the debtor to oppose and contest the appointment of a receiver is not "permitting" his property to be concealed or removed.[51] On similar principles, where a partner of an insolvent firm withdrew from the firm's bank account a certain sum of money, by a check which he at once deposited to his personal account in another bank, but thereupon drew a larger check upon that bank and deposited it to the firm's credit in its

[46] Fox v. Eckstein, 4 N. B. R. 373, Fed. Cas. No. 5,009.

[47] In re Hammond, 1 Low. 381, 3 N. B. R. 273, Fed. Cas. No. 5,999.

[48] See In re Glazier, 195 Fed. 1020, 28 Am. Bankr. Rep. 391.

[49] In re Williams, 1 Low. 406, 3 N. B. R. 286, Fed. Cas. No. 17,703; In re Hussman, 2 N. B. R. 437, Fed. Cas. No. 6,951. "Concealment is the doing of an act, whether by way of conveyance or transfer, by which the true title and ownership of the debtor is kept from the view of the creditor, when done with the intent and purpose of preventing its being attached or taken on execution." O'Neil v. Glover, 5 Gray (Mass.) 144. There was a concealment of property constituting an act of bankruptcy when the debtor, asked by a creditor what he had done with certain money, said he had left it in a safe place, but that he had offsets exceeding the creditor's claim. In re Burg (D. C.) 245 Fed. 173, 40 Am. Bankr. Rep. 126.

[50] In re Wilmington Hosiery Co., 120 Fed. 180, 9 Am. Bankr. Rep. 581; Livermore v. Bagley, 3 Mass. 487; Fox v. Eckstein, 4 N. B. R. 373, Fed. Cas. No. 5,009.

[51] Vaccaro v. Security Bank, 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474; In re Wilmington Hosiery Co., 120 Fed. 180, 9 Am. Bankr. Rep. 581.

bank, the transaction was held not to constitute a withdrawal of firm funds nor an act of bankruptcy.[52] And where no depletion of his estate occurs as a result of the debtor's removal of his property from one place to another, such removal is not an act of bankruptcy of which creditors can complain.[53]

Under the provisions of the former bankruptcy act, it was an act of bankruptcy if the debtor departed from the state, district, or territory of which he was an inhabitant, with intent to defraud his creditors, or if, being absent, he should, with such intent, remain absent, or if he concealed himself to avoid the service of legal process. There is no corresponding provision in the present act. But if a debtor should abscond with his available assets, it is very clear that he may be adjudged bankrupt on the ground of having "removed" his property with intent to defraud his creditors.[54] But it is not an act of bankruptcy on the part of one partner to influence or procure the departure of another from the state, although the circumstances are such that the absconding partner makes himself liable to the law.[55]

It should be observed that the present statute denounces not only the act of a debtor who has "concealed or removed" his property with intent to delay or defraud creditors, but also the act of one who has "permitted" this to be done, with like intent. But one does not permit a removal of property who has neither the power nor the right to prevent its being taken away.[56] And hence, where a creditor of a bankrupt removed goods from the bankrupt's store during the latter's absence, and retained possession of them against his protest, the bankrupt's failure to take legal proceedings to recover the possession of the goods did not amount to "permitting" their removal, so as to constitute an act of bankruptcy, at least in the absence of any evidence of collusion.[57]

§ 84. **Giving a Preference.**—It is an act of bankruptcy if an insolvent debtor shall have "transferred any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors;" and a preference is deemed to have been given when "the effect of the enforcement of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."[58] The bankruptcy law, it is said,

[52] In re Perlhefter, 177 Fed. 299, 25 Am. Bankr. Rep. 576.

[53] In re McGraw (D. C.) 254 Fed. 442, 43 Am. Bankr. Rep. 38.

[54] In re Filer, 108 Fed. 209, 5 Am. Bankr. Rep. 332.

[55] In re Terry, 5 Biss. 110, Fed. Cas. No. 13,836.

[56] In re Wilmington Hosiery Co., 120 Fed. 180, 9 Am. Bankr. Rep. 581.

[57] In re Belknap, 129 Fed. 646, 12 Am. Bankr. Rep. 326.

[58] Bankruptcy Act 1898, § 3a, clause 2; Idem, § 60a. See Folger v. Putnam, 194 Fed. 793, 114 C. C. A. 513, 28 Am. Bankr. Rep. 173. Payments by an insolvent per-

does not prohibit an insolvent debtor from dealing with or exchanging his property before proceedings in bankruptcy are instituted against him, provided there is no purpose to defraud or delay his creditors, or to give a preference to any one, and the value of his estate is not thereby impaired.[59] According to the language of the clause in question, there are several ingredients, all of which are essential to the commission of this act of bankruptcy. First of all, there must be an intention on the part of the debtor to prefer one or more creditors over others; without this, there is no act of bankruptcy.[60] Next, the transfer or payment must have been made at a time when the debtor was insolvent.[61] Next, it must have been made within four months before the filing of a petition in bankruptcy against him.[62] Again, it must operate to the disadvantage of some other creditor or creditors. Thus, a transfer of property, though made by an insolvent person to a creditor, is not an act of bankruptcy, unless there was, as the time of the transfer, some other creditor holding a claim or demand against the insolvent such as would be provable in bankruptcy.[63] And of course the person to be benefited by the transfer must occupy the position of a "creditor." A trustee for creditors, however, is in the same position as a creditor. Thus, where an alleged bankrupt was a stockholder in an insolvent bank, which was in the hands of the bank commissioner, and he executed a note to the commissioner for the amount of his double liability, secured by a mortgage on nonexempt real property, it was held that he was guilty of an

son to certain creditors of 25 per cent. of their claims, pursuant to an arrangement made by a creditors' committee, approved by most of them, for the settlement of all his indebtedness on that basis, where he had secured funds to complete the settlement, do not constitute an act of bankruptcy as the giving of a preference. In re Bloomberg (D. C.) 253 Fed. 94, 42 Am. Bankr. Rep. 115. Further, the preference must have been given by the bankrupt. The settlement of a suit brought on a note, by the attorney for the alleged bankrupt, who himself paid the money and had not been repaid when the petition was filed, was held not an act of bankruptcy. In re Kerlin, 209 Fed. 42, 126 C. C. A. 184, 31 Am. Bankr. Rep. 12.

[59] Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816. Where a corporation conveys all its property in trust, with directions to the trustee to sell the same, and, out of the proceeds, to pay first the costs and expenses, second, debts entitled to priority under the laws of the state, third, the claims of the creditors of the company, whose names, with the amounts due them, are all set forth in the deed, and fourth, to pay over to the grantor any balance which may remain, the deed does not effect a preference to any creditor, since all are treated alike, and it cannot be made the basis of a petition in involuntary bankruptcy on allegations of preferences. Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co., 99 Fed. 699, 3 Am. Bankr. Rep. 704. But compare In re Cutler & John (D. C.) 228 Fed. 771, 36 Am. Bankr. Rep. 420.

[60] Goodlander-Robertson Lumber Co. v. Atwood, 152 Fed. 978, 82 C. C. A. 109, 18 Am. Bankr. Rep. 510.

[61] Wilder v. Watts, 138 Fed. 426, 15 Am. Bankr. Rep. 57.

[62] In re Bogen, 134 Fed. 1019, 13 Am. Bankr. Rep. 529.

[63] Beers v. Hamlin, 99 Fed. 695, 3 Am. Bankr. Rep. 745.

act of bankruptcy.[64] But it makes no difference that the creditor is the wife of the bankrupt; it is equally against the law to give her a preference as to prefer any other creditor.[65] An accommodation indorser of notes, even before payment, is a creditor of the maker,[66] and so is a surety on the bond of a contractor for government work, who, under the federal statute, is directly liable to laborers to whom the contractor is indebted for labor performed under the contract.[67] Next, it is necessary that the property or money transferred should amount to something substantial, and not be such a mere trifle as to be beneath the consideration of the law. Thus, it is held that the payment of a debt of three dollars by a firm engaged in trade is not such a substantial preference as will constitute an act of bankruptcy sufficient in itself to sustain an involuntary petition.[68] Finally, there must be some actual advantage accruing to the creditor preferred. Thus, where a debtor sold some of his property, for nearly its full value, for the purpose of raising money to satisfy a creditor who was threatening him with a criminal prosecution, but the creditor refused to receive the money, the mere sale, though made with the intention of preferring that creditor, was not an act of bankruptcy.[69] It is evident that many transactions may occur, involving the sale or transfer of property, which do not amount to acts of bankruptcy because they involve some, but not all, of the necessary elements mentioned. For instance, where a debtor, being the owner of a leasehold interest in land having a term of years to run but not assignable without the consent of the landlord, sells the same and applies part of the proceeds in paying the arrears of rent due, taxes on the property, and the incidental expenses of the sale, such payment does not constitute a preference of the creditors paid, but merely a means of realizing the value of the leasehold, and therefore is not an act of bankruptcy on which a petition against the debtor may be maintained.[70] Again, the retirement of one partner from the firm, and the consequent transfer of assets and liabilities to the other, are not necessarily acts of bankruptcy

[64] Fulkerson v. Shaffer, 217 Fed. 355, 133 C. C. A. 271, 33 Am. Bankr. Rep. 526.

[65] In re McCartney, 188 Fed. 815, 26 Am. Bankr. Rep. 548.

[66] In re O'Donnell, 131 Fed. 150, 12 Am. Bankr. Rep. 621.

[67] United Surety Co. v. Iowa Mfg. Co., 179 Fed. 55, 102 C. C. A. 623, 24 Am. Bankr. Rep. 726.

[68] In re Stovall Grocery Co., 161 Fed. 882, 20 Am. Bankr. Rep. 537. And see In re Hallin, 199 Fed. 806, 20 Am. Bankr. Rep. 708. A transfer by an alleged bankrupt to a creditor of an automobile which he had bought in good faith, and to which he had added accessories which he paid for, is a transfer of property and an act of bankruptcy, although in fact the automobile had been stolen and the bankrupt did not acquire the legal title. In re Schenderlein (D. C.) 268 Fed. 1018, 46 Am. Bankr. Rep. 128.

[69] In re Belknap, 129 Fed. 646, 12 Am. Bankr. Rep. 326.

[70] In re Pearson, 95 Fed. 425, 2 Am. Bankr. Rep. 482.

by the partnership, but may be so if intended to give a preference to separate creditors over partnership creditors, or in any other way to cover actual or legal fraud.[71]

As to the intention of the debtor, this may sometimes be imputed to him from the acts of his subordinates or agents. For example, if a wife is the owner of a business, but intrusts its entire management and control to her husband, his acts and intentions, in the giving of preferences to creditors and the like, may constitute acts of bankruptcy on which she may be adjudged bankrupt.[72] So a payment made, in the establishment of an insolvent partnership, out of its funds, by the recognized agent of the partners, without objection on their part, which has the effect to produce a preference, will be regarded as having been made by the partnership with the intention of giving a preference.[73] In this connection, it is important to observe that, where a transfer of property by an insolvent debtor with intent to prefer a creditor, is made the basis of a petition in involuntary bankruptcy against him, the intent of the debtor is alone material; it is not necessary to show the intent with which the creditor received the transfer, nor that he had reasonable cause to believe a preference was intended.[74] It is true that, when a trustee in bankruptcy sues to set aside a conveyance of property on the ground of its being an unlawful preference, he must show, not only that the bankrupt intended to give a preference, but also that the creditor receiving it had reasonable cause to believe that a preference was intended. But as regards the commission of an act of bankruptcy, no such knowledge or belief on the part of the creditor is required, nor any unlawful intent on his part. In this case, the law looks only to the intention of the debtor. Hence it follows that a transaction may constitute an act of bankruptcy, such as to warrant an adjudication against the debtor, although the conveyance is not voidable under the law.[75]

Under the comprehensive meaning of the word "transfer," as defined

[71] Ex parte Shouse, Crabbe, 482, Fed. Cas. No. 12,815; In re Waite, 1 Low. 207, 1 N. B. R. 373, Fed. Cas. No. 17,044.

[72] Graham v. Stark, 3 Ben. 520, 3 N. B. R. 357, Fed. Cas. No. 5,676. And see In re Berkebile, 144 Fed. 572.

[73] Sedgwick v. Sheffield, 6 Ben. 21, Fed. Cas. No. 12,624.

[74] In re Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123; In re Ed. W. Wright Lumber Co., 114 Fed. 1011, 8 Am. Bankr. Rep. 345; Thompson v. First Nat. Bank, 84 Miss. 54, 36 South. 65; In re Truitt, 203 Fed. 550, 29 Am. Bankr. Rep. 570.

[75] Alter v. Clark, 193 Fed. 153; In re Drummond, 1 N. B. R. 231, Fed. Cas. No. 4,093; In re Williams, 1 Low. 406, 3 N. B. R. 286, Fed. Cas. No. 17,703; In re Locke, 1 Low. 293, 2 N. B. R. 382, Fed. Cas. No. 8,439; In re Beck, 6 Phila. 475, 1 N. B. R. 588, Fed. Cas. No. 1,205. The verdict on the question as to whether an act of bankruptcy has been committed in giving a preference will not affect the question of the right to recover back the property transferred or the right to a discharge. In re Dibblee, 3 Ben. 283, 2 N. B. R. 617, Fed. Cas. No. 3,884; Harmanson v. Bain, 1 Hughes, 188, 15 N. B. R. 173, Fed. Cas. No. 6,072.

in the bankruptcy act, a preference may be given by an insolvent debtor by a conveyance of property by way of an absolute sale or gift,[76] or by a mortgage, pledge, or other form of security.[77] But the giving of a mortgage by the debtor upon a present consideration and in good faith, to raise a contested attachment and to pay overdue paper, to enable the debtor to continue in business, is not an act of bankruptcy.[78] Nor is the giving of a chattel mortgage to secure an antecedent debt, where it is given in good faith in renewal of a prior mortgage covering the same property, nor even where it includes additional property, if the mortgagor receives a further present consideration sufficient to warrant the additional security.[79] Also it is settled that money is "property," and the payment of a debt in money is a transfer of property, such as will constitute an act of bankruptcy, if the other elements are present.[80] And if the debtor was insolvent and a preference was intended, it is not material that the debt was a just one and that no fraud was perpetrated or designed.[81] Thus, it is an act of bankruptcy for an insolvent debtor to sell all of his property to one not a creditor, and then to apply the proceeds to the full payment of a part of his creditors, leaving others unpaid, the transaction being in effect a transfer of property with intent to give a preference.[82] And so of an assignment by an insolvent debtor

[76] See Peckham v. Burrows, 3 Story, 544, Fed. Cas. No. 10,897; In re Warner, 5 N. B. R. 414, Fed. Cas. No. 17,177.

[77] In re Edelman, 130 Fed. 700, 65 C. C. A. 665, 12 Am. Bankr. Rep. 238; In re Riggs Restaurant Co., 130 Fed. 691, 66 C. C. A. 48, 11 Am. Bankr. Rep. 508; Arnold v. Maynard, 2 Story, 349, Fed. Cas. No. 561; Baldwin v. Rosseau, Fed. Cas. No. 803; In re Ryan, 2 Sawy. 411, Fed. Cas. No. 12,183; Jones v. Sleeper, Fed. Cas. No. 7,496; In re Rogers, 2 N. B. R. 397, Fed. Cas. No. 12,002. But see Martin v. Hulen, 149 Fed. 982, 79 C. C. A. 492, 17 Am. Bankr. Rep. 510; In re Puget Sound Engineering Co. (D. C.) 270 Fed. 353, 46 Am. Bankr. Rep. 310. Where a deed, originally intended to operate as a mortgage, was withheld from record by agreement of the parties, and was afterwards allowed by their agreement to stand as security for any balance in favor of the grantee, and later, at a time when the grantor was insolvent and within four months of the filing of a petition in bankruptcy against him, the deed was placed on record, and shortly thereafter the parties agreed that it should operate as an absolute transfer of the property, an act of bankruptcy was committed when the deed was recorded, as it then operated as a forbidden preference. In re Donnelly, 193 Fed. 755, 27 Am. Bankr. Rep. 504.

[78] In re Sanford, 7 N. B. R. 351, Fed. Cas. No. 12,310.

[79] In re Cutting, 145 Fed. 388, 16 Am. Bankr. Rep. 751.

[80] Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814; Boyd v. Lemon & Gale Co., 114 Fed. 647, 8 Am. Bankr. Rep. 81; In re Pinson, 180 Fed. 787, 24 Am. Bankr. Rep. 804; In re Perlhefter, 177 Fed. 299, 25 Am. Bankr. Rep. 576; In re Foley, 140 Fed. 300, 15 Am. Bankr. Rep. 830; In re Ft. Wayne Electric Corp., 96 Fed. 803; In re Conhaim, 97 Fed. 923, 3 Am. Bankr. Rep. 249; In re Wise, 2 Nat. Bankr. News, 151; Payne v. Solomon, 14 N. B. R. 162, Fed. Cas. No. 10,856.

[81] Brock v. Terrell, 2 N. B. R. 643, Fed. Cas. No. 1,914.

[82] Boyd v. Lemon & Gale Co., 114 Fed. 647, 52 C. C. A. 343, 8 Am. Bankr. Rep. 81.

to a creditor of earnings to become due under a building contract.[83] Payment by the indirect method of turning over property to the creditor is equally within the inhibition of the statute. Thus, the payment and discharge of a debt, by an insolvent debtor, by a conveyance to the creditor of personal property of greater value than the debt, the debtor receiving the difference in cash, is a preference of such creditor and an act of bankruptcy.[84] It has been held to be no defense to a petition founded on a preferential payment that it was made in the ordinary course of business.[85] But payments so made by a person who does not know that he is actually insolvent, and who expects to deal with all his other creditors in the same way, that is, to meet all his obligations as they fall due in the ordinary course of business, would lack the essential element of an intent to give a preference, and therefore could not be held to be acts of bankruptcy.[86] There is some doubt as to whether payment of the ordinary and necessary running expenses of the debtor's business will constitute a preference. It has been held that such a payment is not an act of bankruptcy, where there is no design to give the payee an advantage over other creditors, but merely the endeavor to keep the business alive.[87] And this doctrine seems to be well in accord with the spirit and reason of the law. But it does not pass entirely without question.[88]

§ 85. Same; Intention of Debtor Presumed.—Where a transfer of property, or the giving of a mortgage, or the payment of a debt, made by an insolvent debtor to one of his creditors, actually and necessarily operates to give that creditor a preference over others, it will be presumed that the debtor intended to bring about that result. Direct evidence of an intent on his part to prefer the creditor will not be required; but it will devolve on the insolvent, if he denies that the transaction was designed as a preference, to prove his real intention in the matter, on some theory not inconsistent with the facts of the case. This rule is deduced from the familiar principle that every man is presumed to intend the natural and necessary consequences of his volun-

[83] In re O'Donnell, 131 Fed. 150, 12 Am. Bankr. Rep. 621.

[84] Johnson v. Wald, 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84. And see Goldman v. Smith, 93 Fed. 182, 1 Am. Bankr Rep. 266.

[85] In re Oregon Bulletin Printing & Pub. Co., 13 N. B. R. 503, Fed. Cas. No. 10,559.

[86] In re Morgan, 184 Fed. 938, 25 Am. Bankr. Rep. 861.

[87] Smith v. Teutonia Ins. Co., Fed. Cas. No. 13,115; In re Union Feather & Wool Mfg. Co., 112 Fed. 774, 50 C. C. A. 524, 7 Am. Bankr. Rep. 472; In re Perlhefter, 177 Fed. 299, 25 Am. Bankr. Rep. 576; In re Columbia Real Estate Co., 205 Fed. 980, 30 Am. Bankr. Rep. 471; In re Brown Commercial Car Co., 227 Fed. 387, 142 C. C. A. 83, 36 Am. Bankr. Rep. 45.

[88] See In re Kenyon, 1 Utah, 47, 6 N. B. R. 238.

tary acts.[89] For instance, where a petition in involuntary bankruptcy charges the debtor with having transferred property with intent to give a preference, his intent to prefer may be presumed from the fact of his having made a transfer of a large part of his property, while insolvent, to a single creditor; and when this is shown, the burden is on the debtor to show that he was ignorant of his insolvency and had reason to believe he could pay his debts in full.[90] The presumption, as we have stated, is not conclusive. It is open to the debtor to prove that he was actuated by a different motive, and had no intention of preferring the particular creditor, and if this is satisfactorily established, an adjudication of bankruptcy will not be made on that ground.[91] It is ordinarily sufficient to rebut the presumption for the debtor to show that he actually did not know himself to be insolvent.[92] For a preference, as defined in the sixtieth section of the act, does not include paying one creditor promptly while others are made to wait, or making it easy for one creditor to collect his claim while others are evaded or contested, but only "enabling one creditor to obtain a greater percentage of his debt than other creditors of the same class." Hence there can be no intention to give a preference, within the meaning of the law, unless the debtor knows, or at least has reason to believe, that the effect of the transaction will be to reduce his assets to a point where they will be insufficient to satisfy his other creditors. On this principle it has been held that payments of comparatively small sums of money to

[89] Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481; Traders' Nat. Bank v. Campbell, 14 Wall. 87, 20 L. Ed. 832; In re Condon, 209 Fed. 800, 126 C. C. A. 524, 31 Am. Bankr. Rep. 754. Johnson v. Wald, 93 Fed. 640, 35 C. C. A. 522, 2 Am. Bankr. Rep. 84; Rex. Buggy Co. v. Hearick, 132 Fed. 310, 65 C. C. A. 676, 12 Am. Bankr. Rep. 726; In re Flint Hill Stone & Const. Co., 149 Fed. 1007, 18 Am. Bankr. Rep. 81; In re Smith, 176 Fed. 426, 23 Am. Bankr. Rep. 864; In re Gilbert, 112 Fed. 951, 8 Am. Bankr. Rep. 101; In re McGee, 105 Fed. 895, 5 Am. Bankr. Rep. 262; Catlin v. Hoffman, 2 Sawy. 486, 9 N. B. R. 342, Fed. Cas. No. 2,521; Campbell v. Traders' Nat. Bank, 2 Biss. 423, 3 N. B R. 498, Fed. Cas. No. 2,370; Haughey v. Albin, 2 Bond. 244, 2 N. B. R. 399, Fed. Cas. No. 6,222; Morgan v. Mastick, 2 N. B. R. 521, Fed. Cas. No. 9,803; In re Black, 2 Ben. 196, 1 N. B. R. 353, Fed. Cas. No. 1,457; In re Craft, 2 Ben. 214, 1 N. B. R. 378, Fed. Cas. No. 3,316; Webb v. Sachs, 4 Sawy. 158, 15 N. B. R. 168, Fed. Cas. No. 17,325; In re Perry, Fed. Cas. No. 10,999; Warren v. Delaware, L. & W. Ry. Co., 7 N. B. R. 451, Fed. Cas. No. 17,194; Warren v. Tenth Nat. Bank, 10 Blatchf. 493, 7 N. B. R. 481, Fed. Cas. No. 17,202; Vanderhoof v. City Bank, 1 Dill. 476, 5 N. B. R. 270, Fed. Cas. No. 16,842; Martin v. Toof, 1 Dill. 203, 4 N. B. R. 488, Fed. Cas. No. 9,167; In re Silverman, 1 Sawy. 410, 2 Abb. U. S. 243, 4 N. B. R. 522, Fed. Cas. No. 12,855; Vogle v. Lathrop, 3 Pittsb. 268, 4 N. B. R. 439, Fed. Cas. No. 16,985; Rison v. Knapp, 1 Dill. 187, 4 N. B. R. 349, Fed. Cas. No. 11,861; In re Alexander, 1 Low. 470, 4 N. B. R. 178, Fed. Cas. No. 161.

[90] In re Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123.

[91] In re Seeley, 19 N. B. R. 1, Fed. Cas. No. 12,628; In re Frantzen, 20 Fed. 785.

[92] In re Gilbert, 112 Fed. 951, 8 Am. Bankr. Rep. 101.

each of a number of creditors, made by a corporation in the usual course of its business, though at a time when it was actually insolvent, do not raise a presumption of an intention to prefer those creditors over others so as to establish an act of bankruptcy.[93]

§ 86. Suffering Preference Through Legal Proceedings.—It is declared to be an act of bankruptcy if the debtor, while insolvent, shall have "suffered or permitted any creditor to obtain a preference through legal proceedings," provided the debtor does not, "at least five days before a sale or final disposition of any property affected by such preference," vacate or discharge the preference.[94] The motive or intention of the debtor is not material in this connection. An act of bankruptcy can be committed in this way although there was no collusion between the debtor and the creditor, although the former had no wish or intention that the latter should obtain a preference, and even although the debtor did not know that there was any such law as the bankruptcy law in existence, and therefore could not have directly intended to evade or defeat it.[95] But it is held that this provision of the statute does not apply to liens acquired by legal proceedings more than four months before the filing of the petition in bankruptcy and which, therefore, will not be dissolved by an adjudication.[96] The phrase "legal proceedings" means any proceeding in a court of justice, either inter-

[93] In re Douglas Coal & Coke Co., 131 Fed. 769, 12 Am. Bankr. Rep. 539.

[94] Bankruptcy Act 1898, § 3a, clause 3. Suffering a creditor to obtain a preference through legal proceedings involves insolvency, suffering the preference, not avoiding it within five days before sale, and a sale of the property affected. In re Fisher (D. C.) 219 Fed. 638, 33 Am. Bankr. Rep. 628.

[95] In re Craft, 2 Ben. 214, 1 N. B. R. 378, Fed. Cas. No. 3,316; In re Meyers, 1 Nat. Bankr. News, 207. But compare In re Truitt, 203 Fed. 550, 29 Am. Bankr. Rep. 570.

[96] In re Superior Jewelry Co., 243 Fed. 368, 156 C. C. A. 148, 39 Am. Bankr. Rep. 575. Colston v. Austin Run Min. Co. (C. C. A.) 194 Fed. 929, 28 Am. Bankr. Rep. 92; In re Chapman, 99 Fed. 395, 3 Am. Bankr. Rep. 607; In re Ferguson, 95 Fed. 429, 2 Am. Bankr. Rep. 586; In re Deer Creek Water & Water Power Co., 205 Fed. 205, 29 Am. Bankr. Rep. 356; Owen v. Brown, 120 Fed. 812, 57 C. C. A. 180, 9 Am. Bankr. Rep. 717. See In re Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123, where it is suggested by Judge Coxe that the gaining of an advantage by one creditor over other creditors by seizing the debtor's property, which the debtor suffers or permits, may be an act of bankruptcy, and yet not be voidable by the trustee. See also In re Schick, 2 Ben. 5, 1 N. B. R. 177, Fed. Cas. No. 12,455, where it was held that, although the judgment complained of was entered against the bankrupt before the passage of the bankruptcy act, yet if it was fraudulent and fictitious, and the debtor has taken no steps to set it aside, and, after the enactment of the law, the judgment being still in force, his property is seized on an execution issuing thereon, it is a "procuring or suffering his property to be taken on legal process." Where a judgment creditor delays more than four months in advertising or directing sale under execution, no act of bankruptcy is committed, though the judgment then becomes invulnerable to attack under the act. In re D. F. Herlehy Co. (D. C.) 247 Fed. 369, 41 Am. Bankr. Rep. 171.

locutory or final, by which the property of the debtor is seized and diverted from his general creditors.[97] It is a substitute for certain language found in the act of 1867, which made it an act of bankruptcy for a debtor to "procure his property to be taken on legal process." The most familiar methods of gaining a preference through "legal proceedings" are found in the levy of an execution or attachment on property of the debtor.[98] But the phrase in question has a wider scope than this. It includes all liens obtained by legal proceedings which are valid under state laws,[99] such as the lien on real estate of a judgment duly docketed, particularly when followed by an execution and levy,[100] but not a livery stable keeper's lien, given by a state statute, but not established by any proceeding in the courts.[101] But in order that the debtor should commit an act of bankruptcy by failing to discharge the lien of an execution on his property, it is necessary that there should first have been an actual and valid levy by the proper officer, and it is open to him to show, in contradiction of the recitals of the sheriff's return, that there was no actual levy at all or that the pretended levy was wholly invalid.[102]

It is also held that the phrase "legal proceedings" may include the appointment of a receiver by a state court and the vesting of the debtor's property in him. But to make this an act of bankruptcy, it must be shown, first, that the receiver was appointed at the instance of the debtor, or that the latter tacitly permitted and acquiesced in the appointment, and second, that the effect of the receivership and the distribution of the estate under his administration will be to give a preference to one or more creditors, as, where creditors who are entitled to priority under the laws of the state will receive a greater amount under the receivership than they would receive under the bankruptcy act.[103]

[97] In re Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123.

[98] In re Storm, 103 Fed. 618, 4 Am. Bankr. Rep. 601; In re Ferguson, 95 Fed. 429, 2 Am. Bankr. Rep. 586; Barnes v. Billington, 1 Wash. C. C. 29, Fed. Cas. No. 1,015.

[99] In re Crafts-Riordon Shoe Co., 185 Fed. 931, 26 Am. Bankr. Rep. 449.

[100] In re Tupper, 163 Fed. 766, 20 Am. Bankr. Rep. 824; Zugalla v. International Mercantile Agency, 142 Fed. 927, 74 C. C. A. 97, 16 Am. Bankr. Rep. 67; Bogen v. Protter, 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288.

[101] In re Mero, 128 Fed. 630, 12 Am. Bankr. Rep. 171.

[102] In re Bodek, 188 Fed. 817, 26 Am. Bankr. Rep. 476. A void execution levy on the equity of redemption of an alleged bankrupt in mortgaged personal property was held not to diminish his estate nor constitute a final disposition of his property, and hence was not an act of bankruptcy. In re Moark-Nemo Consol. Mining Co. (D. C.) 219 Fed. 340, 34 Am. Bankr. Rep. 201.

[103] Mather v. Coe, 92 Fed. 333, 1 Am. Bankr. Rep. 504; In re Hardy, 7 Blatchf. 262, 3 N. B. R. 385, Fed. Cas. No. 6,058; In re Merchants' Ins. Co., 3 Biss. 162, 6 N. B. R. 43, Fed. Cas. No. 9,441; In re Bininger, 7 Blatchf. 262, Fed. Cas. No. 1,420. In another case it was held that,

Further, to constitute this act of bankruptcy, a preference must have been obtained through legal proceedings by a "creditor" of the alleged bankrupt, and to be a creditor the person must own a claim or demand provable in bankruptcy; and it is doubtful whether the character of a creditor is sufficiently established by the mere fact of his having brought a suit in contract against the alleged bankrupt and attached property on mesne process, when there has been no trial of the action at the time of the filing of the petition in bankruptcy, and consequently nothing to show whether the claim is well founded or not.[104]

§ 87. **Same; Attachment.**—It has been held in several cases that the levy of an attachment on property of an insolvent debtor constitutes the obtaining of a preference "through legal proceedings," so that the failure of the debtor to discharge the attachment will constitute an act of bankruptcy.[105] "We hold it incumbent upon an insolvent person to discharge or vacate a lien secured by an attachment upon his property at least five days before a period of four months expires following the date of the levy of such attachment, and if he fails therein he commits the third act of bankruptcy. [Since otherwise it becomes an irrevocable preference.] It may be, and has been, suggested that this will sometimes force a person into bankruptcy when the attachment is acquired upon an invalid or spurious claim, or one not provable against the bankrupt's estate; but it seems to us better that this contingency should obtain than that the very statute itself should be defeated in its fundamental purpose." [106]

But there are strong authorities to the contrary. In one case it was said that "the mere suing out of an attachment and levying the same does not suffice to constitute an act of bankruptcy. A judgment must be rendered thereon which would result in creating a preference among creditors, and a failure for at least five days to vacate and discharge the preference in terms refers to the five days before a sale or final disposi-

where a corporation makes no defense to a bill in equity against it in a state court, and tacitly permits the appointment of a receiver and the vesting of its property in him, it is not an act of bankruptcy by the corporation, although certain classes of persons may be entitled to larger dividends under the receivership proceedings than they would obtain in bankruptcy, if it does not appear that any such persons are concerned, or that any sale or final disposition of the property affected by the receivership has been made. In re Baker-Ricketson Co., 97 Fed. 489, 4 Am. Bankr. Rep. 605.

[104] In re Crafts-Riordon Shoe Co., 185 Fed. 931, 26 Am. Bankr. Rep. 449.

[105] Folger v. Putnam (C. C. A.) 194 Fed. 793, 28 Am. Bankr. Rep. 173; In re Putnam, 193 Fed. 464, 27 Am. Bankr. Rep. 923; Parmenter Mfg. Co. v. Stoever (C. C. A.) 97 Fed. 330, 3 Am. Bankr. Rep. 220; In re Reichman, 91 Fed. 624, 1 Am. Bankr. Rep. 17.

[106] Folger v. Putnam (C. C. A.) 194 Fed. 793, 28 Am. Bankr. Rep. 173.

tion of any property affected." [107] In another case, in which a very able opinion was rendered, it was laid down that an attachment on mesne process, before any trial of the action or the rendition of any judgment, is not enough in itself to constitute a preference obtained by the plaintiff, within the meaning of the statute. For the act of bankruptcy is not completed by the mere attaching of a lien of this kind, but there must also be a failure on the part of the debtor to vacate or discharge it within five days before a sale or final disposition of the property. Having had as yet no opportunity to contest and disprove the claim set up, he could vacate or discharge it only by paying it, and he should not be required to do this against his own contention that the claim is unjust or without merit. Giving a bond to dissolve the attachment would not vacate the alleged preference, since it would leave the attaching creditor in exactly as strong a position as before. Hence if, in these circumstances, the attached property is sold, at the instance of the plaintiff, on the ground that the expense of keeping it would be too great and out of all proportion to its value, and the sheriff retains in his hands the proceeds of the sale to stand in place of the property and to await the issue of the suit, the failure of the defendant to vacate or discharge the attachment before such sale cannot be held to constitute an act of bankruptcy. The court said: "In the cases which have held preferences to have been obtained through legal proceedings, and an attachment has formed part of the proceedings, the attachment has either been after judgment in the suit, or, if before judgment, has been followed by a judgment before the petition in bankruptcy, so that the attachment lien has passed beyond the stage during which it remains wholly uncertain whether there is really any claim against the defendant or not." [108] It was further held, in the same case, that the sheriff's sale of the property, above mentioned, could not be considered such a "sale or final disposition" of the property as the statute intends. There was a sale, it is true, but not a sale effecting any final disposition of the property. "It is difficult to believe the language of the section intended to include sales which accomplished no diminution of the bankrupt's assets, but merely substitute money for property, without rendering the 'preference' obtained by an attachment any more effective in the plaintiff's favor than it was before the sale was made."

[107] Seaboard Steel Casting Co. v. William R. Trigg Co., 124 Fed. 75, 10 Am. Bankr. Rep. 594. And see In re Vetterman, 135 Fed. 443, 14 Am. Bankr. Rep. 245.

[108] In re Crafts-Riordon Shoe Co. (D. C.) 185 Fed. 931, 26 Am. Bankr. Rep. 449.

§ 88. Same; Failure to Vacate or Discharge.—It should be observed that the act of bankruptcy described in the clause under consideration does not consist merely in permitting a creditor to secure a judgment or a lien. It must be a preference which would be dissolved by an adjudication in bankruptcy. Hence the failure of an insolvent to discharge a lien obtained through judicial proceedings more than four months prior to bankruptcy proceedings, is not an act of bankruptcy, although the time fixed for the sale of the property was within the four months period.[109] Nor is this all. There must further be an impending sale or other final disposition of the property affected and the failure of the debtor to avoid it within a limited time before its expected occurrence. Thus, if an execution is levied on property of an insolvent debtor, the mere fact that he remains inactive and allows creditors to file a petition in bankruptcy against him, without any offer or attempt to lift the lien of the execution, does not constitute an act of bankruptcy. The levy does not constitute a "final disposition" of the property; and the circumstance which will make him liable to an adjudication in bankruptcy is not his inactivity with respect to the lien, but a failure to vacate or discharge the preference at least five days before a sale or final disposition.[110] But creditors who seek to secure an adjudication of bankruptcy on this ground need not wait until a sale has taken place. If the debtor, five days before the advertised day of sale, has not discharged the preference, creditors may then file a petition against him, and, on a proper showing, have the sale enjoined.[111] But under the rule prescribed by the statute for the computation of time when days are mentioned, the debtor has the whole of the fifth day preceding that appointed for the sale in which to discharge the lien, and is not guilty of an act of bankruptcy until that day has expired without effective action.[112] It is held, however, that an independent act of bankruptcy is also committed by a failure to discharge the lien on each succeeding day, including the day of the sale.[113] By analogy, where a debtor permitted a judgment against him to remain unsatisfied

[109] In re Superior Jewelry Co. (D. C.) 239 Fed. 373, 38 Am. Bankr. Rep. 275, 412; In re Murphy (D. C.) 228 Fed. 1018, 35 Am. Bankr. Rep. 320.

[110] Citizens' Banking Co. v. Ravenna Nat. Bank, 234 U. S. 360, 34 Sup. Ct. 806, 58 L. Ed. 1352, on certification of questions by Circuit Court of Appeals, 202 Fed. 892, 121 C. C. A. 250. And see In re McGraw (D. C.) 254 Fed. 442, 43 Am. Bankr. Rep. 38; Parmenter Mfg. Co. v. Stoever, 97 Fed. 330, 38 C. C. A. 200, 3 Am. Bankr. Rep. 220; In re Windt (D. C.) 177 Fed. 584, 24 Am. Bankr. Rep. 536; In re R. L. Radke Co. (D. C.) 193 Fed. 735, 27 Am. Bankr. Rep. 950.

[111] In re Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123.

[112] Pittsburgh Laundry Supply Co. v. Imperial Laundry Co., 154 Fed. 662, 83 C. C. A. 486, 18 Am. Bankr. Rep. 756.

[113] In re Nusbaum, 152 Fed. 835, 18 Am. Bankr. Rep. 598.

after execution had been issued thereon, and garnishment proceedings instituted on the judgment proceeded so far that the garnishee answered, admitting a sum to be due from him to the debtor, it was held that an act of bankruptcy had been committed where more than five days had elapsed after the time when the garnishee might have answered under the statute and paid the money into court.[114]

execution or an actual sale would, in my judgment, be a final disposition, of the property affected, it has been said: "Congress had in mind, when it enacted this law, the fact that there were different ways or modes of disposing of property, of enforcing executions, judgments, and liens, and it referred to the ordinary method of disposition by way of sale, and then used the words 'or final disposition' to cover every other method of passing the control and dominion of the property from the debtor, or insolvent person, to another or to others either absolutely or as security to the preferred creditor to the exclusion of his other creditors."[115] In the same case it was further remarked: "It has been held that this act of bankruptcy is not committed until a sale is at least advertised or the property to be affected by the preference is to be finally disposed of, and the fifth day prior to the proposed sale or proposed final disposition of the property affected has arrived. In the case of personal property, a sale or proposed sale on execution issued on a judgment is, of course, the sale or final disposition intended, as there is no right of redemption. In the case of real estate, an advertised sale on execution or an actual sale would, in my judgment, be a final disposition, notwithstanding there is a right of redemption."

As to the debtor's duty to "vacate or discharge" the preference, it is probable that the former term relates to the taking of such measures in the "legal proceedings" spoken of as will cause the claim of the creditor to be defeated or the lien or attachment to be extinguished or annulled, while to "discharge" the claim is to pay it. But it is held that the commencement of voluntary proceedings for the dissolution of a corporation does not have the effect of extinguishing the liens of levies on executions against the corporate property, so as to relieve the corporation from the operation of this clause of the bankruptcy law.[116]

§ 89. Same; Meaning of "Suffer or Permit."—The bankruptcy act of 1867 provided that it should be an act of bankruptcy if an insolvent debtor should "procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors."[117]

[114] In re Harper, 105 Fed. 900, 5 Am. Bankr. Rep. 567.

[115] In re Tupper, 163 Fed. 766, 20 Am. Bankr. Rep. 811.

[116] In re Storm, 103 Fed. 618, 4 Am. Bankr. Rep. 601.

[117] Rev. Stat. U. S. § 5021, clause 7.

Many of the lower federal courts held that this provision made it the duty of an insolvent man, when sued, to take measures to secure the equal distribution of his property among his creditors, by filing his voluntary petition in bankruptcy, and that if he failed to take this step, and made no defense to the action nor any attempt to prevent the acquisition of a preference, and one or more of his creditors seized his property under legal process, he might be held to have "suffered" his property to be taken, although he did not act in collusion with the creditors, nor procure, induce, or influence them to act.[118] Eventually, however, the Supreme Court of the United States put a different construction upon the statute. It was held that something more than passive nonresistance on the part of an insolvent debtor was necessary to make a judgment and levy on his property an act of bankruptcy when the debt was due and he had no defense. In such a case, the court ruled, the debtor's failure to file a petition in bankruptcy, in order to prevent a judgment and levy, was not sufficient evidence of an intent to give a preference or to defeat the operation of the bankruptcy law, and it could not be said that he had "procured or suffered" his property to be taken.[119] But in this construction of the statute, the word "suffer" was made to take its color from the associated word "procure," and the opinion of the court on the question of interpretation was further fortified by the consideration that another section of the act of 1867, avoiding fraudulent preferences, was directed against attachments or seizures "procured" by the debtor. Both of these sections, said the court, "describe substantially the same acts of payment, transfer, or seizure of property so declared void. It is therefore very strongly to be inferred that the act of 'suffering' the debtor's property to be taken on legal process, in section thirty-nine, is precisely the same as 'procuring' it to be attached or seized on execution in section thirty-five."[120] But the present statute does not use the word "procure" in the definition of acts of

[118] In re Wells, 3 N. B. R. 371, Fed. Cas. No. 17,388; In re Heller, 3 Biss. 153, Fed. Cas. No. 6,337; Fitch v. McGie, 2 Biss. 163, Fed. Cas. No. 4,835; In re Forsyth, 7 N. B. R. 174, Fed. Cas. No. 4,948; Vogle v. Lathrop, 3 Pittsb. 268, 4 N. B. R. 439, Fed. Cas. No. 16,985; Smith v. Buchanan, 8 Blatchf. 153, 4 N. B. R. 397, Fed. Cas. No. 13,016; Linkman v. Wilcox, 1 Dill. 161, Fed. Cas. No. 8,374.

[119] Wilson v. City Bank of St. Paul, 17 Wall. 473, 21 L. Ed. 723; Tenth Nat. Bank v. Warren, 96 U. S. 539, 24 L. Ed. 640; Parsons v. Caswell, 1 Fed. 74; Henkelman v. Smith, 42 Md. 164, 12 N. B. R. 121; Sleek v. Turner, 76 Pa. St. 142, 10 N. B. R. 580; Kemmerer v. Tool, 81 Pa. St. 467, 12 N. B. R. 334; Mason v. Warthens, 7 W. Va. 532, 14 N. B. R. 346; Warren v. Tenth Nat. Bank, 5 Ben. 395, 5 N. B. R. 479, Fed. Cas. No. 17,200; Rankin v. Florida, A. & G. C. R. Co., 1 N. B. R. 647, Fed. Cas. No. 11,567; Jones v. Sleeper, Fed. Cas. No. 7,496; Wright v. Filley, 1 Dill. 171, 4 N. B. R. 610, Fed. Cas. No. 18,077.

[120] Wilson v. City Bank of St. Paul, 17 Wall. 473, 21 L. Ed. 723.

bankruptcy. It is true the section relating to the avoidance of preferences declares that an insolvent debtor shall be deemed to have given a preference if he shall have "procured or suffered a judgment to be entered against himself." But this provision is not so wide as that relating to acts of bankruptcy. For it does not necessarily involve an actual levy on property, but merely that the enforcement of the judgment, if it comes to be enforced, will result in giving an advantage to the creditor, whereas the act of bankruptcy is not committed unless there has been a levy or attachment, for the law gives the debtor an opportunity to save himself by discharging the preference "five days before a sale or final disposition of the property affected." If, then, the construction of the words "suffered or permitted a creditor to obtain a preference through legal proceedings" cannot be determined by other parts of the act, and if the two words here employed must color each other, according to the doctrine of the Supreme Court, it is evident that the idea of any active participation or procurement on the part of the debtor must be excluded, and that to "suffer" a preference to be acquired through legal proceedings and to "permit" it mean the same thing, and that either word is satisfied by mere passive nonresistance or supine submission on the part of the debtor. This is the doctrine of the cases decided under the present law. They hold that, in order to commit an act of bankruptcy of the kind described, it is not necessary that the debtor should do any affirmative act. If suit is brought against an insolvent debtor, and he makes no defense, and judgment is rendered against him, and an attachment or execution issued and levied on his property, and he allows a sale to be made without applying to be adjudged bankrupt, he commits an act of bankruptcy. And this is true, although the debt on which the judgment rests was valid, though the debtor did not in any way procure the institution of the proceedings or the issuance of process, though there was no collusion between the parties, and though the debtor had no actual intention to give the creditor a preference.[121]

It should be noted that the real act of bankruptcy, so far as concerns

[121] In re Rung Furniture Co., 139 Fed. 526, 71 C. C. A. 342, 14 Am. Bankr. Rep. 12; In re Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123; In re Moyer, 93 Fed. 188, 1 Am. Bankr. Rep. 577; In re Cliffe, 94 Fed. 354, 2 Am. Bankr. Rep. 317; In re Meyers, 1 Nat. Bankr. News, 207; In re Reichman, 91 Fed. 624, 1 Am. Bankr. Rep. 17. Compare In re Nelson, 98 Fed. 76, 1 Am. Bankr. Rep. 63; In re Truitt, 203 Fed. 550, 29 Am. Bankr. Rep. 570. An insolvent corporation which suffers or permits a creditor to obtain a preference by means of an attachment on its property and a sale thereunder, commits an act of bankruptcy, notwithstanding the fact that one method of preventing such a result, viz., filing a voluntary petition in bankruptcy, was prohibited to corporations as the law stood at that time. Parmenter Mfg. Co. v. Stoever (C. C. A.) 97 Fed. 330, 3 Am. Bankr. Rep. 220.

the conduct of the debtor, consists in the failure to vacate or discharge the lien or other advantage secured by the creditor. One can hardly be said to suffer or permit a thing over which he has no influence or control. Ordinarily the steps taken by a creditor to obtain a preference or lien are hostile to the debtor, not at all under his control, and often a surprise to him. It is only after the inception of such a lien that he has any choice in the matter, or any power to decide whether he will suffer or permit the creditor to obtain an advantage over other creditors, or not. If he has the opportunity and the power to vacate or discharge the lien, and decides not to do so, then he suffers or permits the creation of a preference and commits an act of bankruptcy.[122] Even though the debtor actively resists the legal proceedings through which a creditor seeks to obtain a preference, still this does not prevent such preference constituting an act of bankruptcy, if the debtor fails to discharge the preference within the time limited.[123]

If, then, the circumstances are such that a creditor has obtained an advantage through legal proceedings, which will ripen into an irrevocable preference if not vacated or discharged, and there is no legal ground on which the debtor could vacate it, and he is unable to discharge it by payment, is it his duty to file his voluntary petition in bankruptcy, as a means of defeating the impending preference, and is he guilty of an act of bankruptcy if he fails to do so? This question has been answered in the affirmative by the Supreme Court of the United States, in an opinion in which its former contrary decisions under the act of 1867 were carefully noted, but held to be inapplicable on account of the intentional and radical change in the language of the present statute.[124] And this decision has been either anticipated or followed by some of the inferior federal courts.[125] But against its authority may be alleged the fact that the decision was pronounced by a divided court, four of the nine judges dissenting, and the existence of a very strong and well-reasoned opinion to the contrary by a very able bench of judges sitting in the circuit court of appeals.[126] In the opinion last mentioned, it was pointed out that such a construction of the statute would force the debtor, in the case supposed, to become a bankrupt either on his own petition or on the motion of his creditors, and this, solely as the result or effect

122 In re Tupper, 163 Fed. 766, 20 Am. Bankr. Rep. 824; White v. Bradley Timber Co., 119 Fed. 989, 9 Am. Bankr. Rep. 441.

123 White v. Bradley Timber Co., 119 Fed. 989, 9 Am. Bankr. Rep. 441.

124 Wilson Brothers v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147, 7 Am. Bankr. Rep. 142.

125 In re Putnam, 193 Fed. 464, 27 Am. Bankr. Rep. 923; In re Cliffe, 94 Fed. 354, 2 Am. Bankr. Rep. 317; In re Moyer, 93 Fed. 188, 1 Am. Bankr. Rep. 577.

126 Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649.

of the creditor's act in obtaining a preference, which the debtor was powerless to prevent, and not by reason of any act of his own. Such a construction, it was said, is not justified by the language used, nor by the general spirit and scope of the act construed as a whole.

While, as above stated, "suffering or permitting" the acquisition of a preference does not include "procuring" it, and the statute is satisfied without any active participation by the debtor, yet one who procures a creditor to seize his property also suffers or permits it. Hence if the debtor directly or indirectly instigates or assists or facilitates the recovery of a judgment against him and the issuance of process thereon, he is guilty of "suffering" the creditor to obtain a preference through legal proceedings.[127] If his co-operation is not necessary to complete the act of bankruptcy, neither will it save him from the consequences of the act. Thus, where the members of an insolvent firm appeared in a suit against them for the appointment of a receiver, and proposed candidates for the office of receiver, they must be held to have suffered or permitted any preference obtained by the creditors through such suit.[128] So, where an insolvent corporation has allowed some of its creditors to obtain preferences through legal proceedings, and then its stockholders and officers sue for and obtain a dissolution for the express purpose of hindering and delaying creditors, and the effect of such proceedings is to permit the preferences obtained to stand in full force, it has committed an act of bankruptcy, by permitting effective preferences to be fastened upon its property.[129]

Finally, it is no defense that the debtor's submission to an attachment or levy was forced by the pressure or insistence of the creditor. "To say that there cannot be a 'suffering' where there is pressure by a creditor is to destroy the plain meaning of the word. To suffer or permit implies pressure and action from without. Pressure being thus an inherent element of sufferance, to say that where there is pressure there can be no sufferance is to utter a fallacy. Where a person permits what he can prevent, he suffers or allows the thing to be done, whether he is threatened or pressed or not. A debtor who is threatened or pressed can prevent the taking of his property on legal process by going into voluntary bankruptcy. If he does not, he clearly suffers or allows or permits the taking."[130]

[127] Sage v. Wyncoop, 104 U. S. 319, 26 L. Ed. 749; In re Woods, 7 N. B. R. 126, Fed. Cas. No. 17,990; Fisher v. Currier, Fed. Cas. No. 4,818; In re Dunkle, 7 N. B. R. 72, Fed. Cas. No. 4,160; Wight v. Muxlow, 8 Ben. 52, Fed. Cas. No. 17,629; Sage v. Wyncoop, 16 N. B. R. 363, Fed. Cas. No. 12,215.

[128] In re Kersten, 110 Fed. 929, 6 Am. Bankr. Rep. 516.

[129] Scheuer v Smith & Montgomery Book & Stationery Co., 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384.

[130] In re Craft, 2 Ben. 214, 1 N. B. R. 378, Fed. Cas. No. 3,316, per Blatchford, J.

§ 90. **Warrant of Attorney; Confession of Judgment.**—The confession of a judgment (or his participation in proceedings to secure a default judgment against himself) by an insolvent debtor, with intent either to defraud his creditors or to prefer a given creditor, is an act of bankruptcy.[131] If he confesses judgment with the expectation and intention that one of his creditors shall thereby obtain a preference over others, it constitutes the second of the enumerated acts of bankruptcy; but if there is no such intention, still it is suffering or permitting a creditor to obtain a preference through legal proceedings and therefore an act of bankruptcy in that aspect.[132] Hence if a judgment is entered up on his warrant of attorney and an execution issued, his failure to vacate the judgment or discharge the lien of the execution is an act of bankruptcy.[133] And the Supreme Court of the United States has held that the failure of an insolvent debtor to file a voluntary petition in bankruptcy at least five days before a sale of his property under a judgment entered against him upon an irrevocable power of attorney (though given years before) constitutes the suffering or permitting the creditor to obtain a preference, which amounts to an act of bankruptcy, although the judgment is entered without the knowledge or consent of the debtor, and he is unable to prevent its enforcement in any other way than by going into voluntary bankruptcy.[134]

§ 91. **Assignment for Creditors.**—Under the provision of the Bankruptcy Act of 1898, that it shall be an act of bankruptcy if a debtor shall have "made a general assignment for the benefit of his creditors," such an assignment, though it embraces all the property of the debtor and is made for the equal and common benefit of all his creditors, without preferences, and without any actual fraudulent intent, either as to creditors or as to an evasion of the bankruptcy law, and though it would be valid under the laws of the state, is nevertheless an act of bankruptcy, on which an adjudication may be made if a petition therefor is duly presented within the prescribed time.[135] And the rule is the same

[131] In re Irish (D. C.) 238 Fed. 411, 38 Am. Bankr. Rep. 263.

[132] In re Musgrove Mining Co. (D. C.) 234 Fed. 99, 37 Am. Bankr. Rep. 628; In re Fisher (D. C.) 219 Fed. 638, 33 Am. Bankr. Rep. 628.

[133] In re Moyer, 93 Fed. 188, 1 Am. Bankr. Rep. 577; Pittsburgh Laundry Supply Co. v. Imperial Laundry Co., 154 Fed. 662, 83 C. C. A. 486, 18 Am. Bankr. Rep. 756; In re Truitt, 203 Fed. 550, 29 Am. Bankr. Rep. 570.

[134] Wilson Brothers v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147, 7 Am. Bankr. Rep. 142. Contra, see Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649.

[135] Boese v. King, 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760; In re Federal Mail & Express Co. (D. C.) 233 Fed. 691, 37 Am. Bankr. Rep. 240; In re Utley (D. C.) 235 Fed. 905, 37 Am. Bankr. Rep. 670; In re Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; Griffin v. Dutton, 165 Fed. 626, 91 C. C. A. 614, 21 Am. Bankr. Rep. 449; In re Salmon,

whether the assignment is made within or without the United States, and whether it is a voluntary or a statutory assignment.[136] Though not in itself unlawful prior to the institution of bankruptcy proceedings, yet the assignment is constructively a wrongful and fraudulent act as to creditors, if they choose so to treat it, being in effect an invitation to them to institute proceedings in involuntary bankruptcy against the debtor at their election; and if they take that course, within the proper time, an adjudication of bankruptcy will avoid the assignment and subject the assigned property to the jurisdiction of the court of bankruptcy.[137] For even stronger reasons it is held that a general assignment by an insolvent debtor for the benefit of certain preferred creditors is an act of bankruptcy, even though made without moral fraud and under the importunity of the creditors.[138] But the words of the statute must be taken in their proper technical signification and restricted to "general assignments" strictly so called, and cannot be extended by implication. Thus, an absolute and unconditional sale and conveyance of his property by a debtor, free from all reservation, in payment and satisfaction of antecedent debts, cannot be declared a general assignment, though it may embrace all his property, and though he may be insolvent,[139] and generally, a direct transfer to creditors, without the intervention of a trustee, is not an assignment for the benefit of credi-

143 Fed. 395, 16 Am. Bankr. Rep. 122; Whittlesey v. Philip Becker & Co., 142 App. Div. 313, 126 N. Y. Supp. 1046; Costello v. Harbaugh, 83 Ill. App. 29 (affirmed, Harbaugh v. Costello, 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147); In re Burt, 1 Dill. 439, Fed. Cas. No. 2,210; Cragin v. Thompson, 2 Dill. 513, 12 N. B. R. 81, Fed. Cas. No. 3,320; In re Smith, 4 Ben. 1, 3 N. B. R. 377, Fed. Cas. No 12,974; Spicer v. Ward, 3 N. B. R. 512, Fed. Cas. No. 13,241; In re Randall, Deady, 557, 3 N. B. R. 18, Fed. Cas. No. 11,551; Jones v. Sleeper, 2 N. Y. Leg. Obs. 131, Fed. Cas. No. 7,496; In re Kasson, 18 N. B. R. 379, Fed. Cas. No. 7,617; In re Pierce, 3 N. B. R. 258, Fed. Cas. No. 11,141; Barnes v Rettew, 8 Phila. 133, Fed. Cas. No. 1,019; Barton v. Tower, 1 N. Y. Leg. Obs. 8, Fed. Cas. No. 1,085; In re Chamberlain, 3 N. B. R. 710, Fed. Cas. No. 2,574; In re Croft, 8 Biss. 188, 17 N. B. R. 324, Fed. Cas. No. 3,404; In re Mendelsohn, 3 Sawy. 342, Fed. Cas. No. 9,420; In re Frisbee, 14 Blatchf. 185, 15 N. B. R. 522, Fed. Cas. No. 5,129: McLean v. Meline, 3 McLean, 199 Fed. Cas. No. 8,890; Hobson v. Markson, 1 Dill. 421, Fed. Cas. No. 6,555; Harding v. Crosby, 17 Blatchf. 348, Fed. Cas. No. 6,050; In re Kraft, 4 Fed. 523; Wald v. Wehl, 6, Fed. 163. There are a few decisions to the contrary of this proposition, but they are not entitled to consideration, being opposed to the overwhelming weight of authority. See, for example, Farrin v. Crawford, 2 N. B. R. 602, Fed. Cas. No. 4,686; In re Kintzing 3 N. B. R. 217, Fed. Cas. No. 7,833; Anonymous, 1 Pa. Law J. 323, Fed. Cas. No. 467.

[136] In re Berthoud (D. C.) 231 Fed. 529, 36 Am. Bankr. Rep. 555.

[137] In re Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117; Cohen v. American Surety Co., 192 N. Y. 227, 84 N. E. 947; In re Curtis, 91 Fed. 737, 1 Am. Bankr. Rep. 440; Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Louis Neuburger, Inc., 240 Fed. 947, 153 C. C. A. 633, 39 Am. Bankr. Rep. 139.

[138] Ex parte Breneman, Crabbe, 456, Fed. Cas. No. 1,830; Hutchins v. Taylor, Fed. Cas. No. 6,953; In re Broome, 3 N. B. R. 444, Fed. Cas. No. 1,967.

[139] Otis v. Maguire, 76 Ala. 295.

tors, although it may be an act of bankruptcy on another ground, namely, that of giving a preference.[140] It has also been held that the same rule applies to a deed of trust directing the trustee to sell the property and pay the debts of the grantor, and turn over to the latter any balance that may remain. The condition of defeasance and the reservation of an equity in the property to the grantor, it is thought, distinguish such a conveyance from a general assignment, at least if this form of deed is used in good faith and not with a design of evading the provisions of the bankruptcy law.[141] But there are decisions directly to the contrary,[142] and it has been held that a confession of judgment by a debtor to a trustee for all his creditors amounts to a general assignment for the benefit of creditors, under the law of Pennsylvania, and constitutes an act of bankruptcy.[143] On similar principles, it is ruled that a mortgage by a corporation to secure all its creditors equally out of its earnings, or to pay to such as refuse the security their ratable proportion of the proceeds, is not an act of bankruptcy.[144] And where a corporation, under the provisions of a state statute, files in a state court its voluntary application for dissolution and for the appointment of a receiver to wind up its affairs and distribute its assets, on the ground of its insolvency, and procures the appointment of a receiver thereon, such application is not a "general assignment for the benefit of its creditors" within the meaning of the bankruptcy law, and does not constitute the particular act of bankruptcy herein denounced,[145] although, since the amendment to the statute enacted in 1903, the precise transaction here described is an independent act of bankruptcy in itself. But it must be so alleged, and not called an assignment for creditors. Even if such a proceeding were equivalent to an assignment for creditors, still the provisions of the statute, defining acts of bankruptcy, cannot be extended by construction to embrace transactions equivalent to.

[140] Anniston Iron & Supply Co. v. Anniston Rolling Mill Co., 125 Fed. 974, 11 Am. Bankr. Rep. 200.

[141] Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co., 99 Fed. 699, 3 Am. Bankr. Rep. 704; Fidelity Trust Co. v. Kline, 74 N. J. Eq. 445, 70 Atl. 151.

[142] In re Thomlinson Co., 154 Fed. 834, 83 C. C. A. 550, 18 Am. Bankr. Rep. 691; In re Salmon, 143 Fed. 395, 16 Am. Bankr. Rep. 122. The execution of a deed to trustees for creditors, pursuant to an agreement with the creditors, is not an act of bankruptcy where the deed was delivered in escrow for delivery only in case all the creditors should consent. N. L. Carpenter & Co. v. Lybrand, 230 Fed. 84, 144 C. C. A. 382, 36 Am. Bankr. Rep. 12.

[143] In re Green, 106 Fed. 313, 5 Am. Bankr. Rep. 848.

[144] In re Union Pac. R. Co., 10 N. B. R. 178, Fed. Cas. No. 14,376.

[145] In re Empire Metallic Bedstead Co., 98 Fed. 981, 39 C. C. A. 372, 3 Am. Bankr. Rep. 575, affirming 95 Fed. 957, 2 Am. Bankr. Rep. 329; In re Baker-Ricketson Co., 97 Fed. 489, 4 Am. Bankr. Rep. 605; In re Ambrose, Matthews & Co., 236 Fed. 539, 149 C. C. A. 591, 38 Am. Bankr. Rep. 18, affirming (D. C.) 229 Fed. 309, 36 Am. Bankr. Rep. 501.

but not identical with, those denounced as acts of bankruptcy.[146] And for the same reason, a resolution of the stockholders of a corporation, authorizing a committee of the directors to advertise and sell the corporate property at auction at not less than a stated price, and to pay the debts of the corporation with the proceeds, with power to declare such sale revoked or not to take place in a certain contingency, is not an assignment for the creditors.[147] And although a general assignment, as an act of bankruptcy, may be made without a formal deed, yet the mere preparation of a deed of general assignment, not signed nor out of escrow, is not an act of bankruptcy, nor is the mere adoption by a corporation of resolutions authorizing its treasurer to convert the corporate assets into cash and to deposit the same with a trust company for the benefit of its creditors, where the plan is not carried out.[148]

§ 92. Same; What Constitutes "General" Assignment.—To constitute this act of bankruptcy, there must be a "general" assignment for the benefit of creditors. A general assignment is one by which a debtor voluntarily transfers all (or substantially all) of his property to an assignee, in trust to collect the assets, convert them into cash, and apply the proceeds to the payment of the debts of the assignor, being made either for the benefit of one or more preferred creditors or for the creditors generally.[149] An assignment may be general although it does not include every one of the creditors, or although it does not transfer all of the debtor's property, provided it is available to substantially all of the creditors (though some may be preferred) and conveys substantially all of the property. Thus, the assignment is none the less general because it provides for the payment of only those creditors who shall as-

[146] In re Empire Metallic Bedstead Co., 95 Fed. 957, 2 Am. Bankr. Rep. 329.

[147] In re Hartwell Oil Mills, 165 Fed. 555, 21 Am. Bankr. Rep. 586.

[148] In re Federal Lumber Co., 185 Fed. 926, 26 Am. Bankr. Rep. 438.

[149] See Anders Bros. v. Latimer, 198 Ala. 573, 73 South. 925; Bishop v. Catlin, 28 Vt. 71; Burrill, Assignments, § 13. The phrase "general assignment for the benefit of creditors" as used in the Bankruptcy Act, "does not concern itself merely with such acts of a debtor as would constitute an assignment for the benefit of creditors under the laws of the state in which it was made, or merely with the form of the written instrument employed to effectuate such purpose; on the contrary, the act does concern itself with, and does contemplate, all acts of a debtor, regardless of the manner or form of their accomplishment, by which he parts with the title and possession of all his property of every kind and nature for the benefit of his creditors, to be disposed of as his trustee or assignee by him selected and named may employ, independent of the Bankruptcy Act." In re Heleker Bros. Mercantile Co. (D. C.) 216 Fed. 963, 33 Am. Bankr. Rep. 503. But the appointment of special commissioners to sell West Virginia lands of a judgment debtor, execution having been returned "nulla bona," does not constitute an act of bankruptcy by the debtor, either on the theory of its being a general assignment or on the theory of his permitting the appointment of a trustee or receiver. In re McGraw (D. C.) 254 Fed. 442, 43 Am. Bankr. Rep. 38.

sent to it and agree to accept the dividend thereunder in full satisfaction of their claims. "Had all the creditors accepted, it certainly would have operated as a general assignment. We do not think that the question as to whether an instrument of that character constitutes a general assignment or a mortgage is dependent upon the subsequent event of its acceptance by each and all of the debtor's creditors." [150] And as to the property conveyed, the reservation of some trivial or insignificant portion of the debtor's estate, for the very purpose of evading the legal consequences of making a general assignment, will not make it a partial assignment. For this would be a fraud upon the law. And if, without such fraud, the property omitted is insignificant in amount, with reference to the whole, or is mainly beyond the reach of process, or is exempt from process, or of such a character as not readily to be made available either to the creditors or the debtor, and the great mass of the debtor's property which constitutes the basis of his business operations, and which can alone form any reliance to himself for support, or to his creditors for payment, is included in the deed, it must be regarded as a general assignment.[151] An assignment by a partnership for the benefit of its creditors, purporting to transfer all the property of the firm, is a general assignment, such as to constitute an act of bankruptcy by the firm and on which the firm may be adjudged bankrupt, although, considered as an assignment by the individual partners, it would be but partial, by reason of not including their separate property.[152]

§ 93. **Same; Invalid Assignment.**—If a deed of general assignment made by a debtor is invalid by reason of its defective execution, or for want of conformity to the laws of the state regulating such instruments, or for any other reason, so that it could not be enforced or relied on in the courts of the state, some of the earlier cases held that it ought not to be considered as amounting to an act of bankruptcy.[153] But recent decisions of high authority rule that the language of the bankruptcy act applies to any instrument which is or purports to be a

150 Courtenay Mercantile Co. v. Finch (C. C. A.) 194 Fed. 368, 27 Am. Bankr. Rep. 688; In re Courtenay Mercantile Co., 186 Fed. 352, 26 Am. Bankr. Rep. 365.

151 Mussey v. Noyes, 26 Vt. 462; United States v. Clark, 1 Paine, 629, Fed. Cas. No. 14,807.

152 In re Meyer (C. C. A.) 98 Fed. 976, 3 Am. Bankr. Rep. 559.

153 In re Dunham, 2 Ben. 488, 2 N. B. R. 17, Fed. Cas. No. 4,143; In re Mendelsohn, 3 Sawy. 342, 12 N. B. R. 533, Fed. Cas. No. 9,420. In the latter case, it was held that an assignment, invalid under the state laws and so defective in its execution that it cannot be enforced, may perhaps not be an act of bankruptcy, but if designed and used as a means of giving a preference to certain creditors over others, it is an act of bankruptcy on that ground.

general assignment, without distinguishing between valid and invalid instruments, and that it is no defense to a petition in involuntary bankruptcy, based on this ground, that the instrument in question would not be valid or enforceable under the state law or in the state courts.[154] Thus, upon a petition in involuntary bankruptcy against a firm, alleging, as an act of bankruptcy, the making of an assignment for the benefit of its creditors, which purports to transfer all the property of the firm, though it was executed by one partner only, the question of the validity of the assignment as to the partners not joining is immaterial.[155] So, an assignment for the benefit of such creditors only as should accept its terms, and release their claims on receiving the dividend to be paid by the assignee is an act of bankruptcy, it being unnecessary that the assignment should be valid as to dissenting creditors.[156]

§ 94. Same; Solvency No Defense.—Under the provision of the statute that it shall be an act of bankruptcy if a debtor shall have "made a general assignment for the benefit of his creditors," it is no defense to an involuntary petition, alleging such an assignment as an act of bankruptcy, that the debtor was solvent at the time of the assignment. The making of such an assignment is itself sufficient to warrant an adjudication, without averment or proof of the debtor's insolvency either at the time of its execution or at the time of the filing of the petition.[157] "As a deed of general assignment for the benefit of creditors is made by the bankruptcy act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor making such deed, without reference to his solvency at the time of the filing of the petition, the denial of insolvency by way of defense to a petition based upon the making of a deed of general assignment is not warranted by the bankruptcy law." [158]

[154] Griffin v. Dutton, 165 Fed. 626, 91 C. C. A. 614, 21 Am. Bankr. Rep. 449; In re Courtenay Mercantile Co., 186 Fed. 352, 26 Am. Bankr. Rep. 365; In re Federal Lumber Co., 185 Fed. 926, 26 Am. Bankr. Rep. 438; Canner v. Webster Trapper Co., 168 Fed. 519, 21 Am. Bankr. Rep. 872; In re Lawrence, 10 Ben. 4, 18 N. B. R. 516, Fed. Cas. No. 8,133.

[155] In re Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559.

[156] In re Courtenay Mercantile Co., 186 Fed. 352, 26 Am. Bankr. Rep. 365.

[157] George M. West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, 2 Am. Bankr. Rep. 463; Day v. Beck & Gregg Hardware Co., 114 Fed. 834, 52 C. C. A. 468, 8 Am. Bankr. Rep. 175; Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; Green River Deposit Bank v. Craig, 110 Fed. 137, 6 Am. Bankr. Rep. 381; Couts v. Townsend, 126 Fed. 249, 11 Am. Bankr. Rep. 126; In re Sully, 142 Fed. 895, 15 Am. Bankr. Rep. 304; Bray v. Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153; Lea v. George M. West Co., 91 Fed. 237, 1 Am. Bankr. Rep. 261; In re Farthing, 202 Fed. 557, 29 Am. Bankr. Rep. 732; Corbett v. Riddle, 209 Fed. 811, 126 C. C. A. 535, 31 Am. Bankr. Rep. 330.

[158] George M. West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, 2 Am. Bankr. Rep. 463.

§ 95. Appointment of Receiver or Trustee.—By an amendment to the bankruptcy law enacted in 1903, Congress has declared that it shall be an act of bankruptcy if a person, "being insolvent," shall have "applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States."[159] Prior to this amendment, the appointment of a receiver to take charge of the affairs of an insolvent corporation or partnership, whether on its voluntary application for a dissolution or receivership, or on its consent or acquiescence in hostile proceedings against it, could not generally be held to be an act of bankruptcy by itself. It was settled that such an appointment, brought about in either of the ways mentioned, was not a "general assignment for the benefit of creditors."[160] Nor was the consent of partners or of a corporation to the appointment of a receiver an act of bankruptcy as involving a fraudulent transfer or concealment or removal of their property.[161] It might amount to "suffering a creditor to obtain a preference through legal proceedings," but only where it appeared that there were one or more creditors interested in the property who would be entitled to larger dividends under the receivership proceedings than they would receive if the estate were administered and distributed in bankruptcy.[162] It was probably in view of these considerations that the amendment was enacted. It is not, however, retroactive; and the appointment of a receiver for a firm or corporation because of insolvency, prior to the passage of the amendatory act, will not support a petition in involuntary bankruptcy filed after that time, although the receivership still continues.[163]

Considering first that clause of the act which makes it an act of bankruptcy for an insolvent to "apply for" a receiver or trustee, it is apparent that the application intended is one made to a court, state or federal. But it is held that the fact that an application by an insolvent corporation to a state court for the appointment of a receiver for its property was not authorized by the laws of the state does not prevent

159 Act Cong. February 5, 1903, c. 487, § 2; 32 Stat. 797; U. S. Comp. St. Supp. 1903, p. 410.

160 In re Baker-Ricketson Co., 97 Fed. 489, 4 Am. Bankr. Rep. 605; In re Empire Metallic Bedstead Co., 95 Fed. 957, 2 Am. Bankr. Rep. 329; In re Gilbert, 112 Fed. 951, 8 Am. Bankr. Rep. 101; Vaccaro v. Security Bank, 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474; Seaboard Steel Casting Co. v. William R. Trigg Co., 124 Fed. 75, 10 Am. Bankr. Rep. 594. Compare Moody-Hormann-Boelhauwe v. Clinton Wire Cloth Co., 246 Fed. 653, 158 C. C. A. 609, 40 Am. Bankr. Rep. 441.

161 In re Burrell, 123 Fed. 414, 59 C. C. A. 508, 9 Am. Bankr. Rep. 62.

162 In re Baker-Ricketson Co., 97 Fed. 489, 4 Am. Bankr. Rep. 605; Mather v. Coe, 92 Fed. 333, 1 Am. Bankr. Rep. 504.

163 Seaboard Steel Casting Co. v. William R. Trigg Co., 124 Fed. 75, 10 Am. Bankr. Rep. 594.

it from constituting an act of bankruptcy.[164] But it is essential that the applicant corporation or partnership, should be "insolvent" within the meaning of that term as used in the bankruptcy law, that is, that the aggregate of its property, exclusive of property conveyed in fraud of creditors, should not be sufficient, at a fair valuation, to pay its debts.[165] And where a bill in equity filed by creditors against a corporation alleges that it is unable to meet its obligations as they mature, and that it will be for the advantage of creditors and stockholders that its affairs shall be wound up, but that it is solvent, the filing of an answer by the corporation, admitting such allegations and joining in the request for a receiver, is not an act of bankruptcy, as there is no showing of insolvency and no "application" by the corporation.[166] But where the proceedings are instituted by the voluntary application for a receiver, preferred by the corporation itself, while the fact of insolvency must exist, in order to constitute an act of bankruptcy, it is not necessary that the receiver should have been appointed and put in charge "because of insolvency" as required by the other clause of the amendatory statute.[167] And where an insolvent applies for a receiver of his assets, he commits an act of bankruptcy in so doing, though his purpose was not to have his assets liquidated and distributed among his creditors.[168]

But under the second clause, the appointment of a receiver on the application of creditors is not an act of bankruptcy unless it was made on the ground of insolvency.[169] It is not necessary, however, that it

[164] Exploration Mercantile Co. v. Pacific Hardware & Steel Co., 177 Fed. 825, 101 C. C. A. 39, 24 Am. Bankr. Rep. 216.

[165] In re Electric Supply Co., 175 Fed. 612, 23 Am. Bankr. Rep. 647; In re McKinnon Co. (D. C.) 237 Fed. 869, 38 Am. Bankr. Rep. 727.

[166] Shannon v. Shepard Mfg. Co., 230 Mass. 224, 119 N. E. 768; In re Edward Ellsworth Co., 173 Fed. 699, 23 Am. Bankr. Rep. 284. The consent of a corporation to the appointment of a receiver for its property, on an application by others, is not equivalent to its having "applied for" a receiver, as an act of bankruptcy. In re Gold Run Mining & Tunnel Co., 200 Fed. 162, 29 Am. Bankr. Rep. 563. But see James Supply & Hardware Co. v. Dayton Coal & Iron Co., 223 Fed. 991, 139 C. C. A. 367, 34 Am. Bankr. Rep. 649. Bankruptcy proceedings cannot be maintained against one who merely stipulated that a receiver might be appointed in a suit against him by creditors. In re Big Pines Lime & Transp. Co. (D. C.) 257 Fed. 141, 43 Am. Bankr. Rep. 289.

[167] Exploration Mercantile Co. v. Pacific Hardware & Steel Co., 177 Fed. 825, 101 C. C. A. 39, 24 Am. Bankr. Rep. 216; Blackstone v. Everybody's Store (C. C. A.) 207 Fed. 752, 30 Am. Bankr. Rep. 497. Where an application for a receiver was nominally made by a creditor, but the evidence shows that it was actually filed by the debtor, it may be treated as a case where the insolvent "applied" for a receiver. In re Muir (D. C.) 212 Fed. 495, 31 Am. Bankr. Rep. 528.

[168] Hill v. Western Electric Co., 214 Fed. 243, 130 C. C. A. 613, 32 Am. Bankr. Rep. 332.

[169] In re Spalding, 139 Fed. 244, 71 C. C. A. 370. 14 Am. Bankr. Rep. 129; Schumert & Warfield v. Security Brewing Co. (D. C.) 199 Fed. 358, 28 Am. Bankr. Rep. 676; In re Butte Duluth Mining Co.

should appear of record that the insolvency was the sole reason which moved the court to appoint a receiver, if the appointment was in fact made on that and other grounds. "As the statutes of bankruptcy are to have an honest and practical interpretation, we are not to inject into what we have quoted therefrom such phraseology as would require that the cause of the receivership need be solely insolvency. If insolvency, either as a distinct ground of proceeding or as coupled with others, was one of the substantial reasons for the appointment of the receiver, the case would come within the reasonable construction of the statute." [170] The question, then, whether the appointment was made "because of insolvency," must be determined by reference to the pleadings and record in the case.[171] Although the state statute under which the proceedings were had authorizes the appointment of a receiver upon the dissolution of a corporation on various stated grounds, which do not include insolvency by name, and for "other good and sufficient reasons," this is not alone determinative of the question. If the record and findings in the state court show that the appointment was in fact, though not in name, made because of insolvency, there is proof of an act of bankruptcy.[172] If the decree of the court recites the ground for the appointment of a receiver it is conclusive. If it recites that the receivership was ordered on the ground that the defendant had conveyed property and was threatening to make further conveyances of property in fraud of the plaintiff's rights, it is decisive against the commission of an act of bankruptcy.[173] If the ground of appointment is not stated in the decree, it must be sought in the pleadings. And where

(D. C.) 227 Fed. 334, 36 Am. Bankr. Rep. 101. The term insolvency as here used means insolvency as defined by the bankruptcy act. The appointment of receivers for a corporation on the ground that it is unable to meet its obligations as they mature in the ordinary course of business, is not an appointment because of insolvency, and therefore not an act of bankruptcy. In re Wm. S. Butler & Co., 207 Fed. 705, 125 C. C. A. 223, 30 Am. Bankr. Rep. 502. And see Karst v. Black Diamond Range Co., 82 N. J. Eq. 231, 88 Atl. 692. But compare In re Sedalia Farmers' Co-Op. Packing & Produce Co. (D. C.) 268 Fed. 898, 45 Am. Bankr. Rep. 287, holding that actual insolvency satisfies the statute.

[170] Beatty v. Anderson Coal Min. Co., 150 Fed. 293, 80 C. C. A. 181, 17 Am. Bankr. Rep. 738.

[171] If the proceedings, pleadings, or orders in the state court by which a receiver was appointed do not state the ground for the appointment, this will not defeat the jurisdiction of a court of bankruptcy to make an adjudication on that ground, for the presumption will be indulged that the appointment was made because of insolvency. In re Maplecroft Mills (D. C.) 218 Fed. 659, 33 Am. Bankr. Rep. 815. But see In re Commonwealth Lumber Co. (D. C.) 223 Fed. 667, 35 Am. Bankr. Rep. 202.

[172] In re Belfast Mesh Underwear Co., 153 Fed. 224, 16 Am. Bankr. Rep. 620.

[173] In re Spalding, 139 Fed. 244, 71 C. C. C. A. 370, 14 Am. Bankr. Rep. 129. And see Maplecroft Mills v. Childs, 226 Fed. 415, 141 C. C. A. 245, 35 Am. Bankr. Rep. 311.

the bill or complaint alleges insolvency, and it is confessed by the defendant, or the receiver is appointed by the consent of both parties, this is sufficient evidence that he was appointed because of insolvency.[174] But otherwise where the prayer for a receiver is based on allegations of fraud and mismanagement by the officers or majority stockholders of a corporation,[175] or, in addition to such charges, on an allegation that the corporation is in danger of becoming insolvent, without averring that it is presently insolvent.[176] And so, the appointment of a receiver for the property of a corporation in a suit to foreclose a mortgage, in which the bill does not allege insolvency, but a breach of the covenants of the mortgage, does not authorize an adjudication of bankruptcy against the corporation, although it may in fact have been insolvent, and such insolvency may have caused its default.[177]

It is not necessary that the proceedings for a receivership should have been instituted by creditors. The appointment by a state court of a receiver for an insolvent domestic corporation, at the suit of a stockholder, is an act of bankruptcy.[178] And the provision of the statute that it shall be an act of bankruptcy where, because of insolvency, "a receiver or trustee has been put in charge" of the property, does not mean exclusively that a trustee must have been put in charge by order of a court, but embraces as well a case where liquidating trustees have been elected by an insolvent corporation and put in charge of its property for the purpose of winding up its affairs.[179] And under a state statute which provides that, on the return of an execution against a corporation unsatisfied, the judgment creditor may procure a special writ of fieri facias, on which all the property of the corporation, except real estate held in fee, shall be sold and the proceeds distributed by the sheriff among all its creditors, it is held that such a proceeding results in placing the sheriff, in the character of a receiver or trustee, in

[174] In re Pickens Mfg. Co., 158 Fed. 894, 20 Am. Bankr. Rep. 202; Lowenstein v. Henry McShane Mfg. Co., 130 Fed. 1007, 12 Am. Bankr. Rep. 601; In re Wenatchee Heights Orchard Co., 204 Fed. 674, 30 Am. Bankr. Rep. 401.

[175] In re Boston & Oaxaca Mining Co., 181 Fed. 422, 24 Am. Bankr. Rep. 923.

[176] In re Perry Aldrich Co., 165 Fed. 249, 21 Am. Bankr. Rep. 244. But compare In re Maplecroft Mills (D. C.) 218 Fed. 659, 33 Am. Bankr. Rep. 815.

[177] In re Douglas Coal & Coke Co., 131 Fed. 769, 12 Am. Bankr. Rep. 539.

[178] Roberts Cotton Oil Co. v. F. E. Morse & Co., 97 Ark. 513, 135 S. W. 334. Proceedings instituted by the officers and directors of a corporation, holding a majority of the stock, for the appointment of a receiver of its assets, are the act of the corporation itself. Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co., 206 Fed. 813, 30 Am. Bankr. Rep. 604. But see In re Valentine Bohl Co., 224 Fed. 685, 140 C. C. A. 225, 34 Am. Bankr. Rep. 855. And compare Hansen v. Uniform Seamless Wire Co., 243 Fed. 177, 156 C. C. A. 43, 39 Am. Bankr. Rep. 627.

[179] In re Hercules Atkin Co., 133 Fed. 813, 13 Am. Bankr. Rep. 369; In re C. H. Bennett Shoe Co., 140 Fed. 687, 15 Am. Bankr. Rep. 497.

charge of the property of the corporation because of its insolvency, so as to constitute an act of bankruptcy.[180]

It has been held to be immaterial whether receivers appointed for an alleged bankrupt corporation are temporary or permanent, with reference to the commission of an act of bankruptcy.[181] But the better doctrine appears to be that the appointment of merely temporary receivers for a corporation, by a court acting under its general equity powers, in a pending suit which has not been heard, and in which there has been no adjudication of insolvency, does not amount to an act of bankruptcy.[182] And probably the same rule should apply where the court, on account of the pendency of a prior bill or for other reasons, had no jurisdiction to make the appointment.[183]

§ 96. **Confession of Insolvency.**—The bankruptcy act of 1898 introduces a new act of bankruptcy, not previously known in the federal legislation on this subject. It is committed by a debtor who has "admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground." (§ 3a.) It should be observed that inability to pay one's debts is not synonymous with "insolvency" as the latter term is used in the bankruptcy law. The phrase here used has reference to a present inability to satisfy the claims of creditors, not to the ultimate insufficiency of assets for that purpose. And therefore it is not necessary to constitute this act of bankruptcy that the debtor should admit in writing that he is "insolvent," nor can the petition for adjudication be resisted by other creditors on the ground that he is not actually insolvent.[184]

A voluntary application for the benefit of the bankruptcy law would come within the terms of this clause, and would therefore appear to constitute an act of bankruptcy; so that, once made, such an application could not be withdrawn by the debtor, for his attempt to do so would give creditors the right to file an involuntary petition.[185] Under

[180] In re International Coal Min. Co. 143 Fed. 665, 16 Am. Bankr. Rep. 309.

[181] Blue Mountain Iron & Steel Co. v. Portner, 131 Fed. 57, 65 C. C. A. 295, 12 Am. Bankr. Rep. 559; In re Wm. S. Butler & Co., 207 Fed. 705, 30 Am. Bankr. Rep. 502.

[182] In re Hudson River Electric Power Co., 173 Fed. 934, 23 Am. Bankr. Rep. 191; Zugalla v. International Mercantile Agency, 142 Fed. 927, 74 C. C. A. 97, 16 Am. Bankr. Rep. 67; In re Columbia Real Estate Co., 205 Fed. 980, 30 Am. Bankr. Rep. 471.

[183] Blue Mountain Iron & Steel Co. v. Portner, 131 Fed. 57, 65 C. C. A. 295, 12 Am. Bankr. Rep. 559.

[184] In re Kersten, 110 Fed. 929, 6 Am. Bankr. Rep. 516; In re Northampton Portland Cement Co., 179 Fed. 726, 24 Am. Bankr. Rep. 61. In re Wellesly (D. C.) 252 Fed. 854, 40 Am. Bankr. Rep. 597, 42 Am. Bankr. Rep. 412; In re Dressler Producing Corporation (C. C. A.) 262 Fed. 257, 44 Am. Bankr. Rep. 457; Riggs v. Price, 277 Mo. 333, 210 S. W. 420.

[185] See Van Nostrand v. Carr, 30 Md. 128, holding that an application by a

this provision of the law it is held that where a corporation, by the unanimous vote of its stockholders, authorizes one of its officers to appear on behalf of the company in the federal court and make the admission of insolvency contemplated by the statute, "in the event of an involuntary petition in bankruptcy being filed against said company," this is not in itself such an unqualified admission as is required by the act, and is therefore not an act of bankruptcy on the part of the corporation. Further, where such officer makes a written admission that the company is not able to pay its debts and is willing to be adjudged bankrupt on that ground, but this writing is not executed until after the filing of a petition in involuntary bankruptcy against the corporation, it constitutes no ground for an adjudication on that petition.[186] So, a letter written by the president of an alleged bankrupt corporation to its creditors, is not necessarily an admission that the corporation had committed an act of bankruptcy.[187] And it is not an act of bankruptcy for an insolvent debtor to sign and publish a statement of his affairs showing an excess of liabilities over assets.[188] And a debtor, by admitting the allegations of a bill requesting an equitable receivership and alleging the debtor's insolvency, does not thereby commit an act of bankruptcy.[189]

debtor for the benefit of the insolvency law of a state is an act of bankruptcy.

[186] In re Baker-Ricketson Co., 97 Fed. 489, 4 Am. Bankr. Rep. 605. Further as to admission of insolvency by corporations, as an act of bankruptcy, see infra, § 145.

[187] Lackawanna Leather Co. v. La Porte Carriage Co., 211 Fed. 318, 127 C. C. A. 604, 31 Am. Bankr. Rep. 658.

[188] In re Berthoud (D. C.) 231 Fed. 529, 36 Am. Bankr. Rep. 555.

[189] In re Connecticut Brass & Mfg. Corp. (D. C.) 257 Fed. 445, 43 Am. Bankr. Rep. 376.

CHAPTER VII

WHO ARE SUBJECT TO BANKRUPTCY LAW

§ 97. Voluntary Bankruptcy.—The present bankruptcy law as originally enacted in 1898, provided that "any qualified person may file a petition to be adjudged a voluntary bankrupt" (§ 59), and that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." (§ 4.) But in 1910, the latter clause was amended so as to read thus: "Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." [1] It appears therefore that the right of voluntary bankruptcy, though originally withheld from all corporations, is now withheld from only the four classes specifically mentioned, and is open to all others. It is also open to all natural persons without distinction as to occupation or pursuit.[2] Further, the statute makes the word "person" include a partnership, and hence a firm as such may be adjudged bankrupt on the voluntary petition of the partners.[3] It is next to be noted that the amendatory statute omits the requirement that the petitioner shall "owe debts." But as it is inconceivable that any person who did not owe debts should desire the benefit of the act, and as the existence of at least some indebtedness is ap-

[1] Act Cong. June 25, 1910, 36 Stat. 838.

[2] Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009, 5 Am. Bankr. Rep. 829. As to the provision which extends the benefit of the act in voluntary cases to "any person who owes debts," the court, in the case cited, said: "An officer in the army falls within this description, and it may be that he is not bound to include his pay in his schedule. Flarty v. Odlum, 3 Term, 682; Apthorpe v. Apthorpe, L. R. 12 Prob. Div. 192. Our bankrupt act contains no such provision as the English bankruptcy act of 1883, authorizing the court, when the bankrupt is an officer in the army or navy or employed in the civil service, to order a portion of his pay to be applied for the benefit of his creditors in bankruptcy. Re Ward [1897] 1 Q. B. 266. But the question now before us is not whether his pay can be reached in bankruptcy, but whether he is entitled to a discharge from the arrears of alimony due to his former wife."

[3] Bankruptcy Act 1898, § 1, clause 19.

parently essential to the jurisdiction of the court, there being otherwise nothing for the statute to operate upon, this provision may be understood as still silently present. But no minimum amount of indebtedness is specified, nor is it required that the petitioner should be insolvent. And the fact that he owes debts contracted in a fiduciary capacity, which would not be affected by his discharge, is no objection to his being adjudged bankrupt and obtaining the benefit of the act, if he owes other debts not of a fiduciary character.[4] But if the existence of at least one debt is a jurisdictional necessity, then it must be of such a kind as to be provable in bankruptcy, and an unliquidated claim for damages for a personal tort is not such a debt.[5] Hence a petition in voluntary bankruptcy which schedules no property except such as is exempt under the law of the state, and only one debt, which is a judgment from which the petitioner would not be released by a discharge, fails to disclose any subject-matter upon which the court can act, and should be dismissed for want of jurisdiction.[6] Next, it is not required that the proposed voluntary bankrupt should have any assets. Even if he has not enough money to pay the ordinary filing fee and cannot obtain it, he may present his petition "in forma pauperis" on making affidavit as to his poverty.[7] Hence a person who owes but one debt and has no assets to which a trustee could take title may become a voluntary bankrupt.[8] It is further requisite that the petitioner should have "had his principal place of business, resided, or had his domicile" within the territorial jurisdiction of the court in which his petition is filed "for the preceding six months or the greater portion thereof," or, if an alien, he must have property within such jurisdiction.[9]

To a person possessing these qualifications the law gives the right of voluntary bankruptcy as a privilege and an absolute right. If he chooses to take the benefit of the act, no one can legally prevent him. There is no provision of the law which can be construed as authorizing creditors to file answers to a voluntary petition and oppose the adjudication thereon. The proceeding is entirely ex parte. The adjudication is made as of course and "upon the filing of the petition," and no person can intervene to contest it.[10]

In the voluntary bankruptcy of a partnership, as will more fully appear hereafter, only one petition is needed, and on that petition the firm

[4] In re Tebbetts, 5 Law Rep. 259, Fed. Cas. No. 13,817.

[5] In re Yates, 114 Fed. 365, 8 Am. Bankr. Rep. 69.

[6] In re Maples, 105 Fed. 919, 5 Am. Bankr. Rep. 426.

[7] Bankruptcy Act 1898, § 51.

[8] In re Schwaninger, 144 Fed. 555, 16 Am. Bankr. Rep. 427.

[9] Bankruptcy Act 1898, § 2, clause 1.

[10] In re Jehu, 94 Fed. 638, 2 Am. Bankr. Rep. 498; Blake v. Francis-Valentine Co., 89 Fed. 691, 1 Am. Bankr. Rep. 372.

may be adjudged bankrupt and also the individual partners, however numerous they may be. But proceedings in voluntary bankruptcy cannot be conducted in the united names of parties who have no common interest and do not seek a common decree; and individuals cannot associate and make a joint and several petition with a view to a separate decree in favor of each applicant.[11] It should be remarked, however, that in those states where the system of community property prevails, it is held that a husband and wife may file a joint petition in voluntary bankruptcy, in the nature of a partnership petition; for though they are not exactly partners, yet, where joint debts and obligations are contracted, there is a joint liability such as will sustain a joint petition.[12]

Voluntary bankruptcy being the privilege of a person who possesses the necessary qualifications, he can neither be prevented from availing himself of his rights in this regard nor forced to seek an adjudication as a voluntary bankrupt. A state court, for example, will not grant an injunction restraining a party from applying for the benefits of the bankruptcy law on his voluntary petition.[13] And, on the other hand, "no creditor can either compel a debtor to go into voluntary bankruptcy or compel a partner to petition for the adjudication of his fellows. Nor can any man lawfully be called upon to show cause why he should not go himself, or put any body else, into voluntary bankruptcy."[14] Where a petition in involuntary bankruptcy was filed, and the debtor, before an adjudication thereon, filed his voluntary petition, and was duly adjudged a bankrupt, it was held that the pendency of the first proceeding was no bar to the institution of the second, and that the court would proceed in the latter, and the further prosecution of the former would be stayed.[15] And so, the pendency of proceedings in insolvency under a state law, on the debtor's voluntary petition, begun before the passage of the bankruptcy act, will not be ground for dismissing the debtor's subsequent voluntary petition in bankruptcy, although he has contracted no new debts, when it appears that one or more of the creditors scheduled by the bankrupt are citizens of states other than that in which the insolvency proceedings were instituted.[16] It should be added that the default of the defendant to a petition in involuntary bankruptcy through failure to appear, does not convert the proceeding into a case of voluntary bankruptcy, so that if he belonged to one of the exempt classes, as, for instance, farmers, and therefore could not be adjudged in

[11] In re Moritz, 5 Law Rep. 325, Fed. Cas. No. 9,814.

[12] In re Ray, 1 Nat. Bankr. News, 276.

[13] Fillingin v. Thornton, 49 Ga. 384, 12 N. B. R. 92.

[14] In re Harbaugh, 15 N. B. R. 246, Fed. Cas. No. 6,045.

[15] In re Flanagan, 5 Sawy. 312, Fed. Cas. No. 4,850.

[16] In re Mussey, 99 Fed. 71, 3 Am. Bankr. Rep. 592.

involuntary proceedings, he cannot be adjudged on default, though he might have filed his voluntary petition had he so chosen.[17]

§ 98. **Involuntary Bankruptcy; General Considerations.**—The provision of the statute as to involuntary bankruptcy stood originally as follows: "Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."[18] An amendment enacted in 1903 added to the category of corporations subject to the act those engaged in "mining." There was some doubt whether the provision as to being "engaged principally in manufacturing, trading," etc., should be restricted to corporations or was intended to apply equally to natural persons.[19] But this ambiguity cannot be said to exist under the statute as amended in 1910, for the whole of the provision quoted is stricken out, and the following substituted for it: "Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act."[20] Apart, therefore, from wage-earners and farmers, the law now subjects to involuntary bankruptcy any natural person who owes a sufficient amount of debts, without reference to the character of his pursuits. "The statute makes subject to its provisions any natural person unless he is chiefly engaged in the exempt occupations, and the man who has no active business, but is only giving attention to his investments of capital, as an ordinary investor does, would seem to be subject to adjudication."[21] The burden of proof is primarily on the petitioning creditors to show that the alleged bankrupt is not among the exempt classes, but it may be shifted according to the course

[17] In re Taylor (C. C. A.) 102 Fed. 728, 4 Am. Bankr. Rep. 515.

[18] Bankruptcy Act 1898, § 4.

[19] See Cleage v. Laidley, 149 Fed. 346, 79 C. C. A. 284, 17 Am. Bankr. Rep. 598; In re Excelsior Café Co., 175 Fed. 294, 23 Am. Bankr. Rep. 701.

[20] Act Cong. June 25, 1910, 36 Stat. 838.

[21] In re Leland, 185 Fed. 830, 25 Am. Bankr. Rep. 209.

of the evidence.[22] A more difficult question arises in the case of a man who has been engaged in various occupations successively. The problem is to fix the point of time at which he must have been a wage-earner or a farmer in order to escape liability to adjudication in involuntary bankruptcy. According to some of the authorities this point is the time when the debts due to the petitioning creditors were contracted so that, if he was then engaged in a business which was not exempt, he cannot escape adjudication by showing that subsequently, and at the time of filing the petition, he was a farmer.[23] But although there is much to be said in favor of this position, the weight of the argument appears to be with those decisions which hold that the question of exemption or non-exemption by reason of occupation should be determined as of the date of the alleged act of bankruptcy.[24]

§ 99. **Aliens.**—An alien, as well as an American citizen, may be adjudicated a bankrupt in either voluntary or involuntary proceedings. For the statute provides that the courts of bankruptcy shall have jurisdiction to adjudge persons bankrupt who "do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions."[25] Although this language might be interpreted as applying only to citizens of the United States residing and doing business in foreign countries, it is not conceivable that Congress intended it should be so narrowly construed. The bankruptcy act of 1867 was not so comprehensive as the present law, for, both in the case of voluntary and involuntary bankruptcy, it was required that the proposed bankrupt should "reside within the jurisdiction of the United States."[26] But under this provision it was held that an alien coming into the country might file his voluntary petition as soon as he had acquired a residence within the United States, and be adjudged bankrupt thereon.[27] Under the present stat-

[22] In re Leland, 185 Fed. 830, 25 Am. Bankr. Rep. 209.

[23] Tiffany v. La Plume Condensed Milk Co., 141 Fed. 444, 15 Am. Bankr. Rep. 413; In re Burgin, 173 Fed. 726, 22 Am. Bankr. Rep. 574; In re Crenshaw, 156 Fed. 638, 19 Am. Bankr. Rep. 502.

[24] Virginia-Carolina Chemical Co., v. Shelhorse, 228 Fed. 493, 143 C. C. A. 75, 35 Am. Bankr. Rep. 720; Flickinger v. First Nat. Bank, 145 Fed. 162, 76 C. C. A. 132, 16 Am. Bankr. Rep. 678; In re Leland (D. C.) 185 Fed. 830, 25 Am. Bankr. Rep. 209; In re Folkstad (D. C.) 199 Fed. 363, 29 Am. Bankr. Rep. 77; Harris v. Tapp (D. C.) 235 Fed. 918, 37 Am. Bankr. Rep. 564; In re Disney (D. C.) 219 Fed. 294, 33 Am. Bankr. Rep. 656.

[25] Bankruptcy Act 1898, § 2, clause 1.

[26] Rev. Stat. U. S. §§ 5014, 5021. See In re Burton, 9 Ben. 324, 17 N. B. R. 212, Fed. Cas. No. 2,214.

[27] In re Goodfellow, 1 Low. 510, 3 N. B. R. 452, Fed. Cas. No. 5,536; In re Boynton, 10 Fed. 277; Judd v. Lawr-

ute, it is said that there is no reason why an Indian, a member of the Chickasaw tribe, should not take the benefit of the bankruptcy law on his own petition.[28]

§ 100. **Married Women.**—There has been some doubt, and uncertainty as to the power of courts of bankruptcy to proceed against married women; but the true rule on this subject appears to be that the federal court, when called upon to adjudge a feme covert bankrupt, must regard the laws of the state of her domicile; and if, in that state, by enabling statutes, her common-law disabilities have been taken away to such an extent as to allow her to make valid and enforceable contracts in the way of trade or business, then she is amenable to the bankruptcy law; and that in any case where a plea of coverture would not avail her in an action on the debt, she may be proceeded against in bankruptcy. These views are supported by both the English and American cases.[29] Thus, in New York and some other states, a married woman who is a partner in her husband's business, or who engages in business in her own name, by her husband, acting as her agent, he exercising the entire control and management of the same in his discretion, may be adjudged bankrupt.[30] So, in Illinois, where a married

ence, 1 Cush. (Mass.) 531; Cutter v. Folsom, 17 N. H. 139. Blackstone, speaking of the English bankruptcy laws in force at the close of the eighteenth century, says: "The benefits, as well as the penal parts of the law, are extended as well to aliens and denizens as to natural-born subjects, being intended entirely for the protection of trade, in which aliens are often as deeply concerned as natives. Any person, whether native, denizen, or alien, who trades in England, although he never resides here as a trader, may be a bankrupt, if he should come to England and commit an act of bankruptcy whilst he is here." 2 Bl. Comm. 475, and Christian's note in loco.

[28] In re Rennie, 1 Nat. Bankr. News, 335, per Robnett, Referee. An Indian was adjudged bankrupt (apparently without any opposition) in Re Russie, 96 Fed. 609, 3 Am. Bankr. Rep. 6.

[29] Lavie v. Phillips, 3 Burr. 1783; Johnson v. Gallagher, 3 De Gex, F. & J. 494; In re Matthewman, L. R. 3 Eq. 781; Picard v. Hine, L. R. 5 Ch. App. 274; McHenry v. Davies, L. R. 10 Eq. 88; In re Kinkead, 3 Biss. 405, 7 N. B. R. 439, Fed. Cas. No. 7,824; In re O'Brien, 1 N. B. R. 176, Fed. Cas. No. 10,397; In re Lyons, 2 Sawy. 524, Fed. Cas. No. 8,649; In re Collins, 3 Biss. 415, 10 N. B. R. 335, Fed. Cas. No. 3,006; In re Ruddell, 2 Low. 124, Fed. Cas. No. 12,109. It would appear that a married woman may be adjudged bankrupt if the debts due to the petitioning creditors are such as she had the power to contract and such as are legally binding upon her and upon her separate estate by the laws of the state of her domicile. But if the laws of the state are such that she had no power to contract the particular debts claimed by the petitioning creditors, and such debts are not legally binding upon her, of course they are not provable in bankruptcy, and if not provable, they will not support the petition. In such cases, therefore, she may avail herself of her coverture to defeat the debt; that is, she cannot be adjudged bankrupt. In re Slichter, 2 N. B. R. 336, Fed. Cas. No. 12,943.

[30] Graham v. Stark, 3 Ben. 520, 3 N. B. R. 357, Fed. Cas. No. 5,676; In re Steele, 98 Fed. 78, 3 Am. Bankr. Rep. 549. For other cases in which married women have been adjudged bankrupt in New York, under the present statute, see In re Meyers, 96 Fed. 408, 2 Am. Bankr.

woman has entire control of her separate estate, whether owned before marriage or since acquired, and may make contracts in respect to the same, enforceable either at law or in equity, and may engage in trade, using her own property, it was held that where she formed a business partnership with her husband, contributing her separate money to the capital of the concern and her time and skill to the management of its affairs, the firm might be adjudged bankrupt, and it was thought that the wife might be so adjudged individually.[31] So, where a married woman was authorized by her husband to carry on business as a partner with other members of a firm, and was separate in property from her husband, it was held that it was not necessary to make the husband a party in a proceeding in involuntary bankruptcy against the firm.[32] And it has been held that the statute authorizes the adjudication of a married woman as an involuntary bankrupt, where she was engaged in business on her own account, and owed business obligations of the amount required by the statute, for which her separate property would be liable in equity though not at law.[33]

But on the other hand, if the statutes of the state have not removed the common-law disabilities of a married woman, so that she is still incompetent to contract, a petition in bankruptcy will not lie against her, at least where it is not shown that she has a separate estate.[34] And in one of the cases, where a petition in involuntary bankruptcy was filed against a married woman having a separate estate, founded on the nonpayment of certain promissory notes made by her, it was held that, inasmuch as it did not appear on the face of the notes that it was her intention to bind her separate estate, and there being no allegation that they were given for the benefit of her separate estate, or in the course of trade, the petition must be dismissed, but with permission to amend.[35] A married woman, where no fraud is intended, may take advantage of bankruptcy with respect to debts contracted while she was sole.[36]

§ 101. **Insane Persons.**—A person who is under guardianship as a lunatic or incompetent may be adjudged bankrupt, upon compulsory

Rep. 707; In re Hyman, 97 Fed. 195, 3 Am. Bankr. Rep. 169.

[31] In re Kinkead, 3 Biss. 405, 7 N. B. R. 439, Fed. Cas. No. 7,824.

[32] Lastrapes v. Blanc, 3 Woods, 134, Fed. Cas. No. 8,100.

[33] MacDonald v. Tefft-Weller Co., 128 Fed. 381, 63 C. C. A. 123, 65 L. R. A. 106, 11 Am. Bankr. Rep. 800.

[34] In re Goodman, 5 Biss. 401, 8 N. B. R. 380, Fed. Cas. No. 5,540.

[35] In re Howland, 2 N. B. R. 357, Fed. Cas. No. 6,791.

[36] Lawver v. Gladden (Pa. Sup.) 1 Atl. 659. That husband and wife may file a joint petition in voluntary bankruptcy, in a state where the system of community property obtains, where they have contracted joint debts, see In re Ray, 1 Nat. Bankr. News, 276.

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majority, and, by presenting a petition to that effect, ratify and confirm involuntary proceedings begun against him during his minority. If the court never acquired jurisdiction of his person, jurisdiction cannot be conferred upon it by any such retroactive process.[44]

It must be stated, however, that exceptions have sometimes been made to the rule above given. An English decision holds that if an infant, representing himself to be of full age, engages in trade and incurs debts, his creditors relying on such representations, he may be adjudged bankrupt and such debts are provable against his estate.[45] And in a recent American case, the state statute relating to the liabilities of a minor was made the test of his being subject to the bankruptcy law. This statute provides that a minor may not disaffirm his contracts on reaching full age when, "from his having engaged in business as an adult, the other party has good reason to believe him capable of contracting." [46] And it was held that if a minor engages in business as a merchant, and parties consequently assume that he is of full age and deal with him in that belief, no inquiry or representation being made as to his minority, he becomes absolutely liable for the debts contracted in such business, and may be adjudged bankrupt on his own petition, though still an infant.[47] And generally, there is respectable authority for the proposition that the bankruptcy act does include an infant when he owes debts for which his property is legally chargeable.[48]

A somewhat different question arises when proceedings in involuntary bankruptcy are instituted against a firm, and it appears that one of the partners is a minor, but that the latter has taken no action to repudiate the partnership relation. The authorities on this point teach that an adjudication may be made against the adult partners and against the firm as such, but as to the infant partner, no adjudication can be made, but the petition must be dismissed. The assets of the firm and the separate estates of the adult partners may be administered in the bankruptcy proceedings, and must be applied to the payment of the partnership debts in full, before the infant partner is entitled to receive any portion of the firm's assets.[49]

[44] In re Derby, 6 Ben. 232, 8 N. B. R. 106, Fed. Cas. No. 3,815.

[45] Ex parte Unity Banking Ass'n, 3 De Gex & J. 63.

[46] Code Iowa, 1897, § 3190.

[47] In re Brice, 93 Fed. 942, 2 Am. Bankr. Rep. 197.

[48] In re Walrath, 175 Fed. 243, 24 Am. Bankr. Rep. 541.

[49] Jennings v. Stannus (C. C. A.) 191 Fed. 347, 27 Am. Bankr. Rep. 384; In re Duguid, 100 Fed. 274, 3 Am. Bankr. Rep. 794; In re Dunnigan, 95 Fed. 428, 2 Am. Bankr. Rep. 628; Lovell v. Beauchamp [1894] App. Cas. 607. See In re Minor, 11 Fed. 406. A person against whom and his partner proceedings in insolvency have been instituted under the state law, cannot avoid them on the ground that his partner was an infant when the proceedings were begun, if the infant was then represented by a guard-

§ 103. **Decedents' Estates.**—The bankruptcy act does not authorize the institution of proceedings against the estate of a deceased person, nor provide for the administration of such an estate in the court of bankruptcy; nor does the court acquire jurisdiction of the estate of a decedent by proceedings against a partnership of which he was a member.[50] And it has been held that an adjudication against a firm, on the voluntary petition of one of the partners, is void when it appears that the firm had been dissolved by the death of the co-partner.[51]

§ 104. **Executors and Other Trustees.**—Executors, administrators, guardians, and other trustees are not generally liable to be proceeded against in bankruptcy in their representative capacity. In one of the cases it appeared that a testator, who was engaged in business as a private banker, made his wife his general executrix, but, by a codicil to his will, nominated two other persons as his executors for the limited purpose of winding up his business, and clothed them with the powers necessary to carry on the business to effect that object without injury to his estate or to his customers. These persons qualified, and carried on the business for some time, until forced by a financial panic to suspend business and stop payment. A petition in bankruptcy was filed against them, but was dismissed on the ground that they were not subject to the operation of the law. The court observed that the bankruptcy act did not in general embrace trustees, such as executors, administrators, and guardians, and others acting strictly in a fiduciary capacity; that under the English law there were instances in which executors had been adjudged bankrupt, but it was where they were directed by the will to carry on trade in partnership with others, or where a specific sum was placed in their hands to be employed in trade, and was so employed, and acts of bankruptcy were committed; but in all such cases the business was conducted not for the purpose of winding it up, but for the purpose of employing the capital for the acquisition of profits and the benefit of the beneficiaries under the will; and that this was not one of the class of executorships designed to be administered under the bankruptcy act.[52]

§ 105. **Wage-Earners.**—These persons, by the express terms of the act, are exempt from liability to be adjudged bankrupts. The word

ian ad litem and has ratified the proceedings after coming of age. Winchester v. Thayer, 129 Mass. 129.

[50] Adams v. Terrell, 4 Woods, 337, 4 Fed. 796; In re Daggett, 8 N. B. R. 287. Fed. Cas. No. 3,535; In re Fackelman (D. C.) 248 Fed. 565, 41 Am. Bankr. Rep. 14.

[51] In re Temple, 4 Sawy. 92, 17 N. B. R. 345, Fed. Cas. No 13,825.

[52] Graves v. Winter, 9 N. B. R. 357, Fed. Cas. No. 5,710.

"wage-earner" is not a technical term of the law, but has come to be much used of late years, especially by writers on political and social economy, as a substitute for the term "laborer" or the phrase "laboring class." It might be expected that difficulties would arise in its construction in view of the complex conditions of modern business life and the manifold nature of the relation of employer and employed. The first section of the statute provides that the term "wage-earner" shall mean an "individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year." But obviously the terms of this definition require explanation, and especially the words "wages" and "salary." According to Webster, the former expression means "hire, reward, that which is paid or stipulated for services, but chiefly for services by manual labor, or for military and naval services. We speak of servants' wages, a laborer's wages, or soldiers' wages; but we never apply the word to the rewards given to men in office, which are called fees or salary." Another authority defines wages as "the agreed compensation for services rendered in a menial or subordinate capacity." [53] Bouvier defines the same term as "a compensation given to a hired person for his or her services." [54] In a recent work of high authority, "wages" is defined as "that which is paid for a service rendered; what is paid for labor; hire. In common use the word 'wages' is applied specifically to the payment made for manual labor or other labor of a menial or mechanical kind, distinguished (but somewhat vaguely) from 'salary' and from 'fee,' which denotes compensation paid to professional men, as lawyers and physicians." And a wage-earner is "one who receives stated wages for labor." [55] "The word 'wages,' in its popular use, signifies the remuneration of hired labor. As so used, it is more or less disparaging, being commonly placed in contrast with the words 'salaries,' 'fees,' 'honorarium,' etc., by which it is sought to denote the remuneration of services of a higher or more intellectual character." [56] In a case in Pennsylvania, Chief Justice Sharswood observed: "The truth is, and this the lexicographers seem to hold, that if there is any difference in the popular sense between 'salary' and 'wages,' it is only in the application of them to more or less honorable services. A farmer pays his farm hand, in common speech, wages, whether by the day, the week, the harvest, or the year. If for any reason he has occasion to employ

[53] Abbott, Law Dict.; Ryan v. Hook, 34 Hun (N. Y.) 185.

[54] Bouvier, Law Dict.

[55] Century Dict., s. v. The fees of lawyers, physicians, and other like professional men are not to be classed as "wages." Vane v. Newcombe, 132 U. S. 220, 10 Sup. Ct. 60, 33 L. Ed. 310.

[56] F. A. Walker, in Lalor's Polit. Cyclop.

an overseer, his compensation, no matter how measured, is called a 'salary.' An ironmaster pays his workmen wages; his manager receives a salary. A merchant pays wages to his servant who sweeps the floor, makes the fire, and runs his errands; but he compensates his salesman or clerk by a salary." [57] In another case it is said: "'Fees' are compensation for particular acts or services, as the fees of clerks, sheriffs, lawyers, physicians, etc. 'Wages' are the compensation paid or to be paid for services by the day, week, etc., as of laborers, commissioners, etc. 'Salaries' are the compensation per annum to men in official and some other situations." [58] But according to other opinions, "this compensation to a laborer may be a specified sum for a given time of service, or a fixed sum for specified work; that is, payment may be made by the job. The word 'wages' does not imply that the compensation is to be determined solely upon the basis of time spent in service; it may be determined by the work done. It means compensation estimated in either way." [59]

[57] Com. v. Butler, 99 Pa. St. 542. And see South & North Alabama R. Co. v. Falkner, 49 Ala. 118; People v. Remington, 45 Hun (N. Y.) 328. In First Nat. Bank v. Barnum, 160 Fed. 245, 20 Am. Bankr. Rep. 439, it was said: "The terms 'wages,' 'salary,' and 'hire' mean much the same thing, and are no doubt collectively used in order to cover the different possible kinds of employment comprehended within the general idea. Wages, as distinguished from salary, are commonly understood to apply to the compensation for manual labor, skilled or unskilled, paid at stated times, and measured by the day, week, month, or season, and also by the piece, but not by the job nor including profits on the services of others. Neither is it so broad a term as 'earnings,' which comprehend the returns from skill and labor in whatever way acquired. Indeed the act itself, in exempting wage-earners, recognized that there are other kinds. Salary, on the other hand, has reference to a superior grade of services, and implies a position or office. By contrast, therefore, 'wages' indicate inconsiderable pay for a lower and less responsible character of employment, where 'salary' is suggestive of something higher, larger, and more permanent. The word 'hire' is rather associated with the act of employment than the reward for services done; and in the latter connection is more on the plane of wages than of salary, although in a certain sense it comprehends both, and is also applied to engaging the use of property. We hire a coachman, a gardner, or a cook, or a carriage to take a ride. And we may also be said to hire a superintendent, a bookkeeper, or a clerk, although it would seem more correct, in the latter instances, to say 'engage' or 'employ.' And coming up from the people, as the word thus does, it is sometimes applied, out of place, to the securing of professional services, as where one is said to hire a lawyer, a doctor, or a person of that class."

[58] Cowdin v. Huff, 10 Ind. 85.

[59] Ford v. St. Louis, K. & N. W. R. Co., 54 Iowa, 728, 7 N. W. 126; In re Gurewitz, 121 Fed. 982, 58 C. C. A. 320, 10 Am. Bankr. Rep. 350; Swift Mfg. Co. v. Henderson, 99 Ga. 136, 25 S. E. 27. "Wages" includes compensation for labor performed under a contract by which the laborer is to have the price of his services applied on a lot of ground which his employer contracts to sell to him, though the contract is broken by the employer. Scott v. Watson, 36 Pa. St. 342. But one who threshes out grain by the job does not work for "wages." Johnston v. Barrills, 27 Or. 251, 41 Pac. 656, 50 Am. St. Rep. 717. And debts due by customers to a blacksmith for work done by him in carrying on an independent business for himself as the proprietor of a blacksmith shop are not ex-

A fixed annual compensation paid to the secretary of a business corporation is a salary; it is not wages.[60] Where the receiver of a railroad corporation is directed by the order of the court to pay "wages of employés" out of the income of the road, this term does not include the services of counsel employed for special purposes.[61] So, it is held that the term "wages" does not include the salary of the president, manager, or superintendent of a business corporation; nor sums payable to attorneys at law for professional services rendered to the corporation upon occasional retainers; nor the compensation of a person who is employed by the company to sell its goods in a foreign country, at a fixed annual salary, with the addition of a commission and his traveling expenses.[62] Again, the term "wages" is not applicable to the compensation of the public officers of a municipal corporation, who receive annual salaries, which are not due until the end of the year, and who are entitled to be paid so long as they hold their offices without regard to the services rendered.[63] So also, a person who takes a contract to perform a specified work, as, to build a house according to plans and specifications, to execute a cutting on a line of railway at a given sum per cubic yard, or the like, and who employs men under him to do the actual work or to assist him in doing it, is not a "workman" or "laborer," although he does a portion of the work himself, and his compensation is not "wages."[64] So again, where manufacturers receive raw material from another, and work it up for him into a finished or partly finished product, by the use of their machinery and the labor of their employés, under a contract specifying a fixed rate of payment, the money due them therefor is not wages.[65] But on the other hand, in one state, under a constitutional and statutory provision that "current wages for personal service" shall not be subject to garnishment, it has been held that the exemption might be claimed by one who was employed by a live-stock company as manager, at a monthly salary of $200, though he was also a stockholder of the company.[66]

empt from garnishment as "wages." Tatum v. Zachry, 86 Ga. 573, 12 S. E. 940.

[60] Gordon v. Jennings, 9 Q. B. Div. 45.

[61] Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 505, 11 Sup. Ct. 405, 34 L. Ed. 1023.

[62] People v. Remington, 45 Hun (N. Y.) 329. But as to the latter part of the proposition stated in the text, compare Hamberger v. Marcus, 157 Pa. St. 133, 27 Atl. 681, 37 Am. St. Rep. 719; In re Luxton & Black Co., 35 App. Div. 243, 54 N. Y. Supp. 778.

[63] People v. Meyers, 25 Abb. New Cas. 368, 11 N. Y. Supp. 217.

[64] Riley v. Warden, 2 Exch. 59; Heard v. Crum, 73 Miss. 157, 18 South. 934, 55 Am. St. Rep. 520; Smith v. Brooke, 49 Pa. St. 147; Diller v. Frantz, 17 Pa. Co. Ct. R. 306; Henry v. Fisher, 2 Pa. Dist. R. 71. But see Howell v. McDowell, 47 N. J. Law, 359, 1 Atl. 474; Moore v. Heaney, 14 Md. 558.

[65] Lang v. Simmons, 64 Wis. 525, 25 N. W. 650; Campfield v. Lang, 25 Fed. 128.

[66] Bell v. Indian Live Stock Co. (Tex.) 11 S. W. 344, 3 L. R. A. 642.

If it were not for the definition contained in the bankruptcy act itself, we should be justified in concluding, from these authorities, that "wage-earner" must be taken as synonymous with "laborer," as the latter term is ordinarily employed in statutes and in legal speech, or as denoting one who subsists by his physical labor, as distinguished from one who subsists by professional skill.[67] But since the statute makes the term "wage-earner" include not only a person who works for wages, but also one who works for "salary" or "hire," it is generally held to include almost all classes of employés, whatever be the nature of their labor, who are compensated at a fixed rate not exceeding $1,500 per annum, but excluding independent contractors and all those persons whose remuneration is given for specific services rendered upon an occasional employment, and not under a permanent engagement, and who are employed in such occupations as require something more than mere physical labor or mere clerical ability. For example, a teacher receives compensation for his instruction which cannot properly be described as either "wages" or "hire." And if he charges so much per lesson or per hour of instruction, it is not "salary." But one who teaches in the public schools at a fixed monthly or annual salary comes squarely within the bankruptcy law.[68] So one who owns a team of horses and wagons and a plow, and who works by the day for different employers as he can obtain work, earning usually not more than $15 per week, and who works alone when he cannot find work for his team, is not an independent contractor but a wage-earner.[69] The tendency of the later decisions is to construe this part of the statute according to its spirit and purpose, without too great technicality. And as to this, it has been said: "It is evidently intended to relieve from adverse proceedings those who, not being engaged in business or trade, depend for a living upon the result of individual labor or effort, without the aid of property or capital." [70] Thus, it is held that one who is engaged in manufacturing and trading pursuits, does not become a wage-earner, so as to be exempt from compulsory bankruptcy, merely because, while so engaged, he also earns wages by working for another in a different occupation.[71] Neither is one to be included in the exempt class merely because he receives a small salary, when the greater part of

[67] Weymouth v. Sanborn, 43 N. H. 173, 80 Am. Dec. 144; Pennsylvania & D. R. Co. v. Leuffer, 84 Pa. St. 168, 24 Am. Rep. 189.

[68] First Nat. Bank v. Barnum, 160 Fed. 245, 20 Am. Bankr. Rep. 439.

[69] In re Yoder, 127 Fed. 894, 11 Am. Bankr. Rep. 445.

[70] First Nat. Bank v. Barnum, 160 Fed. 245, 20 Am. Bankr. Rep. 439. And see In re Wakefield, 182 Fed. 247, 25 Am. Bankr. Rep. 118.

[71] In re Naroma Chocolate Co., 178 Fed. 383, 24 Am. Bankr. Rep. 154.

his income is derived from independent business or from investments. "Every individual who is paid a salary of less than $1,500 a year is not necessarily therefore a wage-earner within the meaning of the law. A person extensively engaged in some mercantile or manufacturing business might at the same time incidentally earn a salary of less than $1,500 a year in some collateral employment; or the individual owner of a large business might incorporate it, and, being entitled as the holder of a great majority of the stock to practically all of the dividends earned, might prefer that his salary as president and head of the business should be placed at a nominal figure, or at a figure less than $1,500 a year, and much less than he would expect to draw for his services in the management of the business. Manifestly Congress did not intend to exempt such persons as these from the operation of the law." [72] But in another case the court refused to make an adjudication of bankruptcy against a person whose occupation was that of secretary and financial manager for a corporation at a salary of $100 a month, and who had no other business. He was also a stockholder in the company, but apparently derived no income from his stock, as the corporation was stated to be bankrupt. The court held that his ownership of stock in the company could not be treated as a separate business or occupation, and that it would not affect his exemption.[73] In a case where the alleged bankrupt was a traveling salesman and received a salary of $100 a month and also his expenses while traveling, and it was proved that his employer's agreement to pay his expenses was worth $40 a month to him, it was held that his total compensation exceeded $1,500 a year, and therefore he was not exempt from adjudication in bankruptcy.[74]

§ 106. Farmers.—By the express terms of the bankruptcy law (§ 4b) a petition in involuntary bankruptcy will not lie against "a person engaged chiefly in farming or the tillage of the soil." Such a person cannot commit an act of bankruptcy, and does not become subject to the statute by making a general assignment for the benefit of his creditors.[75] But one engaged in trade or some other nonexempt pursuit and who commits an act of bankruptcy cannot be permitted to evade the provisions of the statute by engaging in farming and making that his chief occupation, after the act of bankruptcy and before the filing of a

[72] Carpenter v. Cudd, 174 Fed. 603, 98 C. C. A. 449, 23 Am. Bankr. Rep. 463.

[73] In re Pilger, 118 Fed. 206, 9 Am. Bankr. Rep. 244.

[74] In re Hurley, 204 Fed. 126, 29 Am. Bankr. Rep. 567.

[75] Olive v. Armour, 167 Fed. 517, 21 Am. Bankr. Rep. 901; In re Doroski (D. C.) 271 Fed. 8, 46 Am. Bankr. Rep. 549.

petition against him.[76] It is also to be noted that this clause of the statute is construed as applying only to natural persons and not to corporations.[77]

As to what constitutes farming, it is said that "a farmer is one who is devoted to the tillage of the soil, and persons who follow this occupation may call themselves horticulturists, viticulturists, or gardeners, but they are farmers."[78] But the operation of farming plainly must mean something more than the cultivation of a small plot of ground. It has been remarked that a person may be said to be "engaged in the science of agriculture when he derives the support of himself and his family, in whole or in part, from the tillage and cultivation of fields. He must cultivate something more than a garden, though it may be much less than a farm. If the area cultivated can be called a field, it is agriculture."[79] Primarily the mention of farming suggests the raising of crops of grain and hay, though it may be observed, in passing, that the operation of a grist mill is not farming, at least in so far as it consists in grinding grain produced on the land, and by the labor, of others.[80] But of course farming is not restricted, either in scientific or in popular language, to these products. The cultivation of vegetables for the market and of berries and small fruits is called "truck farming." And undoubtedly one whose land was devoted entirely to the purpose of an orchard would be within the statute; for if fruit-raising is not "farming," certainly it is "tillage of the soil." But there is a more serious question as to whether the terms of the statute include the business of stock-raising, or of maintaining and operating ranches for the raising of horses or cattle for the market, or the business which is commonly described as operating a "dairy-farm." If the words "tillage of the soil" are to be understood as a definition or explanation of what is meant by "farming," then they operate as a limitation upon the broader senses of which the latter word is capable. But the authorities generally hold that this is not the true construction of the statute.[81] And although

[76] In re Mackey, 110 Fed. 355, 6 Am. Bankr. Rep. 577; In re Luckhardt, 101 Fed. 807, 4 Am. Bankr. Rep. 307.

[77] In re Lake Jackson Sugar Co., 129 Fed. 640. But it seems that a partnership engaged chiefly in farming is not subject to adjudication in bankruptcy. H. D. Still's Sons v. American Nat. Bank, 209 Fed. 749, 126 C. C. A. 473, 31 Am. Bankr. Rep. 320.

[78] In re Slade's Estate, 122 Cal. 434, 55 Pac. 158.

[79] Springer v. Lewis, 22 Pa. St. 191.

[80] State v. Patterson, 98 N. C. 657, 4 S. E. 47; Bachelder v. Bickford, 62 Me. 526. One who is chiefly engaged in threshing for hire grain raised by others is not engaged chiefly in farming or tillage of the soil, so as to be exempt from involuntary bankruptcy. Hart-Parr Co. v. Barkley, 231 Fed. 913, 146 C. C. A. 109, 36 Am. Bankr. Rep. 540.

[81] In re Thompson, 102 Fed. 287, 4 Am. Bankr. Rep. 340; In re Dwyer, 184 Fed. 880, 25 Am. Bankr. Rep. 913; In re Brown (D. C.) 251 Fed. 365, 41 Am. Bankr. Rep. 549.

there is some difference of opinion, the accredited rule appears to be that a person whose principal occupation is the raising of cattle, sheep, hogs, or other live stock for the market, his farm being devoted to use as pasture land and for raising grass, hay, and corn with which to feed and fatten the stock, is exempt from the bankruptcy law, being a "farmer" though not a tiller of the soil, and does not lose this character by the fact that he incidentally supplements the products of his own farm by the purchase of fodder for the stock, nor by the fact that he does not entirely restrict his operations to cattle raised on his own land.[82] But on the other hand, one whose chief occupation is the purchase and sale of live stock, and who uses his lands as a mere feeding station, and, even for the maintenance of the cattle while on his lands, relies chiefly on purchased supplies, is not engaged in either farming or the tillage of the soil, but is a trader.[83] Much the same principles apply to the business of dairy-farming. It is held that a farmer does not cease to be "engaged chiefly in farming," within the meaning of the statute, because he establishes a dairy as one of the branches of his industry, to utilize the products of his farm and convert them to profitable uses, nor because he may sell the products of his dairy at retail; but that one is not exempt as

[82] In re Dwyer, 184 Fed. 880, 25 Am. Bankr. Rep. 913; In re Sutter (D. C.) 270 Fed. 248, 46 Am. Bankr. Rep. 267; In re Thompson, 102 Fed. 287, 4 Am. Bankr. Rep. 340; State v. Patterson, 98 N. C. 657, 4 S. E. 47; Simons v. Lovell, 7 Heisk. (Tenn.) 510. The farmer "may also include breeding, feeding, and rearing of live stock, embracing cattle, horses, mules, sheep, and hogs, for domestic use and for market. If he find it more profitable to feed his agricultural products or his grasses to live stock than to rely upon marketing the surplus, he may not be limited to the quantity of live stock for such purpose to what he may breed or rear on his farm. For this purpose he may rely entirely upon the purchase of such live stock from his neighbors or on the market, and utilize his farm products in feeding and fattening such 'feeders' for market. Neither, in my opinion, should the act be so construed as to restrict the farmer entirely, under all circumstances and conditions, to the corn and hay and grasses he may produce for rearing such feeders and preparing them for market. In other words, where he relies largely upon his pasture lands for grazing his cattle, and his crops of corn may not be sufficient to carry them through the particular winter and the feeding season, he may supplement these by purchasing from without sufficient corn and the like to meet the requirement. But certainly there should be apparent such relation between his method of farming and the buying and feeding of cattle, hogs, and the like, for market, as to reasonably indicate that his farming is not made principally subsidiary to the business of buying and selling cattle. So that, if his chief business is that of thus trading in cattle, using his lands as a mere feeding station, relying upon the purchase feed from the market for preparing them for sale much more than on his agricultural products, he may cross the dividing line between farming as his chief business and trading in cattle as his chief source of livelihood. No hard and fast rule can safely be laid down by the courts indifferently applicable to all cases. Each must depend more or less upon its own particular facts." Bank of Dearborn v. Matney, 132 Fed. 75, 12 Am. Bankr. Rep. 482, per Philips, J.

[83] Bank of Dearborn v. Matney, 132 Fed. 75, 12 Am. Bankr. Rep. 482; In re Brown, 132 Fed. 706, 13 Am. Bankr. Rep. 140; Trustees of Rochester v. Pettinger, 17 Wend. (N. Y.) 265.

a farmer whose business is to maintain a herd of cows and sell the milk, owning no farm but only the barn in which they are kept and buying from others the grain and other forage to maintain them.[84]

It is next necessary that the person claiming to be exempt should be "engaged" in farming, and this necessarily implies either the expenditure of one's personal labor on the farm or the direction and control of farm laborers.[85] For this reason, where the title to a farm stood in the name of a wife, and she performed only such services as are generally performed by the wives of farmers, the husband taking full charge of the farming operations, it was held that the wife was not "engaged chiefly in farming."[86] On the same principle, the owner of a farm, who does not work it himself, but lets it to a tenant, retaining a general supervision to the extent of seeing that the tenant carries on the work as agreed, but taking no active direction or control, and who has no active business of any kind except looking after his investments, is not "engaged in farming" so as to be exempt from involuntary bankruptcy.[87] At the same time, it is certainly not necessary that the farmer should labor with his own hands. If a man's principal occupation is the management and control of a large plantation, which he owns, upon which he resides, and upon which he relies for his income, he is engaged chiefly in farming, and it is not material that part of the property is rented to tenants, the owner exercising supervision and control of their operations, nor that, as to the rest, the manual labor is performed by hired servants, the owner himself not personally working on the land.[88]

Further, it is essential that the person should be engaged "chiefly" in farming or the tillage of the soil. From the use of the word quoted, it was evidently the intention of Congress to exclude from the compulsory features of the law persons whose principal occupation is agriculture, and whose main support is derived from husbandry, although they may, at the same time, be engaged in other kinds of business, but only incidentally or as a temporary or occasional matter. Each such case must be determined on its own facts, and by a comparison of the relative importance to the individual of the various pursuits or lines of business

[84] Gregg v. Mitchell, 166 Fed. 725, 92 C. C. A. 415, 20 L. R. A. (N. S.) 148, 21 Am. Bankr. Rep. 659.

[85] A so-called "retired" farmer, who incurred considerable indebtedness in purely commercial ventures, is not a person engaged chiefly in farming, so as to be exempt from involuntary bankruptcy, though at times he assisted his son, to whom he had rented his farm. In re Driver (D. C.) 252 Fed. 956, 42 Am. Bankr. Rep. 106.

[86] In re Johnson, 149 Fed. 864, 18 Am. Bankr. Rep. 74.

[87] In re Leland, 185 Fed. 830, 25 Am. Bankr. Rep. 209; In re Matson, 123 Fed. 743, 10 Am. Bankr. Rep. 473. And see In re Hoy, 137 Fed. 175, 14 Am. Bankr. Rep. 648.

[88] Wulbern v. Drake, 120 Fed. 493, 56 C. C. A. 643, 9 Am. Bankr. Rep. 695.

which he may be carrying on.[89] But the general rule emerges that a person's chief occupation is that which is of principal concern and importance to him, which is his permanent pursuit and not merely transitory, and upon which he mainly depends for his living and support, and if this main occupation is some form of agriculture, he is exempt from the bankruptcy law, though he may devote some minor part of his time and energy to side lines or incidental pursuits, and thereby supplement his income.[90] Thus, one who resides with his family on a farm and cultivates it, and derives his main support from it, is a farmer, though he is also the publisher of a weekly newspaper and the proprietor of patent medicines,[91] or the owner of a small store, from which he derives a profit, but very small in comparison with the income from his farm.[92] But one having regular clerical employment in a city, but whose home is upon a farm, where he spends his Sundays and one night in each week, the management of which is, in his absence, in the hands of men hired by him for the purpose, is not a farmer.[93]

§ 107. **Second Bankruptcy.**—There is nothing in the bankruptcy act which prevents a person who has received his discharge as a bankrupt from applying a second time for the benefits of the law, if he has

[89] American Agricultural Chemical Co. v. Brinkley, 194 Fed. 411, 114 C. C. A. 373, Ann. Cas. 1915C, 100, 27 Am. Bankr. Rep. 438. Where an alleged bankrupt is engaged in several occupations at the same time, what constitutes his principal occupation is to be determined from all the circumstances of the particular case. Harris v. Tapp (D. C.) 235 Fed. 918, 37 Am. Bankr. Rep. 564. A man who regularly follows two occupations is not, at the time of the commission of an act of bankruptcy, chiefly engaged in one of them merely because at that time he is giving his principal attention to it rather than to his other pursuit. In re Disney (D. C.) 219 Fed. 294, 33 Am. Bankr. Rep. 656. In determining whether an alleged bankrupt is chiefly engaged in farming, all his activities are to be taken into consideration, the relative amount of time devoted to each, and the comparative amount of revenue received and indebtedness incurred in each. And an alleged bankrupt who, although conducting a large farm, also built and operated a packing house, creamery, and poultry yards, buying live stock and poultry, and who contracted the larger part of his indebtedness in connection with business other than farming, is not chiefly engaged in farming. In re Brown, 253 Fed. 357, 165 C. C. A. 139, 42 Am. Bankr. Rep. 452. One who cultivates about two acres of land and has a few farming implements, but who has various outside pursuits, cannot be said to be "chiefly engaged" in farming. In re Spengler (D. C.) 238 Fed. 862, 39 Am. Bankr. Rep. 64. In determining the question of a person's chief or principal occupation, all his pursuits must be considered as a whole, although as to some of them he is in partnership with other persons. American Agricultural Chemical Co. v. Brinkley, 194 Fed. 411, 114 C. C. A. 373, Ann. Cas. 1915C, 100, 27 Am. Bankr. Rep. 438.

[90] In re Mackey, 110 Fed. 355, 6 Am. Bankr. Rep. 577; Virginia-Carolina Chemical Co. v. Shelhorse, 228 Fed. 493, 143 C. C. A. 75, 35 Am. Bankr. Rep. 720; In re Terry (D. C.) 208 Fed. 162, 30 Am. Bankr. Rep. 631.

[91] McCue v. Tunstead, 65 Cal. 506, 4 Pac. 510.

[92] Rise v. Bordner, 140 Fed. 566, 15 Am. Bankr. Rep. 297.

[93] Johnson v. London Guaranty & Accident Co., 115 Mich. 91, 72 N. W. 1115, 40 L. R. A. 440, 69 Am. St. Rep. 549.

contracted new debts which he is unable to pay, except the provision added by the amendment of 1903, which forbids the granting of a discharge if the bankrupt has, in voluntary proceedings, been granted a discharge within six years.[94] This provision, it is held, is not retroactive as applied to cases where the first proceedings were had prior to its enactment, as it creates no new offense and imposes no new penalty, but only fixes new conditions of discharge in the case of petitions filed after its passage.[95] But it is to be noted that it applies only to cases where the first proceedings were voluntary, and to cases where a discharge was granted, not where a discharge was refused or never applied for. It was held under the act of 1867 (and the same rule now applies) that a bankrupt who has not been discharged, or to whom a discharge has been refused, and who has contracted new debts sufficient in amount to give the court jurisdiction, may file a second petition in bankruptcy; but a discharge under such new petition would apply only to new debts and to such old debts as had been proved anew.[96] The denial of a bankrupt's application for discharge renders the issue as to his right to a discharge res judicata as to debts which were provable in that proceeding, and it is held that his failure to apply for a discharge has the same effect.[97] Hence where, in a subsequent voluntary proceeding, the bankrupt schedules the same debts and the same assets, the second proceeding is a manifest attempt to evade the effect of the former, and should be dismissed, or the bankrupt should be restrained by the court from prosecuting a second application for a discharge. But where a considerable time has elapsed, and new debts are also scheduled, the bankrupt has the right to maintain the proceeding as to those, and an order granting a stay should be limited accordingly.[98]

[94] Act Cong. February 5, 1903, c. 487, § 4; 32 Stat. 797.

[95] In re Carleton, 131 Fed. 146, 12 Am. Bankr. Rep. 475.

[96] In re Drisko, 2 Low. 430, 13 N. B. R. 112, Fed. Cas. No. 4090, affirmed 14 N. B. R. 551, Fed. Cas. No. 4086; Fisher v. Currier, 7 Metc. (Mass.) 424.

[97] In re Pullian, 171 Fed. 595, 22 Am. Bankr. Rep. 513.

[98] In re Kuffler, 151 Fed. 12, 80 C. C. A. 508, 18 Am. Bankr. Rep. 16; In re Pullian, 171 Fed. 595, 22 Am. Bankr. Rep. 513.

CHAPTER VIII

BANKRUPTCY OF PARTNERSHIPS

§ 108. Jurisdiction in Partnership Cases.—The jurisdiction of the courts of bankruptcy over partnerships is founded upon the following provisions of the bankruptcy act: Those courts are invested with jurisdiction to "adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months or the greater portion thereof." (Section 2, clause 1.) The word "persons," as used in the act, shall include partnerships. (Section 1, clause 19.) "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt. The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property." (Section 5, clauses "a" and "c.") It will be observed that this act, unlike previous bankruptcy statutes, treats a partnership as a legal entity, which may be adjudged a bankrupt, separately from the individuals composing it, as though it were an independent legal person.[1] But it must be shown

[1] Francis v. McNeal, 186 Fed. 481, 108 C. C. A. 479, 26 Am. Bankr. Rep. 555; In re Perlhefter, 177 Fed. 299, 25 Am. Bankr. Rep. 576; In re Everybody's

that a partnership exists in fact, and who are the members of it, before the court can act intelligently upon a petition against it, and an adjudication will be denied until these matters are before the court.[2]

It will also be perceived from the provisions quoted that the jurisdiction of the court of bankruptcy over a firm may be based either upon the residence or domicile of one or more of the partners within the district, or upon the fact that the principal place of business of the firm is within the district, without regard to the domicile of the members of the firm. Hence, if one of the partners has been a resident of the district for the required length of time, he may there file a petition for the adjudication of the firm, notwithstanding the fact that the business of the firm is carried on in another district or state, or that the other partners reside elsewhere, although, in such a case, the other members of the firm must be given an opportunity to join in the petition or to oppose it.[3] The same rule applies to a petition by creditors against the firm. And a bankruptcy court which has jurisdiction over one of the partners may take jurisdiction over the firm, without reference to the question whether the firm is six months old, or three months old (so as to have had a "principal place of business" for the "preceding six months or the greater portion thereof"), and without any specific allegation as to its principal place of business.[4] But if the petition is distinctly based on the ground of residence or domicile, it will be dismissed where it is shown that none of the members of the firm had his domicile or resided within the district long enough to support the

Grocery & Meat Market, 173 Fed. 492, 21 Am. Bankr. Rep. 925; In re L. Stein & Co., 127 Fed. 547, 62 C. C. A. 272, 11 Am. Bankr. Rep. 536. In the case last cited, it was said: "The present bankruptcy act recognizes the equitable rule that partnership property is primarily a fund for the payment of copartnership debts, and that the interest of a copartner is subject to that special equity, and attaches only to the surplus remaining after the payment of the copartnership debts. It treats a copartnership as a legal entity, irrespective of the status or separate rights of the individual copartners. It deals with the copartnership as a person for the purpose of subjecting the partnership property to the satisfaction of copartnership liabilties. In this respect, the present act is a marked departure from the previous bankruptcy acts. And so it has been held that a copartnership may be adjudged a bankrupt after death of one partner, upon an act of bankruptcy committed by the surviving partner, and that the adjudication of bankruptcy of a copartnership does not necessarily draw into the proceedings the estate of every individual member." But see H. D. Still's Sons v. American Nat. Bank, 209 Fed. 749, 126 C. C. A. 473, 31 Am. Bankr. Rep. 320; holding that a partnership, in bankruptcy, is not an entity separate and distinct from its partners, but is a natural person within the meaning of § 4b of the Bankruptcy Act.

[2] In re McLaren, 125 Fed. 835, 11 Am. Bankr. Rep. 141.

[3] In re Penn, 5 Ben. 89, 5 N. B. R. 30, Fed. Cas. No. 10,927; Ex parte Hall, 5 Law Rep. 269, Fed. Cas. No. 5,919; Whitson v. Farber Bank, 105 Mo. App. 605, 80 S. W. 327. And see In re J. & M. Schwartz, 204 Fed. 326, 30 Am. Bankr. Rep. 344.

[4] In re Mitchell, 219 Fed. 690, 135 C. C. A. 362, 33 Am. Bankr. Rep. 463.

jurisdiction of the court.[5] On the other hand, if the principal place of business of a partnership has been within a given district for the requisite length of time, the court of bankruptcy of that district will have jurisdiction of a voluntary or involuntary petition against the partnership, irrespective of the fact that some of the partners may be nonresidents.[6] And where a partnership has had its only place of business within a given judicial district for a period of more than three months before the filing of a petition in bankruptcy against it in such district, the court therein will have jurisdiction of the petition, although, during a part of that time, the only business carried on was in the way of winding up the affairs of the firm by two of the partners, the others having retired.[7]

In the case of two or more petitions being filed against the same partnership in different courts, each having jurisdiction over the case, it is provided that "the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and in either case the proceedings upon the other petition may be stayed until an adjudication is made upon the petition first heard, and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership, for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court."[8] Such a case of double jurisdiction arises where the partners are domiciled in differ-

[5] In re Blair, 99 Fed. 76, 3 Am. Bankr. Rep. 588.

[6] Cameron v. Canieo, 9 N. B. R. 527, Fed. Cas. No. 2,340; In re Flaherty (D. C.) 265 Fed. 741, 45 Am. Bankr. Rep. 638; In re Gurler & Co. (D. C.) 232 Fed. 1016, 37 Am. Bankr. Rep. 418. A nonresident partner may be served by publication, but there can be no adjudication against him personally until he has been given a proper opportunity to answer. In re J. & M. Schwartz, 204 Fed. 326, 30 Am. Bankr. Rep. 344.

[7] In re Blair, 99 Fed. 76, 3 Am. Bankr. Rep. 588.

[8] General Order No. 6. See supra, § 33. And see Ex parte Hall, 5 Law Rep. 269, Fed. Cas. No. 5,919; In re Greenfield, 42 How. Pr. (N. Y.) 469, 5 Ben. 552, Fed. Cas. No. 5,772; In re Smith, 1 N. B. R. 214, Fed. Cas. No. 12,983.

ent districts and the firm maintains a business establishment in each district. Petitions being filed in both districts, that court in which the petition is first filed possesses exclusive jurisdiction to determine which of the two courts can proceed with the case for the greater convenience of the parties in interest.[9] It has been held that where the same persons constitute two separate partnerships engaged in business, similar or dissimilar, in different states, each partnership having a distinct firm name, an adjudication of bankruptcy in either jurisdiction, on petition of creditors of one firm only, will apply to all the debts and assets of both partnerships.[10] But the adjudication of a firm in one district does not prevent a subsequent adjudication in another district of a firm only in part composed of the same persons.[11]

§ 109. **Same; Minority or Insanity of One Partner.**—From the doctrine that the present statute treats a partnership as a distinct legal entity, it follows that an adjudication of bankruptcy may be passed upon a firm, notwithstanding the fact that one of the partners may be a minor or insane. In one of the cases so holding it was said: "We perceive no valid reason why this manifest purpose of the bankruptcy act [to treat the partnership as a distinct entity apart from the partners composing it] should not have full effect. In the case of a decedent, the proper probate court assumes charge of and the disposition of his estate. But even then the partnership of which he was a member might, as we think, be properly adjudicated bankrupt as against the survivors, and the partnership estate administered by the bankruptcy court, since the decedent's interest in the estate extends only to the surplus after the payment of the partnership debts. So also, in respect to a minor, neither he nor his estate is responsible for debts contracted by him during his minority. And yet we perceive no objection, where he is a partner in a copartnership, his interests therein being subordinate to the partnership debts, to the adjudication of such copartnership as a bankrupt under the provisions of the present bankruptcy act. Conceding for the purpose of the argument—a question which we do not determine—that an insane person may not be adjudicated a bankrupt, nevertheless we think a copartnership of which he was or is a member may be so adjudicated, and the firm property applied to the payment of the firm debts. There is here no attempt to adjudicate the insane partner a bankrupt individually. The proceeding is merely to subject part-

[9] In re Sterne & Levi, 190 Fed. 70, 26 Am. Bankr. Rep. 259.

[10] Ballin v. Ferst, 55 Ga. 546.

[11] In re Jewett, 7 Biss. 473, 16 N. B. R. 48, Fed. Cas. No. 7,307.

nership property to the payment of partnership debts, and for an adjudication of bankruptcy against the sane partner." [12] As to minors, it may be regarded as now well settled, that a partnership in which one member is a minor may be adjudged bankrupt, as also the adult members of the firm, and the partnership property and the separate estates of such adult partners may be administered in bankruptcy, although no adjudication can be made against the infant partner individually.[13]

§ 110. **Proceedings in Partnership Cases.**—Under the bankruptcy act of 1867, a partnership was regarded simply as an aggregation of the partners, and the bankruptcy of the partners conditioned the bankruptcy of the firm.[14] But under the present law, as above stated, a partnership is a "person" and a distinct entity in law. It owns its property and owes its debts apart from the individual property of its members and apart from their individual debts, and it may be adjudged bankrupt upon its voluntary petition, or in involuntary proceedings if it has committed an act of bankruptcy, irrespective of any adjudication of the individual partners; and the adjudication of the firm will subject the separate estates of the partners, as well as the firm property, to administration in bankruptcy.[15] Even though one of the partners has not been, and could not be, adjudicated a bankrupt individually, the court of bankruptcy has jurisdiction to take possession of his property and to administer the same so far as necessary to a settlement of the

[12] In re L. Stein & Co., 127 Fed. 547, 62 C. C. A. 272, 11 Am. Bankr. Rep. 536.

[13] Jennings v. Stannus (C. C. A.) 191 Fed. 347, 27 Am. Bankr. Rep. 384; In re Dunnigan, 95 Fed. 428, 2 Am. Bankr. Rep. 628.

[14] In re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577.

[15] Fidelity Trust Co. v. Gaskell, 195 Fed. 865, 115 C. C. A. 527, 28 Am. Bankr. Rep. 4; In re Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559; In re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577; Mills v. Fisher, 159 Fed. 897, 87 C. C. A. 77, 20 Am. Bankr. Rep. 237; New Orleans Acid & Fertilizer Co. v. Guillory & Co., 117 La. 821, 42 South. 329; Lacey v. Cowan, 162 Ala. 546, 50 South. 281; In re Samuels, 215 Fed. 845, 132 C. C. A. 187; Abbott v. Anderson, 265 Ill. 285, 106 N. E. 782, L. R. A. 1915F, 668, Ann. Cas. 1916A, 741. Where a petition in voluntary bankruptcy is presented both in the name of a partnership and in the names of the individual partners, and is accompanied by schedules setting forth the debts and assets of the firm and also of the partners, and thereupon the petitioners are adjudged bankrupts as prayed, it is not necessary that each partner should also file an individual petition, in order to be relieved from his individual debts, but the court of bankruptcy may administer upon the separate estates of the partners as well as upon the estate of the firm in a single proceeding, and may grant to the partners a discharge from both separate and joint debts. In re Gay, 98 Fed. 870, 3 Am. Bankr. Rep. 529. Where a voluntary petition in bankruptcy by partners prays that "the petitioners" may be adjudged bankrupts, instead of "the said firm," but otherwise follows the official form for a partnership petition, describing the petitioners as the members of the firm, and the schedules show that all their debts are firm debts, and the order of adjudication corresponds with the petition, the defect of form in the petition and adjudication is not material on opposition to the application for dis-

partnership estate.[16] And further, that provision of the act (section 5h) which relates to the right of an unadjudicated partner to wind up the partnership business does not apply to a case where the partnership itself has been adjudged bankrupt. It only applies to cases where some of the partners, but not all, have been adjudged, and not the firm as such. Consequently, at least in cases where the act of bankruptcy on which the adjudication was made involved the insolvency of the partnership (including the insolvency of all its members) though the adjudication is against the partnership only, or against the partnership and some of its members, but not all, yet the estates of all the members are drawn into the proceedings for administration in bankruptcy.[17]

Proceedings in the bankruptcy of a partnership do not differ from those proper to be had upon the adjudication of an individual, except in a very few particulars specified in the statute. It is directed that "the creditors of the partnership shall appoint the trustee; in other respects, so far as possible, the estate shall be administered as herein provided for other estates." [18] The creditors here meant are those to whom the firm, as a firm, is indebted. A person holding a claim against one of the individual partners may be, in a sense, a creditor of the firm, in view of the fact that he may have an ultimate right to come upon the assets of the firm, but he is not a "creditor of the partnership" in the sense of the statute, and therefore has no right to vote in the choice of a trustee.[19] It is also provided that "the trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners," and "the expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine." [20] Under the act of 1867, there was no provision similar to this, but it was there directed that the "net proceeds" of the partnership property should go to the firm creditors, and the net proceeds of separate property to individual creditors; and it was held that the costs of the proceeding must be apportioned pro rata between the partnership and separate estates.[21]

charge, but may be amended nunc pro tunc. In re Meyers, 97 Fed. 757, 3 Am. Bankr. Rep. 260.

[16] Dickas v. Barnes, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654, 15 Am. Bankr. Rep. 566; In re Samuels & Lesser, 207 Fed. 195, 30 Am. Bankr. Rep. 293; In re R. F. Duke & Son, 199 Fed. 199, 29 Am. Bankr. Rep. 93.

[17] Francis v. McNeal, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706, 30 Am. Bankr. Rep. 244; affirming 186 Fed. 481, 108 C. C. A. 459, 26 Am. Bankr. Rep. 555; Menke v. Sunderman, 186 Fed. 486, 108 C. C. A. 464.

[18] Bankruptcy Act 1898, § 5b.

[19] In re Phelps, 1 N. B. R. 525, Fed. Cas. No. 11,071; In re Scheiffer, 2 N. B. R. 591, Fed. Cas. No. 12,445; In re South Boston Iron Co., 4 Cliff. 343, Fed. Cas. No. 13,183.

[20] Bankruptcy Act 1898, § 5e.

[21] In re Blumer, 12 Fed. 489; In re Smith, 13 N. B. R. 500, Fed. Cas. No.

§ 111. **What Constitutes Partnership.**—The fifth section of the bankruptcy act, relating to "partners," does not apply to limited partnerships, unless the members of such a partnership remain individually liable for the debts of the firm; for the first section declares that the term "corporation" (as to which there are special provisions) "shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association." If, however, persons who attempt to organize a limited partnership fail in law to accomplish that result, for lack of compliance with the statutory provisions governing such associations, then they may be put into bankruptcy as general partners.[22] And for a similar reason, where persons associate themselves together, intending to form a corporation, or assuming to be a corporation and using a corporate name, but without authority of law, they are individually liable as partners for the debts of the association, and a creditor who has dealt with them as a corporation is not thereby estopped from setting up his claim against them individually in bankruptcy.[23] But the directors or stockholders of a corporation, who have made themselves personally liable for its debts, by failure to obey the laws governing corporations of that class, are not subject to be proceeded against in bankruptcy as partners.[24]

To warrant an adjudication of bankruptcy against an alleged partnership, or against an individual as a member of a partnership, the existence of a partnership in fact must be shown, and the burden of proof on this issue rests upon the petitioning creditors.[25] A mere "holding out," by which one may have become liable to some creditors on the principle of estoppel, is not sufficient; "otherwise a bankrupt might become liable to some creditors and not liable to others, and the proceedings in bankruptcy might be good as to some and void as to others. Partnership in fact must be actually proven in order to sustain an adjudication."[26] But whether a partnership exists as between the parties themselves depends on their intention, and that intention must be as-

12,987; In re Ingalls, 5 Law Rep. 401, Fed. Cas. No. 7,032. And see In re Gay, 98 Fed. 870, 3 Am. Bankr. Rep. 529.

[22] In re Merrill, 12 Blatchf. 221, 13 N. B. R. 91, Fed. Cas. No. 9,467.

[23] Manson v. Williams, 153 Fed. 525, 82 C. C. A. 475, 18 Am. Bankr. Rep. 674; In re Hudson Clothing Co., 148 Fed. 305, 17 Am. Bankr. Rep. 826; In re Mendenhall, 9 N. B. R. 497, Fed. Cas. No. 9,425.

[24] James v. Atlantic Delaine Co., 11 N. B. R. 390, Fed. Cas. No. 7,179.

[25] Buffalo Milling Co. v. Lewisburg Dairy Co., 159 Fed. 319, 20 Am. Bankr. Rep. 279; Jones v. Burnham, Williams & Co., 138 Fed. 986, 71 C. C. A. 240, 15 Am. Bankr. Rep. 85; In re Beckwith & Co. 130 Fed. 475, 12 Am. Bankr. Rep. 453.

[26] In re Beckwith & Co., 130 Fed. 475, 12 Am. Bankr. Rep. 453; In re Hudson Clothing Co., 148 Fed. 305, 17 Am. Bankr. Rep. 826.

certained from the whole evidence and the circumstances in the case.[27] "The existence of a partnership may be deduced from facts and circumstances, and does not have to be established by proof of an express agreement, either oral or written. Where two or more parties are engaged in a joint business enterprise, to which they contribute their capital, skill, or labor, upon an understanding, tacit or otherwise, that they will share in common the profits accruing therefrom, they are partners in fact and in law, both between themselves and as to creditors." [28]

When an issue is raised as to the persons who constitute a bankrupt partnership, the court of bankruptcy has power and jurisdiction to determine it.[29] A person who is not actually a member of the firm cannot properly be adjudged bankrupt in proceedings by or against the firm.[30] But the proceedings will not be rendered invalid as to the actual partners by the inclusion of persons who are not partners; but on the application of a person thus wrongfully included, the proceedings may be vacated so far as they relate to him,[31] unless, perhaps, in cases where there has been a slothful acquiescence in the proceedings for such a length of time that rights and interests of third persons have grown up under the adjudication and been adapted to it.[32] For the purposes of an adjudication in bankruptcy, participation in the profits of a business is presumptive or primary proof that the participator is a partner in such business, and in the absence of other proof, is sufficient evidence thereof; but such presumption may be overcome by showing that such profits were received by the party simply as wages for services performed, or interest for money loaned to the persons carrying on the business.[33] In an action by the trustee in bankruptcy of a partnership, the issue being as to whether all the persons composing the firm were included in the adjudication of bankruptcy, the trustee is not bound or concluded by the record of a prior judgment wherein the persons

[27] In re Hirth, 189 Fed. 926, 26 Am. Bankr. Rep. 666.

[28] In re Beckwith & Co., 130 Fed. 475, 12 Am. Bankr. Rep. 453.

[29] In re Griffith, 18 N. B. R. 510, Fed. Cas. No. 5,820.

[30] In re Berryman, 2 Hask. 293, Fed. Cas. No. 1,360.

[31] Hanson v. Paige, 3 Gray (Mass.) 239.

[32] In re Griffith, 18 N. B. R. 510, Fed. Cas. No. 5,820; In re Gilbert, Fed. Cas. No. 5,411.

[33] In re Francis, 2 Sawy. 286, 7 N. B. R. 359, Fed. Cas. No. 5,031; In re Kobre, 224 Fed. 104, 139 C. C. A. 660. Under Civ. Code S. Dak. § 1723, which provides that a partnership is the association of two or more persons for the purpose of carrying on business together and dividing its profits between them, a business conducted in the name of a bankrupt and his brother as partners, was not a partnership business, but the individual business of the bankrupt, where his brother had no capital invested and worked for a salary, and there was no agreement between them that he should share in either profits or losses. In re Gibson, 191 Fed. 665, 27 Am. Bankr. Rep. 401.

composing the firm were ascertained and determined, although he, in his private capacity, was a party to that judgment.[34]

The bankruptcy law is applicable not only to general partnerships, and to the rare instances of "universal partnerships," [35] but also to the case of what is sometimes called a "special" partnership, that is, a partnership formed for the single purpose of prosecuting some special adventure or enterprise.[36] But where two firms shared in a certain venture, and kept an account in a bank in the name of one firm with the addition of the word "Co.," and so signed the checks, it was held that these checks did not establish a copartnership between the two firms, and that a holder of a check so signed could not file a petition in bankruptcy against the members of both firms.[37] A judgment procured against three persons as partners may be proved against the estate of two, regarding the other as a surety, where the third has been held, in the bankruptcy proceedings, not a partner.[38]

§ 112. **Secret and Presumptive Partners.**—It is not essential to the validity of an adjudication in bankruptcy against a partnership that a secret or dormant partner should have been made a party defendant; where only the ostensible partners are served and proceeded against, this will at least bind the partnership property.[39] But a secret partner may be included in the adjudication under proper circumstances. Thus, where the petitioning creditors, at the time the indebtedness was incurred, knew that a person was a secret partner in a firm, and such partner is a guarantor on commercial paper of the firm, he may, although solvent, and having personally committed no acts of bankruptcy, be adjudged a bankrupt on a petition filed against him and his partners.[40] There is, however, a decision by a circuit court of appeals that a bankruptcy court, in proceedings against a partnership, has no jurisdiction to administer on the estate of an alleged secret partner without declaring him a bankrupt or finding him to be insolvent; that neither under the provision relating to examinations in bankruptcy nor independently of it, has the bankruptcy court any jurisdiction of a creditors' petition in proceedings against a firm to try the question of an alleged secret

[34] Abendroth v. Durant, 1 Fed. 849.

[35] See In re Culver, 176 Fed. 450, 23 Am. Bankr. Rep. 779.

[36] See Thrall v. Crampton, 9 Ben. 218, 16 N. B. R. 261, Fed. Cas. No. 14,008.

[37] In re Warner, 7 N. B. R. 47, Fed. Cas. No. 17,178.

[38] In re Kitzinger, 19 N. B. R. 152, Fed. Cas. No. 7,861.

[39] In re Gibson, 191 Fed. 665, 27 Am. Bankr. Rep. 401; In re Harris, 108 Fed. 517; Metcalf v. Officer, 5 Dill. 565, Fed. Cas. No. 9,496; In re Kenney, 97 Fed. 554, 3 Am. Bankr. Rep. 353; In re Lane, 2 Low. 333, 10 N. B. R. 135, Fed. Cas. No. 8,044. And see In re Samuels & Lesser, 207 Fed. 195, 30 Am. Bankr. Rep. 293.

[40] In re Ess, 3 Biss. 301, 7 N. B. R. 133, Fed. Cas. No. 4,530.

partner's membership in the firm against his will, or to compel him to file schedules of assets and liabilities; and that, if no petition in bankruptcy has been filed against him as an individual, and he asserts under oath that he is not a partner, he cannot be summarily adjudged such on an inquiry before a referee in bankruptcy to which he does not consent.[41] At any rate, it is necessary, to charge a person as a silent partner in the business of a bankrupt, so as to debar him from the rights of a creditor of the estate where there has been no holding out as such, an actual and definite agreement must be proved binding on all the parties thereto.[42] The trustee in bankruptcy of a dormant partner is not entitled to the possession of the partnership effects, as against attaching creditors of the partnership.[43] But on the other hand, where the adjudication in bankruptcy has been made against the ostensible partner, his trustee cannot be kept out of possession of property of the firm by one who claims title under a mortgage given by the secret partner.[44]

Although a person who is not actually a partner in a firm may incur liabilities by holding himself out to the world as a partner, or permitting this to be done, and may so found a claim against him on the part of those who are thereby induced to do business with the firm and become its creditors, this does not render him liable to be adjudged bankrupt as a partner in the firm. The law applies only to actual partners, not to those who may have incurred responsibilities to particular creditors on the principle of estoppel.[45] On the other hand, where a partner has retired from the firm, but permits his name to remain in the style of the firm and to be used for the benefit of the other partners, he is liable

[41] In re Samuels, 215 Fed. 845, 132 C. C. A. 187, reversing In re Samuels & Lesser (D. C.) 207 Fed. 195, 30 Am. Bankr. Rep. 293.

[42] In re Clark, 111 Fed. 893, 7 Am. Bankr. Rep. 96. This decision was reversed in Rush v. Lake, 122 Fed. 561, 58 C. C. A. 447, 10 Am. Bankr. Rep. 455, but on the evidence and not on the proposition of law laid down. And see In re Kaplan, 234 Fed. 866, 148 C. C. A. 464, 37 Am. Bankr. Rep. 104.

[43] Talcott v. Dudley, 5 Ill. (4 Scam.) 427.

[44] White v. Farnham, 99 Me. 100, 58 Atl. 425, 105 Am. St. Rep. 261.

[45] Moore v. Walton, 9 N. B. R. 402, Fed. Cas No. 9,779; In re Murray, 13 Fed. 530. In the case last cited, there was a petition in bankruptcy against a partnership conducting the business of private bankers. The question was as to the liability of certain of the respondents to be adjudged bankrupt with the rest. The court said that, even if, by failing publicly to disclaim a printed statement that they were directors of the bank, and by allowing their neighbors to believe that they were in some manner interested in the bank, the respondents would be estopped from denying their liability to those who trusted the bank in reliance upon their supposed connection with it, yet a resort to a court of bankruptcy would not be proper. For, to declare such parties bankrupt would render them liable not only to those actually deceived, but to all who had claims against the bank, whether they were deceived or not; and those who were actually deceived had a perfect remedy in the state courts. And see, supra, § 111.

to a person who takes notes of the new firm, or gives it credit, in ignorance of the dissolution and in reliance on the name of the retiring partner; and on the petition of such creditors for an adjudication of bankruptcy against the firm, the retiring partner will be made bankrupt with the others.[46] But "bankruptcy, like the death of a partner, dissolves the partnership, and as it is a public, notorious proceeding, all creditors are bound to take notice of it, and no further notice need be given. The publication of bankruptcy or insolvency proceedings is legal notice to all persons, by which they are bound." Consequently, where a member of a firm withdraws and subsequently becomes insolvent, and receives his discharge in insolvency (or bankruptcy), a creditor of the firm cannot maintain an action against him on a debt incurred by the firm subsequent to his insolvency, although, at the time of his withdrawal, no notice was given to the creditor, who was then also a creditor of the firm.[47]

§ 113. **Acts of Bankruptcy by Partners.**—In considering the commission of acts of bankruptcy on which an involuntary petition against a partnership may be founded, it is necessary to discriminate between the acts of the firm and the acts of the partners. Under the bankruptcy law, a partnership is so far a "person" or entity that it can commit an act of bankruptcy and be adjudged bankrupt, irrespective of any adjudication of the individual partners as bankrupts; and the act of the firm does not necessarily imply the concurrence of all the partners. Consequently, when an act of bankruptcy has been committed by an insolvent firm, as such, it may be made bankrupt on the petition of its creditors, although some of the partners have not committed, nor participated in committing, any act upon which they, as individuals, could be adjudged bankrupt. Thus, where the liquidating partner makes a general assignment of the firm's property for the benefit of its creditors, the other partner making no attempt to prevent such assignment, it is an act of bankruptcy upon which the firm as such may be adjudged bankrupt. Moreover, in such a case, the liquidating partner may also be adjudged bankrupt, as an individual, since the assignment tends to hinder, delay, and defraud his individual creditors. But no adjudication can be made against a partner who has not committed, nor participated in committing, any of the acts specified in the statute as acts of bankruptcy, although, if a petition is filed against the firm, he is within the

[46] In re Krueger, 2 Low. 66, 5 N. B. R. 439, Fed. Cas. No. 7,941. See also Lyon v. Johnson, 28 Conn. 1; Dickinson v. Dickinson, 25 Gratt. (Va.) 321.

[47] Eustis v. Bolles, 146 Mass. 413, 16 N. E. 286, 4 Am. St. Rep. 327.

jurisdiction of the court, and is a proper party to the proceedings and entitled to the rights of a party.[48] So also, where a petition in bankruptcy is filed by one member of a firm against the firm and his partners, it is involuntary in so far as it affects the non-consenting partners, and they cannot, as individuals, be adjudged bankrupts, unless it is alleged and shown that they personally have committed acts of bankruptcy within four months before the petition was filed.[49] Pursuing the distinction between the acts of the firm and of the partners one step further, it has been held that a conveyance by one partner of his individual property, although an act of bankruptcy as against him, will not sustain a proceeding in bankruptcy against the firm, even though such conveyance was made with intent to hinder, delay, or defraud firm creditors, or with a view to give a preference to a firm creditor. In such case, the proceedings must be against such partner alone, not against the firm.[50] But where the members of a firm jointly owning real estate convey or incumber the same, without consideration, in fraud of the creditors of the firm, such transaction is an act of bankruptcy by the firm.[51] And when a firm is insolvent, it is an act of bankruptcy for a member thereof to suffer the partnership property to be taken on legal process, with intent to prefer a creditor of the firm.[52] The taking of firm property, when the firm is insolvent, to pay a debt not a debt of the firm, is an act of bankruptcy, although each of the partners may be liable therefor.[53] A sale by one partner to his copartner when the firm is insolvent and on the eve of bankruptcy is presumptively fraudulent as to firm creditors, the effect of such transfer being to change the order of payment and prefer private creditors to partnership creditors, and the court should set it aside and distribute the property as firm property.[54] But the filing of a petition in bankruptcy by one partner against his copartners is not

[48] The foregoing principles were settled in the important case of Chemical Nat. Bank v. Meyer, 92 Fed. 896, 1 Am. Bankr. Rep. 565, affirmed on appeal in Re Meyer (C. C. A.) 98 Fed. 976, 3 Am. Bankr. Rep. 559. Compare Ex parte Galbraith, Fed. Cas. No. 5,187; Fisher v. Currier, Fed. Cas. No. 4,818. See In re Kobre (D. C.) 224 Fed. 106, 35 Am. Bankr. Rep. 389.

[49] In re J. M. Ceballos & Co., 161 Fed. 445, 20 Am. Bankr. Rep. 459.

[50] Hartman v. John Peters & Co., 146 Fed. 82, 17 Am. Bankr. Rep. 61; Mills v. J. H. Fisher & Co., 159 Fed. 897, 87 C. C. A. 77, 20 Am. Bankr. Rep. 237; In re Redmond, 9 N. B. R. 408, Fed. Cas. No. 11,632. But one member of a firm which is insolvent and without assets, who applies his whole separate estate to the payment of a creditor of the firm, thereby gives such creditor a preference over others of the same class, and commits an act of bankruptcy which may be made the basis of a petition against him individually. Mills v. J. H. Fisher & Co., supra.

[51] Lastrapes v. Blanc, 3 Woods, 134, Fed. Cas. No. 8,100.

[52] In re Black. 2 Ben. 196, 1 N. B. R. 353, Fed. Cas. No. 1,457.

[53] In re Matot, 16 N. B. R. 485, Fed. Cas. No. 9,282.

[54] In re Cook, 3 Biss. 122, Fed. Cas. No. 3,150; Collins v. Hood, 4 McLean, 186, Fed. Cas. No. 3,015.

an act of bankruptcy on the part of the firm.[55] And a written admission by one of the three partners composing a firm, that the firm is unable to pay its debts and is willing on that ground to be adjudged a bankrupt, is not an act of the partnership, and is therefore insufficient to support an adjudication against the opposition of the other partners.[56]

It should also be remarked that an assignment by a partnership for the benefit of its creditors, purporting to transfer all the property of the firm, is a "general" assignment, such as to constitute an act of bankruptcy by the firm and on which the firm may be adjudged bankrupt, although, considered as an assignment by the individual partners, it would be but partial, by reason of not including their separate property.[57] So, a voluntary assignment of all the property and assets of a firm operating a private bank constitutes an act of bankruptcy, though done by one of the partners and not participated in by the other.[58] And where a partnership and the individuals composing it make an assignment for the benefit of creditors, the act of bankruptcy is committed by all.[59]

§ 114. Same; Insolvency of Firm and of Partners.—Following out the "entity" doctrine of partnership under the bankruptcy law, some of the courts have held that, in so far as insolvency is necessary to constitute an act of bankruptcy and to warrant an adjudication, it is enough to allege and show the insolvency of the firm, without inquiry into the solvency of the individual partners.[60] But this doctrine is opposed to the weight of authority. It is more generally held that, insolvency being a necessary element of the particular act of bankruptcy charged, the firm cannot be adjudged bankrupt unless all its members are also shown to be insolvent, or that it is not enough to show that the assets of the firm, as such, are insufficient to pay its debts, if some or all of the partners, residing within the jurisdiction, are personally solvent.[61] In one

[55] In re J. M. Ceballos & Co., 161 Fed. 445, 20 Am. Bankr. Rep. 459.

[56] In re Wellesley (D. C.) 252 Fed. 854, 40 Am. Bankr. Rep. 597, 42 Am. Bankr. Rep. 412.

[57] In re Meyer (C. C. A.) 98 Fed. 976, 3 Am. Bankr. Rep. 559. And see Moss Nat. Bank v. Arend, 146 Fed. 351, 76 C. C. A. 629, 16 Am. Bankr. Rep. 867.

[58] Yungbluth v. Slipper (C. C. A.) 185 Fed. 773, 26 Am. Bankr. Rep. 265.

[59] Green River Deposit Bank v. Craig, 110 Fed. 137, 6 Am. Bankr. Rep. 381.

[60] In re Everybody's Grocery & Meat Market, 173 Fed. 492, 21 Am. Bankr. Rep. 925; In re McMurtrey & Smith, 142 Fed. 853, 15 Am. Bankr. Rep. 427; In re Bertenshaw, 157 Fed. 363, 19 Am. Bankr. Rep. 577; In re Solomon & Carvel, 163 Fed. 140, 20 Am. Bankr. Rep. 488; In re Morgan & Williams, 184 Fed. 938, 25 Am. Bankr. Rep. 861; Peterson v. Peregoy & Moore Co., 180 Iowa, 325, 163 N. W. 224.

[61] Vaccaro v. Security Bank, 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474; Tumlin v. Bryan, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960, 21 Am. Bankr. Rep. 319; In re Perlhefter, 177 Fed. 299, 25 Am. Bankr. Rep. 576; Washington Cotton Co. v. Morgan, 192 Fed. 310, 112 C. C. A. 568, 27 Am. Bankr. Rep. 638; In re Perley & Hays, 138 Fed. 927, 15 Am. Bankr. Rep. 54; Davis v. Stevens, 104 Fed. 235, 4 Am. Bankr. Rep. 763; Francis v. McNeal, 186 Fed. 481, 108 C. C. A. 459, 26 Am. Bankr. Rep. 555;

of the cases so holding it was said: "A partnership cannot be adjudged a bankrupt in an involuntary proceeding unless it has committed an act of bankruptcy. If the act charged be one involving insolvency, since every partner is liable in solido for all the partnership debts, the adjudication against the partnership must be based on allegations and proofs that the assets of its members, in excess of their individual debts, plus the assets of the partnership, are insufficient to pay the partnership debts. Otherwise there is no partnership insolvency, notwithstanding the entity doctrine. That doctrine furnishes a direct proceeding against the partnership as a legal entity, but it does not authorize an adjudication of bankruptcy against a partnership, where the act of bankruptcy charged is one involving insolvency, unless, as above stated, it is shown that there is an insufficiency of partnership and individual assets to pay the partnership debts. If a partnership is insolvent in the sense above explained, all the assets of the partnership and its members are needed for the proper winding up of the partnership affairs." [62]

§ 115. Involuntary Proceedings Against Firm.—It is not necessary that involuntary proceedings in bankruptcy against a firm should be instituted by its creditors. A court of bankruptcy has jurisdiction to adjudge a partnership bankrupt on the petition of one of its members and against the objection of the others.[63] But when involuntary proceedings are instituted against a partnership, all the partners must be joined as parties defendant. A firm cannot be adjudged bankrupt in a proceeding to which one of its members is not a party; and the petition cannot be amended by adding a new party after all the testimony has been taken and the case is on hearing before the court.[64] Further, an adjudication of bankruptcy against a firm must be made in one proceeding and on one petition. The adjudication of one member of a firm in one proceeding, and of the remaining member or members of it in a separate proceeding, with such effect as to bring the firm into bankruptcy, is a thing not contemplated by the statute.[65] For similar reasons, distinct firms, consisting of three persons, one of whom was a partner in both, cannot be joined in one proceeding, though one was the successor

affirmed, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706, 30 Am. Bankr. Rep. 244; Abbott v. Anderson, 265 Ill. 285, 106 N. E. 782, L. R. A. 1915F, 668, Ann. Cas. 1916A, 741; In re Samuels, 215 Fed. 845, 132 C. C. A. 187.

[62] Francis v. McNeal, 186 Fed. 481, 108 C. C. A. 459, 26 Am. Bankr. Rep. 555, affirmed, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706, 30 Am. Bankr. Rep. 244.

[63] In re J. M. Ceballos & Co., 161 Fed. 445, 20 Am. Bankr. Rep. 459.

[64] In re Pitt, 8 Ben. 389, 14 N. B. R. 59, Fed. Cas. No. 11,188.

[65] In re Plumb, 9 Ben. 279, 17 N. B. R. 76, Fed. Cas. No. 11,231. Compare In re Kelley, 19 N. B. R. 326, Fed. Cas. No. 7,656.

of the other and undertook to pay its debts.[66] When the requisite number of creditors join in a petition against a firm, it is not necessary that they should all be creditors of the partnership, if they are creditors of the partners.[67] In a petition in involuntary bankruptcy against a firm it is not sufficient merely to allege that "the partnership is insolvent," but there must also be an averment as to the insolvency of each of the partners.[68]

§ 116. Effect of Dissolution of Firm.—Although a partnership has been dissolved by mutual consent, yet if the members continue to treat each other as partners after the alleged dissolution, and to act as such in their business transactions with third parties, a petition in bankruptcy may be filed against the firm as if there had been no dissolution.[69] Further, under the act of 1867, it was held that a formal dissolution of a partnership would not prevent the bankruptcy court from taking jurisdiction of proceedings against the firm so long as any unfinished business, debts, credits, or assets remained.[70] This rule has been formally enacted in the present bankruptcy statute, which declares that a partnership may be adjudged bankrupt "during the continuance of the partnership business, or after its dissolution and before the final settlement thereof."[71] And the courts have decided that there can be no final settlement of the affairs of a firm until its debts are paid or in some other way extinguished; and consequently an adjudication may be made upon the voluntary petition of the partners, or in involuntary proceedings against them, when it appears that there are any firm debts remaining unsatisfied, although the assets of the firm have been entirely consumed, and although it has long since ceased to do business and has been dissolved by the partners.[72] But it has been held that the "continuance" of a partnership, within the meaning of the act, is its actual

[66] In re Wallace, 12 N. B. R. 191, Fed. Cas. No. 17,095.

[67] In re Matot, 16 N. B. R. 485, Fed. Cas. No. 9,282.

[68] In re Blair, 99 Fed. 76, 3 Am. Bankr. Rep. 588. And see, supra, § 114.

[69] In re McFarland, 10 N. B. R. 381, Fed. Cas. No. 8,788; In re Tomes, 19 N. B. R. 36, Fed. Cas. No. 14,084.

[70] In re Crockett, 2 Ben. 514, 2 N. B. R. 208, Fed. Cas. No. 3,402; In re Noonan, 3 Biss. 491, 10 N. B. R. 330, Fed. Cas. No. 10,292; In re Williams, 1 Low. 406, 3 N. B. R. 286, Fed. Cas. No. 17,703; Hunt v. Pooke, 5 N. B. R. 161, Fed. Cas. No. 6,896; In re Gorham, 9 Biss. 23, 18 N. B. R. 419, Fed. Cas. No. 5,624. Compare (under the act of 1841) Ex parte Hartz, Fed. Cas. No. 6,174.

[71] Bankruptcy Act 1898, § 5a. But a partnership cannot be adjudged bankrupt after its dissolution, even under § 5a of the Bankruptcy Act, so long as there is a solvent former partner. In re Young (D. C.) 223 Fed. 659, 35 Am. Bankr. Rep. 200.

[72] Holmes v. Baker & Hamilton, 160 Fed. 922, 20 Am. Bankr. Rep. 252; In re Hirsch, 97 Fed. 571, 3 Am. Bankr. Rep. 344; In re Levy, 95 Fed. 812; In re Webster, 2 Nat. Bankr. News, 54. Where an agreement that the accounts of a firm should be used to pay firm debts was not incorporated in a partnership dis-

status as a firm, as distinguished from a status created by estoppel against a partner, and it is therefore essential that the partnership should exist as such, or that its affairs should be still unsettled at the time of the filing of a petition, in order to subject it to adjudication. And further, although the affairs of a partnership are "unsettled," so as to subject it to adjudication, so long as the partnership debts are unpaid, yet debts which are binding on partners only by way of estoppel as to creditors without notice of dissolution, are not firm debts in this sense.[73]

§ 117. Dissolution of Firm by Death of Partner.—As to the power to make an adjudication of bankruptcy in the case of a partnership which has been dissolved by the death of one of its members, the authorities are not in agreement. Clearly, a court of bankruptcy can have no jurisdiction to adjudge a dead man bankrupt, nor to administer upon his estate, whether solvent or insolvent. And in at least one case it has been held that where one partner, on his voluntary petition, obtained an adjudication against a firm of which he had been a member, but which had been dissolved by the death of his copartner, the adjudication was void.[74] But the preponderance of judicial opinion appears to be that the surviving partner may file his petition, and that, if it is properly framed for that purpose, the court may adjudge him bankrupt both as an individual and also in his capacity as surviving partner; that the same decree may be made upon an involuntary petition, when the respondent has committed an act of bankruptcy in administering the partnership assets; and that, under such an adjudication, the court will have jurisdiction of the partnership property which remains in the hands of the surviving partner, as well as of his individual estate,[75] though it will not attempt to take from the custody and control of the executor of the deceased partner the individual estate of the latter, nor any of the partnership assets which may have been committed to the hands of

solution agreement, an outgoing partner is not entitled to enforce such provision as against partnership creditors in bankruptcy. In re Wilson, 194 Fed. 564, 27 Am. Bankr. Rep. 867.

[73] In re Pinson & Co., 180 Fed. 787, 24 Am. Bankr. Rep. 804.

[74] In re Temple, 4 Sawy. 92, 17 N. B. R. 345, Fed. Cas. No. 13,825. In this case, it was said: "Although partners are deemed to continue to be such quoad creditors, notwithstanding a formal dissolution inter sese, where there are joint assets and joint creditors, it has never been held that a partnership dissolved by the death of one of the members can be treated as still subsisting so as to be subject to the provisions of the bankruptcy law. The status of a deceased person cannot be passed upon by a bankruptcy court, nor has he any property the title to which can vest in an assignee appointed in a proceeding by or against the surviving partner."

[75] In re Coe, 157 Fed. 308, 19 Am. Bankr. Rep. 618; In re Stevens, 1 Sawy. 397, 5 N. B. R. 112, Fed. Cas. No. 13,393; Briswalter v. Long, 7 Sawy. 74, 14 Fed. 153. Contra, In re Evans, 161 Fed. 590, 20 Am. Bankr. Rep. 406.

such executor for administration.[76] Though a deceased partner's interest in a partnership claim vests in the surviving partner, it does not pass to the latter's trustee in bankruptcy, so that the surviving partner can maintain an action thereon in his own name.[77] But a surviving partner, after the adjudication, has no power to consent to an allowance to the widow and children of the deceased partner out of the assets of the firm prior to the payment of the firm debts.[78] And the trustee in bankruptcy of the surviving partner is not entitled, as against judgment creditors of the latter suing on firm obligations, to a surplus arising from a foreclosure against firm property.[79] Where a partner carries on business with the consent of the personal representatives of the deceased partner, upon the surviving partner being adjudged bankrupt, there is no priority of payment between debts contracted before, and those contracted after, the death of the partner.[80]

§ 118. Bankruptcy of Firm Without Adjudication of Any Partner. —It is clear beyond question, from the explicit terms of the present bankruptcy act, that a partnership, as such, may be adjudged bankrupt without any adjudication being made against any one of the members of the firm. But in such a case, is the jurisdiction of the court of bankruptcy restricted to the partnership property, or may it be extended to the individual estates of the partners? In case of an insufficiency of assets of the partnership, may the creditors work out their claims against the separate estates of the partners through the instrumentality of the trustee in bankruptcy of the firm, or are they left to their ordinary remedies at law? These questions are not yet fully settled. But there is a decision of the Supreme Court that an individual partner who has not been adjudged a bankrupt may be required to turn over his separate estate for administration to the trustee in bankruptcy of the firm, where the partnership and individual estates together are not enough

[76] In re Daggett, 8 N. B. R. 287, Fed. Cas. No. 3,535, affirmed, 3 Dill. 83, 8 N. B. R. 433, Fed. Cas. No. 3,536; French v. Grenet, 57 Tex. 273. But compare Hewitt v. Hayes, 204 Mass. 586, 90 N. E. 985, 27 L. R. A. (N. S.) 154, where it was held that the trustee in bankruptcy of a surviving partner may sue the executors of the deceased partner for whatever firm assets and property have come into their hands; and that, where the executors of a deceased partner acted individually under a power of attorney given by the surviving partner, and they deposited in a bank in their names, "for the benefit of whom it may concern," funds made up of cash on hand belonging to the firm and of sums belonging to the firm as proceeds of its property, or as commissions due to it, or otherwise, the trustee in bankruptcy of the surviving partner was entitled to the fund.

[77] McCandless v. Hadden, 9 B. Mon. (Ky.) 186.

[78] In re F. Dobert & Son, 165 Fed. 749, 21 Am. Bankr. Rep. 634.

[79] Moses v. Pond, 32 Misc. Rep. 406, 66 N. Y. Supp. 600.

[80] In re Mills, 11 N. B. R. 74, Fed. Cas. No. 9,611.

to pay the partnership debts, and especially where such partner has not objected that he should have been put into bankruptcy along with the firm.[81] Likewise, some of the inferior federal courts have held that the adjudication of a partnership as a bankrupt draws to the court of bankruptcy for administration the individual estates of the partners, although they, personally and individually, are not adjudged bankrupts, and that the court may compel any partner to transfer his individual property to the trustee.[82] Against these decisions may be placed a very able opinion of the circuit court of appeals in the eighth circuit, in which it was held that, in the case supposed, the court of bankruptcy has no jurisdiction to order the surrender of his separate property by a partner who has not been adjudged bankrupt and who is not shown to be insolvent.[83] To a certain extent, the latest decisions on the point attempt to reconcile these contrary views, in holding that the property of a solvent partner is not drawn into the administration, where only the firm is adjudged bankrupt, but that if the adjudication is based upon or involves the insolvency of the firm (which necessarily implies the insolvency of each of the partners as well), then even unadjudicated partners may be compelled to turn over their separate estates to the trustee. "In our opinion," says the circuit court of appeals in the third circuit, "the subdivisions of section 5 preceding subdivision 'h' mean that a partnership is a legal entity that may be adjudged a bankrupt, irrespective of an adjudication against any of its members; that it may be so adjudged either in a voluntary or an involuntary proceeding; that in an involuntary proceeding, where the act of bankruptcy charged does not involve insolvency of the partnership, and where there is an adjudication against the partnership only, probably nothing is involved but partnership assets; that in an involuntary proceeding, where the act of bankruptcy charged is one that does involve insolvency of the partnership, there can be no adjudication against the partnership unless it and all its members are insolvent; and that in such a case, though the adjudication be against the partnership only, or against the partnership

[81] Francis v. McNeal, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706, 30 Am. Bankr. Rep. 244, affirming 186 Fed. 481, 108 C. C. A. 459, 26 Am. Bankr. Rep. 555.

[82] Vaccaro v. Security Bank, 103 Fed. 436, 43 C. C. A. 279, 4 Am. Bankr. Rep. 474; Armstrong v. Fisher, 224 Fed. 97, 139 C. C. A. 653, 34 Am. Bankr. Rep. 701; In re Hansley & Adams (D. C.) 228 Fed. 564, 36 Am. Bankr. Rep. 1; Ft. Pitt Coal & Coke Co. v. Diser, 239 Fed. 443, 152 C. C. A. 321, 38 Am. Bankr. Rep. 566; In re Lattimer (D. C.) 174 Fed. 824, 23 Am. Bankr. Rep. 388; In re Stokes (D. C.) 106 Fed. 312, 6 Am. Bankr. Rep. 262.

[83] In re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577. But this decision was spoken of with disapproval by the Supreme Court in Francis v. McNeal, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706, 30 Am. Bankr. Rep. 244.

and some, but not all, of its members, the estates of all the members are drawn into the proceeding for administration." [84]

§ 119. **Voluntary Petition by One or More Partners.**—Under the bankruptcy act of 1841, it was held that a decree in bankruptcy could not be rendered against a firm on a voluntary application therefor, unless all the partners united in the petition.[85] But under the act of 1867, the rule prevailed that a partnership might be adjudged bankrupt on the voluntary petition of one or more of the partners,[86] provided that those who did not join in the petition were either formally made parties to the proceeding or given an opportunity to contest the adjudication, or assented to the decree of bankruptcy.[87] It was held, in fact, that the right of one partner to have the firm adjudged bankrupt was co-extensive with the right of the firm creditors or of another partner.[88] The present statute and the general orders in bankruptcy promulgated by the Supreme Court contemplate the adjudication of a partnership as such (not merely of the individual petitioner) upon a voluntary application by one or more members of the firm without the joinder of the rest. But it is provided that "any member of a partnership who refuses to join in a petition to have the partnership declared bankrupt shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to make by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made." [89]

[84] Francis v. McNeal, 186 Fed. 481, 108 C. C. A. 459, 26 Am. Bankr. Rep. 555, affirmed 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029; Menke v. Sunderman (C. C. A.) 186 Fed. 486.

[85] Ex parte Hartz, Fed. Cas. No. 6,174.

[86] In re Smith, 16 Fed. 465; In re Foster, 3 Ben. 386, 3 N. B. R. 236, Fed. Cas. No. 4,962; In re Mitchell, 3 N. B. R. 441, Fed. Cas. No. 9,656; In re Stowers, 1 Low. 528, Fed. Cas. No. 13,516.

[87] In re Lewis, 2 Ben. 96, 1 N. B. R. 239, Fed. Cas. No. 8,311; In re Crockett, 2 Ben. 514, 2 N. B. R. 208, Fed. Cas. No. 3,402; In re Moore, 5 Biss. 79, Fed. Cas. No. 9,750.

[88] In re Gorham, 9 Biss. 23, 18 N. B. R. 419, Fed. Cas. No. 5,624.

[89] General Order No. 8. And see In re

Hence it appears that, when some of the members of a partnership file their petition in bankruptcy asking for an adjudication against the firm, the other partners not joining, the proceeding is, in its inception, a voluntary proceeding in bankruptcy, and it will remain so in its entirety unless the other partners, on due notice, dissent from the petition and contest the adjudication, in which case the proceeding becomes, as to those partners, an involuntary one.[90] In consequence of the original voluntary nature of the proceeding, it is not necessary that the petitioning partner should allege acts of bankruptcy to have been committed by the firm, though the absence of such acts will be a defense to the partners who do not join.[91] And, as it is expressly provided in the general order, the dissenting partner may show that the firm is not insolvent.[92]

Where one of the partners files his petition in bankruptcy, with the object of obtaining a discharge from debts of the firm as well as his individual debts, the petition should set forth the names of the partners and pray for a discharge from partnership debts, the schedules should list both the petitioner's individual property and debts and the property and debts of the firm, notices to creditors should inform them that firm creditors are affected and that the bankrupt seeks a discharge from their debts, and notice of the filing of the petition and of creditors' meetings should be sent to the partners who have not joined.[93] Notice to the

Junck & Balthazard, 169 Fed. 481, 22 Am. Bankr. Rep. 298; In re Hansley & Adams (D. C.) 228 Fed. 564, 36 Am. Bankr. Rep. 1.

[90] In re Junck & Balthazard, 169 Fed. 481, 22 Am. Bankr. Rep. 298; In re Carleton, 131 Fed. 146, 12 Am. Bankr. Rep. 475; In re Murray, 96 Fed. 600, 3 Am. Bankr. Rep. 601. In the case last cited it was also held that where a petition in bankruptcy is filed by certain of the members of a partnership, praying an adjudication against the firm and averring that the partner who has not joined in the petition is not a resident of the district and that his residence is unknown to the petitioners, if the judge of the court of the bankruptcy is absent from the district, or the division of the district in which the petition is filed, at the time of its filing, the clerk should forthwith refer the case to the proper referee; but that if partners who did not join in the petition shall, upon notice, enter their appearance and contest the adjudication of the firm, the referee cannot act upon the petition (it being then an involuntary case), but must certify the case to the judge, before whom the issue will be heard and determined. See also In re Wilson, 2 Low. 453, 13 N. B. R. 253, Fed. Cas. No. 17,784. If the nonjoining partner afterwards comes in and confesses himself a bankrupt, and is so adjudged, it is a case of involuntary bankruptcy. Metsker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654.

[91] In re Junck & Balthazard, 169 Fed. 481, 22 Am. Bankr. Rep. 298; In re Noonan, 3 Biss. 491, 10 N. B. R. 330, Fed. Cas. No. 10,292. But compare In re Forbes, 128 Fed. 137, 11 Am. Bankr. Rep. 787.

[92] In re Fowler, 1 Low. 161, 1 N. B. R. 680, Fed. Cas. No. 4,998.

[93] In re Laughlin, 96 Fed. 589, 3 Am. Bankr. Rep. 1; In re Hartman, 96 Fed. 593, 3 Am. Bankr. Rep. 65. If the petition and schedule as originally filed do not conform to these requirements, they should be amended before an adjudication is made. If adjudication has already passed, it may be set aside, and

partners not joining is absolutely essential to any adjudication against the firm as such. No adjudication can be made until the non-joining members of the firm have had due notice of the filing of the petition and a proper opportunity to defend against the same; or, if an adjudication has been made without such notice, it will be vacated and set aside on motion.[94] If the partners who have not joined in the petition can be found, whether within the district or without it, personal service of such notice must be made upon them. But if personal service cannot be had, then, upon the filing of an affidavit showing the fact, the court will order publication of the notice in the same manner as in equity cases.[95]

A petition by a partner of a dissolved firm against his copartners will be dismissed where it appears that the firm was dissolved by judicial decree, and all its assets transferred to a receiver.[96] It should also be remarked that where one of the partners files his voluntary petition in bankruptcy, as an individual, and does not seek an adjudication against the firm nor a release from firm debts, the proceeding cannot be turned into a partnership proceeding by the voluntary joinder therein of the other partners.[97] And if the bankrupt lists only his individual

leave granted to the petitioner to amend, and thereupon an adjudication should be again entered and the case proceeded with de novo. Idem.

[94] In re Altman, 95 Fed. 263, 2 Am. Bankr. Rep. 407; In re Murray, 96 Fed. 600, 3 Am. Bankr. Rep. 601; In re Russel, 97 Fed. 32, 3 Am. Bankr. Rep. 91; In re Gorham, 9 Biss. 23, 18 N. B. R. 419, Fed. Cas. No. 5,624. Where certain of the members of a partnership file their voluntary petition in bankruptcy, asking for an adjudication of the firm, but the other partners do not join and are not notified of the proceedings, the defect is not cured by filing in court, after the adjudication, a paper purporting to embody the consent of the non-joining partners, but which is unverified, qualified in its terms, and signed only by their attorneys. In re Altman, 95 Fed. 263, 2 Am. Bankr. Rep. 407.

[95] In re Murray, 96 Fed. 600, 3 Am. Bankr. Rep. 601. Under the act of 1867, it was held that there was no jurisdiction over the firm, as such, if the non-joining partners did not reside or have their places of business within the judicial district, or if service of the notice was made upon such a partner beyond the territorial jurisdiction of the court. Isett v. Stuart, 80 Ill. 404, 22 Am. Bankr. Rep. 194, 16 N. B. R. 191; In re Martin, 6 Ben. 20, Fed. Cas. No. 9,150; In re Prankard, 1 N. B. R. 297, Fed. Cas. No. 11,366. But this objection is now met by the provision of the present act that "the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property." Bankruptcy Act 1898, § 5c. But a firm having failed more than eight years before a member thereof petitioned individually to be adjudged a bankrupt, and more than nine years before the other partner was cited, without any proof of bankruptcy, a rule on the latter to show cause why he and the partnership should not be adjudged bankrupt was held properly discharged. Royston v. Weis, 112 Fed. 962, 50 C. C. A. 638, 7 Am. Bankr. Rep. 584.

[96] In re Oehninger, 8 Ben. 487, Fed. Cas. No. 10,441; Hopkins v. Carpenter, 18 N. B. R. 339, Fed. Cas. No. 6,686. Compare In re Hathorn, 2 Woods, 37, Fed. Cas. No. 6,214.

[97] In re Boylan, 1 Ben. 266, 1 N. B. R. 2, Fed. Cas. No. 1,757. See In re Lewis,

debts and assets, and does not seek an adjudication of the partnership, nor cause notice to be given to his co-partners or to the creditors of the firm, the discharge which he may receive will not release him from partnership debts.[98] But a firm may be declared bankrupt although one of its members has already been adjudicated in involuntary proceedings against him by creditors,[99] and conversely, the fact that a partnership has been adjudicated bankrupt, and the partners have been denied a discharge in such proceedings, does not preclude one of the partners from filing an individual petition, although he schedules the same debts and the same assets.[100]

§ 120. Individual Bankruptcy of One or More Partners.—Since in the contemplation of the statute, a partnership is a distinct entity, its bankruptcy must be conditioned upon a petition specifically directed against it, alleging an act of bankruptcy in which it is expressly involved, and resulting in an adjudication against the partnership itself, irrespective of and in addition to any that may be made against the individual members, and even simultaneous proceedings against all the individual members of the firm do not necessarily bring the partnership itself into court so as to authorize an amendment calling for an adjudication against it.[101] And upon a petition in involuntary bankruptcy against one person as an individual, no adjudication can be made against other persons who were in partnership with him, even though the latter voluntarily come in and consent to be adjudged bankrupts. If such persons desire to take the benefit of the act, they must file their individual petitions, deposit the fees required, and proceed strictly according to law.[102] And although a voluntary petitioner in bankruptcy may be a member of a firm, he may apply for adjudication simply in his private capacity, and without seeking to bring the partnership into bankruptcy. But it is his duty in such a case to include in his schedule not merely his individual assets, but also his interest in the partner-

2 Ben. 96, 1 N. B. R. 239, Fed. Cas. No. 8,311. Where a petition in bankruptcy is signed in the firm name by a partner who has purchased the other partner's interest, it will be regarded as instituted by him individually doing business in the firm name. In re Baker & Edwards, (D. C.) 224 Fed. 611, 35 Am. Bankr. Rep. 469.

[98] In re Little, 2 Ben. 186, Fed. Cas. No. 8,390; In re Noonan, 3 Biss. 49, Fed. Cas. No. 10,292; Hudgins v. Lane, 2 Hughes, 361, Fed. Cas. No. 6,827; In re Plumb, 9 Ben. 279, Fed. Cas. No. 11,231.

[99] Hunt v. Pooke, 5 N. B. R. 161, Fed. Cas. No. 6,986.

[100] In re Feigenbaum, 151 Fed. 508, 7 Am. Bankr. Rep. 339.

[101] In re Mercur, 116 Fed. 655, 8 Am. Bankr. Rep. 275; affirmed, 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505; In re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 19 Am. Bankr. Rep. 577, and numerous cases cited. And see Lacey v. Cowan, 162 Ala. 546, 50 South. 281.

[102] Mahoney v. Ward, 100 Fed. 278, 3 Am. Bankr. Rep. 770; Lacey v. Cowan, 162 Ala. 546, 50 South. 281.

ship and its property, since even his private creditors may have an ultimate or reversionary right in the assets of the firm.[103] But the question arises whether a partner thus filing his individual petition, and not asking nor obtaining an adjudication of the firm, can receive a discharge which will release him from his responsibility for the debts of the partnership as well as from his private debts. The earlier cases generally held that this could not be done, although some of the judges saw no obstacle to the granting of such a discharge in cases where there were no partnership assets to be administered.[104] But the present statute provides a special rule for the administration of firm property in cases where one or more of the partners become bankrupt, without an adjudication against the others or against the firm. And in view of this rule, the modern cases appear to agree that if the bankrupt, being a member of a partnership which is not in bankruptcy, seeks a discharge from both individual and firm debts, the creditors of the firm may prove their debts against the bankrupt and cause his interest in the firm property to be subjected to the payment thereof; and if a proper foundation is laid in the pleadings and in the notices to creditors, the discharge granted to the bankrupt will release him from both classes of debts.[105] But where one member of a firm thus files his separate petition, with the object of obtaining a discharge from the debts of the firm as well as from his private obligations, the petition should set forth the names of the partners and pray for a discharge from partnership debts, the schedules should list both the petitioner's individual property and debts and the assets and debts of the firm, notices to creditors should

[103] In re Brick, 4 Fed. 804; Ex parte Norcross, Fed. Cas. No. 10,293. The firm property may be administered on the bankruptcy of the sole surviving partner, both individually and as sole surviving partner. In re Stringer, 253 Fed. 352, 165 C. C. A. 134, 41 Am. Bankr. Rep. 510.

[104] Hudgins v. Lane, 2 Hughes, 361, 11 N. B. R. 462, Fed. Cas. No. 6,827; In re Little, 2 Ben. 186, 1 N. B. R. 341, Fed. Cas. No. 8,390; In re Noonan, 3 Biss. 491, 10 N. B. R. 330, Fed. Cas. No. 10,292; In re Winkens, 2 N. B. R. 349, Fed. Cas. No. 17,875; In re Marks, Fed. Cas. No. 9,094; In re Abbe, 2 N. B. R. 75, Fed. Cas. No. 4; Crompton v. Conkling, 15 N. B. R. 417, Fed. Cas. No. 3,408; West Philadelphia Bank v. Gerry, 106 N. Y. 467, 13 N. E. 453. One of the later cases has held that partners are not entitled to a discharge in bankruptcy affecting the debts of the firm, when the partnership, as such, is not in bankruptcy, but only the individual partners on their separate voluntary petitions, and when there is evidence of the existence of firm assets not brought into the bankruptcy, or circumstances justifying the inference that there has been a fraudulent concealment of partnership assets. In re Meyers, 96 Fed. 408, 2 Am. Bankr. Rep. 707.

[105] In re Laughlin, 96 Fed. 589, 3 Am. Bankr. Rep. 1; In re McFaun, 96 Fed. 592, 3 Am. Bankr. Rep. 66; In re Hartman, 96 Fed. 593, 3 Am. Bankr. Rep. 65; In re Russel, 97 Fed. 32, 3 Am. Bankr. Rep. 91; In re Wilcox, 94 Fed. 84, 2 Am. Bankr. Rep. 117. See also In re Frear, 2 Ben. 467, 1 N. B. R. 660, Fed. Cas. No. 5,074.

inform them that firm creditors are affected and that the bankrupt seeks a discharge from their debts, and notice of the filing of the petition and of creditors' meetings should be sent to the other partners.[106] Failing compliance with these requirements, the petitioner's responsibility for the firm debts will not be affected, although, on a seasonable application by the bankrupt, the adjudication may be set aside, and leave granted him to file an amended petition, and thereupon an adjudication may again be entered and the case proceeded with de novo.[107]

The statutory rule for the distribution of assets as between individual and firm creditors—that partnership property goes to firm creditors, and separate property to individual creditors, and that only the surplus of either estate is available to creditors of the other class—applies not only to the case of the adjudication of the partnership as such, but also to the case where one member of the firm is adjudged bankrupt in his individual capacity; and creditors of the firm will not be entitled to receive dividends out of the bankrupt's separate estate until his individual creditors have been paid in full; and this rule prevails notwithstanding the fact that there are no partnership assets.[108]

Where a partnership is dissolved, and one of the partners sells his interest to his copartner, and the latter is adjudged a bankrupt, creditors of the firm may, as against the bankrupt's individual creditors, have the firm property applied to the payment of their debts in the settlement of the bankrupt's estate.[109]

§ 121. Effect of Adjudication of One or More Partners.—We have now to consider the effect on the firm and its assets of an adjudication

[106] In re Hartman, 96 Fed. 593, 3 Am. Bankr. Rep. 65; In re Russel, 97 Fed. 32, 3 Am. Bankr. Rep. 91; In re McFaun, 96 Fed. 592, 3 Am. Bankr. Rep. 66.

[107] In re McFaun, 96 Fed. 592, 3 Am. Bankr. Rep. 66.

[108] In re Wilcox, 94 Fed. 84, 2 Am. Bankr. Rep. 117; In re Morse, 13 N. B. R. 376, Fed. Cas. No. 9,854. Compare In re Goedde, 6 N. B. R. 295, Fed. Cas. No. 5,500. Where a partnership has been dissolved by decree of a state court, and its affairs wound up and all its assets distributed to its creditors, and no partner remains solvent, and afterwards one of the partners is adjudged bankrupt in his individual capacity, creditors of the firm who proved their claims and received the dividend in the state court, and who do not offer to surrender the same, are not entitled to participate in the distribution of the bankrupt's estate, as to the residue of their debts, until all his individual creditors have been paid in full. In re Mills, 95 Fed. 269, 2 Am. Bankr. Rep. 667. If one member of a firm is adjudged bankrupt, but not the other partners of the firm, a joint creditor may prove against the separate estate of the bankrupt. He cannot compete with the separate creditors in the distribution of separate assets, but he will receive dividends from any joint assets which the trustee may obtain, and from any surplus of the separate assets after the separate debts are paid. Wilkins v. Davis, 2 Low. 511, 15 N. B. R. 60, Fed. Cas. No. 17,664.

[109] In re Young (D. C.) 223 Fed. 659, 35 Am. Bankr. Rep. 200; In re Suprenant (D. C.) 217 Fed. 470, 33 Am. Bankr. Rep. 454. But compare In re Zartman (D. C.) 242 Fed. 595, 39 Am. Bankr. Rep. 544.

in bankruptcy passed against one or more of the partners individually, the firm itself not being in bankruptcy. And first, it is held that where all the members of a firm are adjudged bankrupts, but there has been no adjudication against the firm as such, the trustee appointed in the individual cases has no authority to reclaim or interfere with the assets of the firm, notwithstanding that all the cases were instituted at the same time by the same creditors, and the same trustee was appointed for all the partners.[110] But practical difficulties arise in the case of the bankruptcy of some, but not all, of the members of a firm, in view of the fact that the firm's surplus of assets over liabilities may constitute a secondary fund for the satisfaction of individual creditors of the bankrupts. It is the rule that the bankruptcy of one member of a firm will ipso facto dissolve the partnership.[111] And under the earlier bankruptcy laws it was generally held (following the English rule) that an adjudication against one partner, the firm itself not being in bankruptcy, would have the effect of making the trustee in bankruptcy of the bankrupt partner a joint owner or tenant in common of the partnership property with the remaining partners.[112] They must join as plaintiffs in any action for the recovery of partnership property,[113] and the trustee in bankruptcy alone could not maintain a suit to set aside a preference or to recover money or other property alleged to have been paid away or transferred in fraud of the creditors of the firm.[114] In this state of affairs, neither of the joint owners or tenants in common would be exclusively entitled to the possession and administration of the entire property of the partnership. Only one of the partners being adjudged bankrupt, his trustee would take only his private property and his interest in the assets of the firm, but would have no superior right to the control of the partnership estate for the purpose of ascertaining and segregating that interest.[115] On the other hand, the partner who

[110] In re Mercur, 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505, affirming 116 Fed. 655, 8 Am. Bankr. Rep. 275; Ludowici Roofing Tile Co. v. Pennsylvania Inst. for Instruction of the Blind, 116 Fed. 661, 8 Am. Bankr. Rep. 739; Oldmixon v. Severance, 119 App. Div. 821, 104 N. Y. Supp. 1042; American Steel & Wire Co. v. Coover, 27 Okl. 131, 111 Pac. 217, 30 L. R. A. (N. S.) 787.

[111] Wilkins v. Davis, 2 Low. 511, 15 N. B. R. 60, Fed. Cas. No. 17,664; Blackwell v. Claywell, 75 N. C. 213, 15 N. B. R. 300.

[112] Ayer v. Brastow, 5 Law Rep. 498, Fed. Cas. No. 682; Wilkins v. Davis, 2 Low. 511, 15 N. B. R. 60, Fed. Cas. No. 17,664; Forsaith v. Merritt, 1 Low. 336, 3 N. B. R. 48, Fed. Cas. No. 4,946; McNutt v. King, 59 Ala. 597; Halsey v. Norton, 45 Miss. 703, 7 Am. Rep. 745; Morgan v. Marquis, 9 Exch. 145. But the partnership effects in the possession of the bankrupt partner could be surrendered by him to his trustee. Judson v. Lathrop, 6 La. Ann. 587.

[113] Murray v. Murray, 5 Johns. Ch. (N. Y.) 60; Peel v. Ringgold, 6 Ark. 546.

[114] Amsinck v. Bean, 22 Wall. 395, 22 L. Ed. 801; Forsaith v. Merritt, 1 Low. 336, 3 N. B. R. 48, Fed. Cas. No. 4,946; Withrow v. Fowler, 7 N. B. R. 339, Fed. Cas. No. 17,919.

[115] Harrison v. Sterry, 5 Cranch, 289, 3 L. Ed. 104; Wright v. Nostrand, 94

was not bankrupt could not claim that he had the sole right to administer upon the entire estate of the firm, including the bankrupt partner's interest, even though he himself was solvent.[116] It was, however, decided by the courts that while each of the parties would primarily have the right to the possession and management of such of the joint property as he might happen to have, subject to account to the other, the court of bankruptcy had power to commit the administration of the entire partnership estate to either. If the partner who stood outside of the bankruptcy proceedings was solvent and responsible, it would generally be left to him to wind up the affairs of the firm and account for the interest of the bankrupt partner. But it might become necessary for the court of bankruptcy to take into its own hands the exclusive management and settlement of the joint assets, and forbid the other partner to intermeddle. Such action would be taken with caution, and only when it seemed absolutely necessary, as, for instance, where the remaining partner, though not adjudged a bankrupt, was insolvent or incompetent to liquidate the business of the firm.[117] Another course sometimes resorted to was to appoint a receiver, on the application of the trustee of the bankrupt partner, who should settle the affairs of the firm and account.[118] But it was held that there could be no recovery of property from the estate of a deceased partner who had not been adjudged bankrupt. This, it was said, would be "too great a stretch of the jurisdiction of the court." [119]

The present bankruptcy law cuts the knot of these difficulties by providing that "in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt." [120] This section applies to the case (and only to the case) where the partnership as such is not in bank-

N. Y. 31; In re Shepard, 3 Ben. 347, 3 N. B. R. 172, Fed. Cas. No. 12,754.

[116] In re Shanahan, 6 Biss. 39, Fed. Cas. No. 12,701; Hubbard v. Guild, 1 Duer (N. Y.) 662. Compare Ogden v. Arnot, 29 Hun (N. Y.) 146.

[117] Forsaith v. Merritt, 1 Low. 336, 3 N. B. R. 48, Fed. Cas. No. 4,946; Parker v. Muggridge, 2 Story, 334, Fed. Cas. No. 10,743; Wilkins v. Davis, 2 Low. 511, 15 N. B. R. 60, Fed. Cas. No. 17,664; Ayer v. Brastow, 5 Law Rep. 498, Fed. Cas. No. 682.

[118] Cory v. Clark, Fed. Cas. No. 3,260.

[119] In re Frazier, 2 Hughes, 293, Fed. Cas. No. 5,070.

[120] Bankruptcy Act 1898, § 5h. See Lacey v. Cowan, 162 Ala. 546, 50 South. 281; Williams v. Lane, 158 Cal. 39, 109 Pac. 873; Marnet Oil & Gas Co. v. Staley, 218 Fed. 45, 133 C. C. A. 108, 33 Am. Bankr. Rep. 266; H. C. Denny & Co. v. Lee (Tex. Com. App.) 221 S. W. 947.

ruptcy, and one or more of the partners have also escaped adjudication or have not been petitioned against, while another or others of the firm have been adjudged bankrupt in their individual capacities.[121] That it cannot apply to a case where the partnership itself is in bankruptcy is shown by the words "the partnership property shall not be administered in bankruptcy," which would lead to evidently absurd results if the firm as such had been included in the adjudication. Moreover, it plainly means that both the partner who remains outside the bankruptcy proceedings and the firm itself should be solvent, that is, that the assets of the firm plus the unadjudged partner's surplus of assets over liabilities should at least equal the liabilities of the firm. For otherwise there would be nothing for that partner to account for, as the "interest of the partner or partners adjudged bankrupt," upon his settlement of the partnership business. And in fact, where the total assets of the partners and of the firm are insufficient to pay the partnership debts, it would be the proper course to render an adjudication of bankruptcy against both the firm and the individual partners, though one of them may be personally solvent.[122]

It has been ruled under this section that the court of bankruptcy has power to require the non-bankrupt partner either to consent to the administration of the partnership property in bankruptcy or to proceed himself to settle the partnership business with expedition.[123] And in the same case it was decided that where such partner had become insane and therefore could not speak or act in the bankruptcy proceedings, he could do so through a guardian appointed for him by the court of bankruptcy, and by such guardian might give consent to the administration of the partnership property in bankruptcy. But it is said that this provision of the statute does not apply to a case where the infancy of the partner not adjudged bankrupt was the only ground for dismissing the petition in bankruptcy as to him. In such a case, the firm, as a firm, may be adjudged bankrupt, and its whole property administered in the bankruptcy proceedings, though there can be no adjudication against the infant partner.[124]

Where the non-bankrupt partner elects to wind up the affairs of the firm, he cannot be interfered with by the trustee of the bankrupt

[121] Francis v. McNeal, 186 Fed. 481, 108 C. C. A. 459, 26 Am. Bankr. Rep. 555, affirmed 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029; In re Junck & Balthazard, 169 Fed. 481, 22 Am. Bankr. Rep. 298; Armstrong v. Fisher, 224 Fed. 97, 139 C. C. A. 653, 34 Am. Bankr. Rep. 701.

[122] Yungbluth v. Slipper (C. C. A.) 185 Fed. 773, 26 Am. Bankr. Rep. 265.

[123] In re O'Brian, 2 Nat. Bankr. News, 312, per Moss, Referee.

[124] In re Dunnigan, 95 Fed. 428, 2 Am. Bankr. Rep. 628; In re Duguid, 100 Fed. 274, 3 Am. Bankr. Rep. 794.

partner. Such trustee has no right to sue for or take possession of any of the assets of the firm.[125] But the liquidating partner is not entirely free from the supervision of the court of bankruptcy. At least he is bound to report to the court the residuum of assets remaining to be distributed by the court among the partnership creditors, if not to report the details of his settlement of the firm's affairs,[126] and, when he has completed the settlement of the firm's affairs, to pay over the share of the bankrupt partner to his trustee.[127]

§ 122. **Continuing or Liquidating Partner.**—When a partnership is dissolved by mutual consent, and all its property is transferred to one of the partners, who proposes to continue the business and who assumes the payment of the firm debts, the assets of the partnership become the separate estate of the continuing partner, provided the transfer was made in good faith and for consideration, and will be so treated on his bankruptcy.[128] And since, under such an arrangement, he becomes individually responsible for the debts, the partnership creditors may, at their option, prove their claims as separate creditors of such partner and share pari passu with his individual creditors.[129] But they are not compelled to do so as against their own interest. And if the equities of the case require it, the law will still distinguish partnership assets and debts from the assets and debts of the individual bankrupt, and require the application of property belonging to the firm at the time of its dissolution to the satisfaction of debts existing against it at that time, and the application of the separate estate of the bankrupt partner to the payment of his individual debts, leaving only the surplus of either estate available to creditors of the other class.[130] Moreover, the terms

[125] Burke v. Rollinson, 23 R. I. 177, 49 Atl. 694; Lane v. Tanner, 156 Cal. 135, 103 Pac. 846. An intervening trustee in bankruptcy was held not entitled to a fund garnisheed, where it appeared that the fund was obtained from the assets of the partnership, which had not been adjudicated a bankrupt, and not from the assets of the bankrupt partner. Foot, Schulze & Co. v. Porter, 131 Minn. 224, 154 N. W. 1078.

[126] Dycus v. Brown, 135 Ky. 140, 121 S. W. 1010, 28 L. R. A. (N. S.) 190; In re Junck & Balthazard, 169 Fed. 481, 22 Am. Bankr. Rep. 298.

[127] Mills v. J. H. Fisher & Co., 159 Fed. 897, 87 C. C. A. 77, 20 Am. Bankr. Rep. 237.

[128] In re Long, 7 Ben. 141, 9 N. B. R. 227, Fed. Cas. No. 8,476; In re Collier, 12 N. B. R. 266, Fed. Cas. No. 3,002; In re Montgomery, 3 Ben. 565, 3 N. B. R. 429, Fed. Cas. No. 9,727. But see In re Morse, 13 N. B. R. 376, Fed. Cas. No. 9,854.

[129] In re Lloyd, 22 Fed. 88; In re Long, 7 Ben. 141, 9 N. B. R. 227, Fed. Cas. No. 8,476; In re Rice, 9 N. B. R. 373, Fed. Cas. No. 11,750.

[130] In re Denning, 114 Fed. 219, 8 Am. Bankr. Rep. 133; In re Filmar, 177 Fed. 170, 100 C. C. A. 632, 24 Am. Bankr. Rep. 194; Oxley v. Willis, 1 Cranch, C. C. 436, Fed. Cas. No. 10,639; In re Young (D. C.) 223 Fed. 659, 35 Am. Bankr. Rep. 200; In re Suprenant (D. C.) 217 Fed. 470, 33 Am. Bankr. Rep. 454. Compare In re Zartman (D. C.) 242 Fed. 595, 39 Am. Bankr. Rep. 544.

of the dissolution agreement may set apart particular items of the firm's property for the payment of particular creditors, and such an appropriation (if not voidable as a preference) will be respected and enforced in the bankruptcy proceedings against the liquidating partner. But it must have been effected by such an assignment or other form of transfer as would take the property out of the hands of the parties, or else it must have been incorporated in the written agreement for the dissolution of the firm. A mere oral agreement of the partners at the time of dissolution will not suffice.[131]

It should be remarked that the conveyance of the firm assets to a continuing partner may amount to a fraudulent preference as against the firm creditors. This will depend upon the motives of the parties and the circumstances of the particular case. If such transfer constitutes a preference, it may be set aside by the filing of a petition in bankruptcy within four months thereafter. But where the continuing partner has assumed the joint debts, the firm creditors may assent to the conveyance, after petition, and they will then be entitled to come in with the individual creditors upon the separate estate of the bankrupt partner.[132] Where the liquidating partner of an insolvent firm makes a general assignment of the firm's property for the benefit of its creditors, it is an act of bankruptcy upon which such partner, as an individual, may be adjudged bankrupt, being a conveyance or transfer of a portion of his property with intent to hinder, delay, or defraud his individual creditors.[133]

With regard to the position of the retiring partner, it may be observed that he is liable to be drawn into the bankruptcy proceeding if creditors insist upon it. For the express terms of the statute permit an adjudication against a partnership "after its dissolution and before the final settlement thereof."[134] But the retiring partner will not ordinarily be adjudged bankrupt on the petition of the continuing partner, at least where the latter has assumed the joint debts and given bond for their payment, and the creditors do not desire such an adjudication.[135] But on the other hand, the retiring partner cannot interfere and claim the administration of the firm's property. It is true the statute provides for the case where one partner is adjudged bankrupt and the other not, and directs that, in such a case, the partnership property

131 In re Wilson, 194 Fed. 564, 27 Am. Bankr. Rep. 867.

132 In re Johnson, 2 Low. 129, Fed. Cas. No. 7,369.

133 In re Meyer, 98 Fed. 976, 39 C. C. A. 368, 3 Am. Bankr. Rep. 559, affirming Chemical Nat. Bank v. Meyer, 92 Fed. 896, 1 Am. Bankr. Rep. 565.

134 Bankruptcy Act 1898, § 5a. And see supra, § 116.

135 In re Bennett, 2 Low. 400, 12 N. B. R. 181, Fed. Cas. No. 1,314.

shall not be administered in bankruptcy without the consent of the non-bankrupt partner, but that the latter shall settle the partnership business and account for the interest of the bankrupt partner. (§ 5h.) But this provision is not applicable to the case of the bankruptcy of a liquidating partner.[136] Generally, the retiring partner occupies the position of a surety; and he cannot make proof for the difference between the amount of the firm debts and the dividend which the firm assets will pay, when he has not actually paid any part of such difference.[137] But assets withdrawn by the retiring partner are subject to the payment of the firm debts, where the remaining assets are insufficient, and may be reached for the benefit of the creditors.[138]

§ 123. **Distribution of Estate.**—The bankruptcy act provides that "the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."[139] This statute is in affirmance of a rule which has always prevailed in English and American bankruptcy law—that partnership assets are for partnership creditors and individual property for separate creditors, and that individual creditors cannot receive anything out of the firm assets until partnership creditors have been paid in full, and conversely that creditors of the partnership cannot share in the assets of either of the partners until his individual creditors have received the full amount of their claims.[140] It is even said that, under the express

[136] In re Denning, 114 Fed. 219, 8 Am. Bankr. Rep. 133.

[137] In re Phelps, 9 Ben. 286, 17 N. B. R. 144, Fed. Cas. No. 11,070.

[138] In re Sauthoff, 8 Biss. 35, 16 N. B. R. 181, Fed. Cas. No. 12,380; In re Pease, 13 N. B. R. 168, Fed. Cas. No. 10,881.

[139] Bankruptcy Act 1898, § 5f.

[140] In re Mills, 95 Fed. 269, 2 Am. Bankr. Rep. 667; Collins v. Hood, 4 McLean, 186, Fed. Cas. No. 3,015; In re Williams, Fed. Cas. No. 17,702; In re Warren, 2 Ware, 322, Fed. Cas. No. 17,191; In re Ingalls, 5 Law Rep. 401, Fed. Cas. No. 7,032; In re Byrne, 1 N. B. R. 464, Fed. Cas. No. 2,270; In re Wiley, 4 Biss. 214, Fed. Cas. No. 17,656; In re Smith, 13 N. B. R. 500, Fed. Cas. No. 12,987; In re Estes, 3 Fed. 134, 6 Sawy. 459; In re Hollister, 3 Fed. 452; In re Lloyd, 22 Fed. 90; In re Wilcox, 94 Fed. 84, 2 Am. Bankr. Rep. 117; In re Jones, 2 Nat. Bankr. News, 193; In re Bates, 104 Fed. 263; Murray v. Murray, 5 Johns. Ch. (N. Y.) 60; New York Inst. for Instruction of Deaf and Dumb v. Crockett, 117 App. Div. 269, 102 N. Y. Supp. 412; Gray v. Brunold, 140 Cal. 615, 74 Pac. 303; Ex parte Cook, 2 P. Wms. 500. And see Hiscock v. Varick Bank, 206 U. S. 28, 27 Sup. Ct. 681, 51

provisions of the bankruptcy law, partnership creditors have an equitable lien upon partnership property for the payment of the partnership debts.[141] But the fact that partnership creditors have reduced their claims to judgments in a state court against both the partnership and the individual members of it does not give them the right to primary participation in the distribution of the assets of the individual partners.[142] But the holder of a firm's notes indorsed by one of the partners is entitled to have them paid out of the partner's individual estate, unless the indorsement was given to effect a preference.[143] Where members of a partnership operated at different times under different firm names and under their individual names, creditors have no right of preference in bankruptcy because of the use of a particular name in their particular transaction.[144] And any scheme or device resorted to by persons contemplating bankruptcy for the purpose of charging partnership assets with individual debts is in violation of the act and will be frustrated by the court.[145] Of course the other part of the rule is equally respected. The firm creditors cannot compete with separate creditors in the distribution of individual assets, unless there should be a surplus. But a partnership debt on which a bankrupt partner remains liable is none the less provable against his estate because there may be no surplus of his individual assets over his separate debts. The provability of a debt depends on the nature of the liability, not on the existence or the prospect of assets for its satisfaction.[146]

It will be noticed that the law directs that a surplus remaining after paying the partnership creditors shall be divided between the individual estates of the partners, for distribution to their separate creditors, "in the proportion of their respective interests in the partnership." But this applies only to a surplus. In the primary distribution partnership assets must be applied to partnership debts, without reference to any

L. Ed. 945, 18 Am. Bankr. Rep. 1; In re Wood, 248 Fed. 246, 160 C. C. A. 324, 40 Am. Bankr. Rep. 810; International Agr. Corp. v. Cary, 240 Fed. 101, 153 C. C. A. 137, 38 Am. Bankr. Rep. 753; Schall v. Camors, 250 Fed. 6, 162 C. C. A. 178, 10 A. L. R. 846, 41 Am. Bankr. Rep. 76; Lansing Liquidation Corp. v. Heinze, 184 App. Div. 129, 171 N. Y. Supp. 738.

[141] In re Abrams, 193 Fed. 271.

[142] Cutler Hardware Co. v. Hacker, 238 Fed. 146, 151 C. C. A. 222, 38 Am. Bankr. Rep. 488, affirming In re F. J. Hacker & Co. (D. C.) 225 Fed. 869, 35 Am. Bankr. Rep. 647.

[143] In re Frazer (D. C.) 221 Fed. 83, 34 Am. Bankr. Rep. 467.

[144] In re W. S. Kuhn & Co. (D. C.) 241 Fed. 935, 39 Am. Bankr. Rep. 823.

[145] In re Jones (D. C.) 100 Fed. 781, 4 Am. Bankr. Rep. 141; but see Stringer v. Stevenson, 240 Fed. 892, 153 C. C. A. 578, 39 Am. Bankr. Rep. 170, holding that the priority of firm creditors depends on the existence of the partner's lien, and if the partners consent that the firm assets shall become the individual property of one partner, the priority of firm creditors is gone.

[146] In re Bates, 100 Fed. 263, 4 Am. Bankr. Rep. 56.

disproportion between the interests of the individual partners therein.[147] The general rule of distribution applies to all creditors without distinction. Thus, where the United States holds claims against the individual members of a firm, it is not entitled to priority of payment out of the partnership assets, but only out of the individual estates.[148] Satisfaction of his claim as it stood at the date of the adjudication, or of proof made, is all that a creditor of either class can claim before creditors of the other class shall be admitted to share with him. For example, where the separate estate of one of the partners is more than sufficient to pay his individual debts, but the partnership assets are not sufficient for firm creditors, the separate creditors are not entitled, as against the joint creditors, to receive interest on their debts for the period subsequent to the adjudication.[149] Where a bankrupt partner is a member of two firms, one of which also in bankruptcy, the assets of that firm should be applied to the payment of the firm debts, and any surplus of the individual assets that may remain, after paying the individual debts in full, distributed pro rata among the creditors of both firms.[150] Where the bankrupt is a partnership, the members or some of the members of which are themselves partnerships, the creditors of such a constituent firm are entitled to have their debts first paid out of its assets, before creditors of the bankrupt partnership may participate therein.[151]

This general rule of distribution as between individual and firm creditors is subject to one important exception in the English practice, which was quite generally recognized in this country until recently, namely, that if there are no partnership assets and no solvent partner, both partnership and separate debts may be proved against the separate estates of the partners, and those estates will be divided pro rata among all the creditors so proving, both firm and individual creditors, without preference or discrimination.[152] This exception rests upon the principle

[147] In re Lowe, 11 N. B. R. 221, Fed. Cas. No. 8,564.

[148] In re Webb, 2 N. B. R. 614, Fed. Cas. No. 17,313.

[149] In re Chandler, 184 Fed. 887, 25 Am. Bankr. Rep. 865; In re Berrian, 6 Ben. 297, 44 How. Pr. 216, Fed. Cas. No. 1,351.

[150] In re Dunkerson, 12 N. B. R. 391, Fed. Cas. No. 4,159. See In re Vetterlein, 44 Fed. 57.

[151] Bank of Reidsville v. Burton, 259 Fed. 218, 43 Am. Bankr. Rep. 374.

[152] In re Green, 116 Fed. 118, 8 Am. Bankr. Rep. 553; In re Keller, 109 Fed. 118, 6 Am. Bankr. Rep. 334; Conrader v. Cohen, 121 Fed. 801, 58 C. C. A. 249, 9 Am. Bankr. Rep. 619; In re Conrader, 118 Fed. 676, 9 Am. Bankr. Rep. 85; In re West, 39 Fed. 203; In re Lloyd, 22 Fed. 88; In re Litchfield, 5 Fed. 47; In re Slocum, Fed. Cas. No. 12,950; In re Jewett, 1 N. B. R. 491, Fed. Cas. No. 7,304; In re Knight, 2 Biss. 518, Fed. Cas. No. 7,880; In re Gray (D. C.) 208 Fed. 959, 31 Am. Bankr. Rep. 146. The general rule and its exception are not limited to the case where there has been an adjudication in bankruptcy against the firm. Both the rule and the exception apply where the individual partners have been adjudged bankrupts on

that partnership debts are both joint and several, and that there is no marshalling of assets unless there is a joint as well as a several fund before the court. But the Supreme Court of the United States, upon a comparison and consideration of all the clauses of the present bankruptcy law relating to partnerships, has refused to recognize such an exception. It holds that the lack of any partnership assets and of any solvent partner does not alter the rule that a creditor of an individual partner in a bankrupt firm is entitled to be paid out of that partner's individual estate, to the exclusion, if necessary, of the creditors of the firm.[153] The cases admitting the exception to the rule hold that, where firm creditors claim the right to share with individual creditors in the individual estate, on the ground that there was no partnership property, the test of available assets of the firm is whether, at the time of the filing of the petition in bankruptcy, there was an available fund to pay firm creditors; and neglect by firm creditors to avail themselves of such fund then existing whereby it has been dissipated or lost to them, does not enlarge their equity against the individual estate, although in fact they have received nothing on their debts.[154] If in fact there is any joint fund, however small, and even though it was purposely created by separate creditors by purchasing worthless partnership assets, still firm creditors cannot prove against the separate estate in competition with the separate creditors.[155] But if the joint estate has all been expended in payment of costs, it is considered that partnership creditors may share pari passu with the individual creditors.[156] But this exception would not apply where there were originally partnership assets, which would have been applicable to the payment of firm debts, but which have been totally expended by the trustee in a vain and fruitless attempt to realize more.[157] And even if there are no actual assets of the firm, still a firm creditor cannot share in the separate property of a bankrupt partner, in competition with his individual creditors, while there remains a member of the firm who is solvent and not in bank-

petitions against them individually. In re Litchfield, 5 Fed. 47. Compare In re Downing, 1 Dill. 33, Fed. Cas. No. 4,044; Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513; In re Pease, Fed. Cas. No. 10,881.

153 Farmers' & Mechanics' Nat. Bank of Philadelphia v. Ridge Avenue Bank, 240 U. S. 498, 36 Sup. Ct. 461, 60 L. Ed. 767, L. R. A. 1917A, 135, 36 Am. Bankr. Rep. 728. And see In re Hull (D. C.) 224 Fed. 796, 34 Am. Bankr. Rep. 447; In re Wilcox (D. C.) 94 Fed. 84, 2 Am. Bankr. Rep. 117; Euclid Nat. Bank v. Union Trust & Deposit Co., 149 Fed. 975, 79 C. C. A. 485, 17 Am. Bankr. Rep. 834; In re Henderson (D. C.) 142 Fed. 588, 16 Am. Bankr. Rep. 91; In re Janes, 133 Fed. 912, 67 C. C. A. 216, 13 Am. Bankr. Rep. 341.

154 In re Litchfield, 5 Fed. 47.

155 In re Marwick, 2 Ware, 233, Fed. Cas. No. 9,181.

156 In re McEwen, 6 Biss. 294, 12 N. B. R. 11, Fed. Cas. No. 8,783; In re Slocum, Fed. Cas. No. 12,950.

157 In re Blumer, 12 Fed. 489.

ruptcy. For it is obvious that firm creditors, in their power to hold the solvent partner responsible for the debts of the firm, have an advantage over the separate creditors of the bankrupt partner which should preclude rivalry between them.[158] On the other hand, if one member of the firm, though thrown into bankruptcy with the rest, owes no private debts, his individual assets are to be distributed among the partnership creditors.[159]

§ 124. **Marshaling Assets.**—The bankruptcy act provides (section 5 g) that the court may "marshal the assets of the partnership estate and the individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates." This grant of jurisdiction is probably to be taken in a somewhat wider sense than the rule already laid down in the statute, that partnership assets are for partnership creditors and individual assets for separate creditors, and in a somewhat wider sense, also, than the ordinary equity rule which prevails between two creditors one of whom has recourse to only one fund while the other may come upon two funds, since one of the specific objects of the grant of authority is to "prevent preferences," as well as to secure the "equitable distribution of the property." It has been held that where there are both partnership creditors and individual creditors, a partnership creditor, who has a lien on both the partnership and the individual assets, will be required to exhaust the funds of the partnership estate before resorting to the individual fund.[160] But under the act of 1867, the cases generally agreed in holding that a creditor of a firm, holding security from one partner, might prove against the joint estate without surrendering or selling his security or applying its value on the claim.[161] And a lien acquired before bankruptcy, by execution on the individual property of a member of the bankrupt firm, under a judgment against the firm, will not yield to the equities of the separate creditors of such partner.[162] As an example of the application of the present statute, may be cited a case in which it appeared that one of the members of a firm, who was indebted to a relative on his individual note, long overdue, caused the note to be indorsed

[158] In re Dunham, 1 Hask. 495, Fed. Cas. No. 4,144.

[159] In re Leavitt, 1 Hask. 194, Fed. Cas. No. 8,169.

[160] In re Lewis, 2 Hughes, 320, 8 N. B. R. 546, Fed. Cas. No. 8,313; In re May, 17 N. B. R. 192, Fed. Cas. No. 9,327.

[161] In re Holbrook, 2 Low. 259, Fed. Cas. No. 6,588; In re Thomas, 8 Biss. 139, 17 N. B. R. 54, Fed. Cas. No. 13,886. But a note given by the firm as an accommodation to a partner, to enable him to raise his share of the firm's capital, may be proved against the firm, but securities pledged by the individual partner must first be applied to its payment. In re Norris, 2 Hask. 19, Fed. Cas. No. 10,302.

[162] In re Sandusky, 17 N. B. R. 452, Fed. Cas. No. 12,308.

in the name of the firm, no new consideration moving to the firm. The partnership was then financially embarrassed, as the creditor knew, and within four months thereafter became bankrupt on its voluntary application. The firm had assets, but neither partner had any separate estate. It was held that the transaction was a fraudulent attempt to prefer the holder of the note over other creditors, by converting the individual debt of the maker into a partnership obligation, and that the court of bankruptcy, under its power to marshal the assets of the bankrupts, should not allow the proof of the note as a claim against the joint estate.[163] So, where the actions of partners, in connection with the transfer by one of his interest in the firm to the other, are fraudulent and constitute acts of bankruptcy upon which both partners and the firm are adjudged bankrupt, the property will be marshaled, as between firm and individual creditors, as though no transfer had been made.[164] Where the members of a bankrupt partnership were a natural person and another partnership, which was also insolvent, in the marshaling of assets in the bankruptcy proceedings the constituent partnership is to be treated as an individual partner, and its assets applied first to the payment of its own creditors.[165]

§ 125. **Partnership Assets.**—In the application of the general rule of distribution,—that partnership assets are for partnership creditors and individual assets for separate creditors,—questions sometimes arise as to whether particular property belongs to the firm or to the partners, and whether particular debts are due by the partnership or by a member thereof. While these questions must generally be determined by the circumstances of each case, a few general principles may here be laid down. In the first place, it is a rule that any particular property which is contributed by one of the partners to the capital of the firm, which thereupon passes out of his individual ownership and control and into the control and possession of the firm, becomes a part of the assets of the firm upon its supervening bankruptcy. This rule has been applied in a case where the property in question was a seat in a stock exchange.[166] And the rule applies even in cases where all the capital was in fact contributed by one of the partners alone.[167] In the next place, real estate, purchased

[163] In re Jones, 100 Fed. 781, 4 Am. Bankr. Rep. 141.

[164] In re Shapiro, 106 Fed. 495, 5 Am. Bankr. Rep. 839.

[165] In re Knowlton & Co. (C. C. A.) 202 Fed. 480, 29 Am. Bankr. Rep. 729, affirming 196 Fed. 837, 28 Am. Bankr. Rep. 140.

[166] In re Hurlbutt, 135 Fed. 504, 68 C. C. A. 216, 13 Am. Bankr. Rep. 50; In re Stringer, 253 Fed. 352, 165 C. C. A. 134, 41 Am. Bankr. Rep. 510.

[167] Buckingham v. First Nat. Bank, 131 Fed. 192, 65 C. C. A. 498, 12 Am. Bankr. Rep. 465.

with partnership funds and used by the firm in its business, and constituting a part of its capital, though the legal title may stand in the name of one or more of the partners, is to be treated as personalty so far as to be charged with the debts of the firm in the first instance; that is, it is assets in bankruptcy for the creditors of the firm, not for the separate creditors.[168] Even where a creditor has obtained a judgment against those members of the firm in whose name the legal title stands, he will have no prior lien thereon.[169] Again, if one of the partners has fraudulently converted to his own use property or money of the firm, or taken the funds of the firm for the purchase of property in his own name, it remains partnership assets and may, under the equitable powers of the court, be subjected to the payment of the debts of the firm.[170] So where property of an insolvent firm is sold within a month of the commencement of the proceedings in bankruptcy, and the proceeds divided, and one partner, with his share, purchases property, it will be regarded as partnership assets.[171] Where the same partners, under different firm names carry on the same business at two different places, the assets of both nominal firms are equally applicable to the payment of all the creditors of both.[172]

§ 126. **Individual Assets.**—The "separate estate" of a member of a firm, or his "individual estate," within the meaning of the bankruptcy act, is that in which such partner is separately interested at the time of the bankruptcy. The term can only be applied to such property as belonged to one or more of the partners to the exclusion of the others.[173]

[168] In re Groetzinger, 127 Fed. 814, 62 C. C. A. 494, 11 Am. Bankr. Rep. 723; In re Farmer, 18 N. B. R. 207, Fed. Cas. No. 4,650; In re Lawrence, 5 Fed. 349. Real estate owned and held by a firm as partnership property and brought into the firm stock is not converted absolutely and for all purposes. It is to be treated as personalty in so far as may be necessary to secure the payment of the firm debts and advances made by the partners respectively, but for every other purpose it remains real estate. Hence a judgment against the firm for a partnership debt is a lien on partnership real estate, and in the bankruptcy of the firm, if such judgment is valid and not voidable under the act, the judgment creditor is entitled to enforce his lien against such realty, and the trustee in bankruptcy, as representing the unsecured creditors of the firm, cannot claim the land on the theory of its conversion into personalty. In re Codding, 9 Fed. 849. The nature of the title to real estate held by partners cannot be changed to the prejudice of the rights of separate creditors by their classification thereof in their schedule. In re Zug, 16 N. B. R. 280, Fed. Cas. No. 18,222.

[169] Marrett v. Murphy, 11 N. B. R. 131, Fed. Cas. No. 9,103.

[170] In re Hamilton, 1 Fed. 800; Patrick v. Central Bank, 1 Dill. 303, Fed. Cas. No. 10,803.

[171] In re Melvin, 17 N. B. R. 543, Fed. Cas. No. 9,406.

[172] In re Williams, 3 Woods, 493, Fed. Cas. No. 17,707.

[173] In re Lowe, 11 N. B. R. 221, Fed. Cas. No. 8,564. Policies insuring the life of one member of a bankrupt partnership, and payable to himself or his legal representatives (or in one case, to his wife and children if they should outlive him), and which have been individ-

But where property once belonging to a partnership has, by a bona fide contract, ceased to be partnership property, and become the separate property of one of the partners who afterwards becomes bankrupt, the partnership creditors are not entitled to any preference over the bankrupt's individual creditors in relation to such property.[174] And so, where a partner sues for a dissolution of the firm, and bankruptcy proceedings are begun against the firm, the amount claimed by such partner on dissolution is his individual property, which will pass to the trustee for the payment of his separate debts.[175] But on the bankruptcy of a person who is, actually and in fact, the sole owner of a business, although it was conducted in the name of himself and another as partners, the property and assets of such business will pass to his trustee as his individual property without regard to any liability of the ostensible partner to the creditors.[176]

§ 127. **Partnership Debts and Claims.**—It is necessary to discriminate carefully between debts due by a partnership, as such, and debts due by the partners jointly or individually. For instance, a claim founded on a note or bond signed by the individual members of a firm, but not given for a firm debt, is not entitled, as against partnership creditors, to be paid out of the assets of the firm in bankruptcy; for though it is a joint debt, it is not a partnership debt.[177] But if notes are given for liabilities of the partnership, they constitute debts of the firm, though not

ually pledged by him, do not belong to the partnership estate, although the firm may have pledged the policies in connection with his separate individual pledge. Hiscock v. Varick Bank, 200 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945, 18 Am. Bankr. Rep. 1.

[174] In re Wiley, 4 Biss. 214, Fed. Cas. No. 17,656; Crane v. Morrison, Sawy. 138, 17 N. B. R. 393, Fed. Cas. No. 3,355; In re Zartman (D. C.) 242 Fed. 595, 39 Am. Bankr. Rep. 544. But compare In re Young (D. C.) 223 Fed. 659, 35 Am. Bankr. Rep. 200; In re Suprenant (D. C.) 217 Fed. 470, 33 Am. Bankr. Rep. 454.

[175] In re Clark, 4 Ben. 88, 3 N. B. R. 491, Fed. Cas. No. 2,798.

[176] In re Gibson, 191 Fed. 665, 27 Am. Bankr. Rep. 401.

[177] In re L. B. Weisenberg & Co., 131 Fed. 517, 12 Am. Bankr. Rep. 417; In re Webb, 2 N. B. R. 614, Fed. Cas. No. 17,313; In re Nims, 16 Blatchf. 439, Fed. Cas. No. 10,269; In re Roddin, 6 Biss. 377, Fed. Cas. No. 11,989; In re Nashville Laundry Co. (D. C.) 240 Fed. 795, 39 Am. Bankr. Rep. 22. "It is not certain that a promise by a partnership and a promise by the individual partners collectively have the same effect. If a firm be composed of two persons associated for the conduct of a particular branch of business, it can hardly be maintained that the joint contract of two partners, made in their individual names respectively, on a matter that has no connection with the firm business, creates a liability of the firm as such. The partnership is a distinct thing from the partners themselves, and it would seem that the debts of the firm are different in character from other joint debts of the partners. If it is not so, the rule that sets apart the property of a partnership exclusively in the first instance for the payment of its debts may be of little value. That rule presumes that a partnership debt was incurred for the benefit of the partnership, and that its property consists, in whole or in part, of what has been obtained from its creditors. The reason of the rule fails when a debt or liability has not been incurred by the firm as such, even though all the

signed by the firm name, but as the joint and several notes of the partners, and notwithstanding the individual liability of the partners thereon.[178] And notwithstanding some difference of opinion, the decided weight of authority is to the effect that a note made jointly by all the members of a firm, strictly in the course of the partnership business, and for a consideration passing to the firm, is to be treated as the debt of the firm, though not signed in the firm name, and not as the debt of the individual partners.[179] And so, where property has been wrongfully converted by a partnership and inures to the benefit of the firm, and the owner, waiving the tort, seeks to recover the value of the property as on an implied contract, his claim is against the firm, and not against any individual partner.[180] But there must be something to show that the debt in question is properly chargeable to the firm, rather than to the partners jointly, or that the firm had the benefit of the transaction out of which it arose. A note signed by the members of the firm as individuals, with nothing on its face to indicate that it was given for a partnership debt, is presumptively the debt of the individuals, and cannot be proved as a claim against the estate of the partnership in bankruptcy to share with firm creditors.[181] And the real nature of the transaction relating to a note given by a bankrupt firm may be shown, to determine whether the debt is one provable against the firm or the individual partners, notwithstanding the failure to enter the transaction at large on the books of the creditor.[182] It is also important to consider whether the consideration for the obligation passed directly to the firm, or through the agency of the partners.

persons who compose the firm may be the parties to the contract." Forsyth v. Woods, 11 Wall. 484, 20 L. Ed. 207.

[178] In re Mosier, 112 Fed. 138, 7 Am. Bankr. Rep. 268; Frederick v. Citizens' Nat. Bank, 251 Fed. 667, 145 C. C. A. 553, 37 Am. Bankr. Rep. 22.

[179] In re L. B. Weisenberg & Co., 131 Fed. 517, 12 Am. Bankr. Rep. 417, citing In re Warren, 2 Ware, 322, Fed. Cas. No. 17,191; In re Thomas, 8 Biss. 139, 17 N. B. R. 54, Fed. Cas. No. 13,886; Davis v. Turner, 120 Fed. 605, 56 C. C. A. 669, 9 Am. Bankr. Rep. 704. There are some authorities to the contrary, as, for instance, In re Bucyrus Machine Co., 5 N. B. R. 303, Fed. Cas. No. 2,100; In re Holbrook, 2 Low. 259, Fed. Cas. No. 6,588; In re Herrick, 13 N. B. R. 312, Fed. Cas. No. 6,420; Strause v. Hooper, 105 Fed. 590, 5 Am. Bankr. Rep. 255; In re Jones, 116 Fed. 431, 8 Am. Bankr. Rep. 626. But it was pointed out in the Weisenberg Case that at least two of the foregoing cases (In re Holbrook and In re Herrick) may be distinguished by the fact that the note there in question was also signed by other persons, not members of the firm, as sureties, and was the joint and several note of all and not the joint note of less than all.

[180] Reynolds v. New York Trust Co., 188 Fed. 611, 110 C. C. A. 409, 26 Am. Bankr. Rep. 695.

[181] In re Jones, 116 Fed. 431, 8 Am. Bankr. Rep. 626.

[182] In re Stevens, 104 Fed. 323, 5 Am. Bankr. Rep. 9. The right of one who advanced securities, to assist a partnership, to prove the claim against the firm is not affected by the fact that the loan was entered on the firm's books as a loan to one of the partners and not to the firm. In re Stringer (D. C.) 234 Fed. 454, 37 Am. Bankr. Rep. 713. But see this case on appeal, Stringer v. Stevenson, 240 Fed. 892, 153 C. C. A. 578, 39 Am. Bankr. Rep. 170.

Thus, in one case, it appeared that a bank made a loan of money to each of the two members of a firm, taking in each case a note signed by both partners. The proceeds were passed to the individual accounts of the partners respectively, but they thereupon, by their checks, transferred the money to the partnership account and it was used in the firm's business. But it was held that the notes did not constitute debts of the firm provable against its estate in bankruptcy, because it had received the money from the partners and not from the bank.[183] But a firm note separately indorsed by one of the partners is a firm obligation, whether the indorser's liability has become fixed or not, and cannot be made the basis of a claim against his estate in bankruptcy as an individual debt.[184] The mortgagee in a chattel mortgage of a stock of goods cannot prove his claim against a partnership formed after the making of the mortgage and before its maturity.[185] And an agreement between two traders to unite their stocks in trade as the capital of a partnership to be formed between them, and to convert the separate business debts of either into joint debts of the firm, will not entitle a separate creditor who has not acceded in any way to the arrangement before the bankruptcy of the firm to prove his claim as a joint creditor of the firm against the partnership estate.[186] A bank holding a draft drawn by one firm and accepted by another, where both are adjudged bankrupts, cannot share with the individual creditors in the separate assets of one who was a partner in both firms.[187] Proof of a debt in the case of a bankrupt firm should show with reasonable certainty whether it was contracted by the firm or the individual partners; and proof against the partnership should not be joined with proof of a debt against an individual partner.[188]

§ 128. **Separate Debts of Partners.**—Where a member of a firm gives his individual note, bond, or mortgage (not executed in the name of the firm nor by the other partner), to secure an existing creditor of the firm, or to secure the future payment of the price of goods purchased for the firm's stock in trade, it is his separate debt, and the creditor cannot come upon the partnership assets in competition with partnership creditors.[189] So, where a creditor of a firm, holding its promissory note

[183] In re L. B. Weisenberg & Co., 131 Fed. 517, 12 Am. Bankr. Rep. 417.

[184] Lamoille County Nat. Bank v. Stevens' Estate, 107 Fed. 245, 6 Am. Bankr. Rep. 164; In re Speer Bros., 144 Fed. 910, 16 Am. Bankr. Rep. 524.

[185] In re Forbes, 5 Biss. 510, Fed. Cas. No. 4,922. See In re Van Buren, 2 Fed. 647.

[186] In re Isaacs, 3 Sawy. 35, 6 N. B. R. 92, Fed. Cas. No. 7,093. But compare In re Sickman & Glenn, 155 Fed. 508, 19 Am. Bankr. Rep. 232.

[187] In re Dunkerson, 4 Biss. 277, Fed. Cas. No. 4,158.

[188] In re Walton, Deady, 510, Fed. Cas. No. 17,129.

[189] In re Forse, 184 Fed. 85, 25 Am. Bankr. Rep. 843; In re Stevens, 104 Fed. 323, 5 Am. Bankr. Rep. 9; In re Dobson,

for money loaned, surrendered the same and accepted in lieu thereof the individual note of a member of the firm for the same amount, the assumption of the debt by that partner being part of the consideration for the purchase of an interest in the firm for her son-in-law, and the latter note was twice renewed and was finally reduced to a judgment against the maker and within four months thereafter the partnership and its members became bankrupt, it was held that the debt was that of the individual partner, not of the firm, notwithstanding the fact that the interest on the new note had always been paid by the firm.[190] Again, an indebtedness contracted by a member of a partnership individually, before the partnership was formed, cannot be converted into a firm obligation by its entry as such on the books without the creditor's knowledge, or by making payments thereon by checks of the firm.[191] So, where one member of a firm gives a note signed in the firm name, but in fraud of his copartners and for his private benefit, or even, as some of the cases hold, without the consent of the other partners, the firm being insolvent, and the transaction not being in any way for the benefit of the firm, it does not create a debt provable against the assets of the partnership,[192] except in the hands of a bona fide holder for value, who has no knowledge or notice of the fraud or want of authority, or of any intended misapplication of the proceeds.[193] It has even been held that a mortgage given by one partner on partnership property, although with the consent of his copartner, cannot be enforced as against firm creditors in bankruptcy,[194] at least where given to secure his individual debt. So, a note given by the bankrupt firm to a member for his contribution to the capital stock, and by him turned over to his wife, who furnished the money, is evidence only of the individual debt of such member, and not provable against the firm.[195] On the other hand, where, after the failure of a firm and while they were endeavoring to settle with their creditors, one partner, at the request of the holder of a firm obligation, guaranties

2 Nat. Bankr. News, 514; In re Linforth, 87 Fed. 386.

[190] In re Lehigh Lumber Co., 101 Fed. 216, 4 Am. Bankr. Rep. 221.

[191] Hibberd v. McGill, 129 Fed. 590, 64 C. C. A. 158, 12 Am. Bankr. Rep. 101.

[192] First Nat. Bank v. State Nat. Bank, 131 Fed. 422, 65 C. C. A. 406, 12 Am. Bankr. Rep. 429; In re Forsyth, 7 N. B. R. 174, Fed. Cas. No. 4,948; In re Golder, 2 Hask. 28, Fed. Cas. No. 5,510; In re Irving, 17 N. B. R. 22, Fed. Cas. No. 7,074. A partner cannot bind the firm by notes given in the firm name in renewal of his individual notes, and the burden rests upon the creditor seeking to prove the same against the partnership estate in bankruptcy to show that the other partner knew of the transaction and assented thereto. In re McIntire, 132 Fed. 295, 12 Am. Bankr. Rep. 787.

[193] In re White, 183 Fed. 310, 105 C. C. A. 522, 25 Am. Bankr. Rep. 541; Bush v. Crawford, 9 Phila. 392, 7 N. B. R. 299, Fed. Cas. No. 2,224; In re Dunkle, 7 N. B. R. 107, Fed. Cas. No. 4,161.

[194] In re Blanchard, 161 Fed. 793, 20 Am. Bankr. Rep. 417.

[195] In re Frost, 3 N. B. R. 736, Fed. Cas. No. 5,135.

its payment, such guaranty is without legal effect and does not entitle that creditor to prove against the separate estate of the guarantor upon a subsequent adjudication of bankruptcy.[196] A judgment against partners and others jointly is a several claim as against the bankrupt partners, and cannot receive a dividend from the joint estate.[197] But a creditor holding a claim against the partners jointly, which is not a firm debt, may file separate proofs of the same claim to its full amount against each of the members of the firm.[198] In one case, where a firm, failing without assets, resumed business under the name of one of its members as "agent," and again failed, it was held that the debts contracted under the former name were not entitled to share in the assets of the second failure.[199] In some states, by a peculiarity of the local law, taxes assessed against a firm are individual liabilities of the several partners, and where this is the case they may be proved against the separate estates in bankruptcy.[200]

§ 129. **Joint and Several Liability; Double Proof.**—There are some instances in which a creditor will be entitled to prove his claim against both the bankrupt partnership and the several members of the firm, and to receive dividends from both sources until satisfaction. Thus, a creditor who holds commercial paper made by the bankrupt firm and indorsed by an individual member of the firm, also a bankrupt, may prove his debt against both estates and share in the dividends of each. For he would have a right of action against each, though entitled to only one satisfaction.[201] This rule is of course subject to modification

196 In re Blumer, 13 Fed. 622.

197 In re Herrick, 13 N. B. R. 312, Fed. Cas. No. 6,420. A debt founded on a judgment against the two members of a firm jointly, in a suit on a partnership note, does not entitle the creditor to dividends out of the separate estate of each member of the firm, on an equal footing with the separate creditors of each member. In re Berrian, 6 Ben. 297, Fed. Cas. No. 1,351.

198 In re Beers, 5 N. B. R. 211, Fed. Cas. No. 1,229.

199 In re Nims, 16 Blatchf. 439, Fed. Cas. No. 10,269. And see In re Cobb's Consol. Cos. (D. C.) 233 Fed. 458, 36 Am. Bankr. Rep. 812.

200 In re Green, 116 Fed. 118, 8 Am. Bankr. Rep. 553.

201 Buckingham v. First Nat. Bank. 131 Fed. 192, 65 C. C. A. 498, 12 Am. Bankr. Rep. 465; Bank of Reidsville v. Burton, 259 Fed. 218, 170 C. C. A. 286. In re McCoy, 150 Fed. 106, 80 C. C. A. 60, 17 Am. Bankr. Rep. 760; In re Thomas, 8 Biss. 139, 17 N. B. R. 54, Fed. Cas. No. 13,886; Emery v. Canal Nat. Bank, 3 Cliff. 507, 7 N. B. R. 217, Fed. Cas. No. 4,446; In re Bigelow, 3 Ben. 146, 2 N. B. R. 371, Fed. Cas. No. 1,397; In re Howard, 4 N. B. R. 571, Fed. Cas. No. 6,750; Stephenson v. Jackson, 2 Hughes, 204, 9 N. B. R. 255, Fed. Cas. No. 13,374; In re Farnum, 6 Law Rep. 21, Fed. Cas. No. 4,674; In re Bradley, 2 Biss. 515, Fed. Cas. No. 1,772. Where a firm composed of three persons gave, in settlement of part of a debt due to one creditor, the note of the copartnership with the indorsement of one of the partners, and, for other parts of it, severally, three notes, each made by one of the partners and indorsed by the others, and the firm was adjudged bankrupt, and the creditor proved his debt against the makers alone of the four notes, it was held that he was

in cases where either the making of the note or its indorsement would constitute a fraudulent preference under the bankruptcy act,[202] and its operation may in some instances be restrained by the principle of the marshalling of assets, discussed in a preceding section.[203] But generally speaking, a joint and several obligation given by a partnership is also provable as an individual obligation against the estate of either of the parties.[204] A joint and several note, given for money borrowed by a firm and signed in the firm name, with other names following, may be proved against the joint assets of the firm; but not one which is signed individually by certain of the partners and by others as sureties.[205] On similar principles, where one member of a firm, with the knowledge and assent of his copartners, misappropriates trust funds (as, the money of an estate of which he is executor, or the money of a corporation of which he is the treasurer or agent) and invests the same in the business of the firm, the obligation thus created is both joint and several; and proof of the claim may be made against the partnership as well as against the individual partner.[206] A parallel rule applies to the case of a liability to the United States, incurred by a fraudulent undervaluation of goods entered at the custom house; the claim of the government against the firm for the tort is joint and several and may be proved against both estates.[207] And in general, and notwithstanding some vigorous dissent, the rule may be said to be fairly well established that the commission of a tort by a partnership makes the partners also jointly and severally liable, and the party injured may prove his claim both against the estate of the firm in bankruptcy and against the sep-

entitled to dividends according to such proofs out of the several estates, joint or separate, against which the proofs were made. Mead v. Nat. Bank of Fayetteville, 6 Blatchf. 180, 2 N. B. R. 173, Fed. Cas. No. 9,366.

[202] In re Jones, 2 Nat. Bankr. News, 193.

[203] Supra, § 124. If a creditor having a firm note indorsed by one partner, and holding property of that partner as security, obtains payment by a sale of the security after the commencement of the proceedings in bankruptcy, the separate creditors are entitled to receive from the joint fund a sum equal to the dividend on the note. In re Foot, 8 Ben. 228, 12 N. B. R. 337, Fed. Cas. No. 4,906.

[204] In re Biehl (D. C.) 237 Fed. 720, 38 Am. Bankr. Rep. 150; Ex parte Miller, Fed. Cas. No. 9,550. A creditor who has proved a joint and several claim against the bankrupt members of a firm separately, and not against the firm, is entitled to dividends out of the several assets of the individual partners. In re Bigelow, 3 Ben. 146, 2 N. B. R. 371, Fed. Cas. No. 1,397.

[205] In re Holbrook, 2 Low. 259, Fed. Cas. No. 6,588; Robinson v. Seaboard Nat. Bank of New York, 247 Fed. 667, 159 C. C. A. 569, 10 A. L. R. 842, 41 Am. Bankr. Rep. 263; In re W. S. Kuhn & Co. (D. C.) 241 Fed. 935; Anderson v. Stayton State Bank, 82 Or. 357, 159 Pac. 1033.

[206] In re Baxter, 18 N. B. R. 62, Fed. Cas. No. 1,119; In re Tesson, 9 N. B. R. 378, Fed. Cas. No. 13,844; In re Jordan, 2 Fed. 319.

[207] In re Vetterlein, 20 Fed. 109.

arate estates of the partners.[208] But merely because proofs of individual claims for fraud against bankrupt partners have established the responsibility of each partner for the fraud, so that they are liable in solido, not only as partners, but individually, it does not follow that the unliquidated, unprovable claims in tort for the fraud are provable both against the individual partners and against the firm as claims in quasi contract or equitable debt, the basis of such a liability being unjust enrichment, where the facts show that no benefit accrued to the individuals as a result of the fraud beyond what accrued to the firm.[209]

§ 130. Claims of Partners Inter Sese and Against the Firm.—It is provided by the present bankruptcy act that "the court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa." [210] In respect to the allowance of such claims, the authorities under the act of 1867 were not entirely clear. It appears to have been settled that if a member of an insolvent partnership fraudulently misappropriated the funds of the firm, for the purpose of paying off his private debts, the trustee in bankruptcy of the firm would be entitled to recover the amount so diverted or prove a claim therefor against the estate of that partner.[211] But some of the authorities maintained that no such proof could be made for money withdrawn from the assets of the firm by one of the partners, if this was done without fraud against his copartners, or with their consent or privity.[212] On the other hand, there were decisions that money advanced by a firm to one of its members beyond his share of the capital was a separate debt of the firm against such member, and that the trustee of the firm might prove it;[213] and that the claim of a firm against one of its bankrupt members, who acted as treasurer under the articles of copartnership,

[208] In re Parkers, 19 Q. B. Div. 84; Blyth v. Fladgate, L. R. Ch. Div. (1891) 337; In re Blackford, 35 App. Div. 330, 54 N. Y. Supp. 972; In re Baxter, 18 N. B. R. 62, Fed. Cas. No. 1,119; In re Jordan, 2 Fed. 319; In re Coe, 169 Fed. 1002, 22 Am. Bankr. Rep. 384. The last-cited case was affirmed on appeal, In re Coe, 183 Fed. 745, 106 C. C. A. 181, 26 Am. Bankr. Rep. 352.

[209] Schall v. Camors, 251 U. S. 239, 40 Sup. Ct. 135, 64 L. Ed. 247, 45 Am. Bankr. Rep. 599. And see Reynolds v. New York Trust Co., 188 Fed. 611, 110 C. C. A. 409, 39 L. R. A. (N. S.) 391, 26 Am. Bankr. Rep. 698.

[210] Bankruptcy Act 1898, § 5g. In at least one case under the act of 1867, it was held that, when all the partners are in bankruptcy, the separate estate of one partner could not claim against the joint estate of the partnership in competition with the joint creditors, nor the joint estate against the separate estate in competition with the separate creditors. In re Lloyd, 22 Fed. 90.

[211] Brecher v. Fox, 1 McCrary, 48, 1 Fed. 273; Ryan v. Cavanagh (D. C.) 238 Fed. 604, 39 Am. Bankr. Rep. 44.

[212] In re May, 19 N. B. R. 101, Fed. Cas. No. 9,328; In re Lane, 2 Low. 333, 10 N. B. R. 135, Fed. Cas. No. 8,044; In re McEwen, 6 Biss. 294, 12 N. B. R. 11, Fed. Cas. No. 8,783.

[213] In re McLean, 15 N. B. R. 333, Fed. Cas. No. 8,879.

might be proved against his separate estate.[214] Under the present statute, providing that the court "may" permit the proof of such a claim, the question of its allowance would appear to rest always in the sound discretion of the court, to be determined on equitable principles, and by the application of a just and fair judgment to the circumstances of the particular case. But it is held that, while the trustee of a partnership estate may prove a claim against the individual estate of one partner, such claim is not entitled to payment pro rata with the claims of individual creditors, but only from the surplus, if any, remaining after the individual claims have been paid.[215]

The converse case—that of a claim by one of the partners against the firm—is chiefly met with in instances where one of the partners has made advances of goods or money to the firm or used his private means in paying off the debts of the insolvent or embarrassed partnership. The authorities clearly recognize the rule that a claim of this character may be proved by the partner against the partnership estate in bankruptcy, when its amount has been definitely fixed by an accounting and settlement of the partnership affairs, which, however, may be had in the bankruptcy proceedings before the referee,[216] but they also maintain that the partner is not entitled to share in the distribution of the partnership estate, under the quoted provision of the bankruptcy act, or at all, until all the other creditors of the partnership have been paid.[217] But this does not apply to a debt which was due from the firm to the particular partner before he entered into the partnership, and which was not brought into the firm's capital, but was overlooked and remained unpaid until after the bankruptcy.[218] But the act of a partner in advancing money or paying off debts may be regarded as creating separate claims against his copartners for their proportionate shares, and thus entitle him to prove against their separate estates in the bank-

214 Brown v. Curtis, 5 Mason, 421, Fed. Cas. No. 2,000. Where a surviving partner converts the property of the deceased partner to his own use, and the administrators of the latter consent, they may prove a claim therefor against the estate of the former in bankruptcy. In re Mills, 11 N. B. R. 74, Fed. Cas. No. 9,611. One partner, as between himself and the firm creditors, cannot estop himself by any dealings with the other partner from claiming partnership assets. In re Gorham, 9 Biss. 23, 18 N. B. R. 419, Fed. Cas. No. 5,624.

215 In re Telfer, 184 Fed. 224, 106 C. C. A. 366.

216 In re Hirth, 189 Fed. 926, 26 Am. Bankr. Rep. 666.

217 In re Effinger, 184 Fed. 728, 25 Am. Bankr. Rep. 930; In re Denning, 114 Fed. 219, 8 Am. Bankr. Rep. 133; In re Rice, 164 Fed. 509, 21 Am. Bankr. Rep. 205; Wallerstein v. Ervin, 112 Fed. 124, 50 C. C. A. 129, 7 Am. Bankr. Rep. 256; In re Carmichael, 96 Fed. 594, 2 Am. Bankr. Rep. 815; In re Ervin, 109 Fed. 135, 6 Am. Bankr. Rep. 356. See In re Lough (C. C. A.) 182 Fed. 961, 25 Am. Bankr. Rep. 597.

218 In re Ervin, 114 Fed. 596.

ruptcy proceedings. Thus, where judgments against a firm, in favor of certain of its creditors, were bought up by one of the partners, who took assignments of the judgments to himself, it was held that he thereby became a creditor of each of his copartners for their respective shares of the money advanced by him in purchasing the judgments, and was entitled to prove a claim for such share against the individual estate of one of the copartners in bankruptcy.[219] So, where a partnership is dissolved by consent, one partner buying the assets and assuming all the debts and liabilities of the firm, from which he agrees to save the other harmless, the relation of the former partners becomes that of principal and surety, and if the retiring partner is compelled to pay a debt of the firm, after an adjudication in bankruptcy against the continuing partner, the former may prove the amount so paid as a claim against the latter's estate in bankruptcy, making such proof in the name of the creditor; or if the creditor has already proved the debt, the partner paying it may have himself subrogated to the rights of such creditor.[220] In another case it appeared that, out of a firm consisting of four partners, two were insolvent, one was a bankrupt, and the fourth paid off and discharged all the firm debts out of his separate estate. It was held that he was entitled to prove against the separate estate of the bankrupt one-half of the amount so paid by him.[221] But a partner who has taken notes on the sale of his interest to his copartner cannot receive a dividend from the estate of the latter in bankruptcy until all partnership debts have been paid.[222] Where a member of a bankrupt firm is also a member of another firm, his partner, as the remaining member of the latter firm settling its affairs, may prove a debt against the bankrupt firm.[223] But the fact that two firms, carrying on business under different names in different places, are composed of identically the same persons, will not operate to give the claims of one firm against another firm the character of individual demands, as distinguished from partnership demands, against the others.[224]

[219] In re Carmichael, 96 Fed. 594, 2 Am. Bankr. Rep. 815. See In re Mason, 1 Nat. Bankr. News, 331; In re Eagles, 99 Fed. 695, 3 Am. Bankr. Rep. 733. As to the right of the partner paying the debt to be subrogated to the rights of the creditor, see In re Smith, 16 N. B. R. 113, Fed. Cas. No. 12,991.

[220] In re Dillon, 100 Fed. 627, 4 Am. Bankr. Rep. 63. And see In re Baker & Edwards (D. C.) 224 Fed. 611, 35 Am. Bankr. Rep. 469.

[221] In re Deil, 5 Sawy. 344, Fed. Cas. No. 3,774.

[222] In re Jewett, 1 N. B. R. 495, Fed. Cas. No. 7,309.

[223] In re Buckhause, 2 Low. 331, 10 N. B. R. 206, Fed. Cas. No. 2,086.

[224] In re Stanton, Fed. Cas. No. 13,295. And see In re Vetterlein, 5 Ben. 311, Fed. Cas. No. 16,927.

§ 131. Discharge of Partners.—Where a firm and its members have been adjudged bankrupt on the voluntary petition of the partners composing it, either partner, without reference to the others, may present his individual petition for a separate discharge; and the petition should recite the adjudication of the firm and of the petitioner as a member of it, and should pray for a discharge from both firm and individual debts, and the notice to creditors should advise them of the same facts.[225] And while the trial of objections to the discharge of partners may be joint, the decrees thereon must be several.[226] The grounds of objection to an application for discharge will be fully discussed in another chapter. At present it will suffice to remark that the failure to keep proper books of account may prevent the discharge of both partners, although the fault was wholly that of one of them.[227] The discharge of one partner cannot be made operative in favor of the other; that is, it will not release the other from the indebtedness of the firm.[228] And a discharge in bankruptcy of two general partners cannot be set up in favor of a special partner in an action against the three as general partners, on the ground that the special partner had made himself liable as a general partner.[229] A discharge in bankruptcy granted to a member of a firm, in proceedings based on a voluntary petition in which both the firm and the individual partners joined, and on which the petitioners were adjudged bankrupt as prayed, should be made to cover his liability on the debts of the firm and also his individual indebtedness.[230] But when the partnership as such is not in bankruptcy, but only the individual partners on their separate voluntary petitions, they are not entitled to a discharge which will release them from the debts of the firm.[231] And conversely, when the proceeding in bank-

[225] In re Meyers, 97 Fed. 757, 3 Am. Bankr. Rep. 260. Where a member of a firm filed a petition individually to be adjudged a bankrupt, and the petition was silent as to any partnership assets or liabilities, though the schedule disclosed individual and partnership debts, and the creditors of the firm were not notified, the bankrupt was not entitled to a discharge from firm debts, though the firm had been dissolved and was without assets, and the firm debts were barred by limitation. In re Morrison, 127 Fed. 186, 11 Am. Bankr. Rep. 498.

[226] In re George, 1 Low. 409, Fed. Cas. No. 5,325.

[227] In re George, 1 Low. 409, Fed. Cas. No. 5,325.

[228] Payne v. Able, 7 Bush (Ky.) 344, 3 Am. Rep. 316, 4 N. B. R. 220.

[229] Abendroth v. Van Dolsen, 131 U. S. 66, 9 Sup. Ct. 619, 33 L. Ed. 57.

[230] In re Gay, 98 Fed. 870, 3 Am. Bankr. Rep. 529. See Keeler v. Snodgrass, 8 Wkly. Law Bul. (Ohio) 219: Curtis v. Woodward, 58 Wis. 499, 17 N. W. 328, 46 Am. Rep. 647. A discharge purporting on its face to release one member of a firm from his individual debts will not discharge him from the firm liabilities. Honegger v. Wettstein, 47 N. Y. Super. Ct. 125.

[231] In re Meyers, 96 Fed. 408, 2 Am. Bankr. Rep. 707.

ruptcy is against the firm, as a legal entity, but does not include adjudications against the partners separately, it is only the firm which is entitled to a discharge, and the court cannot grant discharges to the partners as individuals.[232]

[232] In re Neyland, 184 Fed. 144, 24 Am. Bankr. Rep. 879; In re Hale, 107 Fed. 432, 6 Am. Bankr. Rep. 35.

CHAPTER IX

BANKRUPTCY OF CORPORATIONS

§ 132. **Jurisdiction of Corporations.**—Under the present Bankruptcy Act, as amended in 1910, all kinds of private corporations, including limited partnerships and other quasi corporate organizations, may file voluntary petitions in bankruptcy, except only railroad, insurance, and banking companies. Whether the directors of a corporation, without authority from the stockholders, have power to file a voluntary petition in bankruptcy, must be determined by the law of the state in which the corporation is organized. But under the general law, and in the absence of any provision on the subject in the statutes of the state, or in its articles of incorporation or its by-laws, the directors of a corporation have authority to execute a general assignment of its property for the benefit of its creditors; and such power may well be extended to the filing of a petition in voluntary bankruptcy.[1] A state court has no power, by any form of order or injunction, to limit the operation of the Bankruptcy Act, and therefore cannot enjoin a corporation from filing its petition

[1] In re Ann Arbor Mach. Corporation (C. C. A.) 274 Fed. 24; In re De Camp Glass Casket Co. (C. C. A.) 272 Fed. 558, 47 Am. Bankr. Rep. 1; Fitts v. Custer Slide Mining & Development Co. (C. C, A.) 266 Fed. 864, 46 Am. Bankr. 101. After a receiver has been appointed for a corporation by a state court, under authority of the law of the state, with power to take possession of and hold the property of the corporation, its directors are without power to authorize the filing of a petition in voluntary bankruptcy and the surrender of its property to the bankruptcy court. In re Associated Oil Co. (D. C.) 271 Fed. 788, 46 Am. Bankr.

in voluntary bankruptcy.[2] But a court of bankruptcy cannot be compelled to exercise its jurisdiction in aid of a fraud, and it has power to permit the intervention of stockholders to contest a voluntary petition filed on behalf of the corporation by its officers and directors, upon a showing that the object of the proceeding was to avoid the effect of a judgment obtained by stockholders against the corporation and its directors for the appointment of a receiver for the corporation, and for an accounting by the directors for fraudulent mismanagement.[3]

As to compulsory or involuntary proceedings, the present provision is that an adjudication may be made in such proceedings against "any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over." A petition in involuntary bankruptcy against a corporation which does not show that it belongs to one or other of the enumerated classes is not sufficient to support an adjudication.[4] It is within the jurisdiction of the court of bankruptcy to determine whether the respondent is amenable to involuntary bankruptcy or not, in view of the nature of its business or occupation.[5] In other respects, the proceeding against a corporation is the same as in the case of an individual debtor. The same proportion of creditors, in number and amount, must join in a proceeding to force a corporation into bankruptcy that is required in the case of a natural person.[6]

In regard to the jurisdiction of the courts of bankruptcy over the

Rep. 482. There is no presumption of authority in an officer of a corporation to make and file a voluntary petition in bankruptcy for it, and he may not do so without the consent of the directors. Regal Cleaners & Dyers v. Merlis (C. C. A.) 274 Fed. 915. But a petition in voluntary bankruptcy filed by the attorney of a corporation, whose action was ratified by a majority of the stockholders and by all the directors who were competent to act for it, the other directors having claims against it, was held sufficient to give the court jurisdiction. In re People's Warehouse Co. (D. C.) 273 Fed. 611.

[2] In re Hargadine-McKittrick Dry Goods Co. (D. C.) 239 Fed. 155, 39 Am. Bankr. Rep. 142. The decree in this case was reversed on appeal (Zeitinger v. Hargadine-McKittrick Dry Goods Co., 244 Fed. 719, 157 C. C. A. 167, 40 Am. Bankr. Rep. 324, but not on the proposition stated in the text, but because the directors, in filing a voluntary petition for the corporation, were attempting a fraud on the stockholders.

[3] Zeitinger v. Hargadine-McKittrick Dry Goods Co., 244 Fed. 719, 157 C. C. A. 167, 40 Am. Bankr. Rep. 324.

[4] In re Oregon Bulletin Printing & Pub. Co., 3 Sawy. 614, Fed. Cas. No. 10,561.

[5] T. E. Hill Co. v. Contractor's Supply & Equipment Co., 156 Ill. App. 270. Though a company against which a petition in involuntary bankruptcy was filed may not have been subject to adjudication, yet a court of bankruptcy which entertained the petition and appointed a receiver had jurisdiction over the parties and the subject-matter. In re Wilkes-Barre Light Co. (D. C.) 235 Fed. 807, 38 Am. Bankr. Rep. 99.

[6] In re Leavenworth Sav. Bank, 4 Dill. 363, 14 N. B. R. 92, Fed. Cas. No. 8,165; In re Oregon Bulletin Printing & Pub. Co., 3 Sawy. 614, 14 N. B. R. 405, Fed. Cas. No. 10,561.

person of the debtor, the terms of the act are very broad. They have authority to make an adjudication in bankruptcy against persons (including corporations) who "have had their principal place of business, resided, or had their domicile, within their respective territorial jurisdictions for the preceding six months or the greater portion thereof." (Section 2, clause 1.) It is now reasonably well settled that the residence or domicile of a corporation can be only in that state from which it derives its charter or under whose laws it was organized. For purposes of federal jurisdiction, it does not become a "citizen" or a "resident" of any other state by maintaining a place of business in such other state, even though that may be its principal or exclusive place of business.[7] But the terms of the bankruptcy act are much wider than this, and, indeed, it would be singularly lacking in efficiency if an adjudication could only be made in the district where a corporation was officially a "resident" or had its "domicile." And it is now well settled that, in the case of a corporation organized under the laws of one state but which carries on business in another state or in several other states, it is not necessary that proceedings in bankruptcy should be instituted in the federal court in the state from which it derives its charter (though that court would have jurisdiction by reason of the "domicile" of the corporation), but may be maintained in that district, wherever it may be, in which the company has its chief or principal place of business.[8] The whereabouts of the principal place of business of a corporation, for the purposes of jurisdiction in bankruptcy proceedings against it, is a question of fact, and the decision of it is not controlled either by the place of incorporation or by any provision in the charter of the company as

[7] In re Mathews Consol. Slate Co., 144 Fed. 724, 15 Am. Bankr. Rep. 779, 16 Am. Bankr. Rep. 350; Germania Fire Ins. Co. v. Francis, 11 Wall. 210, 20 L. Ed. 77; Shaw v. Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; Southern Pacific Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; Ward v. Blake Mfg. Co., 56 Fed. 437, 5 C. C. A. 538; National Typographic Co. v. New York Typographic Co., 44 Fed. 711; Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. 577; Hatch v. Chicago, R. I. & P. R. Co., 6 Blatchf. 105, Fed. Cas. No. 6,204; Guinn v. Iowa Cent. Ry. Co., 14 Fed. 323.

[8] In re Munger Vehicle Tire Co., 159 Fed. 901, 87 C. C. A. 81, 19 Am. Bankr. Rep. 785; In re Alaska American Fish Co., 162 Fed. 498, 20 Am. Bankr. Rep. 712; Dressel v. North State Lumber Co., 107 Fed. 255, 5 Am. Bankr. Rep. 744; In re Magid-Hope Silk Mfg. Co., 110 Fed. 352, 6 Am. Bankr. Rep. 610; Tiffany v. La Plume Condensed Milk Co., 141 Fed. 444, 15 Am. Bankr. Rep. 413; Home Powder Co. v. Geis (C. C. A.) 204 Fed. 568, 29 Am. Bankr. Rep. 580. But in determining in what jurisdiction the principal place of business of a bankrupt corporation is located, doubt should be resolved in favor of that jurisdiction where it obtained its corporate existence, and where it is usually required to maintain an office. In re Tennessee Const. Co., 207 Fed. 203. The court of the district in which the corporation has its domicile has priority of jurisdiction over the court of the district in which it has its chief place of business. In re New Era Novelty Co. (D. C.) 241 Fed. 298, 39 Am. Bankr. Rep. 80.

to where its principal office shall be located.[9] It is likewise immaterial that a corporation which maintains its principal place of business in a state other than that in which it was incorporated has not complied with the laws of the foreign state, as to filing its articles of incorporation, obtaining a certificate, paying a license fee, or other requirements necessary to its lawful right to do business therein.[10] Actual maintenance of a principal place of business therein is sufficient to give jurisdiction, though it be unlicensed or otherwise contrary to law. But questions of great difficulty sometimes arise in determining what is the "principal" place of business. There are some decisions to the effect that, although a company may have its home office in one state, where its officers are and where its directors meet, and where its records are kept and its finances administered, this is not the place where it is "carrying on business" if its actual operations are conducted in another state, where its mines, shops, factories, mills, or railroad are located.[11] But the modern decisions have generally abandoned this rule, probably in view of the change in methods of corporate management and the tendency to separate the office from the factory and to establish the executive administration in the larger cities, and probably also in view of the fact that it is ordinarily much more convenient to settle the affairs of an insolvent corporation at the place where its records are kept and its financial business transacted. Accordingly, it is generally held that where a corporation operates factories, mills, mines, or other works in one state, but maintains a head office in another state, from which supreme direction and control are exercised over all its business, and where its directors hold their meetings, its records and accounts are kept, its correspondence conducted, and its banking business mainly done, it is the latter place, and not the former, which constitutes the company's principal place of business, and where proceedings in bankruptcy against it may be instituted.[12]

[9] In re Pennsylvania Consol. Coal Co., 163 Fed. 579, 20 Am. Bankr. Rep. 872; In re Guanacevi Tunnel Co. (C. C. A.) 201 Fed. 316, 29 Am. Bankr. Rep. 229; In re Wenatchee-Stratford Orchard Co., 205 Fed. 964, 30 Am. Bankr. Rep. 540; In re R. H. Pennington & Co. (D. C.) 228 Fed. 388, 35 Am. Bankr. Rep. 832; In re San Antonio Land & Irrigation Co. (D. C.) 228 Fed. 984, 36 Am. Bankr. Rep. 512.

[10] In re Duplex Radiator Co., 142 Fed. 906, 16 Am. Bankr. Rep. 324; In re Perry Aldrich Co., 165 Fed. 249, 21 Am. Bankr. Rep. 244.

[11] In re Alabama & C. R. Co., 9 Blatchf. 390, 6 N. B. R. 107, Fed. Cas. No. 124; Continental Coal Corp. v. Roszelle Bros., 242 Fed. 243, 155 C. C. A. 83, 39 Am. Bankr. Rep. 562; Roszell Bros. v. Continental Coal Corp. (D. C.) 235 Fed. 343, 38 Am. Bankr. Rep. 31; In re Beiermeister Bros. Co. (D. C.) 208 Fed. 945, 31 Am. Bankr. Rep. 474.

[12] Burdick v. Dillon, 144 Fed. 737, 75 C. C. A. 603; In re Marine Machine & Conveyor Co., 91 Fed. 630, 1 Am. Bankr. Rep. 421; In re Mathews Consol. Slate Co., 144 Fed. 724, 15 Am. Bankr. Rep. 779, 16 Am. Bankr. Rep. 350; In re Pennsylvania Consol. Coal Co., 163 Fed. 579, 20 Am. Bankr. Rep. 872. Compare In re Elmira Steel Co., 109 Fed. 456, 5 Am. Bankr. Rep. 484; In re Tygarts River Coal Co., 203 Fed. 178, 30 Am. Bankr.

But where a company having both its executive offices and its plant in one state ceases to manufacture any products, the fact that it continues to make sales of its finished goods through an agent in another state does not operate to transfer its principal place of business to the latter state.[13] And so, where a company, incorporated in one state and doing business in another, sold most of its stock and gave up its place of business, and went into the hands of receivers appointed by a court of the state of its domicile, who took charge of the remaining property in the other state, all about six months before the filing of a petition in bankruptcy against it, it was held that a federal court in the latter state had no jurisdiction of the petition.[14]

Returning to the subject of residence or domicile, it may be observed that if a corporation, already enjoying corporate existence under the laws of one state, receives also a charter from another state, it becomes, for purposes of jurisdiction, a resident or citizen of either state and of both.[15] And where the same corporation thus enjoys a corporate existence by legislative recognition in two states at once, and successive petitions in bankruptcy are filed against it in the federal courts within each of those states, that court which first acquires jurisdiction by the filing of the petition will retain it, and must be permitted to exercise it to the fullest extent, without interference by any other court.[16] And so, where a bankrupt corporation has its domicile in one judicial district, and its principal place of business in another, the courts of bankruptcy of both districts will have concurrent jurisdiction of involuntary proceedings in bankruptcy against it.[17]

§ 133. Same; Effect of Proceedings for Dissolution Under State Law.—A corporation which is subject to the provisions of the act, and has committed an act of bankruptcy, and which is in existence when the petition against it is filed and when the proper papers are served on its proper officer, cannot oust the jurisdiction of the court of bankruptcy to proceed to an adjudication on the return day, because a decree dissolving the corporation has been made after such service and before such

Rep. 183. And see In re Worcester Footwear Co. (D. C.) 251 Fed. 760, 41 Am. Bankr. Rep. 695.

[13] In re Elmira Steel Co., 109 Fed. 456, 5 Am. Bankr. Rep. 484.

[14] In re Perry Aldrich Co., 165 Fed. 249, 21 Am. Bankr. Rep. 244. And see In re Thomas McNally Co. (D. C.) 208 Fed. 291, 31 Am. Bankr. Rep. 382.

[15] Railroad Co. v. Harris, 12 Wall. 65, 20 L. Ed. 354; Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518; Minot v. Philadelphia, W. & B. R. Co., 2 Abb. U. S. 323, Fed. Cas. No. 9,645; Horne v. Boston & M. R. Co., 18 Fed. 50.

[16] In re Boston, H. & E. R. Co., 9 Blatchf. 101, 6 N. B. R. 209, Fed. Cas. No. 1,677.

[17] In re United Button Co., 137 Fed. 668, 13 Am. Bankr. Rep. 454; In re New Era Novelty Co. (D. C.) 241 Fed. 298, 39 Am. Bankr. Rep. 80.

return day.[18] And it is even held that the federal court has power to declare a corporation bankrupt, notwithstanding its dissolution by decree of a state court, and the appointment of a receiver to wind up its affairs, before the commencement of the proceedings in bankruptcy, provided that such proceedings are begun within four months after such dissolution, that being the time within which an act of bankruptcy must be alleged.[19] At any rate it seems clear that where a corporation, being insolvent, commits an act of bankruptcy by preferring certain of its creditors, the jurisdiction of a court of bankruptcy to adjudge it bankrupt and administer its property attaches, and the company cannot avoid such jurisdiction and validate its preferences by instituting proceedings for its dissolution in a state court before proceedings in bankruptcy against it are commenced.[20] It is also held that proceedings taken by a state to forfeit the charter of one of its corporations for nonpayment of state taxes, or to suspend it or enjoin it from all corporate activity until such delinquency shall be removed, do not destroy the corporation so as to prevent the institution of proceedings in bank-

[18] Platt v. Archer, 9 Blatchf. 559, 6 N. B. R. 465, Fed. Cas. No. 11,213. "It is argued that, as the dissolution of the corporation has been adjudged and decreed in the state court prior to the hearing, although since the institution of the proceedings in the bankruptcy court, such proceedings abated, and no adjudication in bankruptcy should be rendered, as the corporation is dead, and no judgment can be rendered against a dead man. As to this, we think it only necessary to refer to section 8 of the bankruptcy act in relation to the death or insanity of the bankrupt, and by analogy hold that the section applies to a corporation that seeks by suicide to defeat properly instituted proceedings in bankruptcy." Scheuer v. Smith & Montgomery Book & Stationery Co., 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384.

[19] Morehouse v. Giant Powder Co. (C. C. A.) 206 Fed. 24; In re Munger Vehicle Tire Co., 159 Fed. 901, 87 C. C. A. 81, 19 Am. Bankr. Rep. 785; Tiffany v. La Plume Condensed Milk Co., 141 Fed. 444, 15 Am. Bankr. Rep. 413; In re Belfast Mesh Underwear Co., 153 Fed. 224, 18 Am. Bankr. Rep. 620; White Mountain Paper Co. v. Morse, 127 Fed. 643, 62 C. C. A. 369, 11 Am. Bankr. Rep. 633; In re Independent Ins. Co., 2 Low. 97, 6 N. B. R. 169, Fed. Cas. No. 7,018; In re Green Pond R. Co., 13 N. B. R. 118, Fed. Cas. No. 5,786; In re Safe Deposit & Sav. Inst., 7 N. B. R. 392, Fed. Cas. No. 12,211; In re Washington Marine Ins. Co., 2 Ben. 292, 2 N. B. R. 648, Fed. Cas. No. 17,246; Thornhill v. Bank of Louisiana, 1 Woods, 1, Fed. Cas. No. 13,992; In re Merchants' Ins. Co., 3 Biss. 162, Fed. Cas. No. 9,441; In re New Amsterdam Ins. Co., 6 Ben. 368, Fed. Cas. No. 10,140. And see In re Storck Lumber Co., 114 Fed. 360, 8 Am. Bankr. Rep. 86, where it was said: "Upon the broad principle that the national bankrupt law is to govern the administration of the estates of all insolvent debtors, and supersedes all the state laws having a like object, when its provisions are invoked by the requisite creditors and acts of bankruptcy are proven, a motion made by the receiver of a corporation, appointed under a suit [statute?] for winding up insolvent corporations, which is in the nature of a proceeding in insolvency, to quash the petition in involuntary bankruptcy theretofore filed against the corporation, upon the ground that the state court had full jurisdiction when it entered its decree dissolving the corporation, and that, when said petition was filed, the corporation was no longer in existence, must be overruled."

[20] In re Adams & Hoyt Co., 164 Fed. 489, 21 Am. Bankr. Rep. 161; Scheuer v.

ruptcy against it or its appearance by attorney therein.[21] The same is true of the proceedings taken under a statute of Pennsylvania, by which all the property of an insolvent corporation is sold under a special writ of fieri facias for distribution among its creditors. This does not work a dissolution of the corporation so as to defeat subsequent bankruptcy proceedings against it, based on such proceedings as an act of bankruptcy.[22] Neither is the court of bankruptcy deprived of jurisdiction by the appointment of receivers for a manufacturing corporation and its ceasing to do business in consequence, before the filing of a petition in bankruptcy against it,[23] nor by its election of liquidating trustees, as authorized by a state statute, which further provides that, upon their giving notice by publication, the company "shall cease to carry on its business, except so far as may be required for the beneficial winding up thereof." [24]

Some of the state courts have held that, under state laws empowering them to dissolve a corporation which has abandoned its business and neglected to wind up its affairs, they are not precluded from doing so because a federal court has obtained control of the corporation's property by proceedings in bankruptcy.[25] This may be correct doctrine, so far as regards a mere decree of dissolution. But no federal court could be expected to admit that the process of the state court could extend to the property within its own control, or in any manner regulate its administration or distribution. For the jurisdiction of a federal court, once attaching in bankruptcy proceedings, is not co-ordinate with that of the state courts, but superior and exclusive.

§ 134. **Corporations Amenable to Bankruptcy Law.**—As originally enacted the Bankruptcy Act of 1898 provided for proceedings in involuntary bankruptcy against "any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits," with the further provision that "private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts." Section 4. Doubts having arisen whether companies engaged in the business of mining should be considered as

Smith & Montgomery Book & Stationery Co., 112 Fed. 407, 50 C. C. A. 312, 7 Am. Bankr. Rep. 384.

[21] In re Munger Vehicle Tire Co., 159 Fed. 901, 87 C. C. A. 81, 19 Am. Bankr. Rep. 785; In re Double Star Brick Co. (D. C.) 210 Fed. 980, 32 Am. Bankr. Rep. 149.

[22] In re International Coal Min. Co., 143 Fed. 665, 16 Am. Bankr. Rep. 309; Cresson & Clearfield Coal & Coke Co. v. Stauffer, 148 Fed. 981, 78 C. C. A. 609, 17 Am. Bankr. Rep. 573.

[23] In re C. Moench & Sons Co., 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240.

[24] In re Hercules Atkin Co., 133 Fed. 813, 13 Am. Bankr. Rep. 369.

[25] Hart v. Boston, H. & E. R. Co., 40 Conn. 524.

within the terms of the act,[26] they were expressly included by an amendment adopted in 1903.[27] But seven years later, this section of the act underwent a drastic revision, and there was substituted for the language above quoted a provision bringing within the terms of the law, as to involuntary proceedings, "any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation."[28] The statute, it is held, is not lacking in the "uniformity" required by the Constitution although it discriminates between different classes of corporations, nor is the classification adopted by Congress unreasonable or beyond the limits of its discretion.[29] But it is to be strictly construed in this regard, and cannot be held to include any corporation not clearly within the enumeration.[30] The court of bankruptcy has jurisdiction to determine whether or not a given corporation comes within the terms of the law.[31]

There has been some doubt as to whether it was a jurisdictional requisite that the corporation should be actually carrying on one of the enumerated lines of business, at the time of the institution of proceedings against it, chiefly in view of the original provision giving jurisdiction over corporations "engaged principally" in manufacturing, etc. Some of the cases hold that a corporation chartered for a certain purpose is to be regarded (in bankruptcy proceedings) as engaged in the business contemplated by the charter from the time it starts to put itself in shape to pursue the object for which it was incorporated, and is amenable to bankruptcy proceedings although it has not yet completed its plant, or started its works, or turned out any finished product.[32] But perhaps the better reason as well as the preponderance of authority is with the decisions which maintain that, to authorize an adjudication against a corporation on the ground of its being "engaged principally" in some line of business within the terms of the statute, it is not sufficient that its charter authorizes it to engage in such business, nor that it may have the intention of so engaging. If, up to the time of the filing of a petition against it, it has never done any business, except of a

[26] See Infra, § 139.

[27] Act Cong. Feb. 5, 1903, 32 Stat. 797.

[28] Act Cong. June 25, 1910, 36 Stat. 838.

[29] Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383.

[30] In re New York & New Jersey Ice Lines, 147 Fed. 214, 77 C. C. A. 440, 16 Am. Bankr. Rep. 832.

[31] T. E. Hill Co. v. Contractors' Supply & Equipment Co., 249 Ill. 304, 94 N. E. 544. See In re Broadway Savings Trust Co. (C. C. A.) 152 Fed. 152, 18 Am. Bankr. Rep. 254.

[32] Bollinger v. Central Nat. Bank, 177 Fed. 609, 101 C. C. A. 235, 24 Am. Bankr. Rep. 44; In re Bloomsburg Brewing Co., 172 Fed. 174, 22 Am. Bankr. Rep. 625; White Mountain Paper Co. v. Morse, 127 Fed. 643, 62 C. C. A. 369, 11 Am. Bankr. Rep. 633; In re White Mountain Paper Co., 127 Fed. 180, 11 Am. Bankr. Rep. 491.

preparatory kind, it is not subject to adjudication.[33] It is further to be remarked that the liability of a corporation to bankruptcy proceedings depends on the business it actually transacts, and not on the business it is empowered by its charter to do.[34] And if the occupation which it pursues is one that brings it within the terms of the act, it is no defense to a petition against it that such business was ultra vires.[35] There is also to be considered the case where a corporation is engaged in two or more distinct lines of business, one of which would subject it to the operation of the bankruptcy act, while the other or others would not. Here it is held that the question of the liability of the company to involuntary proceedings depends on the nature of that business which is its chief or principal pursuit.[36] But if it is carrying on two lines of business, both of which are within the terms of the act, it is of course immaterial which is to be considered its "principal" business.[37] And if the business of the corporation was of one of the kinds enumerated in the statute, it is none the less liable to be adjudged bankrupt because it has ceased to operate before the commencement of the proceedings.[38]

§ 135. Trading and Mercantile Corporations.—Though the original provision of the statute in regard to companies engaged in "trading or mercantile pursuits" has now been superseded by the wider provision as to "moneyed, business, or commercial corporations," it is important to consider the judicial constructions given to the earlier clause, because the amendment of 1910 was probably adopted in view of the fact that many corporations were escaping from bankruptcy proceedings, by reason of such constructions, which, in the judgment of Congress, should be made amenable to the law.

[33] In re Coolidge Refrigerator & Car Co., 190 Fed. 908, 27 Am. Bankr. Rep. 209; In re New England Breeders Club, 165 Fed. 517, 21 Am. Bankr. Rep. 349; In re Chicago-Joplin Lead & Zinc Co., 104 Fed. 67, 4 Am. Bankr. Rep. 712; In re Tontine Surety Co., 116 Fed. 401, 8 Am. Bankr. Rep. 421; In re Toledo Portland Cement Co., 156 Fed. 83, 19 Am. Bankr. Rep. 117.

[34] In re Kingston Realty Co., 160 Fed. 445, 87 C. C. A. 406, 19 Am. Bankr. Rep. 845. But see In re H. J. Quimby Freight Forwarding Co., 121 Fed. 139, 10 Am. Bankr. Rep. 424, holding that, while the susceptibility to bankruptcy of a corporation does not depend wholly on its charter, yet it can hardly be brought within the scope of the act by a principal business outside its charter; and therefore a company whose only authorized business is that of a carrier is not liable to bankruptcy on the ground that its principal business is in fact that of a trader.

[35] In re Kingston Realty Co., 157 Fed. 299, 19 Am. Bankr. Rep. 465.

[36] Cate v. Connell, 173 Fed. 445, 97 C. C. A. 647; In re Interstate Paving Co., 171 Fed. 604, 22 Am. Bankr. Rep. 572. See In re Humphrey Advertising Co., 177 Fed. 187, 101 C. C. A. 1, 24 Am. Bankr. Rep. 41.

[37] Burdick v. Dillon, 144 Fed. 737, 75 C. C. A. 603.

[38] Robertson v. Union Potteries Co., 177 Fed. 279, 22 Am. Bankr. Rep. 121. See J. W. Calnan Co. v. Doherty, 174 Fed. 222, 98 C. C. A. 130, 23 Am. Bankr. Rep. 297.

At the present day it cannot be said that there is any practical distinction between a "trader" and a "merchant," or between "trading" and "mercantile pursuits." Although, in a very colloquial sense, "trade" means the exchange of commodities, its legal signification is not so restricted. A merchant or trader is a person who pursues the business of buying commodities, either for money or in exchange for other commodities, for the purpose and with the intention of selling them again at a profit. He is, in fact, one whose avocation is to buy goods, wares, and merchandise to sell again, and who does both, not occasionally or incidentally, but habitually and as a business.[39] Both the elements of purchase with a view to sale, and of habit or continuity in the business, are necessary to constitute a trader. The mere purchase of articles and their subsequent sale will not make one a merchant or trader, within the meaning of the law, if the commodities were not bought for the purpose of being sold again.[40] And again, occasional or incidental dealings in the way of trade will not fix this character upon him. He must pursue it as a business. This is especially true under the provision of the act that proceedings in bankruptcy would lie against a corporation engaged "principally" in trading or mercantile pursuits. To illustrate, a person whose business is that of farming is not a trader, though he may occasionally buy and sell horses, cattle, and hay.[41] Nor is a teamster who, even to a very considerable extent, buys and sells hay and straw, for the bona fide purpose of keeping his teams from standing idle,[42] nor a theatrical manager who buys costumes and machinery for use in his business, and who on a few occasions has sold some such property,[43] nor a bank cashier who buys paintings from time to time, and sells them at auction.[44] So, although a water company may be authorized by its charter to "buy, sell, use, and deal in water for power, manufacturing, and hydraulic purposes," yet if its business is actually confined to supplying water for domestic consumption and to municipal fire departments, it cannot be said to be "engaged principally in trading or mercantile pursuits."[45]

[39] Zugalla v. International Mercantile Agency, 142 Fed. 927, 74 C. C. A. 97, 16 Am. Bankr. Rep. 67; In re H. J. Quimby Freight Forwarding Co., 121 Fed. 139, 10 Am. Bankr. Rep. 424; In re Tontine Surety Co., 116 Fed. 401, 8 Am. Bankr. Rep. 421; Com. v. Natural Gas Co., 32 Pittsb. Leg. J. 309; State v. Smith, 5 Humph. (Tenn.) 394; Lansdale v. Brashear, 3 T. B. Mon. (Ky.) 330; In re Tyler, 4 N. B. R. 104, Fed. Cas. No. 14,305; Wakeman v. Hoyt, 5 Law Rep. 309, Fed. Cas. No. 17,051.

[40] In re Rogers, 1 Low. 423, 3 N. B. R. 564, Fed. Cas. No. 12,001.

[41] In re Cote, 2 Low. 374, 14 N. B. R. 503, Fed. Cas. No. 3,267; In re Ragsdale, 7 Biss. 154, 16 N. B. R. 215, Fed. Cas. No. 11,530.

[42] In re Kimball, 7 Fed. 461.

[43] In re Duff, 4 Fed. 519.

[44] In re Chapman, 9 Ben. 311, Fed. Cas. No. 2,601.

[45] In re New York & W. Water Co., 98 Fed. 711, 3 Am. Bankr. Rep. 508.

The following persons have been held to be "merchants" or "traders," within the meaning of former bankruptcy statutes: A dealer in natural ice;[46] a person engaged in the manufacture and sale of lumber;[47] one engaged in the operation of a planing mill;[48] a person who buys and sells furniture on his own account and has a shop where his goods are displayed;[49] a tin-smith who also keeps a stock of hardware;[50] a baker who buys flour, which he makes into bread, and sells the bread to daily customers;[51] a man who boards horses;[52] a person who keeps a bar or an inn and sells there, for cash and on credit, cigars and liquors bought in quantity;[53] a stair-builder who buys lumber, nails, and other necessary materials, and works them up into stairs for persons who give him orders therefor and pay him a gross price therefor delivered and completed;[54] a butcher who buys cattle on the hoof, and sells some of them, and converts the rest into money by slaughtering and disposing of the product as meat.[55] It has also been held, under the present statute, that a corporation which owns and maintains a private hospital for consumptives, conducting its business for profit and not as a charity, furnishing to its patients the usual accommodations of a hotel, and treating their disease chiefly by the inhalation of an antiseptic vapor chemically prepared on the premises, though it is not a "manufacturing" corporation, within the meaning of the statute, is "engaged principally in trading or mercantile pursuits," and may therefore be adjudged bankrupt in involuntary proceedings against it.[56] A similar ruling has been made in regard to a corporation conducting the business of a mercantile agency, and chiefly occupied in gathering information and printing and publishing a book of ratings with respect to the standing of merchants.[57] Also, on the theory that electricity generated for the purpose of light, heat, and power is a product of "manufacture" and a commercial commodity, it has been held that a corporation whose business is to buy electricity and resell it to consum-

[46] City of Kansas v. Vindquest, 36 Mo. App. 584.

[47] In re Cowles, 1 N. B. R. 280, Fed. Cas. No. 3,297.

[48] Baldwin v. Rosseau, Fed. Cas. No. 803.

[49] In re Newman, 3 Ben. 20, 2 N. B. R. 302, Fed. Cas. No. 10,175.

[50] In re Sawyer, 2 Hask. 337, Fed. Cas. No. 12,394.

[51] In re Cocks, 3 Ben. 260, Fed. Cas. No. 2,933.

[52] In re Morton Boarding Stables, 108 Fed. 791, 5 Am. Bankr. Rep. 763; In re Odell, 9 Ben. 209, 17 N. B. R. 73, Fed. Cas. No. 10,426. But compare In re Wilkis Cab & Automobile Co., 178 Fed. 113, 23 Am. Bankr. Rep. 593.

[53] In re Sherwood, 9 Ben. 66, 17 N. B. R. 112, Fed. Cas. No. 12,773; In re Ryan, 2 Sawy. 411, Fed. Cas. No. 12,183.

[54] In re Garrison, 5 Ben. 430, 7 N. B. R. 287, Fed. Cas. No. 5,254.

[55] In re Bassett, 8 Fed. 266.

[56] In re San Gabriel Sanatorium Co., 95 Fed. 271, 2 Am. Bankr. Rep. 408.

[57] In re Mutual Mercantile Agency, 111 Fed. 152, 6 Am. Bankr. Rep. 607. But compare Zugalla v. International Mercantile Agency, 142 Fed. 927, 74 C. C. A. 97, 16 Am. Bankr. 67.

ers for such purposes at a profit is engaged in "trading," within the meaning of the statute.[58]

On the other hand, in regard to the following, it has been held that they are not to be accounted merchants or traders within the meaning of the law: An owner of oil lands, who divides them into leaseholds and receives the rent in oil, as he deals only in the product of his land;[59] a water-supply company, engaged in the business of obtaining, transporting, and supplying pure water for municipal and domestic use;[60] a man who speculates in stocks, buying and selling them through brokers, but not keeping an office for that purpose nor acting as a commission broker for others;[61] a corporation whose charter authorizes it to deal in notes, loans, and bonds;[62] one who contracts with a railroad company to grade and build its road;[63] the keeper of a livery stable;[64] one who superintends the running of a steamboat, and, as treasurer of the corporation owning her, receives and disburses the money earned by the vessel;[65] a corporation engaged in conducting a general fire insurance agency;[66] one occupied in buying and selling improved and unimproved real estate;[67] one operating, for profit, a circulating library;[68] a building and loan association;[69] a corporation conducting a public warehouse;[70] one engaged in the business of soliciting advertisements and placing them in newspapers at rates previously obtained;[71] a company incorporated for the purpose of giving theatrical performances and engaged solely in that business;[72] a common carrier;[73] a cor-

[58] In re Charles Town Light & Power Co., 183 Fed. 160, 25 Am. Bankr. Rep. 687.

[59] In re Woods, 7 N. B. R. 126, Fed. Cas. No. 17,990.

[60] In re New York & W. Water Co., 98 Fed. 711, 3 Am. Bankr. Rep. 508.

[61] In re Surety Guarantee & Trust Co., 121 Fed. 73, 56 C. C. A. 654, 9 Am. Bankr. Rep. 129; In re Marston, 5 Ben. 313, Fed. Cas. No. 9,142; In re Woodward, 8 Ben. 563, Fed. Cas. No. 18,001. But see In re H. R. Leighton & Co., 147 Fed. 311, 17 Am. Bankr. Rep. 275.

[62] Murphy v. Penniman, 105 Md. 452, 66 Atl. 282, 121 Am. St. Rep. 583.

[63] In re Smith, 2 Low. 69, Fed. Cas. No. 12,981; In re Minnesota & A. Const. Co., 7 Ariz. 137, 60 Pac. 881.

[64] Hall v. Cooley, Fed. Cas. No. 5,928; Gallagher v. De Lancey Stables Co., 158 Fed. 381, 19 Am. Bankr. Rep. 801.

[65] In re Merritt, 7 Fed. 853.

[66] In re Moore & Muir Co., 173 Fed. 732, 23 Am. Bankr. Rep. 122.

[67] In re Kingston Realty Co., 160 Fed. 445, 87 C. C. A. 406, 19 Am. Bankr. Rep. 845.

[68] In re Parmelee Library, 120 Fed. 235, 56 C. C. A. 583, 9 Am. Bankr. Rep. 568. On nearly the same principle, a corporation whose business is renting films for moving pictures is not engaged in trading or a mercantile pursuit. In re Imperial Film Exchange, 198 Fed. 80, 117 C. C. A. 188, 28 Am. Bankr. Rep. 815.

[69] In re New York Building-Loan Banking Co., 127 Fed. 471, 11 Am. Bankr. Rep. 51.

[70] In re Pacific Coast Warehouse Co., 123 Fed. 740.

[71] In re Snyder & Johnson Co., 133 Fed. 806, 13 Am. Bankr. Rep. 325.

[72] In re Oriental Society, 104 Fed. 975, 5 Am. Bankr. Rep. 219. So as to a corporation whose business is renting films for moving pictures. In re Imperial Film Exchange, 198 Fed. 80, 117 C. C. A. 188, 28 Am. Bankr. Rep. 815.

[73] In re Philadelphia & Lewes Transp.

poration engaged in conducting a hotel, a restaurant, or a saloon;[74] and one operating a laundry.[75]

But it is very essential to notice that most, if not all, of the avocations or pursuits mentioned in the preceding paragraph would come within the terms of the law as it now stands. That is to say, a corporation engaged in carrying on any one of those various lines of business would almost certainly be held to be within the description of "moneyed, business, or commercial corporations."

§ 136. Manufacturing Corporations.—For the reasons stated in the preceding section, it is necessary also to pay some attention to the previous decisions construing the term "manufacturing." For while a manufacturing corporation may or may not be also describable as a "commercial" corporation, it is certainly a "moneyed" or a "business" company; and on the other hand, many companies which were held not to be "engaged principally in manufacturing" would clearly come within the broader language of the amendment of 1910. And first, it is necessary to advert to the distinction between "manufacturing" and "mercantile pursuits." In the case of a merchant, as well as a manufacturer, there is a common element of purchasing personal property with a view of making a gain or profit. But a manufacturer attains the object "by adding to the value of the property after purchase, by some process or combination with other materials, while the merchant is supposed to get his advanced price or profit by selling the article as it is, without subjecting it to any change by hand, by machinery, or by art. The material entering into the manufactured article may be modified more or less in its identity, as it passes through the several stages of a manufacturing process, but the merchant deals in the manufactured article itself, or its constituents, by buying and selling them in the same condition in which he purchases them. His business is that of exchanges, and not of making or fabricating from raw materials."[76]

Co., 114 Fed. 403, 7 Am. Bankr. Rep. 707; In re H. J. Quimby Freight Forwarding Co., 121 Fed. 139, 10 Am. Bankr. Rep. 424.

[74] Toxaway Hotel Co. v. J. L. Smathers & Co., 216 U. S. 439, 30 Sup. Ct. 263, 54 L. Ed. 558, 23 Am. Bankr. Rep. 626; Nollman & Co. v. Wentworth Lunch Co., 217 U. S. 591, 30 Sup. Ct. 694, 54 L. Ed. 895; In re United States Hotel Co., 134 Fed. 225, 67 C. C. A. 153, 13 Am. Bankr. Rep. 403; In re Wentworth Lunch Co., 159 Fed. 413, 86 C. C. A. 393, 20 Am. Bankr. Rep. 29; In re Chesapeake Oyster & Fish Co., 112 Fed. 960, 7 Am. Bankr. Rep. 173; In re Barton Hotel Co., 12 Am. Bankr. Rep. 335.

[75] In re Eagle Steam Laundry Co., 184 Fed. 949, 25 Am. Bankr. Rep. 868.

[76] Engle v. Sohn, 41 Ohio St. 691, 52 Am. Bankr. Rep. 103. And see further, People v. Roberts, 90 Hun, 533, 36 N. Y. Supp. 73; Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; Walker Roofing & Heating Co. v. Merchant & Evans Co., 173 Fed. 771, 97 C. C. A. 495, 23 Am. Bankr. Rep. 185; In re Church Const. Co., 157 Fed. 298, 19 Am. Bankr. Rep. 549.

Proceeding now to specify examples of these questions, we find decisions to the effect that the production of illuminating gas and supplying it to consumers is a manufacture, and that corporations organized for this purpose and engaged in this business are "manufacturing companies." [77] Not so, however, with natural gas. A company engaged in supplying natural gas to customers for light and heat is not a manufacturing company.[78] As to electric companies, the decisions are squarely opposed. In some states, it is held that a company generating electricity and selling it to consumers for power, illuminating, or heating purposes, is not a manufacturing company, within the meaning of statutes exempting the capital stock of such companies from taxation.[79] But in other states, it is as decidedly held that such a corporation is within the terms of a similar statute.[80] Again, a corporation engaged in supplying its tenants with steam power, to enable it the more readily to rent its buildings and rooms, has been adjudged not a manufacturer.[81] And on the same principle which was held to determine the case of natural gas, that it is a product of nature and not of any manufacturing process, it has been ruled that hay is not a "manufactured article." [82] As to natural ice, there is again a difference of judicial opinion. It was very sensibly said by the Supreme Judicial Court of Massachusetts: "The cutting of ice produced by the agencies of nature, on the surface of a pond, into pieces of a size convenient for handling, and storing the pieces in a building, cannot in any proper sense be called a maufacture. The material is in no way changed or adapted to any new or different use; it still remains ice, to be used simply as ice; it is no more a manufacture than putting the water from the pond into casks for transportation and use would be a manufacture." [83] And a similar conclusion has been reached by the courts in New York.[84] On the other hand, in Michigan, it is ruled that the business of cutting natural ice from a river or lake and preparing it for use as an article of consumption, by clearing it from

[77] Nassau Gas-Light Co. v. City of Brooklyn, 89 N. Y. 409. But see Shreveport Gas Co. v. Assessor, 47 La. Ann. 65, 16 South. 650; Ottawa Gas-Light Co. v. Downey, 127 Ill. 201, 20 N. E. 20.

[78] Emerson v. Com., 108 Pa. St. 111. And see Com. v. Natural Gas. Co., 32 Pittsb. Leg. J. 309.

[79] Com. v. Northern Electric L. & P. Co., 145 Pa. St. 105, 22 Atl. 839, 14 L. R. A. 107; Com. v. Edison Electric L. & P. Co., 170 Pa. St. 231, 32 Atl. 419; Frederick Electric L. & P. Co. v. Frederick City, 84 Md. 599, 36 Atl. 362, 36 L. R. A. 130; Com. v. Brush Electric Light Co., 145 Pa. St. 147, 22 Atl. 844.

[80] People v. Wemple, 129 N. Y. 543, 29 N. E. 808, 14 L. R. A. 708; People v. Campbell, 88 Hun, 527, 34 N. Y. Supp. 711.

[81] Com. v. Arrott Steam-Power Mills Co., 145 Pa. St. 69, 22 Atl. 243.

[82] Frazee v. Moffitt, 20 Blatchf. 267, 18 Fed. 584.

[83] Hittinger v. Westford, 135 Mass. 258.

[84] People v. Knickerbocker Ice Co., 99 N. Y. 181, 1 N. E. 669. And see In re New York & New Jersey Ice Lines, 147 Fed. 214, 77 C. C. A. 440, 16 Am. Bankr. Rep. 832.

snow and reducing it to blocks of a convenient size, is manufacturing.[85] And however this may be, a company carrying on a wholesale and retail ice business, and selling not only ice of its own harvesting, but also large quantities which it buys from third parties, is certainly engaged in "mercantile pursuits," and liable to adjudication in bankruptcy.[86] And it is also clear that the production of artificial ice by frigorific processes, as an article of commerce, is within the description of "manufacturing."[87] In this connection it may be mentioned that an aqueduct company is not a manufacturing corporation, although it purifies the water before distributing it by means of filters and screens.[88] The business of slaughtering cattle and refrigerating the carcasses and shipping them to points for sale is not manufacturing,[89] though it seems that a company which buys and slaughters hogs, and subjects them to certain processes and combinations with other materials, requiring the application of skill, labor, and capital, and converts them into lard and cured meats, for the purpose of adding to the value thereof, with a view of making gain or profit, is engaged in manufacturing.[90] And so of a company carrying on the business of catching fish, and preserving them by salt and marketing them, and which owns and operates a plant for the preparing, preserving, and packing of the fish.[91] It is also held that the term "manufacturing" includes the business of refining and preparing for use oil, coal, and other minerals.[92] But the business of converting trees and logs into marketable lumber, in a saw mill, is not manufacturing,[93] though it seems that a corporation whose business is the production of kindling-wood from slabs, by the use of machinery, skill, capital and labor, which article is different in form and condition from the material out of which it was made, being specially prepared for use as a kindler for anthracite coal, and known under a distinctive name, is engaged in the business of manufacturing.[94] On the other hand, it has been held that a planing mill, engaged in dressing rough lumber into plain and

[85] Attorney General v. Lorman, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287.

[86] First Nat. Bank v. Wyoming Valley Ice Co., 136 Fed. 466, 14 Am. Bankr. Rep. 448; City v. Kansas v. Vindquest, 36 Mo. App. 584.

[87] People v. Knickerbocker Ice Co., 99 N. Y. 181, 1 N. E. 669. Compare Greenville Ice & Coal Co. v. City of Greenville, 69 Miss. 86, 10 South. 574.

[88] Dudley v. Jamaica Pond Aqueduct Corp., 100 Mass. 183.

[89] People v. Roberts, 155 N. Y. 408, 50 N. E. 53, 41 L. R. A. 228.

[90] Engle v. Sohn, 41 Ohio St. 691, 52 Am. Rep. 103. And see State v. Whittaker, 33 Mo. 457; In re Bassett, 8 Fed. 266.

[91] In re Alaska-American Fish Co., 162 Fed. 498, 20 Am. Bankr. Rep. 712.

[92] Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385.

[93] Jones v. Raines, 35 La. Ann. 996. Compare In re Chandler, 1 Low. 478, 4 N. B. R. 213, Fed. Cas. No. 2,591.

[94] People v. Roberts, 20 App. Div. 514, 47 N. Y. Supp. 122. Compare Correio v. Lynch, 65 Cal. 273, 3 Pac. 889.

tongued and grooved weatherboarding, flooring, and ceiling, and also in making mouldings, door and window casings, baseboards, and wainscoting, is not a manufacturing concern such as to be entitled to be exempt from taxation.[95] But a corporation which buys lumber, iron, and other materials in the rough, and at its own shops finishes, shapes, designs, and makes such materials suitable for use, and puts the same together in the erection of bridge, roofs, and other structures, is a manufacturing company.[96] And generally, a construction company is to be regarded as engaged in manufacturing, whether its products be ships and vessels, concrete piers, waterworks and sewers, bridges, houses, or other structures.[97] But not one which merely constructs houses on its own land.[98] A company operating a steam flouring mill is a manufacturing corporation,[99] but not a grain elevator company engaged in buying, selling, and storing grain, building and operating grain warehouses, and incidentally dealing in coal, lime, and cement.[100] A book-binder who also makes blank books has been held to be a manufacturer,[101] but not one who prints bill-heads, orders, and other forms for commercial purposes, on paper bought by him, and who cuts and folds the paper into shapes for such purposes, as well as to serve for ledgers and other commercial books.[102] A company engaged in mixing teas and in roasting, grinding, and mixing coffee is not a manufacturing corporation.[103] Nor is the making of soda, vichy, seltzer, and similar drinks, a manufacture of chemicals, within a statute granting exemption from taxation.[104] But the building and construction of locomotive engines is manufacturing, and not the less so because a portion of the materials used in the con-

[95] Whited v. Bledsoe, 49 La. Ann. 325, 21 South. 538.

[96] Com. v. Keystone Bridge Co., 156 Pa. St. 500, 27 Atl. 1.

[97] Friday v. Hall & Kaul Co., 216 U. S. 449, 30 Sup. Ct. 261, 54 L. Ed. 562, 26 L. R. A. (N. S.) 475, 23 Am. Bankr. Rep. 610; United Surety Co. v. Iowa Mfg. Co., 179 Fed. 55, 102 C. C. A. 623, 24 Am. Bankr. Rep. 726; In re First Nat. Bank, 152 Fed. 64, 81 C. C. A. 260, 18 Am. Bankr. Rep. 265; In re Marine Construction & Dry Dock Co., 130 Fed. 446, 64 C. C. A. 648, 11 Am. Bankr. Rep. 640; Columbia Ironworks v. National Lead Co., 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645, 11 Am. Bankr. Rep. 340; In re Niagara Contracting Co., 127 Fed. 782, 11 Am. Bankr. Rep. 643. But compare In re T. E. Hill Co., 148 Fed. 832, 78 C. C. A. 522, 17 Am. Bankr. Rep. 517; Butt v. C. F. MacNichol Const. Co., 140 Fed. 840, 72 C. C. A. 252, 15 Am. Bankr. Rep. 515, affirming In re MacNichol Const. Co., 134 Fed. 979, 14 Am. Bankr. Rep. 188; In re New York Tunnel Co., 166 Fed. 284, 92 C. C. A. 202, 21 Am. Bankr. Rep. 531.

[98] In re Kingston Realty Co., 160 Fed. 445, 87 C. C. A. 406, 19 Am. Bankr. Rep. 845.

[99] Carlin v. Western Assur. Co., 57 Md. 515, 40 Am. Rep. 440.

[100] Mohr v. Minnesota Elevator Co., 40 Minn. 343, 41 N. W. 1074.

[101] Seeley v. Gwillim, 40 Conn. 106.

[102] Patterson v. City of New Orleans, 47 La. Ann. 275, 16 South. 815.

[103] People v. Roberts, 145 N. Y. 375, 40 N. E. 7.

[104] Crescent City Seltz & M. W. Co. v. City of New Orleans, 48 La. Ann. 68, 19 South. 943.

struction of the engines is bought by the manufacturers in such a state of progress as to be adapted to the purpose designed with less labor than the raw material would require.[105] Under the former bankruptcy laws, there was some doubt as to whether a corporation engaged in the business of printing and publishing a newspaper was a manufacturer.[106] But it would clearly come within the present statute as a "business corporation." The following kinds of corporations were held not to be "engaged principally in manufacturing," and therefore not to be subject to the bankruptcy law, although all of them would now be properly described as "business or commercial corporations," viz., a corporation engaged in producing plays and giving theatrical entertainments;[107] one conducting the business of a cold storage warehouse;[108] one engaged in running a laundry;[109] and one operating a restaurant.[110]

§ 137. Banks and Bankers.—The original provision of the bankruptcy law on this point was that "private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts." (Section 4.) The amendment of 1910 excludes from the operation of the act "banking corporations," which apparently leaves the matter much as it stood before. It had already been held under the act of 1867, which contained no such exception, that a national bank was not liable to be proceeded against in bankruptcy.[111] And under the present statute, the ruling is that no corporation organized under the laws of a state can be adjudged an involuntary bankrupt under the description of a "private banker." For this term had, "long before the passage of the bankruptcy law, received a definite and settled meaning. A private banker is a person or firm, not a corporation, engaged in banking without having special privileges or authority from the state."[112] And even a private person cannot be adjudged bankrupt, although he carries on the business of a private banker, if his chief occupation is farming.[113] But an association of in-

[105] Norris v. Com., 27 Pa. St. 494.

[106] See In re Capital Publishing Co., 3 MacArthur (D. C.) 405; In re Kenyon, 6 N. B. R. 238.

[107] In re J. J. Reisler Amusement Co., 171 Fed. 283, 22 Am. Bankr. Rep. 501.

[108] In re Philadelphia Freezing Co., 174 Fed. 702, 23 Am. Bankr. Rep. 508.

[109] In re Eagle Steam Laundry Co., 178 Fed. 308, 24 Am. Bankr. Rep. 457; In re White Star Laundry Co., 117 Fed. 570, 9 Am. Bankr. Rep. 30. But see In re Troy Steam Laundering Co., 132 Fed. 266, 13 Am. Bankr. Rep. 97.

[110] In re Wentworth Lunch Co., 159 Fed. 413, 86 C. C. A. 393, 20 Am. Bankr. Rep. 29.

[111] In re Manufacturers' Nat. Bank, 5 Biss. 499, Fed. Cas. No. 9,051; Smith v. Manufacturers' Nat. Bank, 9 N. B. R. 122, Fed. Cas. No. 13,076.

[112] In re Surety Guarantee & Trust Co., 121 Fed. 73, 56 C. C. A. 654, 9 Am. Bankr. Rep. 129, citing People v. Doty, 80 N. Y. 225; Perkins v. Smith, 116 N. Y. 441, 23 N. E. 21; In re Sage (D. C.) 224 Fed. 525, 35 Am. Bankr. Rep. 436.

[113] Couts v. Townsend, 126 Fed. 249, 11 Am. Bankr. Rep. 126.

dividuals, formed to carry on the business of a private bank, as authorized by a state statute, but not incorporated, is a partnership, and as such is subject to be adjudged a bankrupt, though entitled to exercise some of the attributes of a corporation.[114] But the exception in the statute applies to a corporation organized for the purpose of carrying on a banking business under the general incorporation laws of a state which has no special laws relating to the formation of banking corporations.[115] An interesting question, which does not appear to have arisen as yet, would be in regard to a trust company, organized under a charter broad enough to give it the powers of a bank, and which does in fact carry on a general banking business. Instances are not wanting in which almost the whole revenue of such a company is derived from its banking department, the proper business of a trust company constituting but a small part of its activity. If such an institution is a "banking corporation," it would not be liable to proceedings in involuntary bankruptcy. If it is to be regarded as a "moneyed corporation" other than a banking corporation, it would be so liable. The solution of this question by the courts cannot be anticipated. But it is suggested that the general purpose of the statute (more clearly made manifest by the amendment of 1910) is to bring within the jurisdiction of the bankruptcy courts all forms of corporations which properly ought to be subject to the statute, and which can conveniently be wound up and their affairs settled by the means of a proceeding in bankruptcy. If this is so, the clause excepting certain classes of corporations ought to be strictly construed; and a strict construction of it would not save from the statute a corporation engaged in banking merely as one branch of its business, but organized for various other forms of business as well.

§ 138. Railroad and Insurance Companies.—It will be observed that the amendment of 1910 (36 Stat. 838), while extending the compulsory features of the bankruptcy law to "moneyed, business, or commercial corporations," expressly excepts railroad and insurance corporations. Under the act of 1867, which contained identically the same language quoted above, but without the exception, it was held by the circuit courts that a railroad company was amenable to proceedings in involuntary bankruptcy, and the Supreme Court of the United States refused to change the rule which their decisions had established.[116] It

114 Burkhart v. German-American Bank, 137 Fed. 958, 14 Am. Bankr. Rep. 222.

115 In re Oregon Trust & Sav. Bank, 156 Fed. 319, 19 Am. Bankr. Rep. 484.

116 New Orleans, S. F. & L. R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. Ed. 244; In re Alabama & C. R. Co., 9 Blatchf. 390, 6 N. B. R. 107, Fed. Cas. No. 124; Alabama & C. R. Co. v. Jones, 5 N. B. R. 97, Fed. Cas. No. 126; Rankin v. Florida, A. & G. C. R. Co., 1

was also settled that an insurance company came within the law, as a "business" corporation, and was therefore liable to be adjudged bankrupt.[117] But under the act of 1898, as it stood originally, it was decided that a petition in involuntary bankruptcy could not be maintained against an incorporated mutual fire insurance company, such a corporation not being "engaged principally in manufacturing, trading, or mercantile pursuits," within the meaning of the statute.[118] It would be interesting to inquire whether a street railway, operated by electricity, cable, or horse power, comes within the designation of "railroad corporations." Although the authorities are not entirely harmonious, it may be said that the tendency of modern decisions is to hold that the term in question, as used generally in statutes of various kinds, does not include street railways.[119] On the other hand, the operation of a street railway is a "business," within the meaning of a statute requiring the payment of a license fee for carrying on business,[120] and corporations of this kind must certainly be classed as "business corporations." But as will be shown in a later section, there is also a tendency to hold that the bankruptcy act should not be so construed as to authorize compulsory proceedings against any kind of public-service corporations.

N. B. R. 647, Fed. Cas. No. 11,567; In re Southern Minn. R. Co., 10 N. B. R. 86, Fed. Cas. No. 13,188; In re California Pac. R. Co., 3 Sawy. 240, 11 N. B. R. 193, Fed. Cas. No. 2,315; In re Greenville & C. R. Co., Fed. Cas. No. 5,787.

117 In re Merchants' Ins. Co., 3 Biss. 162, 6 N. B. R. 43, Fed. Cas. No. 9,441; In re Hercules Mut. Life Assur. Soc., 6 Ben. 35, 6 N. B. R. 338, Fed. Cas. No. 6,402; In re Independent Ins. Co., Holmes, 103, 6 N. B. R. 260, Fed. Cas. No. 7,017.

118 In re Cameron Town Mut. Fire Ins. Co. (D. C.) 96 Fed. 756, 2 Am. Bankr. Rep. 372. Under the act as it now stands, there is no power in a court of bankruptcy to make an adjudication of bankruptcy against any insurance corporation. Vallely v. Northern Fire & Marine Ins. Co., 255 U. S. —, 41 Sup. Ct. 116, 65 L. Ed. —, 46 Am. Bankr. Rep. 340.

119 See Funk v. St. Paul City Ry. Co., 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608; Bloxham v. Consumers' Electric Light & Street R. Co., 36 Fla. 519, 18 South. 444, 29 L. R. A. 507, 51 Am. St. Rep. 44; State v. Duluth Gas & Water Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63; Board of Railroad Com'rs v. Market Street Ry. Co., 132 Cal. 677, 64 Pac. 1065; Manhattan Trust Co. v. Sioux City Cable Ry. Co., 68 Fed. 82; Riley v. Galveston City Ry. Co., 13 Tex. Civ. App. 247, 35 S. W. 826; City of Newark v. Merchants' Ins. Co., 55 N. J. Law, 145, 26 Atl. 137; Fidelity Loan & Trust Co. v. Douglas, 104 Iowa, 532, 73 N. W. 1039; Massillon Bridge Co. v. Cambria Iron Co., 59 Ohio St. 179, 52 N. E. 192; Montgomery's Appeal, 136 Pa. St. 96, 20 Atl. 399, 9 L. R. A. 369; Sams v. St. Louis & M. R. Co., 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475; Lincoln St. Ry. Co. v. McClellan, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736; Ferguson v. Sherman, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622; Thompson-Houston Electric Co. v. Simon, 20 Or. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. Rep. 86.

120 City of New Orleans v. New Orleans City & L. R. Co., 40 La. Ann. 587, 4 South. 512.

§ 139. Mining and Quarrying Companies.—Under former bankruptcy statutes, as also under the act of 1898 in its original form, it was held that corporations engaged in the business of mining gold, silver, or other metals, or coal, were not amenable to proceedings in involuntary bankruptcy, because their business could not be described as "manufacturing," [121] nor as "trading or mercantile pursuits." [122] There was, however, some doubt as to companies operating quarries for the extraction of marble, stone, or slate, the general tendency being to hold that they were "manufacturing corporations" if the principal part of their business consisted in dressing the output of their quarries into specified sizes and shapes, or into such as would be generally convenient to the trade, and marketing the product thus finished.[123] But in 1903, probably in consequence of these decisions, Congress adopted an amendment to the bankruptcy act which, inter alia, added to the enumeration of the kinds of corporations which should be subject to involuntary bankruptcy those engaged in "mining." [124] And it was held that this term was to be taken in a broad and general sense, and therefore would include the extraction of stone or slate from an open quarry.[125] This portion of the statute was again revised in 1910, and while specific reference to such pursuits as manufacturing, mining, or trading was dropped, there was substituted a general provision that the compulsory features of the law should be applicable to "moneyed, business, or commercial corporations." [126] Undoubtedly this phrase, much broader than its predecessors, will be held to include both mining companies and quarry companies.

[121] Horn Silver Min. Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164; In re Rollins Gold & Silver Min. Co., 102 Fed. 982, 4 Am. Bankr. Rep. 327; Com. v. Lackawanna Iron Co., 129 Pa. St. 346, 18 Atl. 133; People v. Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155; Byers v. Franklin Coal Co., 106 Mass. 131. But see In re Tecopa Mining & Smelting Co., 110 Fed. 120, 6 Am. Bankr. Rep. 250.

[122] In re Keystone Coal Co., 109 Fed. 872, 6 Am. Bankr. Rep. 377; In re Woodside Coal Co., 105 Fed. 56, 5 Am. Bankr. Rep. 186; In re Elk Park Mining & Milling Co., 101 Fed. 422, 4 Am. Bankr. Rep. 131; In re Chicago-Joplin Lead & Zinc Co., 104 Fed. 67, 4 Am. Bankr. Rep. 712.

[123] In re Mathews Consol. Slate Co., 144 Fed. 724, 15 Am. Bankr. Rep. 779, 16 Am. Bankr. Rep. 350; Com. v. East Bangor Slate Co., 162 Pa. St. 599, 29 Atl. 706.

[124] Act Cong. Feb. 5, 1903, 32 Stat. 797. A corporation chartered for the purpose of mining and dealing in coal, and which for a time engaged in such business, but which for more than two years had neither mined nor purchased coal, but which was engaged solely in transporting coal for others, was not subject to involuntary bankruptcy, under the 1903 amendment, as a "corporation engaged principally in mining or mercantile pursuits." In re C. Jutte & Co. (C. C. A.) 266 Fed. 357, 46 Am. Bankr. Rep. 28.

[125] Burdick v. Dillon, 144 Fed. 737, 75 C. C. A. 603; In re Mathews Consol. Slate Co., 144 Fed. 724, 15 Am. Bankr. Rep. 779, 16 Am. Bankr. Rep. 350.

[126] Act Cong. June 25, 1910, 36 Stat. 838.

§ 140. **Public-Service Corporations.**—Under this description may be included street railway companies, gas companies, water companies, electric light and power companies, and perhaps telegraph and telephone companies. It is doubtful whether a corporation engaged in any of these activities is liable to be proceeded against in involuntary bankruptcy. They were generally held to be exempt from such proceedings under the act of 1898 as it stood originally, on the ground that their business could not properly be described as "manufacturing, trading, or mercantile pursuits." We find decisions to this effect in the case of a water company, engaged in the business of obtaining, transporting, and supplying pure water for domestic and municipal use,[127] a company engaged in making and distributing illuminating gas and also in generating, transmitting, and selling electricity for light and power,[128] and a company organized to furnish water for irrigation.[129] But unquestionably these and all other such companies are "moneyed, business, or commercial corporations" within the meaning of the 1910 amendment to the statute. But the question arises whether such companies ought not to be held exempt on the ground of public policy. To maintain this position, however, it is necessary to imply an exception to the general terms of the statute in addition to those exceptions which are specified,—a procedure which is contrary to the generally accepted canons of statutory construction.[130] Yet the argument from public convenience, as involving public policy, is a very strong one. Its force was recognized in the case of the irrigation company,[131] and later, in that of a gas and electric light company, wherein it was remarked by the circuit court of appeals in the second circuit: "Without considering these several arguments, we find sufficient reason to sustain the decrees in the peculiar character of these companies. If they do manufacture and do trade, they do much more. Under authority conferred by the state and by various local authorities, they are 'principally engaged' in sup-

[127] In re New York & Westchester Water Co., 98 Fed. 711, 3 Am. Bankr. Rep. 508, affirmed, In re Morris, 102 Fed. 1004, 43 C. C. A. 91.

[128] In re Hudson River Electric Power Co., 173 Fed. 934, 23 Am. Bankr. Rep. 191; In re Wilkes-Barre Light Co. (D. C.) 224 Fed. 248, 34 Am. Bankr. Rep. 697. But see In re Charles Town Light & Power Co., 183 Fed. 160, 25 Am. Bankr. Rep. 687, in which an electric light and power company was adjudicated bankrupt on the ground of its being engaged principally in "trading." And see City of Holland v. Holland City Gas Co., 257 Fed. 679, 168 C. C. A. 629, 44 Am. Bankr. Rep. 66; In re Grafton Gas & Electric Light Co. (D. C.) 253 Fed. 668, 42 Am. Bankr. Rep. 567. In these two cases a gas company and an electric light company were allowed to go into voluntary bankruptcy.

[129] In re Bay City Irrigation Co., 135 Fed. 850, 14 Am. Bankr. Rep. 370.

[130] See Black, Interp. Laws (2d edn.) pp. 219–222.

[131] In re Bay City Irrigation Co., 135 Fed. 850, 14 Am. Bankr. Rep. 370.

plying the means whereby streets, avenues and public places in the state are lighted and the public safety and comfort thereby promoted. They are corporations of public utility, and if they did not themselves light these localities, the public authorities would no doubt be constrained to do so themselves. By reason, moreover, of the circumstance that they are given this authority, with, to a certain extent, the right of exercising eminent domain, they are correlatively charged with a duty to the public, which is no part of the obligations of ordinary corporations engaged in 'manufacturing, trading, printing, publishing, mining, or mercantile pursuits.' And as a result, when financial adversity overtakes them, there are interests which have to be considered other than those which require attention when the ordinary corporation of the enumerated classes becomes insolvent. In the case of an ordinary manufacturing or trading corporation, the matters presented for disposition are in their last analysis merely the disposition of dollars and cents. The assets are to be realized and their proceeds distributed among creditors of different classes and the residue, if any, to the owners. But in the case of a public utility corporation, such as these, the public itself, the community in which the corporation is rendering service, has a right superior even to creditors of every class, and which right cannot be extinguished by the payment of a dividend in money. With the power to terminate franchises for failure to discharge the obligation inherent in their grant, the state or local authorities can destroy what is usually the most valuable asset of the defaulting company, against the wishes of all creditors and before the latter might succeed in finding an assignee of the franchise satisfactory to local authorities who would assume the burden and perhaps pay something for the transfer. Moreover, the public safety and comfort imperatively demand that, whatever else may happen, the corporation, devoid of ready cash though it be, shall not make default on its public obligations, with the result of plunging the community in darkness or stopping the transportation of passengers, and that in some way or other the public service shall be rendered while the financial affairs of the company are being wound up. There are no indications in the bankrupt act that Congress intended to arrange any administrative machinery competent to accomplish these results. On this branch of the case the opinion of Judge Ray is especially illuminative when it is remembered that he was chairman of the House judiciary committee when the bankrupt act was passed. He says: 'There was a serious and wide difference of opinion in the committee on the judiciary and in the Congress itself whether corporations, any corporation, should be brought under the operation

of the law. There was a feeling on the part of some that railroad corporations should be included, if any were. But when it was considered that railroads are the arteries of commerce and transportation, state and interstate, created by state laws in the main, and extending with their connecting lines from state to state and lakes to gulf, under consolidation and merger agreements, it was seen that, to properly administer the property of such corporations in the bankruptcy courts and under a bankruptcy law, it would be necessary to make many special and extraordinary provisions for those cases, if the public service was to be considered and the interests of the public conserved.'"[132] On the other hand, there is a decision, of perhaps quite equal authority, to the effect that a corporation, otherwise amenable to the bankruptcy law, is not exempt from its operation on the ground of being a quasi-public corporation and subserving a public use, if its franchise is assignable, so that its functions might be exercised by any transferee to whom its powers might pass through proceedings in bankruptcy.[133] On the whole, and notwithstanding the possible inconvenience of administering the affairs of such a company in bankruptcy, it seems probable that the courts will eventually decide that public-service companies are not exempt from the statute, and that they will reach this conclusion on the ground that they have no authority to add any exceptions to those specifically created by Congress in the statute itself.

§ 141. Amendment of 1910; Business and Commercial Companies. —In 1910 the bankruptcy act was amended so as to make its compulsory features applicable to "any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation."[134] This language is much broader than the corresponding provision in the amended act, and from this circumstance the courts have rightly inferred that the intention of Congress was to bring within the terms of the statute some classes of corporations which would not have been subject to involuntary proceedings theretofore.[135] But it is held that the amendment is not retroactive, and hence a corporation which was not subject to involuntary bankruptcy under the original act of 1898 (such as one engaged in conducting a restaurant) cannot be sub-

[132] In re Hudson River Power Transmission Co., 183 Fed. 701, 106 C. C. A. 139, 25 Am. Bankr. Rep. 504.

[133] In re New York & Westchester Water Co., 98 Fed. 711, 3 Am. Bankr. Rep. 508, affirmed, In re Morris, 102 Fed. 1004, 43 C. C. A. 91.

[134] Act Cong. June 25, 1910, 36 Stat. 838.

[135] In re H. J. Quimby Freight Forwarding Co., 121 Fed. 139, 10 Am. Bankr. Rep. 424.

jected to proceedings in bankruptcy because of an act of bankruptcy committed prior to the adoption of the amendment.[136]

The phrase "moneyed, business, or commercial corporations" (but not the exception which follows) was directly copied from the bankruptcy act of 1867, showing the intention of Congress that it should have the same interpretation which it then bore.[137] Hence the definitions and decisions made concerning it by the federal courts when administering the earlier statute are now of binding authority.[138] And first, "moneyed" corporations are, properly speaking, those dealing in money or in the business of receiving deposits, loaning money, and exchange; but in a wider sense the term is applied to all business corporations having a money capital and employing it in the conduct of their business.[139] Thus, the term, as used in a state statute concerning actions against directors and stockholders of moneyed corporations, is broad enough to include a mortgage trust company of another state authorized to issue and sell its bonds secured by mortgages.[140] It may also include a building and loan association. In the course of an opinion holding that such a company was not engaged in "trading or mercantile pursuits," it was said by one of the federal courts: "By the law of New York, building and loan associations are ranked as moneyed corporations, and are made subject to the supervision of the banking department, the law relating to them having been in the last revision included in the general banking law. Undoubtedly, a building and loan association is not a bank, or a savings bank, and does not conduct a banking business. It constitutes a corporation in a class by itself, carrying on a business which is peculiar and distinct from all other corporations. But the fact that the state of New York regards it as a moneyed corporation, performing functions somewhat analogous to those performed by savings banks, and therefore to be included in the same general department and to be subjected to the same general supervision, is entitled to such consideration in determining the general character of the corporation."[141] Again, a corporation engaged in leasing its own property and collecting the rents, having also power to sue and be sued, to contract debts, and to dispose of its property is

[136] In re United States Restaurant & Realty Co. (C. C. A.) 187 Fed. 118, 25 Am. Bankr. Rep. 915.

[137] See Black, Interp. Laws (2d edn.) P. 607.

[138] In re R. L. Radke Co., 193 Fed. 735, 27 Am. Bankr. Rep. 950.

[139] In re California Pac. R. Co., 3 Sawy. 240, 11 N. B. R. 193, Fed. Cas. No. 2,315; Hobbs v. National Bank, 101 Fed. 75, 41 C. C. A. 205; Mutual Ins. Co. v. Erie County, 4 N. Y. 444; Gillet v. Moody, 3 N. Y. 487.

[140] Hobbs v. National Bank of Commerce, 101 Fed. 75, 41 C. C. A. 205.

[141] In re New York Building-Loan Banking Co., 127 Fed. 471, 11 Am. Bankr. Rep. 51.

a "moneyed business" corporation, although it may not be a "commercial corporation," and is therefore liable to adjudication in proceedings in involuntary bankruptcy.[142]

A "business" corporation is one formed for the purpose of transacting business in the widest sense of that term, including not only trade and commerce, but manufacturing, mining, banking, insurance, transportation, and practically every form of commercial or industrial activity, where the purpose of the organization is pecuniary profit. These are contrasted with religious, charitable, educational, and other like organizations, which are sometimes grouped in the statutory law of a state under the general designation of "corporations not for profit."[143] And in fact, as the term "business" is used in a state statute authorizing the formation of corporations for the purpose of engaging in any lawful enterprise, "business," pursuit, or occupation, it is not restricted in meaning to a scheme for making money, but includes any object which is consistent with the interests of society and may engage the attention of men and invite their co-operation. Hence a corporation may lawfully be organized under such a statute for the purpose of guarantying bonds of an educational institution to strengthen its credit.[144] Again, as business is not limited to trade it may include agriculture, or the cultivation of a farm, ranch, or truck garden.[145] Hence if a corporation is "engaged chiefly in farming or the tillage of the soil," it is liable to proceedings in involuntary bankruptcy in the character of a "business corporation," though a natural person in the same circumstances would not be. So, also, the work of a contractor who engages for the erection or construction of buildings and other such works is "business" within the ordinary meaning of the word.[146] But a trades council is not a business institution, where the only element of business in which it engages is the furnishing to tradesmen of printed cards certifying that they are proper persons for the members of trades unions to deal with, the cards being suitable for display in a shop or store, and being supplemented by a small pamphlet giving the names and addresses of tradesmen in the

142 In re R. L. Radke Co., 193 Fed. 735, 27 Am. Bankr. Rep. 950. Such a company would not have been subject to adjudication under the act as it stood before the amendment of 1910. See Altonwood Park Co. v. Gwynne, 160 Fed. 448, 87 C. C. A. 409, 20 Am. Bankr. Rep. 31.

143 Black's Law Dict., citing Winter v. Iowa, M. & N. P. R. Co., 2 Dill. 487, 7 N. B. R. 289, Fed. Cas. No. 17,890; In re Independent Ins. Co., 13 Fed. Cas. 13; McLeod v. College, 69 Neb. 550, 96 N. W. 265, 98 N. W. 672.

144 Maxwell v. Akin, 89 Fed. 178.

145 Snow v. Sheldon, 126 Mass. 332, 30 Am. Rep. 684; Hickey v. Thompson, 52 Ark. 234, 12 S. W. 475; Waggener v. Haskell, 89 Tex. 435, 35 S. W. 1.

146 Brown v. German-American Title & Trust Co., 174 Pa. St. 443, 34 Atl. 335.

town, but no compensation being either required or received by the trades council from the tradespeople for granting such indorsements.[147]

Finally, a "commercial" corporation is one engaged in commerce in the widest sense of that term, including not only trade or the marketing of commodities, but also their transportation. Hence it would include a railroad company,[148] and these corporations would thus become subject to the bankruptcy law, if it were not for the specific exception in their favor.

§ 142. Religious, Charitable, Educational, and Other Corporations Not for Profit.—In construing the corresponding provision of the act of 1867, it was held to be the clear intent of Congress to bring within the scope of the statute all corporations except those organized for religious, charitable, literary, educational, municipal, or political purposes. As to the latter, it was said: "These may all be in one sense moneyed or business corporations, for they must all have and use money and transact business, to some extent, in order to carry out their objects. But we do not call them moneyed corporations as we would a bank, nor do we call them business corporations as we would a manufacturing or mining company or express company, because their chief and primary object is not to transact business or make gain. They necessarily transact business in order to accomplish other ends than the mere doing of business and making profit."[149] Religious societies in the United States are almost invariably corporations, and although they may buy and hold real and personal property and perhaps sell some of it again, and though they may raise money for church purposes by fairs and entertainments, conduct parochial schools, and enter into business contracts with those employed in their service, yet they are clearly not to be classed as business corporations, for the reasons above given.[150] So the fact that a college may acquire and convey property necessary to the accomplishment of its object, and may charge fees for tuition or instruction, does not make it a business or trading corporation.[151] And

147 Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881.

148 Sweatt v. Boston, H. & E. R. Co., 3 Cliff. 339, 5 N. B. R. 234, Fed. Cas. No. 13,684.

149 Alabama & C. R. Co. v. Jones, 5 N. B. R. 97, Fed. Cas. No. 126.

150 See Parker v. May, 5 Cush. (Mass.) 336, 345, as to the character and status of religious corporations. It seems, however, that an association of persons organized for religious or ecclesiastical purposes, but which has not complied with the statutes of the state with respect to the steps necessary to secure a corporate existence, might be proceeded against as an "unincorporated company," provided it did not have "any of the powers and privileges of private corporations not possessed by individuals or partnerships" (which would bring it within the definition of a corporation in the first section of the bankruptcy act), and provided it owed debts to the amount of $1,000.

151 McLeod v. Lincoln Medical College, 69 Neb. 550, 96 N. W. 265, 98 N. W. 672.

again, an incorporated club, of which the principal object is social intercourse, any business conducted by it being merely incidental, is not subject to proceedings in involuntary bankruptcy.[152]

§ 143. Unincorporated and Joint Stock Companies.—In the present bankruptcy law, the term "unincorporated company" is put in contrast with the term "corporation." The fourth section of the act provides that "any natural person" except such as follow certain enumerated pursuits, "any unincorporated company," and "any moneyed, business, or commercial corporation," with certain exceptions, may be adjudged an involuntary bankrupt, thus making three classes or groups subject to the law. But the introductory section of the act makes the word "corporation" include "all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships," and "limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association." Now if the term "corporation," in the clause relating to involuntary bankruptcy, is to be taken in this comprehensive sense, then, being contrasted with "unincorporated company," it will include, and "unincorporated company" will not include, limited partnerships and joint stock associations. The effect of this reading will be that such partnerships and associations are not amenable to the law unless describable as "moneyed, business, or commercial," while any other form of unincorporated company is subject to the law without reference to the nature of its business.[153] Proceedings in bankruptcy may be brought against an unincorporated company in the name which it has adopted and under which it carries on its affairs, and with proper notice to its officials, though it is not a legal entity nor suable as a corporation.[154] A trust association for investment purposes, created by an instrument of trust, and in which the shareholders have the power to amend such instrument and to terminate the trust, is an "unincorporated company," within the meaning of the Bankruptcy Act and subject

[152] In re Fulton Club, 113 Fed. 997, 7 Am. Bankr. Rep. 670.

[153] In re Seaboard Fire Underwriters (D. C.) 137 Fed. 987, 13 Am. Bankr. Rep. 722, holding that an unincorporated Lloyd's association of fire underwriters was subject to adjudication. The Tidewater Coal Exchange, which was an association organized by shippers of bituminous coal during the war with Germany, formed at the instance of the Council of National Defense, for the purpose of speeding the transshipment of coal from cars to ships at tidewater, etc., involving a general pooling arrangement for coal, with debit and credit charges against and for each member, was held an "unincorporated company" within the meaning of the Bankruptcy Act, so as to give a federal court jurisdiction of a petition in involuntary bankruptcy against it. In re Tidewater Coal Exchange (D. C.) 274 Fed. 1008.

[154] In re Order of Sparta, 242 Fed. 235, 155 C. C. A. 75, 39 Am. Bankr. Rep. 523.

to adjudication as a bankrupt.[155] But a partnership engaged chiefly in farming is not subject to adjudication in bankruptcy as an unincorporated company.[156]

A limited partnership is "a partnership consisting of one or more general partners, jointly and severally responsible as ordinary partners, and by whom the business is conducted, and one or more special partners, contributing in cash payments a specific sum as capital to the common stock, and who are not liable for the debts of the partnership beyond the fund so contributed."[157] If the statute authorizing the formation of such concerns goes no further than this, it is evident that the association could not be brought within the definition of a "corporation" in the bankruptcy law, nor could it even be regarded as an "unincorporated company." For all purposes of bankruptcy law it is simply a partnership and nothing more. But in some of the states, the laws provide that a "limited partnership" or "joint stock association limited," may be organized by a certain number of persons, who subscribe and contribute capital thereto, "which capital shall alone be liable for the debts of such associations," thus bringing them exactly within the terms of the bankruptcy act. Such, for example, is the statute of Pennsylvania,[158] and an association formed under it, having some of the characteristics of a partnership and some of a corporation, including the right to a common seal, the ownership of property real and personal by the association, and the right to sue and be sued by the corporate name, is regarded as a new artificial person, and one which may be described as a "citizen" of the state for purposes of federal jurisdiction.[159] Such an association, organized under the statute mentioned, is subject to be adjudged an involuntary bankrupt, whether regarded as an unincorporated company or a corporation.[160]

155 In re Associated Trust (D. C.) 222 Fed. 1012, 34 Am. Bankr. Rep. 851.

156 H. D. Still's Sons v. American Nat. Bank, 209 Fed. 749, 126 C. C. A. 473, 31 Am. Bankr. Rep. 320.

157 Black, Law Dict., voc. "Partnership." And see Moorehead v. Seymour, 77 N. Y. Supp. 1054; Taylor v. Webster, 39 N. J. Law, 104.

158 Laws Penna. 1874, c. 153, p. 271.

159 Bushnell v. Park Bros. & Co., 46 Fed. 209; Youngstown Coke Co. v. Andrews Bros. Co., 79 Fed. 669. Compare Carnegie v. Hulbert, 53 Fed. 10, 3 C. C. A. 391. "The persons composing a partnership may agree with each other to invest a certain fixed sum each in the common venture and no more. Such an agreement may limit the interest of each in the property and profit of the firm, but it will not limit the liability of any for the firm debts. Each member will be liable individually for the entire indebtedness of the firm. The act of 1874 was passed to relieve against the risk and inconvenience attending general partnerships, by providing a mode by which individuals might invest a fixed sum in a business enterprise, without liability to loss beyond the sum so invested. The method provided is the creation of a new artificial person, to be called a 'joint stock association,' having some of the characteristics of a partnership and some of a corporation." Hill v. Stetler, 127 Pa. St. 161, 13 Atl. 306, 17 Atl. 887.

160 In re Hercules Atkin Co., 133 Fed. 813, 13 Am. Bankr. Rep. 369.

A joint stock association is an unincorporated association of individuals for business purposes, of a hybrid character, as it resembles a partnership in many respects, but is like a corporation in other respects, possessing a common fund or capital stock, divided into shares, which are apportioned among the members according to their respective contributions, and which are assignable by the owner without the consent of the other members.[161] In the absence of legislation to the contrary, the members of a joint stock company, like the members of a partnership, are liable for all the debts of the association. Hence, unless the rule of liability is changed by a statute of the state, such an association is not a "corporation," within the meaning of the bankruptcy law though it is an "unincorporated company." In some states (as New York) the laws authorize such associations to sue and be sued in the name of the president for the time being,[162] and in some other respects distinguish them from ordinary partnerships; and it is possible that their possession of some of the "powers and privileges of private corporations not possessed by individuals or partnerships" might be held to bring them within the terms of the bankruptcy law. But it has been held that a joint stock company, organized under such a statute as that of New York, is not a corporation, and hence cannot be a "citizen" of that state, but, for all purposes of federal jurisdiction, is to be regarded as a partnership.[163] On this view, such an association might file its voluntary petition in bankruptcy, as a partnership, and would be liable to involuntary proceedings without reference to the nature of the business in which it was employed.

It should also be remarked that persons who associate themselves together for business purposes, if their organization is so defective as to fall short of creating a corporation within the statute, become in legal effect partners, and may be proceeded against under the bankruptcy law as an unincorporated company.[164] If the respondent in bankruptcy claims the right to exist as a corporation, and actually carries on business under a corporate form of organization, it is probable that the validity of its incorporation could not be inquired into. There is a decision to the effect that proceedings in bankruptcy may be had against a corporation which is only so de facto, and the validity of a de facto corporation cannot be questioned collaterally, but only in a direct suit for that pur-

[161] See In re Jones, 28 Misc. Rep. 356, 59 N. Y. Supp. 983; Allen v. Long, 80 Tex. 261, 16 S. W. 43, 26 Am. St. Rep. 735; Adams Expr. Co. v. Schofield, 111 Ky. 832, 64 S. W. 903; Kossakowski v. People, 177 Ill. 563, 53 N. E. 115; Willis v. Chapman, 68 Vt. 459, 35 Atl. 459.

[162] Laws New York 1849, c. 258; Rev. St. Wis. § 3210.

[163] Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800. See 1 Pars. Contr. 144, 214.

[164] Whipple v. Parker, 29 Mich. 369.

pose. But even a de facto corporation can only exist by color of law; and an association of persons cannot claim to be even a de facto corporation, unless there was a statute under which they might have been incorporated for their particular purpose. Hence, if, for example, the laws of the state made no provision for the incorporation of banks, an association of persons claiming to be incorporated as a bank, and which conducts a banking business under the corporate name assumed, is not a corporation within the meaning of the bankruptcy law, but may be proceeded against as a partnership.[165]

A voluntary association of persons organized for moral, social, benevolent, or charitable purposes, might be considered as amenable to the bankruptcy law, under the character of an "unincorporated company," but the cases must be rare in which such a society would owe debts to the amount of a thousand dollars and commit an act of bankruptcy. Moreover, if within the letter, they are not within the spirit and policy of the bankruptcy law.[166] Such an association is regarded as a charity within the jurisdiction of equity, and its members are not partners as between themselves, whatever may be their relation as to third persons.[167] It has been held, however, that an unincorporated fraternal beneficial association, having no capital stock and practically no assets except those derived from assessments paid by members, but issuing to its members benefit certificates payable from the contributions of members, which requires members to pass a medical examination, and whose principal object is beneficial rather than social, is subject to be adjudged bankrupt under the act as amended in 1910, since the word "company," as there used, at least includes any unincorporated association or group of individuals, whose object and purpose are either wholly or chiefly of the same kind as the object and purpose of a "moneyed, business, or commercial corporation."[168]

§ 144. **Acts of Bankruptcy by Corporations.**—As to the commission of acts of bankruptcy, upon which involuntary proceedings may be founded, the law makes no distinction between corporations and natural persons. And it is no defense to a proceeding in bankruptcy against a corporation that the act of bankruptcy charged was ultra vires, or not within its charter powers, and therefore not a corporate act.[169] Each

165 Davis v. Stevens, 104 Fed. 235, 4 Am. Bankr. Rep. 763.

166 See Alabama & C. R. Co. v. Jones, 5 N. B. R. 97, Fed. Cas. No. 126.

167 Lafond v. Deems, 81 N. Y. 507; Thomas v. Ellmaker, 1 Pars. Sel. Cas. (Pa.) 98.

168 In re Order of Sparta, 242 Fed. 235, 155 C. C. A. 75, 39 Am. Bankr. Rep. 523; In re Grand Lodge A. O. U. W. (D. C.) 232 Fed. 199, 36 Am. Bankr. Rep. 634. And so of a lodge of Odd Fellows. In re Carthage Lodge No. 365, I. O. O. F. (D. C.) 230 Fed. 694, 36 Am. Bankr. Rep. 873.

169 Badders Clothing Co. v. Burnham-

of the five acts of bankruptcy enumerated in the statute can be as well committed by a corporate body as by an individual. For instance, it is an act of bankruptcy to make a general assignment for the benefit of creditors. This can be committed by a corporation without a formal deed of assignment, but some corporate act purporting to transfer all the property of the corporation must be shown, and the mere adoption of resolutions authorizing the treasurer to convert the property into cash and deposit it with a trustee for the creditors does not constitute an act of bankruptcy where the plan was not executed.[170] An assignment by the corporation does not require the unanimous consent of the stockholders; it constitutes an act of bankruptcy if directed by a majority vote at a stockholders' meeting, and then by resolution of the board of directors.[171] Where a corporation, under the provisions of a state statute, files in a state court its voluntary application for dissolution and for the appointment of a receiver to wind up its affairs and distribute its assets, on the ground of its insolvency, and procures the appointment of a receiver thereon, such application is not a "general assignment for the benefit of its creditors," within the meaning of the bankruptcy law. Nor can such a proceeding be held to be an act of bankruptcy on the ground that it produces results equivalent to those brought about by a general assignment for creditors; for the acts of bankruptcy enumerated and classified by the statute cannot be enlarged by construction so as to include transactions similar or analogous to, but not identical with, those specified.[172] But it will be observed that the amendment of 1903 makes just such a proceeding an independent act of bankruptcy. And it is accordingly held that, where a suit is brought against a corporation in which the court is asked to appoint a receiver on the ground that it is insolvent and cannot meet its obligations, and on other grounds, and the corporation admits such averments and either consents to or joins in the prayer for a receiver, and one is accordingly appointed, it is an act of bankruptcy on which an adjudication may be based.[173] But the

Munger-Root Dry Goods Co., 228 Fed. 470, 143 C. C. A. 52, 36 Am. Bankr. Rep. 115.

170 In re Federal Lumber Co., 185 Fed. 926, 26 Am. Bankr. Rep. 438. As to assignments for the benefit of creditors as acts of bankruptcy in general, see supra, § 91.

171 Clark v. American Mfg. & Enameling Co., 101 Fed. 962, 42 C. C. A. 120, 4 Am. Bankr. Rep. 351.

172 In re Empire Metallic Bedstead Co., 98 Fed. 981, 39 C. C. A. 372, 3 Am. Bankr. Rep. 575.

173 Stewart Petroleum Co. v. Boardman (C. C. A.) 264 Fed. 826, 45 Am. Bankr. Rep. 573; Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co. (D. C.) 206 Fed. 813, 30 Am. Bankr. Rep. 604. An insolvent corporation commits an act of bankruptcy by procuring the appointment of a receiver through an application by its president in a suit in which the corporation and the president are defendants. Graham Mfg. Co. v. Davy-Pocahontas Coal Co., 238 Fed. 488, 151 C. C. A. 424, 38 Am. Bankr. Rep. 118.

mere institution by minority stockholders of a suit to dissolve the corporation, in which the appointment of a receiver is asked, does not entitle creditors to relief in the bankruptcy court until the corporation becomes insolvent and commits an act of bankruptcy.[174]

Again, a trust to sell all the debtor's property and divide the proceeds ratably among his creditors may be an act of bankruptcy. But it has been held that it is not an act of bankruptcy for a corporation to convey its property in trust to secure bonds to be issued and sold, and the proceeds to be applied to pay all its unsecured debts, the same being done in good faith and with a view to enable the company to continue its legitimate business, though it may be technically insolvent or likely soon to be so.[175]

As to transfers of property, it has been doubted whether the act of an insolvent corporation in voluntarily applying to a state court for a decree dissolving the corporation and winding up its affairs, pursuant to a state law, through the agency of a receiver, is a transfer of its property with intent to hinder and defraud its creditors, because operating to deprive them of the remedies provided by the bankruptcy law.[176] But the question is not of much practical importance at present, because this would clearly constitute an act of bankruptcy under the provisions of the amendment of 1903, relating to the appointment of receivers on voluntary application or "because of insolvency."[177] However, it is held that the sale of property by an insolvent corporation, and the use of the proceeds in paying the current salary of its president, is not a transfer with intent to prefer a creditor, such salary being a legitimate current expense so long as the corporation is a going concern.[178] Nor does an insolvent corporation occupying leased premises commit an act of bankruptcy by permitting its property on such premises, which is subject to a mortgage given to secure its bonds, to be sold under a distress warrant lawfully issued for rent past due, which by the state statute is made a lien on such property; this does

[174] Bank of Andrews v. Gudger, 212 Fed. 49, 128 C. C. A. 505, 32 Am. Bankr. Rep. 11. And see Standard Warehouse & Compress Co. v. George H. McFadden Bros. Agency (C. C. A.) 272 Fed. 251; W. H. Baker, Inc. v. Monarch Wholesale Mercantile Co. (C. C. A.) 269 Fed. 794, 46 Am. Bankr. Rep. 309.

[175] In re Union Pac. R. Co., 10 N. B. R. 178, Fed. Cas. No. 14,376.

[176] In re Harper & Bros., 100 Fed. 266, 3 Am. Bankr. Rep. 804.

[177] Hooks v. Aldridge, 145 Fed. 865, 76 C. C. A. 409, 16 Am. Bankr. Rep. 658. And see supra, § 95.

[178] Richmond Standard Steel Spike & Iron Co. v. Allen, 148 Fed. 657, 78 C. C. A. 389, 17 Am. Bankr. Rep. 583. The owner of the stock of a solvent corporation does not necessarily commit an act of bankruptcy on the part of the corporation by selling its property and depositing the proceeds to his own credit. In re M. S. Fersko, Inc., 250 Fed. 357, 162 C. C. A. 427, 41 Am. Bankr. Rep. 395.

not operate to give any creditor a "preference through legal proceedings." [179]

§ 145. Same; Admission of Insolvency and Willingness to be Adjudged Bankrupt.—It is an act of bankruptcy for a person (including a corporation) to "admit in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground." [180] This is the ground on which proceedings in bankruptcy have been most usually taken against corporations, and indeed the impression has prevailed that this method was sometimes resorted to by corporations, as a means of evading the provision of the statute (as originally enacted) which forbade them to file a voluntary petition in bankruptcy. It was said that, where it is apparent that the admission of insolvency was made for the very purpose of inducing creditors to take the action which the corporation itself was forbidden to take, and that the real motive was the desire of the managers of the company to liquidate its affairs through the court of bankruptcy, that court should discourage the attempt to evade the law.[181] Since insolvency is not a necessary element of this particular act of bankruptcy, the question whether the company is actually unable to pay its debts or not is immaterial, and a creditor intervening to oppose the petition cannot prove its solvency as a defense.[182] The admission of insolvency need not be made in the form of a resolution of the directors or stockholders. A published notice or letter to creditors will be sufficient. But in any case it must be explicit and unqualified. Thus, a letter written by the clerk of a corporation, by authority of its directors, stating its inability to pay its debts in full and that the only course open to non-attaching creditors was to bring involuntary proceedings in bankruptcy, in which case the company would admit its insolvency and its willingness to be adjudged bankrupt, is not such an unqualified admission as to constitute an act of bankruptcy.[183] Where the company itself files a bill in a state court asking for the appointment of a receiver, this may constitute an effectual admission of insolvency.[184] And so, where hostile

179 Richmond Standard Steel Spike & Iron Co. v. Allen, 148 Fed. 657, 78 C. C. A. 389, 17 Am. Bankr. Rep. 583.

180 Bankruptcy Act 1898, § 3. And see supra, § 96.

181 In re Bates Machine Co., 91 Fed. 625, 1 Am. Bankr. Rep. 129. But see In re C. Moench & Sons Co., 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240; In re T. L. Kelly Dry-Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528.

182 In re Duplex Radiator Co., 142 Fed. 906, 15 Am. Bankr. Rep. 324; In re C. Moench & Sons Co., 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240, affirming 123 Fed. 965, 10 Am. Bankr. Rep. 656; In re Russell Wheel & Foundry Co. (D. C.) 222 Fed. 569, 35 Am. Bankr. Rep. 66.

183 In re Standard Shipyard Co. (D. C.) 262 Fed. 522, 45 Am. Bankr. Rep. 67.

184 Moody v. Port Clyde Development Co., 102 Me. 365, 66 Atl. 967.

proceedings are instituted against it in a state court, its answer may constitute an act of bankruptcy if it thereby admits both its insolvency and its willingness to be adjudged bankrupt, though the former admission is not enough without the latter.[185] And so, if a petition in involuntary bankruptcy is filed by creditors against the corporation, and its answer waives process, admits the allegations of the petition, and declares its willingness to be adjudged bankrupt, it is an act of bankruptcy within the meaning of the statute,[186] though the opinion has been advanced that such an admission cannot be availed of as a ground of adjudication on the pending petition, but may constitute the foundation for a new petition.[187] Where a petition in bankruptcy is filed against a corporation, it is not necessary, in order to authorize counsel to appear and admit the acts of bankruptcy charged, that the corporators or stockholders should previously vote to authorize that act or direct it to be done.[188]

As to where the authority resides to commit the corporation to bankruptcy by making an admission of this kind, the authorities differ materially. In the first place, it is clear that no officer of a corporation can commit an act of bankruptcy in its name and behalf, by admitting its inability to pay its debts and its willingness to be adjudged bankrupt, without express authority from some competent source,[189] nor, it is said, can his unauthorized admission be made effective by subsequent ratification by the directors.[190] As to the authority of the board of directors, much depends on the statute law of the state in respect to the distribution of corporate power between the directors and the stockholders. Thus, it has been ruled that, under the laws of Massachusetts and of Maine, the directors of a manufacturing corporation have no authority to make a written admission of its inability to pay its debts and its willingness to be adjudged bankrupt. Such an admission is in excess of their authority, and therefore does not con-

[185] In re Wilmington Hosiery Co., 120 Fed. 179, 9 Am. Bankr. Rep. 579.

[186] In re Columbia Real Estate Co., 101 Fed. 965, 4 Am. Bankr. Rep. 411. But where a corporation authorizes one of its officers to appear on behalf of the company in the federal court and make the admission of insolvency contemplated by the statute, "in the event of an involuntary petition in bankruptcy being filed against said company," this is not in itself such an unqualified admission as is required by the act, and is therefore not an act of bankruptcy on the part of the company. In re Baker-Ricketson Co., 97 Fed. 489, 4 Am. Bankr. Rep. 605.

[187] In re Baker-Ricketson Co., 97 Fed. 489, 4 Am. Bankr. Rep. 605.

[188] Leiter v. Payson, 9 N. B. R. 205, Fed. Cas. No. 8,226.

[189] In re Southern Steel Co., 169 Fed. 702, 22 Am. Bankr. Rep. 476; In re Jefferson Casket Co., 182 Fed. 689, 25 Am. Bankr. Rep. 663. And a written admission signed by a majority of the directors, but individually and not in their official capacity, is ineffective. In re Gold Run Mining & Tunnel Co., 200 Fed. 162, 29 Am. Bankr. Rep. 563.

[190] In re Burbank Co., 168 Fed. 719, 21 Am. Bankr. Rep. 838.

stitute an act of bankruptcy; nor will a vote of the stockholders ratifying the action of the directors, but taken after the filing of the petition, relate back so as to validate it, at least where creditors other than the petitioners have already entered an appearance and opposed the adjudication.[191] And a similar ruling has been made in the case of an Oregon corporation.[192] On the other hand, the federal courts in New York have decided that the directors of a New York corporation have power and authority to put it into bankruptcy in this way, without the concurrence or authorization of the stockholders, and have generalized the rule that this is not a corporate function, to be exercised by the whole body of corporators, but an administrative act, and that the act of bankruptcy in question may be committed by the board of directors alone, unless there is something in the statute law of the particular state to forbid it.[193] And the same doctrine is held in Minnesota and several other states with regard to corporations of those states.[194] If this rule prevails, it is further held that the appointment of receivers for an insolvent corporation does not dissolve it nor vacate the offices of the directors to such an extent as to make it legally impossible for them to make the admission of insolvency contemplated by the bankruptcy act.[195] But they may be otherwise disqualified or restrained from taking such action, as in a case where the court appointing the receivers granted an injunction restraining the officers of the company from commencing or prosecuting any proceeding "involving in any way the property or property rights" of the corporation, or incumbering or embarrassing the same. Here it was held that the subsequent action of the board of directors in adopting a resolution confessing the insolvency of the company and its willingness to be adjudged bankrupt was a violation of the injunction and unauthorized, and therefore did

[191] In re Bates Machine Co., 91 Fed. 625, 1 Am. Bankr. Rep. 129; In re Standard Shipyard Co. (D. C.) 262 Fed. 522, 45 Am. Bankr. Rep. 67.

[192] In re Quartz Gold Min. Co., 157 Fed. 243, 19 Am. Bankr. Rep. 667; Van Emon v. Veal, 158 Fed. 1022, 85 C. C. A. 547.

[193] In re C. Moench & Sons Co., 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240; In re Rollins Gold & Silver Min. Co., 102 Fed. 982, 4 Am. Bankr. Rep. 327; In re Mutual Mercantile Agency, 111 Fed. 152, 6 Am. Bankr. Rep. 607; In re Guanacevi Tunnel Co. (C. C. A.) 201 Fed. 316, 29 Am. Bankr. Rep. 229.

[194] In re Kenwood Ice Co., 189 Fed. 525. 26 Am. Bankr. Rep. 499; Dodge v. Kenwood Ice Co. (C. C. A.) 204 Fed. 577, 29 Am. Bankr. Rep. 586; In re Russell Wheel & Foundry Co. (D. C.) 222 Fed. 569, 35 Am. Bankr. Rep. 66; Home Powder Co. v. Geis, 204 Fed. 568, 123 C. C. A. 94, 29 Am. Bankr. Rep. 580; Rudebeck v. Sanderson, 227 Fed. 575, 142 C. C. A. 207, 36 Am. Bankr. Rep. 146; In re Foster Paint & Varnish Co. (D. C.) 210 Fed. 652, 31 Am. Bankr. Rep. 548; Bell v. Blessing, 225 Fed. 750, 141 C. C. A. 34, 35 Am. Bankr. Rep. 672; In re United Grocery Co. (D. C.) 239 Fed. 1016, 39 Am. Bankr. Rep. 501; In re S. & S. Mfg. & Sales Co. (D. C.) 246 Fed. 1005, 39 Am. Bankr. Rep. 786.

[195] Cresson & Clearfield Coal & Coke Co. v. Stauffer, 148 Fed. 981, 78 C. C. A.

not constitute an act of bankruptcy.[196] Although ordinarily a majority of the directors of a corporation have no power to hold a meeting for the transaction of business affecting the corporation without giving notice to the minority, yet such notice may, in some circumstances, be dispensed with, and the action of the majority in putting the corporation into bankruptcy may be valid without notice to the minority directors, as, where the latter resided in a distant state and could not have attended the meeting, and there does not appear to have been any fraud or collusion,[197] where the directors not notified were only nominal members of the board and had never taken part in the meetings of the directors or given any attention to the affairs of the company,[198] or where one single director constituted the minority, and it appears that notice to him would have been entirely perfunctory and of no avail in the way of securing his attendance at the meeting or his concurrence in the views of the majority, as he had had a violent quarrel with the other directors, and had instituted a suit to rescind his contract for the purchase of stock in the company on the ground of fraud, and would have resisted the proceeding to put the company into bankruptcy in order to sustain an attachment of the company's property in his own favor.[199] It remains to be added that a resolution adopted at meetings both of the board of directors and of the stockholders of a corporation, admitting its insolvency and its willingness to be adjudged bankrupt, will unquestionably constitute an act of bankruptcy.[200]

§ 146. **Effect of Adjudication on Status of Corporation.**—On the question whether or not a corporation is dissolved by its adjudication in bankruptcy, the authorities are not in harmony. On the one hand, it has been said that a corporation, for all essential purposes, is as effectually dissolved by the commencement of proceedings in bankruptcy against it as if a solemn judgment were pronounced to that effect. It is such a dissolution, it is said, as will afford creditors a remedy against the individual shareholders where they are made liable upon the "dissolution" of the company.[201] And a federal court has declared that,

609, 17 Am. Bankr. Rep. 573; In re C. Moench & Sons Co., 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240.

196 In re Hudson River Electric Power Co., 173 Fed. 934, 23 Am. Bankr. Rep. 191.

197 In re Lisk Mfg. Co., 167 Fed. 411, 21 Am. Bankr. Rep. 674.

198 In re Marine Machine & Conveyor Co., 91 Fed. 630, 1 Am. Bankr. Rep. 421.

199 In re Kenwood Ice Co., 189 Fed. 525, 26 Am. Bankr. Rep. 499.

200 In re American Guarantee & Security Co. (C. C. A.) 192 Fed. 405, 27 Am. Bankr. Rep. 640.

201 State Savings Ass'n v. Kellogg, 52 Mo. 583. And see Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; Penniman v. Briggs, Hopk. Ch. (N. Y.) 300; In re Washington Marine Ins. Co., 2 Ben. 292, 2 N. B. R. 648, Fed. Cas. No. 17,246.

under a state statute providing that upon the "dissolution" of a corporation its president and directors or managers shall be in law trustees for the settlement of its affairs and personally responsible to creditors to the extent of the property which may come to their hands, the mere insolvency of the concern, known to the president and directors, works a practical dissolution, so as to impose upon them the statutory consequences.[202] But there is strong authority the other way. The adjudication in bankruptcy, it is argued, does not necessarily destroy the life of the corporation any more than that of a natural person. It is true the bankrupt, while under the control of the court, is said to be civiliter mortuus; and of course all corporate functions, or at least all control of the business of the corporation, must be regarded as suspended during the continuance of the proceedings in bankruptcy.[203] But there is nothing in the language of the act, nor in the necessary consequences of such a proceeding, to prevent the corporation from resuming its business and the exercise of all its corporate functions, after it shall have obtained a discharge; and so long as that is possible, it cannot with any propriety be said that the company is dissolved.[204] This view has been picturesquely expressed by the court in Georgia in the following terms: "The bankruptcy of a corporation does not put an end to its corporate existence nor vacate the office of its directors. A corporation of this state cannot be dissolved by an act of Congress, nor by the administration thereof through the federal courts. Georgia created, and she alone can destroy. Besides, it is not the purpose of the bankruptcy law to dissolve corporations. The assets are seized, but the franchise is spared. 'Your money,' not 'your life,' is the demand made by the bankruptcy act."[205] The same view has been maintained by eminent courts in considerating the effect of proceedings under the state insolvency laws upon the existence of corporations.[206] However this may be, it is settled that a decree adjudging a corporation bankrupt is in the

[202] Sprague-Brimmer Mfg. Co. v. Murphy Furnishing Goods Co., 26 Fed. 572.

[203] But it is said that, in view of the provisions of the Bankruptcy Act for compositions, a corporation, though bankrupt, may elect officers and directors while its affairs are being conducted in the bankruptcy court, and such officers and directors may agree to a settlement and distribution of assets in the nature of a composition. In re O'Gara Coal Co., 260 Fed. 742, 171 C. C. A. 480, 44 Am. Bankr. Rep. 206.

[204] Morley v. Thayer, 3 Fed. 737. That insolvency and the appointment of a receiver do not effect a dissolution of the corporation, see Chemical Nat. Bank v. Hartford Deposit Co., 161 U. S. 1, 16 Sup. Ct. 439, 40 L. Ed. 595; State v. Merchant, 37 Ohio St. 251.

[205] Holland v. Heyman, 60 Ga. 174. And see National Surety Co. v. Medlock, 2 Ga. App. 665, 58 S. E. 1131; Chamberlin v. Huguenot Mfg. Co., 118 Mass. 532; Shenandoah Valley R. Co. v. Griffith, 76 Va. 913.

[206] Coburn v. Boston Papier-Maché Mfg. Co., 10 Gray (Mass.) 243; Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292.

nature of a decree in rem as respects the status of the corporation, and if the court rendering it had jurisdiction, it can be assailed only by a direct proceeding in a competent court, unless it appears that the decree is void in form, or that due notice of the petition was not given.[207]

§ 147. Franchises as Assets.—Are the franchises of a corporation, including that by which it enjoys corporate existence, property such as will vest in its trustee in bankruptcy, and which may be sold by him in the administration of his trust? It appears that the act of 1867 contemplated an affirmative answer to this question. For No. 21 of the General Orders framed under that act provided that, "in making sale of the franchise of a corporation, it may be offered in fractional parts or in certain numbers of shares corresponding to the number of shares in the bankrupt corporation." And the courts accordingly held that the franchises of the corporation vested in the assignee in bankruptcy, as other property, and were subject to sale by him.[208] There is no such provision in the present statute nor in the present General Orders. But it is enacted that the trustee in bankruptcy shall be vested, by operation of law, with the title of the bankrupt to "property which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold under judicial process against him."[209] And "transfer," according to the definitions given in the first section of the law, "shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security."[210] Now it is a general rule, settled by the preponderance of authority, that a corporation cannot sell, mortgage, or otherwise alienate its franchises, particularly the franchise of corporate existence, unless power to do so has been expressly conferred upon it, and, consequently, that such franchises are not subject to levy and sale on execution to satisfy the debts of the corporation. But this rule will be found to have been established, and to be almost exclusively applied, in the case of such corporations as have duties to fulfill, or services to render, towards the public, where the reason for the rule is very apparent. Public corporations, properly so called, are not subject to the

[207] New Lamp Co. v. Ansonia Brass Co., 91 U. S. 656, 23 L. Ed. 336.

[208] Adams v. Boston, H. & E. R. Co., 1 Holmes, 30, 4 N. B. R. 314, Fed. Cas. No. 47; Sweatt v. Boston, H. & E. R. Co., 3 Cliff, 339, 5 N. B. R. 234, Fed. Cas. No. 13,684. But parties who purchase the property and franchises of a corporation from its assignee in bankruptcy do not thereby become its corporators and acquire the corporate entity. Metz v. Buffalo, C. & P. R. Co., 58 N. Y. 61, 17 Am. Rep. 201, 12 N. B. R. 559.

[209] Bankruptcy Act 1898, § 70a, clause 5.

[210] Bankruptcy Act 1898, § 1, clause 25.

bankruptcy law. As to quasi-public corporations, or those which are organized for purposes of private gain by individuals, though they serve a public use or render service to the public generally, they may probably be adjudged bankrupt in a proper case;[211] and it would seem that their franchises might be sold by the trustee in bankruptcy, provided the public service to be rendered could be equally well performed by any purchaser and did not involve the element of a personal trust.[212] As to corporations of other kinds, it is almost universally the case that their franchises, as such, have little or no pecuniary value. Where, however, such a corporation has authority to mortgage or sell its franchises, they would seem to come clearly within the description of property vesting in the trustee under the bankruptcy law.

§ 148. **Assessment on Unpaid Stock.**—When the assets of a bankrupt corporation are not sufficient to pay its debts, the court of bankruptcy has power and authority to levy an assessment upon the stockholders and call upon them to make good the unpaid balance of their subscriptions to the capital stock of the company, to an amount not exceeding in the aggregate the deficiency of the other assets as compared with the debts; it has, in fact, all the powers of a court of equity in the premises.[213] A provision in the subscription and in the stock certificate that the unpaid balance was to be paid on the call of the directors "when ordered by a vote of a majority of the stockholders themselves," does not prevent the effectual exercise of this power by the court of bankruptcy; for, as a court of equity, it has all the power of the directors or

[211] See supra, § 140.

[212] It has been held that a franchise to construct a turnpike road or a toll bridge, and collect tolls thereon, or to run a ferry, is a personal trust and not assignable, and will not vest in a trustee in bankruptcy. In re Scott, 6 Sawy. 234, 11 Fed. 133. But this view has been squarely denied. See Stewart v. Hargrove, 23 Ala. 429. And in the case of In re New York & W. Water Co., 98 Fed. 711, 3 Am. Bankr. Rep. 508, the opinion is expressed that a corporation otherwise amenable to the bankruptcy law (such as a water-supply company, engaged in the business of obtaining, transporting, and supplying pure water for municipal and domestic use) is not exempted from the operation of the law on the ground of its being a quasi public corporation and subserving a public use, if its franchise is assignable, so that its functions might be exercised by any transferee to whom its powers might pass through proceedings in bankruptcy.

[213] Ogilvie v. Knox County Ins. Co., 22 How. 380, 16 L. Ed. 349; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220; Scovill v. Thayer, 105 U. S. 155, 26 L. Ed. 968; Turnbull v. Payson, 95 U. S. 418, 24 L. Ed. 437; In re Munger Vehicle Tire Co., 168 Fed. 910, 94 C. C. A. 314, 21 Am. Bankr. Rep. 395; In re Remington Automobile & Motor Co., 153 Fed. 345, 82 C. C. A. 421, 18 Am. Bankr. Rep. 389; In re Miller Electrical Maintenance Co., 111 Fed. 515, 6 Am. Bankr. Rep. 701; In re Eureka Furniture Co., 170 Fed. 485, 22 Am. Bankr. Rep. 395; In re Monarch Corporation, 177 Fed. 464, 24 Am. Bankr. Rep. 428; Glenn v. Soule, 22 Fed. 417; In re Crystal Spring Bottling Co., 96 Fed. 945, 3 Am. Bankr. Rep. 194; In re Republic Ins. Co., 3 Biss. 452, Fed. Cas. No. 11,704; Payson v. Stoever, 2 Dill. 427, Fed. Cas. No. 10,863; Upton v.

the stockholders or both collectively.[214] And the directors of the corporation cannot relieve the stockholders from this liability by refusing to issue a call; and where the charter provided that the company should commence business with the full amount of its capital stock paid in, the fact that it actually commenced business is enough for the trustee in bankrptcy to show, in an action against stockholders for unpaid balances, without showing any call for their subscriptions.[215]

It should be observed that this liability of subscribers for unpaid balances, up to the full par value of their stock, is an asset of the corporation itself, not a remedy available to creditors. It is in the character of an asset of the corporation that it vests in the trustee in bankrupcy, and he is thereupon solely invested with the right to maintain actions against the stockholders who are in arrear.[216] Such actions cannot be maintained either by the corporation or by the creditors. But it is necessary to distinguish carefully between a liability of this kind and one which is made by law directly available to creditors. For instance, where the statute provides (as in New York) that holders of stock in a corporation which is not fully paid shall be personally liable to certain classes of creditors to the extent of the amount unpaid on their stock, this gives the corporation itself no claim or right of action against such stockholders, and therefore no right of action thereunder passes to the

Burnham, 3 Biss. 520, Fed. Cas. No. 16,799; Upton v. Jackson, 1 Flip. 413, Fed. Cas. No. 16,802; Wilbur v. Stockholders, 13 Phila. 479, 18 N. B. R. 178, Fed. Cas. No. 17,636; Myers v. Seeley, 10 N. B. R. 411, Fed. Cas. No. 9,994; Upton v. Hansbrough, 3 Biss. 417, 10 N. B. R. 368, Fed. Cas. No. 16,801; Lane v. Nickerson, 99 Ill. 284.

[214] Upton v. Hansbrough, 3 Biss. 417, 10 N. B. R. 368, Fed. Cas. No. 16,801.

[215] Rathbone v. Ayer, 84 App. Div. 186, 82 N. Y. Supp. 235.

[216] Rathbone v. Ayer, 84 App. Div. 186, 82 N. Y. Supp. 235; Stoddard v. Lum, 159 N. Y. 272, 53 N. E. 1108, 45 L. R. A. 551, 70 Am. St. Rep. 541; Stocker v. Davidson, 74 Kan. 214, 86 Pac. 136, 118 Am. St. Rep. 315; Harris v. Wells, 57 Misc. Rep. 172, 108 N. Y. Supp. 1078; Falco v. Kaupisch Creamery Co., 42 Or. 422, 70 Pac. 286; In re Remington Automobile & Motor Co., 153 Fed. 345, 82 C. C. A. 421, 18 Am. Bankr. Rep. 389; Foote v. Greilick, 166 Mich. 636, 132 N. W. 473; Commercial Bank of Augusta v. Warthen, 119 Ga. 990, 47 S. E. 536; Perkins v. Cowles, 157 Cal. 625, 108 Pac. 711, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158; Bernard v. Carr, 167 N. C. 481, 83 S. E. 816; Babbitt v. Read (D. C.) 215 Fed. 395; Mills v. Friedman, 111 Misc. Rep. 253, 181 N. Y. Supp. 285; Petition of Stuart (C. C. A.) 272 Fed. 938; Babbitt v. Read (D. C.) 215 Fed. 395; De Muth v. Faw, 103 Wash. 279, 174 Pac. 18. But see Kelley v. Abbott (Cal.) 196 Pac. 39. If a subscriber for stock in a corporation has given his note in part payment of the price, the corporation's trustee in bankruptcy may sue and recover on the note. Bailey v. Anderson, 142 Ga. 11, 82 S. E. 290. Under the laws of Minnesota, however, a stockholder of a corporation of that state is liable for the difference between the par value of his stock and the agreed amount he paid therefor only to those who have given credit to the corporation on the faith of its capital stock, and consequently such liability cannot be enforced by the trustee in bankruptcy. Courtney v. Croxton, 239 Fed. 247, 152 C. C. A. 235, 38 Am. Bankr. Rep. 560.

trustee in bankruptcy of the corporation.[217] So, if stock was issued in exchange for patent rights or other property, and the corporation itself cannot claim that it was not fully paid, neither can its trustee in bankruptcy.[218]

It has been held that the trustee in bankruptcy cannot levy an assessment for unpaid stock of his own motion. There must have been either corporate action to fix the liability of the stockholders or a judicial ascertainment of their liability.[219] And where a formal assessment and call are necessary, the proper practice is for the trustee to file his petition in the court of bankruptcy, asking for an order directing him to make an assessment and call upon the unpaid stock of the corporation for the purpose of paying its debts.[220] On the hearing of this petition, the court will decide the necessary preliminary questions, such as the question whether particular stock has or has not been fully paid, whether the corporation is indebted in excess of its assets, and what is the amount of its indebtedness. But the order should not be so framed as to authorize the issue of an execution against any named stockholder for the amount considered to be due from him. The trustee should proceed against each in a plenary action.[221] But the authorities favor the view that a formal assessment or call is necessary only in two cases: First, where it is not certain that the whole amount of the unpaid subscriptions to stock will be needed to pay the debts of the company, for in this case some preliminary investigation and order are necessary to determine what percentage the delinquent subscribers should be called on to pay, for they are not liable in the total sum unless it is all required to satisfy creditors.[222] Second, when no time was fixed for the payment of the successive installments on the stock, but they were to be called in by order of the directors from time to time. Here it could not be said that any stockholder is delinquent until something equivalent to such a call as the directors might have issued has been in effect issued.[223]

[217] In re Jassoy Co., 178 Fed. 515, 101 C. C. A. 641, 23 Am. Bankr. Rep. 622.

[218] Sternbergh v. Duryea Power Co. (C. C. A.) 161 Fed. 540, 20 Am. Bankr. Rep. 625. And see In re Beachy & Co., 170 Fed. 825, 22 Am. Bankr. Rep. 538; In re Jassoy Co., 178 Fed. 515, 101 C. C. A. 641, 23 Am. Bankr. Rep. 622.

[219] Payson v. Brooke, 1 Wkly. Notes Cas. (Pa.) 89, Fed. Cas. No. 10,857.

[220] Bergdoll v. Harrigan (C. C. A.) 263 Fed. 279, 44 Am. Bankr. Rep. 633.

[221] In re Remington Automobile & Motor Co., 153 Fed. 345, 82 C. C. A. 421, 18 Am. Bankr. Rep. 389; citing Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968; Bergdoll v. Harrigan (C. C. A.) 263 Fed. 279, 44 Am. Bankr. Rep. 633. But see Kaye v. Metz (Cal.) 198 Pac. 1047.

[222] Kelley v. Aarons (D. C.) 238 Fed. 996, 39 Am. Bankr. Rep. 115.

[223] See Rathbone v. Ayer, 84 App. Div. 186, 82 N. Y. Supp. 235; Phœnix Warehousing Co. v. Badger, 67 N. Y. 294; Ross-Mehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co., 72 Fed. 957; Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968; Citizens' & Miners' Sav.

Compliance with the call may be enforced by a suit in equity in the federal district court in which the estate of the bankrupt corporation is being administered,[224] or the trustee may proceed against the stockholders severally in the proper state courts. In suits to enforce the collection of the assessment, the validity of the action of the bankruptcy court in making the levy cannot be brought into question.[225] Nor can a stockholder defend himself against such an action on the ground that the proceedings to increase the stock of the corporation (his subscription being made for such increase) were irregular or invalid,[226] nor on the ground that his subscription for the stock and agreement to pay for it were based on an express understanding that he was to receive the stock for two-thirds of its par value,[227] nor on the ground that he was ignorant of the condition of the company at the time the subscription was made,[228] nor on the ground that he was fraudulently misled and induced to believe that there was no personal liability for the unpaid balance, and that the amount thereof could not be assessed against him,[229] or that the word "non-assessable" was written across the face of his certificate of stock.[230] Further, the fact that a call for unpaid subscriptions was for more than was necessary to pay the debts of the company cannot be tried in an action by the trustee against an individual stockholder.[231] The fact that the defendant's name appears on the books of the corporation as a stockholder is presumptive proof that he is the owner of the stock, and proof that he received a dividend on the

Bank v. Gillespie, 115 Pa. St. 564, 9 Atl. 73; Tiger Shoe Mfg. Co.'s Trustee v. Shanklin, 102 S. W. 295, 31 Ky. Law Rep. 298.

[224] In re Crystal Spring Bottling Co., 96 Fed. 945, 3 Am. Bankr. Rep. 194; Shiffer v. Akenbrook (Ind. App.) 130 N. E. 241; Kelley v. Abbott (Cal.) 196 Pac. 39. A referee in bankruptcy has jurisdiction of a proceeding to compel the officers of a bankrupt corporation to pay over the proceeds of sales of its stock alleged to belong to the corporation, and also to pay an amount assessed against them for unpaid shares. In re Kornit Mfg. Co., 192 Fed. 302, 27 Am. Bankr. Rep. 244.

[225] Clevenger v. Moore, 71 N. J. Law, 148, 58 Atl. 88; Payson v. Stoever, 2 Dill. 427, Fed. Cas. No. 10,863; Michener v. Payson, 13 N. B. R. 49, Fed. Cas. No. 9,524; Jeffery v. Selwyn, 220 N. Y. 77, 115 N. E. 275, 6 A. L. R. 1111; Mills v. Friedman, 111 Misc. Rep. 253, 181 N. Y. Supp. 285. Compare Lamb v. Lamb, 6 Biss. 420, 13 N. B. R. 17, Fed. Cas. No. 8,018. As to contest by nonresident stockholder, see In re Newfoundland Syndicate (C. C. A.) 201 Fed. 917, 29 Am. Bankr. Rep. 858.

[226] Chubb v. Upton, 95 U. S. 665, 24 L. Ed. 523.

[227] Flinn v. Bagley, 7 Fed. 785.

[228] Payson v. Withers, 5 Biss. 269, Fed. Cas. No. 10,864.

[229] Upton v. Tribilcok, 91 U. S. 45, 23 L. Ed. 203; Michener v. Payson, 13 N. B. R. 49, Fed. Cas. No. 9,524.

[230] Upton v. Burnham, 3 Biss. 520, Fed. Cas. No. 16,799. But under the laws of Minnesota, where a corporation agreed that its stock would be non-assessable, the unpaid balance of the par value of stock of any given stockholder is not recoverable by the trustee in bankruptcy. Courtney v. Georger, 228 Fed. 859, 143 C. C. A. 257, 36 Am. Bankr. Rep. 20.

[231] Upton v. Hansbrough, 3 Biss. 417, 10 N. B. R. 368, Fed. Cas. No. 16,801.

stock renders the presumption conclusive.[232] The transferee of stock is liable on such an assessment, unless it appears that the transfer has not been accepted by him, in which case the transferror alone is liable.[233] The provision of the statute that "suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed" [234] applies to an action by a trustee to enforce against stockholders the payment of their unpaid shares.[235]

Under the doctrine that the capital of a corporation constitutes a trust fund for the benefit of its creditors, it is held that a stockholder who is indebted to the bankrupt corporation for unpaid shares cannot set off against his liability thereon a debt due to him by the corporation. The fund arising from such unpaid stock must be equally divided among all the creditors.[236] Thus the fact that stockholders of a bankrupt corporation are also holders of its bonds, and as such entitled to share in the distribution of its estate, does not entitle them to set off their claims on the bonds in a suit against them by the trustee to recover unpaid subscriptions.[237] Nor will a delinquent stockholder be permitted to prove his claim against the estate of the corporation in bankruptcy until he has paid the balance remaining due on his subscription.[238]

§ 149. Statutory Liability of Stockholders and Directors.—In many of the states, statutes impose upon stockholders in certain classes of corporations a personal liability for the debts of the company, to an extent equal to the amount of stock held by them, and there are also laws making the directors of a corporation liable for its debts when they have transacted business before the capital was paid in, failed to make annual reports to state officers, incurred debts in excess of the amount allowed by law, or declared dividends when the company was insolvent or when there were no real profits to be divided. Such a liability is a collateral obligation for the benefit of the creditors of the corporation, by which the stockholders or directors become sureties to the creditors for the debts of the company.[239] But it is not an asset, legal or equi-

[232] Turnbull v. Payson, 95 U. S. 418, 24 L. Ed. 437.

[233] Wilbur v. Stockholders, 13 Phila. 479, 18 N. B. R. 178, Fed. Cas. No. 17,636.

[234] Bankruptcy Act 1898, § 11d.

[235] Walker v. Towner, 4 Dill. 165, 16 N. B. R. 285, Fed. Cas. No. 17,089; Payson v. Coffin, 5 Dill. 473, Fed. Cas. No. 10,859; Scovill v. Shaw, 4 Cliff. 549, Fed. Cas. No. 12,552.

[236] Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731; Jenkins v. Armour, 6 Biss. 312, 14 N. B. R. 276, Fed. Cas. No.7,260; Kaye v. Metz (Cal.) 198 Pac. 1047.

[237] Babbitt v. Read, 173 Fed. 712, 23 Am. Bankr. Rep. 254.

[238] In re Wiener & Goodman Shoe Co., 96 Fed. 949, 3 Am. Bankr. Rep. 200.

[239] The pendency of bankruptcy proceedings against a corporation do not stand in the way of a resort to a method provided by the laws of the state for en-

table, of the corporation, nor is it a right of action which the corporation itself could have enforced. Hence, upon the bankruptcy of the corporation, the trustee does not acquire any right to enforce such a liability for the benefit of the creditors. It is true he represents the creditors as well as the bankrupt, but his trust relates only to the corporate assets.[240] And the fact that directors of the bankrupt corporation have made themselves thus liable under the state law is not a circumstance which will prevent the trustee from calling upon stockholders for the unpaid balance of their stock.[241] Further, proceedings in bankruptcy against a corporation will not prevent a judgment creditor of the corporation from pursuing in a state court his remedy upon the statutory individual liability of stockholders or directors.[242]

But the case is altogether different where the officers or directors of a corporation are alleged to have "looted" it, to have divided its property among themselves, to have made a private and secret profit out of a transaction with their own company, or to have wasted or lost its assets by a violation of their duties or abuse of their powers. In such a case, whether the right of action against them be founded on a statute or considered as arising at common law, it is a right of action in favor of the corporation, not the creditors, and therefore it vests in the corpo-

forcing the liability of a stockholder for corporate debts. Selig v. Hamilton, 234 U. S. 652, 34 Sup. Ct. 926, 58 L. Ed. 1518, Ann. Cas. 1917A, 104.

[240] In re Beachy & Co., 170 Fed. 825, 22 Am. Bankr. Rep. 538; In re Crystal Spring Bottling Co., 96 Fed. 945, 3 Am. Bankr. Rep. 194; Jacobson v. Allen, 20 Blatchf. 525, 12 Fed. 454; Bristol v. Sanford, 12 Blatchf. 341, 13 N. B. R. 78, Fed. Cas. No. 1,893; Dutcher v. Marine Bank, 12 Blatchf. 435, 11 N. B. R. 457, Fed. Cas. No. 4,203; Rathbone v. Ayer, 84 App. Div. 186, 82 N. Y. Supp. 235; John V. Farwell Co. v. Jackson Stores, 137 Ga. 174, 73 S. E. 13; Tiger Shoe Mfg. Co.'s Trustee v. Shanklin, 31 Ky. Law Rep. 298, 102 S. W. 295; Babbitt v. Read, 236 Fed. 42, 149 C. C. A. 252, 38 Am. Bankr. Rep. 303; Lummis v. Crosby, 176 App. Div. 315, 162 N. Y. Supp. 444; Seegmiller v. Day, 249 Fed. 177, 161 C. C. A. 213, 41 Am. Bankr. Rep. 317; In re Huffman-Salvar Roofing Paint Co. (D. C.) 234 Fed. 798, 37 Am. Bankr. Rep. 426; Smith v. Kastor, 195 Ill. App. 458; Abele v. S. A. Meagher Co., 227 Mass. 427, 116 N. E. 805; State Bank of Commerce v. Kenney Band Instrument Co., 143 Minn. 236, 173 N. W. 560. But see, per contra, Cardozo v. Brooklyn Trust Co., 228 Fed. 333, 142 C. C. A. 625, 36 Am. Bankr. Rep. 351; E. L. Moore & Co. v. Murchison, 226 Fed. 679, 141 C. C. A. 435; Coleman v. Booth, 268 Mo. 64, 186 S. W. 1021; Mohr v. Minnesota Elevator Co., 40 Minn. 343, 41 N. W. 1074. In the case of Main v. Mills, 6 Biss. 98, Fed. Cas. No. 8,974, it was held that if the directors of a corporation spend its capital stock in declaring and paying dividends, when there are no actual profits to be divided, and the company is adjudged bankrupt, the trustee in bankruptcy may recover the amount so paid in dividends, at least from any officer of the corporation who was bound to know the condition of its affairs, and that he had no right to receive the dividends. And see Mackall v. Pocock, 136 Minn. 8, 161 N. W. 228, L. R. A. 1917C, 390.

[241] In re Crystal Spring Bottling Co. (D. C.) 96 Fed. 945, 3 Am. Bankr. Rep. 194.

[242] Allen v. Ward, 4 Jones & S. (N. Y.) 290, 10 N. B. R. 285. And see Jacobson v. Allen, 20 Blatchf. 525, 12 Fed. 454.

ration's trustee in bankruptcy as part of its assets, and may be enforced by him.[243]

§ 150. Discharge of Corporations.—The former bankruptcy law did not allow the granting of a discharge, under any circumstances, to a bankrupt corporation.[244] And as a consequence of this it was held that the provision of the statute for staying any pending suit or proceeding against the bankrupt, to await the determination of the court of bankruptcy on the question of discharge, did not apply to the case of a corporation,[245] and that the act of a creditor in proving his debt and receiving dividends in bankruptcy proceedings against a corporation was no bar to his recovering judgment for the balance in a state court.[246] But this appears to be changed by the present statute, which enacts that "any person" who has been adjudged a bankrupt "may file an application for a discharge in the court of bankruptcy in which the proceedings are pending" (section 14a), and that the word "person" as used in the act "shall include corporations except where otherwise specified" (section 1, clause 19). In the absence of any provision in the law necessarily making the discharge of a corporation impossible or inconsistent with the act, the irresistible inference from the clauses quoted is that a corporation which has been thrown into bankruptcy may have its discharge on the same conditions, and attended with the same consequences, as in the case of a natural person; and especially in view of the fact that the earlier drafts of the present bankruptcy law, in the section relating to discharges, began with the words "any person not a corporation," and that the words "not a corporation" were afterwards stricken out. There is also an explicit decision that a corporation is entitled to a discharge,[247] though in the same case it was held that such a discharge would not prevent creditors from subsequently taking a judgment against the corporation in a state court in such limited form as might enable them to enforce the secondary liability of the directors under the state statute, to which, by the terms of the statute, a judgment against the corporation would be a prerequisite.

[243] Rathbone v. Ayer, 84 App. Div. 184, 82 N. Y. Supp. 239; In re Swofford Bros. Dry Goods Co., 180 Fed. 549, 25 Am. Bankr. Rep. 282. Sherwood v. Holbrook, 98 Misc. Rep. 668, 163 N. Y. Supp. 326; McCullam v. Buckingham Hotel Co., 198 Mo. App. 107, 199 S. W. 417.

[244] Rev. Stat. U. S. § 5122. And see New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S. 656, 666, 23 L. Ed. 336.

[245] Meyer v. Aurora Ins. Co., 7 N. B. R. 191.

[246] Ansonia Brass & Copper Co. v. New Lamp Chimney Co., 53 N. Y. 123, 13 Am. Rep. 476, 10 N. B. R. 355.

[247] In re Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468.

CHAPTER X

PETITION AND ADJUDICATION

§ 151. Voluntary Petition and Adjudication Thereon.—The fifty-ninth section of the act provides that "any qualified person may file a petition to be adjudged a voluntary bankrupt;" and under the amendment of 1910, "any person," including a corporation, "except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." It appears, therefore, to be the absolute and indefeasible right of any qualified person to file his voluntary petition, and in this he cannot be hindered or restrained by injunction or otherwise.[1] On the other hand, there is

[1] See supra, § 3. Although a person may be actually solvent, this does not prevent him from voluntarily having his property distributed among his creditors

no legal obligation on an insolvent debtor to file a voluntary petition in bankruptcy,[2] except perhaps in the case where he has no other means of vacating or discharging a lien which will otherwise ripen into a preference.[3] So also, a voluntary petition may be withdrawn and all further proceedings stayed on the application of the petitioner, before an adjudication has been made, upon proper cause shown and the payment of costs,[4] unless such a course is opposed by creditors, in which event the petitioner must show very substantial grounds for leave to withdraw;[5] but after the decree of bankruptcy has been passed, it is not open to the bankrupt to withdraw and obtain a dismissal of the proceedings without the concurrence of all whose interests may be affected.[6]

In these cases, the operation of the law is almost automatic. It is indeed directed (section 18g) that the judge shall "hear the petition, and make the adjudication or dismiss the petition," but the hearing is merely ex parte and no provision is made for notice to creditors or others. "The filing of the petition is of itself an act of bankruptcy, and the debtor then surrenders all his estate and effects for the benefit of his creditors, and is at once, without any hearing, adjudged a bankrupt. The district court is thereby clothed in such cases, upon the filing of the petition, with jurisdiction over the debtor and his property." [7]

under the Bankruptcy Act. In re Pyatt (D. C.) 257 Fed. 362, 42 Am. Bankr. Rep. 462. On the other hand, to entitle a petitioner to be adjudged a bankrupt in voluntary proceedings, it is not essential that he should own any property, or that his property, if he has any, should be subject to administration in bankruptcy. In re Hargadine-McKittrick Dry Goods Co. (D. C.) 239 Fed. 155, 39 Am. Bankr. Rep. 142. This last case was reversed on appeal, but on other grounds. Zeitinger v. Hargadine-McKittrick Dry Goods Co., 244 Fed. 719, 157 C. C. A. 167, 40 Am. Bankr. Rep. 324. The fact that a voluntary bankrupt, who had practically no assets, filed his petition for the purpose of protecting from his creditors a legacy which he expected shortly to receive from his mother, does not warrant setting aside his adjudication as a bankrupt, for it is one of the purposes of the Bankruptcy Act to protect after-acquired property from creditors, and the fact that the bankrupt had some special property in view does not change his rights. Bank of Elberton v. Swift (C. C. A.) 268 Fed. 305, 46 Am. Bankr. Rep. 75.

[2] Richmond Standard Steel Spike & Iron Co. v. Allen, 148 Fed. 657, 78 C. C. A. 389, 17 Am. Bankr. Rep. 583; Summers v. Abbott, 122 Fed. 36, 58 C. C. A. 352, 10 Am. Bankr. Rep. 254.

[3] See supra, § 88.

[4] Ex parte Randall, 5 Law Rep. 115, Fed. Cas. No. 11,550.

[5] Ex parte Harris, 3 N. Y. Leg. Obs. 152, Fed. Cas. No. 6,110. But where, upon the institution of proceedings in composition, it appeared that no adjudication had yet been made upon the bankruptcy petition, which was voluntary, it was held that an adjudication ought not to be made merely because certain creditors asked it, if the debtor did not desire it. In re Alsberg, 9 Ben. 17, Fed. Cas. No. 260.

[6] In re Gile, 5 Law Rep. 224, Fed. Cas. No. 5,423.

[7] Blake v. Francis-Valentine Co., 89 Fed. 691, 1 Am. Bankr. Rep. 372.

Voluntary bankruptcy must be upon the debtor's own initiative. Thus, where a petition in involuntary bankruptcy is filed, the default of the defendant, through failure to appear, does not convert the proceeding into one of voluntary bankruptcy,[8] though it has been held that if the defendant, being a corporation, adopts a resolution consenting to an adjudication being made in the compulsory proceedings begun against it, such proceedings substantially become voluntary, though involuntary in form.[9] But where a petition is filed by one member of a firm against the firm and his partners, it is involuntary in so far as it affects the partners who do not assent, and hence they cannot be adjudged bankrupt except upon proof of the commission of an act of bankruptcy within the statutory time.[10]

It sometimes happens that both a voluntary petition and an involuntary petition against the same debtor will be pending at the same time. It is held that the pendency of the one is no bar to the filing of the other. And the question whether the court should proceed under the one petition or the other is not a question of jurisdiction or of right in the parties, but one of practice; and the adjudication should be made in that proceeding in which, under all the circumstances, it appears to be for the best interests of the entire estate. As a general rule, it should be made in the voluntary case, with proper protection to the rights of prior petitioning creditors, because quicker, less expensive, and less likely to lead to costly litigation; and the court is not precluded from acting under this general rule by the fact that the debtor may have appeared and participated in the involuntary proceeding under such circumstances as might ordinarily create an estoppel if his own interests alone were involved.[11]

§ 152. Same; Opposition by Creditors.—The present bankruptcy act does not authorize creditors of a proposed voluntary bankrupt to file answers in opposition to his petition for adjudication.[12] Thus, a

[8] In re Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. Bankr. Rep. 515.

[9] In re New Amsterdam Motor Co., 180 Fed. 943, 24 Am. Bankr. Rep. 757.

[10] In re J. M. Ceballos & Co., 161 Fed. 445, 20 Am. Bankr. Rep. 459.

[11] In re New Chattanooga Hardware Co., 190 Fed. 241, 27 Am. Bankr. Rep. 77; International Silver Co. v. New York Jewelry Co., 233 Fed. 945, 147 C. C. A. 619, 37 Am. Bankr. Rep. 91. And see In re Stegar, 113 Fed. 978, 7 Am. Bankr. Rep. 665; In re Canfield, 5 Law Rep. 415, Fed. Cas. No. 2,380; In re Flanagan, 5 Sway. 312, 18 N. B. R. 439, Fed. Cas. No. 4,850. Compare In re Stewart, 3 N. B. R. 108, Fed. Cas. No. 13,419; In re Lachenmaier (C. C. A.) 203 Fed. 32, 29 Am. Bankr. Rep. 325.

[12] In re Jehu, 94 Fed. 638, 2 Am. Bankr. Rep. 498; In re R. H. Pennington & Co. (D. C.) 228 Fed. 388, 35 Am. Bankr. Rep. 832; In re Greer (D. C.) 248 Fed. 131, 40 Am. Bankr. Rep. 797; In re Ann Arbor Machine Corp. (C. C. A.) 274 Fed. 24.

creditor will not be heard to allege that the petitioner is not in reality insolvent and therefore not entitled to the benefits of the act.[13] Nor will the giving of preferences, fraudulent transfers of property, concealment of assets, or other acts done in contravention of the statute avail as grounds of objection to an adjudication on a voluntary petition.[14] There is, however, one single ground on which creditors may interpose to prevent the granting of the petition, namely, a want of jurisdiction in the particular court. Before an adjudication is made on a voluntary petition, creditors may move to set aside the petition or dismiss it, on the ground that the petitioner has not resided or had his domicile or his principal place of business within the jurisdiction of the court for the requisite length of time, or at all, and thereupon the court may inquire into the facts of jurisdiction, and make the adjudication or dismiss the petition according to the result.[15] Even after the adjudication has been made, it is not too late for creditors to object on this ground their proper course being to move the court to vacate the adjudication. But they must act promptly. If they prove their debts, choose a trustee, and otherwise participate in the proceedings so as to recognize their validity, they will be considered as having waived this objection. They cannot first set it up in opposition to the bankrupt's application for discharge.[16]

§ 153. Involuntary Bankruptcy; Creditors Entitled to File Petition.—To sustain a petition in involuntary bankruptcy, it is necessary that it should be brought by not less than three of the creditors, except in the case where the debtor has less than twelve creditors in all, in which event one alone may file the petition. In either case it is required that the petitioning creditor or creditors should have provable claims against the debtor amounting to a minimum of five hundred dollars, over and above the value of any securities held by them. It is absolutely necessary, therefore, that each creditor joining in the petition should be the owner of a demand or claim "provable" against the bankrupt within the provisions of the act.[17] But it is not material to

[13] In re Carleton, 115 Fed. 246, 8 Am. Bankr. Rep. 270; In re Fowler, 1 Low. 161, 1 N. B. R. 680, Fed. Cas. No. 4,998.

[14] In re Houghton, 4 Law Rep. 482, Fed. Cas. No. 6,727; Ex parte Paget Fed. Cas. No. 10,670; In re United Grocery Co. (D. C.) 239 Fed. 1016, 39 Am. Bankr. Rep. 501. Compare In re Bailey, 1 N. Y. Leg. Obs. 18, Fed. Cas. No. 726.

[15] In re Waxelbaum, 98 Fed. 589, 3 Am. Bankr. Rep. 392. Where a voluntary petition is filed in a court of another district after the filing of an involuntary petition, the petitioning creditors are entitled to notice. In re Continental Coal Corp., 238 Fed. 113, 151 C. C. A. 189, 38 Am. Bankr. Rep. 168.

[16] Allen v. Thompson, 10 Fed. 116; In re Mason, 99 Fed. 256, 3 Am. Bankr. Rep. 599.

[17] In re Howell, 215 Fed. 1, 131 C. C. A. 309, 32 Am. Bankr. Rep. 572. In re

inquire when the debt or claim accrued. A debt contracted before the passage of the bankruptcy statute is within its operation and will support a petition, and it is no objection that the statute is thus made to retroact by giving the creditor a remedy which was not available to him when the claim accrued.[18] But it has been thought by some of the authorities that only those creditors could bring or join in the petition who had provable claims against the bankrupt at the time of the commission of the alleged act of bankruptcy.[19] But these decisions proceed upon the mistaken theory that a petition in bankruptcy is analogous to a creditor's bill to set aside fraudulent conveyances, and hence maintainable only by those directly injured or defrauded. On the contrary, the whole purpose of the statute is to secure the equal distribution of the debtor's property among all his creditors alike, not to reward those whose superior activity has enabled them to unearth concealed assets or secure liens. When the bankrupt's estate shall have been collected by the trustee, it is for distribution among all the creditors whose claims have been proved and allowed, and the petitioning creditors have absolutely no higher rights than any other creditors. Further, there are acts of bankruptcy upon which a petition may be maintained which have nothing to do with the giving of preferences or the transfer or concealment of assets, and as to which, therefore, the supposed analogy breaks down. Finally the courts are not justified in adding to the statute a qualification or condition which it does not express. It merely provides that "three or more creditors who have provable claims" may petition; it does not require that the claims should have been in existence and should have been provable at a time anterior to the filing of the petition. We think therefore that the better reason is clearly with those authorities which reject this qualification, and hold that it is only necessary that the petitioning

Crafts-Riordon Shoe Co., 185 Fed. 931, 26 Am. Bankr. Rep. 449, Bankruptcy Act 1898, §§ 59b, 63. Persons related to the alleged bankrupt within the third degree of consanguinity may bring a petition in involuntary bankruptcy against him, although it is provided that they are not to be included in computing the total number of his creditors for the purpose of ascertaining whether a sufficient proportion have joined in the petition. Perkins v. Dorman, 206 Fed. 858. A corporation of another state may be a petitioning creditor, and it is not necessary to allege that it has obtained the right to do business in the state where the proceeding is brought. In re R. L. Radke Co., 193 Fed. 735, 27 Am. Bankr. Rep. 950. But persons who extended credit to a corporation, in violation of the express provisions of the statute under which it was organized that it should neither give nor receive credit, have no claims which could be proved in bankruptcy against it, and cannot maintain a petition to have it adjudged an involuntary bankrupt. In re Wyoming Valley Co-op. Ass'n, 198 Fed. 436, 28 Am. Bankr. Rep. 462.

[18] Ex parte Hull, Fed. Cas. No. 6,856.

[19] Brake v. Callison, 129 Fed. 201, 63 C. C. A. 359, 11 Am. Bankr. Rep. 797;

creditors should have provable claims at the time they sign the petition.[20]

But a creditor who has sold and assigned his claim has no standing to bring or join in the petition,[21] and this applies to one who was qualified at the time the original petition was filed, but ceased to be a creditor before the filing of an amended petition, the first having been dismissed for insufficiency.[22] But it is immaterial that he has contracted to sell his claim, agreeing, as a condition, first to join in a petition in bankruptcy against the debtor, if the transfer is not made until after the petition is filed.[23] Nor is the bankruptcy proceeding defeated by the fact that one of the petitioning creditors has received payment of his claim from the debtor after the filing of the petition.[24] But a petitioner must be the real owner of a provable claim, entitled to sue on it, and, if not the beneficial owner of the claim, at least he must be the representative or trustee of one who is the beneficial owner of a genuine and provable debt.[25] Under ordinary circumstances, the assignee of a claim succeeds to the rights of his assignor, including the right to join in a petition in bankruptcy against the debtor, unless where the assignment was taken as part of an unlawful or oppressive scheme;[26] but one is not qualified as a petitioner to whom a claim has been transferred without consideration and as a mere subterfuge to avoid a possible set-off or counterclaim.[27] This condition being fulfilled it is not necessary that the claim should be immediately enforceable. The statute only requires that it should be "a fixed liability absolutely owing at the time of the filing of the petition, whether then payable or not." (Section 63.) Consequently a debt payable in the future, but upon which the debtor's liability is fixed and not contingent, will support a

In re Callison, 130 Fed. 987, 12 Am. Bankr. Rep. 344; In re Brinkman, 103 Fed. 65, 4 Am. Bankr. Rep. 551; Beers v. Hamlin, 99 Fed. 695, 3 Am. Bankr. Rep. 745; In re Muller, Deady, 513, 3 N. B. R. 329, Fed. Cas. No. 9,912.

[20] In re Hanyan, 180 Fed. 498, 24 Am. Bankr. Rep. 72, affirmed without opinion in (C. C. A.) 181 Fed. 1021, 24 Am. Bankr. Rep. 954; In re Lewis F. Perry & Whitney Co., 172 Fed. 745, 22 Am. Bankr. Rep. 772; Ex parte Shouse, Crabbe, 482, Fed. Cas. No. 12,815; In re Van Horn, 246 Fed. 822, 159 C. C. A. 124, 41 Am. Bankr. Rep. 12.

[21] In re Burlington Malting Co., 109 Fed. 777, 6 Am. Bankr. Rep. 369.

[22] In re Western Savings & T. Co., 4 Sawy. 190, 17 N. B. R. 413, Fed. Cas. No. 17,442.

[23] Lowenstein v. Henry McShane Mfg. Co., 130 Fed. 1007, 12 Am. Bankr. Rep. 601.

[24] In re Lutfy, 156 Fed. 873, 19 Am. Bankr. Rep. 614.

[25] In re Halsey Electric Generator Co., 163 Fed. 118, 20 Am. Bankr. Rep. 738. One holding a note of the bankrupt as an agent or trustee of another is competent to join in an involuntary petition. In re Veler, 249 Fed. 633, 161 C. C. A. 543, 41 Am. Bankr. Rep. 736.

[26] In re H. E. Page Motor Car Co. (D. C.) 251 Fed. 318, 41 Am. Bankr. Rep. 546.

[27] In re Pangborn, 185 Fed. 673, 26 Am. Bankr. Rep. 40.

petition in bankruptcy, such as a promissory note not yet due.[28] Where there has been presentment of a note for payment, dishonor, and notice, the payee may file a petition in involuntary bankruptcy against the indorser.[29] But if the debtor's liability, as distinguished from the date of payment, is uncertain or conditional, it will not suffice. Thus, a surety who has not paid the debt is not a creditor in such sense as to be entitled to file a petition in bankruptcy against the principal debtor,[30] nor a subcontractor whose claim against the contractor was not to become fixed until the latter should have been paid by the owner, the latter event not having occurred at the time of the filing of the petition.[31] So, where the law of the state provides that a tax collector may sue for the recovery of delinquent taxes only after they have remained unpaid for three months, he cannot maintain a petition in bankruptcy against the taxpayer without showing that the prescribed time has elapsed.[32] The claims of several joint makers of a note, who have discharged the same, are provable debts against the maker, who refuses to pay his pro rata share, so as to sustain a petition in bankruptcy against him.[33]

Secured creditors, as well as those who are unsecured, may file a petition in involuntary bankruptcy, although, in making up the requisite amount of debts, their claims are to be counted only to the extent to which they may exceed the value of the securities.[34] A state may be a petitioning creditor.[35] And a married woman may file a petition against her own husband, if the law of the state permits the creation of enforceable debts as between man and wife, and she is an actual creditor of her

[28] In re Rothenberg, 140 Fed. 798, 15 Am. Bankr. Rep. 485; Linn v. Smith, N. B. R. 46, Fed. Cas. No. 8,375; In re Alexander, 1 Low. 470, 4 N. B. R. 78, Fed. Cas. No. 161; Phelps v. Clasen, Woolw. 204, Fed. Cas. No. 11,074; In re Muller, Deady, 513, 3 N. B. R. 329, Fed. Cas. No. 9,912; In re Ouimette, 1 Sawy. 47, Fed. Cas. No. 10,662; Barton v. Tower, Fed. Cas. No. 1,085; In re King, Fed. Cas. No. 7,785. Compare In re Morse, 17 Blatchf. 72, Fed. Cas. No. 9,851.

[29] Doty v. Mason (D. C.) 244 Fed. 587, 40 Am. Bankr. Rep. 58.

[30] Phillips v. Dreher Shoe Co., 112 Fed. 404, 7 Am. Bankr. Rep. 326. See Boyce v. United States Fidelity & Guaranty Co., 111 Fed. 138, 49 C. C. A. 276, 7 Am. Bankr. Rep. 6.

[31] In re Ellis, 143 Fed. 103, 74 C. C. A. 297, 16 Am. Bankr. Rep. 221.

[32] In re Corwin Mfg. Co., 185 Fed. 976, 26 Am. Bankr. Rep. 269.

[33] Wright v. Rumph, 238 Fed. 138, 151 C. C. A. 214, 38 Am. Bankr. Rep. 235.

[34] In re Bloss, 4 N. B. R. 147, Fed. Cas. No. 1,562; In re Stansell, 6 N. B. R. 183, Fed. Cas. No. 13,293; In re Alexander, 1 Low. 470, 4 N. B. R. 178, Fed. Cas. No. 161; In re California Pac. R. Co., 3 Sawy. 240, 11 N. B. R. 193, Fed. Cas. No. 2,315; Morrison v. Rieman, 249 Fed. 97, 161 C. C. A. 149, 41 Am. Bankr. Rep. 325. As to the case of a creditor who has already attached property of the debtor, see In re Automatic Typewriter & Service Co. (C. C. A.) 271 Fed. 1, 46 Am. Bankr. Rep. 377. See In re Hazens, 4 Dill. 549, Fed. Cas. No. 6,285.

[35] In re Chamberlin, 9 Ben. 149, 17 N. B. R. 49, Fed. Cas. No. 2,580.

husband in good faith, having a provable claim.[36] And creditors of a corporation, who happen also to be stockholders and directors in the company, are not precluded by reason of that relation, from commencing proceedings in involuntary bankruptcy against the corporation.[37] A creditor of a partnership is also a creditor of each member of the firm, and is entitled as such to join in a petition in bankruptcy brought against one of the partners individually,[38] and one partner may file a petition against the firm and his co-partners,[39] but not, it seems, where his only claim is for a share in the assets of the firm, growing out of unsettled partnership transactions, because in that case he could not compete with firm creditors, his right being subordinate to their claim to full satisfaction out of firm property.[40]

As to the nature of the claim in general, so long as it is a "fixed liability," it is not necessary that it should be an obligation cognizable strictly at law; it may be an equitable demand.[41] Or it may be a statutory liability, such as the liability of a stockholder in a corporation to pay the debts of the corporation to the extent of the unpaid balance on his stock,[42] or the liability of directors in certain kinds of corporations (such as savings banks) to creditors when the funds of the company have been embezzled or misappropriated by its officers.[43] Further, since the statute provides (section 63b) that unliquidated claims against the bankrupt may be liquidated in such manner as the court of bankruptcy shall direct, and may thereafter be proved and allowed against his estate, it is held that where the claim constitutes a fixed liability and only the amount of damages remains unliquidated, it will support a petition in bankruptcy, the sufficiency of the claim in respect to its amount being determinable on the trial of the petition.[44] Such is a claim for damages for breach of an executory contract,[45] or for damages arising out of a breach of warranty on the sale of personal property,[46] though it is held

[36] In re Novak, 101 Fed. 800, 4 Am. Bankr. Rep. 311.

[37] In re Rollins Gold & Silver Min. Co., 102 Fed. 982, 4 Am. Bankr. Rep. 327; Home Powder Co. v. Geis (C. C. A.) 204 Fed. 568, 29 Am. Bankr. Rep. 580.

[38] In re Mercur, 95 Fed. 634, 2 Am. Bankr. Rep. 626.

[39] In re J. M. Ceballos & Co., 161 Fed. 445, 20 Am. Bankr. Rep. 459. But see Robinson v. Hanway, 19 N. B. R. 289, Fed. Cas. No. 11,953.

[40] Sigsby v. Willis, 3 Ben. 371, 3 N. B. R. 207, Fed. Cas. No. 12,849; In re Schenkein, 113 Fed. 421.

[41] Sigsby v. Willis, 3 Ben. 371, 3 N. B. R. 207, Fed. Cas. No. 12,849.

[42] In re Putnam, 193 Fed. 464, 27 Am. Bankr. Rep. 923; Walker v. Woodside, 164 Fed. 680, 21 Am. Bankr. Rep. 132.

[43] In re Brown, 164 Fed. 673, 21 Am. Bankr. Rep. 123.

[44] In re Frederick L. Grant Shoe Co., 125 Fed. 576, 11 Am. Bankr. Rep. 48. But see In re Big Meadows Gas Co., 113 Fed. 974, 7 Am. Bankr. Rep. 697, as to an unliquidated claim the validity of which is not admitted, but disputed.

[45] In re Stern, 116 Fed. 604, 54 C. C. A. 60, 8 Am. Bankr. Rep. 569.

[46] Frederick L. Grant Shoe Co. v. W. M. Laird Co., 212 U. S. 445, 29 Sup. Ct. 332, 53 L. Ed. 591, 21 Am. Bankr.

that one whose claim is for unliquidated damages growing out of an alleged tort is not qualified as a petitioning creditor.[47]

A debt outlawed by the statute of limitations is not a provable claim within the meaning of the bankruptcy act,[48] nor can one person force another into bankruptcy by the use of alleged debts which, by operation of law, would be extinguished by the adjudication,[49] nor where the debtor has counterclaims against the petitioning creditor, of such a nature as are provable in bankruptcy, sufficient to reduce his claim below the jurisdictional amount.[50] Creditors who have proved their claims in bankruptcy are not entitled, while the estate is still in process of administration, though after the bankrupt has been refused a discharge, to maintain proceedings to have him adjudged a bankrupt a second time on account of the same debts, on the ground that he has acquired property after the first adjudication which he is alleged to have conveyed in fraud of his creditors.[51] And one is not a creditor of a corporation, within the meaning of the law, merely because goods furnished by him were shipped to and used by the company, where they were billed and charged to another corporation, though the latter owns the stock and controls the business of the former company.[52]

§ 154. Same; Preferred Creditors.—There are numerous and respectable authorities to the effect that a creditor who has received a preference is not thereby disqualified from bringing a petition in involuntary bankruptcy against his debtor.[53] According to these cases, the bankruptcy act maintains a clear distinction between the proof and the allowance of claims. That section which relates to the filing of petitions

Rep. 484. Compare In re Morales, 105 Fed. 761, 5 Am. Bankr. Rep. 425.

47 In re Brinckman, 103 Fed. 65, 4 Am. Bankr. Rep. 551, citing Beers v. Hanlin, 99 Fed. 695, 3 Am. Bankr. Rep. 745; Ex parte Charles, 14 East, 197, 16 Ves. 256. But otherwise when a claim for damages has been reduced to judgment. In re Putman, 193 Fed. 464, 27 Am. Bankr. Rep. 923.

48 In re Putman, 193 Fed. 464, 27 Am. Bankr. Rep. 923; In re Lipman, 94 Fed. 353, 2 Am. Bankr. Rep. 46; In re Resler, 95 Fed. 804, 2 Am. Bankr. Rep. 602; In re Cornwall, 9 Blatchf. 114, 6 N. B. R. 305, Fed. Cas. No. 3,250.

49 In re Windt, 177 Fed. 584, 24 Am. Bankr. Rep. 536.

50 In re Osage Valley & S. K. R. Co., 9 N. B. R. 281, Fed. Cas. No. 10,592. And see Cutler v. Nu-Gold Ring Co. (C. C. A.) 264 Fed. 836, 45 Am. Bankr. Rep. 505.

51 In re Barton's Estate, 144 Fed. 540, 16 Am. Bankr. Rep. 569.

52 In re Hudson River Electric Power Co., 173 Fed. 934, 23 Am. Bankr. Rep. 191. And see In re Eclipse Poultry Co., 250 Fed. 96, 162 C. C. A. 268, 42 Am. Bankr. Rep. 49.

53 In re Hornstein, 122 Fed. 266, 10 Am. Bankr. Rep. 308; In re Herzikopf, 118 Fed. 101, 9 Am. Bankr. Rep. 90; In re Norcross, 1 Nat. Bankr. News, 257, 1 Am. Bankr. Rep. 644; In re Cain, 1 Nat. Bankr. News, 389, 2 Am. Bankr. Rep. 378; In re Bloss, 4 N. B. R. 147, Fed. Cas. No. 1,562; In re California Pac. R. Co., 3 Sawy. 240, 11 N. B. R. 193, Fed. Cas. No. 2,315; In re Stansell, 6 N. B. R. 183, Fed. Cas. No. 13,293; Rankin v. Railway Co., 1 N. B. R. 647, Fed. Cas. No. 11,567; Coxe v. Hale, 10 Blatchf. 56, 8 N. B. R. 562, Fed. Cas. No. 3,310.

only requires that the creditor's claim should be "provable," and the claim of a creditor is provable, so as to entitle him to join in the petition, notwithstanding the fact that he has received a preference, which he will be required to surrender before his claim is allowed. But the preponderance of authority is the other way. The majority of the decisions hold that a creditor having a preference, which he does not surrender or disclaim, is not entitled to join in the petition, and that if his elimination reduces the number of creditors (or the amount of their claims) below what the statute requires, the defect is jurisdictional and the petition must be dismissed.[54] This rule has been applied even in a case where the preferred creditor based his petition on an entirely separate and distinct debt, as to which he had received no preference.[55] The last position, however, is open to very serious doubt, as it appears to inject an entirely unnecessary limitation into the statute. At the same time, it must be conceded that there is very strong reason in favor of the view adopted by some of the courts, that a preferred creditor cannot proceed for adjudication against his debtor when he alleges as the act of bankruptcy on which his petition is founded the very act of preference to which he was a party, as he is estopped on every principle of equity, and the law should discourage a course of procedure which would amount to laying a trap for an embarrassed and unwary debtor.[56] But if the preferred creditor, in his petition, disclaims or abjures the preference which he has received, or offers to surrender or vacate it, or to bring the money into court, if it was a payment in money, or if he will otherwise, according to its nature, renounce all benefit or advantage from it, then he may join in the petition as an ordinary creditor.[57] And it should be noted that a creditor is not disqualified from petitioning, because of the receipt of a payment more than four months previously, which, if made within that time, would have been preferential, but under the actual circumstances is not.[58]

[54] In re Fishblate Clothing Co., 125 Fed. 986, 11 Am. Bankr. Rep. 204; In re Schenkein, 113 Fed. 421; In re Burlington Malting Co., 109 Fed. 777, 6 Am. Bankr. Rep. 369; In re Rogers Milling Co., 102 Fed. 687, 4 Am. Bankr. Rep. 540; In re Gillette, 104 Fed. 769, 5 Am. Bankr. Rep. 119; Buckingham v. Schuylkill Plush & Silk Co., 38 Misc. Rep. 305, 77 N. Y. Supp. 857; In re Hunt, 5 N. B. R. 433, Fed. Cas. No. 6,882; In re Rado, 6 Ben. 230, Fed. Cas. No. 11,522; Ecker v. McAllister, 45 Md. 290. But a creditor will not be considered as preferred because he holds as security for his debt a life insurance policy having no surrender value. In re Blount, 142 Fed. 263, 16 Am. Bankr. Rep. 97.

[55] In re Rogers Milling Co., 102 Fed. 687, 4 Am. Bankr. Rep. 540.

[56] In re Currier, 2 Low. 436, 13 N. B. R. 68, Fed. Cas. No. 3,492; In re Williams, 14 N. B. R. 132, Fed. Cas. No. 17,706.

[57] In re Vastbinder, 126 Fed. 417, 11 Am. Bankr. Rep. 118; Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 17 Am. Bankr. Rep. 609; In re Marcer, 6 N. B. R. 351, Fed. Cas. No. 9,060; In re Murphy (D. C.) 225 Fed. 392, 35 Am. Bankr. Rep. 635.

[58] In re Girard Glazed Kid Co., 129 Fed. 841, 12 Am. Bankr. Rep. 295.

§ 155. Same; Creditors Estopped to Petition.—It is well settled that where the act of bankruptcy relied on in an involuntary petition is the making of a general assignment for the benefit of creditors, no creditors will be entitled to join in the petition who have recognized and assented to the assignment and participated in the proceedings under it, so as to make themselves parties to it, being estopped by the election between their rights under the assignment and those under the bankruptcy law.[59] This rule is applied as against creditors who have received and accepted dividends on their claims under the assignment,[60] who have filed their claims and permitted the assignee to sell the property and collect the proceeds, involving considerable delay and the incurring of expenses,[61] or who have simply allowed four months to elapse without attempting to institute or join in bankruptcy proceedings.[62] But there are numerous exceptions or qualifications of the rule. Thus, it is said not to apply to a creditor who merely offered to assent to the assignment if the assignee should be changed, which was not done,[63] or who applied to the state court to have the bond of the assignee increased,[64] or who merely filed his claim in the assignment proceedings, but derived no benefit from it,[65] particularly if it was done in ignorance of facts tending to show that the assignment was fraudulent and that the debtor had disposed of property in fraud of his creditors.[66] In one of the leading cases, it was ruled that creditors were not estopped to maintain a petition in involuntary bankruptcy on any or all of the following grounds: (1) That, having knowledge of the assignment and of the acts of the assignee thereunder in conducting the business and selling the stock on hand, they delayed instituting proceedings for two months; (2) that, pending a proposition for compromise, they sold to such assignee for cash small bills of

[59] In re Lewis F. Perry & Whitney Co., 172 Fed. 745, 22 Am. Bankr. Rep. 772; Moulton v. Coburn, 131 Fed. 201, 66 C. C. A. 90, 12 Am. Bankr. Rep. 553; In re Romanow, 92 Fed. 510, 1 Am. Bankr. Rep. 461; Durham Paper Co. v. Seaboard Knitting Mills, 121 Fed. 179, 10 Am. Bankr. Rep. 29; In re Kraft, 3 Fed. 892; Despres v. Galbraith, 213 Fed. 190, 129 C. C. A. 534, 32 Am. Bankr. Rep. 170; In re Henry Campe & Co. (D. C.) 240 Fed. 433, 38 Am. Bankr. Rep. 792. But while knowledge and assent will preclude a creditor from urging the debtor's general assignment as an act of bankruptcy, yet the creditor's knowledge of and assent to the execution of an instrument which did not amount to a "general" assignment will not prevent him from urging that a subsequent instrument, which was in fact a general assignment, constitutes an act of bankruptcy. Doty v. Mason (D. C.) 244 Fed. 587, 40 Am. Bankr. Rep. 58.

[60] In re Brokaw, 11 Fed. 704.

[61] Simonson v. Sinsheimer, 95 Fed. 948, 37 C. C. A. 337; Utz & Dunn Co. v. Regulator Co., 213 Fed. 315, 130 C. C. A. 17, 32 Am. Bankr. Rep. 167.

[62] In re Lewis F. Perry & Whitney Co., 172 Fed. 752, 22 Am. Bankr. Rep. 780.

[63] Spicer v. Ward, 3 N. B. R. 512, Fed. Cas. No. 13,241.

[64] In re Langley, 1 N. B. R. 559, Fed. Cas. No. 11,006.

[65] In re Curtis, 91 Fed. 737, 1 Am. Bankr. Rep. 440.

[66] In re Curtis, 94 Fed. 630, 36 C. C. A. 430, 2 Am. Bankr. Rep. 226.

goods to replenish the stock and make it more salable; (3) that they submitted to the assignee, at his request, unverified statements of their claims, for the specific purpose of comparing the same with the entries in the insolvent's books; (4) that an order made by the state court for the sale of the assignor's goods was submitted to the attorneys for the said creditors and by them indorsed "seen."[67] Again, where the secretary and treasurer of a corporation, which was a creditor of the bankrupt, agreed to act as the bankrupt's assignee in his capacity as an individual only, this did not estop the corporation from joining in the bankruptcy petition.[68] For even stronger reasons, a creditor should not be held to be estopped who went into the state court only for the purpose of attacking certain alleged preferences as fraudulent,[69] or for the purpose of preventing a distribution of the assets until proceedings in bankruptcy could be begun.[70] Nor does the rule apply to creditors who were induced to assent to the assignment by the debtor's fraud or misrepresentations; in this case, they may repudiate it and allege it as an act of bankruptcy.[71] And so, there is no estoppel where the act of bankruptcy relied on is a conveyance of property not included in the assignment nor drawn into the proceedings in the state court thereunder.[72] And even where a creditor would be thus estopped in respect to a particular debt or claim, it will not preclude him from joining in the petition in bankruptcy in respect to an entirely different claim.[73] And it is said that the rule of estoppel does not apply where the state court in which the proceedings were had was entirely without jurisdiction, because operating under a statute annulled or suspended by the bankruptcy law.[74]

On analogous principles, an arrangement effected between an insolvent debtor and his creditors for the conversion of his stock in trade and accounts into cash, through the agency of a trustee, and the proportional distribution of the proceeds among the creditors, to be accepted by them in full payment, will estop creditors who participated in the agreement from petitioning in bankruptcy, when the plan has been so far carried out that a sale of the property has been accomplished.[75] And

[67] Sinsheimer v. Simonson, 96 Fed. 579, affirmed Simonson v. Sinsheimer, 100 Fed. 426, 40 C. C. A. 474, 3 Am. Bankr. Rep. 824.

[68] In re Winston, 122 Fed. 187, 10 Am. Bankr. Rep. 171.

[69] Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383.

[70] Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383.

[71] Canner v. Webster Tapper Co., 168 Fed. 519, 21 Am. Bankr. Rep. 872.

[72] In re Salmon & Salmon, 143 Fed. 395, 16 Am. Bankr. Rep. 122.

[73] Hays v. Wagner, 150 Fed. 533, 80 C. C. A. 275, 18 Am. Bankr. Rep. 163; Johnson v. Rogers, 15 N. B. R. 1, Fed. Cas. No. 7,408.

[74] In re Weedman Stave Co., 199 Fed. 948, 29 Am. Bankr. Rep. 460.

[75] Clark v. Henne & Meyer, 127 Fed. 288, 62 C. C. A. 172, 11 Am. Bankr. Rep.

so as to creditors of a corporation who intervened in a suit against it in a state court and assisted in having receivers appointed.[76] Nor is there anything in the law to prevent the creditors of an embarrassed debtor from uniting in granting him an extension of time for payment. And it would seem that creditors who had signed such an agreement should not be allowed to maintain a petition in bankruptcy while the agreement was circulating among creditors for their signature, or until a reasonable time had been given the debtor to procure their signatures. Yet where such an agreement is not to be binding unless all the creditors will unite in it, an unequivocal dissent by any creditor will release others who had already signed, and remove any impediment to their petitioning in bankruptcy.[77] It should probably be a defense to such a petition that the creditor maintaining it had previously agreed to compromise with his debtor on receiving a certain proportion of his claim; but not where the composition was not carried into effect, and it is not shown that such an agreement on the part of one creditor was made the basis for a similar agreement by another.[78] A release of his debt would put the creditor in a position where he would no longer be entitled to petition in bankruptcy; but a release obtained by fraud and deceit may be repudiated.[79] Also an estoppel against a creditor may be based on his having consented to the giving of a preference to another creditor, at least so far as to preclude him from alleging that preference as an act of bankruptcy.[80] But obtaining the consent of an insolvent corporation to be thrown into bankruptcy (by a resolution declaring its inability to pay its debts and its willingness to be adjudged bankrupt) is not necessarily collusion such as to defeat the petition, where the object of the creditor was not to obtain an advantage for himself, but to secure the equal distribution of its property among all the creditors.[81]

Since a proceeding in involuntary bankruptcy is not one for the recovery of a debt, but to secure an equitable division of the debtor's

583. But otherwise where, after such a transfer and sale, the proceeds were diverted by the debtor to other purposes than that proposed. In re Gillette, 104 Fed. 769, 5 Am. Bankr. Rep. 119.

[76] Lowenstein v. Henry McShane Mfg. Co., 130 Fed. 1007, 12 Am. Bankr. Rep. 601; In re Gold Run Mining & Tunnel Co., 200 Fed. 162, 29 Am. Bankr. Rep. 563; Ohio Motor Car Co. v. Eiseman Magneto Co., 230 Fed. 370, 144 C. C. A. 512, 36 Am. Bankr. Rep. 237; In re Commonwealth Lumber Co. (D. C.) 223 Fed. 667, 35 Am. Bankr. Rep. 202; In re McKinnon Co. (D. C.) 237 Fed. 869, 38 Am. Bankr. Rep. 727.

[77] Ex parte Potts, Crabbe, 469, Fed. Cas. No. 11,344.

[78] Simonson v. Sinsheimer, 95 Fed. 948, 37 C. C. A. 337; In re Simonson, 92 Fed. 904, 1 Am. Bankr. Rep. 197.

[79] Michaels v. Post, 21 Wall. 398, 22 L. Ed. 520.

[80] In re Massachusetts Brick Co., 2 Low. 58, 5 N. B. R. 408, Fed. Cas. No. 9,259. And see In re Taylor House Ass'n (D. C.) 209 Fed. 924, 31 Am. Bankr. Rep. 727.

[81] In re C. Moench & Sons Co., 123 Fed. 965, 10 Am. Bankr. Rep. 656, affirmed 130 Fed. 685, 66 C. C. A. 37, 12 Am. Bankr. Rep. 240.

property, the fact that a particular creditor has brought suit for the recovery of his debt, or the pendency of such an action, is not a bar to his filing a petition in bankruptcy against the debtor,[82] and certainly not where he bases his bankruptcy petition on a distinct and independent demand.[83] Even the levy of an execution on sufficient property to satisfy the debt,[84] or the collection of a portion of it by means of execution,[85] will not estop the creditor to petition in bankruptcy, provided he will surrender the preference thus obtained, by releasing the levy or bringing into court the sum already realized.

§ 156. Same; Requisites as to Number and Amount.—According to the provisions of the statute (section 59), in every case of proceedings in involuntary bankruptcy, it is requisite that the amount of the debts represented by those joining in the petition should be at least $500. But as to the number of creditors who must join, it is provided that at least three shall unite in filing the petition, except in the case where the whole number of the creditors of the proposed bankrupt is less than twelve, in which event one creditor or two may file the petition. If the number of creditors exactly equals twelve, then three must join, for the right to petition is given to a single creditor (or to two) only in case all the creditors are "less than twelve" in number. It appears that the bankruptcy law may be made the means of collecting a single debt. If the claimant who files the petition is the solitary creditor of the proposed bankrupt, it is only necessary that his claim should amount to $500 or more, and that he should be able to prove the commission of an act of bankruptcy within four months. Cases would undoubtedly be rare in which the ordinary legal remedies would be insufficient for a creditor so situated; but at any rate he would have his option to throw his debtor into bankruptcy if he saw fit to proceed in that way. It was so held under the earlier bankruptcy law,[86] though the courts also ruled that a petition presented by a single creditor who had ample security for his claim was not within the purpose of the statute and the court should decline to take jurisdiction.[87]

[82] In re Henderson, 9 Fed. 196.

[83] Everett v. Derby, 5 Law Rep. 225, Fed. Cas. No. 4,576.

[84] In re Sheehan, 8 N. B. R. 345, Fed. Cas. No. 12,737.

[85] In re Miller, 104 Fed. 764, 5 Am. Bankr. Rep. 140.

[86] In re Alexander, 1 Low. 470, 4 N. B. R. 178, Fed. Cas. No. 161. And see In re Culgin-Pace Contracting Co. (D. C.) 224 Fed. 245, 35 Am. Bankr. Rep. 375, holding that a single intervening creditor may carry on an involuntary petition in bankruptcy good on its face.

[87] Avery v. Johann, 3 N. B. R. 144, Fed. Cas. No. 675; In re Johann, 2 Biss. 139, 4 N. B. R. 434, Fed. Cas. No. 7,331; In re Scammon, 6 Biss. 145, Fed. Cas. No. 12,428.

In computing the number of creditors, to determine whether enough have joined, or whether the total number is greater or less than twelve, the time to be taken is the date of the filing of the petition, as that is the commencement of the proceedings,[88] subject, of course, to the exception provided for in the statute, where other creditors intervene and join in the petition before the final decision.[89]

Creditors holding fraudulent or voidable preferences are not to be counted in computing the number of creditors,[90] nor are secured creditors unless their claims severally exceed the value of the securities which they hold.[91] Neither should the count include any creditors who would be estopped to join in the petition, as, by having assented to a general assignment by the debtor.[92] Further the act directs that "such creditors as were employed by him [the bankrupt] at the time of the filing of the petition, or are related to him by consanguinity or affinity within the third degree, as determined by the common law,[93] and have not joined in the petition, shall not be counted."[94] But it is a fair inference from this provision that if any employés or relatives have joined in the petition, they are not to be excluded from the computation; they may then be counted either for the purpose of making up the minimum of three who must join, or, on the other hand, for making out the total number of creditors to be twelve or more. It will also be perceived that the law places no minimum limitation upon the value

[88] In re H. E. Page Motor Car Co. (D. C.) 251 Fed. 318, 41 Am. Bankr. Rep. 546; Moulton v. Coburn, 131 Fed. 201, 66 C. C. A. 90, 12 Am. Bankr. Rep. 553; Stroheim v. Lewis F. Perry & Whitney Co. (C. C. A.) 175 Fed. 52, 23 Am. Bankr. Rep. 695; In re Coburn, 126 Fed. 218, 11 Am. Bankr. Rep. 212. Contra, see In re Plymouth Cordage Co., 135 Fed. 1000, 68 C. C. A. 434, 13 Am. Bankr. Rep. 665.

[89] But see In re Kehoe, 233 Fed. 415, 147 C. C. A. 351, 36 Am. Bankr. Rep. 891, holding that, where there were more than 12 creditors, and only one filed an involuntary petition, creditors who acquired their claims after the filing of the petition cannot intervene as petitioning creditors.

[90] Stevens v. Nave-McCord Mercantile Co. (C. C., A.) 150 Fed. 71, 17 Am. Bankr. Rep. 609; Clinton v. Mayo, 12 N. B. R. 39, Fed. Cas. No. 2,899; In re Currier, 2 Low. 436, 13 N. B. R. 68, Fed. Cas. No. 3,492; In re Israel, 3 Dill. 511, 12 N. B. R. 204, Fed. Cas. No. 7,111; In re Jewett, 7 Biss. 242, Fed. Cas. No. 7,305; In re Scrafford, 4 Dill. 376, Fed. Cas. No. 12,556. Contra, see Boston West Africa Trading Co. v. Quaker City Morocco Co., (C. C. A.) 261 Fed. 665, 44 Am. Bankr. Rep. 315, affirming In re Boston-West Africa Trading Co. (D. C.) 255 Fed. 924, 43 Am. Bankr. Rep. 382.

[91] In re Blount, 142 Fed. 263, 16 Am. Bankr. Rep. 97; In re Crossette, 17 N. B. R. 208, Fed. Cas. No. 3,435; In re Bouton, 5 Sawy. 427, Fed. Cas. No. 1,706. And see Bankruptcy Act 1898, §§ 56b, 59b.

[92] In re Miner, 104 Fed. 520, 4 Am. Bankr. Rep. 710. But see In re Coburn, 126 Fed. 218, 11 Am. Bankr. Rep. 212.

[93] As to the meaning of these terms, see supra, § 61. It has been thought that the officers of a corporation, having claims against it, should not be counted among its creditors, their relation to the corporation being analogous to consanguinity between natural persons. See In re Barrett Publishing Co., 2 Nat. Bankr. News, 80.

[94] Bankruptcy Act 1898, § 59e.

of the several claims, so far as regards computing the number of creditors. It has been strongly intimated from the bench that, for this purpose, trivial debts for petty amounts, "trashy debts," as the court called them, should not be noticed, on the principle of the maxim "de minimis non curat lex."[95] But this is in the face of the statute, and there is authority for the proposition that all creditors must be counted, even those for merely nominal sums.[96] In estimating the number and amount of claims on a petition against a partner, the partnership debts and creditors must be considered.[97] Personal property taxes are debts, to be included in determining whether or not the bankrupt's debts amount to the jurisdictional sum.[98]

An insolvent debtor having more than twelve creditors cannot defeat bankruptcy proceedings against him by transferring his property for the benefit of some of his creditors, leaving less than three unprovided for, but at the same time leaving the preferred creditors actually unpaid for the purpose of requiring them to be counted, so that those remaining will be insufficient in number to maintain the petition.[99] And payments made by the bankrupt to some of the petitioning creditors, after the filing of the petition, so as to eliminate them from the count or reduce the aggregate amount of the petitioning creditors' claims below the statutory limit, will not defeat the jurisdiction of the court, at least where enough other creditors afterwards come in to raise the amount above the jurisdictional limit.[100]

In regard to the requirement that the amount due to the petitioning creditors should be at least $500, it is held to be unnecessary that the amount due to the petitioning creditor or creditors should be exactly determined (as in the case of claims for damages) provided it clearly appears that it will be more than enough to satisfy the statute.[101] Nor is it necessary that the principal sum of the debts should equal the jurisdictional amount, but accrued interest, evidently due on the face

[95] Gage v. Bell, 124 Fed. 371, 10 Am. Bankr. Rep. 696. And see In re Blount, 142 Fed. 263, 16 Am. Bankr. Rep. 97. Relative to there being less then 12 creditors, so that one holder of a claim for $500 could file a petition in involuntary bankruptcy holders of small claims for household supplies payable monthly may be disregarded. In re Burg (D. C.) 245 Fed. 173, 40 Am. Bankr. Rep. 126.

[96] In re Brown, 111 Fed. 979, 7 Am. Bankr. Rep. 102.

[97] In re Lloyd, 15 N. B. R. 257, Fed. Cas. No. 8,429.

[98] Kaw Boiler Works v. Schull, 230 Fed. 587, 144 C. C. A. 641, L. R. A. 1916E, 628, 36 Am. Bankr. Rep. 531.

[99] In re Blount, 142 Fed. 263, 16 Am. Bankr. Rep. 97. But see Leighton v. Kennedy, 129 Fed. 737, 64 C. C. A. 265, 12 Am. Bankr. Rep. 229.

[100] In re Ryan, 114 Fed. 373, 7 Am. Bankr. Rep. 562; W. A. Gage & Co. v. Bell, 124 Fed. 371, 10 Am. Bankr. Rep. 696.

[101] In re Hughes, 183 Fed. 872, 25 Am. Bankr. Rep. 556; In re Stern, 116 Fed. 604, 54 C. C. A. 60, 8 Am. Bankr. Rep. 569; In re Manhattan Ice Co., 114 Fed. 399, 7 Am. Bankr. Rep. 408.

of the petition, may be added for this purpose.[102] But costs cannot be added. Unless the creditors have provable claims to the amount of $500, they have no right to make costs by proceeding in bankruptcy.[103] Set-offs and counterclaims on the part of the proposed bankrupt will naturally be considered in determining the amount of indebtedness; and when a creditor has received a conditional payment, the effect of which is to reduce his claim below the amount entitling him to maintain a petition, he cannot bring proceedings in bankruptcy unless the condition has failed, so as to make the payment nugatory.[104]

The petition should affirmatively show that it is subscribed by the requisite number and amount of creditors.[105] But it is often very difficult to ascertain how many creditors an insolvent debtor may have or the amount of their claims, and the petitioning creditors should not be held to literal accuracy nor to greater precision than their available sources of information enable them to attain. It has been held that a merchant who has refused, on the demand of creditors, to give them information about his affairs sufficient to enable them to know the number and amount of his debts, will not be heard to object that a sufficient number of his creditors did not join in the petition, at least if enough have come in before the trial.[106] But on the other hand, petitioning creditors must be held to good faith in the matter of alleging and showing that they constitute the requisite quorum of creditors. They cannot "recklessly file a petition for the purpose of making the respondent file a statement of his creditors. It would be intolerable if any one or two creditors, upon either a real or pretended claim, could by a simple allegation in the words of the act compel a business man to spread upon the records a statement of his liabilities. Such a fishing petition cannot be entertained under the act." [107] And the petition will be dismissed on motion, without requiring the debtor to file a schedule, where it appears that the petitioning creditors knew that they did not constitute the requisite number.[108]

If it is averred in the petition that there are less than twelve creditors in all, and the debtor desires to contest this point, so as to prevent an adjudication being made against him on the petition of a single

[102] Sloan v. Lewis, 22 Wall. 150, 22 L. Ed. 832.

[103] In re Skelley, 3 Biss. 260, 5 N. B. R. 214, Fed. Cas. No. 12,921.

[104] In re Ouimette, 1 Sawy. 47, 3 N. B. R. 566, Fed. Cas. No. 10,622.

[105] In re Keeler, 10 N. B. R. 419, Fed. Cas. No. 7,638; In re California Pac. R. Co., 3 Sawy. 240, 11 N. B. R. 193, Fed. Cas. No. 2,315. And see infra, § 160.

[106] Perin & Gaff Mfg. Co. v. Peale, 17 N. B. R. 377, Fed. Cas. No. 10,981.

[107] In re Scammon, 3 Biss. 195, 11 N. B. R. 280, Fed. Cas. No. 12,429.

[108] In re Scammon, 3 Biss. 195, 11 N. B. R. 280, Fed. Cas. No. 12,429.

creditor, he must do so in the manner prescribed by the act,[109] that is, by an answer accompanied by a sworn list of all his creditors with their addresses.[110] But it is not only the bankrupt who may take issue with the petitioning creditors on this point. Another creditor, desiring to oppose the adjudication, may suggest the insufficiency of the petition in this respect, and require the bankrupt to file the list of creditors,[111] or such opposing creditor may himself file the "answer" contemplated by the statute.[112] Thereupon, all the creditors shown by the list are to be notified of the pendency of the petition. Apparently they are to be so notified by mail, since the bankrupt is required to furnish their addresses. The object is to give the petitioning creditors an opportunity to secure the concurrence of a sufficient number of other creditors to make up the jurisdictional quorum, and for this purpose they are to be accorded a reasonable length of time.[113] It was held under the act of 1867 that the case at this stage might be referred to a register or commissioner to hear and ascertain the facts,[114] on any proper evidence,[115] and probably the same course might now be pursued. If it is found that the petitioning creditors were originally sufficient in number and amount, or if, prior to or during the hearing, a sufficient number join in the petition, the case may be proceeded with, but otherwise the petition will be dismissed.

It is more difficult to determine whether or not the joinder of a sufficient number and amount of creditors in the petition is to be regarded as a jurisdictional fact. There are respectable authorities in support of the view that it is to be so considered,[116] and even that the validity of the adjudication in this respect may be collaterally questioned.[117] But the preponderance of authority is to the contrary, and it may be stated as the generally accepted rule that the joinder of the specified proportion of creditors, in number and amount, in a petition in involun-

[109] Lastrapes v. Blanc, 3 Woods, 134, Fed. Cas. No. 8,100.

[110] Bankruptcy Act 1898, § 59d. And see In re Steinman, 6 Biss. 166, 10 N. B. R. 214, Fed. Cas. No. 13,357; In re Hymes, 7 Ben. 427, 10 N. B. R. 433, Fed. Cas. No. 6,986.

[111] Clinton v. Mayo, 12 N. B. R. 39, Fed. Cas. No. 2,899.

[112] Anonymous, 11 Chi. Leg. News, 190, Fed. Cas. No. 441.

[113] In re California Pac. R. Co., 3 Sawy. 240, 11 N. B. R. 193, Fed. Cas. No. 2,315; In re Rebmeister, 15 Blatchf. 467, Fed. Cas. No. 11,623; In re Bedingfield, 96 Fed. 190, 2 Am. Bankr. Rep. 355.

[114] In re Hymes, 7 Ben. 427, 10 N. B. R. 433, Fed. Cas. No. 6,986; In re Sargent, 13 N. B. R. 144, Fed. Cas. No. 12,361.

[115] In re California Pac. R. Co., 3 Sawy. 240, 11 N. B. R. 193, Fed. Cas. No. 2,315.

[116] In re Scammon, 6 Biss. 130, Fed. Cas. No. 12,427; In re Rosenfields, 11 N. B. R. 86, Fed. Cas. No. 12,061; Doty v. Mason (D. C.) 244 Fed. 587, 40 Am. Bankr. Rep. 58; Cutler v. Nu-Gold Ring Co. (C. C. A.) 264 Fed. 836, 45 Am. Bankr. Rep. 505.

[117] Buckingham v. Schuylkill Plush & Silk Co., 38 Misc. Rep. 305, 77 N. Y. Supp. 857.

tary bankruptcy is not a jurisdictional prerequisite.[118] And in one case where it plainly appeared that the petition was not presented by the requisite quorum of creditors, but the bankrupt himself consented to an adjudication thereon, the court remarked that there was great force in the suggestion that this was merely an irregularity which the bankrupt might waive.[119] And at any rate, the judgment of the court of bankruptcy that the required number and amount of creditors have joined in the petition is final, and the question so adjudged is not thereafter re-examinable, except it may be in cases of fraud or imposition practised on the court.[120]

§ 157. Same; Solicitation, Procurement, or Purchase of Claims.—The validity of a proceeding in involuntary bankruptcy is not affected by the fact that it was commenced at the instigation of the bankrupt himself. There is no legal fraud in an insolvent debtor's requesting his creditors to petition against him, or soliciting a sufficent number of creditors to join in the petition, when the court otherwise has jurisdiction and he has committed an act of bankruptcy.[121] And on the same principle, an agreement to withdraw opposition to a proceeding in involuntary bankruptcy, and to consent and submit to an adjudication of bankruptcy, cannot be said to be in fraud of the act.[122] So also it is permissible for a creditor, who desires the settlement of his debtor's estate through the agency of a court of bankruptcy, to use all lawful and honest means to bring about that result. There is nothing to forbid him from seeking out other creditors of the common debtor and asking them to join in the petition, or to come in after the filing of the petition and join in it, when such intervention becomes necessary to save the proceed-

[118] In re Plymouth Cordage Co., 135 Fed. 1000, 68 C. C. A. 434, 13 Am. Bankr. Rep. 665; In re Haff, 136 Fed. 78, 68 C. C. A. 646, 13 Am. Bankr. Rep. 362; In re Henderson, 9 Fed. 196; Ex parte Jewett, 2 Low. 393, 11 N. B. R. 443, Fed. Cas. No. 7,303; In re Duncan, 8 Ben. 365, 14 N. B. R. 18, Fed. Cas. No. 4,131.

[119] In re Williams, 6 Biss. 233, 11 N. B. R. 145, Fed. Cas. No. 17,700.

[120] In re Duncan, 8 Ben. 365, 14 N. B. R. 18, Fed. Cas. No. 4,131; In re Funkenstein, 3 Sawy. 605, 14 N. B. R. 213, Fed. Cas. 5,158; In re Lloyd, Fed. Cas. No. 8,431.

[121] In re Ordway, 19 N. B. R. 171, Fed. Cas. No. 10,552; In re Duncan, 8 Ben. 365, 14 N. B. R. 18, Fed. Cas. No. 4,131; In re Bouton, 5 Sawy. 427, Fed. Cas. No. 1,706; In re Matot, 16 N. B. R. 485, Fed. Cas. No. 9,282. The fact that proceedings in involuntary bankruptcy were instigated by a promise on the part of the debtor that the petitioning creditor should be paid in full, while it would affect the right to a discharge, will not invalidate the proceedings in bankruptcy so as to make void a sale made by the bankrupt's assignee. Wallace v. Loomis, 97 U. S. 146, 24 L. Ed. 895. But a bankrupt who procures a fraudulent petition to be filed by his creditors, with intent to procure a discharge, which he could not obtain by voluntary proceedings, is in contempt of court. In re Lalor, 19 N. B. R. 253, Fed. Cas. No. 8,001.

[122] Sanford v. Huxford, 32 Mich. 313, 20 Am. Rep. 647.

ing.[123] And if other creditors than the one chiefly moving in the matter are unwilling to sign the petition, it is perfectly proper for other persons to purchase their claims, in order to be qualified to join, and so to make up the requisite number of petitioning creditors,[124] though if such a sale of a claim is void for fraud or want of consideration, the claim is to be considered as still belonging to the assignor, and it will be so treated in counting the number of creditors.[125] But the debts or claims thus brought into the proceeding, whether by solicitation or by transfer, must be genuine and independent of each other. A creditor of a bankrupt may not split up his claim into portions and assign some of the parts to third persons for the purpose of qualifying them as joint petitioners in a proceeding in involuntary bankruptcy. This is a subterfuge, entirely contrary to the spirit and purpose of the act, and which the law will not countenance.[126] On the other hand, creditors may use proper means to prevent the filing of a petition against their debtor. It has been held that an agreement between creditors who have received preferences to contribute proportionally such sum as may be necessary to induce the other creditors to forbear to put the debtor into bankruptcy is not invalid.[127]

§ 158. Same; Withdrawal of Petitioners.—On account of the community of interest between the creditors joining in a petition in involuntary bankruptcy and the requirement that there shall be a certain number, holding claims to a certain value, in order to sustain the petition, a creditor so uniting with others in such a petition has not the same right to abandon the proceeding that the plaintiff in a suit has to discontinue it. It is in fact a well-settled rule that a creditor in this situation will not be permitted to withdraw his name from the proceedings, against the protest of the others, merely because he repents of his action or has obtained a settlement of his claim, when his withdrawal would reduce the number of creditors or the amount of debts below the jurisdictional

123 In re Smith, 176, Fed. 426, 23 Am. Bankr. Rep. 864.

124 In re Bevins, 165 Fed. 434, 91 C. C. A. 302, 21 Am. Bankr. Rep. 344; In re Woodford, 13 N. B. R. 575, Fed. Cas. No. 17,972. But see Emerine v. Tarault, 219 Fed. 68, 134 C. C. A. 606, 34 Am. Bankr. Rep. 55. Under the New York insolvency law, if an insolvent procures a person to buy up a judgment against him, and such person pays nothing, or at most a nominal consideration, for the assignment of the judgment, he can be a petitioning creditor only for the sum actually paid. Slidell v. McCrea, 1 Wend. (N. Y.) 156.

125 In re Woodford, 13 N. B. R. 575, Fed. Cas. No. 17,972.

126 In re Halsey Electric Generator Co., 163 Fed. 118, 20 Am. Bankr. Rep. 738; Stroheim v. Lewis F. Perry & Whitney Co. (C. C. A.) 175 Fed. 52, 23 Am. Bankr. Rep. 695; In re Tribelhorn, 137 Fed. 3, 69 C. C. A. 601, 14 Am. Bankr. Rep. 491; In re Independent Thread Co., 113 Fed. 998, 7 Am. Bankr. Rep. 704; In re Lewis F. Perry & Whitney Co., 172 Fed. 745, 22 Am. Bankr. Rep. 772.

127 Perryman v. Allen, 50 Ala. 573, 15 N. B. R. 113.

minimum, and so require the dismissal of the petition.[128] It must be said, however, that some of the more recent cases do not acquiesce in this rule. For instance, it has been said: "No doubt any petitioner may be allowed to withdraw in the court's discretion. If the original petitioners so withdraw before others intervene, that ends the proceeding completely; there is nothing left to intervene in. But until they do withdraw, there is a proceeding, in which others may intervene; and if they have done so, in the lifetime of the proceeding, subsequent withdrawal of the originators will leave the interveners free to proceed." [129] In another decision it is ruled that the withdrawal of any number of creditors who in good faith filed a petition in bankruptcy against the debtor does not prevent the court from proceeding with the adjudication, so long as one or more of the petitioning creditors, though less than the number required to institute the proceedings, desires it, since any other rule would permit the alleged bankrupt to bargain with part of the creditors to induce them to withdraw and thereby defeat the proceedings.[130] But a creditor whose name was joined with others in the petition without his knowledge or consent may repudiate the proceeding, and if he does so, the petition will be dismissed as to him, even though the result is to break the quorum.[131]. And it is in the discretion of the court to permit the withdrawal, at any time before an adjudication, of a creditor who was induced to join by misrepresentation or misunderstanding,[132] or who did so under a mistake of fact as to his having previously assented to the debtor's general assignment for the benefit of creditors,[133] or where the qualification of the creditor to become a petitioner is open to doubt or challenge.[134] And in another case, where two of the three petitioning creditors brought about the payment of a judgment on the claim of one of them and the latter's withdrawal as a petitioning creditor, it was held that both were estopped to complain of the paid creditor's withdrawal from the proceeding.[135]

[128] In re Bedingfield, 96 Fed. 190, 2 Am. Bankr. Rep. 355; In re Quincy Granite Quarries Co., 147 Fed. 279, 16 Am. Bankr. Rep. 823; In re Cronin, 98 Fed. 584, 3 Am. Bankr. Rep. 552; In re Vogel, 9 Ben. 498, 18 N. B. R. 165, Fed. Cas. No. 16,981; In re Heffron, 6 Biss. 156, 10 N. B. R. 213, Fed. Cas. No. 6,321; In re Rosenfields, 11 N. B. R. 86, Fed. Cas. No. 12,061; In re Philadelphia Axle Works, 1 Wkly. Notes Cas. 126, Fed. Cas. No. 11,091; In re Black Diamond Copper Min. Co., 10 Ariz. 42, 85 Pac. 653.

[129] In re Bolognesi, 223 Fed. 771, 139 C. C. A. 351, 34 Am. Bankr. Rep. 692.

[130] In re San Jose Baking Co. (D. C.) 232 Fed. 200, 36 Am. Bankr. Rep. 635.

[131] In re Rosenfields, 11 N. B. R. 86, Fed. Cas. No. 12,061.

[132] In re Sargent, 13 N. B. R. 144, Fed. Cas. No. 12,361.

[133] In re Coburn, 126 Fed. 218, 11 Am. Bankr. Rep. 212.

[134] Moulton v. Coburn, 131 Fed. 201, 66 C. C. A. 90, 12 Am. Bankr. Rep. 553.

[135] Cummins Grocer Co. v. Talley, 187 Fed. 507, 109 C. C. A. 273, 26 Am. Bankr. Rep. 484. See In re J. W. Lavery & Son (D. C.) 235 Fed. 910, 37 Am. Bankr. Rep. 606.

§ 159. Petition in Bankruptcy; Formal Requisites.—Whether a proceeding in bankruptcy is voluntary or involuntary, it is initiated by a petition to the proper court. "Petition" is defined by the statute as "a paper filed in a court of bankruptcy, or with a clerk or deputy clerk, by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named,"[136] though a petition necessarily contains much more than is here specified, as, for instance, the prayer for an adjudication. The General Orders in bankruptcy direct that "all petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference."[137] And some of the courts of bankruptcy have adopted a rule that petitions in bankruptcy will not be placed on file nor considered unless made out on the prescribed printed forms, written or typewritten petitions being returned to the parties without action.[138] Models for the various kinds of petitions, voluntary and involuntary, will be found among the official forms printed in the appendix to this book. The Supreme Court has directed that, as to the use of the official forms, "the several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case."[139] These forms are simple in character and not difficult to follow, and little comment on them is necessary. It should be observed, however, that the petition is not addressed to the court by title alone, but to the judge by name with the addition of the designation of the court. It was held, under the former statute, that the petition must give the judge's name correctly, and

[136] Bankruptcy Act 1898, § 1, clause 20.

[137] General Order No. 5. This subject was considered in the case of In re Malcom, 4 Law Rep. 488, Fed. Cas. No. 8,986, where it was observed by Judge Betts that the petition should be free from erasures and interlineations, and the name of the petitioner signed in full. If wanting in conformity to these rules, the papers would be sent back. But it was not contemplated by the rules to destroy the merits of an application, unless the sense of the paper was ruined by such erasures and interlineations, or if the papers were grossly imperfect. It was intended to have the papers neatly made out, so they could readily be read over. Minor interlineations in the body of the petition would not vitiate it when they did not obscure the sense of the document, but rather rendered it more definite. In this case the petitioner first wrote his name in the abbreviated form "Robt." and this was then erased and the name written in full. This, it was held, was no sufficient reason for rejecting the petition. But in an anonymous case reported in 15 Pittsb. Leg. J. 81, 1 N. B. R. 215, Fed. Cas. No. 471, permission to file a petition in bankruptcy was refused on account of the illegible manner in which it was written.

[138] Mahoney v. Ward, 100 Fed. 278, 3 Am. Bankr. Rep. 770.

[139] General Order No. 38. A petition in bankruptcy filed before the promulgation of the official forms by the Supreme Court should not be dismissed for want of conformity thereto, but the court will order a new petition, in the form prescribed, to be filed nunc pro tunc, the

that if the name as given is not correct, it cannot be stricken out as surplusage, and the petition cannot be filed.[140] A creditor's petition should ordinarily contain no more than the official form contemplates. But it has been held that such a petition, being in fact an original petition, is not deprived of its character as such merely because it contains a prayer by the petitioner to intervene in earlier proceedings, as a cautionary measure, in order that he might not be unrepresented in such earlier proceedings.[141] It may also be noted that the court will consider a petition in bankruptcy as the joint act of all the petitioners, and wilfull falsehood in one petitioner's verification will cause the summary dismissal of the petition as the fraud of all, and no copetitioner's prayer for an amendment will be heard.[142]

As to partnership cases, official form No. 2 covers the case of a voluntary petition by partners, but as no form has been prescribed for involuntary proceedings against a firm, form No. 3, the general form of a creditors' petition, should be used for that purpose, with such adaptations as will meet the exigencies of the particular case.[143] Where a voluntary petition by partners prays that "the petitioners" may be adjudged bankrupt, instead of "the said firm," but otherwise follows the official form, the variance is not material.[144] And proceedings to adjudge a partnership bankrupt, after its dissolution by the death of one of the partners, are not invalidated by the fact that the petition did not refer to the deceased partner, nor disclose that the partners named were surviving partners, when the business was being continued as provided in the partnership articles.[145] But subject to some such exceptions as this, it is a general rule that the petition, whether by or against the firm, should set out the individual names of all the partners,[146] and this rule applies where one member of a firm files his own petition in bankruptcy,

original petition, however, not to be withdrawn from the files. In re Ogles, 93 Fed. 426, 1 Am. Bankr. Rep. 671.

[140] Anonymous, 3 N. B. R. 128, Fed. Cas. No. 459. A bankruptcy petition must be addressed to the court which is authorized by law to take cognizance of the case, as determined by the residence of the bankrupt. In re Mitchell, 219 Fed. 690, 135 C. C. A. 362, 33 Am. Bankr. Rep. 463.

[141] In re Haff, 136 Fed. 78, 68 C. C. A. 646, 13 Am. Bankr. Rep. 362.

[142] In re Keller, 18 N. B. R. 10, Fed. Cas. No. 7,647.

[143] Mather v. Coe, 92 Fed. 333, 1 Am. Bankr. Rep. 504. And see In re Farley, 115 Fed. 359, 5 Am. Bankr. Rep. 266; In re Gay, 98 Fed. 870, 3 Am. Bankr. Rep. 529; In re Russell, 97 Fed. 32, 3 Am. Bankr. Rep. 529. A petition filed against a partnership by one partner alone must conform to the requirements of an involuntary petition and must allege insolvency and an act of bankruptcy by the firm. In re Ollinger & Perry (D. C.) 274 Fed. 970.

[144] In re Meyers, 97 Fed. 757, 3 Am. Bankr. Rep. 260.

[145] In re Coe, 157 Fed. 308, 19 Am. Bankr. Rep. 618. And see Hawkins v. Quinette, 156 Mo. App. 153, 136 S. W. 246.

[146] Adams v. May, 27 Fed. 907.

but with the object of obtaining a discharge from the debts of the partnership as well as from his individual liabilities.[147]

§ 160. Same; Allegations.—To sustain a petition in involuntary bankruptcy, it must affirmatively show that it is brought by the requisite number of creditors. If three petitioners unite in it, the statute is satisfied and no allegation as to the whole number of the bankrupt's creditors is necessary. But if it be brought by one or two creditors only, it must allege that the whole number of such creditors is less than twelve. But since a fact of this kind is usually very difficult to ascertain, until after the bankrupt himself shall have filed a list of his creditors, it is held that this allegation need not be made in terms of such positiveness that the petitioning creditor could be prosecuted for perjury if it should prove to be incorrect; in other words, the allegation may be made upon information and belief.[148] It is also necessary that the petitioning creditors, whether one or three, should have provable claims amounting in the aggregate, in excess of securities held by them, to $500. The official form for a creditors' petition contains an allegation to this effect, and it should be followed, though it is held that the want of such an averment may be cured by amendment.[149] The petition must also set forth the nature and amount of the petitioning creditors' claims severally. An allegation that the proposed bankrupt owes a debt, but not that it is due to a petitioning creditor, is insufficient.[150] As to the degree of particularity required in describing the claims, it is held that they should be so far explained in the petition that the court may see, on the face of it, that they are provable claims.[151] But the provision

147 In re Laughlin, 96 Fed. 589, 3 Am. Bankr. Rep. 1.

148 In re Scammon, 10 N. B. R. 66, Fed. Cas. No. 12,430; In re Joliet Iron & Steel Co., 10 N. B. R. 60, Fed. Cas. No. 7,436; In re Scammon, 6 Biss. 195, 11 N. B. R. 280, Fed. Cas. No. 12,429; In re Mann, 13 Blatchf. 401, 14 N. B. R. 572, Fed. Cas. No. 9,033; Perin & Gaff Mfg. Co. v. Peale, 17 N. B. R. 377, Fed. Cas. No. 10,981; In re Roberts, 71 Me. 390.

149 In re Pangborn, 185 Fed. 673, 26 Am. Bankr. Rep. 40; Roche v. Fox, 16 N. B. R. 461, Fed. Cas. No. 11,974; Ex parte Shouse, Crabbe, 482, Fed. Cas. No. 12,815. In a case of voluntary bankruptcy, an allegation in the petition that the bankrupt owes debts establishes prima facie the existence of provable debts against him. In re Hargadine-McKittrick Dry Goods Co. (D. C.) 239 Fed. 155, 39 Am. Bankr. Rep. 142.

150 In re Western Savings & Trust Co., 4 Sawy. 190, 17 N. B. R. 413, Fed. Cas. No. 17,442.

151 In re Hadley, 12 N. B. R. 366, Fed. Cas. No. 5,894; In re Harmon, Fed. Cas. No. 6,078; In re White (D. C.) 135 Fed. 199, 14 Am. Bankr. Rep. 241; In re Farthing (D. C.) 202 Fed. 557, 39 Am. Bankr. Rep. 732. The sufficiency of a petition in involuntary bankruptcy, in respect to the description of the petitioner's claim, must be tested by the rules which would govern a declaration or a bill in equity in an action or suit to enforce such claims. Doty v. Mason (D. C.) 244 Fed. 587, 40 Am. Bankr. Rep. 58. A petition in involuntary bankruptcy which sets out contracts between petitioners and the bankrupt, and alleges tender of performance by petitioners and refusal by the bankrupt, sufficiently establishes the status of the petitioners as creditors. In re H. A. Shaver Co. (D. C.) 265 Fed. 426, 44 Am. Bankr. Rep. 540.

of the fifty-seventh section of the act, requiring the consideration of a claim to be set forth and sworn to, relates to the proof of the claim and not to the averments of the petition.[152] This description of the several debts need not state whether they are secured or unsecured,[153] and an allegation that the indebtedness of the respondent to one of the petitioners was fraudulently contracted is impertinent, and should be stricken out on motion.[154] Where it is alleged that the claim is due, but the proof shows that it is owing but not yet due, the variance is not fatal, as the allegation was unnecessary.[155] As an example of the measure of particularity required, it may be remarked that the courts have approved as sufficient an allegation that the petitioning creditor was the owner of a promissory note, dated on such a date, made by the alleged bankrupt, payable to the order of the said creditor in three months after its date at a specified bank.[156] So of an allegation that the claim of the creditor is for goods sold and delivered, and that the bankrupt purchased the same within a year from the date of the petition.[157] But a debt sufficient to sustain the petition is not shown where the petitioner merely counts upon a judgment from which an appeal has been taken and is pending, with nothing to show the nature of his original claim, or that he would still have a provable debt if the judgment should be reversed.[158] And the petition is demurrable if it shows on its face that the claim of the petitioning creditor is barred by the statute of limitations.[159]

The petition must also contain a proper averment as to the occupation of the defendant. The statute does not subject all natural persons to its operation, but excepts such as are wage-earners and also persons engaged chiefly in farming or the tillage of the soil. So, as to corporations, it excepts municipal, railroad, insurance, and banking corporations. Now it is a well-known rule of pleading that, in proceeding on a

[152] In re Brett (D. C.) 130 Fed. 981, 12 Am. Bankr. Rep. 492.

[153] In re Harmon, Fed. Cas. No. 6,078. An allegation in a petition by creditors that certain of them are secured by maritime liens on vessels, but that the liens are of no value, is sufficient on demurrer to show such petitioners qualified under the Bankruptcy Act. In re Triangle S. S. Co. (D. C.) 267 Fed. 300, 46 Am. Bankr. Rep. 109.

[154] In re Ewing, 115 Fed. 707, 53 C. C. A. 289, 8 Am. Bankr. Rep. 269.

[155] Linn v. Smith, 4 N. B. R. 46, Fed. Cas. No. 8,375.

[156] In re Brett, 130 Fed. 981, 12 Am. Bankr. Rep. 492. In a petition in involuntary bankruptcy, the claim of one of the petitioners was held sufficiently pleaded by alleging that it was for money had and received by the bankrupt on account of a protested check, representing the indebtedness, issued by the bankrupt to the creditor, a copy of which was attached. Stewart Petroleum Co. v. Boardman (C. C. A.) 264 Fed. 826, 45 Am. Bankr. Rep. 573.

[157] In re Hark, 135 Fed. 604, 14 Am. Bankr. Rep. 400.

[158] In re R. L. Radke Co., 193 Fed. 735, 27 Am. Bankr. Rep. 950.

[159] In re R. L. Radke Co., 193 Fed. 735, 27 Am. Bankr. Rep. 950.

statute, the pleader must negative an exception contained in the enacting clause. Therefore a petition in involuntary bankruptcy must affirmatively show that the respondent is not within the excepted classes; and this may be done either by words of express negation or by such an allegation as to the nature of his (or its) business as will show plainly that the respondent is not exempt from the operation of the statute.[160] The want of such an averment will be ground of demurrer.[161] But it is generally held that this allegation is not jurisdictional,[162] but the want of it may be cured by amendment,[163] and that, if the parties go to trial on a petition which is defective in this respect, without objection seasonably taken, and an adjudication is made, the defect is cured by the decree, and will not constitute ground for setting aside the adjudication or impeaching it collaterally.[164]

To show jurisdiction, it is further necessary for the petition to show where the debtor has resided for the greater portion of the preceding six months, naming the town, county, and state, and averring that the place mentioned is within the federal district where the petition is filed.[165] Or if jurisdiction is claimed on the ground that he has had his principal place of business within the district, it should be so stated. Care should be taken not to confuse these terms. An allegation as to

[160] Armstrong v. Fernandez, 208 U. S. 324, 28 Sup. Ct. 419, 52 L. Ed. 514, 19 Am. Bankr. Rep. 746; Conway v. German, 166 Fed. 67, 91 C. C. A. 653, 21 Am. Bankr. Rep. 577; Edelstein v. United States, 149 Fed. 636, 79 C. C. A. 328, 17 Am. Bankr. Rep. 649; In re First Nat. Bank, 152 Fed. 64, 81 C. C. A. 260, 18 Am. Bankr. Rep. 265; In re Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. Bankr. Rep. 515; In re Marion Contract & Const. Co., 166 Fed. 618, 22 Am. Bankr. Rep. 81; In re Rutland Realty Co., 157 Fed. 296, 19 Am. Bankr. Rep. 546; Rise v. Bordner, 140 Fed. 566, 15 Am. Bankr. Rep. 297; In re Mero, 128 Fed. 630, 12 Am. Bankr. Rep. 171; In re Callison, 130 Fed. 987, 12 Am. Bankr. Rep. 344; In re Bellah, 116 Fed. 69, 8 Am. Bankr. Rep. 310; In re Brett, 130 Fed. 981, 12 Am. Bankr. Rep. 492; In re White, 135 Fed. 199, 14 Am. Bankr. Rep. 241; Sabin v. Blake-McFall Co., 223 Fed. 501, 139 C. C. A. 49, 35 Am. Bankr. Rep. 179. McAfee v. Arnold & Mathis, 155 Ala. 561, 46 South. 870.

[161] Edelstein v. United States, 149 Fed. 636, 79 C. C. A. 328, 17 Am. Bankr. Rep. 649; In re First Nat. Bank, 152 Fed. 64, 81 C. C. A. 260, 18 Am. Bankr. Rep. 265; In re Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. Bankr. Rep. 515.

[162] In re Broadway Savings Trust Co., 152 Fed. 152, 81 C. C. A. 58, 18 Am. Bankr. Rep. 254; Conway v. German, 166 Fed. 67, 91 C. C. A. 653, 21 Am. Bankr. Rep. 577; In re Marion Contract & Const. Co., 166 Fed. 618, 22 Am. Bankr. Rep. 81. But compare In re Elmira Steel Co., 109 Fed. 456, 5 Am. Bankr. Rep. 484; In re Imperial Film Exchange, 198 Fed. 80, 117 C. C. A. 188, 28 Am. Bankr. Rep. 815.

[163] Armstrong v. Fernandez, 208 U. S. 324, 28 Sup. Ct. 419, 52 L. Ed. 514, 19 Am. Bankr. Rep. 746; Conway v. German, 166 Fed. 67, 91 C. C. A. 653, 21 Am. Bankr. Rep. 577; In re First Nat. Bank, 152 Fed. 64, 81 C. C. A. 260, 18 Am. Bankr. Rep. 265; In re Marion Contract & Const. Co., 166 Fed. 618, 22 Am. Bankr. Rep. 81; In re Bellah, 116 Fed. 69, 8 Am. Bankr. Rep. 310; In re White, 135 Fed. 199, 14 Am. Bankr. Rep. 241.

[164] In re First Nat. Bank, 152 Fed. 64, 81 C. C. A. 260, 18 Am. Bankr. Rep. 265; In re Stern, 116 Fed. 604, 54 C. C. A. 60, 8 Am. Bankr. Rep. 569.

[165] See Official Form No. 3. A petition in involuntary proceedings must affirmatively and distinctly show the essential

the debtor's "principal place of residence" does not satisfy the statute, although such a defect may be considered as immaterial when the court has taken jurisdiction and granted a discharge.[166] But a petition which states disjunctively that the respondent has had his principal place of business, or has resided, or has had his domicile, within the district, is insufficient upon its face to confer jurisdiction.[167] And in a case of voluntary bankruptcy of a partnership, it has been held that, where the allegation of residence within the district as a ground of jurisdiction is false as to one of the petitioning partners, the court will have no jurisdiction as to any of them.[168] The allegation that the respondent in an involuntary petition owes debts to the amount of $1,000, or over is also indispensable, and its omission leaves the court without jurisdiction.[169]

Coming now to the allegations of acts of bankruptcy, it is first of all necessary to allege the insolvency of the respondent in all instances where insolvency is an essential element of the act of bankruptcy charged and relied on,[170] and in partnership cases it is not enough to allege that the firm is insolvent, but there must also be an averment as to the solvency or insolvency of each of the partners.[171] The petitioning creditors are not restricted to the allegation of a single act of bankruptcy, but they may include in their petition as many separate acts as they have knowledge of, provided they were all committed within the four months.[172] This last item is highly important. If the petition

facts necessary to give the bankruptcy court jurisdiction. In re McGraw (D. C.) 254 Fed. 442, 43 Am. Bankr. Rep. 38.

[166] Ross-Lewin v. Goold, 113 Ill. App. 499, judgment affirmed 211 Ill. 384, 71 N. E. 1028.

[167] In re Laskaris, 1 Nat. Bankr. News, 209.

[168] In re Beals, 9 Ben. 223, 17 N. B. R. 107, Fed. Cas. No. 1,165.

[169] C. C. Taft Co. v. Century Sav. Bank, 141 Fed. 369, 72 C. C. A. 671, 15 Am. Bankr. Rep. 594.

[170] In re Lachenmaier, 202 Fed. 32, 121 C. C. A. 368; In re Hammond (D. C.) 163 Fed. 548, 20 Am. Bankr. Rep. 776; In re Dodge, Fed. Cas. No. 3,946a. A petition for adjudication of one as a bankrupt on the ground of his having made a general assignment for the benefit of creditors need not allege his insolvency. Moody-Hormann-Boelhauwe v. Clinton Wire Cloth Co., 246 Fed. 653, 158 C. C. A. 609, 40 Am. Bankr. Rep. 441. A petition in involuntary bankruptcy, alleging that the debtor is insolvent, without more, is insufficient, because pleading a conclusion. In re Connecticut Brass & Mfg. Corporation (D. C.) 257 Fed. 445, 43 Am. Bankr. Rep. 376.

[171] In re Blair, 99 Fed. 76, 3 Am. Bankr. Rep. 588. And see supra, § 114. Compare In re Everyhody's Grocery & Meat Market (D. C.) 173 Fed. 492, 21 Am. Bankr. Rep. 925. A petition against a partnership may be sufficient, where it is answered without objection, though it does not distinctly allege that the partners individually are insolvent. Houghton Wool Co. v. Morris, 249 Fed. 434, 161 C. C. A. 408, 41 Am. Bankr. Rep. 271. But in a bankruptcy proceeding against a firm, a creditor's petition against an alleged secret partner, seeking to compel him to file schedules of assets and liabilities, but not alleging him to be insolvent, is not sustainable. In re Samuels, 215 Fed. 845, 132 C. C. A. 187.

[172] Bradley Timber Co. v. White, 121 Fed. 779, 58 C. C. A. 55, 10 Am. Bankr. Rep. 329; In re Nusbaum, 152 Fed. 835, 18 Am. Bankr. Rep. 598.

does not show that the act of bankruptcy charged was committed within the time limited by the statute, it is an absolutely fatal defect.[173] And in setting out the act charged, there must be a particular statement of the facts and details, as particular as the nature of the transaction and the petitioners' means of knowledge will permit. To state an act of bankruptcy in the mere words of the statute is not enough. There must be such certainty and particularity as to time, place, persons concerned, and other details as will definitely inform the debtor of the charge which he is expected to controvert or explain.[174] But since the tortuous ways of an embarrassed debtor are often shrouded in mystery, it is naturally impossible for petitioning creditors, in all cases, to have exact and certain knowledge of all the details of a transaction alleged as fraudulent or preferential. In this situation, therefore, they are not held to any greater degree of particularity than their means of knowledge will warrant. They may make their allegation on information and belief, but they must show that they have used due diligence in the endeavor to ascertain the details, and that they have something more than mere rumor, vague hearsay, or suspicion to go on, and their allegation of the commission of an act of bankruptcy should be supplemented, in such cases, by an explanation of its lack of completeness.[175]

[173] Gross v. Potter, 15 Gray (Mass.) 556; In re Muller, Deady, 513, 3 N. B. R. 329, Fed. Cas. No. 9,912; Bradley Timber Co. v. White, 121 Fed. 779, 58 C. C. A. 55, 10 Am. Bankr. Rep. 329; In re Mason-Seaman Transp. Co. (D. C.) 235 Fed. 974, 37 Am. Bankr. Rep. 677.

[174] In re Pressed Steel Wagon Goods Co., 193 Fed. 811, 27 Am. Bankr. Rep. 44; In re Cliffe, 94 Fed. 354, 2 Am. Bankr. Rep. 317; In re Hark, 135 Fed. 604, 14 Am. Bankr. Rep. 400; In re Randall, Deady, 557, 3 N. B. R. 18, Fed. Cas. No. 11,551; In re Nelson, 98 Fed. 76, 1 Am. Bankr. Rep. 63; Clark v. Henne & Meyer, 127 Fed. 288, 62 C. C. A. 172, 11 Am. Bankr. Rep. 583; In re Deer Creek Water & Water Power Co., 205 Fed. 205, 29 Am. Bankr. Rep. 356; In re Stone, 206 Fed. 356, 30 Am. Bankr. Rep. 392; In re Sig H. Rosenblatt & Co., 193 Fed. 638, 113 C. C. A. 506, 28 Am. Bankr. Rep. 401; In re Hallin, 199 Fed. 806, 28 Am. Bankr. Rep. 708; In re McGraw (D. C.) 254 Fed. 442, 43 Am. Bankr. Rep. 38; In re D. F. Herlehy Co. (D. C.) 247 Fed. 369, 41 Am. Bankr. Rep. 171; In re Condon, 209 Fed. 800, 126 C. C. A. 524, 31 Am. Bankr. Rep. 754; In re Louisell Lumber Co., 209 Fed. 784, 126 C. C. A. 508, 31 Am. Bankr. Rep. 356.

[175] In re Blumberg, 133 Fed. 845, 13 Am. Bankr. Rep. 343; In re Muller, Deady, 513, 3 N. B. R. 329, Fed. Cas. No. 9,912. A person proceeded against under an insolvency law "is entitled to as specific a statement of the acts by which it is asserted he has exposed himself to the summary proceedings and severe consequences of the insolvency law, as their nature will reasonably admit of. * * * It is not meant by these observations that the allegations must be made with great minuteness of detail, or that the petitioner must establish every circumstance embraced in his averment. This would be too stringent a requirement, and would often defeat the remedial purposes of the statute. A debtor seeking to fraudulently conceal or dispose of his property resorts to secrecy and artifice in effecting his purpose, and it would be difficult to trace all the steps or discover all the facts attending the perpetration of his fraud. But the allegations should be sufficiently pointed to describe with substantial identification the material facts which justify the characterization

Applying these principles to particular acts of bankruptcy, and considering first the giving of a preference, it is absolutely necessary to aver that the transfer of property was made with the intent to prefer the particular creditor, as this is an essential element of this act of bankruptcy.[176] Further the name of the preferred creditor must be alleged if known to the petitioners.[177] An averment that the respondent paid money to one or more creditors with intent to prefer them is insufficient.[178] But if the petitioners do not know the name of the creditor preferred, the petition is good although it may only aver in general terms that the payment was made, adding a specific reason why a more particular allegation is not possible.[179] The exact date of the preference should also be given if known, though a petition which only shows that it was within four months may perhaps be sustained as against a demurrer.[180] The property transferred, if other than money, should also be particularly described, though it has been held that an insufficient description of it, if not objected to by demurrer, may be cured by the evidence.[181]

of the act complained of as an act of insolvency, in order that the defendant, the court, and the jury may be informed, in substance, of the subject-matter of the accusation and inquiry." Schiff v. Solomon, 57 Md. 572. The statements made in a petition in involuntary bankruptcy in accordance with the form prescribed by the rules in bankruptcy, in which the petitioners "represent" certain facts to be true, are of matters which must necessarily be alleged on hearsay, and do not purport to be of facts to which the petitioners make oath as personal witnesses, and hence the statement in the petition that it is made on information and belief does not add to nor detract from the strength of the allegations made, nor is a statement in the verification, that affiants believe the matters so alleged on information and belief to be true, ground for dismissing the petition, although improper in form. In re Ball, 156 Fed. 682, 19 Am. Bankr. Rep. 609. A petition in involuntary bankruptcy may be sufficient although it does not set forth the evidence relied on to establish the facts. Graham Mfg. Co. v. Davy-Pocahontas Coal Co., 238 Fed. 488, 151 C. C. A. 424, 38 Am. Bankr. Rep. 18.

[176] In re Tupper, 163 Fed. 766, 20 Am. Bankr. Rep. 824; In re Hammond, 163 Fed. 548, 20 Am. Bankr. Rep. 776; In re Ewing, 115 Fed. 707, 53 C. C. A. 289, 8 Am. Bankr. Rep. 269; In re Musgrove Mining Co. (D. C.) 234 Fed. 99, 37 Am. Bankr. Rep. 628.

[177] In re Hadley, 12 N. B. R. 366, Fed. Cas. No. 5,894. Where a petition averred that the debtor, while insolvent, transferred and delivered a large number of good and collectible notes, of the value of over $5,000, to C. & Co. with intent to prefer them over other creditors, it was not objectionable for failure to charge that C. & Co. were creditors of the bankrupt. In re Vastbinder, 126 Fed. 417, 11 Am. Bankr. Rep. 118. As to omitting name of preferred creditor when it cannot be discovered from the books or papers of the bankrupt, see In re Standard Aero Corp. of New York (C. C. A.) 270 Fed. 779, 46 Am. Bankr. Rep. 511.

[178] In re Pure Milk Co., 154 Fed. 682, 18 Am. Bankr. Rep. 735; In re Triangle S. S. Co. (D. C.) 267 Fed. 300, 46 Am. Bankr. Rep. 109.

[179] In re Lackow, 140 Fed. 573, 14 Am. Bankr. Rep. 514.

[180] In re Vastbinder, 126 Fed. 417, 11 Am. Bankr. Rep. 118.

[181] First State Bank v. Haswell, 174 Fed. 209, 98 C. C. A. 217, 23 Am. Bankr. Rep. 330.

The rules are similar where the act of bankruptcy charged is a fraudulent transfer or concealment of property. The intent to hinder, delay, or defraud creditors must be specifically charged, as the act of bankruptcy is not complete without this,[182] or facts and circumstances must be pleaded from which such an intent may properly be inferred.[183] An allegation of a transfer of property for an "improper consideration" is not sufficient.[184] And so, a charge that claims due to the bankrupt were assigned without consideration, that suits thereon have been commenced by the assignee, and that the assignments were made to hinder and defraud creditors, does not sufficiently allege an act of bankruptcy, because it does not exclude a theory that the assignments were made merely for purposes of collection.[185] And generally the petition should state the particulars of any transfer alleged, describing the property transferred and when and to whom the transfer was made.[186] But if the petitioners cannot obtain exact knowledge of the details, it is enough if their allegation is as specific as they can make it.[187] Thus, in a case of removal and concealment of property, they may state that they have been unable to ascertain to what place the goods have been removed.[188] And where the evidence of a fraudulent concealment of assets is wholly circumstantial, it is unnecessary to set out the precise details.[189] Thus, a charge that the respondent, at a certain time, received a specific sum of money, and that he has ever since concealed it, with intent to hinder, delay, and defraud his creditors, is not defective for failing to set forth the manner and details of the concealment.[190]

[182] In re Tupper, 163 Fed. 766, 20 Am. Bankr. Rep. 824. In re Heleker Bros. Mercantile Co. (D. C.) 216 Fed. 963, 33 Am. Bankr. Rep. 503. And the petition is insufficient if it fails to show that the debts of petitioners were in existence at the time of the commission of an alleged act of bankruptcy by the transfer and concealment of property with intent to defraud creditors. In re Stone (D. C.) 206 Fed. 356, 30 Am. Bankr. Rep. 392.

[183] In re White, 135 Fed. 199, 14 Am. Bankr. Rep. 241.

[184] In re Blumberg, 133 Fed. 845, 13 Am. Bankr. Rep. 343.

[185] In re R. L. Radke Co., 193 Fed. 735, 27 Am. Bankr. Rep. 950.

[186] Conway v. German, 166 Fed. 67, 91 C. C. A. 653, 21 Am. Bankr. Rep. 577; In re Rosenblatt (C. C. A.) 193 Fed. 638, 28 Am. Bankr. Rep. 401. An act of bankruptcy by the fraudulent transfer of assets is sufficiently charged by a petition which alleges that, within four months before the filing of the petition, the bankrupt corporation permitted the two persons who were its only stockholders to appropriate portions of its property to their individual use. In re R. L. Radke Co., 193 Fed. 735, 27 Am. Bankr. Rep. 950. So an averment in an involuntary petition that the defendant, who was a merchant, committed an act of bankruptcy by conveying a part of his property, consisting of real estate described, to a person named, with intent to hinder, delay, and defraud his creditors, is sufficient. In re White, 135 Fed. 199, 14 Am. Bankr. Rep. 241.

[187] In re Mero, 128 Fed. 630, 12 Am. Bankr. Rep. 171.

[188] In re Hark, 135 Fed. 604, 14 Am. Bankr. Rep. 400.

[189] In re Bellah, 116 Fed. 69, 8 Am. Bankr. 310.

[190] In re Bellah, 116 Fed. 69, 8 Am. Bankr. Rep. 310.

As to suffering a preference through legal proceedings, it is not sufficient to allege that the bankrupt suffered the recovery of a judgment against him and had not "at least five days before a sale or final disposition of any property affected by such preference vacated or discharged the same" (in the words of the statute) without alleging the issuance of an execution on the judgment, or the levying thereof on any property of the debtor, and making no allegation of the date of any proposed sale.[191] Nor is it enough to allege that attachments have been issued and levied, which "have not to the present time been vacated," [192] or merely that executions have been levied on the bankrupt's property without stating the further history of the executions.[193] Where the ground of the petition is the appointment of a receiver for the insolvent defendant on the ground of insolvency, it should allege the fact of the appointment, and show that it was made by a court of competent jurisdiction, and that the reason for the appointment was insolvency.[194]

§ 161. Same; Multifarious and Misjoined Matter.—It is improper to incorporate in a creditors' petition for an adjudication in bankruptcy allegations charging other creditors with having received voidable preferences, or a request for a warrant directing the marshal to seize and hold the debtor's property pending an adjudication, or a prayer for the seizure of property of the alleged bankrupt in the hands of adverse claimants, or for an injunction forbidding a third person having property of the respondent in his possession (such as a receiver appointed by a state court) to dispose of the same. All these are matters which can only be litigated in a separate proceeding. And hence such allegations and prayers are multifarious and will be stricken out, or treated as having been stricken.[195]

§ 162. Signature and Verification of Petition.—The provision of the statute (section 18c) that "all pleadings setting up matters of fact shall

[191] In re Pressed Steel Wagon Goods Co., 193 Fed. 811, 27 Am. Bankr. Rep. 44. See In re Truitt, 203 Fed. 550, 29 Am. Bankr. Rep. 570; In re Fineman (D. C.) 223 Fed. 652, 34 Am. Bankr. Rep. 245.

[192] Seaboard Steel Casting Co. v. William R. Trigg Co., 124 Fed. 75, 10 Am. Bankr. Rep. 594.

[193] In re Vastbinder, 126 Fed. 417, 11 Am. Bankr. Rep. 118.

[194] In re Kennedy Tailoring Co., 175 Fed. 871, 23 Am. Bankr. Rep. 656; Exploration Mercantile Co. v. Pacific Hardware & Steel Co., 177 Fed. 825, 101 C. C. A. 39, 24 Am. Bankr. Rep. 216; Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co., 206 Fed. 813, 30 Am. Bankr. Rep. 604; In re Maplecroft Mills (D. C.) 218 Fed. 659, 33 Am. Bankr. Rep. 815; In re Valentine Bohl Co., 224 Fed. 685, 140 C. C. A. 225, 34 Am. Bankr. Rep. 855.

[195] Mather v. Coe, 92 Fed. 333, 1 Am. Bankr. Rep. 504; In re Ogles, 93 Fed. 426, 1 Am. Bankr. Rep. 671; In re Kelly, 91 Fed. 504, 1 Am. Bankr. Rep. 306; In re Hadley, 12 N. B. R. 366, Fed. Cas.

be verified under oath" is applicable to a petition in involuntary bankruptcy, which must be signed and verified in duplicate by the petitioning creditors,[196] and not by one for all, but by each separately.[197] The verification may be made before any of the officers whom the bankruptcy act enumerates as authorized to administer oaths required by the act to be taken. These are referees in bankruptcy, officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken, and diplomatic and consular officers of the United States in any foreign country.[198] It is not a fatal defect that the notary public who took the verification was the bankrupt's own attorney,[199] and the date of the jurat is not an essential part of the verification.[200] It is important to be noted that any mere irregularity or defect in the verification of the petition will not defeat the jurisdiction of the court of bankruptcy. Jurisdiction attaches upon the filing of the petition, and if the verification is insufficient or defective, the court may allow it to be amended, or, if it is not seasonably objected to it will be cured by an adjudication. "An order of adjudication is a judgment, and is as effective as any other judgment to cure irregularities in practice which do not touch the jurisdiction of the court." [201] Further, an objection to a petition in involuntary bankruptcy, on the ground of informality

No. 5,894; Creditors v. Cozzens, 3 N. B. R. 281, Fed. Cas. No. 3,378; In re Kintzing, 3 N. B. R. 217, Fed. Cas. No. 7,833.

[196] In re Bellah, 116 Fed. 69, 8 Am. Bankr. Rep. 310. The verification of a petition must name the persons who swear to it. Although a creditor may have signed his name to the petition, or to the verification, it is not sufficiently verified as to him unless his name is recited as being one of the persons who appeared and made the verification. In re Rosenfields, 11 N. B. R. 86, Fed. Cas. No. 12,061.

[197] In re Simmons, 10 N. B. R, 253, Fed. Cas. No. 12,864. But see Green River Deposit Bank v. Craig, 110 Fed. 137, 6 Am. Bankr. Rep. 381, holding that a petition in bankruptcy is not subject to a motion to dismiss for want of jurisdiction because of a failure of one of the petitioners to verify it.

[198] Bankruptcy Act 1898, § 20. As to the authority of clerks and deputy clerks of the United States courts to take the verification to a petition in bankruptcy, see Schermerhorn v. Talman, 14 N. Y. 93, 134; United States v. Nihols, 4 McLean, 23, Fed. Cas. No. 15,880. A petition in bankruptcy may properly be verified before a commissioner of deeds. In re Morse (D. C.) 210 Fed. 900, 32 Am. Bankr. Rep. 207.

[199] In re Kindt, 98 Fed. 403, 3 Am. Bankr. Rep. 443; In re Mauer, 5 Sawy. 66, Fed. Cas. No. 9,304.

[200] In re Houghton, 4 Law Rep. 482, Fed. Cas. No. 6,727.

[201] Green River Deposit Bank v. Craig, 110 Fed. 137, 6 Am. Bankr. Rep. 381; In re Simmons, 10 N. B. R. 253, Fed. Cas. No. 12,864; In re Donnelly, 5 Fed. 783; In re Getchell, 8 Ben. 256, Fed. Cas. No. 5,371. Verification of the petition on information and belief is insufficient, but the defect is not jurisdictional, and may be cured by amendment. In re Farthing, 202 Fed. 557, 29 Am. Bankr. Rep. 732. And see Sabin v. Blake-McFall Co., 223 Fed. 501, 139 C. C. A. 49, 35 Am. Bankr. Rep. 179; Lackawanna Leather Co. v. La Porte Carriage Co., 211 Fed. 318, 127 C. C. A. 604, 31 Am. Bankr. Rep. 658.

or insufficiency in its verification, is waived by the tender of a plea and answer on the merits and the respondent cannot afterwards have the proceedings dismissed on account of such defect.[202]

It is not essential that the creditor in person should sign and verify the petition; it may be done for him by an attorney at law retained to represent him in the proceedings, provided that the attorney has personal knowledge of the facts directly alleged in the petition,[203] and provided he states some good and sufficient reason why the creditor does not appear in person to sign and verify, as, that he is a non-resident or is absent from the district.[204] And no other evidence of the attorney's authority to act for his client in this particular need appear than the fact that he has been admitted to practice in the federal courts.[205] For

[202] Simonson v. Sinsheimer, 95 Fed. 948, 37 C. C. A. 337; Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; In re Simonson, 92 Fed. 904, 1 Am. Bankr. Rep. 197; In re Herzikopf, 118 Fed. 101, 9 Am. Bankr. Rep. 90; In re Chequasset Lumber Co., 112 Fed. 56, 7 Am. Bankr. Rep. 87; In re McNaughton, 8 N. B. R. 44, Fed. Cas. No. 8,912; Ex parte Jewett, 2 Low. 393, 11 N. B. R. 443, Fed. Cas. No. 7,303.

[203] In re Vastbinder, 126 Fed. 417, 11 Am. Bankr. Rep. 118; In re Hunt, 118 Fed. 282, 9 Am. Bankr. Rep. 251; In re Herzikopf, 118 Fed. 101, 9 Am. Bankr. Rep. 90; In re Raynor, 11 Blatchf. 43, 7 N. B. R. 527, Fed. Cas. No. 11,597. It must be admitted that this question has been much debated and is not entirely free from doubt. In a few cases under the act of 1867, it was held that the petitioning creditors must sign and verify the petition in person and that it could not be done for them by an agent or attorney. See In re Butterfield, 6 N. B. R. 257; Hunt v. Pooke, 5 N. B. R. 161, Fed. Cas. No. 6,896. And some intimations of a similar doctrine were given in early cases under the present act. See In re Nelson, 98 Fed. 76, 1 Am. Bankr. Rep. 63; In re Simonson, 92 Fed. 904, 1 Am. Bankr. Rep. 197. So far as the act of 1867 bore on this question, the only provision was that a person might be adjudged bankrupt "on the petition of one or more of his creditors," and it was held (In re Raynor, supra) that there was no necessity for construing this so strictly as to exclude a petition filed for a creditor by his duly authorized attorney or agent. The act of 1898 is not more specific. It requires all pleadings setting up matters of fact to be verified, but does not state that the verification may not be by an agent. It provides that a petition may be filed by "three or more creditors who have provable claims," but also declares that the word "creditor" may "include his duly authorized agent, attorney, or proxy." Sec. 1, clause 9. As for the official forms, that prescribed under the act of 1867, like that now in force, marked the place for signing by blank lines, with the word "petitioner" appended as descriptive of the signer. But the courts held that the blanks might be filled by the words "A. B., attorney (or agent) for the petitioner," or with the name of the petitioner "by A. B., his agent or attorney," and that no violence would be done to any form or to any prescription in the law or the rules. Moreover as finally disposing of any argument founded on the rules, it was pointed out that the general orders prescribed that the forms should be "observed and used with such alterations as may be necessary to suit the circumstances of any particular case;" and we now have the same language repeated in General Order No. 38.

[204] Rogers v. De Soto Placer Min. Co., 136 Fed. 407, 69 C. C. A. 251, 14 Am. Bankr. Rep. 252; In re Hadley, 12 N. B. R. 366, Fed. Cas. No. 5,894.

[205] In re Herzikopf, 118 Fed. 101, 9 Am. Bankr. Rep. 90. Compare In re Sargent, 13 N. B. R. 144, Fed. Cas. No. 12,361. The fact that the attorney for a voluntary bankrupt, who signed the

similar reasons, the petition may be signed and verified on behalf of a creditor by an attorney in fact or an accredited agent,[206] but in this case, proof of his agency or of express authority to do the particular act is necessary,[207] though if the petition is defective for failing to show such authority, it may be amended,[208] or supplementary proof may be received nunc pro tunc in the discretion of the court to establish the authority of the agent.[209] Where a partnership is one of the petitioning creditors, the signing and verifying may be done for the firm by one of its members.[210] And in the case of a corporation, its name may be signed and the petition verified for it by its attorney, by an agent, or by one of its officers duly authorized to act for it in this particular.[211] But this authority must be special. Neither the president nor "any officer of a corporation has authority, by virtue of his office, to sign and verify a petition for adjudication of bankruptcy against a debtor of the corporation, unless specially authorized by some statute, by-law, or resolution of its board of directors. Such authority, being special, must in all cases be made to appear by the oath of the person signing and verifying the petition or other competent evidence."[212] The same rule applies, and with even greater force, to the case of a voluntary petition by a corporation. It is held that the president of a company has no inherent power to take the necessary steps to have the corporation adjudged bankrupt, and hence a voluntary petition filed on behalf of the corporation, and signed and verified by the president, but which fails to show that any action had been taken by the board of directors authorizing the filing of the petition, or empowering the president to execute the petition in the name of the corporation, is insufficient to confer jurisdiction on the court of bankruptcy.[213]

petition as such attorney, had not at that time been admitted to practice in the district court where the proceedings are brought, is not a ground for dismissing the petition, but for an order on notice to the bankrupt and the attorney, that the latter will no longer be recognized as attorney in the case. In re O'Halloran, 8 Ben. 128, Fed. Cas. No. 10,463.

[206] Wald v. Wehl, 18 Blatchf. 495, 6 Fed. 163; In re California Pac. R. Co., 3 Sawy. 240, 11 N. B. R. 193, Fed. Cas. No. 2,315.

[207] In re Rosenfields, 11 N. B. R. 86, Fed. Cas. No. 12,061.

[208] In re California Pac. R. Co., 3 Sawy. 240, 11 N. B. R. 193, Fed. Cas. No. 2,315.

[209] In re Rosenfields, 11 N. B. R. 86, Fed. Cas. No. 12,061.

[210] Walker v. Woodside, 164 Fed. 680, 21 Am. Bankr. Rep. 132.

[211] In re Chequasset Lumber Co., 112 Fed. 56, 7 Am. Bankr. Rep. 87; Walker v. Woodside, 164 Fed. 680, 21 Am. Bankr. Rep. 132; In re Bellah, 116 Fed. 69, 8 Am. Bankr. Rep. 310; Merriam v. Sewall, 8 Gray (Mass.) 316.

[212] In re McNaughton, 8 N. B. R. 44, Fed. Cas. No. 8,912; Roche v. Fox, 16 N. B. R. 461, Fed. Cas. No. 11,974. But see In re Summers, 1 Nat. Bankr. News, 266.

[213] In re Jefferson Casket Co., 182 Fed. 689, 25 Am. Bankr. Rep. 663.

§ 163. Amendment of Petition.—It is provided by the General Orders in bankruptcy (No. 11) that "the court may allow amendments to the petition and schedules on application of the petitioner. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed." Upon this it is to be remarked, in the first place, that the "court" may here include the referee, and that officer has jurisdiction and discretion to order amendments to be made in the petition and schedules of a voluntary bankrupt referred to him, in particulars as to which he finds them defective or insufficient.[214] Secondly, though the order only specifies the petition and schedules, yet formal amendments to an answer filed by a creditor to a petition in involuntary bankruptcy may be allowed at any time before adjudication.[215] Third, the application for leave to amend is fatally defective if it does not state the reason of the error or defect sought to be amended, but the applicant may be granted time to supply this omission.[216] But this provision of the General Orders does not abrogate or restrict the general power of amendment in other respects vested in the courts of bankruptcy.[217] The privilege of amending a petition in bankruptcy in effect rests in the sound judicial discretion of the court, which will not be interfered with on review unless an abuse of discretion is shown.[218] And it is perfectly proper for the court to refuse to allow an amendment as to jurisdictional facts or one going to the very foundation of the proceeding.[219] It may also be observed that a creditor who has joined in the petition cannot object to an amendment thereof which is necessary to the prosecution of the same to final effect.[220]

Amendments to a petition relate back to the time of the filing of the original petition, and have the same force and effect as if included in the petition itself.[221] For this reason, where a petition, sufficient in form to give the court jurisdiction, is filed within four months after

[214] In re Brumelkamp, 95 Fed. 814, 2 Am. Bankr. Rep. 318.

[215] In re Harris, 155 Fed. 216, 19 Am. Bankr. Rep. 204.

[216] In re Portner, 149 Fed. 799, 18 Am. Bankr. Rep. 89.

[217] In re Bellah, 116 Fed. 69, 8 Am. Bankr. Rep. 310; In re Hill, 5 Law Rep. 326, Fed. Cas. No. 6,485.

[218] In re Rosenblatt (C. C. A.) 193 Fed. 638, 28 Am. Bankr. Rep. 401; Armstrong v. Fernandez, 208 U. S. 324, 28 Sup. Ct. 419, 52 L. Ed. 514, 19 Am. Bankr. Rep. 746; Woolford v. Diamond State Steel Co., 138 Fed. 582, 15 Am. Bankr. Rep. 31; Sabin v. Blake-McFall Co., 223 Fed. 501, 139 C. C. A. 49, 35 Am. Bankr. Rep. 179; Morrison v. Rieman, 249 Fed. 97, 161 C. C. A. 149, 41 Am. Bankr. Rep. 325.

[219] In re Wood, 6 Ben. 339, 13 N. B. R. 96, Fed. Cas. No. 17,935; In re Craft, 6 Blatchf. 177, 2 N. B. R. 111, Fed. Cas. No. 3,317; In re Farthing, 202 Fed. 557, 29 Am. Bankr. Rep. 732.

[220] In re Sargent, 13 N. B. R. 144, Fed. Cas. No. 12,361.

[221] Millan v. Exchange Bank, 183 Fed. 753, 106 C. C. A. 327, 24 Am. Bankr. Rep.

the commission of the act of bankruptcy alleged, it is no sufficient objection to the allowance of an amendment that the four months have more than elapsed at the time the amendment is applied for.[222] The rule is otherwise, however, where the petition, as originally filed, was fatally defective. In this case, the date of the amendment must be taken as the date from which the limitation of four months begins to run.[223] And if the petition was fatally defective in failing to allege any act of bankruptcy, an amendment curing the defect, but not filed until more than four months after the attaching of a lien, will not take effect by relation as of the date of the original for the purpose of setting aside the lien.[224] For other purposes, that is, with reference to the course of the proceedings, it is held that amendments may be made in bankruptcy proceedings at any stage of the case, regardless of the time that has elapsed,[225] although here, as in other matters, the law contemplates a continuous prosecution of the proceedings and a speedy termination; and where the petitioning creditors have delayed for nearly a year, without sufficient excuse, to correct an averment in their petition as to the residence of the debtor, their application to amend should be refused.[226] If otherwise meritorious, the amendment may be allowed after the sustaining of a demurrer to the petition,[227] and indeed, the petition will not ordinarily be dismissed after a successful demurrer, without giving the petitioners opportunity to apply for leave to amend.[228] And amendments may even be made after adjudication, as, on the trial of the issue before a jury, when the court has power to permit amendments to be made to cover the case shown by the evidence.[229]

889; Ryan v. Hendricks, 166 Fed. 94, 92 C. C. A. 78, 21 Am. Bankr. Rep. 570; Sherman v. International Bank, 8 Biss. 371, Fed. Cas. No. 12,765.

222 In re Shoesmith, 135 Fed. 684, 68 C. C. A. 322, 13 Am. Bankr. Rep. 645; International Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866; Hark v. C. M. Allen Co., 146 Fed. 665, 77 C. C. A. 91, 17 Am. Bankr. Rep. 3.

223 In re Condon, 209 Fed. 800, 126 C. C. A. 524, 31 Am. Bankr. Rep. 754; In re Triangle S. S. Co. (D. C.) 267 Fed. 303, 45 Am. Bankr. Rep. 458.

224 In re Louisell Lumber Co., 209 Fed. 784, 126 C. C. A. 508, 31 Am. Bankr. Rep. 356.

225 In re Mercur, 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505; In re Mercur, 116 Fed. 655, 8 Am. Bankr. Rep. 275.

226 In re Freudenfels, Fed. Cas. No. 5,112a. A petition in involuntary bankruptcy is not amendable after many years by adding a general and indefinite allegation of a preferential transfer of property. In re Lewis Shoe Co. (D. C.) 235 Fed. 1017, 38 Am. Bankr. Rep. 134.

227 In re Riggs Restaurant Co., 130 Fed. 691, 66 C. C. A. 48, 11 Am. Bankr. Rep. 508.

228 In re Brett, 130 Fed. 981, 12 Am. Bankr. Rep. 492.

229 In re Bininger, 7 Blatchf. 262, Fed. Cas. No. 1,420; In re Craft, 2 Ben. 214, 1 N. B. R. 378, Fed. Cas. No. 3,316; affirmed, 6 Blatchf. 177, 2 N. B. R. 111, Fed. Cas. No. 3,317.

The various mistakes or omissions which may be corrected by amendment cover a very wide range of subjects, of which the more important may be here instanced. In the first place, creditors may in this manner correct a mistake in the name of the alleged bankrupt as set forth in their petition,[230] or in the allegation concerning his place of residence,[231] or in that which states the length of time he has resided within the jurisdiction of the court.[232] But it is doubtful if the power of amendment can be used to bring in new parties as respondents. It is held that a petition against a firm, naming only two of the three actual partners, cannot be amended so as to make the third a party after the testimony is taken and the cause is before the court on hearing.[233] And the pendency of simultaneous proceedings against the individual members of a partnership do not necessarily bring the firm itself into court, so as to authorize an amendment calling for an adjudication against it.[234] But on the other hand, where the petition is brought against an alleged partnership and its two members, but it appears that there was no partnership in fact, and that the business was owned and the act of bankruptcy committed by one defendant individually, it is in the discretion of the court to permit the petition to be amended by dismissing as to the partnership and the other defendant.[235] For another example, it is necessary for the petition in involuntary bankruptcy to show that the proposed bankrupt, whether a corporation or a natural person, does not come within those classes which are expressly exempted from the operation of the bankruptcy law, but if this allegation is omitted, it may be supplied by amendment.[236] So also, the petitioning creditors should show that their claims amount in the aggregate to the jurisdictional minimum, and the petition is defective for want of such an averment, but it may be supplied by an amendment,[237] as may also an allegation of the nature and amount of their several debts

[230] Gleason v. Smith, 145 Fed. 895, 76 C. C. A. 427, 16 Am. Bankr. Rep. 602.

[231] In re Vanderhoef, 18 N. B. R. 543, Fed. Cas. No. 16,841.

[232] In re Elmira Steel Co., 109 Fed. 456, 5 Am. Bankr. Rep. 484.

[233] In re Pitt, 8 Ben. 389, 14 N. B. R. 59, Fed. Cas. No. 11,188.

[234] In re Mercur, 122 Fed. 384, 58 C. C. A. 472, 10 Am. Bankr. Rep. 505.

[235] In re Richardson, 192 Fed. 50, 27 Am. Bankr. Rep. 590; In re Young (D. C.) 223 Fed. 659, 35 Am. Bankr. Rep. 200.

[236] Armstrong v. Fernandez, 208 U. S. 324, 28 Sup. Ct. 419, 52 L. Ed. 514, 19 Am. Bankr. Rep. 746; Conway v. German, 166 Fed. 67, 91 C. C. A. 653, 21 Am. Bankr. Rep. 577; In re Marion Contract & Const. Co., 166 Fed. 618, 22 Am. Bankr. Rep. 81; In re First Nat. Bank, 152 Fed. 64, 81 C. C. A. 260, 18 Am. Bankr. Rep. 265; In re Plymouth Cordage Co., 135 Fed. 1000, 68 C. C. A. 434, 13 Am. Bankr. Rep. 665; In re Crenshaw, 156 Fed. 638, 19 Am. Bankr. Rep. 502; Beach v. Macon Grocery Co., 120 Fed. 736, 57 C. C. A. 150, 9 Am. Bankr. Rep. 762; In re Bellah, 116 Fed. 69, 8 Am. Bankr. Rep. 310; McAfee v. Arnold & Mathis, 155 Ala. 561, 46 South. 870.

[237] In re Scull, 7 Ben. 371, 10 N. B. R. 165, Fed. Cas. No. 12,568; In re McKib-

or claims.[238] But it has been ruled that an amended petition cannot set forth, as part of the indebtedness to the petitioning creditor, a note indorsed by the debtor which did not fall due until after the original petition was filed.[239] If the petition is invalid by reason of a defect in the verification, it is amendable,[240] and so of a clerical error in the jurat; it may be cured by amendment.[241] And so a petition which alleges the insolvency of the debtor at the time of the filing of the petition may be changed by amendment so as to charge insolvency at the date of the execution of the alleged preference.[242] But an amended petition, executed as such by a creditor, to be filed in proceedings previously instituted, cannot thereafter and after the proceedings have been dismissed by the court, be converted into an original petition by striking out the word "amended," and so made the basis of a new and independent proceeding.[243]

The allegations in the petition concerning the commission of an act of bankruptcy may also be amended, where necessary, either in the way of being made more specific or in being made to conform more closely to the facts as developed. Thus, if these allegations are vague, general, and lacking in detail, the particulars may be supplied by amendment.[244] So also, if the petition charges the commission of an act of bankruptcy by a transfer of property with intent to hinder or defraud creditors, but it is developed at the hearing that the transfer was made in satisfaction of an existing debt or for a consideration, it is proper for the court to permit an amendment charging that the transfer was made with intent to prefer the creditor benefited by it.[245] As to the

ben, 12 N. B. R. 97, Fed. Cas. No. 8,859; In re Blair, 17 N. B. R. 492, Fed. Cas. No. 1,481.

238 In re White, 135 Fed. 199, 14 Am. Bankr. Rep. 241.

239 In re Morse, 17 Blatchf. 72, Fed. Cas. No. 9,851.

240 In re Vastbinder, 126 Fed. 417, 11 Am. Bankr. Rep. 118; Sabin v. Blake-McFall Co., 223 Fed. 501, 139 C. C. A. 49, 35 Am. Bankr. Rep. 179. See In re Frank, 239 Fed. 709, 152 C. C. A. 543, 38 Am. Bankr. Rep. 674. But where petitioning creditors knew nothing of the facts averred and did not take oath before a notary public, although their petition bore his certificate, it was held that it could not be amended by subsequently allowing them to verify it. In re Frank (D. C.) 234 Fed. 665, 37 Am. Bankr. Rep. 19.

241 In re Bellah (D. C.) 116 Fed. 69, 8 Am. Bankr. Rep. 310.

242 In re Pangborn, 185 Fed. 673, 26 Am. Bankr. Rep. 40.

243 In re Hyde & Gload Mfg. Co., 103 Fed. 617, 4 Am. Bankr. Rep. 602.

244 In re Cliffe, 94 Fed. 354, 2 Am. Bankr. Rep. 317; In re Nelson, 98 Fed. 76, 1 Am. Bankr. Rep. 63; In re Irish (D. C.) 228 Fed. 573, 36 Am. Bankr. Rep. 185. Though a petition in involuntary bankruptcy against a corporation did not allege any act of bankruptcy, yet where the corporation, being in fact insolvent, afterwards adopted resolutions admitting its insolvency and inability to pay its debts and its willingness to be adjudged bankrupt, it was held that a new petition could thereupon be filed. In re D. F. Herlehy Co. (D. C.) 247 Fed. 369, 41 Am. Bankr. Rep. 171.

245 Hark v. C. M. Allen Co., 146 Fed. 665, 77 C. C. A. 91, 17 Am. Bankr. Rep. 3; In re Hark, 142 Fed. 279, 15 Am.

propriety of an amendment introducing an entirely new act of bankruptcy, not referred to in the original petition, there is more doubt. But the preponderance of authority favors the view that such an amendment is in the discretion of the court, and its allowance is not improper, especially where the testimony at the trial or hearing plainly discloses the commission of an act of bankruptcy additional to that alleged in the petition, and particularly if the proof fails as to the act originally charged, so that the proceeding will be saved and the ends of justice promoted by granting the amendment.[246] But it is necessary for the petitioning creditors, in order to obtain this privilege, to explain or excuse their omission to allege the new act of bankruptcy in their original petition.[247] This rule, however, is exceptional and entirely contrary to the general rules of pleading, which require that the cause of action shall remain unchanged, however great a latitude in the way of amendment may otherwise be allowed. And a number of the courts have preferred to adhere to the more stringent rule that a new or entirely different act of bankruptcy cannot be introduced into the petition by an amendment.[248] And even where this is allowed, it seems to be conceded that it is wholly improper to permit an amendment of this kind where the new act of bankruptcy proposed to be set up was committed more than four months before the application for leave to amend, so that it could not be made the basis of a new original petition.[249]

Bankr. Rep. 460; In re Henderson, 9 Fed. 196.

[246] International Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866; Chicago Motor Vehicle Co. v. American Oak Leather Co., 141 Fed. 518, 72 C. C. A. 576, 15 Am. Bankr. Rep. 804; In re Hamrick, 175 Fed. 279, 23 Am. Bankr. Rep. 721; In re Nusbaum, 152 Fed. 835, 18 Am. Bankr. Rep. 598; In re Miller, 104 Fed. 764, 5 Am. Bankr. Rep. 140; In re Lange, 97 Fed. 197, 3 Am. Bankr. Rep. 231; In re Mercur, 95 Fed. 634, 2 Am. Bankr. Rep. 626; In re Strait, 1 Nat. Bankr. News, 354; In re Gallinger, 1 Sawy. 224, 4 N. B. R. 729, Fed. Cas. No. 5,202; Hardy v. Bininger, 4 N. B. R. 262, Fed. Cas. No. 6,057; In re Forbes (D. C.) 235 Fed. 316, 37 Am. Bankr. Rep. 511.

[247] White v. Bradley Timber Co., 116 Fed. 768, 8 Am. Bankr. Rep. 671; Wilder v. Watts, 138 Fed. 426, 15 Am. Bankr. Rep. 57.

[248] In re Pure Milk Co., 154 Fed. 682, 18 Am. Bankr. Rep. 735; In re Harris, 155 Fed. 216, 19 Am. Bankr. Rep. 204; In re Sears, 117 Fed. 294, 54 C. C. A. 532, 8 Am. Bankr. Rep. 713; Reed v. Crowley, 1 N. B. R. 516, Fed. Cas. No. 11,644; In re Leonard, 4 N. B. R. 562, Fed. Cas. No. 8,255; Stern v. Schonfield, Fed. Cas. No. 13,377; In re Brown Commercial Car Co., 227 Fed. 387, 142 C. C. A. 83, 36 Am. Bankr. Rep. 45. In the case of In re Leonard, supra, it was said: "Amendments in legal proceedings always presuppose something to amend—something in the record concerning that distinct substantive matter, not that an entirely new cause of action is to be substituted for the previous one. Substitution is not amendment." And see In re McGraw (D. C.) 254 Fed. 442, 43 Am. Bankr. Rep. 38.

[249] In re Haff, 136 Fed. 78, 68 C. C. A. 646, 13 Am. Bankr. Rep. 362; Walker v. Woodside, 164 Fed. 680, 90 C. C. A. 644, 21 Am. Bankr. Rep. 132; In re Pure Milk Co., 154 Fed. 682, 18 Am. Bankr. Rep. 735; In re Perlhefter, 177 Fed. 299, 25 Am. Bankr. Rep. 576; In re Lewis Shoe Co. (D. C.) 235 Fed. 1017, 38 Am.

§ 164. Limitation of Time for Filing Petition.—The statute provides that a petition in involuntary bankruptcy may be filed within four months after the commission of an act of bankruptcy by the debtor. It cannot be maintained on alleged acts of bankruptcy occurring more than four months before the petition is filed.[250] But the fact that the general assignment for the benefit of creditors, which is alleged as the act of bankruptcy in the petition, was made in England, of which country the debtor was a resident, and that the English bankruptcy law requires action to be taken by creditors within three months after an act of bankruptcy, does not in any way deter American creditors from maintaining a proceeding in bankruptcy within the four months allowed by our own law.[251]

Where the act of bankruptcy alleged consists in the transfer of property in fraud of creditors or for the purpose of giving a preference or in the making of a general assignment, then the time does not expire until four months after the recording or registering of the transfer or assignment, if such recording or registering is required or permitted by law; if not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment.[252] The statute is not retroactive, and a conveyance of property is not an act of bankruptcy when made before the passage of the law, though not recorded until after that time. The deed is operative from its date, and the act of creditors in recording it cannot be taken as the act of the grantor.[253] But a petition in involuntary bankruptcy could be maintained upon an act of bankruptcy committed before November 1, 1898, the earliest day on which such a petition, under the present statute, could be filed, provided the act was committed after July 1, 1898, the date when the law took effect.[254] In determining whether a transfer of property was made within the time limited, it will be held to have taken place at the time of the actual execution and delivery of the

Bankr. Rep. 134. But compare In re C. W. Bartleson Co. (D. C.) 253 Fed. 296, 42 Am. Bankr. Rep. 1; International Silver Co. v. New York Jewelry Co., 233 Fed. 945, 147 C. C. A. 619, 37 Am. Bankr. Rep. 91. An act of bankruptcy committed and complete more than four months prior to the amendment of a petition in involuntary bankruptcy, cannot be charged for the first time in the amendment. But where such act consists of a concealment of property, which has continued, the four months period will not begin to run until discovery by the petitioning creditors. In re Havens, 255 Fed. 478, 166 C. C. A. 554, 42 Am. Bankr. Rep. 734.

[250] Trammell v. Yarbrough, 254 Fed. 685, 166 C. C. A. 183, 42 Am. Bankr. Rep. 727.

[251] In re Berthoud (D. C.) 231 Fed. 529, 36 Am. Bankr. Rep. 555.

[252] Bankruptcy Act 1898, § 3b. See Thornhill v. Link, 8 N. B. R. 521, Fed. Cas. No. 13,993.

[253] In re Wynne, Chase, 227, 4 N. B. R. 23, Fed. Cas. No. 18,117.

[254] Leidigh Carriage Co. v. Stengel, 95

deed, and not at its date.[255] And where an insolvent corporation sold its real estate and used the proceeds in paying some of its creditors to the exclusion of others, and a petition in bankruptcy against it, alleging the transaction as an act of bankruptcy, not on the theory of its being a conveyance of property with intent to delay and defraud creditors, but on the ground that the payments out of the price received were a transfer of property with intent to prefer certain creditors, was filed more than four months after such payments were made, though within four months after the recording of the deed, it was held that the petition was too late and must be dismissed.[256] It will be observed that the four months' limitation applies to the filing of the petition as the commencement of the proceedings, and hence, if the petition is filed in due time, the proceedings will not be vitiated by a delay in the issuance of process thereon.[257] And moreover, in such a case, it is not material that certain creditors, who joined in the petition subsequent to its filing and before an adjudication thereon, and who are to be reckoned in making up the requisite number of creditors and amount of claims, did not enter their appearance, for the purpose of such joinder, until more than four months after the act of bankruptcy.[258] The period of four months is to be computed by excluding the day on which the act of bankruptcy was committed and including that on which the petition is filed.[259]

In regard to the provision that a petition may be filed within four months after the beneficiary in a preferential conveyance takes "notorious, exclusive, or continuous possession of the property," it has been held that the word "notorious" does not mean that the fact of his taking possession should be advertised or made public by any active efforts on the part of those concerned, but only that there should be nothing secret or hidden in the transaction; the change of possession need only be such that creditors could have discovered it by proper inquiry.[260]

As to acts of bankruptcy other than the transfer of property and the making of an assignment, the limitation is simply that the petition must be filed within four months after the commission of the act of bankruptcy. Thus, it is an act of bankruptcy if an insolvent debtor shall have "suffered or permitted any creditor to obtain a preference through

Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383.

[255] In re Rooney, 6 N. B. R. 163, Fed. Cas. No. 12,032.

[256] In re Mingo Valley Creamery Ass'n, 100 Fed. 282, 4 Am. Bankr. Rep. 67.

[257] In re Lewis, 91 Fed. 632, 1 Am. Bankr. Rep. 458.

[258] In re Romanow, 92 Fed. 510, 1 Am. Bankr. Rep. 461.

[259] In re Stevenson, 94 Fed. 110, 2 Am. Bankr. Rep. 66; In re Dupree, 97 Fed. 28.

[260] In re Woodward, 1 Nat. Bankr. News, 352.

legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference," and it is held that a petition in involuntary bankruptcy may be filed, when the preference alleged was obtained by an attachment of the defendant's property and a sale thereunder, within four months after the seizure and sale of the property, though it be more than four months after the attachment was made.[261] But where the act alleged is rather a "concealment" of property than a transfer of it, the opinion has been expressed that this is a continuing act, and the time begins to run from its discovery by the creditors.[262] As to the appointment of a receiver as cause for an adjudication of bankruptcy, it may be said that a receiver is "put in charge" of the property of a defendant when the decree appointing him is entered, and the four months' limitation begins to run from the date of the decree, rather than from the time when the receiver qualifies or takes actual possession of the property.[263] It is further necessary to remark that both the original and the duplicate petition required by the statute must be filed within the four months; it is not enough to file the original, and then, after the four months, the duplicate.[264]

As stated in a preceding section, the four months' limitation does not apply to an amendment of the petition; that is, if the original petition was filed in due time, it is no objection to an amendment that it is allowed more than four months after the act of bankruptcy charged, provided it does not introduce a wholly new act of bankruptcy.[265]

§ 165. Filing and Presenting Petition.—Proceedings in involuntary bankruptcy are commenced by the filing of the petition, and take date from that time, not from the issuance of process or its service on the defendant.[266] And the filing of a bankruptcy petition is, in effect, a caveat, and, the proceedings being in rem, gives notice to the whole world.[267] It is not necessary that the petition should be filed or presented to the court simultaneously with its execution or verification; the fact that the petition was attested a number of days before being

261 Parmenter Mfg. Co. v. Stoever (C. C. A.) 97 Fed. 330, 3 Am. Bankr. Rep. 220; In re Nusbaum, 152 Fed. 835, 18 Am. Bankr. Rep. 598.

262 Citizens' Bank v. W. C. De Pauw Co., 105 Fed. 926, 45 C. C. A. 130, 5 Am. Bankr. Rep. 345.

263 In re Perry Aldrich Co., 165 Fed. 249, 21 Am. Bankr. Rep. 244.

264 In re Stevenson, 94 Fed. 110, 2 Am. Bankr. Rep. 66; In re Dupree, 97 Fed. 28.

265 Supra, § 163. And see In re R. L. Radke Co., 193 Fed. 735, 27 Am. Bankr. Rep. 950.

266 In re Appel, 103 Fed. 931, 4 Am. Bankr. Rep. 722; In re Lawis, 91 Fed. 632, 1 Am. Bankr. Rep. 458; First Nat. Bank v. Masterson, 29 Okl. 76, 116 Pac. 162.

267 Hamilton v. Smith, 36 Mont. 1, 92 Pac. 32, 122 Am. St. Rep. 330; In re Schow (D. C.) 213 Fed. 514.

filed, affords no obstacle to its prosecution.[268] All petitions are intended by the statute to be filed with the clerk of the court in which the proceeding is to be taken, and it is bad practice to send them directly to the judge or to present them to a referee.[269] A petition in bankruptcy is to be deemed "filed," within the meaning of the law, when it is delivered personally to the clerk of the court of bankruptcy and received by him for the purpose of being placed on file, although not at his office or during office hours,[270] and the time of filing does not date from the time when the clerk presents it to the judge for his action as to issuing an order to show cause.[271] Where a voluntary partnership petition in bankruptcy was signed, verified, and presented by all the members of the firm, and was accompanied by schedules of the firm's assets and debts, but not by any individual schedules, and no adjudication was made thereon, but subsequently the petition was in part withdrawn, and a new petition was filed, with parts of the old petition pasted thereon, and individual schedules of all the partners added by way of amendment, and thereupon an adjudication was made, it was held that the petition was "filed" on the later date and not the earlier.[272]

The General Orders (No. 2) require the clerk to indorse on each paper filed with him the day and hour of filing; and when this indorsement is made it is evidence of the facts stated and is for every legal purpose a certificate.[273] In fact, the record of the bankruptcy court showing that a petition was filed at a particular time is conclusive and cannot be contradicted by parol testimony,[274] although if the recital as to the date of filing is actually incorrect, it may be made right by an order entered nunc pro tunc.[275]

The statute also provides (section 59c) that "petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt." This is imperative. But it applies only to involuntary proceedings, as is shown by the connection in which the clause is found, and by the further consideration that, in a case of voluntary bankruptcy, it would be wholly unnecessary for the bankrupt to duplicate his petition, since

[268] In re Abrahams, 5 Law Rep. 328, Fed. Cas. No. 20.

[269] In re Sykes, 106 Fed. 669, 6 Am. Bankr. Rep. 264. Relationship between the bankrupt and the deputy clerk of the court in whose office the petition was filed will be cause for transferring the cause to another seat of the court in the same district and division, and ordering the record to be filed and docketed in the office of the clerk of the court at the latter place. Bray v. Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153.

[270] In re Von Borcke, 94 Fed. 352. See Franks v. Houston, 9 Kan. 406.

[271] In re Bear, 5 Fed. 53.

[272] In re Washburn, 99 Fed. 84, 3 Am. Bankr. Rep. 585.

[273] In re Dean, 1 N. B. R. 249, Fed. Cas. No. 3,699.

[274] Alabama & C. R. Co. v. Jones, 7 N. B. R. 145, Fed. Cas. No. 127.

[275] Alabama & C. R. Co. v. Jones, 7 N. B. R. 145, Fed Cas.. No. 127.

no provision is made for its service on any one. But in cases where this requirement applies, it is held to mean that there shall be one petition in the form of two duplicate originals, each verified as prescribed, and both filed at the same time,[276] not merely one formal and verified petition and an unsworn copy of it. And the omission of the petitioning creditors to file both duplicates of the petition within the time limited by the statute is not cured by the appearance of the alleged bankrupt for the purpose of moving to dismiss the petition.[277] And although the court has broad and liberal powers in the way of permitting amendments, it should not undertake practically to repeal the legislative declaration that petitions must be filed in duplicate within the four months specified.[278]

When a petition in bankruptcy is offered to the clerk for filing, he must collect fees for himself ($10), for the referee ($10), and for the trustee ($5), except in the case of a voluntary petition which is accompanied by an affidavit stating that the petitioner has not the money to pay such fees and cannot obtain it.[279] This statutory affidavit is prima facie evidence of the inability of the petitioner to make the required deposit of fees, and if, upon examination as to his available means, proper inquiries being fairly answered, it appears that there was no money or property held by the petitioner at the institution of the proceedings, or obtainable through his individual earnings or efforts, the exemption from making such deposit must be allowed and the case proceed.[280]

§ 166. Service of Process.—In cases where personal service is practicable, the provision of the statute is that, "upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time."[281] The equity rules provide that "the process of subpœna shall

[276] In re Stevenson, 94 Fed. 110, 2 Am. Bankr. Rep. 66; In re Dupree, 9 Fed. 28. But see Millan v. Exchange Bank, 183 Fed. 753, 106 C. C. A. 327, 24 Am. Bankr. Rep. 889, where a copy of the petition made and certified by the clerk of the court and delivered to the marshal with the summons, was held to satisfy the requirement of the statute as to the filing of the petition in duplicate.

[277] In re Stevenson, 94 Fed. 110, 2 Am. Bankr. Rep. 66. But compare In re Plymouth Cordage Co., 135 Fed. 1000, 68 C. C. A. 434, 13 Am. Bankr. Rep. 665.

[278] In re Stevenson, 94 Fed. 110, 2 Am. Bankr. Rep. 66.

[279] Bankruptcy Act 1898, §§ 40, 48, 51, 52.

[280] In re Levy, 101 Fed. 247.

[281] Bankruptcy Act 1898, § 18a. Though a subpœna issued September 27, requiring the alleged bankrupt to appear on October 12, with a memorandum stating that the petition would be taken as confessed unless the answer was filed before the return day, was irregular, in that the bankrupt should have 5 days after the return day in which to answer,

constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill." [282] As to the form and sanction of the writ, it is provided that "all writs and process issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from a district court shall bear teste of the judge, or, when that office is vacant, of the clerk thereof." [283] This is supplemented by the third general order in bankruptcy, which provides that "all process, summons, and subpœnas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees." It is not probable, however, that the last clause was intended to apply to the original process for compelling the appearance and answer of the respondent, as no provision is made by the statute for the filing of the petition with a referee, nor is that officer vested with any jurisdiction of a bankruptcy case until it has been properly referred to him.

Service of the process is to be made by the marshal or a deputy, except where that officer is a party to the cause, in which case it is to be executed by a disinterested third person specially appointed by the court for that purpose.[284] If service is not effected before the return day, the petitioning creditors are entitled to alias and successive subpœnas until due service is had.[285] And if the process is found to be irregular or defective in any way, the court may allow it to be amended.[286] As to the mode of service, the equity rules provide that "the service of all subpœnas shall be by delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family." [287] There is nothing to prevent service on the alleged bankrupt wherever he may be found, though it is outside the district.[288] If the defendant is a partnership, service on one member of the firm will give jurisdiction

yet the irregularity will not be ground for an avoidance of the subpœna, where it was served 10 days before the return day and the bankrupt had more than 5 days before the return day in which to answer. Stewart Petroleum Co. v. Boardman (C. C. A.) 264 Fed. 826, 45 Am. Bankr. Rep. 573.

[282] Equity Rule No. 7.

[283] Rev. Stat. U. S. § 911.

[284] Equity Rule No. 15; Rev. Stat. U. S. § 922.

[285] Equity Rule No. 14; Gleason v. Smith, Perkins & Co., 145 Fed. 895, 76 C. C. A. 427, 16 Am. Bankr. Rep. 602.

[286] Rev. Stat. U. S. § 948.

[287] Equity Rule No. 13.

[288] Stuart v. Hines, 33 Iowa, 60, 6 N. B. R. 416; Hills v. F. D. McKinniss Co., 188 Fed. 1012, 26 Am. Bankr. Rep. 329. But see In re Appel, 103 Fed. 931, 4 Am. Bankr. Rep. 722.

of the firm and its property.[289] And in the case of a corporation, service is good if made on any of its principal officers,[290] as, the cashier of a banking company,[291] or, in the case of a foreign corporation, that officer of the state who has been appointed its attorney to receive service of process within the state.[292] But if the corporation has been dissolved by decree of a state court, and a receiver appointed to wind up its affairs, service may be made by publication, as this is a case where the defendant cannot be found.[293] While a defendant may ordinarily waive service of process, this cannot be done in a bankruptcy proceeding, or at least it will not justify an adjudication before the return day of the writ, because creditors have the right to intervene and plead to the petition, and they must be allowed the full statutory time for that purpose.[294]

If the defendant is temporarily absent from the district, but has his dwelling-house or usual place of abode therein, the service may be made by leaving a copy there with some adult member of the family, as authorized by the equity rules, this being a personal service within the meaning of the bankruptcy act.[295] And in one case, the validity of service was sustained where it had been effected by leaving the subpœna and a copy of the petition with the clerk of a hotel of which the bankrupt was the proprietor and where he usually resided, although, at the time, he was absent in another town in the last stage of a fatal illness.[296] It may be added that the equity rule does not require the copy of the process to be left with a person within the dwelling-house, but is satisfied by a service at the door, outside the house.[297]

If personal service cannot be had, "then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall other-

[289] Bail v. Hartman, 9 Ariz. 321, 83 Pac. 358.

[290] In re California Pac. R. Co., 3 Sawy. 240, 11 N. B. R. 193, Fed. Cas. No. 2,315. Where service of the subpœna and a copy of the petition was made on one who was a director and a stockholder of the corporation defendant, under the mistaken belief that he was its president, but in fact he handed over the papers to the real president of the corporation, it was held that the service was sufficient to warrant the court in assuming jurisdiction and adjudging the corporation a bankrupt. Lamar-Wells Co. v. Hamilton Co., 237 Fed. 54, 150 C. C. A. 256, 38 Am. Bankr. Rep. 454.

[291] Platt v. Archer, 9 Blatchf. 559, 6 N. B. R. 465, Fed. Cas. No. 11,213.

[292] In re Magid-Hope Silk Mfg. Co., 110 Fed. 352, 6 Am. Bankr. Rep. 610.

[293] In re Washington Marine Ins. Co., 2 Ben. 292, 2 N. B. R. 648, Fed. Cas. No. 17,246.

[294] In re L. Humbert Co., 100 Fed. 439, 4 Am. Bankr. Rep. 76.

[295] In re Norton, 148 Fed. 301, 17 Am. Bankr. Rep. 504.

[296] In re Risteen, 122 Fed. 732, 10 Am. Bankr. Rep. 494.

[297] Phœnix Ins. Co. v. Wulf, 1 Fed. 775.

wise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication, unless the judge shall for cause fix a longer time." [298] The statute here referred to, authorizing substituted service in suits to enforce liens, provides that "it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon a person or persons in possession or charge of said property, if any there be, or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks." [299] As applied to proceedings in bankruptcy against an absconding debtor, it is held that this requires the publication of an order designating a day on which the bankrupt is required to appear and answer, demur, or plead; and where the order for publication did not designate a time for appearance, and publication was made of the citation issued by the clerk directing the marshal to summon the bankrupt, instead of the order for publication, it was held that this conferred no jurisdiction on the court to make an adjudication.[300] The manner of publication is apparently left entirely in the discretion of the judge, though there is another provision of the bankruptcy act (section 28) which requires the courts of bankruptcy to designate the newspapers in which the notices and orders in bankruptcy proceedings shall be published.

If the defendant in such proceedings desires to raise the objection that the court has no jurisdiction because the writ was improperly served, he may do so by motion or by defense at the trial, but not by demurrer.[301] But a general appearance will waive all irregularities in the service of process and confer jurisdiction of the defendant's person.[302] And where there are several defendants, as in the case of a partnership, one who was not served may appear by attorney.[303] An omission in the

[298] Bankruptcy Act 1898, § 18, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797.

[299] Act Cong. March 3, 1875, § 8, 18 Stat. 472, U. S. Comp. Stat. 1901, p. 513, now constituting § 57 of the Federal Judicial Code of 1911.

[300] Sidney L. Bauman Diamond Co. v. Hart, 192 Fed. 498, 27 Am. Bankr. Rep. 632. In the same case it was held that, in case of service by publication on an absconding bankrupt, it was not necessary that personal service, other than by publication, should be made on a receiver appointed by a state court in charge of certain of the bankrupt's property.

[301] In re Seaboard Fire Underwriters, 137 Fed. 987, 13 Am. Bankr. Rep. 722.

[302] In re Ulrich, 3 Ben. 355, 3 N. B. R. 133, Fed. Cas. No. 14,327.

[303] In re Weyhausen, 1 Ben. 397, Fed. Cas. No. 17,474.

printed copy of an order for publication of the subpœna in involuntary bankruptcy proceedings against a partnership and the members thereof, who resided without the district, will not be ground for setting aside the adjudication if the omission did not render the order unintelligible.[304]

§ 167. **Notice to Creditors.**—In the case where the petition is filed by one or two creditors only, and the bankrupt alleges in his answer the existence of more than twelve creditors, he is required also to file a sworn list of all his creditors, with their addresses, and thereupon the court shall cause such creditors to be notified of the proceeding and give them an opportunity to be heard. Where this is done, the mode of service of notice on such creditors is immaterial, if the creditors named in the list are actually notified in time to intervene if they desire. It is left in the discretion of the court to decide whether notice shall be served personally or by mail, and by whom the service shall be made.[305] But this is the only provision in the statute for notice to creditors of the institution of the proceedings. In all other cases, no such notice is necessary, the filing of the proper petition by proper parties in the proper court conferring jurisdiction and in itself operating as a lis pendens and as notice to all who may be concerned.[306] And although a creditor has had no notice of the petition, this will not entitle him to impeach the decree of adjudication, where the records show a regular proceeding. The fact that his name did not appear on the list of creditors and that he was not notified of the proceeding would not affect the jurisdiction of the court to proceed to an adjudication, nor will it affect the trustee's right to maintain an action against him to recover a preference or to set aside a fraudulent conveyance.[307]

[304] Hunter, Walton & Co. v. J. G. Cherry Co., 247 Fed. 458, 159 C. C. A. 512, 40 Am. Bankr. Rep. 732.

[305] In re Tribelhorn, 137 Fed. 3, 69 C. C. A. 601, 14 Am. Bankr. Rep. 491. Notice of bankruptcy proceedings, given to the owner of an interest in a judgment against the bankrupt, is not notice to the other co-owner. Strickland v. Capital City Mills, 74 S. C. 16, 54 S. E. 220, 7 L. R. A. (N. S.) 426.

[306] In re Billing, 145 Fed. 395, 17 Am. Bankr. Rep. 80. And see International Bank v. Sherman, 100 U. S. 406, 25 L. Ed. 866; Mueller v. Nugent, 184 U. S. 14, 22 Sup. Ct. 269, 46 L. Ed. 405, 7 Am. Bankr. Rep. 224; Wiley v. Pavey, 61 Ind. 457, 28 Am. Rep. 677; Coppard v. Gardner (Tex. Civ. App.) 199 S. W. 650. Intervening creditors are not entitled to notice of a continued hearing before the master on the question whether the claims of the original petitioners were sufficient in amount. In re Smith (D. C.) 232 Fed. 284, 36 Am. Bankr. Rep. 637. An indorser of a note, who had become the equitable owner of a judgment against himself and the maker, by paying the judgment, is not entitled to notice of the bankruptcy of the maker, where the maker is not shown to have had notice of the equitable assignment, and in such case notice to the judgment creditor is sufficient. Morency v. Landry, 79 N. H. 305, 108 Atl. 855, 9 A. L. R. 123.

[307] Roberts v. Fernald, 72 N. H. 198, 55 Atl. 942.

§ 168. **Parties.**—Strictly speaking, the only parties to a proceeding in involuntary bankruptcy, before the adjudication, are the petitioning creditor or creditors and the alleged bankrupt, although other creditors have the privilege of intervening for the purpose of either sustaining or opposing the petition. Persons having a lien on property of the bankrupt passing to his trustee are not parties to the bankruptcy proceeding, unless they come into the bankruptcy court to enforce their rights.[308] So, the appearance of a nonresident as a witness in the bankruptcy proceeding, in obedience to a subpœna, does not make him a party to the proceeding.[309] Where it is necessary to reform a contract in order to sustain a petition in bankruptcy against a corporation, the corporation should be made a party to the proceeding, notwithstanding its default as to the petition, which did not ask such reformation, or the assent of its board of directors to the bankruptcy.[310]

Where the act of bankruptcy alleged is the making of a general assignment for the benefit of creditors, it is perhaps not improper to join the assignee as a defendant in the bankruptcy proceeding, but his rights and interests cannot be adjudicated at this stage of the cause, and where the petition sets up no cause of action against him nor prays any special relief as to him, the mere fact of his being included does not make him continuously subject to the orders of the court without other process.[311] Where the alleged bankrupt in involuntary proceedings dies after the filing of the petition, but before service of process, the proceeding does not abate, but his heirs and personal representatives should be brought in and made parties to the proceeding before any adjudication.[312] Similarly, when the alleged bankrupt is insane, the court of bankruptcy has authority to appoint a guardian ad litem to defend against the petition, if he has no regular guardian or committee. If he has, then such guardian or committee must be brought in by process, as well as the lunatic, and may thereupon be appointed guardian ad litem for him.[313]

§ 169. **Same; Intervention and Substitution of Parties.**—The statute provides (section 59f) that "creditors other than original petitioners may at any time enter their appearance and join in the petition." This

[308] In re Reading Hat Mfg. Co. (D. C.) 224 Fed. 786, 34 Am. Bankr. Rep. 884.

[309] In re Geller (D. C.) 216 Fed. 558.

[310] In re Imperial Corp. (D. C.) 133 Fed. 73.

[311] Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, 7 Am. Bankr. Rep. 421.

[312] Shute v. Patterson, 147 Fed. 509, 78 C. C. A. 75, 17 Am. Bankr. Rep. 99. In such a case, a recital in the subpœnas issued to the heirs, that the purpose of the proceedings is to have them adjudged bankrupts, is erroneous. Idem.

[313] In re Burka, 107 Fed. 674, 5 Am. Bankr. Rep. 843.

is a privilege of which any creditors having provable claims may avail themselves.[314] But it is first necessary that the petition should be sufficient on its face to give jurisdiction. If it does not show that the requisite amount of debts is represented, it cannot be amended by the joinder of other creditors having sufficient claims.[315] But if there is no want of jurisdiction apparent on the face of the petition, but it transpires before adjudication that there is a deficiency in the amount of debts represented, then other creditors who have entered their appearance and joined in the petition may be reckoned in making up the statutory quorum.[316] So, if the first petitioner is disqualified by failing to show that he is a creditor, another, who has joined in the petition after filing, will be substituted for him, and all rights of amendment of the first petitioner will inure to the second.[317] To establish a right to intervene, it is not necessary that the party should have proved his debt in the ordinary form, provided he can satisfy the court that he is in fact a creditor,[318] and the fact that his petition of intervention is defective in matter of form in setting out his claim is immaterial, where the deficiency is supplied by proof on the hearing.[319] But he must be a genuine creditor having a real and provable claim.[320]

This right of additional creditors to come in and press the petition, being secured to them by law, cannot be defeated by any settlement or arrangement by which the original petitioners obtain satisfaction and seek to withdraw the petition or drop the proceedings,[321] nor by their failure to appear or their omission or neglect to prosecute the proceeding to an adjudication.[322]

[314] In re Etheridge Furniture Co., 92 Fed. 329, 1 Am. Bankr. Rep. 112; In re Crenshaw, 156 Fed. 638, 19 Am. Bankr. Rep. 502; In re Black Diamond Copper Min. Co., 10 Ariz. 42, 85 Pac. 653.

[315] In re Stein, 130 Fed. 377, 12 Am. Bankr. Rep. 364.

[316] In re Crenshaw, 156 Fed. 638, 19 Am. Bankr. Rep. 502; In re Mackey, 110 Fed. 355, 6 Am. Bankr. Rep. 577; In re Bedingfield, 96 Fed. 190, 2 Am. Bankr. Rep. 355; In re Romanow, 92 Fed. 510, 1 Am. Bankr. Rep. 461; In re Vastbinder, 126 Fed. 417, 11 Am. Bankr. Rep. 118.

[317] In re Taylor, 1 Nat. Bankr. News, 412. On the same principle, where a petition in involuntary bankruptcy, good on its face, has been filed, other creditors, acting in good faith, have the right to file intervening petitions at any time during the pendency of the proceeding, although the original petitioners were estopped to file the petition. In re Freeman Cotting Coat Co. (D. C.) 212 Fed. 551.

[318] In re Boston, H. & E. R. Co., 9 Blatchf. 101, 6 N. B. R. 209, Fed. Cas. No. 1,677.

[319] Hays v. Wagner, 150 Fed. 533, 80 C. C. A. 275, 18 Am. Bankr. Rep. 163.

[320] In re Lewis F. Perry & Whitney Co., 172 Fed. 752, 22 Am. Bankr. Rep. 780.

[321] In re Lacey, 12 Blatchf. 322, 10 N. B. R. 477, Fed. Cas. No. 7,965; In re Calendar, 5 Law Rep. 125, Fed. Cas. No. 2,307; In re Mammouth Pine Lumber Co., 109 Fed. 308, 6 Am. Bankr. Rep. 84.

[322] In re Sheffer, 4 Sawy. 363, 17 N. B. R. 369, Fed. Cas. No. 12,742; In re Calendar, 5 Law Rep. 125, Fed. Cas. No. 2,307; In re Buchanan, 10 N. B. R. 97, Fed. Cas. No. 2,073; In re Lacey, 12 Blatchf. 322, 10 N. B. R. 477, Fed. Cas. No. 7,965; In re Stein, 105 Fed. 749, 45 C. C. A. 29, 5 Am. Bankr. Rep. 288.

The statute does not limit the time within which creditors may thus intervene, and therefore it is held that they may come in at any time before a final judgment is rendered on the petition, that is, before the court either makes the adjudication or dismisses the petition,[323] and it is immaterial that it may be more than four months after the commission of the act of bankruptcy alleged.[324] Where the parties appear and join issue, and no further proceedings take place and no formal adjournment is had, the matter will be regarded as pending from day to day until disposed of, to permit any other creditor to come in and prosecute the petition.[325] But it is probable that a very long and unreasonable delay (seventeen months in the case cited) will debar any creditors from the privilege of entering the case and taking up the petition for action.[326] And after the petition has been definitively dismissed, whether for want of prosecution, for insufficiency of petitioners, or because the issues were decided against them, it is then too late for any other creditors to intervene, and the petition cannot be revived for their benefit.[327] Their only course is to bring a new and independent petition against the debtor, and they must found it on acts of bankruptcy committed within four months before they file it; but in the prosecution of it they will not be estopped by the judgment of dismissal.[328]

There are also some instances in which a substitution of parties in a bankruptcy proceeding will be proper. This is the case, for example, where one of the creditors joining in an involuntary petition himself becomes a bankrupt before the hearing. In this event, his trustee in bankruptcy, who succeeds to all his rights and claims as against his debtors, should be substituted in his place as a petitioner.[329]

[323] In re Lewis F. Perry & Whitney Co., 172 Fed. 744, 22 Am. Bankr. Rep. 770; In re Plymouth Cordage Co., 135 Fed. 1000, 68 C. C. A. 434, 13 Am. Bankr. Rep. 665; In re Frisbee, 14 Blatchf. 185, 15 N. B. R. 522, Fed. Cas. No. 5,129. So long as the petition has not been formally dismissed, other creditors have the right to intervene, regardless of any laches which might be urged against them. In re C. Jutte & Co., 258 Fed. 422, 169 C. C. A. 438, 44 Am. Bankr. Rep. 166.

[324] In re Charles Town Light & Power Co., 183 Fed. 160, 25 Am. Bankr. Rep. 687; In re Bolognesi, 223 Fed. 771, 139 C. C. A. 351, 34 Am. Bankr. Rep. 692.

[325] In re Buchanan, 10 N. B. R. 97, Fed. Cas. No. 2,073.

[326] Ex parte Freedley, Crabbe, 544, Fed. Cas. No. 5,079.

[327] In re Tribelhorn, 137 Fed. 3, 69 C. C. A. 601, 14 Am. Bankr. Rep. 491; In re Olmsted, 4 N. B. R. 240, Fed. Cas. No. 10,505. An order in an involuntary proceeding that the petition be dismissed when the fees due the clerk and marshal shall be paid, is not a final discontinuance, so as to deprive another creditor of the right to intervene and prosecute the original petition at any time before such fees are paid. In re Lacey, 12 Blatchf. 322, 10 N. B. R. 477, Fed. Cas. No. 7,965.

[328] Neustadter v. Chicago Dry Goods Co., 96 Fed. 830, 3 Am. Bankr. Rep. 96; Trammell v. Yarbrough, 254 Fed. 685, 166 C. C. A. 183, 42 Am. Bankr. Rep. 727.

[329] Hays v. Wagner, 150 Fed. 533, 80 C. C. A. 275, 18 Am. Bankr. Rep. 163; In re Jones, 7 N. B. R. 506, Fed. Cas. No. 7,450.

§ 170. Same; Persons Entitled to Oppose Adjudication.—Under the earlier bankruptcy acts, and particularly that of 1841, it was generally held that the only parties to a proceeding in involuntary bankruptcy were the petitioning creditors and the alleged bankrupt; that the latter was alone entitled to set up any available defenses against the petition; and that no other creditors or other third parties could intervene for the purpose of opposing the adjudication.[330] But the present statute expressly declares (section 59f) that "creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition." And in another place (section 18b) it is provided that "the bankrupt or any creditor may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow." This applies only to involuntary proceedings. There is nothing in the act which gives to a creditor the right to intervene and oppose an adjudication on a voluntary petition, unless perhaps on the ground of a want of jurisdiction.[331] As to the limitation of time, it rests in the discretion of the court to allow an extension, but it is a proper exercise of such discretion to refuse to allow a creditor to file an answer when he knew of the proceedings and gives no sufficient excuse for his failure to answer within the ten days.[332]

Any creditor whose interests are directly affected by the proceedings, or who conceives that he may be prejudiced by an adjudication of bankruptcy against the debtor, even a general unsecured creditor, may avail himself of this privilege and contest the petition, though the debtor himself fails to appear or to answer.[333] In particular, where the petition alleges as an act of bankruptcy the giving of an unlawful preference to a particular creditor, or that such creditor has obtained a preference through legal proceedings, he may, on his own petition, intervene and be made a party defendant, with leave to plead to the petition.[334] So a

[330] Karr v. Whittaker, 5 N. B. R. 123, Fed. Cas. No. 7,613; Dutton v. Freeman, 5 Law Rep. 447, Fed. Cas. No. 4,210; In re Lawrence, 10 Ben. 4, 18 N. B. R. 516, Fed. Cas. No. 8,133; In re Bush, 6 N. B. R. 179, Fed. Cas. No. 2,222; In re Boston, H. & E. R. Co., 5 N. B. R. 232, Fed. Cas. No. 1,679. Under the present statute, debtors of an alleged bankrupt cannot be heard as objectors to an involuntary petition against him. In re Tidewater Coal Exchange (D. C.) 274 Fed. 1008.

[331] In re Carleton, 115 Fed. 246, 8 Am. Bankr. Rep. 270. And see supra, § 152.

[332] In re Marion Contract & Const. Co., 166 Fed. 618, 22 Am. Bankr. Rep. 81; In re Mutual Mercantile Agency, 111 Fed. 152, 6 Am. Bankr. Rep. 607; In re D. F. Herlehy Co. (D. C.) 247 Fed. 369, 41 Am. Bankr. Rep. 171.

[333] In re Jonas, 16 N. B. R. 452, Fed. Cas. No. 7,442; In re Austin, 16 N. B. R. 518, Fed. Cas. No. 662; Johansen Bros. Shoe Co. v. Alles, 197 Fed. 274, 116 C. C. A. 636, 28 Am. Bankr. Rep. 299; B–R Electric & Telephone Mfg. Co. v. Ætna Life Ins. Co., 206 Fed. 885 (C. C. A.) 30 Am. Bankr. Rep. 424.

[334] Goldman v. Smith, 93 Fed. 182, 1

creditor who holds property of the alleged bankrupt under an attachment, the lien of which would be dissolved by an adjudication, may intervene and oppose the petition.[335] And so of a judgment creditor who would be injuriously affected by the bankruptcy proceedings,[336] and a receiver of the corporation defendant, who is in possession of its property and conducting its business under the orders of the court which appointed him.[337] As a general rule, the stockholders of a corporation, as such, cannot appear and defend involuntary proceedings against the corporation;[338] and an assumption that the corporation is not insolvent, and that there will be a surplus, does not make a stockholder a proper party to the bankruptcy proceeding.[339] But the court of bankruptcy clearly has the power to permit the intervention of stockholders to contest a voluntary petition filed by the officers and directors where its purpose is shown to have been fraudulent.[340]

As to the grounds of opposition open to creditors thus coming in, it may be said that any defense which would be available to the debtor himself may be pleaded and proved by the interveners. Thus, they may contest the allegations concerning the commission of an act of bankruptcy, or show that the respondent is not within the operation of the statute, or allege a want of jurisdiction or a defect in the number and amount of the petitioning creditors.[341] And in addition, they may allege and show that the proceeding is not instituted in good faith, but

Am. Bankr. Rep. 266; In re Heusted, 5 Law Rep. 510, Fed. Cas. No. 6,440; In re Donnelly, 5 Fed. 783.

335 In re C. Moench & Sons Co., 123 Fed. 977, 10 Am. Bankr. Rep. 590; In re Williams, 14 N. B. R. 132, Fed. Cas. No. 17,706; In re Hatje, 6 Biss. 436, Fed. Cas. No. 6,215; In re Mendelsohn, 3 Sawy. 342, Fed. Cas. No. 9,420; In re Scrafford, Fed. Cas. No. 12,557; In re Burton, 9 Ben. 324, Fed. Cas. No. 2,214.

336 In re Jack, 13 N. B. R. 296, Fed. Cas. No. 7,119; Jackson v. Wauchula Mfg. & Timber Co., 230 Fed. 409, 144 C. C. A. 551, 36 Am. Bankr. Rep. 408; In re Carey, 254 Fed. 688, 166 C. C. A. 186, 42 Am. Bankr. Rep. 553.

337 In re Hudson River Electric Power Co., 173 Fed. 934, 23 Am. Bankr. Rep. 191; In re Gold Run Mining & Tunnel Co., 200 Fed. 162, 29 Am. Bankr. Rep. 563; Blackstone v. Everybody's Store (C. C. A.) 207 Fed. 752, 30 Am. Bankr. Rep. 497.

338 In re Eureka Anthracite Coal Co. (D. C.) 197 Fed. 216, 28 Am. Bankr. Rep. 758.

339 In re Witherbee, 202 Fed. 896, 121 C. C. A. 254, 30 Am. Bankr. Rep. 314.

340 Zeitinger v. Hargadine-McKittrick Dry Goods Co., 244 Fed. 719, 157 C. C. A. 167, 40 Am. Bankr. Rep. 324; Ogden v. Gilt Edge Consol. Mines Co., 225 Fed. 723, 140 C. C. A. 597, 34 Am. Bankr. Rep. 893.

341 Clinton v. Mayo, 12 N. B. R. 39, Fed. Cas. No. 2,899; In re Williams, 14 N. B. R. 132, Fed. Cas. No. 17,706. Where the petitioning creditors alleged 11 acts of bankruptcy, among which was that the debtor had admitted in writing his inability to pay his debts, and one creditor denied such acts, demanding trial, and the bankrupt later withdrew his denial of such acts, and his admission of inability to pay his debts was filed, the answering creditor had the right to a full and fair trial of every issue material to the adjudication of bankruptcy. Albers Commission Co. v. Richter, 251 Fed. 869, 164 C. C. A. 85, 42 Am. Bankr. Rep. 157.

is the product of fraud and collusion between the debtor and the petitioning creditors.[342]

§ 171. **Answer and Other Pleadings.**—Under the former practice, the plea of the defendant in involuntary bankruptcy proceedings might take the form of a demurrer. But in view of the fact that proceedings in bankruptcy are to be conducted in accordance with the rules and practice in equity so far as consistent with the provisions of the Bankruptcy Act and the general orders in bankruptcy, and since the new Equity Rule No. 29 abolishes demurrers, it is held that a demurrer will not now lie to a petition in involuntary bankruptcy, but any defense in point of law arising on the face of the petition must be made by motion to dismiss or in the answer.[343]

If the defendant chooses to answer, his pleading should conform to the general rules of pleading applicable in actions at law,[344] or rather, having regard to the general equitable character of a proceeding in bankruptcy, to the rules of chancery pleading. Under the former statute, it was doubtful whether any formal answer was required at all, though it was thought better that the defendant's response to the petition should not take the form of a verbal general denial, but should be reduced to writing and signed.[345] But the present act clearly intends, as do also the official forms prescribed by the Supreme Court, that there should be a formal answer, not only signed by the respondent but verified by oath.[346] There was also much conflict of opinion under the act of 1867, as to whether the answer should be general or special, the question ultimately depending upon the rules of the particular court.[347] But at present, though the defendant might certainly use the simple

[342] In re Jack, 13 N. B. R. 296, Fed. Cas. No. 7,119; In re Mendelsohn, 3 Sawy. 342, 12 N. B. R. 533, Fed. Cas. No. 9,420; In re Scrafford, 14 N. B. R. 184, Fed. Cas. No. 12,557; In re Hatje, 6 Biss. 436, 12 N. B. R. 548, Fed. Cas. No. 6,215. A creditor at large may suggest suspicious circumstances, upon which the court will direct an inquiry to ascertain whether the petition is not collusively and fraudulently prosecuted. In re Hopkins, 18 N. B. R. 396, Fed. Cas. No. 6,684.

[343] In re Jones (D. C.) 209 Fed. 717, 31 Am. Bankr. Rep. 693.

[344] In re Findlay, 5 Biss. 480, Fed. Cas. No. 4,789. An answer to a petition in involuntary bankruptcy not putting in issue any material allegation of the petition, but merely alleging that the alleged bankrupt cannot be adjudicated, because not within the terms of the statute, which is a question of law, and that it is not insolvent, which is irrelevant, and lacking a material traverse, is no hindrance to the adjudication. In re Tidewater Coal Exchange (D. C.) 274 Fed. 1011.

[345] Phelps v. Clasen, Woolw. 204, 3 N. B. R. 87, Fed. Cas. No. 11,074; In re Heydette, 8 N. B. R. 332, Fed. Cas. No. 6,444.

[346] See Day v. Beck & Gregg Hardware Co., 114 Fed. 834, 52 C. C. A. 468, 8 Am. Bankr. Rep. 175. Where a petition in involuntary bankruptcy is verified on information and belief, the petitioners are not entitled to have a better verification of the answer. Lackawanna Leather Co. v. La Porte Carriage Co., 211 Fed. 318, 127 C. C. A. 604, 31 Am. Bankr. Rep. 658.

[347] In re Sutherland, Deady, 344, 1

form of general denial prescribed in the official forms, the circumstances of his defense are usually such as to make a detailed and specific answer proper. Still, the courts have expressed much disapproval of answers unnecessarily defensive, prolix, evasive, or responsive to multifarious matter in the petition.[348] It is always necessary for the defendant, in his answer, to deny explicitly the allegation of the petition as to his insolvency, failing which denial the allegation will be taken as admitted,[349] except in the case where insolvency is not a necessary element of the act of bankruptcy relied on, or where the particular act alleged conclusively imports a right to the adjudication in bankruptcy, if established. Here the allegation of insolvency in the petition becomes superfluous and need not be traversed.[350] A simple denial of insolvency, in the language of the official form, is ordinarily enough,[351] but the respondent is not necessarily limited to the language of the form. If the petition sets forth the debts alleged to be due by the defendant, the answer may contain detailed averments of defenses and counterclaims to such debts, showing the solvency of the respondent at the times alleged.[352] On the other hand, the defendant may admit his insolvency and his willingness to be adjudged a bankrupt, and in that case it is not necessary to substantiate the various allegations of the petition, but an adjudication may be made at once.[353]

Though the official form contains only a general denial of the fact of insolvency and of the commission of the act of bankruptcy alleged, there are other defenses open to the respondent, and which he may set up in his answer. Thus, it is clear that he has a right to plead

N. B. R. 531, Fed. Cas. No. 13,638; In re Silverman, 1 Sawy. 410, 4 N. B. R. 522, Fed. Cas. No. 12,855.

348 Mather v. Coe, 92 Fed. 333, 1 Am. Bankr. Rep. 504; Bradley Timber Co. v. White, 121 Fed. 779, 58 C. C. A. 55, 10 Am. Bankr. Rep. 329.

349 In re American Pub. Co., 15 Okl. 177, 79 Pac. 762. Where the act of bankruptcy charged in the petition was the giving of a preference while insolvent, a denial in the answer that the defendant committed such act of bankruptcy must be construed as a denial of insolvency, at least where it has been so accepted by the petitioners and evidence taken on the issue. Troy Wagon Works v. Vastbinder, 130 Fed. 232, 12 Am. Bankr. Rep. 352.

350 George M. West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, 2 Am. Bankr. Rep. 463.

351 In re Ouimette, 1 Sawy. 47, 3 N. B. R. 566, Fed. Cas. No. 10,622. But see Bray v. Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153.

352 In re Paige, 99 Fed. 538, 3 Am. Bankr. Rep. 679.

353 In re Cleary, 179 Fed. 990, 24 Am. Bankr. Rep. 742; Brinkley v. Smithwick, 126 Fed. 686, 11 Am. Bankr. Rep. 500; In re Puget Sound Engineering Co. (D. C.) 270 Fed. 353, 46 Am. Bankr. Rep. 310. Where the answer admitted that the bankrupt owed debts which he was unable to pay, and that he had transferred his property for cash, and had applied the proceeds in payment of some of his debts, such answer was held to constitute an admission that he had preferred some of his creditors over others, which constituted an act of bankruptcy. Brinkley v. Smithwick, supra.

that he is exempt from the operation of the bankruptcy law, as a farmer or a wage-earner, or, in the case of a corporation, that it belongs to one of the excepted classes.[354] He may also allege in his answer that the petition is not supported by the requisite number of creditors, or that they have not provable claims amounting to the jurisdictional sum.[355] If he takes exception to the sufficiency of the number of petitioning creditors, he is required by the act (section 59d) to file with his answer a sworn list of all his creditors with their addresses. This list should contain a statement of the amount due to each creditor appearing on it, the date of the debt, when it is due, whether it is due by note or account or some other form of contract, the consideration therefor, whether it is owed jointly with another as partner or otherwise, and such full particulars as will save the necessity and cost of referring the case to ascertain the facts.[356] Also, the defendant may plead such facts as will show that the creditors acting against him are, in equity, estopped to prosecute the petition.[357] And generally speaking, distinct defenses to a petition in involuntary bankruptcy should be separately pleaded.[358]

The defendant's answer or plea must be filed within five days after the return day, or within such further time as the court may allow.[359] It is held that this authorizes the judge to receive and consider a meritorious pleading, though filed after the five days, if it is interposed in good faith and not merely for purposes of delay.[360] But the time to plead cannot be extended by an agreement of counsel, without leave of the court and without the consent of the other creditors, especially in a case where, the allegations of the petition being simple and easily answered, the court would not have extended the time if applied to for that purpose.[361] If an amended petition is filed, the defendant must be allowed a reasonable time to answer it; and if it charges him with new acts of fraud and bankruptcy, a single day is not a reasonable time, at least where the defendant is not in the district.[362]

354 In re Taylor (C. C. A.) 102 Fed. 728, 4 Am. Bankr. Rep. 515.

355 In re John A. Etheridge Furniture Co., 92 Fed. 329, 1 Am. Bankr. Rep. 112. In an involuntary bankruptcy proceeding, the alleged bankrupt may be entitled to a liquidation of the claims of petitioning creditors before being required to answer. In re Smith (D. C.) 209 Fed. 91, 31 Am. Bankr. Rep. 560.

356 W. A. Gage & Co. v. Bell, 124 Fed. 371, 10 Am. Bankr. Rep. 696.

357 Cummins Grocer Co. v. Talley, 187 Fed. 507, 109 C. C. A. 273, 26 Am. Bankr. Rep. 484.

358 In re Ouimette, 1 Sawy. 47, 3 N. B. R. 566, Fed. Cas. No. 10,622.

359 Bankruptcy Act 1898, § 18d, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797. See Stewart Petroleum Co. v. Boardman (C. C. A.) 264 Fed. 826, 45 Am. Bankr. Rep. 573.

360 In re Cooper Bros., 159 Fed. 956, 20 Am. Bankr. Rep. 392.

361 In re Simonson, 92 Fed. 904, 1 Am. Bankr. Rep. 197.

362 Lockman v. Lang, 132 Fed. 1, 65 C. C. A. 621, 12 Am. Bankr. Rep. 497.

If the defendant answers in the form officially prescribed, no replication on the part of the petitioning creditors is necessary, since it is in effect a plea of the general issue.[363] But if the answer alleges new matter, there must be a replication, and if none is filed, and the case is submitted on the petition and answer, the allegations of the answer must be taken as true.[364] Finally, it should be observed that a debtor who contests a proceeding in involuntary bankruptcy against him, does so in his own behalf and not in the interest of his creditors, and he is at liberty to withdraw his opposition at any time, when done in good faith, without notice to his creditors or their consent.[365]

Creditors who are opposed to the adjudication of their debtor as a bankrupt may also file an answer to a petition in involuntary bankruptcy against him.[366] And it is open to them to allege, in such answer, that the proceedings are not in good faith, but are the result of fraud and collusion between the debtor and the petitioning creditors.[367]

§ 172. Defenses and Grounds of Opposition.—Want of jurisdiction is of course a complete defense to a petition in bankruptcy, and jurisdiction cannot be conferred by the consent of the parties or their failure to object, if the want of it appears on the face of the pleadings.[368] This applies primarily to cases where the proceedings are brought in a court which has not jurisdiction over the defendant by reason of his residence or doing business elsewhere. But sufficient petitioning creditors are also essential to the maintenance of the proceeding. Hence the respondent may allege and show that the person bringing the petition is not a creditor, and so have the petition dismissed.[369] Or if the petitioner is in fact a creditor, the defendant may show that his debt is not such as to be provable in bankruptcy.[370] Or he may defend on the ground that the petitioning creditor or creditors do not own debts sufficient in amount to entitle them to maintain the petition.[371] Again, if he is a farmer or a wage-earner (or an exempt corporation), the court is without

[363] In re Dunham, 2 Ben. 488, 2 N. B. R. 17, Fed. Cas. No. 4,143.

[364] Brinkley v. Smithwick, 126 Fed. 686, 11 Am. Bankr. Rep. 500; In re Taylor (C. C. A.) 102 Fed. 728, 4 Am. Bankr. Rep. 515.

[365] In re Billing, 145 Fed. 395, 17 Am. Bankr. Rep. 80.

[366] In re Cohn (D. C.) 220 Fed. 956, 33 Am. Bankr. Rep. 839.

[367] In re Cohn, 227 Fed. 843, 142 C. C. A. 367, 35 Am. Bankr. Rep. 735.

[368] Hopkins v. Carpenter, 18 N. B. R. 339, Fed. Cas. No. 6,686; Fogarty v. Gerrity, 1 Sawy. 233, 4 N. B. R. 450, Fed. Cas. No. 4,895; In re Lady Bryan Min. Co., 1 Sawy. 349, 4 N. B. R. 394, Fed. Cas. No. 7,978. But compare Allen v. Thompson, 10 Fed. 116.

[369] In re Cornwall, 9 Blatchf. 114, 6 N. B. R. 305, Fed. Cas. No. 3,250. But a proceeding in involuntary bankruptcy is not void because facts show that the petitioners are estopped from taking advantage of the act of bankruptcy relied on. In re Bolognesi, 223 Fed. 771, 139 C. C. A. 351, 34 Am. Bankr. Rep. 692.

[370] Sigsby v. Willis, 3 Ben. 371, 3 N. B. R. 207, Fed. Cas. No. 12,849.

[371] In re Ouimette, 1 Sawy. 47, 3 N.

jurisdiction over him, and this may be pleaded and proved in defense.[372] But if the undisputed facts stated in the petition make out a good case for an adjudication, it is no defense that foreclosure proceedings, instituted after the filing of the petition, will absorb all or most of the bankrupt's property since it is not a jurisdictional requisite in bankruptcy that there should be any assets for distribution.[373]

If the act of bankruptcy charged is a fraudulent conveyance or concealment of property, it will constitute a complete defense that the defendant is solvent at the time of the filing of the petition.[374] Again, the personal disability of the defendant may constitute an available defense, as in case of insanity, infancy, or coverture.[375] But an adjudication of bankruptcy duly entered on the voluntary petition of the debtor, being personally within the jurisdiction of the court, the petition being signed and verified by the bankrupt in person, will not be set aside on motion of a creditor because the attorney who appeared for the bankrupt had not been admitted to practice in the federal courts of the district, as such an irregularity does not affect the jurisdiction of the court.[376]

Under no circumstances can a plea of tender be a defense to a petition in involuntary bankruptcy. For if the debtor is insolvent, he has no right to offer payment to any creditor, nor the creditor to accept it; the transaction would be a fraud upon the other creditors and a preference. And if he is not insolvent or has not committed an act of bankruptcy, a plea of tender would be entirely outside the controversy and extraneous to the issue, as the proceeding is not one to collect a debt.[377] But payments made to petitioning creditors, after the filing of the petition and before trial or hearing thereon, are material facts on such trial, and if such payments are shown to an amount sufficient to reduce the indebtedness of the alleged bankrupt below the minimum prescribed by the act, the court loses jurisdiction to adjudge the debtor a bankrupt; and the receipt of such payments by the petitioning creditors must be considered a waiver of the alleged act of bankruptcy.[378] And where the only debt on which an adjudication may be entered is that of the

B. R. 566, Fed. Cas. No. 10,622; In re Skelley, 3 Biss. 260, 5 N. B. R. 214, Fed. Cas. No. 12,921.

372 In re Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. Bankr. Rep. 515; Counts v. Columbus Buggy Co., 210 Fed. 748, 127 C. C. A. 298, 31 Am. Bankr. Rep. 312.

373 Vulcan Sheet Metal Co. v. North Platte Valley Irr. Co., 220 Fed. 106, 136 C. C. A. 198, 33 Am. Bankr. Rep. 686.

374 George M. West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, 2 Am. Bankr. Rep. 463.

375 In re Kehler, 153 Fed. 235, 18 Am. Bankr. Rep. 596; In re Ward, 161 Fed. 755, 20 Am. Bankr. Rep. 482. And see, supra, §§ 100, 101, 102.

376 In re Kindt, 98 Fed. 867, 3 Am. Bankr. Rep. 546.

377 In re Ouimette, 1 Sawy. 47, 3 N. B. R. 566, Fed. Cas. No. 10,622; In re Williams, 1 Low. 406, 3 N. B. R. 286, Fed. Cas. No. 17,703.

378 In re Skelley, 3 Biss. 260, 5 N. B. R. 214, Fed. Cas. No. 12,921; In re Merkle, 5 Ben. 8, Fed. Cas. No. 9,458.

petitioner, the bankrupt may have the petition dismissed on its payment with costs.[379]

Collusion between the petitioning creditors and the alleged bankrupt might probably be a ground of defense to any intervening creditor who desired to oppose the adjudication,[380] but not so the mere fact that an insolvent corporation, after admitting its inability to pay its debts and its willingness to be adjudged a bankrupt, requested certain of its creditors to file an involuntary petition against it.[381] And an agreement to withdraw opposition to bankruptcy proceedings, and to consent and submit to an adjudication, is not in fraud of the act.[382] Nor is it a defense to a bankruptcy proceeding against a partnership, on petition of one of its members, that the firm is without assets, having transferred all its property to an assignee for the benefit of creditors more than four months before the filing of the petition.[383]

It is still an unsettled question how far the existence of selfish or vindictive motives on the part of the petitioning creditors may constitute a defense to the proceedings. In some cases under the act of 1867 it was thought that, if the court is satisfied that the petition in bankruptcy is not presented in good faith, but for sinister, vexatious, or oppressive purposes, it has power to dismiss the proceedings, as where one member of a firm takes this method of vexing and harrassing his partner,[384] and this is also the practice of the English courts.[385] But other cases stand upon the strict rule that if an act of bankruptcy is shown to have been committed, and the jurisdictional requisites are present, an adjudication must follow as a matter of course, and the reasons or motives which may have instigated the proceeding are entirely immaterial.[386] Yet clearly a court of bankruptcy, as a court of equity, should require reasonably "clean hands" on the part of its suitors, and should

[379] In re Sheehan, 8 N. B. R. 353, Fed. Cas. No. 12,738.

[380] In re Cohn (D. C.) 220 Fed. 956, 33 Am. Bankr. Rep. 839, affirmed, 227 Fed. 843, 142 C. C. A. 367, 35 Am. Bankr. Rep. 735; In re Dressler Producing Corp. (C. C. A.) 262 Fed. 257, 44 Am. Bankr. Rep. 457. But creditors of an alleged bankrupt are not entitled to oppose the adjudication on the ground that the bankrupt is not insolvent, that he is preparing to conceal his assets, and that false claims will be presented against his estate. In re Cohn (D. C.) 220 Fed. 956, 33 Am. Bankr. Rep. 839.

[381] In re Duplex Radiator Co., 142 Fed. 906, 15 Am. Bankr. Rep. 324.

[382] Sanford v. Huxford, 32 Mich. 313, 20 Am. Rep. 647; First Nat. Bank v. Wyoming Valley Ice Co., 136 Fed. 466, 14 Am. Bankr. Rep. 448.

[383] In re J. M. Ceballos & Co., 161 Fed. 445, 20 Am. Bankr. Rep. 459.

[384] In re Hamlin, 8 Biss. 122, 16 N. B. R. 522, Fed. Cas. No. 5,994.

[385] Ex parte Harcourt, 2 Rose, 203; Ex parte Ashworth, L. R. 18 Eq. Cas. 705; In re Davies, L. R. 3 Ch. Div. 461; Ex parte Bourne, 2 Glyn & J. 137.

[386] In re Simonson, 92 Fed. 904, 1 Am. Bankr. Rep. 197; In re Blninger, 7 Blatchf. 262, Fed. Cas. No. 1,420; In re Duncan, 8 Ben. 365, 14 N. B. R. 18, Fed. Cas. No. 4,131; In re Automatic Typewriter & Service Co. (C. C. A.) 271 Fed. 1, 46 Am. Bankr. Rep. 377.

not allow itself to be made either the instrument of private vengeance or the tool of speculators in the assets of insolvents. When there is ground to suspect the existence of such elements as these in the proceedings, or to question the good faith of the petitioning creditors, it is said that the court is justified in resolving all doubtful questions both of fact and law against them.[387]

This leads us to remark that proceedings to put a debtor into bankruptcy should never be resorted to as proceedings in terrorem to collect a debt; and if such action is taken by the creditor maliciously and without probable cause, and the petition is dismissed, the debtor is entitled to recover, in an action for that purpose, the damages he has sustained by the unlawful attempt to throw him into bankruptcy.[388]

§ 173. Issue of Insolvency.—The statute, after enumerating the various acts of bankruptcy, the first of which is the fraudulent transfer or concealment of assets, provides that "it shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt, the proceedings shall be dismissed." [389] The statute does not make insolvency an essential prerequisite in every case to and adjudication in involuntary bankruptcy.[390] And in the cases where it is necessary, the date when insolvency must have existed varies according to the act of bankruptcy alleged. If this consists in a conveyance or concealment of assets in fraud of creditors, it must have existed at the time of the filing of the petition, as above stated. But if the act charged consists in the giving or suffering a preference, or in the appointment of a receiver because of insolvency, then it must have

[387] Lowenstein v. Henry McShane Mfg. Co., 130 Fed. 1007, 12 Am. Bankr. Rep. 601.

[388] Sonneborn v. Stewart, 2 Woods, 599, Fed. Cas. No. 13,176. This decision was reversed in Stewart v. Sonneborn, 98 U. S. 187, 25 L. Ed. 116, but not on the ground that the action would not lie, but because of certain erroneous instructions given by the court below on the subject of malice and probable cause. See also Smith v. Broomhead, 7 Durn. & E. 296; 2 Bl. Comm. 480, note; In re Moehs & Rechnitzer, 174 Fed. 165, 22 Am. Bankr. Rep. 286; In re Haff, 135 Fed. 742, 68 C. C. A. 380, 13 Am. Bankr. Rep. 354; In re J. Ito Terusaki (D. C.) 238 Fed. 934, 39 Am. Bankr. Rep. 256.

[389] Bankruptcy Act 1898, § 3c.

[390] George M. West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, 2 Am. Bankr. Rep. 463. Solvency is no defense to a petition charging that act of bankruptcy which consists in an admission of inability to pay debts and of willingness to be adjudged bankrupt. In re Russell Wheel & Foundry Co. (D. C.) 222 Fed. 569, 35 Am. Bankr. Rep. 66. As to insolvency as an element in acts of bankruptcy, see further, supra, § 81.

existed at the time of the commission of the act of bankruptcy.[391] In either case, however, the defendant is entitled to take issue on this point and contest the petition, and the question of solvency or insolvency must be tried by a jury if he demands it.[392]

Under the act of 1867, the doctrine was well settled that insolvency does not import an absolute inability to pay one's debts at some future time, upon a settlement and winding up of his affairs, but means that a trader is not in condition to pay his debts as they mature in the ordinary course of his business, in money, as persons in trade usually do.[393] Under this definition, a person might be technically insolvent merely for the want of cash or "quick assets," though his reserves and his property not readily convertible into money might be more than sufficient to liquidate all his indebtedness. "A trader is insolvent when he cannot pay his debts in the ordinary course of business, although he may not be compelled to stop business from his inability, and although, on a settlement of his affairs, he may have sufficient to pay in full."[394] But this rule was entirely abrogated by the act of 1898. It is therein provided (section 1, clause 15) that "a person shall be deemed insolvent, within the provisions of this act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." This definition makes the question depend upon the balance between total assets and total liabilities, and it establishes the fixed and invariable rule to be applied in bankruptcy proceedings, and which must be strictly adhered to.[395]

[391] Acme Food Co. v. Meier, 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550.

[392] Bankruptcy Act 1898, § 19a.

[393] In re Doyle, 1 Holmes, 61, Fed. Cas. No. 4,050; Bailey v. Schofield, 1 Maule & S. 338; Thompson v. Thompson, 4 Cush. (Mass.) 127; In re Gay, 1 Hask. 108, 2 N. B. R. 358, Fed. Cas. No. 5,279; May v. Le Claire, 18 Fed. 164; Webb v. Sachs, 4 Sawy. 158, 15 N. B. R. 168, Fed. Cas. No. 17,325; Anshutz v. Hoerr, 1 Fed. 592; Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481; Wager v. Hall, 16 Wall. 599, 21 L. Ed. 504; Barr v. Bartram & F. Mfg. Co., 41 Conn. 502.

[394] Jackson v. McCulloch, 1 Woods, 433, 13 N. B. R. 283, Fed. Cas. No. 7,140.

[395] Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649; In re Rome Planing Mill Co., 99 Fed. 937, 3 Am. Bankr. Rep. 766; Mackel v. Bartlett, 36 Mont. 7, 91 Pac. 1064; Plymouth Cordage Co. v. Smith, 18 Okl. 249, 90 Pac. 418, 11 Ann. Cas. 445. And see Harmanson v. Bain, 1 Hughes, 188, 15 N. B. R. 173, Fed. Cas. No. 6,072; In re Wells, 3 N. B. R. 371, Fed. Cas. No. 17,388. Where it has not been shown what a person's liabilities are or what is the fair or market value of the property owned by him, he has not been proved insolvent within the meaning of the Bankruptcy Act. Jump v. Bernier, 221 Mass. 241, 108 N. E. 1027.

The term "fair valuation," as a measure of the defendant's assets, is probably not susceptible of exact definition, but apparently it was meant as the equivalent of such expressions as "fair price," "fair cash value," "fair market value," and the like, as used in tax laws and similar statutes. The general understanding is that all these expressions mean the price which might be fixed upon as between a vendor willing to sell, but not forced to do so, and a purchaser willing to buy, but not compelled to take the particular article.[396] "As it respects property considered in a commercial sense, I can conceive of no better or surer standard by which to arrive at a fair valuation than the market value; that is, what the property will probably bring or is worth in the general market where everybody buys. It could not be what it is worth to one person or to another specially circumstanced, or having special use for a particular article, but what it is worth as a marketable commodity at a given time, with no special conditions prevailing other than affect the market generally in the locality where the commodity is for sale." [397] Or, as stated in another case, "fair valuation" means such a price as a capable and diligent business man could presently obtain for the property after conferring with those accustomed to buy such property.[398] But there are occasional decisions recognizing as the fair value of property what it has actually brought at a sale on execution, shown to have been in all respects fair and reasonable.[399]

From the aggregate of the debtor's property there is to be deducted what he may have transferred, removed, or concealed in fraud of creditors.[400] And where he is shown to have sold property for a large sum in cash, which he retained for several months, and where he gives no information about it except to say that, since the filing of the petition,

[396] Grandison v. National Bank of Commerce, 231 Fed. 800, 145 C. C. A. 620, 36 Am. Bankr. Rep. 438; Lackawanna Leather Co. v. La Porte Carriage Co., 211 Fed. 318, 127 C. C. A. 604, 31 Am. Bankr. Rep. 658; In re Kobre (D. C) 224 Fed. 106, 35 Am. Bankr. Rep. 389. Arnold v. Knapp, 75 W. Va. 804, 84 S. E. 895; In re Sedalia Farmers' Co-op. Packing & Produce Co. (D. C.) 268 Fed. 898, 45 Am. Bankr. Rep. 287. See National Bank of Commerce v. City of New Bedford, 175 Mass. 257, 56 N. E. 288; Jones v. Whitworth, 94 Tenn. 602, 30 S. W. 736; Walker v. People, 192 Ill. 106, 61 N. E. 489; Huntington v. Attrill, 118 N. Y. 365, 23 N. E. 544; Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666, 5 Am. Bankr. Rep. 649; Martin v. Bigelow, 36 Misc. Rep. 298, 73 N. Y. Supp. 443. The market value of property is to be taken into account, rather than any special value which the property may have for the owner. Ziegler v. Thayer, 34 R. I. 288, 83 Atl. 266.

[397] In re Hines, 144 Fed. 142, 16 Am. Bankr. Rep. 295. And see In re Marine Iron Works, 159 Fed. 753, 20 Am. Bankr. Rep. 390.

[398] Stern v. Paper, 183 Fed. 228, 25 Am. Bankr. Rep. 451.

[399] In re Martin, 93 Fed. 990.

[400] In re Burg (D. C.) 245 Fed. 173, 40 Am. Bankr. Rep. 126.

he has invested it in distant states, such sum should be treated as concealed assets, and deducted from his available property in determining the question of his solvency.[401] But property which is exempt from execution under the laws of the state is not to be excluded in computing the assets of the alleged bankrupt,[402] nor property which has been pledged as security for a just debt, or paid away in discharge of it, although the transaction would constitute a preference under the bankruptcy law, if it were made the basis of a petition.[403] Where the assets include notes, book debts, or other accounts, their value is the sum which could have been realized from their collection, by the exercise of reasonable diligence, within a reasonable time after the date of the proceeding, and not necessarily their face or par value.[404] But the liability of stockholders of a corporation for stock claimed to have been issued without payment, which claim is disputed, cannot be taken into account as an asset of the corporation,[405] nor prospective profits on goods which had been ordered from abroad, but not shipped or paid for, and for which orders had been taken to be delivered six months later.[406] On the other hand, as to debts, a bankrupt who is the manager and ostensible head of a business, cannot avoid liability for the debts contracted in the business, on the ground that another was the real party in interest and he was merely an employé, where that fact was not stated to or known by the creditors.[407] So, a note secured by mortgage is to be reckoned as one of the bankrupt's debts, though he has fraudulently conveyed away the property on which the mortgage rests.[408] But a judgment in a state court against the alleged bankrupt, which has been opened and the bankrupt permitted to appear generally and defend without conditions, cannot be reckoned as an established debt on the issue of his solvency.[409] And the same rule applies to the bank-

[401] In re Shoesmith, 135 Fed. 684, 68 C. C. A. 322, 13 Am. Bankr. Rep. 645.

[402] In re Hines, 144 Fed. 142, 16 Am. Bankr. Rep. 295; In re Crenshaw, 156 Fed. 628; In re Baumann, 96 Fed. 946, 3 Am. Bankr. Rep. 196; In re Gilmore, 5 Alaska, 293.

[403] In re Doscher, 120 Fed. 408, 9 Am. Bankr. Rep. 547; Acme Food Co. v. Meier, 153 Fed. 74, 82 C. C. A. 208, 18 Am. Bankr. Rep. 550.

[404] In re Coddington, 118 Fed. 281, 9 Am. Bankr. Rep. 243; Plymouth Cordage Co. v. Smith, 18 Okl. 249, 90 Pac. 418, 11 Ann. Cas. 445; Louisiana Nat. Life Assur. Society v. Segen, 196 Fed. 903, 28 Am. Bankr. Rep. 407.

[405] First Nat. Bank v. Wyoming Valley Ice Co., 136 Fed. 466, 14 Am. Bankr. Rep. 448. But compare In re Commonwealth Lumber Co. (D. C.) 223 Fed. 667, 35 Am. Bankr. Rep. 202.

[406] In re Bloch, 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300.

[407] Strellow v. Schloss, 149 Fed. 907, 17 Am. Bankr. Rep. 881.

[408] In re Shoesmith, 135 Fed. 684, 68 C. C. A. 322, 13 Am. Bankr. Rep. 645.

[409] McGowan v. Knittel, 137 Fed. 453, 69 C. C. A. 595, 15 Am. Bankr. Rep. 1.

rupt's liability as a surety or indorser for a solvent principal.[410] Nor can a corporation be charged, for this purpose, with the outstanding individual debts of a merchant whose business it bought and continued, but without assuming liability for the debts.[411] A more difficult question arose in the case of a Pennsylvania corporation which increased its capital stock and thereupon issued a series of bonds, the law of the state authorizing such issue only to the extent of half the capital stock. The company had duly reported the increase of stock to the state authorities, as required by law, but failed to pay the tax due thereon. It was argued that this invalidated the bonds, and that therefore they should not be counted as debts of the corporation in determining the question of its solvency. But the court held that the failure to pay the tax was only an irregularity, of which the state alone could take advantage, and as the state had waived its right by subsequently accepting the tax, the delay in payment did not invalidate the bonds.[412]

Where the alleged bankrupt is a partnership, the rule generally accepted as correct, as stated in a previous section, is that the firm is not insolvent unless the individual property of the several partners, over and above their private debts, when added to the firm property, would not make up a sum sufficient to discharge the partnership debts.[413]

§ 174. **Proof of Solvency or Insolvency.**—If the act of bankruptcy charged in the petition is a fraudulent transfer or concealment of assets, the solvency of the defendant at the time of the filing of the petition is a matter of defense, and the petitioners are not called upon to prove insolvency, but on the contrary the burden of proving his solvency at that date is on the defendant.[414] On the other hand, if the act of bankruptcy charged is either a transfer of property with intent to give a preference or the suffering a creditor to obtain a preference through legal proceedings, it is made the duty of the defendant to appear in court at the hearing, with his books and papers, and submit to an examination touching his solvency, and give testimony as to all matters relating thereto. If he does this, the burden of proving insolvency is on the petitioning creditors, but if he fails to obey the statute in this respect, he

[410] In re Bowers (D. C.) 215 Fed. 617, 33 Am. Bankr. Rep. 51.

[411] In re C. W. Aschenbach Co., 174 Fed. 396, 98 C. C. A. 290, 23 Am. Bankr. Rep. 95.

[412] First Nat. Bank v. Wyoming Valley Ice Co., 136 Fed. 466, 14 Am. Bankr. Rep. 448.

[413] Supra, § 114.

[414] Bankruptcy Act 1898, § 3c. And see In re West, 108 Fed. 940, 48 C. C. A. 155, 5 Am. Bankr. Rep. 734; In re Crenshaw, 156 Fed. 638, 19 Am. Bankr. Rep. 502; In re Burg (D. C.) 245 Fed. 173, 40 Am. Bankr. Rep. 126; In re Wellesley (D. C.) 252 Fed. 854, 40 Am. Bankr. Rep. 597, 42 Am. Bankr. Rep. 412.

must assume the burden of proving his solvency.[415] Assuming the burden to rest on the creditors, they are not required to make full and absolute proof of the debtor's insolvency, but may offer evidence tending to show that fact, sufficient at least to make out a prima facie case, and the debtor must then explain or contradict the evidence, if possible, as he is best acquainted with the condition of his own affairs.[416]

As to the admissibility and sufficiency of the evidence, it may be remarked, in the first place, that the insolvency of a person at a particular time cannot be proved by general reputation,[417] nor by the opinion of witnesses, unless the testimony also shows that they are stating conclusions based on their own knowledge of the circumstances.[418] But the inability of a person engaged in business to meet his debts, as shown by his submitting to suit on claims against which he has no defense, especially when coupled with such circumstances as his suspension of business, or the dissolution of a partnership, is strong evidence of insolvency, and may be sufficient, unless completely explained.[419] Admissions of the debtor may also be used against him for this purpose.[420] Thus, evidence of a letter written by the defendant, stating that he was unable to pay his debts, and calling a meeting of his creditors for the purpose of inducing them to accept a compromise, is prima facie proof of his insolvency, and sufficient to sustain a finding against him on that issue, unless overcome by countervailing proof.[421] There may also be cir-

[415] Bankruptcy Act 1898, § 3d. And see Cummins Grocer Co. v. Talley, 187 Fed. 507, 109 C. C. A. 273, 26 Am. Bankr. Rep. 484; McGowan v. Knittel, 137 Fed. 453, 69 C. C. A. 595, 15 Am. Bankr. Rep. 1; In re Electron Chemical Co. (D. C.) 208 Fed. 954, 31 Am. Bankr. Rep. 471.

[416] See In re Iron Clad Mfg. Co., 197 Fed. 280, 116 C. C. A. 642, 28 Am. Bankr. Rep. 628; In re Doyle, 199 Fed. 247, 29 Am. Bankr. Rep. 102; In re Kassel, 195 Fed. 492, 28 Am. Bankr. Rep. 233; In re Oregon Bulletin Printing & Pub. Co., 13 N. B. R. 503, Fed. Cas. No. 10,559. The bankrupt's books and financial statements, showing an excess of assets over liabilities, may justify a refusal to find him insolvent. N. L. Carpenter & Co. v. Lybrand, 230 Fed. 84, 144 C. C. A. 382, 36 Am. Bankr. Rep. 12.

[417] Stewart v. McMurray, 82 Ala. 269, 3 South. 47; Hurley v. Smith, 1 Hask. 308, Fed. Cas. No. 6,920. See Lakin v. First Nat. Bank, 13 Blatchf. 83, Fed. Cas. No. 7,999.

[418] Brundred v. Paterson Machine Co., 4 N. J. Eq. 294; Royall's Adm'r v. McKenzie, 25 Ala. 363.

[419] In re Elmira Steel Co., 109 Fed. 456, 5 Am. Bankr. Rep. 484; In re Miller, 104 Fed. 764, 5 Am. Bankr. Rep. 140; Mayer v. Hermann, 10 Blatchf. 256, Fed. Cas. No. 9,344. But failure to pay a single debt when due is not sufficient to establish insolvency. Driggs v. Moore, 1 Abb. U. S. 440, 3 N. B. R. 602, Fed. Cas. No. 4,083.

[420] A statement of indebtedness drawn from the books of a corporation, is admissible in evidence in proceedings in bankruptcy against it. Badders Clothing Co. v. Burnham-Munger-Root Dry Goods Co., 228 Fed. 470, 143 C. C. A. 52, 36 Am. Bankr. Rep. 115.

[421] In re Lange, 97 Fed. 197, 3 Am. Bankr. Rep. 231. A corporate officer's statement to creditors, and request for settlement on the basis of 35 cents on the dollar, may be considered on the question of insolvency, though his authority was not clear. In re Brown Commercial Car Co., 227 Fed. 387, 142 C. C. A. 83, 36 Am. Bankr. Rep. 45.

cumstances in which the debtor would be concluded or estopped by a pleading or a judgment in proceedings in court to which he was a party. But a petition filed in a state court by the directors of a corporation, alleging its insolvency and praying for its dissolution and the appointment of a receiver, is not sufficient ground for a finding of insolvency by a court of bankruptcy in involuntary proceedings subsequently instituted against it, where the rule obtaining in the state courts as to what constitutes insolvency differs from that prescribed by the bankruptcy act.[422] But generally the evidence on this issue must consist of proof, item by item, of the debtor's available assets and their value, and of his valid liabilities and their amount. In neither instance is his own estimate to be accepted as conclusive, nor, on the other hand, is he bound by what the petitioners' witnesses may say, but each disputed item is a proper subject for testimony on both sides,[423] and if there is a wide discrepancy in the opinion of witnesses, all equally trustworthy, as to the value of assets, the doubt must be resolved against the party having the burden of proof.[424] As a hearing of this kind is generally held before a referee, the rule applies as to the effect to be given to his findings and conclusions. "As the referee heard the witnesses," said the court in one case, "his judgment of the relative value and credibility of their testimony is entitled to affirmance under these conditions, unless it appears that it rests upon an erroneous theory of valuation, or controlling testimony was disregarded in his conclusions."[425] Finally, the issue of solvency or insolvency may depend upon a single circumstance, to which the evidence should be confined, as, for instance, whether or not the defendant was a partner in a particular firm, as alleged in the petition,[426] or whether or not all his creditors had entered into and bound themselves by a composition agreement.[427]

§ 175. **Examination of Debtor as to Solvency.**—Where the act of bankruptcy charged is a preferential transfer of property, or the suffering a creditor to obtain a preference through legal proceedings, and the

[422] In re Doscher, 120 Fed. 408, 9 Am. Bankr. Rep. 547. And see In re Pickens Mfg. Co., 158 Fed. 894, 20 Am. Bankr. Rep. 202.

[423] Bogen & Trummel v. Protter, 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288; In re Bloch, 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; Troy Wagon Works v. Vastbinder, 130 Fed. 232, 12 Am. Bankr. Rep. 352. The court will not, at the outset, determine a question of title, to reduce the alleged bankrupt's apparent assets and show insolvency. Blackstone v. Everybody's Store (C. C. A.) 207 Fed. 752, 30 Am. Bankr. Rep. 497.

[424] In re Gilbert, 112 Fed. 951, 8 Am. Bankr. Rep. 101.

[425] Chicago Motor Vehicle Co. v. American Oak Leather Co., 141 Fed. 518, 72 C. C. A. 576, 15 Am. Bankr. Rep. 804.

[426] Buffalo Milling Co. v. Lewisburg Dairy Co., 159 Fed. 319, 20 Am. Bankr. Rep. 279.

[427] Kinsing v. Bartholew, 1 Dill. 156, Fed. Cas. No. 7,831.

alleged bankrupt takes issue with and denies the allegation of his insolvency, "it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him."[428] It has been held that a simple denial of the fact of insolvency in the answer by an alleged bankrupt (who had previously assigned all his property for the benefit of creditors), unaccompanied by any affidavits, schedules, or other evidence, does not raise such an issue of solvency as is contemplated by the act.[429] But assuming the issue to have been properly raised, the failure of the bankrupt to appear and submit to examination will justify the presumption of insolvency against him.[430] And if he does not appear voluntarily, he may be called and cross-examined by the creditors.[431] If he is engaged in trade, he is required to produce such books, invoices, and other accounts as should properly be kept in his business and which are necessary to show the character and amount of his assets and liabilities,[432] and even where the nature of his business is not such as to require him to keep books of account, in the ordinary or mercantile sense, yet the rule of the statute applies to such papers and accounts as he actually does keep, these being usually the best evidence of the existence of the assets, which he claims and relies on to establish his solvency, and frequently throwing light on their value.[433] Where the bankrupt appears with other witnesses and is examined, and books are produced, but neither the testimony of the witnesses nor the matters shown by the books disclose the actual financial condition of the respondent, this is not a compliance with the requirement of the statute.[434]

[428] Bankruptcy Act 1898, § 3d. And see In re American Pub. Co., 15 Okl. 177, 79 Pac. 762; United States v. Coyle (D. C.) 229 Fed. 256; In re Wilkes-Barre Light Co., 208 Fed. 539, 125 C. C. A. 541, 31 Am. Bankr. Rep. 451.

[429] Bray v. Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153.

[430] In re Perlhefter, 177 Fed. 299, 25 Am. Bankr. Rep. 576.

[431] In re Coddington, 118 Fed. 281, 9 Am. Bankr. Rep. 243. But see In re Thompson, 179 Fed. 874, 24 Am. Bankr. Rep. 655, where it is held that an alleged bankrupt cannot be subjected to examination on written interrogatories before adjudication at the instance of petitioning creditors.

[432] Bogen & Trummel v. Protter, 129 Fed. 533, 64 C. C. A. 63, 12 Am. Bankr. Rep. 288. An insolvent debtor who undertakes to raise funds and compound his indebtedness, should keep accurate accounts showing what he receives and disburses, and his failure to do so will count heavily against his assertion of honesty and good faith towards his creditors. In re Bloomberg (D. C.) 253 Fed. 94, 42 Am. Bankr. Rep. 115.

[433] Cummins Grocer Co. v. Talley, 187 Fed. 507, 109 C. C. A. 273, 26 Am. Bankr. Rep. 484.

[434] In re American Pub. Co., 15 Okl. 177, 79 Pac. 762.

§ 176. Burden of Proof and Evidence.—Except as to the issue of insolvency, as mentioned in the preceding sections, the creditors filing a petition in involuntary bankruptcy are charged with the burden of proving all the facts necessary to warrant an adjudication, in so far as the same are contested or not admitted by the alleged bankrupt, not, indeed, beyond a reasonable doubt, but by a fair preponderance of the evidence.[435] Thus, they must show the jurisdictional facts as to the debtor's residence or maintaining his principal place of business within the district for the requisite length of time, although, in the case of a voluntary petition, if the facts are ambiguous, it is the petitioner who must satisfy the court on this point.[436] So, if the answer filed on behalf of the bankrupt by his guardian or committee alleges his insanity at the time the alleged act of bankruptcy was committed, the burden is on the petitioning creditors to show that the act was done during a lucid interval.[437] They must also prove affirmatively, by a preponderance of evidence, that the person or corporation proceeded against is not within one of the classes specifically exempted from the operation of the bankruptcy act.[438] Likewise the burden is on them, if the point is disputed, to show that they have provable claims against the defendant, and that the same are sufficient in amount to support the petition,[439] although, if the debtor admits the existence of his promissory note in the hands of a petitioning creditor, but alleges that it is invalid because given in a gambling transaction, he must assume the burden of proving his con-

[435] In re Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123; In re Rogers Milling Co., 102 Fed. 687, 4 Am. Bankr. Rep. 540; In re Oregon Bulletin Printing & Pub. Co., 13 N. B. R. 503, Fed. Cas. No. 10,559; In re Scudder, Fed. Cas. No. 12,563; Brock v. Hoppock, 2 N. B. R. 7, Fed. Cas. No. 1,912. Compare In re Price, 8 N. B. R. 514, Fed. Cas. No. 11,411. And see Cameron v. National Surety Co. (C. C. A.) 272 Fed. 874, 47 Am. Bankr. Rep. 67; In re Ponzi (D. C.) 268 Fed. 997, 46 Am. Bankr. Rep. 113; In re Saludes Lumber Co. (D. C.) 273 Fed. 303, 47 Am. Bankr. Rep. 111.

[436] In re Waxelbaum, 97 Fed. 562, 3 Am. Bankr. Rep. 267; In re Tennessee Const. Co., 213 Fed. 33, 129 C. C. A. 627; In re Gurler & Co. (D. C.) 232 Fed. 1016, 37 Am. Bankr. Rep. 418.

[437] In re Kehler, 159 Fed. 55, 86 C. C. A. 245, 19 Am. Bankr. Rep. 513.

[438] Walker Roofing & Heating Co. v. Merchant & Evans Co., 173 Fed. 771, 97 C. C. A. 495, 23 Am. Bankr. Rep. 185; In re Hudson River Electric Power Co., 173 Fed. 934, 23 Am. Bankr. Rep. 191; Philpot v. O'Brion, 126 Fed. 167, 61 C. C. A. 111, 11 Am. Bankr. Rep. 205; In re Pilger, 118 Fed. 206, 9 Am. Bankr. Rep. 244; In re Lake Jackson Sugar Co., 129 Fed. 640; United States v. Freed, 179 Fed. 236, 25 Am. Bankr. Rep. 89; In re Leland, 185 Fed. 830, 25 Am. Bankr. Rep. 209; American Agricultural Chemical Co. v. Brinkley (C. C. A.) 194 Fed. 411, 27 Am. Bankr. Rep. 438; In re Driver (D. C.) 252 Fed. 956, 42 Am. Bankr. Rep. 106.

[439] In re Crafts-Riordon Shoe Co., 185 Fed. 931, 26 Am. Bankr. Rep. 449; In re Morgan & Williams, 184 Fed. 938, 25 Am. Bankr. Rep. 861; In re Borelli & Callahan, 142 Fed. 296, 16 Am. Bankr. Rep. 115; In re Ferguson, 127 Fed. 407, 11 Am. Bankr. Rep. 371; In re Lewis F. Perry & Whitney Co., 172 Fed. 745, 22 Am. Bankr. Rep. 772; Ex parte Foster, 5 Law Rep. 406, Fed. Cas. No. 4,959; Emerine v. Tarault, 219 Fed. 68, 134 C. C. A.

tention.[440] So also, if the proceeding is against persons alleged to constitute a partnership, the burden of proving the partnership is on the creditors.[441]

The creditors must also assume the burden of proving the commission of an act of bankruptcy. This is absolutely essential, and there can be no adjudication until the fact is satisfactorily proved or admitted.[442] But if two distinct matters are alleged conjunctively, each of which constitutes an act of bankruptcy sufficient to warrant an adjudication, it is enough if either of them be satisfactorily proven.[443] But creditors cannot travel outside their petition, and they will not be permitted to adduce evidence of acts of bankruptcy not therein alleged.[444] As to the admissibility and weight of evidence on these points, the ordinary rules prevail. It is said that, where a fraudulent transfer of property is charged as an act of bankruptcy, great latitude in the admission of evidence should be allowed on the trial, and all the circumstances fairly connected with the transaction may be shown.[445] The declarations, admissions, and letters of the respondent may be admitted as evidence against him.[446] And where the only proof of an act of bankruptcy given by the creditors is a statement of the bankrupt, such statement must be accepted, in its entirety, as true, and if it admits a transaction which would constitute an act of bankruptcy if not explained, but also includes an explanation, the latter as well as the former part of the statement must be taken as true.[447] The bankrupt's own testimony may be contradicted and impeached, but the uncorroborated testimony of a

606, 34 Am. Bankr. Rep. 55; In re Spengler (D. C.) 238 Fed. 862, 39 Am. Bankr. Rep. 64.

[440] Hill v. Levy, 98 Fed. 94, 3 Am. Bankr. Rep. 374.

[441] Jones v. Burnham, Williams & Co., 138 Fed. 986, 71 C. C. A. 240, 15 Am. Bankr. Rep. 85; Lott v. Young, 109 Fed. 798, 48 C. C. A. 654, 6 Am. Bankr. Rep. 436; In re Samuels, 215 Fed. 845, 132 C. C. A. 187. In bankruptcy proceedings against a partnership, the court has no concern with an alleged issue of fraud by which a partner had been induced to enter the firm. In re Mitchell & Co. (D. C.) 211 Fed. 778, 31 Am. Bankr. Rep. 814.

[442] In re Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123; In re Brown, 15 N. B. R. 416, Fed. Cas. No. 1,981; In re Safe-Deposit & Sav. Inst., 7 N. B. R. 392, Fed. Cas. No. 12,211; Lennox v. Allen-Lane Co., 167 Fed. 114, 92 C. C. A. 566, 21 Am. Bankr. Rep. 648; In re Billing, 145 Fed. 395, 17 Am. Bankr. Rep. 80; Jones v. Coates, 196 Fed. 860, 116 C. C. A. 422, 28 Am. Bankr. Rep. 249. In re Condon, 209 Fed. 800, 126 C. C. A. 524, 31 Am. Bankr. Rep. 754. Creditors alleging that the debtor has admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt have the burden of proving such allegations. Albers Commission Co. v. Richter, 251 Fed. 869, 164 C. C. A. 85, 42 Am. Bankr. Rep. 157.

[443] In re Drummond, 1 N. B. R. 231, Fed. Cas. No. 4,093.

[444] In re Sykes, 5 Biss. 113, Fed. Cas. No. 13,708; Ex parte Potts, Crabbe, 469, Fed. Cas. No. 11,344; Ex parte Shouse, Crabbe, 482, Fed. Cas. No. 12,815.

[445] In re Luber, 152 Fed. 492, 18 Am. Bankr. Rep. 476.

[446] In re Hatje, 6 Biss. 436, 12 N. B. R. 548, Fed. Cas. No. 6,215.

[447] In re Franklin, 8 Ben. 233, Fed. Cas. No. 5,053.

single witness to a declaration stated to have been made by the bankrupt will not prevail as against his positive denial supported by other witnesses.[448] Where the act of bankruptcy alleged is the appointment of a receiver because of insolvency, the record of the court which appointed the receiver is admissible to show the fact and the reason,[449] and its recitals cannot be contradicted by evidence aliunde.[450]

A transfer, removal, or concealment of property, in order to constitute an act of bankruptcy, must have been effected "with intent" to hinder or defraud creditors, or "with intent" to give a preference, as the case may be. To make out a case for adjudication, therefore, it is necessary for the petitioning creditors to show not only the fact of transfer, concealment, etc., but also the intent of the debtor with reference to defrauding creditors or giving a preference.[451] This need not be, and ordinarily cannot be, established by direct testimony. But his conduct, actions, financial situation, and the method of dealing adopted by him on a particular occasion may be shown, and such an intent inferred therefrom, provided a careful examination of all the details warrants such an inference.[452] Or, as the authorities generally hold, where the actual and necessary result of a payment or transfer of property is to give a preference to a particular creditor, a showing of this fact raises a presumption that a preference was intended by the debtor and casts upon

[448] In re Foster, 126 Fed. 1014, 11 Am. Bankr. Rep. 131.

[449] Blue Mountain Iron & Steel Co. v. Portner, 131 Fed. 57, 65 C. C. A. 295, 12 Am. Bankr. Rep. 559. See In re Muir (D. C.) 212 Fed. 495, 31 Am. Bankr. Rep. 528. Where the act of bankruptcy alleged is that because of insolvency a receiver was put in charge of the debtor's property, the issue is not directly that of insolvency, but whether the receiver was appointed on that ground. In re Maplecroft Mills (D. C.) 218 Fed. 659, 33 Am. Bankr. Rep. 815. Where the record of a state court showed that the appointment of a receiver for a corporation was made because the corporation was insolvent, petitioners in involuntary bankruptcy against the corporation need not prove its insolvency and the appointment of a receiver for that reason, except by the record of the proceedings in the state court. Greenwood Gum Co. v. Zimmerman, 240 Fed. 637, 153 C. C. A. 635, 39 Am. Bankr. Rep. 198. Evidence that certain of a corporation's agents and its counsel procured a creditor to file a bill for the appointment of receivers does not show that the corporation committed an act of bankruptcy by procuring such appointment, in the absence of evidence that the agents and the counsel were authorized so to do by the directors acting as a board, or that their acts were ratified by the stockholders with full knowledge. In re Wm. S. Butler & Co., 207 Fed. 705, 125 C. C. A. 223, 30 Am. Bankr. Rep. 502.

[450] In re Edward Ellsworth Co., 173 Fed. 699, 23 Am. Bankr. Rep. 284.

[451] Clark v. Henne & Meyer, 127 Fed. 288, 62 C. C. A. 172, 11 Am. Bankr. Rep. 583; Cunningham v. Cady, 13 N. B. R. 525, Fed. Cas. No. 3,480; In re King, 10 N. B. R. 103, Fed. Cas. No. 7,783; Cribben & Sexton Co. v. North End House Furnishing Co., 222 Fed. 830, 138 C. C. A. 256, 34 Am. Bankr. Rep. 474. Johnson-Baillie Shoe Co. v. Bardsley, Elmer & Nichols, 237 Fed. 763, 150 C. C. A. 517, 38 Am. Bankr. Rep. 492; Houghton Wool Co. v. Morris, 249 Fed. 434, 161 C. C. A. 408, 41 Am. Bankr. Rep. 271; Marine Nat. Bank v. Swigart (C. C. A.) 262 Fed. 854, 45 Am. Bankr. Rep. 162.

[452] Strauss v. Abrahams, 32 Fed. 310.

him the burden of exculpating himself.[453] And so, where the actual and necessary result of a conveyance or mortgage is to hinder and delay creditors or put property out of their reach, a fraudulent intent on the part of the debtor will be presumed, and he must assume the burden of proving his good faith.[454] But this presumption is not conclusive. It is rebuttable by the defendant, and he must be permitted to introduce evidence explaining the transaction and negativing the alleged fraudulent intention.[455] And he will succeed in this if he can show that he was ignorant of his insolvency and that his affairs were in such condition that he could reasonably expect to pay all his debts in full.[456] Moreover, the presumption of a fraudulent or preferential intent varies in intensity with the circumstances of the particular case. It is affected by the amount involved, and is not of great strength where the transfer involved a comparatively small part of the debtor's property.[457] Thus, although the debtor was certainly insolvent, the fact that he paid a sum of less than three dollars in settlement of a current store bill in the usual course of such dealings, where his total indebtedness amounted to thirteen thousand dollars, cannot raise a presumption of an intent to give a preference, as against his own testimony that the payment was not made with any such intention.[458]

§ 177. **Discontinuance and Dismissal of Proceedings.**—As originally enacted, the bankruptcy act provided that creditors should be entitled to at least ten days' notice by mail of the proposed dismissal of the proceedings (section 58), and that "a voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors" (section 59g). This was a departure from the rule prevailing under the former statute, by which a petitioning creditor could discontinue the proceedings and have his petition dismissed before adjudication, without giving notice to any other creditors of the alleged bankrupt.[459] Now,

[453] In re Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123; In re Bloch, 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; In re Gilbert, 112 Fed. 951, 8 Am. Bankr. Rep. 101.

[454] Lansing Boiler & Engine Works v. Joseph T. Ryerson & Son, 128 Fed. 701, 63 C. C. A. 253, 11 Am. Bankr. Rep. 558.

[455] Lansing Boiler & Engine Works v. Joseph T. Ryerson & Son, 128 Fed. 701, 63 C. C. A. 253, 11 Am. Bankr. Rep. 558; Ex parte Potts, Crabbe, 469, Fed. Cas. No. 11,344.

[456] In re Rome Planing Mill, 96 Fed. 812, 3 Am. Bankr. Rep. 123; In re Pangborn, 185 Fed. 673, 26 Am. Bankr. Rep. 40; In re Bloch, 109 Fed. 790, 48 C. C. A. 650, 6 Am. Bankr. Rep. 300; Wager v. Hall, 16 Wall. 584, 21 L. Ed. 504; Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481; Macon Grocery Co. v. Beach, 156 Fed. 1009, 19 Am. Bankr. Rep. 558.

[457] In re Gilbert, 112 Fed. 951, 8 Am. Bankr. Rep. 101.

[458] Macon Grocery Co. v. Beach, 156 Fed. 1009, 19 Am. Bankr. Rep. 558.

[459] In re Camden Rolling Mill Co., 3 N. B. R. 590, Fed. Cas. No. 2,338.

however, the notice to creditors is indispensable, and the dismissal of the proceedings without giving such notice is erroneous and reversible for error, if not absolutely void.[460] But it was held that no such notice was necessary where no list of creditors had been filed and no creditors other than the petitioners had intervened or appeared in any way in the proceedings, since, in such a case the court would have no means of knowing whether there were any other creditors or their names or addresses, and therefore could not give them notice.[461] Probably in consequence of these decisions, an amendment was added to the statute in 1910, by which it was provided that "the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard." [462] Both this amendment and the original section relate only to dismissals which withdraw the case without its having been submitted to the court for decision on the merits, and not to dismissals which follow as the result of a trial or hearing on the merits.[463]

Since the new equity rules have abolished demurrers, it should be remembered that a motion to dismiss a petition in involuntary bankruptcy is in the nature of, or takes the place of, a demurrer, so that, in determining it, the facts alleged in the petition will be considered as true.[464] And though the petition may be defective, yet if the defect could easily be cured, it should not be dismissed without opportunity given to amend.[465] But it is the duty of the court to dismiss the proceedings where it appears that there is a want of jurisdiction over the person of the defendant,[466] or that there is a want of sufficient petitioning creditors,[467] or where, the case being submitted on the petition and

[460] In re Plymouth Cordage Co., 135 Fed. 1000, 68 C. C. A. 434, 13 Am. Bankr. Rep. 665; In re Black Diamond Copper Min. Co., 10 Ariz. 42, 85 Pac. 653.

[461] In re Levi & Klauber, 142 Fed. 962, 74 C. C. A. 132, 15 Am. Bankr. Rep. 294; In re Jemison Mercantile Co., 112 Fed. 966, 50 C. C. A. 641, 7 Am. Bankr Rep. 588.

[462] Act Cong. June 25, 1910, § 10, 32 Stat. 838; Luxury Fruit Co. v. Harris, 217 Fed. 740, 133 C. C. A. 434, 33 Am. Bankr. Rep. 228. But see In re Mason-Seaman Transp. Co. (D. C.) 235 Fed. 974, 37 Am. Bankr. Rep. 677, holding that notice of motion to dismiss need not be served on all creditors, where it is opposed by the petitioning creditors, who are few in number and not joined by the great majority of the creditors.

[463] Neustadter v. Chicago Dry Goods Co., 96 Fed. 830, 3 Am. Bankr. Rep. 96.

[464] Graham Mfg. Co. v. Davy-Pocahontas Coal Co., 238 Fed. 488, 151 C. C. A. 424, 38 Am. Bankr. Rep. 118.

[465] Doty v. Mason (D. C.) 244 Fed. 587, 40 Am. Bankr. Rep. 58.

[466] In re Waxelbaum, 98 Fed. 589, 3 Am. Bankr. Rep. 392. See In re Tully, 156 Fed. 634, 19 Am. Bankr. Rep. 604.

[467] Cummins Grocer Co. v. Talley, 187 Fed. 507, 109 C. C. A. 273, 26 Am. Bankr. Rep. 484; In re Tribelhorn, 137 Fed. 3, 69 C. C. A. 601, 14 Am. Bankr. Rep. 491.

answer, and the averments of the answer being therefore taken as true, it sufficiently negatives the commission of an act of bankruptcy.[468] So if, after the institution of involuntary proceedings, the debtor files his own voluntary petition, and all the creditors, including the first petitioners, come in and prove their claims, under the last petition, this must be taken as a waiver of the involuntary petition, and it should be dismissed.[469] Moreover, it is in the discretion of the court, though perhaps not its imperative duty, to dismiss a petition in voluntary bankruptcy which schedules no debts which would be barred by a discharge,[470] or where the petitioner's only purpose is to try again for a discharge from the same debts which were listed in previous proceedings, wherein he failed to apply for a discharge or in which a discharge was denied.[471] But it is not ground for dismissing a petition in involuntary bankruptcy that the petitioning creditor, since filing the petition, has begun a suit at law against the bankrupt and prosecuted it to judgment.[472]

The court also has discretionary power to dismiss a petition in involuntary bankruptcy for want of prosecution.[473] And this may also be done, in proper cases, upon the consent or agreement of the parties concerned. But the court must be a party to it, and a discontinuance by consent can be obtained only by an order of the court upon a special application,[474] made before an adjudication has passed, for after that it is too late to settle with the debtor and drop the proceedings.[475] A voluntary petitioner in bankruptcy may be permitted to withdraw his

[468] In re Doddy Jourdan & Co., 127 Fed. 771, 11 Am. Bankr. Rep. 344.

[469] In re Nounnan & Orr, 1 Utah, 44. But see In re Waxelbaum, 98 Fed. 589, 3 Am. Bankr. Rep. 392. Where an alleged bankrupt resists an involuntary proceeding, a judgment of dismissal is not res judicata nor a bar to a subsequent voluntary proceeding. In re Lachenmaier, 203 Fed. 32, 29 Am. Bankr. Rep. 325.

[470] In re Colaluca, 133 Fed. 255, 13 Am. Bankr. Rep. 292; In re Shepardson (D. C.) 220 Fed. 186, 34 Am. Bankr. Rep. 284.

[471] Kuntz v. Young, 131 Fed. 719, 65 C. C. A. 477, 12 Am. Bankr. Rep. 505; In re Elby, 157 Fed. 935, 19 Am. Bankr. Rep. 734.

[472] Van Kleeck v. Thurber, Fed. Cas. No. 16,861.

[473] In re Levi & Klauber, 142 Fed. 962, 74 C. C. A. 132, 15 Am. Bankr. Rep. 294; In re Camden Rolling Mill Co., 3 N. B. R. 590, Fed. Cas. No. 2,338; In re Connecticut Brass & Mfg. Corp. (D. C.) 257 Fed. 445, 43 Am. Bankr. Rep. 376; In re Puget Sound Engineering Co. (D. C.) 270 Fed. 353, 46 Am. Bankr. Rep. 310.

[474] In re Buchanan, 10 N. B. R. 97, Fed. Cas. No. 2,073. A bankruptcy court will not set aside a stipulation discontinuing the bankruptcy proceedings given upon a release procured by fraud, until relief is sought in a court having jurisdiction to set aside the release for fraud or to award damages. In re Bieler, 7 N. B. R. 552, Fed. Cas. No. 1,394. Where proceedings before the referee on an involuntary petition warrant an inference that the failure of petitioners to produce any proof may be pursuant to an agreement amounting to consent of parties to a dismissal, the referee should investigate the question. In re Chalfen (D. C.) 223 Fed. 379, 35 Am. Bankr. Rep. 257.

[475] In re Sherburne, 1 N. B. R. 558, Fed. Cas. No. 12,758.

petition if there are no creditors who have proved their claims or who object to that course,[476] but he cannot have the petition dismissed against the protest and objection of any creditor.[477] Similarly, in involuntary proceedings, the petition may be dismissed when the bankrupt desires it and all the creditors will consent.[478] If the petitioning creditors desire to withdraw their petition, they are entitled to do so unless some other creditor objects, and cannot be prevented by the bankrupt's own objection, though he may desire an adjudication for the purpose of making secure some after-acquired property.[479] But if one or more of the petitioning creditors insists upon an adjudication being made, or an intervening creditor protests and shows cause against a dismissal, it cannot be ordered if the statutory grounds for an adjudication exist and no fraud, mistake, or oppression is shown.[480] And a trustee in bankruptcy (if one has been appointed) may appear and answer an application for dismissal.[481] This is the strict rule, and undoubtedly it is well supported by the authorities. Yet there are some indications of a disposition towards a more equitable solution of such cases. In a recent decision, where a bankrupt moved to dismiss the involuntary proceedings against him, and gave the required notice to all the creditors, and all but one of them freely assented to a dismissal, it was held that the petition was properly dismissed. It was said: "The first duty of the bankruptcy court is to administer or dispose of the estate in the interest of the creditors, and where practically all of them assent to dismissal, either affirmatively or by failure to oppose, and the statutory three creditors are not found insisting on a continuance of the proceeding and no deception is suggested to have been practised on the creditors, it should be dismissed."[482] It should also be noted, as the rule prevailing under the act of 1867, that where a majority of the creditors desire a dismissal of the proceeding, it may be so ordered upon their giving proper security for the payment of the objecting or non-assenting creditors.[483]

[476] In re Hebbart, 104 Fed. 322, 5 Am. Bankr. Rep. 8.

[477] In re Smith, 155 Fed. 688, 19 Am. Bankr. Rep. 63; In re McKee (D. C.) 214 Fed. 885. A voluntary bankruptcy proceeding will not be dismissed because instituted to escape payment of alimony and contempt proceedings in a state court, since a dismissal would merely invite involuntary proceedings against the bankrupt and result in no advantage to his wife. In re Pyatt (D. C.) 257 Fed. 362.

[478] In re Miller, 1 N. B. R. 410, Fed. Cas. No. 9,553; Bernard v. Abel, 156 Fed. 649, 19 Am. Bankr. Rep. 383.

[479] In re Weidenfeld (D. C.) 257 Fed. 872, 44 Am. Bankr. Rep. 62.

[480] In re Cronin, 98 Fed. 584, 3 Am. Bankr. Rep. 552; In re Lewis, 129 Fed. 147, 11 Am. Bankr. Rep. 683; In re Mendenhall, 9 N. B. R. 380, Fed. Cas. No. 9,424.

[481] In re Pennsylvania Consol. Coal Co., 163 Fed. 579, 20 Am. Bankr. Rep. 872.

[482] In re Rosenblatt & Co. (C. C. A.) 193 Fed. 638, 28 Am. Bankr. Rep. 401.

[483] In re Indianapolis, C. & L. R. Co.,

As to the persons entitled to move for a dismissal, it has been held that, where one of several partners filed a petition seeking the adjudication of the firm and himself as bankrupts, persons who denied that they were members of the firm had no standing to complain that their motion to dismiss was denied.[484] The mere fact that a corporation adjudged a bankrupt may be able to pay its creditors in full is not ground for dismissing the proceedings, although an attempt has been made by one creditor to use the bankruptcy court in an improper way.[485] Though the court of bankruptcy has expressed an opinion indicating its purpose to dismiss an involuntary petition, yet where no order of dismissal has been drawn, as directed by the opinion, the petition is not dismissed but remains pending.[486]

A petition which has been erroneously or improvidently dismissed may be reinstated and the proceedings resumed, but only when proper notice has been given to the defendant or he has appeared,[487] and not where creditors have shown an unreasonable dilatoriness in applying for such reinstatement,[488] nor where such dismissal was ordered after a trial or hearing on the merits.[489]

§ 178. Death or Insanity of Bankrupt Before Adjudication.—The eighth section of the statute provides that "the death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane." From other provisions of the act we learn that the term "bankrupt" may include one who has filed his voluntary petition or against whom a petition has been filed, and that "bankruptcy," with reference to time, also refers to the filing of the petition. Hence it follows that, when once the petition is duly filed, the proceedings are saved from discontinuance upon the subsequent death of the defendant, even though that occurs before the service of process, or, after service, at any time before adjudication.[490] But thereupon his

5 Biss. 287, 8 N. B. R. 302, Fed. Cas. No. 7,023; In re Great Western Tel. Co., 5 Biss. 359, Fed. Cas. No. 5,739. And see In re Baxter & Co., 154 Fed. 22, 83 C. C. A. 106, 18 Am. Bankr. Rep. 450.

484 In re Fook Woh & Co. (D. C.) 232 Fed. 483, 36 Am. Bankr. Rep. 419.

485 In re Jamaica Slate Roofing & Supply Co., 197 Fed. 240, 28 Am. Bankr. Rep. 763.

486 In re C. Jutte & Co., 258 Fed. 422, 169 C. C. A. 438, 44 Am. Bankr. Rep. 166.

487 Gage v. Gates, 62 Mo. 412, 15 N. B. R. 145.

488 In re Jemison Mercantile Co., 112 Fed. 966, 50 C. C. A. 641, 7 Am. Bankr. Rep. 588.

489 Neustadter v. Chicago Dry Goods Co., 96 Fed. 830, 3 Am. Bankr. Rep. 96.

490 In re Spalding, 139 Fed. 244, 71 C. C. A. 370, 14 Am. Bankr. Rep. 129; In re Hicks, 107 Fed. 910, 6 Am. Bankr. Rep. 182; Shute v. Patterson, 147 Fed. 509, 78 C. C. A. 75, 17 Am. Bankr. Rep. 99; In re Agnew (D. C.) 225 Fed. 650, 35 Am. Bankr. Rep. 709. And see Home Buyers' Building & Loan Ass'n v. Peterman, 253 Pa. 418, 98 Atl. 619. Contra under act of 1867, see Frazier v. Mc-

heirs and personal representatives should be brought in and made parties before an adjudication.[491] So, after a petition has been filed against partners, the decease of one of them prior to any adjudication upon the question of bankruptcy is no legal cause for dismissing the petition.[492] The act of 1867 required a bankrupt, on applying for his discharge, to make oath that he had done nothing which would be cause for withholding the discharge, and it was held that this was an indispensable prerequisite to the granting of a discharge, and hence, that if the bankrupt died before taking this oath, no discharge could be granted.[493] The present statute contains no such requirement, and it seems probable that the heirs and representatives of a deceased bankrupt might obtain a discharge from liability for his debts; but the point is undecided. The death of the bankrupt, however, makes this further difference in the settlement of his estate, that it is to be distributed according to the bankruptcy law, and not according to the state law which otherwise would be applicable.[494] As to insanity, the rule is that if an alleged bankrupt commits an act of bankruptcy while sane, and by reason of a petition founded on such act the court of bankruptcy obtains jurisdiction of a proceeding against him, it will continue the proceedings notwithstanding his supervening insanity; but if the bankrupt was insane when the alleged act of bankruptcy was committed, no adjudication of bankruptcy can properly be made against him.[495]

§ 179. Trial by Jury.—The respondent in a petition in involuntary bankruptcy has the right to a trial by jury in respect to the question of his insolvency (where that is a fact material to the maintenance of the petition), and in respect to the commission of the act or acts of bankruptcy alleged in the petition, provided he files a written application therefor at or before the time within which an answer may be filed.[496] This right is expressly limited to the alleged bankrupt himself. Creditors may intervene and contest the issue and oppose the adjudication, but they cannot demand a trial by jury if the defendant himself does not

Donald, 8 N. B. R. 237, Fed. Cas. No. 5,073. But compare In re Litchfield, 7 Ben. 259, 9 N. B. R. 506, Fed. Cas. No. 8,385.

[491] Shute v. Patterson, 147 Fed. 509, 78 C. C. A. 75, 17 Am. Bankr. Rep. 99.

[492] Hunt v. Pooke, 5 N. B. R. 161, Fed. Cas. No. 6,896.

[493] In re Gunike, 4 N. B. R. 92, Fed. Cas. No. 5,868; In re Quinike, 2 Ben. 354, Fed. Cas. No. 11,514; In re O'Farrell, 3 Ben. 191, 2 N. B. R. 484, Fed. Cas. No. 10,446. Under the present statute (§ 8) it is held that, on the death of a bankrupt, his administrator may file an application for a discharge. In re Agnew (D. C.) 225 Fed. 650, 35 Am. Bankr. Rep. 709.

[494] In re Devlin, 180 Fed. 170, 24 Am. Bankr. Rep. 863.

[495] In re Kehler, 159 Fed. 55, 86 C. C. A. 245, 19 Am. Bankr. Rep. 513; In re Ward, 194 Fed. 174, 28 Am. Bankr. Rep. 29.

[496] Bankruptcy Act 1898, § 19a. A trial by jury upon a petition in involuntary bankruptcy is confined to the issue of insolvency and whether acts of bank-

ask it.[497] Moreover, the bankrupt, in order to be entitled to this mode of trial, must enter his appearance and file his answer at the proper time.[498] And he must apply for a jury in the manner pointed out by the statute and within the time there limited. If he does not, he will be deemed to have waived his privilege in this respect and cannot afterwards demand it.[499] In that case, it is the province of the judge to determine all the issues arising upon the petition and answer without the intervention of a jury.[500] It is also held that if the alleged bankrupt files a general demurrer to the petition, which is overruled after argument, it is then too late for him to file a general denial and demand a trial by jury; it is then in the discretion of the court either to adjudge him bankrupt forthwith or to allow him to answer over on terms.[501]

It will be observed that jury trial is given as of right only in the two cases specified in the statute, namely, on the issue of solvency or insolvency and on that as to the commission of an act of bankruptcy. If the respondent admits or does not traverse the allegations of the petition concerning these matters, but takes issue on the ground that the petitioner is not a creditor of his, that he does not owe him the debt alleged, or that it is not a debt provable in bankruptcy, he cannot demand a trial by jury.[502] So where he chooses to contest the proceeding on the ground that he is a farmer or a wage-earner and therefore not amenable to involuntary bankruptcy; this is not an issue on which he is entitled as of right to a jury trial.[503] And so of the question whether one of the respondents was in fact a member of the partnership against which the proceedings are directed.[504] As to these and other similar matters, it is always in the discretion of the court to refer a disputed issue to a jury, but it cannot be demanded as of right, and the verdict is advisory only and not necessarily conclusive on the

ruptcy were committed. Walker Grain Co. v. Gregg Grain Co (C. C. A.) 268 Fed. 510, 46 Am. Bankr. Rep. 121.

[497] In re Herzikopf, 121 Fed. 544, 57 C. C. A. 606, 9 Am. Bankr. Rep. 745.

[498] In re Gebhardt, 3 N. B. R. 268, Fed. Cas. No. 5,294.

[499] In re Neasmith, 147 Fed. 160, 77 C. C. A. 402, 17 Am. Bankr. Rep. 128; Bray v. Cobb, 91 Fed. 102, 1 Am. Bankr. Rep. 153; In re Sherry, 8 N. B. R. 142; In re Hunter, 3 McLean, 297, Fed. Cas. No. 6,902. Where the bankrupt does not demand a jury trial in his answer, it is not an abuse of the court's discretion to refuse such a demand, though made with due promptness afterwards. In re Wester, 242 Fed. 465, 155 C. C. A. 241, 40 Am. Bankr. Rep. 89.

[500] Carpenter v. Cudd, 174 Fed. 603, 98 C. C. A. 449, 23 Am. Bankr. Rep. 463.

[501] In re Benham, 8 N. B. R. 94.

[502] Phelps v. Clasen, Woolw. 204, 3 N. B. R. 87, Fed. Cas. No. 11,074; Morss v. Franklin Coal Co., 125 Fed. 998, 11 Am. Bankr. Rep. 423; Ex parte Foster, 5 Law Rep. 406, Fed. Cas. No. 4,959.

[503] Carpenter v. Cudd, 174 Fed. 603, 98 C. C. A. 449, 23 Am. Bankr. Rep. 463; Stephens v. Merchants' Nat. Bank, 154 Fed. 341, 83 C. C. A. 119, 18 Am. Bankr. Rep. 560.

[504] In re Neasmith, 147 Fed. 160, 77 C. C. A. 402, 17 Am. Bankr. Rep. 128; In re Flaherty (D. C.) 265 Fed. 741, 45 Am. Bankr. Rep. 638; In re Samuels & Lesser (D. C.) 207 Fed. 195, 30 Am. Bankr. Rep. 293.

court.[505] And so, in general, "in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt's estate, which ordinarily would be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. The bankruptcy court may, and in cases peculiarly requiring such a course will, direct an action or an issue at law to aid it in arriving at a right conclusion. But this rests in its sound discretion." [506]

As to the issue of insolvency, this involves as elements the question of the amount of indebtedness and the fair valuation of the bankrupt's property, both of which he is entitled to have determined by a jury; and the court cannot make a preliminary finding as to the validity and amount of the claims of certain creditors which will be conclusive on the jury on the trial of such issue.[507] As to the issue of the commission of an act of bankruptcy, the question whether or not the defendant made a general assignment for the benefit of his creditors is a question of fact on which he is entitled to demand a jury.[508] And so, in respect to the fourth act of bankruptcy, it is proper to submit to a jury the questions whether the respondent was insolvent, whether receivers were appointed because of such insolvency, and whether such receivers took charge and possession of his property and still continue to hold it.[509] But where the act of bankruptcy charged is a transfer of property with intent to prefer a creditor, and the answer admits the respondent's insolvency and the act charged, but merely denies the intent, this does not raise such an issue as to entitle him to a trial by jury.[510]

The statute further provides that "if a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed." [511] The court may therefore, in its discretion, issue a special venire and impanel a jury to try the issue, at any time, without regard to the question of its being term-time or vacation in the district court proper.[512] The proceedings on a jury trial held under

[505] Carpenter v. Cudd, 174 Fed. 603, 98 C. C. A. 449, 23 Am. Bankr. Rep. 463; Oil Well Supply Co. v. Hall, 128 Fed. 875, 63 C. C. A. 343, 11 Am. Bankr. Rep. 738; In re Naasmith, 147 Fed. 160, 77 C. C. A. 402, 17 Am. Bankr. Rep. 128; Morrison v. Rieman, 249 Fed. 97, 161 C. C. A. 149, 41 Am. Bankr. Rep. 325.

[506] Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672.

[507] Schloss v. Strellow, 156 Fed. 662, 84 C. C. A. 374, 19 Am. Bankr. Rep. 359.

[508] Day v. Beck & Gregg Hardware Co., 114 Fed. 834, 52 C. C. A. 468, 8 Am. Bankr. Rep. 175.

[509] Blue Mountain Iron & Steel Co. v. Portner, 131 Fed. 57, 65 C. C. A. 295, 12 Am. Bankr. Rep. 559.

[510] In re Harris, 155 Fed. 216, 19 Am. Bankr. Rep. 204.

[511] Bankruptcy Act 1898, § 19b.

[512] In re Findlay, 5 Biss. 480, 9 N. B. R. 83, Fed. Cas. No. 4,789; Lehman v. Strassberger, 2 Woods, 554, Fed. Cas. No. 8,216.

this provision of the bankruptcy act are the same in form as on the trial of an ordinary action at law in a federal court,[513] and if error is committed, it can only be reviewed on an application for a new trial or on a writ of error, and not by appeal.[514]

§ 180. Trial or Hearing; Conduct of Proceedings.—Where a trial by jury is not demanded, or is not demandable of right, as noted in the preceding section, it is for the judge of the court of bankruptcy to determine the issues presented by the pleadings. But if disputed questions of fact arise, he may refer them to a special master or to a referee in bankruptcy, to ascertain and report the facts,[515] and the report is entitled to the very greatest consideration and, if responsive to the reference, will ordinarily be regarded as conclusive and not to be set aside at the mere discretion of the court.[516] It is also within the authority of the court of bankruptcy to grant continuances or adjournments under proper circumstances,[517] and the want of an adjournment to a day certain, after issue joined as to the acts of bankruptcy alleged, does not terminate the proceedings.[518] If the issues have been tried by a jury, the court has the same power over the verdict as a court of common law, and may set it aside and order a new trial for cause shown,[519] or may award a new trial on the ground of error in its own instructions.[520] Similarly, it may, if deemed best, order the consolidation of different petitions in bankruptcy filed by different creditors against the

[513] In re Ward, 161 Fed. 755, 20 Am. Bankr. Rep. 482; Morss v. Franklin Coal Co., 125 Fed. 998, 11 Am. Bankr. Rep. 423; In re Jelsh, 9 N. B. R. 412, Fed. Cas. No. 7,257.

[514] In re Neasmith, 147 Fed. 160, 77 C. C. A. 402, 17 Am. Bankr. Rep. 128. And see supra, § 40.

[515] W. A. Gage & Co. v. Bell, 124 Fed. 371, 10 Am. Bankr. Rep. 696; Lackawanna Leather Co. v. La Porte Carriage Co., 211 Fed. 318, 127 C. C. A. 604, 31 Am. Bankr. Rep. 658; In re C. W. Bartleson Co. (D. C.) 243 Fed. 1001, 40 Am. Bankr. Rep. 13; United States v. Coyle (D. C.) 229 Fed. 256; In re Lenoir-Cross & Co. (D. C.) 226 Fed. 227, 35 Am. Bankr. Rep. 774. Where a bankrupt's assignment of accounts was preferential, and the transaction was very complicated, the account should be submitted to a special master to determine a disposition of it and state the same. Chapman v. Hunt (D. C.) 248 Fed. 160, 41 Am. Bankr. Rep. 482. Intervening creditors are not entitled as of right to a re-reference of the question whether the original petitioners had sufficient claims against the alleged bankrupt, on a mere suggestion of collusion, but such re-reference may be granted by the court. In re Smith (D. C.) 232 Fed. 284, 36 Am. Bankr. Rep. 637.

[516] In re El Sevilla Restaurant (D. C.) 253 Fed. 410, 41 Am. Bankr. Rep. 608; In re J. W. Lavery & Son (D. C.) 244 Fed. 959, 39 Am. Bankr. Rep. 807; In re Murphy (D. C.) 225 Fed. 392, 35 Am. Bankr. Rep. 635; In re Senoia Duck Mills (D. C.) 193 Fed. 711; Philpot v. O'Brien, 126 Fed. 167, 61 C. C. A. 111, 11 Am. Bankr. Rep. 205; In re Ponzi (D. C.) 268 Fed. 997, 46 Am. Bankr. Rep. 113.

[517] In re Cohen, 131 Fed. 391, 11 Am. Bankr. Rep. 439; In re Pupke, 1 Ben. 342, Fed. Cas. No. 11,468.

[518] In re Buchanan, 10 N. B. R. 97, Fed. Cas. No. 2,073.

[519] In re De Forest, 9 N. B. R. 278, Fed. Cas. No. 3,745; Ex parte Corse, Fed. Cas. No. 3,254.

[520] In re Marks Bros., 135 Fed. 448, 14 Am. Bankr. Rep. 830.

same debtor,[521] but involuntary proceedings in bankruptcy against an individual cannot be changed, during their pendency and after testimony has been taken, by a mere order amending the title, so as to embrace also a proceeding against a partnership of which the original defendant is one member.[522] Where a bankrupt against whom an involuntary petition is pending files a voluntary petition, notice should be given to the creditors filing the involuntary petition before any action on the voluntary one, and such action should then be taken with respect to the two petitions as appears to be for the best interest of the estate. Thus, it would not be proper to make an adjudication on the voluntary petition and dismiss the other, where the result would be to prevent the successful impeachment of certain conveyances alleged to be preferential.[523] A court of bankruptcy also has power to make proper orders respecting the pleadings.[524] But the rule is that if the petitioning creditors move for an adjudication on the petition and answer, they thereby admit the facts properly pleaded in the answer, in accordance with the general rules of equity practice, and the only question presented is as to the legal sufficiency of the answer; and if the motion is denied, the defendant is entitled to a final decree dismissing the petition.[525]

§ 181. **Adjudication.**—If the alleged bankrupt or any of his creditors shall appear within the time limited and controvert the facts alleged in the petition, the judge is to determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a trial by jury is granted by law and is seasonably demanded, and either make the adjudication or dismiss the petition. But if no pleadings are filed before or on the last day allowed by law for that purpose, the judge is to make the adjudication or dismiss the petition, on the next day or as soon thereafter as may be practicable. But if he is absent from the district, or the division of the district in which the petition is pending, on that day, and no pleadings have been filed, the clerk shall forthwith refer the case to the referee.[526] Thus it ap-

[521] In re McCracken & McLeod, 129 Fed. 621, 12 Am. Bankr. Rep. 95; Salt Lake Valley Canning Co. v. Collins, 176 Fed. 91, 99 C. C. A. 611, 23 Am. Bankr. Rep. 716.

[522] In re Kaufman, 176 Fed. 93, 99 C. C. A. 107, 23 Am. Bankr. Rep. 429.

[523] In re Dwyer, 112 Fed. 777, 7 Am. Bankr. Rep. 532.

[524] Young & Holland Co. v. Brande Bros., 162 Fed. 663, 89 C. C. A. 455, 20 Am. Bankr. Rep. 612.

[525] In re Waugh, 133 Fed. 281, 66 C. C. A. 659, 13 Am. Bankr. Rep. 187; In re Taylor, 102 Fed. 728, 42 C. C. A. 1, 4 Am. Bankr. Rep. 515. The alleged bankrupt cannot have the case set down for hearing on the petition and answer. In re Fineman (D. C.) 223 Fed. 652, 34 Am. Bankr. Rep. 245.

[526] Bankruptcy Act 1898, § 18d, e, f, g.

pears that if no pleadings have been filed on behalf of the bankrupt or any of his creditors, and the petition is sufficient on its face, it is the duty of the judge to make an adjudication of bankruptcy.[527] It is also the plain purpose of the act that there shall be absolutely no unnecessary delay in disposing of the petition. If an unreasonably long time elapses after the filing of the pleadings, without any attempt either on the part of the petitioning creditors or the court to bring the matter to a final determination, and more especially if creditors are allowed to take their own course, outside the bankruptcy proceedings, in regard to reorganizing the debtor's business and distributing his property, it may be concluded that the court of bankruptcy has lost its jurisdiction over the case, and a state court will be justified in entertaining and proceeding with an attachment suit of a single creditor.[528]

The adjudication of bankruptcy, for which an official form has been provided (No. 12), is an order or decree of the court of bankruptcy, reciting the hearing and consideration of the petition and concluding that the respondent "is hereby declared and adjudged bankrupt accordingly." The entry of the order constitutes the adjudication; but a mere memorandum of the judge on the petition directing an order to be entered does not complete it.[529] An adjudication of bankruptcy relates back to the date of the filing of the petition.[530]

An order or judgment refusing to make the adjudication asked for may no doubt be opened for a rehearing, but this will not be done where the motion simply repeats the petitioners' original charge of in-

[527] In re Black Diamond Copper Min. Co., 10 Ariz. 42, 85 Pac. 653.

[528] Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208, 27 Am. Bankr. Rep. 262. Herein it was said: "It was the duty of the bankruptcy court, if it intended to administer the property under the bankruptcy law, to promptly determine the question of adjudication, to proceed with the selection of a trustee and the administration and distribution of the estate, as required by the act. This it evidently declined to do, and permitted the creditors' committee, which had been organized for the avowed purpose of defeating court proceedings, to administer the estate, to buy and sell property, and mature a plan for the reorganization of the concern. This may have been for the benefit of the creditors, but it was not the administration of the law as laid down in the bankruptcy act. It is not within the province of the bankruptcy court to deny an adjudication in bankruptcy, and then hold jurisdiction over the property for the purpose of allowing some of the creditors to effect a reorganization and distribution of the property. We cannot say that we think the Supreme Court of Missouri was wrong, indeed we think it was right, in reaching the conclusion that the district court had declined to adjudicate the corporation a bankrupt and vest its property in a trustee, and, deeming it best for the creditors to follow out their plans, had found that the case was not one calling for the intervention of the bankruptcy court."

[529] In re Hill, 7 Ben. 378, 10 N. B. R. 133, Fed. Cas. No. 6,484.

[530] In re Bear, Fed. Cas. No. 1,177; Smith v. Brinkerhoff, 6 N. Y. 305.

solvency without disclosing any new evidence to combat that offered by the respondent.[531] The pendency of a petition in involuntary bankruptcy does not deprive the court of jurisdiction to make an adjudication on a voluntary petition subsequently filed, but if this is done, the right of the petitioning creditors to set aside a preferential transfer should be preserved by the order.[532] An adjudication in bankruptcy may perhaps be amended like any other judgment, but not, it seems, after the time for taking an appeal has expired.[533]

§ 182. **Conclusiveness and Effect of Adjudication.**—A decree of a federal district court sitting in bankruptcy, upon a petition in involuntary proceedings, whereby the debtor is adjudged and declared a bankrupt, is in the nature of a decree in rem, since it determines his legal status in that respect, and is therefore notice, of itself, to all creditors, and is conclusive evidence that all the facts necessary to sustain the decree were proved before the court.[534] All the creditors of a bankrupt are at least constructively parties to the proceeding to have him so adjudged, and are conclusively bound by the adjudication, at least in so far as it determines the fact of his insolvency and his commission of the act of bankruptcy charged.[535] In particular, the insolvency of the debtor at the time of making the conveyance or transfer of property alleged as an act of bankruptcy is necessarily involved in the adjudication, and is conclusively established by it when the question shall again arise at any stage of the proceedings, as, when it is sought to set aside the convey-

[531] Lackawanna Leather Co. v. La Porte Carriage Co., 211 Fed. 318, 127 C. C. A. 604, 31 Am. Bankr. Rep. 658.

[532] International Silver Co. v. New York Jewelry Co., 233 Fed. 945, 147 C. C. A. 619, 37 Am. Bankr. Rep. 91.

[533] Rhame v. Southern Cotton Oil Co., 230 Fed. 403, 144 C. C. A. 545, 35 Am. Bankr. Rep. 732.

[534] Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83; In re Billing, 145 Fed. 395, 17 Am. Bankr. Rep. 80; Lewis v. Sloan, 68 N. C. 557; In re Wallace, Deady, 433, 2 N. B. R. 134, Fed. Cas. No. 17,094; In re Banks, 1 N. Y. Leg. Obs. 274, Fed. Cas. No. 958; In re Ordway, 19 N. B. R. 171, Fed. Cas. No. 10,552; Shawhan v. Wherritt, 7 How. 627, 12 L. Ed. 847; Morse v. Godfrey, 3 Story, 391, Fed. Cas. No. 9,856; Rayl v. Lapham, 27 Ohio St. 452; Thornton v. Hogan, 63 Mo. 143; Fidelity & Deposit Co. v. Queens County Trust Co., 226 N. Y. 225, 123 N. E. 370.

[535] Cook v. Robinson (C. C. A.) 194 Fed. 785, 28 Am. Bankr. Rep. 182; In re Broadway Savings Trust Co., 152 Fed. 152, 81 C. C. A. 58, 18 Am. Bankr. Rep. 254; In re Billing, 145 Fed. 395, 17 Am. Bankr. Rep. 80; Bear v. Chase, 99 Fed. 920, 40 C. C. A. 182, 3 Am. Bankr. Rep. 746; In re American Brewing Co., 112 Fed. 752, 50 C. C. A. 517, 7 Am. Bankr. Rep. 463; Lazarus v. Eagen, 206 Fed. 518, 30 Am. Bankr. Rep. 287; In re Hecox, 164 Fed. 823, 90 C. C. A. 627, 21 Am. Bankr. Rep. 314; In re Malkan (C. C. A.) 261 Fed. 894, 44 Am. Bankr. Rep. 433; In re Gibney Tire & Rubber Co. (D. C.) 241 Fed. 879, 39 Am. Bankr. Rep. 355. A judgment of the bankruptcy court dismissing a petition in bankruptcy, on sustaining a demurrer thereto, will bar a subsequent petition in another district by creditors who intervened in the proceedings. In re Culgin-Pace Contracting Co. (D. C.) 224 Fed. 245, 35 Am. Bankr. Rep. 375. But compare Pepper-

ance or recover the preference.[536] It has also been ruled that the adjudication is conclusive evidence of the existence of creditors, not necessarily creditors antecedent to a given conveyance by the bankrupt, but at least subsequent thereto.[537]

But in other respects an adjudication in bankruptcy is subject to the same rules which govern the conclusiveness of other judgments. It is only against parties and privies that it is conclusive of the facts in issue, and it is conclusive only as to facts which were in issue or which, though not in issue, were necessarily involved in it and without which it could not have been rendered. As to the first part of this rule, the Supreme Court of the United States has said that, while an adjudication in bankruptcy is a judgment in rem, and that while, for the purpose of administering the debtor's property, it establishes as against all the world his status as a bankrupt, yet it is not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between the parties to the proceeding or those in privity with them; and hence, as against other persons, it is not conclusive as to particular facts found, such as that the debtor had been insolvent for a certain length of time, and that while so insolvent he had given certain preferences.[538]

As to the second part of the rule, the effect of the adjudication as an estoppel depends upon whether the matters alleged to be foreclosed by it were in issue and determined. Thus, an adjudication in bankruptcy, though it may be res judicata, as against a chattel mortgage creditor of the bankrupt, of the bankrupt's insolvency at the time he executed the mortgage, does not determine the mortgagee's right to retain the security.[539] And so, if the validity of the claim of one of the petitioning creditors is put in issue by the bankrupt's answer and the issue is decided in favor of the creditor, the adjudication of bankruptcy is conclusive evidence upon that point, not only against the bankrupt and the trustee, but against all other creditors, since, under the statute, they

dine v. Bank of Seymour, 100 Mo. App. 387, 73 S. W. 890; In re Thomas, 11 N. B. R. 330, Fed. Cas. No. 13,891.

[536] In re V. & M. Lumber Co., 182 Fed. 231; In re American Brewing Co., 112 Fed. 752, 50 C. C. A. 517, 7 Am. Bankr. Rep. 463; Whitwell v. Wright, 136 App. Div. 246, 120 N. Y. Supp. 1065; De Graff v. Lang, 92 App. Div. 564, 87 N. Y. Supp. 78; In re Southern Arizona Smelting Co., 231 Fed. 87, 145 C. C. A. 275, 36 Am. Bankr. Rep. 827; Lazarus v. Eagen (D. C.) 206 Fed. 518, 30 Am. Bankr. Rep. 287. But compare Simpson v. Western Hardware & Metal Co., 97 Wash. 626, 167 Pac. 113. And see McNeel v. Folk, 75 W. Va. 57, 83 S. E. 192.

[537] Cartwright v. West, 185 Ala. 41, 64 South. 293.

[538] Gratiot County State Bank v. Johnson, 249 U. S. 246, 39 Sup. Ct. 263, 63 L. Ed. 587, 43 Am. Bankr. Rep. 357.

[539] Sheppard-Strassheim Co. v. Black, 211 Fed. 643, 128 C. C. A. 147, 33 Am. Bankr. Rep. 574.

might have become parties to the proceeding, and, failing to do so, are considered as represented by the bankrupt; so that, when the claim in question is filed for allowance before the referee, it cannot be again contested by any one.[540] But if issue is taken on the question of insolvency or the commission of an act of bankruptcy, and no inquiry is made into the claims of the petitioning creditors, it is thought that the adjudication cannot be considered as conclusive on the question of the precise amount which the bankrupt owed to any one creditor or that he was indebted to any particular creditor in any sum.[541] And again, the adjudication is not conclusive as to any matter which is brought in question only collaterally, and not directly. Thus, where the defendant took issue on the question of his insolvency, and the petitioning creditors, for the purpose of proving insolvency, undertook to show the amount of existing indebtedness and offered in evidence certain promissory notes made by the debtor to third parties (who were not parties to the proceeding), and the debtor contested the validity and consideration of the notes, but the point was decided against him, and an adjudication was made, it was held that the adjudication was not conclusive as to the validity of the notes so as to prevent the bankrupt from opposing their allowance as claims against his estate.[542] As to the commission of the act of bankruptcy charged, this is always a matter concluded by the judgment.[543] For if not put in issue, it must be taken as admitted by the debtor; and if any creditors are interested in controverting it, they have the right to intervene for that purpose, and must be considered as estopped by their failure to do so. Hence, when the act of bankruptcy on which the petition was founded is made the basis of a subsequent suit by the trustee in bankruptcy (as, to set aside a fraudulent conveyance or recover a preference), the adjudication conclusively establishes the fact as against the bankrupt and all creditors.[544] But if the petition

[540] Ayres v. Cone, 138 Fed. 778, 71 C. C. A. 144, 14 Am. Bankr. Rep. 739; In re Henry Ulfelder Clothing Co., 98 Fed. 409, 3 Am. Bankr. Rep. 425; In re Fallon, 2 N. B. R. 277, Fed. Cas. No. 4,628; Gleason v. Thaw, 234 Fed. 570, 148 C. C. A. 336, 38 Am. Bankr. Rep. 866. But where the alleged bankrupt and a creditor resisted an involuntary petition, because a petitioning creditor's claim was invalid and not provable, but later consented to the adjudication, it was held that the trustee was not estopped from contesting the claim on behalf of all, or any non-contesting, creditors. In re Continental Engine Co., 234 Fed. 58, 148 C. C. A. 74, 37 Am. Bankr. Rep. 102.

[541] Cartright v. West, 155 Ala. 619, 47 South. 93; Granite City Bank v. Tvedt, 146 Minn. 12, 177 N. W. 767. But see 2 Black, Judgm. §§ 613, 615, 622, as to the conclusiveness of a judgment upon points or matters necessarily involved in it, or without which it could not have been rendered, though not put in issue.

[542] In re Henry Ulfelder Clothing Co., 98 Fed. 409, 3 Am. Bankr. Rep. 425.

[543] In re Veler, 249 Fed. 633, 161 C. C. A. 543, 41 Am. Bankr. Rep. 736.

[544] In re Hecox, 164 Fed. 823, 21 Am. Bankr. Rep. 314; Cook v. Robinson (C. C. A.) 194 Fed. 785, 28 Am. Bankr. Rep. 182; Whitwell v. Wright, 115 N. Y. Supp. 48; Hackney v. Raymond Bros.

charges different acts of bankruptcy, and the adjudication does not show upon which one of them it proceeded, it does not render either charge res judicata in the further proceedings.[545] An adjudication in a partnership case would ordinarily be conclusive as to the existence of the partnership and the identity of the persons composing it, but not, it seems, as against the trustee in bankruptcy of one of the persons included in the adjudication, who was not heard, although he filed a denial and answer.[546] But it is not only in contested cases that the conclusive effect of a judgment is to be attributed to an adjudication of bankruptcy. One entered on default for want of an answer is as binding on the bankrupt and the creditors as one entered upon a trial or hearing.[547]

From the conclusive character of an adjudication in bankruptcy it follows necessarily that it cannot be attacked or impeached as to its validity in any collateral proceeding in the same or any other court.[548]

Clarke Co., 68 Neb. 624, 94 N. W. 822, 99 N. W. 675, 13 Am. Bankr. Rep. 164; Anderson v. Stayton State Bank, 82 Or. 357, 159 Pac. 1033. But see Pepperdine v. Bank of Seymour, 100 Mo. App. 387, 73 S. W. 890; John Silvey & Co. v. Tift, 123 Ga. 804, 51 S. E. 748, 1 L. R. A. (N. S.) 386. Where involuntary bankruptcy proceedings were instituted on the ground that the bankrupt had made a general assignment for the benefit of creditors, the order of adjudication was held not res judicata that the transfer was a general assignment. In re McCrum, 214 Fed. 207, 130 C. C. A. 555, 32 Am. Bankr. Rep. 604.

[545] In re Letson, 157 Fed. 78, 84 C. C. A. 582, 19 Am. Bankr. Rep. 506; In re Julius Bros., 217 Fed. 3, 133 C. C. A. 328, L. R. A. 1915C, 89.

[546] Manson v. Williams, 213 U. S. 453, 29 Sup. Ct. 519, 53 L. Ed. 869, 22 Am. Bankr. Rep. 22, affirming 153 Fed. 525, 82 C. C. A. 475, 18 Am. Bankr. Rep. 674, which affirmed In re Hudson Clothing Co., 148 Fed. 305, 17 Am. Bankr. Rep. 826. In re Flaherty (D. C.) 265 Fed. 741, 45 Am. Bankr. Rep. 638. See In re Hansley & Adams (D. C.) 228 Fed. 564, 36 Am. Bankr. Rep. 1. An adjudication in bankruptcy was held not conclusive of the fact that certain petitioning creditors were not at one time partners of the bankrupt. In re Bean, 230 Fed. 405, 144 C. C. A. 547.

[547] In re American Brewing Co., 112 Fed. 752, 50 C. C. A. 517, 7 Am. Bankr. Rep. 463.

[548] Fairbanks Steam Shovel Co. v. Wills, 240 U. S. 642, 36 Sup. Ct. 466, 60 L. Ed. 841, 36 Am. Bankr. Rep. 754; Graham v. Boston, H. & E. R. Co., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196; Michaels v. Post, 21 Wall. 398, 22 L. Ed. 520; Corbett v. Riddle, 209 Fed. 811, 126 C. C. A. 535, 31 Am. Bankr. Rep. 330; Sabin v. Larkin-Green Logging Co. (D. C.) 218 Fed. 984, 34 Am. Bankr. Rep. 210; Ward v. Central Trust Co. of Illinois (C. C. A.) 261 Fed. 344, 44 Am. Bankr. Rep. 323; In re Dempster, 172 Fed. 353, 22 Am. Bankr. Rep. 751; Gilbertson v. United States, 168 Fed. 672, 94 C. C. A. 158, 22 Am. Bankr. Rep 32; In re New York Tunnel Co., 166 Fed. 284, 92 C. C. A. 202, 21 Am. Bankr. Rep. 531; In re Hintze, 134 Fed. 141, 13 Am. Bankr. Rep. 721; Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 87 C. C. A. 521, 20 Am. Bankr. Rep. 349; Graham v. Boston, H. & E. R. Co., 14 Fed. 753; Sutton v. Mandeville, 1 Cranch C. C. 187, Fed. Cas. No. 13,651; Cromwell v. Gallup, 17 Hun (N. Y.) 49; Mount v. Manhattan Co., 41 N. J. Eq. 211, 3 Atl. 726; Slaughter v. Louisville & N. R. Co., 125 Tenn. 292, 143 S. W. 603; Chappell v. Lowe, 145 Ga. 717, 89 S. E. 777; Johnson v. Gratiot County State Bank, 193 Mich. 452, 160 N. W. 544; Riggs v. Price, 277 Mo. 333, 210 S. W. 420.

It has sometimes been said, however, that a want of jurisdiction in the court of bankruptcy is such a fatal defect as may be availed of in a collateral proceeding.[549] And this may well be true in a case of voluntary bankruptcy, where creditors may have no opportunity to plead a want of jurisdiction before the adjudication is made.[550] But the general rule is that if jurisdiction appears on the face of the proceedings, or if there is nothing on the face of the proceedings to disclose an absence of jurisdiction, then the adjudication is not impeachable collaterally even on this ground.[551] And it should be observed that jurisdiction does not so far depend upon the question whether the defendant is one of the persons or corporations subject to the act, or is exempt, as to open the adjudication to attack on this ground.[552] And the same is true as to the sufficiency of the petitioning creditors in number and amount.[553] And even if it should be conceded that the question of jurisdiction is always open still this is not the case where the bankrupt and all of his creditors have recognized the validity of the proceedings and have participated therein and sought the benefit thereof.[554] There are also some decisions to the effect that an adjudication in bankruptcy may be impeached collaterally for fraud in its procurement or fraudulent collusion between the debtor and the petitioning creditors.[555] But the better opinion is that these are matters of defense, or perhaps ground for vacating the adjudication in a direct proceeding for that purpose, but not for drawing its validity into question collaterally.[556] Still less can the adjudication be assailed collaterally for mere errors of law or irregularities of

549 Stuart v. Aumiller, 37 Iowa, 102, 8 N. B. R. 541; In re Goodfellow, 1 Low, 510, 3 N. B. R. 452, Fed. Cas. No. 5,536.

550 In re Garneau, 127 Fed. 677, 62 C. C. A. 403, 11 Am. Bankr. Rep. 679.

551 Sloan v. Lewis, 22 Wall. 150, 22 L. Ed. 832; In re Billing, 145 Fed. 395, 17 Am. Bankr. Rep. 80; United States v. Freed, 179 Fed. 236, 25 Am. Bankr. Rep. 89; In re Ives, 5 Dill. 146, 19 N. B. R. 97, Fed. Cas. No. 7,115. In re Sage (D. C.) 224 Fed. 525, 35 Am. Bankr. Rep. 436; In re Davis (D. C.) 217 Fed. 113, 33 Am. Bankr. Rep. 16. In bankruptcy proceedings against a corporation, the fact that its principal place of business is within the district of the court is a quasi jurisdictional fact, and the court's determination thereof cannot be collaterally attacked, but is conclusive on another bankruptcy court, which has not theretofore acquired jurisdiction. Roszell Bros. v. Continental Coal Corp. (D. C.) 235 Fed. 343, 38 Am. Bankr. Rep. 31.

552 In re First Nat. Bank, 152 Fed. 64, 81 C. C. A. 260, 18 Am. Bankr. Rep. 265; In re Columbia Real Estate Co., 101 Fed. 965, 4 Am. Bankr. Rep. 411.

553 Roberts v. Fernald, 72 N. H. 198, 55 Atl. 942; Bail v. Hartman, 9 Ariz. 321, 83 Pac. 358.

554 In re Worsham, 142 Fed. 121, 73 C. C. A. 665, 15 Am. Bankr. Rep. 672. That the wife of a bankrupt has allowed three years to elapse since the adjudication of bankruptcy constitutes such laches as will preclude her from then contesting the allegations of insolvency in the petition upon which the adjudication was founded. In re Gibbons (D. C.) 225 Fed. 420, 35 Am. Bankr. Rep. 620.

555 In re Billing, 145 Fed. 395, 17 Am. Bankr. Rep. 80; Benedict v. Smith, 48 Mich. 593, 12 N. W. 866.

556 Michaels v. Post, 21 Wall. 398, 22 L. Ed. 520; Bissell v. Post, 4 Day (Conn.) 79.

practice, not sapping the foundation of the court's jurisdiction. These may be grounds for a reversal or modification of the decree on appeal, but are closed by the adjudication itself against inquiry in any other proceeding.[557] But the entry of an adjudication of bankruptcy against a corporation on the very day on which the petition against it was filed is not a mere irregularity; it is an act entirely void. The statute gives to creditors a substantial right to the limitation of a time within which they may come in and be heard, which right is not derived through the bankrupt, and consequently cannot be waived by him, nor can they be deprived of it by any act of his or by the court; and hence they may attack the validity of such an adjudication collaterally in proceedings previously instituted by them in another district.[558]

As to the effect of the adjudication in other respects, it is held that it brings the property of the bankrupt into the custody of the law and appropriates it to the payment of his debts, as effectually as if it were taken on execution or attachment, subject to the qualification, except as otherwise provided, that the property is appropriated in the same condition and subject to the same equities as when in the possession of the bankrupt.[559] Thus, the relation of landlord and tenant is not severed by the tenant's adjudication in bankruptcy.[560] The adjudication is also constructive notice to all persons, at least those within the jurisdiction of the court, of the transfer of title to the bankrupt's property, and they must take notice that the ownership of the bankrupt has ceased and that of his trustee begun.[561] This applies, for example, to assessors of taxes.[562] But the adjudication does not create an actual lien on the property in favor of the trustee.[563] It does, however, operate as a caveat to all the world, and some cases have even thought that it tacitly embodies an injunction against any interference with any of the property by any person who has not a valid interest in it or lien upon it, so that intermeddling with the property by any such person amounts to a

[557] In re Getchell, 8 Ben. 256, Fed. Cas. No. 5,371; Hobson v. Markson, 1 Dill. 421, Fed. Cas. No. 6,555; Edelstein v. United States, 149 Fed. 636, 79 C. C. A. 328, 17 Am. Bankr. Rep. 649; In re Columbia Real Estate Co., 101 Fed. 965, 4 Am. Bankr. Rep. 411. Though the petition on which an adjudication in involuntary bankruptcy was based, and which was held to be sufficient, was really insufficient, the proceedings are not for that reason void so as to be open to collateral attack. Larkin-Green Logging Co. v. Sabin, 222 Fed. 814, 138 C. C. A. 240, 35 Am. Bankr. Rep. 86.

[558] In re Elmira Steel Co., 109 Fed. 456, 5 Am. Bankr. Rep. 484.

[559] In re Youngstrom, 153 Fed. 98, 82 C. C. A. 232, 18 Am. Bankr. Rep. 572.

[560] Shapiro v. Thompson, 160 Ala. 363, 49 South. 391.

[561] Hough v. City of North Adams, 196 Mass. 290, 82 N. E. 46.

[562] Hough v. City of North Adams, 196 Mass. 290, 82 N. E. 46.

[563] In re Hager, 166 Fed. 972; Marine Sav. Bank v. Norton, 160 Mich. 614, 125 N. W. 754.

violation of the implied injunction and may be punished as a contempt of the court.[564]

§ 183. Vacating and Setting Aside Adjudication.—An adjudication of bankruptcy taken by default, for want of appearance or answer, may be opened by the bankruptcy court, on application of the bankrupt or a creditor, to permit him to file an answer and contest the petition, provided a good excuse is shown for the default or for any delay in the application, and provided the answer proposed to be filed shows a meritorious defense and not merely a technical objection.[565] So after the entry of an adjudication as the result of a trial or hearing, it may be vacated or set aside, for good and sufficient cause, on the motion of the bankrupt himself,[566] or the receiver of the bankrupt corporation, appointed by a state court,[567] or any creditor who may conceive his interests to be injuriously affected by the adjudication,[568] such as an attaching creditor.[569] But the authorities appear to restrict the right to these persons. It is said that a petition to set aside an adjudication of bankruptcy is in the nature of a bill to review and vacate a judgment, and therefore can be maintained only by the bankrupt or by a creditor of the bankrupt owning a provable debt or claim against him. Such a motion cannot be made by a stranger, although it is in the discretion of the court to allow him to be heard as amicus curiæ, when the ground alleged is a want of jurisdiction, as that is a question which the court

564 Clay v. Waters, 178 Fed. 385, 101 C. C. A. 645, 21 Ann. Cas. 897, 24 Am. Bankr. Rep. 293; In re Reynolds (D. C.) 127 Fed. 760, 11 Am. Bankr. Rep. 758; Ledgerwood v. Dashiell (Tex. Civ. App.) 177 S. W. 1010; Darrough v. First Nat. Bank, 56 Okl. 647, 156 Pac. 191. An adjudication in bankruptcy does not dissolve a corporation or terminate its existence. In re Russell Wheel & Foundry Co. (D. C.) 222 Fed. 569, 35 Am. Bankr. Rep. 66.

565 In re Imperial Corp., 133 Fed. 73, 13 Am. Bankr. Rep. 199; In re Urban & Suburban Realty Title Co., 132 Fed. 140, 12 Am. Bankr. Rep. 687; In re Le Favour, 8 Ben. 43, Fed. Cas. No. 8,208; In re Neilson, 7 N. B. R. 505, Fed. Cas. No. 10,090; In re Gill, 195 Fed. 643, 28 Am. Bankr. Rep. 333; In re Mitchell & Co. (D. C.) 211 Fed. 778, 31 Am. Bankr. Rep. 814; B-R Electric & Telephone Mfg. Co. v. Ætna Life Ins. Co., 206 Fed. 885, 124 C. C. A. 545, 30 Am. Bankr. Rep. 424.

566 In re McFaun, 96 Fed. 592, 3 Am. Bankr. Rep. 66. But a bankrupt who made no defense to the adjudication, filed his schedules, and appeared personally and by attorney, is not entitled to a vacation of the adjudication without showing that fraud was practiced on him. In re Gill, 195 Fed. 643, 28 Am. Bankr. Rep. 333.

567 In re Atlantic Mut. Life Ins. Co., 9 Ben. 270, 16 N. B. R. 541, Fed. Cas. No. 628.

568 In re New England Breeders' Club, 169 Fed. 586, 95 C. C. A. 84, 22 Am. Bankr. Rep. 124; In re Scott, 111 Fed. 144, 7 Am. Bankr. Rep. 39; In re Derby, 6 Ben. 232, 8 N. B. R. 106, Fed. Cas. No. 3,815; Blackstock v. Blackstock (C. C. A.) 265 Fed. 249, 45 Am. Bankr. Rep. 192.

569 In re Donnelly, 5 Fed. 783; In re Bergeron, 12 N. B. R. 385, Fed. Cas. No. 1,342.

should consider whenever and however raised.[570] But where land of the bankrupt had been sold on execution, bought in by the judgment creditor, and subsequently sold by him to a third person, the latter may appeal to the court's discretion to vacate the adjudication of bankruptcy, though he must show that the vacation would be of practical value to him, as by showing that the bankrupt was not insolvent or did not commit the act of bankruptcy alleged.[571]

Whoever makes the application must exhibit reasonable promptness and diligence in so doing. He will not be heard if justly chargeable with laches. What constitutes due diligence for this purpose does not depend merely upon the actual time elapsed, but also upon the question whether the applicant had actual knowledge of the adjudication at the time, or when he received information of it, and upon the nature and extent of the proceedings which may have been taken in the case since the adjudication, and the possible intervening rights of third persons. Naturally each case must depend on its own circumstances, and no fixed rule can be laid down, but the decisons which support and illustrate the rule are cited in the margin.[572]

Want of jurisdiction is a sufficient ground for vacating an adjudication of bankruptcy,[573] as, on a showing that the person or corporation proceeded against was within the exempt or excepted classes.[574] This action is also proper where the adjudication was based upon a waiver of important rights of the alleged bankrupt, made by his attorney,[575] or where it is shown to have been the product of fraud or collusion.[576] But fraud perpetrated upon the bankrupt in connection with the proceedings is not sufficient to warrant vacating the adjudication, unless

570 In re Columbia Real Estate Co., 101 Fed. 965, 4 Am. Bankr. Rep. 411; s. c., 112 Fed. 643, 50 C. C. A. 406, 7 Am. Bankr. Rep. 441.

571 Abbott v. Wauchula Mfg. & Timber Co., 240 Fed. 938, 153 C. C. A. 624, 39 Am. Bankr. Rep. 634.

572 In re First Nat. Bank, 152 Fed. 64, 81 C. C. A. 260, 18 Am. Bankr. Rep. 265; Altonwood Park Co. v. Gwynne, 160 Fed. 448, 87 C. C. A. 409, 20 Am. Bankr. Rep. 31; In re Ives, 113 Fed. 911, 51 C. C. A. 541, 7 Am. Bankr. Rep. 692; In re Baltimore County Dairy Ass'n, 2 Hughes, 250, 11 N. B. R. 253, Fed. Cas. No. 828; In re Groome, 1 Fed. 464; In re Lalor, 19 N. B. R. 253, Fed. Cas. No. 8,001; In re Court, 17 N. B. R. 555, Fed. Cas. No. 3,284; In re Republic Ins. Co., 8 N. B. R. 317, Fed. Cas. No. 11,706; In re Meade, 19 N. B. R. 335, Fed. Cas. No. 9,370. An adjudication entered upon a confession of the acts of bankruptcy charged cannot be set aside after the death of the bankrupt on the application of a creditor who has proved his debt. In re Thomas, 11 N. B. R. 330, Fed. Cas. No. 13,891.

573 In re Niagara Contracting Co., 127 Fed. 782, 11 Am. Bankr. Rep. 643. But see In re Penn, 4 Ben. 99, 3 N. B. R. 582, Fed. Cas. No. 10,926.

574 In re Hudson River Electric Co., 167 Fed. 986, 21 Am. Bankr. Rep. 915. But see In re Urban & Suburban Realty Title Co., 132 Fed. 140, 12 Am. Bankr. Rep. 687.

575 In re Republic Ins. Co., 8 N. B. R. 317, Fed. Cas. No. 11,706.

576 In re Lalor, 19 N. B. R. 253, Fed. Cas. No. 8,001.

it enters into the order of adjudication.[577] And the fraudulent purpose of directors of a corporation to avoid liability in a stockholders' suit, then commenced but in which no receiver had yet been appointed, by filing a petition in voluntary bankruptcy, does not require the adjudication to be set aside on the petition of the stockholders.[578] And an adjudication in bankruptcy will not be set aside merely because the bankrupt filed his petition in anticipation of the early death of his mother, who had made a will leaving him a substantial sum of money.[579] That the adjudication was entered prematurely may be ground for setting it aside, and this action should be taken even though the petition merely alleges matters which would not have prevented the adjudication being made in due season.[580] So the court may open the adjudication and grant a rehearing on the ground of newly discovered evidence,[581] and it appears that it may be set aside by consent, on proof of the assent of all known creditors.[582] But mere irregularities, not affecting the jurisdiction of the court or the substantial rights of the parties, will not be sufficient cause to induce the court to revoke and annul its decree.[583] Thus, an adjudication will not be set aside merely on showing a prior filing of the petition against the bankrupt in another district,[584] nor on the ground that the notary public who took the verification of the petition was the bankrupt's own attorney,[585] nor because the attorney who appeared for the bankrupt had not been admitted to practice in the federal courts of the district.[586] As the statute does not specifically provide for notice to the creditors of an application or proceeding to vacate the adjudication, it has been held that this action may be taken without notifying them.[587] But the bankrupt himself is in a different

577 In re S. & S. Mfg. & Sales Co. (D. C.) 246 Fed. 1005, 39 Am. Bankr. Rep. 786.

578 In re United Grocery Co. (D. C.) 239 Fed. 1016, 39 Am. Bankr. Rep. 501.

579 In re Swift (D. C.) 259 Fed. 612, 44 Am. Bankr. Rep. 211. And see In re Seal (D. C.) 261 Fed. 112, 44 Am. Bankr. Rep. 556.

580 In re Gibney Tire & Rubber Co. (D. C.) 241 Fed. 879, 39 Am. Bankr. Rep. 355.

581 In re Great Western Tel. Co., 5 Biss. 359, Fed. Cas. No. 5,739.

582 In re Magee, Fed. Cas. No. 8,941. But after an adjudication a bankrupt's estate can be wound up in only two ways, by distribution in bankruptcy or by distribution in composition, and the court has no power, over the objection of a creditor, to vacate the decree of adjudication on a settlement made with other creditors outside the proceedings. In re Malkan (C. C. A.) 261 Fed. 894, 44 Am. Bankr. Rep. 433.

583 But a petition to vacate the adjudication in voluntary proceedings is the correct practice, where the residence, domicile, and principal place of business are not correctly alleged in the petition. In re San Antonio Land & Irr. Co. (D. C.) 228 Fed. 984, 36 Am. Bankr. Rep. 512.

584 In re Harris, 6 Ben. 375, Fed. Cas. No. 6,111.

585 In re Kindt, 98 Fed. 403, 3 Am. Bankr. Rep. 443.

586 In re Kindt, 98 Fed. 867, 3 Am. Bankr. Rep. 546.

587 Texas & P. Ry. Co. v. McNairy, 42

case. Though the proceeding may be involuntary, still he has an interest in its continuance, as it may result in his discharge from his debts, and therefore he must have notice of an application to annul the adjudication.[588] It has been held (though not by a federal court) that a referee in bankruptcy has jurisdiction to set aside an adjudication, at least in the case where he himself made the adjudication, the case having been referred to him by the clerk on account of the absence of the judge.[589]

It is within the competence of the court to impose terms or conditions upon the vacating of an adjudication, as, for instance, in the case of an adjudication taken against the bankrupt by default, that he shall appear and plead within five days, and if such terms are not complied with the adjudication will stand.[590]

§ 184. **Clerk's Docket.**—The first of the general orders in bankruptcy prescribed by the Supreme Court directs that "the clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection." It is held that this docket should show not only the fact and the date of the filing of the petition, but also that it was filed in duplicate, as required by the statute, if this requirement of the law is really complied with.[591] But as a court of bankruptcy is always open for the transaction of business and has no regular terms, it is not necessary for the clerk to make an entry showing the opening and closing of the court on days when he enters proceedings in bankruptcy cases.[592]

Tex. Civ. App. 222, 94 S. W. 111. But see In re Nash (D. C.) 249 Fed. 375.

[588] In re Bush, 6 N. B. R. 179, Fed. Cas. No. 2,222.

[589] Texas & P. Ry. Co. v. McNairy, 42 Tex. Civ. App. 222, 94 S. W. 111.

[590] In re Sutter Hotel Co., 241 Fed. 367, 154 C. C. A. 247, 39 Am. Bankr. Rep. 620.

[591] In re Stevenson, 94 Fed. 110, 2 Am. Bankr. Rep. 66; In re Dupree, 97 Fed. 28.

[592] Keatley v. United States, 45 Ct. Cl. 36.

CHAPTER XI

SUITS BY AND AGAINST THE BANKRUPT

§ 185. Effect of Bankruptcy on Pending Suits.—The state tribunals are not deprived, by the mere force of an adjudication of bankruptcy, of jurisdiction over suits pending at the time against the bankrupt. They may grant a stay of proceedings in such suits on a proper application in that behalf. And the court of bankruptcy making the adjudication has the power and authority to arrest or control the proceedings in such suits when it becomes necessary for the proper working of the bankruptcy law, provided the particular action is based upon a debt or claim from which the bankrupt's discharge would release him, and until the question of his discharge has been determined. But when such power is not exercised (or in the cases in which it cannot be exercised) the jurisdiction of the ordinary courts remains unimpaired, and they are not required to dismiss pending actions, but may proceed to render valid judgments therein.[1] As stated by the court in Georgia, the bank-

[1] Martin v. Oliver, 260 Fed. 89, 171 C. C. A. 125, 43 Am. Bankr. Rep. 739; Chase v. Farmers' & Mechanics' Nat. Bank, 202 Fed. 904, 121 C. C. A. 262, 30 Am. Bankr. Rep. 200; Brazil v. Azevedo, 32 Cal. App. 364, 162 Pac. 1049; In re Davis, 1 Sawy. 260, 4 N. B. R. 715, Fed. Cas. No. 3,620; Hewett v. Norton, 1 Woods, 68, 13 N. B. R. 276, Fed. Cas. No. 6,441; First Nat. Bank v. Abner, 1 MacArthur (D. C.) 590; In re Davis, 8 N. B. R. 167, Fed Cas. No. 3,619; Cutter v. Evans, 115 Mass. 27, 11 N. B. R. 448; Munson v. Boston, H. & E. R. Co., 120 Mass. 81, 21 Am. Rep. 499; Seymour v. Browning, 17 Ohio, 362; Serra é Hijo v. Hoffman, 29 La. Ann. 17; Brown v. Newman, 66 Ala. 275; Sutherland v. Davis, 42 Ind. 26, 10 N. B. R. 424; Brandon Mfg. Co. v. Frazer, 47 Vt. 88, 19 Am. Rep. 118, 13 N. B. R. 362; United States v. Mackoy, 2 Dill. 299, Fed. Cas. No. 15,696; Friedman v. Zweifler, 74 Misc. Rep. 448, 132 N. Y. Supp. 320; Hardesty v. Graham, 7 Ky. Law Rep. 447; Brackett v. Dayton, 34 Minn. 219, 25 N. W. 348; Lewis v. Higgins, 52 Md. 616; Hobart v. Haskell, 14 N. H. 127; McCormick v. Raymond, 13 Neb. 306, 14 N. W. 402; Esterbrook Steel Pen Mfg. Co. v. Ahern, 31 N. J. Eq. 3; Bowman v.

ruptcy of some or all of the defendants is no cause for dismissing a bill in equity prior to the hearing unless the complainant admits the bankruptcy and concedes that it bars all the relief prayed for. Suspending proceedings, in terms of the bankruptcy act, is a different thing from dismissing the bill.[2] The case is somewhat altered, however, where the object of the suit is to enforce a specific lien on property of the bankrupt. Even assuming that the lien is of such a character as not to be affected by the proceedings in bankruptcy, it is the prerogative of the court of bankruptcy to control the proceedings thereon in such a manner as to save the rights of general creditors. Hence, if an attaching creditor, who knows that proceedings in bankruptcy have been instituted, proceeds in his suit against the bankrupt to judgment before a trustee is appointed, it is a fraud upon the law, and he will not be allowed to retain the fruits of his writ.[3] And in general, while a valid judgment may be rendered against the bankrupt, if the proceedings are not stayed or arrested, its only effect is to fix the amount of his liability. That is, no judgment rendered against the bankrupt after the filing of the petition can create any lien upon his estate, for the consequence would be to withdraw some portion of the property from the exclusive control and custody of the court of bankruptcy.[4] But the execution of a decree for partition in a state court is not arrested because one of the parties to the suit becomes bankrupt; for his share of the property simply vests in his trustee.[5] And a judgment entered after the adjudication, on a default entered before the petition was filed, without fraud, mistake, or surprise, where the bankrupt had no defense, will not be set aside.[6]

Strother, 144 Mo. App. 100, 128 S. W. 848; Sively v. Campbell, 23 Gratt. (Va.) 893; Williams v. Lane, 158 Cal. 39, 109 Pac. 873; Johnson v. Bishop, Woolw. 324, Fed. Cas. No. 7,373; Irving Nat. Bank v. Adams, 90 N. Y. 682; Nonotuck Silk Co. v. Pritzker, 143 Ill. App. 644. Compare Fellows v. Hall, 3 McLean, 487, Fed. Cas. No. 4,723. For the general rule that the pendency of a suit in a federal court cannot be pleaded in abatement of a suit in a state court (or vice versa), though it involves the same parties and the same subject-matter, see the following cases: Latham v. Chafee, 7 Fed. 529; Hospes v. O'Brien, 24 Fed. 145; Coe v. Aiken, 50 Fed. 640; Logan v. Greenlaw, 12 Fed. 10; Dwight v. Central Vermont R. Co., 9 Fed. 785; Lyman v. Brown, 2 Curt. C. C. 559, Fed. Cas. No. 8,627; Wadleigh v. Veazie, 3 Sumn. 165, Fed. Cas. No. 17,031; White v. Whitman, 1 Curt. C. C. 494, Fed. Cas. No. 17,561.

[2] Ballin v. Ferst, 55 Ga. 546.

[3] Ex parte Foster, 2 Story, 131, Fed. Cas. No. 4,960; Everett v. Stone, 3 Story, 446, Fed. Cas. No. 4,577; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56. L. Ed. 208, 27 Am. Bankr. Rep. 262. And see, infra, Chapter XX, and particularly §§ 376. 389.

[4] McLean v. Rockey, 3 McLean, 235, Fed. Cas. No. 8,891. Though a contractor has been adjudged bankrupt, this is no obstacle to a suit by materialmen on the contractor's bond, where there is no question as to the amounts due the several claimants and credit is given for a dividend already paid by the trustee. People v. Valley Mantel & Tile Co., 200 Mich. 554, 166 N. W. 839.

[5] Baum v. Stern, 1 S. Car. 415.

[6] Fiske v. Hunt, 2 Story, 582, Fed. Cas. No. 4,831. See American Wood Working Machinery Co. v. Furbush, 193 Mass. 455,

For an even stronger reason the bankruptcy of the defendant is not a bar to a motion to amend the minutes of the court, by entering nunc pro tunc a verdict rendered some years previously against him.[7] In the case of several joint defendants in a pending suit in a state court, one or more of whom are in bankruptcy, but not all, the suit will not be stayed on the application of those not affected by the bankruptcy proceedings,[8] and some courts have held that partnership creditors may attach partnership assets, though one member of the firm is a bankrupt.[9] Finally, it should be noted that, while the trustee in bankruptcy is the proper person to assume and carry on litigation in which the bankrupt is concerned, still a bankrupt who is defendant in a pending suit may defend it, if the trustee refuses to do so.[10]

§ 186. Stay of Pending Suits by State Court.—The bankruptcy act of 1867 provided that "no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, on the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of his discharge."[11] It was held that this provision was applicable to suits pending in the state courts, as well as to any proceedings in a federal court, and was equally binding upon them. Consequently it was decided that it was the duty of a state court, in which a suit was pending against a bankrupt on a provable debt, to grant a stay of proceedings therein, upon the application of the bankrupt or his assignee, seasonably made, until the question of his discharge should have been determined; and this, without any injunction or order from the court of bankruptcy.[12] The present statute provides that a suit founded upon a claim from which a discharge in bankruptcy would be a release, and which is pending against a person at the time of the filing of a petition in bankruptcy against him, "shall be stayed" until an adjudication is made or the petition dismissed;

79 N. E. 770. Where, after judgment on a note for plaintiff, it is discovered that he had been adjudged bankrupt, and that the note had not been scheduled, such facts constitute ground for a new trial. Juden v. Nebham (Miss.) 60 South. 45.

[7] Woolfolk v. Gunn, 45 Ga. 117, 10 N. B. R. 526.

[8] Johnson v. Waxelbaum Co., 1 Ga. App. 511, 58 S. E. 56; Ex parte Canada, 151 Mo. App. 704, 132 S. W. 754.

[9] Pelzer Mfg. Co. v. Pitts & Hartzog, 76 S. Car. 349, 57 S. E. 29, 11 Ann. Cas. 665.

[10] Lane v. Moore, 59 N. H. 80.

[11] Rev. Stat. U. S. § 5106.

[12] Hill v. Harding, 107 U. S. 631, 2 Sup. Ct. 404, 27 L. Ed. 493; Boynton v. Ball, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985; Bratton v. Anderson, 5 S. Car. 504, 14 N. B. R. 99; Ray v. Wight, 119 Mass. 426, 20 Am. Rep. 333; Braley v. Boomer, 116 Mass. 527, 12 N. B. R. 303; Rood v. Stevens, 49 Conn. 45; Frostman v. Hicks, 3 Wkly. Notes Cas. (Pa.) 202, 15 N. B. R. 41.

and if such person is adjudged bankrupt, the action "may be further stayed" until his application for discharge is determined or until twelve months from the date of the adjudication have expired.[13] It has been held that this provision is substantially similar to the corresponding clause of the act of 1867, and that the rule announced under the earlier statute is clearly applicable to the present law; so that it is now, as before, the duty of the state court to grant a stay of proceedings when the suit pending against the bankrupt is founded on a debt or claim from which his discharge would release him, and when application therefor is duly made.[14] And although the court of bankruptcy has the power to order a stay of such proceedings, and may, if necessary, enjoin the plaintiff from further prosecution of his suit, it has been ruled that the application for a stay should not be made to the federal court in the first instance, but to the state court.[15]

To warrant the state court in taking this action it is necessary that the fact of the bankruptcy should be brought to its judicial attention in some proper manner, generally by a formal answer or plea.[16] A mere statement of defendant's counsel at the trial that his client is in bank-

[13] Bankruptcy Act 1898, § 11a.

[14] In re Tune, 115 Fed. 906, 8 Am. Bankr. Rep. 285; Star Braiding Co. v. Stienen Dyeing Co. (R. I.) 114 Atl. 129; Maas v. Kuhn, 130 App. Div. 68, 114 N. Y. Supp. 444; First Nat. Bank v. Flynn, 117 Iowa, 493, 91 N. W. 784; McIntyre v. Malone, 3 Neb. (Unof.) 159, 91 N. W. 246; Stone v. Brookville Nat Bank, 39 Ind. 284; Turner v. Gatewood, 8 B. Mon. (Ky.) 613; Dickens v. Dickens, 174 Ala. 305, 56 South. 806. But some courts, particularly in Massachusetts, do not admit this rule to the fullest extent, but hold that it is entirely within their discretion whether or not to stay the suit. See Rosenthal v. Nove, 175 Mass. 559, 56 N. E. 884, 78 Am. St. Rep. 512; Feigenspan v. McDonnell, 201 Mass. 341, 87 N. E. 624; St Louis World Pub. Co. v. Rialto Grain & Securities Co., 108 Mo. App. 479, 83 S. W. 781; Smith v. Miller, 226 Mass. 187, 115 N. E. 243. An order of the state court "abating" a suit because of the pendency of bankruptcy proceedings against the defendant is properly made, but should be interpreted as staying further action until the outcome of the bankruptcy proceeding, and not as a final determination of the matter. Clark v. Fighting Wolf Mining Co. (Mo. App.) 209 S. W. 307.

[15] Ohio Motor Car Co. v. Eiseman Magneto Co., 230 Fed. 370, 144 C. C. A. 512, 36 Am. Bankr. Rep. 237; (certiorari denied, National Carbon Co. v. Ohio Motor Car Co., 241 U. S. 673, 36 Sup. Ct. 724, 60 L. Ed. 1231); In re Geister, 97 Fed. 322, 3 Am. Bankr. Rep. 228; McIntyre v. Malone, 3 Neb. (Unof.) 159, 91 N. W. 246; Delavergue v. Farrand, 1 Mich. N. P. 90; Stone v. Brookville Nat. Bank, 39 Ind. 284; Smith v. Soldiers' Business Messenger & Dispatch Co., 35 N. J. Law, 60. Contra, see Garrett v. Carrow, 3 Houst. (Del.) 652.

[16] Holden v. Sherwood, 84 Ill. 92; Red River Nat. Bank v. Bray (Tex. Civ. App.) 132 S. W. 968; State v. Broaddus, 234 Mo. 358, 137 S. W. 268. See Reynolds v. Pennsylvania Oil Co., 150 Cal. 629, 89 Pac. 610. A defendant who desires to plead his subsequent discharge in bankruptcy as a bar, should move for a continuance to see if he shall obtain it, and if he does, he should then plead it. Rogers v. Abbott, 206 Mass. 270, 92 N. E. 472, 138 Am. St. Rep. 394. A petition by trustees to vacate an attachment of the bankrupt's realty, after the adjudication, is the appropriate method of procedure. Ward v. Hargett, 151 N. C. 365, 66 S. E. 340.

ruptcy will not be sufficient to operate as a stay of proceedings;[17] and evidence of the fact of the defendant's bankruptcy cannot be introduced under the plea of the general issue.[18]

It has been ruled that the mere filing of a petition in bankruptcy, without any adjudication thereon, does not bar the prosecution of a suit against the debtor in a state court, and is no ground for staying the proceedings.[19] But this seems to be contrary to the plain terms of the present statute, which evidently makes the stay before adjudication imperative, though a further stay after the adjudication is perhaps discretionary. But a state court need not grant a stay of an action brought therein against the bankrupt jointly with others; it will order that proceedings on any judgment which may be obtained against him shall be stayed until the further order of the court.[20] Where, after the verdict but before the entry of a judgment thereon, in a cause pending in a state court, the defendant files his petition in bankruptcy, the court, on the filing of a certificate of his having been adjudged bankrupt, and on motion of the defendant, should stay further proceedings until the bankruptcy court passes upon his application for discharge; and on a showing that the discharge was granted, the state court will render judgment on the verdict against the defendant, but with a perpetual stay of execution.[21] A debtor, however, who files his petition in bankruptcy pending a suit against him in a state court for a debt provable in bankruptcy, while he may obtain a stay of proceedings in the suit, is under no obligation to do so. He may allow the suit to proceed to judgment without forfeiting his right to avail himself of his discharge, if he shall subsequently obtain it. And if a judgment is entered, he may apply to the court to vacate it, or he may interpose his discharge as a defense as soon as the plaintiff moves to enforce his judgment.[22] The levy of an execution issued after the defendant has made application for the benefit of the bankruptcy law, will be quashed by the court out of which it issued, on motion.[23]

If the debt or claim in suit is one which would not be affected by the defendant's discharge, no stay is necessary or proper. But if there is doubt on this point, a continuance may be ordered. Thus, where

[17] McGowan v. Bowman, 79 Vt. 295, 64 Atl. 1121.

[18] Styles v. Fuller, 101 N. Y. 622, 4 N. E. 348.

[19] Rennebaum v. Atkinson, 52 S. W. 828, 21 Ky. Law Rep. 587; Givens v. Robbins, 5 Ala. 676; Stewart v. Sonneborn, 51 Ala. 126; Murphy v. Young, 6 Wkly. Notes Cas. (Pa.) 317.

[20] Friedman v. Zweifler, 74 Misc. Rep. 448, 132 N. Y. Supp. 320; Hoyt v. Freel, 8 Abb. Prac. N. S. (N. Y.) 220, 4 N. B. R. 131.

[21] Hill v. Harding, 116 Ill. 92, 4 N. E. 361. See Rosenthal v. Nove, 175 Mass. 559, 56 N. E. 884, 78 Am. St. Rep. 512.

[22] Whyte v. McGovern, 51 N. J. Law, 356, 17 Atl. 957. But compare Darnall v. Cline, 4 Ky. Law Rep. 537.

[23] McDougald v. Reid, 5 Ala. 810.

the complaint states a cause of action for embezzlement, but the defendant asserts that his liability, if any, is on contract, it is proper for the state court to postpone the action, pending a determination against the defendant in the court of bankruptcy.[24] And where an equitable petition was filed, seeking to enjoin the enforcement of a judgment and have an equitable set-off against it established, it was held that the fact that defendant had been adjudicated a bankrupt and no trustee had been appointed, was not ground for staying a hearing on a demurrer to the petition.[25]

§ 187. Stay by Injunction or Order from Federal Court.—The authority of a court of bankruptcy to grant an injunction or restraining order staying the prosecution of a pending suit in a state court against a bankrupt is supported not only by the explicit provision of the eleventh section of the bankruptcy act, but also by the grant to the courts of bankruptcy (in the second section of the act) of jurisdiction to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." It is pertinent also to notice that the general prohibition of the use of the writ of injunction "by any court of the United States to stay proceedings in any court of a state," is subject to the specific exception of "cases where such injnnction may be authorized by any law relating to proceedings in bankruptcy."[26] It may be stated, therefore, that if the pending suit is upon a debt or claim which would be released by a discharge, it is within the jurisdiction of the court of bankruptcy to order its stay or enjoin its prosecution.[27] And it makes no difference that the state court had previously denied a

[24] Ex parte Butler-Keyser Mfg. Co., 174 Ala. 237, 56 South. 960.

[25] Miller v. Smith, 136 Ga. 117, 70 S. E. 887.

[26] Federal Judicial Code 1911, § 265.

[27] Mitchell Storebuilding Co. v. Carroll, 193 Fed. 616, 113 C. C. A. 484, 27 Am. Bankr. Rep. 894; Moore v. Green, 145 Fed. 472, 76 C. C. A. 242, 16 Am. Bankr. Rep. 648; Bothwell v. Fitzgerald, 219 Fed. 408, 135 C. C. A. 212, 34 Am. Bankr. Rep. 261; Drake v. Hodgson, 192 App. Div. 676, 183 N. Y. Supp. 486; Fowler v. Dillon, 1 Hughes, 232, Fed. Cas. No. 5,000. And see supra, § 29. Where there were more than 100 separate damage claims against a bankrupt corporation, all arising from the same transaction, on some of which actions had been brought in the state courts, and in all of which liability depended on the same facts, the bankrupt was held entitled to an injunction restraining prosecution of suits on such claims until it could obtain its discharge, and its trustee was held entitled to an order requiring adjudication of the claims in the bankruptcy court, where they could be consolidated for trial as to liability. In re People's Warehouse Co. (D. C.) 273 Fed. 611. But the court of bankruptcy has no jurisdiction to enjoin a sale of property on a judgment rendered in a state court enforcing a mortgage lien of date long prior to four months preceding the adjudication of the mortgagor as a bankrupt. Sample v. Beasley, 158 Fed. 607, 85 C. C. A. 429, 20 Am. Bankr. Rep. 164. And see Pickens v. Dent, 106 Fed. 653, 45 C. C. A. 522, 5 Am. Bankr. Rep. 644.

similar application by the same petitioner.[28] Even though the pending action is not directly against the bankrupt himself, the court of bankruptcy has power to enjoin its further prosecution, if the proceedings in the state court, if allowed to continue, might interfere with and delay the settlement of the bankrupt's estate, as, where the defendant in such action, though a solvent corporation and not in bankruptcy, is claimed to be a mere department or adjunct of the business of the bankrupt, and therefore its assets are claimed by the trustee in bankruptcy.[29]

Though the statute speaks only of staying suits against a defendant "against" whom a petition in bankruptcy has been filed, it applies equally to the case of voluntary bankrupts as to those adjudged bankrupt on compulsory proceedings; for the first section of the act declares that the phrase "a person against whom a petition has been filed" shall include "a person who has filed a voluntary petition." [30] Though the statute does not in terms declare that this power must be exercised by the judge of the court of bankruptcy, to the exclusion of the referee, the plain direction of the General Orders is to that effect, and the courts have sanctioned the rule that a referee has no jurisdiction to issue an injunction staying proceedings in a state court.[31] It will also be observed that, as regards the staying of an action after the adjudication in bankruptcy, the granting of an order for that purpose rests in the discretion of the district court, since the language of the law is that such action "may be stayed" until the question of the bankrupt's discharge is determined; and the action of the court of bankruptcy in this matter will not be interfered with by the appellate court, on petition for review, unless such discretion has been abused.[32] In fact, the courts should incline against any unnecessary interference with the normal action of the state courts, and their power in this behalf should be sparingly exercised,[33] upon due and careful consideration of all the equities of the case,[34] and not at all where there is legitimate scope for the judg-

[28] New River Coal Land Co. v. Ruffner Bros., 165 Fed. 881, 91 C. C. A. 559, 21 Am. Bankr. Rep. 474.

[29] Mitchell Storebuilding Co. v. Carroll, 193 Fed. 616, 113 C. C. A. 484, 27 Am. Bankr. Rep. 894.

[30] In re Geister, 97 Fed. 322, 3 Am. Bankr. Rep. 228.

[31] General Order No. 12, cl. 3; In re Siebert, 133 Fed. 781, 13 Am. Bankr. Rep. 348; In re Mussey, 2 Nat. Bankr. News, 113. See In re Kimmel, 183 Fed. 665, 25 Am. Bankr. Rep. 595, where such an injunction, granted by a referee, was continued in force by the district court, no question being raised as to the referee's jurisdiction. And see In re Lombardy Inn Co. (D. C.) 266 Fed. 394, 44 Am. Bankr. Rep. 444.

[32] In re Lesser (C. C. A.) 99 Fed. 913, 3 Am. Bankr. Rep. 758; In re Bittle (D. C.) 239 Fed. 191, 38 Am. Bankr. Rep. 484.

[33] In re United Wireless Telegraph Co., 196 Fed. 153, 28 Am. Bankr. Rep. 394; In re Guanacevi Tunnel Co. (C. C. A.) 201 Fed. 316, 29 Am. Bankr. Rep. 229.

[34] Henry v. Harris, 191 Fed. 868.

ment of the state court without interfering with the jurisdiction of the bankruptcy court.[35]

It has been made a question whether the power of a court of bankruptcy to enjoin and stay proceedings against the bankrupt extends to cases pending in any and all courts, state or federal, and whether its process issuing for this purpose may run throughout the United States, or must be confined to its own judicial district.[36] But it will be remembered that the order or process of the court of bankruptcy acts upon the parties (that is, plaintiffs in such actions) and not upon the courts where the suits may be pending. Now all creditors of the bankrupt are parties to the proceedings in bankruptcy, because such proceedings are in rem, and moreover, a court of bankruptcy has power to restrain any and all persons from unlawfully interfering with the property of the estate in bankruptcy.[37] Hence any creditor who is within reach of the process of the court may be enjoined or restrained from the further prosecution of his action. The court, indeed, cannot stay or enjoin foreign creditors proceeding against the bankrupt in a foreign court; but if they seek the aid of the court of bankruptcy for the enforcement of their demands, they will not be allowed any advantage over other creditors.[38] Thus, where the resident partners of a firm, having a partner residing abroad, prove a debt in bankruptcy, the firm becomes a party to the proceedings, and the resident partners may be restrained from prosecuting suits abroad to collect the claim.[39] It must also be remarked that the power of the bankruptcy court to restrain actions against the bankrupt or his property extends not only to the state courts, but also to the admiralty side of the same court, and a libel against the bankrupt's vessel, filed under such circumstances, will be enjoined.[40] But the power to stay actions against the bankrupt, by injunction, is vested only in that court in which the proceedings in bankruptcy are pending. A federal district court cannot enjoin proceedings in a state court on the ground that proceedings in bankruptcy against the defendant are pending in some other federal district court.[41] And while the

[35] In re United Wireless Telegraph Co., 196 Fed. 153, 28 Am. Bankr. Rep. 394.

[36] See In re Hirsch, 2 Ben. 493, 2 N. B. R. 3, Fed. Cas. No. 6,529; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208, 27 Am. Bankr. Rep. 262; Progressive Building & Loan Co. v. Hall, 220 Fed. 45, 135 C. C. A. 613, 33 Am. Bankr. Rep. 313; John A. Roebling's Sons Co. v. Federal Storage Battery Car Co., 185 App. Div. 430, 173 N. Y. Supp. 297.

[37] In re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815.

[38] In re Bugbee, 9 N. B. R. 258, Fed. Cas. No. 2,115. And see Phillips v. Hunter, 2 H. Bl. 402, 414.

[39] In re Schepeler, 4 Ben. 68, Fed. Cas. No. 12,453.

[40] In re People's Mail S. S. Co., 3 Ben. 226, 2 N. B. R. 552, Fed. Cas. No. 10,970.

[41] In re Richardson, 2 Ben. 517, 2 N. B. R. 202, Fed. Cas. No. 11,774; Markson v. Heaney, 1 Dill. 497, 4 N. B. R. 510, Fed. Cas. No. 9,098.

bankruptcy court has power to stay pending suits against the bankrupt, and also to empower the trustee to take the place of the bankrupt therein, it has no authority to withdraw from the state court a suit pending therein and compel its trial in the district court.[42]

Application for an order staying a suit, or enjoining further proceedings therein, may be made by the trustee in bankruptcy, if one has been appointed, or by the bankrupt himself, if no trustee has yet been selected,[43] or perhaps by a creditor of the estate whose interests might be affected by the result of the litigation. As a general rule, the plaintiff in the pending suit is cited before the court of bankruptcy on a rule to show cause why he should not be restrained from the further prosecution of his action, and thereupon, if the facts developed at the hearing will warrant it, an order, in the nature of a restraining order, may issue against him. But the more formal method of a writ of injunction may be resorted to.[44] But when this is desired, it is not necessary that the formal and plenary proceedings common to suits in equity in the circuit courts should be carried out. A petition stating the facts and praying for the order desired will be sufficient. Nor is it necessary that notice should be given of the application for injunction.[45] For similar reasons, any party who desires to obtain the dissolution of an injunction so granted may apply therefor by motion.[46]

The bankruptcy act of 1867 provided that pending suits against the bankrupt might be stayed "to await the determination of the court of bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge." [47] But the present law is much more explicit. It does not allow the stay to extend for a longer period than twelve months after the adjudication in bankruptcy, except where, before the expiration of that time, an application for discharge is filed, and then only until the question of the discharge is determined.[48] After a discharge has been

[42] Samson v. Burton, 5 Ben. 325, 4 N. B. R. 1, Fed. Cas. No. 12,285.

[43] Brock v. Terrell, 2 N. B. R. 643, Fed. Cas. No. 1,914; In re Tifft, 18 N. B. R. 78, Fed. Cas. No. 14,031.

[44] In re Citizens' Sav. Bank, 9 N. B. R. 152, Fed. Cas. No. 2,735.

[45] In re William E. Delaney & Co., 124 Fed. 280, 10 Am. Bankr. Rep. 634. But see Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208, 27 Am. Bankr. Rep. 262.

[46] In re Wallace, Deady, 433, 2 N. B. R. 134, Fed. Cas. No. 17,094.

[47] Rev. Stat. U. S. § 5106. See In re Sweet, 36 Fed. 761; Greenwald v. Appell, 5 McCrary, 339, 17 Fed. 140.

[48] In re Weisberg (D. C.) 253 Fed. 833, 42 Am. Bankr. Rep. 616; In re Federal Biscuit Co., 214 Fed. 221, 130 C. C. A. 635, 32 Am. Bankr. Rep. 612; Pell v. McCabe (D. C.) 254 Fed. 356, 42 Am. Bankr. Rep. 762. "Adjudication," with respect to the time, means the date of the entry of a decree that the defendant is a bankrupt, or, if such decree is appealed from, then the date when such decree is finally confirmed. Bankruptcy Act 1898, § 1, cl. 2. As to restraining

granted or denied, there is no need of staying pending suits; for in the one case the bankrupt may plead his discharge in bar, and in the other, his liability to judgment is not affected by the bankruptcy proceedings. But the fact that the bankrupt has already received his discharge is no obstacle to an injunction from the court of bankruptcy directed against the enforcement of a collusive or fraudulent judgment or transfer of property.[49]

§ 188. Leave to Continue Suit in State Court.—The former bankruptcy law provided that "if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed."[50] No such provision is found in the present law. But practically the same result is worked out by leaving it in the discretion of the court of bankruptcy to stay the further prosecution of a pending suit after the adjudication. It may, of course, withhold its hand and leave the creditor to proceed. For example, in a case in the second circuit, the bankrupt was entitled to support and maintenance out of a trust fund, but under the laws of the state (New York) the surplus income of such a fund, over and above what is necessary for the beneficiary's support, may be made available to satisfy the claims of his creditors. Before the bankruptcy, certain creditors had brought a suit in the state court for this purpose. There was a proposal that the trustee in bankruptcy should then institute a similar action, but a majority of the creditors in number and amount voted against this, on the ground that they did not believe the action could be maintained by him. Orders were then made allowing the creditors to continue the prosecution of their suit, but on condition that the net amount recovered should be turned over to the trustee for distribution, and that, if the action were unsuccessful, the estate in bankruptcy should not be charged with the costs and expenses. And it was held that these orders were proper and could not be complained of by the bankrupt or by other creditors.[51]

That there may be cases in which the court of bankruptcy should not interfere with the prosecution of actions in the state courts is fur-

creditors from prosecuting suits after the lapse of the time provided for by the terms of a composition, see In re Nebenzahl, 9 Ben. 243, 17 N. B. R. 23, Fed. Cas. No. 10,074.

[49] See Southern Loan & Trust Co. v. Benbow, 96 Fed. 514, 3 Am. Bankr. Rep. 9.

[50] Rev. Stat. U. S. § 5106. See May v. Courtnay, 47 Ala. 185: In re Rundle, 2 N. B. R. 113, Fed. Cas. No. 12,138; In re Bousfield & Poole Mfg. Co., 17 N. B. R. 153, Fed. Cas. No. 1,704; In re Cooke, Fed. Cas. No. 3,172; Rutherford v. Rountree, 68 Ga. 725.

[51] In re Buchanan, 219 Fed. 492, 135 C. C. A. 204, 33 Am. Bankr. Rep. 638.

ther shown by another clause of the act, which provides that a creditor may prove, as a claim against the estate, a judgment upon a provable debt rendered after the filing of the petition and before the consideration of the bankrupt's discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of the judgment. (Bankruptcy Act, § 63, cl. 5.) Thus it is not necessary to obtain leave of the court of bankruptcy to continue to judgment a suit founded in tort, pending at the time of the filing of the petition in bankruptcy, for the claim would not be provable until the judgment was obtained.[52] Again, the law provides that "unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate," [53] and this implies the authority to direct the liquidation of such a claim by suit in a state court. So, a pending suit on a dischargeable debt, in which the bankrupts had been arrested and given bail more than four months prior to their bankruptcy, may be permitted to proceed to judgment to enable the plaintiff to enforce his demand against the surety in the undertaking, in case it is in form a security for the payment of the judgment.[54] Moreover, a suit to enforce a valid security against property of the bankrupt may be allowed to continue, where nothing is to be gained for the general creditors by assuming jurisdiction over the property. For instance, where several attachments were levied so far before the commencement of the bankruptcy proceedings as not to be affected by them, a state court may proceed to determine the question of priority of liens as between the several creditors.[55] Again, a stay of proceedings against the bankrupt in a state court may be vacated, so as to permit creditors to move the state court to punish the bankrupt for contempt committed prior to the filing of the bankruptcy petition.[56] But in no case whatever will the court of bankruptcy permit property which is in the custody and possession of a trustee in bankruptcy to be seized on execution or other final process from a state court based on a judgment against the bankrupt, or against the trustee as his successor in interest.[57]

[52] In re Hennocksburgh, 6 Ben. 150, 7 N. B. R. 37, Fed. Cas. No. 6,367; Louisville Dry Goods Co. v. Lanman, 135 Ky. 163, 121 S. W. 1042, 28 L. R. A. (N. S.) 363, 135 Am. St. Rep. 451.

[53] Bankruptcy Act 1898, § 63b. See Blair v. Carter's Adm'r, 78 Va. 621.

[54] In re Ennis v. Stoppani, 171 Fed. 755, 22 Am. Bankr. Rep. 679. See In re Martin, 105 Fed. 753, 5 Am. Bankr. Rep. 423.

[55] Davis v. Friedlander, 104 U. S. 570, 26 L. Ed. 818.

[56] In re Sims, 176 Fed. 645, 23 Am. Bankr. Rep. 899.

[57] Allen v. Montgomery, 48 Miss. 101, 10 N. B. R. 503. Creditors of a bankrupt corporation may apply to the bankruptcy

§ 189. What Actions May be Stayed.—The provision of the act of 1867, authorizing a temporary stay of pending suits against the bankrupt, made no distinction between debts which would be released by his discharge and debts which would not be so released; and it was accordingly held that, even in cases where the claim was one which would not be affected by the discharge, proceedings on it must be stayed until the question of the discharge was determined.[58] But the present act expressly restricts the stay of suits to such as are "founded upon a claim from which a discharge would be a release." It is necessary, therefore, to warrant an order staying pending proceedings, first, that the claim in suit should be one which is provable in the bankruptcy proceedings (for otherwise it could not be affected by the discharge) and second, that, if provable, it should not be within the classes of claims which are expressly excepted from the operation of a discharge.[59] It is within the exclusive jurisdiction of the court of bankruptcy to determine whether these two conditions exist, and its decision on the point is final and conclusive, unless reversed on appeal,[60] and it is not bound or concluded by any decision of the state court on the same question,[61] although the bankruptcy court is not required to enter into an investigation outside of the pleadings in the action to determine the character of the claim.[62] As to the first requisite, an unliquidated claim, which might have been liquidated and proved against the bankrupt, should be treated as a provable debt for this purpose.[63] So where the debt is clearly provable in bankruptcy, an action based upon it should be stayed, although its object is not to enforce collection of the claim, but to remove the bankrupt from his position as a member of a munici-

court for leave to prosecute their claims to judgment, so as to enforce the liability of stockholders; but such creditors will not be permitted to issue executions. John A. Roebling's Sons Co. v. Federal Storage Battery Car Co., 185 App. Div. 430, 173 N. Y. Supp. 297.

[58] In re Ghirardelli, 1 Sawy. 343, 4 N. B. R. 164, Fed. Cas. No. 5,376; In re Rosenberg, 3 Ben. 14, Fed. Cas. No. 12,054; In re Schwartz, 14 Blatchf. 196, Fed. Cas. No. 12,502; In re Van Buren, Fed. Cas. No. 16,833.

[59] In re Camelo, 195 Fed. 632, 28 Am. Bankr. Rep. 353. A fine imposed on a bankrupt by a state court for a civil contempt, for disobedience of its orders, is not a provable debt, and hence a court of bankruptcy has no jurisdiction to interfere with its enforcement. People v. Sheriff of Kings County, 206 Fed. 566. Where it is substantially doubtful whether or not the particular claim is dischargeable in bankruptcy, a motion to vacate the stay should be denied. In re Dunfee, 206 Fed. 745, 30 Am. Bankr. Rep. 721.

[60] In re Mustin, 165 Fed. 506, 21 Am. Bankr. Rep. 147; American Graphophone Co. v. Leeds & Catlin Co., 174 Fed. 158, 23 Am. Bankr. Rep. 337; Wagner v. United States, 104 Fed. 133, 43 C. C. A. 445, 4 Am. Bankr. Rep. 596.

[61] Knott v. Putnam, 107 Fed. 907, 6 Am. Bankr. Rep. 80.

[62] In re Adler, 152 Fed. 422, 81 C. C. A. 564, 18 Am. Bankr. Rep. 240.

[63] In re Hilton, 104 Fed. 981, 4 Am. Bankr. Rep. 774. But compare In re New York Tunnel Co., 159 Fed. 688, 86 C. C. A. 556, 20 Am. Bankr. Rep. 25. And see Imbriani v. Anderson, 76 N. H. 491, 84 Atl. 974.

pal fire department because of his failure to pay the debt in question.[64] Generally speaking, however, suits which contemplate some other relief than the collection of a debt are not to be stayed, as their prosecution would not ordinarily interfere with the bankruptcy proceedings.[65] Examples are proceedings for an accounting before a master in a patent infringement suit, where an interlocutory judgment had been rendered before the adjudication in bankruptcy,[66] and an action of forcible entry and detainer by a landlord, under the state statute, to recover possession of the leased premises.[67] And so, where a lease without rent, granted in consideration of the delivery of corporate stock of the lessee, provided for forfeiture of the lease on the bankruptcy of the lessee, the trustee in bankruptcy of an assignee of the lease cannot have the enforcement of the forfeiture clause enjoined, at least where there is no showing of fraud or mistake.[68] For similar reasons a court of bankruptcy is without power to stay a suit in a state court for money had and received, against a third person, who, in the character of a mere stakeholder, has possession of a fund which is also claimed by the trustee in bankruptcy.[69] But on the other hand, it is held by a state court that a suit brought under the statute to have a mortgage declared a general assignment for creditors should not be stayed on the filing of respondents' special plea setting up the pendency of bankruptcy proceedings when the bill was filed.[70]

Secondly, the prosecution of a pending action in a state court against the bankrupt should not be stayed or enjoined when the debt on which it is founded is one which will not be released by his discharge in bankruptcy,[71] except, of course, in cases where the temporary suspension of the action is necessary to enable the court of bankruptcy fully to carry out the provisions of the law and to exercise without hindrance

[64] In re Hicks, 133 Fed. 739, 13 Am. Bankr. Rep. 654.

[65] In re United Wireless Telegraph Co., 192 Fed. 238, 27 Am. Bankr. Rep. 1.

[66] In re Leeds & Catlin Co., 175 Fed. 309, 23 Am. Bankr. Rep. 679.

[67] In re Van Da Grift Motor Car Co., 192 Fed. 1015, 27 Am. Bankr. Rep. 474.

[68] Empress Theatre Co. v. Horton (C. C. A.) 266 Fed. 657, 46 Am. Bankr. Rep. 80.

[69] In re Interocean Transp. Co. of America (D. C.) 232 Fed. 408, 36 Am. Bankr. Rep. 651.

[70] Anders Bros. v. Latimer, 198 Ala. 573, 73 South. 925.

[71] In re Warnock (D. C.) 239 Fed. 779, 39 Am. Bankr. Rep. 539; In re Johnson (D. C.) 233 Fed. 841, 37 Am. Bankr. Rep. 597; Bloemecke v. Applegate (C. C. A.) 271 Fed. 595; In re Camelo, 195 Fed. 632, 28 Am. Bankr. Rep. 353; A. Klipstein & Co. v. Allen-Miles Co., 136 Fed. 385, 69 C. C. A. 229, 14 Am. Bankr. Rep. 15; Continental Nat. Bank v. Katz (Ill.) 1 Nat. Bankr. News, 165; Black v. McClelland, 12 N. B. R. 481, Fed. Cas. No. 1,462; In re Dowie, 202 Fed. 816, 29 Am. Bankr. Rep. 338. Where the bankrupt, though duly served in an action on a claim barred by his discharge, made default, it was held that the court of bankruptcy could not enjoin the enforcement of the judgment of the state court, for the defense of a discharge in bankruptcy is waived unless pleaded. In re Boardway (D. C.) 248 Fed. 364, 41 Am. Bankr. Rep. 478.

its plenary jurisdiction over the estate of the bankrupt.[72] If, for example, the plaintiff is proceeding against the bankrupt for a debt "created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity," the claim is one which will not be affected by a discharge, if granted, and therefore the action should not be stayed.[73] Again, since a suit to require a defendant corporation to issue a certificate of stock, and for damages for refusing to issue it, involves a claim from which a discharge in bankruptcy would not be a release, the suit cannot be stayed.[74] And wages earned by a bankrupt after his adjudication belong to him and not to his estate in bankruptcy, and the court has no jurisdiction to take action against a creditor who has wrongfully collected such wages on an assignment made prior to the bankruptcy.[75]

So also, according to the preponderance of authority, alimony awarded to a divorced wife by the judgment of a court of competent jurisdiction, to be paid in fixed periodical instalments, and overdue at the time the husband files his petition in bankruptcy (or is adjudged bankrupt on an involuntary petition), is not provable as a "debt" against his estate, and is not such a claim as will be released by his discharge; and therefore the wife will not be stayed or enjoined, pending the bankruptcy proceedings, from pursuing appropriate remedies for its collec-

[72] In re Nuttall (D. C.) 201 Fed. 557, 29 Am. Bankr. Rep. 800.

[73] In re Cole, 106 Fed. 837, 5 Am. Bankr. Rep. 780; In re Thaw, 180 Fed. 419, 24 Am. Bankr. Rep. 759; In re Lawrence, 163 Fed. 131, 20 Am. Bankr. Rep. 698; In re Gulick, 186 Fed. 350, 26 Am. Bankr. Rep. 362; In re Wollock, 120 Fed. 516, 9 Am. Bankr. Rep. 685; Mackel v. Rochester, 135 Fed. 904; In re Adler, 144 Fed. 659, 75 C. C. A. 461, 16 Am. Bankr. Rep. 414; In re Ennis & Stoppani, 171 Fed. 755, 22 Am. Bankr. Rep. 679; Horter v. Harlan, 9 Phila. 63, 7 N. B. R. 238. See Gleason v. O'Mara, 180 Fed. 417, 103 C. C. A. 563, 24 Am. Bankr. Rep. 832; In re Kalk (D. C.) 270 Fed. 627, 46 Am. Bankr. Rep. 597. A complaint in an action in a state court alleging that the defendant, having in his possession money which was the property of the plaintiff, refused to pay over the same and converted it to his own use, was held (by Judge Ray, in the Northern District of New York) to charge a "willful and malicious injury" to property, a judgment for which, if the allegations were sustained, would not be dischargeable in bankruptcy, so that the defendant, on his subsequent bankruptcy, was held not entitled to an injunction restraining further prosecution of the action. In re Northrup, 265 Fed. 420. Where the organizer and president of a corporation induced the stockholders to let him use the corporate funds for the purchase of land for the company, but represented the price paid as larger than it actually was, thus pocketing a secret profit, a stockholder's suit against him to recover such profit necessarily involves a charge against him of misappropriating money in a fiduciary capacity; and as a claim based upon such a charge is not dischargeable in bankruptcy, it follows that, the defendant becoming bankrupt, there is no ground for staying the prosecution of the stockholder's suit. In re Bloemecke (D. C.) 265 Fed. 343, 45 Am. Bankr. Rep. 623.

[74] In re Clipper Mfg. Co., 179 Fed. 843, 103 C. C. A. 260, 24 Am. Bankr. Rep. 683.

[75] In re Karns (D. C.) 148 Fed. 143, 16 Am. Bankr. Rep. 841.

tion.[76] In a few of the district courts, however, the doctrine has prevailed that arrears of alimony, due at the time of the bankruptcy, constitute a provable debt and will be released by the discharge, and hence that contempt proceedings or other coercive means of enforcing their payment, may be stayed to await the determination of the court of bankruptcy on the question of the bankrupt's discharge.[77] But as to future instalments of alimony, that is, such as will become due and payable under the original decree after the date of adjudication in bankruptcy, it is clear that these are not provable against the bankrupt's estate, and therefore not affected by his discharge.[78] The same principle applies to a judgment in a bastardy proceeding, requiring the putative father to provide for the maintenance of the child; such an award is more in the nature of a fine or punishment than a "debt"; it is not an obligation from which the defendant will be released by his discharge in bankruptcy, and hence proceedings for its enforcement should not be stayed.[79] So again, an action for breach of promise of marriage is an action on contract and not in tort, although seduction is also alleged, and a general verdict for the plaintiff, not specifically awarding any damages for the seduction, creates a debt provable and dischargeable in bankruptcy, so that a suit for its enforcement may be stayed.[80]

[76] Audubon v. Shufeldt, 181 U. S. 575. 21 Sup. Ct. 735; 45 L. Ed. 1009, 5 Am. Bankr. Rep. 829; In re Hubbard, 98 Fed. 710, 3 Am. Bankr. Rep. 528; Turner v. Turner, 108 Fed. 785, 6 Am. Bankr. Rep. 289; In re Shepard, 97 Fed. 187; In re Anderson, 97 Fed. 321, 5 Am. Bankr. Rep. 858; In re Smith, 1 Nat. Bankr. News, 471; In re Nowell, 99 Fed. 931, 3 Am. Bankr. Rep. 837; In re Lawrie, 2 Nat. Bankr. News, 77; In re Garrett, 2 Hughes, 233, 11 N. B. R. 493, Fed. Cas. No. 5,252; In re Lachmeyer, 18 N. B. R. 270, Fed. Cas. No. 7,966; Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; Welty v. Welty, 96 Ill. App. 141; Maisner v. Maisner, 62 App. Div. 286, 70 N. Y. Supp. 1107; Young v. Young, 35 Misc. Rep. 335, 71 N. Y. Supp. 944; Lemert v. Lemert, 25 Ohio Cir. Ct. Rep. 253. In the recent case of In re Vadner (D. C.) 259 Fed. 614, the following rules were made: (1) A claim for alimony or for the maintenance of wife or child is not a provable claim which a discharge in bankruptcy will release, and hence a suit pending thereon in a state court cannot be stayed subsequent to the adjudication. (2) Relative to a stay ordered by the bankruptcy court, an action for divorce is not a claim which would be released by a discharge. (3) The enforcement of a judgment for the support of the wife and children of the bankrupt, rendered more than four months before the bankruptcy proceeding, and a lien therefor expressly created by the judgment on a note and mortgage, which, pursuant to the judgment, were lodged with the clerk of the court, will not be stayed.

[77] Wagner v. United States, 104 Fed. 133, 43 C. C. A. 445, 4 Am. Bankr. Rep. 596; In re Houston, 94 Fed. 119, 2 Am. Bankr. Rep. 107; In re Van Orden, 96 Fed. 86, 2 Am. Bankr. Rep. 801; In re Challoner, 98 Fed. 82, 3 Am. Bankr. Rep. 442; Arrington v. Arrington, 131 N. C. 143, 42 S. E. 554, 92 Am. St. Rep. 769; In re Williams' Estate, 118 N. Y. Supp. 562.

[78] See In re Nowell, 99 Fed. 931, 3 Am. Bankr. Rep. 837; In re Garrett, 2 Hughes, 235, 11 N. B. R. 493, Fed. Cas. No. 5,252; In re Lachemeyer, 18 N. B. R. 270, Fed. Cas. No. 7,966: In re Challoner, 98 Fed. 82, 3 Am. Bankr. Rep. 442.

[79] In re Baker, 96 Fed. 954, 3 Am. Bankr. Rep. 101; In re Cotton, Fed. Cas. No. 3,269; Hawes v. Cooksey, 13 Ohio, 242.

[80] In re Warth, 196 Fed. 571, 28 Am.

But there are cases in which a pending action in a state court should be allowed to proceed, even though it involves a provable and dischargeable claim. Thus where the bankrupt is a corporation, and a creditor has an action pending against it, but it appears that his ultimate object is to enforce a statutory liability against the directors and stockholders, and to do this he must first have recovered a judgment against the corporation, the bankruptcy court will refuse to enjoin him and will allow him to proceed to judgment against the bankrupt.[81] So, where the creditor's object is not to collect anything from the bankrupt, but to enforce the liability of the surety on a bail bond.[82]

On the other hand, the general rule must be modified in cases where interference by the court of bankruptcy is necessary to prevent unlawful seizure of property within its exclusive jurisdiction or to avoid the acquisition of preferences or the enforcement of liens which are annulled by the adjudication in bankruptcy. Thus, the statute does not prevent the court of bankruptcy from restraining attaching creditors of the bankrupt from the further prosecution of their attachment suits in a state court, when the preference created by the levy of such attachments was the act of bankruptcy on which the adjudication was based, and the petition was filed within four months after the levy, even though the creditors' causes of action were such as would not be affected by a discharge of the debtor in bankruptcy.[83] So also, the court may interfere where proceedings between the bankrupt and another in a state court are collusive and intended to give such other an advantage over other creditors.[84] But the jurisdiction acquired before the proceedings in bankruptcy by a state court in proceedings for the partition of an estate in which the bankrupt is interested will not be interfered with by the bankruptcy court.[85]

Proceedings to enforce the payment of a tax levied by a state or a municipal corporation should not be stayed or interfered with by the court of bankruptcy. For taxes are not debts of such a character as to be released by a discharge, and moreover they are entitled to priority

Bankr. Rep. 41; In re McCauley, 101 Fed. 223, 4 Am. Bankr. Rep. 122.

[81] In re Marshall Paper Co., 95 Fed. 419, 2 Am. Bankr. Rep. 653; In re Remington Automobile & Motor Co., 119 Fed. 441, 9 Am. Bankr. Rep. 533; John A. Roebling's Sons Co. v. Federal Storage Battery Car Co., 185 App. Div. 430, 173 N. Y. Supp. 297.

[82] In re Franklin, 106 Fed. 666, 6 Am. Bankr. Rep. 285.

[83] Bear v. Chase (C. C. A.) 99 Fed. 920, 3 Am. Bankr. Rep. 746; In re Lilienthal, 256 Fed. 819, 168 C. C. A. 165, 43 Am. Bankr. Rep. 665.

[84] Samson v. Burton, 5 Ben. 343, 5 N. B. R. 459, Fed. Cas. No. 12,286; In re Clark, 9 Blatchf. 372, 6 N. B. R. 403, Fed. Cas. No. 2,801.

[85] In re Caldwell, 2 Hughes, 291, Fed. Cas. No. 2,300.

of payment out of the estate of a bankrupt and outrank the claims of all other creditors.[86]

§ 190. **Foreclosure of Mortgages and Other Liens.**—As a general rule, the institution of proceedings in bankruptcy against a debtor does not take away the jurisdiction of a state court to proceed with a suit already pending therein for the foreclosure of a mortgage or the enforcement of any other valid lien against his property, and such pending action will not be stayed or enjoined by order of the court of bankruptcy, provided, of course, that the lien attached more than four months before the bankruptcy and is otherwise unimpeachable. The trustee in bankruptcy may be authorized or directed to intervene in such suit for the protection of the interests of the general creditors or for the purpose of setting up any defense which would be available to the bankrupt or to them. The proceedings in the state court may be stopped if there is good ground for disputing the date or the validity of the alleged lien. And it is not outside the jurisdiction of the court of bankruptcy to restrain the creditor from proceeding further in his action, and to take charge of the property affected, for administration under its own direction, if it appears that there is a substantial excess of value in the property over the amount of the creditor's claim, and that this will probably be sacrificed at a forced sale under process of the state court, while the property could be more economically sold and at a better price by the trustee in bankruptcy. But except in such cases as these, the creditor will be allowed to proceed in the state court without interference. These general principles will be more fully discussed in a subsequent chapter.[87]

§ 191. **Proceedings Subsequent to Judgment.**—Where a creditor has recovered judgment and caused final process to be issued and levied on property of the debtor, before the latter's adjudication in bankruptcy, if no stay of proceedings is ordered, nor other measures taken, in the court of bankruptcy to arrest the action, the officer holding the writ may proceed to make a sale of the property, and his deed will give the purchaser a title which cannot be impeached collaterally by the trustee in bankruptcy.[88] But if the writ was issued and levied within four months before the institution of the proceedings in bankruptcy, then,

[86] Bankruptcy Act 1898, §§ 11a, 17, 64. See In re Duryee, 2 Fed. 68.

[87] See infra, ch. 20, § 390.

[88] Doe v. Childress, 21 Wall. 642, 22 L. Ed. 549; In re Hufnagel, 12 N. B. R. 554, Fed. Cas. No. 6,837; Thames v. Miller, 2 Woods, 564, Fed. Cas. No. 13,860; Elston v. Castor, 101 Ind. 426, 51 Am. Rep. 754; Hunter v. Porch, 4 Ky. Law Rep. 826; Fisher v. Lewis, 69 Mo. 629; Thompson v. Moses, 43 Ga. 383; Wheeler v. Redding, 55 Ga. 87.

by the provisions of section 67 of the act, its lien is extinguished by the adjudication in bankruptcy, and consequently the officer holds the property as a mere temporary custodian, and the trustee is entitled to recover possession of it, and the court of bankruptcy has jurisdiction to order the surrender of the property, on a summary petition by the trustee.[89] Moreover, the court of bankruptcy has jurisdiction, by injunction, to forbid an execution creditor of the bankrupt from proceeding to sell property on which a levy has been made at the date of the adjudication, where the execution constitutes the act of bankruptcy found against the defendant, or is an unlawful preference and contrary to the provisions of the bankruptcy law.[90] Even though the judgment is not thus impeachable, the court of bankruptcy may enjoin the sale by the sheriff (at least until the trustee in bankruptcy can intervene) when it appears to be necessary for the protection of the interests of the general creditors.[91]

If it shall appear to be for the best interests of all concerned, the court of bankruptcy has power, instead of enjoining the sale by the sheriff, to allow that officer to proceed with the sale and hold the proceeds subject to its own order.[92] When this is done, the sheriff will be directed to bring the entire proceeds, less costs, into the court of bankruptcy; or he may be directed to satisfy the execution creditor (if the latter's claim is valid and not affected by the adjudication), and to pay over the remainder to the trustee in bankruptcy.[93] If the sheriff has already made a sale of the property before the adjudication in

[89] In re Francis-Valentine Co. (C. C. A.) 94 Fed. 793, 2 Am. Bankr. Rep. 522; In re Fellerath, 95 Fed. 121, 2 Am. Bankr. Rep. 40; In re Richards, 95 Fed. 258, 2 Am. Bankr. Rep. 518; In re Francis-Valentine Co., 93 Fed. 953. 2 Am. Bankr. Rep. 188; In re Schnepf, 2 Ben. 72, 1 N. B. R. 190, Fed. Cas. No. 12,471.

[90] In re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815; In re Kimball, 97 Fed. 29, 3 Am. Bankr. Rep. 161; In re Lady Bryan Min. Co., 6 N. B. R. 252, Fed. Cas. No. 7,980; Beattie v. Gardner, 4 Ben. 479, 4 N. B. R. 323, Fed. Cas. No. 1,195; In re Mallory, 1 Sawy. 88, 6 N. B. R. 22, Fed. Cas. No. 8,991; Blake v. Francis-Valentine Co., 89 Fed. 691, 1 Am. Bankr. Rep. 372; Irving v. Hughes, 2 N. B. R. 61, Fed. Cas. No. 7,076; In re Metzler, 1 Ben. 356, 1 N. B. R. 38, Fed. Cas. No. 9,512; Southern Loan & Trust Co. v. Benbow, 96 Fed. 514, 3 Am. Bankr. Rep. 9.

[91] In re Lady Bryan Min. Co., 6 N. B. R. 252, Fed. Cas. No. 7,980; In re Globe Cycle Works, 1 Nat. Bankr. News, 421; Eastburn v. Yardley, Fed. Cas. No. 4,252. An injunction restraining proceedings on execution under a judgment against the bankrupt will be dissolved where the trustee has taken no measures to recover the property levied on, and the bankrupt declares that the property does not belong to him. In re Olcott, 2 Ben. 443, Fed. Cas. No. 10,478.

[92] That property is perishable is no ground for dissolving an injunction which restrained a sale thereof on execution prior to the adjudication. In re Metzler, 1 Ben. 356, 1 N. B. R. 38, Fed. Cas. No. 9,512.

[93] In re Bernstein, 2 Ben. 44, 1 N. B. R. 199, Fed. Cas. No. 1,350; O'Brien v. Weld, 92 U. S. 81, 23 L. Ed. 675.

bankruptcy, but still has the proceeds in his hands, he will not be restrained from paying to the execution creditor the amount of his debt, if the creditor is legally entitled thereto, but will merely be required to account to the trustee in bankruptcy for any balance that may remain. But if the lien was dissolved, because the writ was levied within four months before the commencement of the bankruptcy proceedings, the case is different. Here, the proceeds of the sale do not belong to the execution creditor, but to the estate of the bankrupt; and although there is some difference of opinion, the rule may be stated, as sustained by the best authorities, that the officer may be enjoined from disposing of the fund in his hands, and ordered to surrender it to the trustee in bankruptcy, and this, on summary proceedings, and without the necessity of resorting to a plenary suit.[94] If the sheriff has paid over the proceeds of the execution to the creditor, after the adjudication of the debtor as a bankrupt, the trustee will still have a remedy by action against the creditor to recover the fund, if the levy was dissolved by the bankruptcy proceedings or was voidable as a preference;[95] but otherwise where the sale was made and the proceeds paid over to the creditor before the filing of the petition in bankruptcy, though less than four months prior thereto, since the statute applies only to liens existing and unsatisfied at the commencement of the proceedings in bankruptcy.[96] An adjudication in bankruptcy brings the entire estate of the bankrupt within the custody and control of the court of bankruptcy; and if a sheriff thereafter levies on goods of the bankrupt, he may be enjoined from making a sale under his levy. The title to the goods vests in the trustee in bankruptcy, and he alone must make the sale, the proceeds being subject to any valid liens or claims upon them.[97]

[94] Clark v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555, 9 Am. Bankr. Rep. 476; In re Kenney, 105 Fed. 897, 45 C. C. A. 113, 5 Am. Bankr. Rep. 355; In re English, 127 Fed. 940, 62 C. C. A. 572, 11 Am. Bankr. Rep. 674; In re Franks, 95 Fed. 635, 2 Am. Bankr. Rep. 634; Schmilovitz v. Bernstein, 22 R. I. 330, 47 Atl. 884; In re Duguid, 100 Fed. 274, 3 Am. Bankr. Rep. 794; Bear v. Chase, 99 Fed. 920, 40 C. C. A. 182, 3 Am. Bankr. Rep. 746; Miller v. O'Brien, 9 Blatchf. 270, 9 N. B. R. 26, Fed. Cas. No. 9,586; In re Grinnell, 7 Ben. 42, 9 N. B. R. 29, Fed. Cas. No. 5,830; Pennington v. Lowenstein, 1 N. B. R. 570, Fed. Cas. No. 10,938; In re Richards, 95 Fed. 258, 2 Am. Bankr. Rep. 518; In re Fellerath, 95 Fed. 121, 2 Am. Bankr. Rep. 40; In re Francis-Valentine Co. (C. C. A.) 94 Fed. 793, 2 Am. Bankr. Rep. 522; Mills v. Davis, 10 N. B. R. 340; Kosches v. Libowitz (Tex. Civ. App.) 56 S. W. 613; Davis v. Jewett, 17 S. Dak. 410, 97 N. W. 16. Compare In re Easley, 93 Fed. 419, 1 Am. Bankr. Rep. 715; In re Campbell, 1 Abb. U. S. 185, 1 N. B. R. 165, Fed. Cas. No. 2,349.

[95] Bradley v. Frost, 3 Dill. 457, Fed. Cas. No. 1,780.

[96] Davis v. Jewett, 17 S. Dak. 410, 97 N. W. 16; Levor v. Seiter, 69 App. Div. 33, 74 N. Y. Supp. 499; Greene v. Montana Brewing Co., 28 Mont. 380, 72 Pac. 751; Farrell v. W. B. Lockett & Co., 115 Tenn. 494, 91 S. W. 209.

[97] Leonard v. Yohnk, 68 Wis. 587, 32 N. W. 702, 60 Am. Rep. 884; Pennington

In a suit to revive a judgment against a bankrupt, his trustee is the proper person on whom to serve the citation, if he is still in office.[98]

§ 192. **Proceedings Supplementary to Execution.**—Where proceedings supplementary to execution are pending in a state court at the time of the adjudication of the judgment debtor as a bankrupt, the judgment being a debt provable in bankruptcy, the court of bankruptcy, on the application of the bankrupt or his trustee, may order a stay of all proceedings in the state court to await the determination of the court of bankruptcy on the question of the bankrupt's discharge.[99] When a judgment in a state court has been recovered against two defendants on their joint and several obligations, and one of them is afterwards adjudged bankrupt but not the other, proceedings in the state court supplementary to execution on such judgment may be stayed and enjoined as to the bankrupt, but not as to the other judgment debtor.[100] Of course, the state court may itself stay the proceedings, and it is held that a bankrupt who has omitted to apply for a stay of proceedings in an action against him, pending the question of his discharge, may nevertheless apply to the state court after judgment to have supplementary proceedings against him thereon stayed, on the ground that he has been discharged, if the plaintiff's demand is of such a nature as to be released by the discharge.[101] But the adjudication in bankruptcy will not affect the state court's jurisdiction of the supplementary proceedings, nor authorize the debtor to refuse to comply with its order directing his examination, in the absence of an application to the federal court for a stay of such proceedings.[102] If the plaintiff has procured the appointment of a receiver in his supplementary proceedings, and the latter has taken actual possession of the property, he will not, under any ordinary circumstances, be interfered with by the bankruptcy court, but leave will be given to the trustee to intervene in the creditor's action, for the purpose of contesting his claim, if there

v. Sale, 1 N. B. R. 572, Fed. Cas. No. 10,939.

98 Grayson's Ex'r v. Norton, 33 La. Ann. 1018.

99 In re Reed, 1 N. B. R. 1, Fed. Cas. No. 11,637; In re Kletchka, 92 Fed. 901, 1 Am. Bankr. Rep. 479; In re Lesser (C. C. A.) 99 Fed. 913, 3 Am. Bankr. Rep. 758.

100 In re Burke, 155 Fed. 703, 19 Am. Bankr. Rep. 51; In re De Long, 1 Nat. Bankr. News, 26.

101 World Co. v. Brooks (N. Y. Com. Pleas) 3 N. B. R. 588. And see In re Madden (D. C.) 257 Fed. 581, 43 Am. Bankr. Rep. 452.

102 In re William E. De Laney & Co., 124 Fed. 280, 10 Am. Bankr. Rep. 634. While an order in supplementary proceedings is stayed by an adjudication of bankruptcy for 12 months therefrom, the proceedings are not superseded, and they can be continued after the expiration of that period. Taylor v. Buser (Sup.) 167 N. Y. Supp. 887.

is any ground to do so, and for the protection of the interests of the general creditors.[103]

§ 193. Proceedings on Appeal.—As a general rule, the bankruptcy of a party does not prevent the hearing and determination of an appeal from a judgment of a state court by the appellate court of the state. Proceedings on such appeal are not ipso facto suspended by the adjudication in bankruptcy nor will the court of bankruptcy order them stayed.[104] Where the bankrupt was the appellant, his trustee, on producing the proper evidence of his official character, may, on motion, be substituted as appellant in the case.[105] If the trustee does not intervene and seek to be substituted, still the bankrupt, prior to his discharge, has sufficient interest in preventing the establishment of a claim against him to enable him to maintain an appeal from a judgment thereon.[106] Though the judgment was not rendered until after the adjudication in bankruptcy, yet the bankrupt may prosecute an appeal or writ of error thereon in his own name,[107] at least if his trustee will give his written consent thereto.[108] But after the bankrupt has received his discharge, he has no further interest in any action pending against him, and cannot prosecute an appeal from a judgment rendered against him before the discharge was granted, though his trustee may do so.[109]

[103] Supra, § 27. And see In re Whipple, 6 Biss. 516, 13 N. B. R. 373, Fed. Cas. No. 17,512. In re Cefola (D. C.) 222 Fed. 171.

[104] Smith v. Meisenheimer, 104 Ky. 753, 47 S. W. 1087; Flanagan v. Pearson, 42 Tex. 1, 19 Am. Rep. 40; Merritt v. Glidden, 39 Cal. 559, 2 Am. Rep. 479; Alston v. Wingfield, 53 Ga. 18; Booker v. Adkins, 48 Ala. 529; In re Hirsch, 2 Ben. 493, 2 N. B. R. 3, Fed. Cas. No. 6,529; Booker v. Blythe, 90 Ark. 165, 118 S. W. 401; Bennett v. Bennett, 65 S. W. 12, 23 Ky. Law Rep. 1281. Compare In re Metcalf, 2 Ben. 78, 1 N. B. R. 201, Fed. Cas. No. 9,494; In re Leszynsky, 3 Ben. 487, Fed. Cas. No. 8,278. See United Wireless Telegraph Co. v. National Electric Signaling Co., 198 Fed. 385, 117 C. C. A. 261, 28 Am. Bankr. Rep. 889; Kohn, Weil & Co. v. Weinberg, 110 Miss. 275, 70 South. 353. The court in which the appeal is pending may itself stay further proceedings, but cannot dismiss and finally determine the cause merely on a showing that the defendant has been declared a bankrupt. Tutt v. Fighting Wolf Mining Co. (Mo. App.) 209 S. W. 304.

[105] Herndon v. Howard, 9 Wall. 664, 19 L. Ed. 809; Knox v. Exchange Bank, 12 Wall. 379, 20 L. Ed. 287. See Sigler v. Shehy, 15 Ohio, 471.

[106] Sanford v. Sanford, 58 N. Y. 67, 17 Am. Rep. 206; O'Neil v. Dougherty, 46 Cal. 575; Hughes v. Thweatt, 57 Miss. 376; Schoonmaker v. Pittsburgh Contracting Co., 176 App. Div. 48, 161 N. Y. Supp. 186, 1055.

[107] Hill v. Harding, 131 U. S. (Appendix) cc, 26 L. Ed. 310; O'Neil v. Dougherty, 46 Cal. 575. But compare Parks v. Doty, 13 Bush. (Ky.) 727; Daugherty v. Ringo, 1 Ky. Law Rep. 282. And see Jenkins v. International Bank, 97 Ill. 568.

[108] Christy v. Des Moines City Ry. Co., 126 Iowa, 428, 102 N. W. 194.

[109] Knox v. Exchange Bank, 12 Wall. 379, 20 L. Ed. 287; Wilson v. McMullen, 4 Ky. Law Rep. 895; Jones v. Barnes, 107 Miss. 800, 66 South. 212.

§ 194. Contempt Proceedings.—The power of a court of bankruptcy to stay proceedings in a state court against the bankrupt for a contempt of the latter court will depend upon the nature of the duty or obligation which is sought to be enforced. If the contempt alleged consists of a disobedience to the process or orders of the court, the violation of an injunction, the wilful use of false affidavits, or other affront to the court itself, it would appear that the court of bankruptcy could have no motive for interfering, and every principle of comity would forbid an attempt to control the action of the state tribunal.[110] On the other hand, if the proceeding for contempt is merely used as a means of enforcing a private obligation, the authority of the court of bankruptcy to forbid its prosecution must depend upon the question whether or not the creditor's claim is of a nature to be released by the discharge in bankruptcy.[111] For example those authorities which hold that alimony is a provable debt in bankruptcy, and therefore one which will be affected by the discharge, also maintain the authority of the court of bankruptcy to enjoin the person to whom such alimony is due from forcing its payment by the bankrupt by proceeding against him in the state court as for contempt.[112]

§ 195. Effect of the Stay.—When the court of bankruptcy has exercised its power to order a stay of proceedings in a pending suit against the bankrupt, founded on a debt from which his discharge would be a release, this does not divest the state court of jurisdiction over the case, and "the stay does not operate as a bar to the action, but only as a suspension of proceedings until the question of the bankrupt's discharge shall have been determined in the United States court sitting in bankruptcy. After the determination of that question in that court, the court in which the suit is pending may proceed to such judgment as the circumstances of the case may require. If the discharge is refused, the plaintiff, upon establishing his claim, may obtain a general judgment." [113] If, on the other hand, the discharge is granted, the bankrupt

[110] In re Koronsky, 170 Fed. 719, 96 C. C. A. 39, 21 Am. Bankr. Rep. 851; In re Hall, 170 Fed. 721, 22 Am. Bankr. Rep. 498; In re Hill, 2 N. B. R. 140, Fed. Cas. No. 6,486; People v. Sheriff of Kings County (D. C.) 206 Fed. 566, 31 Am. Bankr. Rep. 84.

[111] In re Adler, 144 Fed. 659, 75 C. C. A. 461, 16 Am. Bankr. Rep. 414.

[112] See In re Van Orden, 96 Fed. 86, 2 Am. Bankr. Rep. 801; In re Houston, 94 Fed. 119, 2 Am. Bankr. Rep. 107; In re Challoner, 98 Fed. 82, 3 Am. Bankr. Rep. 442; In re Summers, 1 Nat. Bankr. News, 60. Contra, In re Pyatt (D. C.) 257 Fed. 362.

[113] Hill v. Harding, 107 U. S. 633, 2 Sup. Ct. 404, 27 L. Ed. 493; Byers v. First Nat. Bank, 85 Ill. 423; Tinkum v. O'Neale, 5 Nev. 93. Where a suit in equity abates by the bankruptcy of the plaintiff before the time for answering has expired, no answer is required until a plaintiff has been substituted by order of the court, and the court has no power to order entry of a decree pro con-

may of course plead it in bar of the further prosecution of the action. But it is provided that "a claim for taxable costs incurred in good faith by a creditor before the filing of the petition, in an action to recover a provable debt" may be proved and allowed as a claim against the bankrupt's estate.[114] While the stay, however, remains in force it suspends all further proceedings in the action. Thus, a creditor enforcing an execution on a judgment recovered in the state court, in defiance of an injunction of the court of bankruptcy, in which the debtor has filed a voluntary petition, is guilty of contempt,[115] and a sale of property of the bankrupt on execution, after notice of the injunction, will render the officer liable.[116] But where the suit is against the bankrupt and another jointly, and proceedings are stayed as to the bankrupt, it is said that judgment may be rendered against both defendants, and an order made staying execution as to the bankrupt until the question of his discharge is determined.[117] And where the creditor has already recovered a judgment against the bankrupt and a third person, though he is enjoined from enforcing execution as against the bankrupt, this does not in any way affect his right to proceed against the other defendant.[118]

§ 196. Effect of Grant or Denial of Discharge.—An injunction issued by the court of bankruptcy, staying proceedings against the bankrupt in a state court until the question of his discharge shall have been

fesso. Western Star Lodge v. Burkes Const. Co. (C. C. A.) 267 Fed. 550, 46 Am. Bankr. Rep. 166.

114 Bankruptcy Act 1898, § 63, cl. 3.

115 In re Atkinson, 3 Pittsb. 423, 7 N. B. R. 143, Fed. Cas. No. 606. Where a bankrupt obtained an injunctive order from the bankruptcy court staying all suits and proceedings against him on the part of certain creditors, their agents and attorneys, to collect certain specified debts, and thereupon a suit by one of the creditors was discontinued, and afterwards a new suit was brought through the same attorney in the same court for the recovery of the same debt, with allegations of fraud, it was held that the last named suit was a violation of the injunction. In re Schwarz, 14 Fed. 787. But see Kittredge v. Emerson, 15 N. H. 227, where it was ruled that the jurisdiction of the court of bankruptcy to issue an injunction of this kind may be inquired into by the state court, and if the latter finds that the federal court has acted without authority, the injunction may be disregarded, or the parties may be enjoined from attempting to enforce it. Where, after a judgment creditor had levied execution, the debtor filed a petition and was adjudged bankrupt, and proceedings on the execution were stayed, it was held that, although the bankrupt had waived in the judgment his right to personal exemptions, it was nevertheless a contempt of court for the judgment creditor to proceed under the writ of execution to sell property set aside to the bankrupt on his claim of exemptions, the restraining order not having been modified so as to allow such proceedings; and this is so even though the creditor was entitled to reach such property. In re Braun (D. C.) 259 Fed. 309, 43 Am. Bankr. Rep. 695.

116 Stinson v. McMurray, 6 Humph. (Tenn.) 339.

117 Byers v. First Nat. Bank, 85 Ill. 423. But compare Hinman v. Cutler, 2 Low. 364, Fed. Cas. No. 6,524.

118 Penny v. Taylor, 10 N. B. R. 200, Fed. Cas. No. 10,957.

determined, if not ipso facto dissolved by the granting of the discharge, should ordinarily be vacated as a matter of course on the application of the creditor who was stayed or enjoined.[119] After the discharge has been granted, the bankrupt's further relief against the prosecution of suits in the state courts, on causes of action such as to be affected by the discharge, must be sought and obtained in those courts only, and they will determine the effect of the discharge on his pleading it. Hence an injunction obtained ex parte in the bankruptcy court, after the discharge has been granted, continuing the previous injunction, was held to have been improvidently granted and was vacated.[120] If the defendant fails to obtain his discharge, an action pending against him in a state court at the time of the adjudication survives.[121] If such a suit was pending in an appellate court, and was ordered abated on the occurrence of the bankruptcy proceeding, and the bankrupt fails to obtain his discharge, the plaintiff may then have the case reinstated for hearing.[122]

§ 197. **Pending Actions by Bankrupt as Plaintiff.**—It was the doctrine of many of the earlier cases that a suit at law or in equity pending and undetermined at the time of the adjudication of the plaintiff as a bankrupt, and founded on a cause of action which would pass to his trustee in bankruptcy, would abate by reason of such bankruptcy, unless the trustee was substituted as a party, and that, if the trustee on due notice, omitted to intervene, the action should be dismissed.[123] For the rule was inflexible that, after an adjudication in bankruptcy and the appointment of a trustee, the bankrupt had no right to prosecute further any action begun by him before his bankruptcy; if the action was to continue, it must be in the name of the trustee.[124] But in view of the fact that the statute makes it optional with the trustee whether or not to intervene, the better authorities now hold that a pending action

[119] In re Rosenthal, 108 Fed. 368, 5 Am. Bankr. Rep. 799; In re Flanders, 121 Fed. 936, 10 Am. Bankr. Rep. 379; In re Thomas, 3 N. B. R. 38, Fed. Cas. No. 13,890; Kittredge v. Emerson, 15 N. H. 227. The same action should be taken by a state court, when the stay of proceedings was granted by it. Wakeman v. Throckmorton, 74 Conn. 616, 51 Atl. 554.

[120] In re Havens (C. C. A.) 272 Fed. 975, 46 Am. Bankr. Rep. 711; In re Herzberg, 25 Fed. 699.

[121] American Woolen Co. v. Maaget, 86 Conn. 234, 85 Atl. 583; Anders Bros. v. Latimer, 198 Ala. 573, 73 South. 925.

[122] Clark v. Fighting Wolf Mining Co. (Mo. App.) 209 S. W. 307.

[123] See Gear v. Fitch, 3 Ban. & A. 573, Fed. Cas. No. 5,290; Cook v. Lansing, 3 McLean, 571, Fed. Cas. No. 3,162; Lacy v. Rockett, 11 Ala. 1002; Brooks v. Harris, 12 Ala. 555; McNutt v. King, 59 Ala. 597; Sutherland v. Davis, 42 Ind. 26, 10 N. B. R. 424; Towle v. Davenport, 57 N. H. 149, 16 N. B. R. 478; Negley v. Jeffers, 28 Ohio St. 90; Atwood v. Bailey, 184 Mass. 133, 68 N. E. 13.

[124] Abernathy v. Phillips, 82 Va. 769, 1 S. E. 113; Charles v. Bain, 9 Ky. Law Rep. 398; Dessau v. Johnson, 66 How. Pr. (N. Y.) 4.

will not abate merely by reason of the bankruptcy of the plaintiff.[125] In fact, the transfer of the right of action to a trustee in bankruptcy is a matter of defense to be set up by the defendant, and the failure of the plaintiff to disclose the fact of his bankruptcy is not a fraud nor ground for a new trial.[126] Besides, where no trustee has been appointed, the bankrupt still retains title to his property, so that he may maintain a suit on a chose in action.[127]

Upon the appointment of a trustee, there are at least three courses open to him with regard to pending suits by the bankrupt as plaintiff. In the first place, the trustee may, with the approval of the court of bankruptcy, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication with like force and effect as though it had been commenced by him.[128] Secondly, a trustee in bankruptcy, though vested with title to all the transferable estate of the bankrupt, is not obliged to accept anything which may prove onerous or unprofitable to his charge. Hence if he judges that there is but slight prospect of a recovery in an action instituted by the bankrupt, and that his intervention is likely to involve the estate in costs and expenses without an adequate return, he may decline to prosecute the action. In that case the suit may be continued by the bankrupt in his own name and for his own benefit.[129] Thirdly, the trustee may consent that the bankrupt shall continue to prosecute the action in his own name, without losing his right to whatever may be recovered in the action, or divesting himself of the title passed to him by the adjudication in bankruptcy.[130] The right of the trustee to receive the fruits

125 Thatcher v. Rockwell, 105 U. S. 467, 26 L. Ed. 949; King v. Morrison, 5 Ark. 519; Pittsburgh, C. & St. L. R. Co. v. Nuzum, 60 Ind. 533; Springer v. Vanderpool, 4 Edw. Ch. (N. Y.) 362; Griffin v. Mutual Life Ins. Co., 119 Ga. 664, 46 S. E. 870.

126 Coulson v. Ferree, 82 S. W. 1000, 26 Ky. Law Rep. 959.

127 Rand v. Iowa Cent. R. Co., 186 N. Y. 58, 78 N. E. 574, 116 Am. St. Rep. 530, 9 Ann. Cas. 542.

128 Bankruptcy Act 1898, § 11c. And see Ames v. Gilman, 10 Metc. (Mass.) 239; Van Camp v. McCulley, 89 Ohio St. 1, 104 N. E. 1004.

129 Hubbard v. Gould, 74 N. H. 25, 64 Atl. 668; Griffin v. Mutual Life Ins. Co., 119 Ga. 664, 46 S. E. 870; Towle v. Rowe, 58 N. H. 394; Ramsey v. Fellows, 58 N. H. 607; Conner v. Southern Expr. Co., 42 Ga. 37, 5 Am. Bankr. Rep. 543, 9 N. B. R. 138; Greenall v. Hersum, 220 Mass. 278, 107 N. E. 941. But see Peters v. Wallace, 4 S. W. 914, 9 Ky. Law Rep. 215. Before a bankrupt can maintain an action on a claim which, under the adjudication in bankruptcy, passed to his trustee, on the ground that the trustee elected not to take such claim, it devolves upon the bankrupt to show that the trustee was informed of the nature of the claim and that he elected not to take it. Buckingham v. Buckingham, 36 Ohio St. 68. And note that "costs taxable against an involuntary bankrupt who was, at the time of the filing of the petition against him, plaintiff in a cause of action which would pass to the trustee, and which the trustee declines to prosecute after notice," may be proved and allowed as a claim against the bankrupt's estate. Bankruptcy Act 1898, § 63a.

130 Thatcher v. Rockwell, 105 U. S. 467, 26 L. Ed. 949; Gilmore v. Bangs,

of the judgment, and of the defendant to be protected in paying the amount to the proper party, may be secured by proper steps taken for that purpose.[131] If no trustee in bankruptcy has yet been appointed, the defendant may, in case of recovery, protect himself against liability to another suit by a trustee, when appointed, by an application to the court of bankruptcy.[132] It has been held that the court in which the action is tried may direct the jury, if they find for the plaintiff, to find that he recover for the use of his trustee in bankruptcy.[133] Or the court of bankruptcy may make its order requiring the defendant to pay the amount of the judgment to the trustee.[134] After the discharge of the trustee, or after the payment of all creditors and the discharge of the bankrupt, the latter may take up and continue the prosecution of any actions which were pending at the time of his bankruptcy and which remain unsettled.[135]

It remains to be stated that if the cause of action, in a suit pending in the name of the bankrupt as plaintiff at the time of the adjudication, is one which does not pass to the trustee in bankruptcy, the bankrupt himself may continue to prosecute the action without any reference to his trustee or to the proceedings in bankruptcy.[136] Thus, where the bankrupt before his adjudication had begun an action in a state court to recover damages for a malicious prosecution and arrest, the court of bankruptcy has no jurisdiction to control him in the further conduct of such suit, the right of action therein not vesting in the trustee, and

55 Ga. 403: Peck v. United States, 15 Ct. Cl. 364; Mayhew v. Pentecost, 129 Mass. 332; Williams v. Fowle, 132 Mass. 385; Thatcher v. Rockwell, 4 Colo. 375; Reed v. Paul, 131 Mass. 129. Where defendant conveyed to plaintiff, with full covenants of warranty, land from which the plaintiff was later evicted by foreclosure of a prior mortgage, it was held no defense to plaintiff's suit on his warranty that, after the conveyance and pending the foreclosure, the plaintiff was adjudged bankrupt, and the trustee and referee in bankruptcy, though rejecting this real estate, did not reject the right of action on the covenant against incumbrances. Smith v. Wahl, 88 N. J. Law, 623, 97 Atl. 261.

[131] Stone v. Jenkins, 176 Mass. 544, 57 N. E. 1002, 79 Am. St. Rep. 343; Griffin v. Mutual Life Ins. Co., 119 Ga. 664, 46 S. E. 870; Southern Exp. Co. v. Connor, 49 Ga. 415, 12 N. B. R. 53. Where plaintiff sued for an accounting and for a decree that the title to land was in him and that defendant should execute title on payment of the amount due, and pending the action the plaintiff became bankrupt, a final decree should declare the amount to be due by the bankrupt and authorize its payment, and that, on the making of such payment, his trustee should have title executed to him, or, on the termination of the bankruptcy, to the person succeeding to the plaintiff's title to the land. Scott v. Lunsford, 141 Ga. 73, 80 S. E. 316.

[132] Rand v. Iowa Cent. R. Co., 186 N. Y. 58, 78 N. E. 574, 116 Am. St. Rep. 530, 9 Ann. Cas. 542.

[133] Woddail v. Holliday, 44 Ga. 18, 10 N. B. R. 545.

[134] Moore v. Jones, 23 Vt. 739, Fed. Cas. No. 9,768.

[135] Bacon v. Abbott, 137 Mass. 397; Peery v. Carnes, 86 Mo. 652.

[136] Towle v. Davenport, 57 N. H. 149, 16 N. B. R. 478.

the bankrupt needs no permission from the court of bankruptcy to prosecute such suit to judgment.[137]

Pending proceedings in bankruptcy and after the appointment of a trustee, the bankrupt has no standing to commence and prosecute an action in his own name, in relation to any of his property, unless it be exempt property.[138] But the assignee of a chose in action may maintain a suit thereon in the name of his assignor, notwithstanding the fact that the latter has been adjudged a bankrupt.[139] And so, the purchaser of a chose in action from the trustee of a bankrupt's estate may maintain an action upon it in the name of such trustee.[140]

§ 198. **Intervention of Trustee in Pending Suits.**—The bankruptcy law provides that the court "may order the trustee to enter his appearance and defend any pending suit against the bankrupt," and that "the trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him."[141] The trustee is therefore entitled to be made a party to suits pending in state courts by or against the bankrupt, and to assume the control of them and be substituted in place of the bankrupt, and the latter, if necessary, will be enjoined from interfering with the litigation.[142] But some of the state courts maintain that, while the trustee is hereby authorized to apply to the court in which an action is pending to be made a party, yet it rests in the discretion of the state court to grant or refuse such an application, and that its authority is not abridged by the fact that the court of bankruptcy has directed or ordered the trustee to enter his appearance or intervene, and that, in deciding such an application, the state court will be governed by state laws and judicial policy.[143] However, if leave of court is necessary to the trustee's

[137] In re Haensell, 91 Fed. 355, 1 Am. Bankr. Rep. 286.

[138] Pickens v. Dent, 106 Fed. 653, 45 C. C. A. 522, 5 Am. Bankr. Rep. 644; Scheidt v. Goldsmith, 103 Ill. App. 623; Simpson v. Miller, 7 Cal. App. 248, 94 Pac. 252; Buckingham v. Buckingham, 36 Ohio St. 68; Rand v. Sage, 94 Minn. 344, 102 N. W. 864; Remmers v. Remmers, 217 Mo. 541, 117 S. W. 1117.

[139] Hayes v. Pike, 17 N. H. 564; Bonvillain v. American Sugar Refining Co. (D. C.) 250 Fed. 641, 41 Am. Bankr. Rep. 267.

[140] Rogers v. Union Stone Co., 134 Mass. 31.

[141] Bankruptcy Act 1898, § 11b, c. See Friedman v. Verchofsky, 105 Ill. App. 414.

[142] Gates v. Goodloe, 101 U. S. 612, 25 L. Ed. 895; Samson v. Burton, 5 Ben. 325, 4 N. B. R. 1, Fed. Cas. No. 12,285; New Orleans Acid & Fertilizer Co. v. Guillory, 117 La. 821, 42 South. 329; Williams v. Lane, 158 Cal. 39, 109 Pac. 873; Neill v. Barbaree, 135 Ga. 771, 70 S. E. 638; Lee v. Pfeffer, 25 Hun (N. Y.) 97; Armfield Co. v. Saleeby, 178 N. C. 298, 100 S. E. 611. But see Jewett Bros. v. Huffman, 14 N. D. 110, 103 N. W. 408.

[143] National Distilling Co. v. Seidel, 103 Wis. 489, 79 N. W. 744; Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417; Drew v. Fort Payne Co., 186

intervention, the objection that it was not obtained comes too late after verdict.[144] Further, to authorize a trustee in bankruptcy to intervene, he must of course be in the actual exercise of his official functions at the time. But if a trustee, after intervening in a pending suit, has been inadvertently or improperly discharged, and is afterwards reinstated by the referee in bankruptcy, the suit may be revived in his name.[145]

But while the trustee thus has the right to intervene in any pending suit by or against the bankrupt, if he sees fit, yet he is not bound to do so. If he is satisfied that nothing is to be gained for the estate by prosecuting or defending such suit, his duty rather requires him to take no part in the litigation, and neither the parties to the action nor any court can compel him to intervene.[146] He may allow the action to proceed in the name of the bankrupt and claim for the estate the fruits of the litigation if it is successful.[147] It is held, however, that where a patent infringement suit is pending against the bankrupt, the court of bankruptcy may grant leave to the plaintiff to file a supplemental bill making the trustee a party defendant, in order that he may be bound by the decree; but this does not oblige him to make any defense or take anything more than a nominal part in the proceedings; whether or not he shall interfere actively is a matter to be determined by him and by the bankruptcy court.[148]

But there is an implied limitation on the right of the trustee to intervene in a pending action, in this, that the action must be one in which the estate of the bankrupt has an interest and which may therefore be prosecuted (or defended) by the trustee for the benefit of the general creditors.[149] Thus, it is a general rule that the right of action for a personal tort—an injury inflicted upon the bankrupt himself, rather than upon his property—does not pass to his trustee as assets of his estate.

Ala. 285, 65 South. 71; Gray v. Arnot, 31 N. D. 461, 154 N. W. 268.

144 Jones v. Meyer Bros. Drug Co., 25 Tex. Civ. App. 234, 61 S. W. 553.

145 Bunch v. Smith, 116 Tenn. 201, 93 S. W. 80.

146 In re Leeds & Catlin Co., 175 Fed. 309, 23 Am. Bankr. Rep. 679; Griffin v. Mutual Life Ins. Co., 119 Ga. 664, 46 S. E. 870; Heckscher v. Blanton, 111 Va. 648, 69 S. E. 1045, 37 L. R. A. (N. S.) 923; Serra é Hijo v. Hoffman, 29 La. Ann. 17. See Norton v. Switzer, 93 U. S. 355, 23 L. Ed. 903.

147 Kessler v. Herklotz, 132 App. Div. 278, 117 N. Y. Supp. 45.

148 Victor Talking Mach. Co. v. Hawthorne & Sheble Mfg. Co., 173 Fed. 617, 23 Am. Bankr. Rep. 234.

149 In re Haensell, 91 Fed. 355, 1 Am. Bankr. Rep. 286. The trustee in bankruptcy of a corporation is properly allowed to intervene in an action by a shareholder seeking to recover from the president the value of his stock which had been destroyed by the president's embezzlement of the entire corporate assets. Floyd v. Layton, 172 N. C. 64, 89 S. E. 998. In an action for the purchase price of a chattel, where the buyer counterclaimed for breach of warranty, it is proper to substitute the buyer's trustee in bankruptcy as a party to the counterclaim. Crouch v. Fahl, 63 Ind. App. 257, 113 N. E. 1009.

Hence if the bankrupt has an action of this kind pending, as, for example, for slander or libel, the trustee cannot claim to be substituted as plaintiff.[150] And so, if the bankrupt has disclaimed title to the property in suit, his trustee cannot come in and assert title.[151] This, however, does not apply to property which he has conveyed away in fraud of his creditors. On the contrary, it is well settled that the trustee has the right to intervene in a judgment creditor's suit to reach and subject such concealed assets,[152] and that his recovery is for the benefit of all the creditors and not merely for the original plaintiff, so that the trustee is entitled to have turned over to him the entire proceeds of a sale of the property.[153] For similar reasons, he will be admitted to prosecute to final judgment a suit begun by a creditor to avoid an unlawful preference,[154] or one to enforce an equitable lien on property of the bankrupt,[155] or to foreclose a mortgage, in order that he may be enabled to claim any surplus proceeds of the sale after satisfying the mortgagee.[156] Moreover, the trustee has a legal status to attack a judgment illegally entered against the bankrupt,[157] or to move to set aside a judgment entered against the bankrupt by default,[158] or to take the bankrupt's place in an action begun by him to obtain an injunction against the collection of a judgment on the ground that it had been paid.[159]

If the trustee desires to intervene in a pending suit, he should act with reasonable promptness. An unreasonable delay, operating to the prejudice of others in interest, will justify a denial of his application,[160] and if he allows the suit to go to judgment in the court of first instance, he cannot intervene after it has been taken up on appeal.[161] But sup-

150 Epstein v. Handverker, 29 Okl. 337, 116 Pac. 789.

151 Simmons v. Richards, 28 Tex. Civ. App. 112, 66 S. W. 687. But where it appears on the face of the record that the bankrupt, plaintiff in an action, has a prima facie right to sue for the property in question, his trustee's application to be substituted as plaintiff cannot be defeated by the bankrupt alleging that his wife is the real party in interest. Person v. United States, 8 Ct. Cl. 543.

152 In re Riker, 107 Fed. 96, 5 Am. Bankr. Rep. 720; Davis v. Vandiver, 143 Ala. 202, 38 South. 850; Kinmouth v. Braeutigam (N. J. Eq.) 57 Atl. 1013; Bunch v. Smith, 116 Tenn. 201, 93 S. W. 80; Tharp v. Tharp's Trustee (Ky.) 119 S. W. 814; Atkins v. Globe Bank & Trust Co. (Ky.) 124 S. W. 879; Googins v. Skillings, 118 Me. 299, 108 Atl. 50; Blick v. Nimmo, 121 Md. 139, 88 Atl. 116; McCrory v. Donald, 119 Miss. 256, 80 South. 643.

153 Bunch v. Smith, 116 Tenn. 201, 93 S. W. 80.

154 Miller v. New Orleans Acid & Fertilizer Co., 211 U. S. 496, 29 Sup. Ct. 176, 53 L. Ed. 300.

155 Snyder v. Smith, 185 Mass. 58, 69 N. E. 1089.

156 In re Gerdes, 102 Fed. 318, 4 Am. Bankr. Rep. 346.

157 Garrison v. Seckendorff, 79 N. J. Law, 203, 74 Atl. 311; Weil v. Simmons, 66 Mo. 617.

158 First Nat. Bank v. Flynn, 117 Iowa, 493, 91 N. W. 784.

159 Brandon v. Cabiness, 10 Ala. 155.

160 Freehold Const. Co. v. Bernstein, 60 Misc. Rep. 363, 113 N. Y. Supp. 368.

161 Weaver Mercantile Co. v. Thurmond, 68 W. Va. 530, 70 S. E. 126, 33 L. R. A. (N. S.) 1061.

posing his application to be seasonably made, the proper method is by his own petition or motion in the court where the suit is pending.[162] A motion by the bankrupt himself, without any application on the part of the trustee, is not sufficient.[163] The trustee's petition should contain allegations showing the fact and the date of the adjudication of bankruptcy,[164] his own appointment as trustee,[165] and such facts as show that he has an interest in the litigation as the representative of the creditors at large.[166] But he need not prove his appointment and qualification unless his right to recover in the capacity of a trustee in bankruptcy is challenged in such form as the state law requires.[167] It should be observed that this provision of the bankruptcy law does not undertake to regulate the practice in state courts, but places on the trustee the official duty of appearing according to the rules and practice of such courts, so as to protect the interests of the general creditors.[168] He is therefore not exempt from the necessity of proper pleadings and evidence.[169] But he cannot set up either the bankrupt's adjudication or his discharge as a ground for staying proceedings or in bar of the action, as that is a right personal to the bankrupt.[170] On the other hand, where the trustee is brought in as a defendant, it is not necessary that the plaintiff's pleadings, alleging the trustee's representative capacity, and the transfer to him of the title to defendant's property, should also state a cause of action against him.[171] If the defendant in an action in a state court wishes to object to the substitution of the plaintiff's trustee in bankruptcy in place of the plaintiff himself, he must do so by objection or exception taken at the time; if he goes to trial, it will then be too late to object to any irregularity.[172]

Where the trustee thus intervenes and takes part in the prosecution of the action, or its defense, he submits himself to the jurisdiction of the state court and becomes a party in the ordinary sense and with the ordinary consequences.[173] Thus, judgment may be taken against him

162 Kent v. Downing, 44 Ga. 116, 10 N. B. R. 538.

163 Oscar Bonner Oil Co. v. Pennsylvania Oil Co., 150 Cal. 658, 89 Pac. 613.

164 Jones v. Meyer Bros. Drug Co., 25 Tex. Civ. App. 234, 61 S. W. 553; A. Lehmann & Co. v. Rivers, 110 La. 1079, 35 South. 296.

165 Jones v. Meyer Bros. Drug Co., 25 Tex. Civ. App. 234, 61 S. W. 553.

166 Hackett's Ex'rs v. Hackett's Trustee (Ky.) 118 S. W. 377; Kohout v. Chaloupka, 69 Neb. 677, 96 N. W. 173.

167 Jones v. Meyer Bros. Drug Co., 25 Tex. Civ. App. 234, 61 S. W. 553.

168 Bacon v. George, 206 Mass. 566, 92 N. E. 721.

169 Wikle v. Jones, 133 Ga. 266, 65 S. E. 577.

170 Serra é Hijo v. Hoffman, 29 La. Ann. 17.

171 Latimer v. McKinnon, 85 App. Div. 224, 83 N. Y. Supp. 315.

172 Chicago Legal News Co. v. Browne, 103 Ill. 317; Brandon v. Cabiness, 10 Ala. 155.

173 Rennells v. Potter, 198 Mich. 49, 164 N. Y. 475; Earl v. Jacobs, 177 Mich. 163, 142 N. W. 1079.

by default.[174] He may become liable for costs, at least those accruing after his entrance into the case.[175] And he will be bound by the judgment rendered, and if that judgment is unfavorable to the claims of the bankrupt, the court of bankruptcy will not, at the instance of the trustee, enjoin the state court's officers from executing the judgment, or from distributing its proceeds according to the orders of the state court.[176] The trustee may be authorized to compromise and settle a suit pending in a state court, in which the bankrupt is plaintiff, but not without consent of the latter's attorney, as he has a lien on any judgment recovered for his services.[177]

If the trustee declines to take up a litigation begun by the bankrupt, the suit may proceed in the name of the bankrupt himself, or the bankrupt's surety may be allowed to continue it in the name of the bankrupt but for his own protection.[178] In any case, the trustee, by taking this course, does not lose his right to claim whatever may be recovered.[179] But on the other hand, as he occupies substantially the position of a purchaser pendente lite, he will be concluded by the judgment.[180] Where, however, the action is against the bankrupt as defendant, and the trustee declines to intervene, a judgment recovered by the creditor may be proved in the bankruptcy proceedings as a liquidation or judicial ascertainment of the amount due the creditor, and as a basis of dividends, but it is effectual and operative for that purpose only.[181]

If the bankrupt was one of two joint plaintiffs on the record, the suit must be continued in the name of the trustee in bankruptcy and the other plaintiff, or, if a trustee has not yet been appointed, the action may be supported in the names of the bankrupt and the other plaintiff until a trustee comes in.[182]

§ 199. **Suits Begun After Adjudication.**—It may be stated as a general rule that, after an adjudication in bankruptcy and until the de-

[174] Kingsbury v. Waco State Bank, 30 Tex. Civ. App. 387, 70 S. W. 551.

[175] Kessler v. Herklotz, 132 App. Div. 278, 117 N. Y. Supp. 45. And see Murtagh v. Sullivan, 74 Misc. Rep. 517, 132 N. Y. Supp. 503.

[176] In re Van Alstyne, 100 Fed. 929, 4 Am. Bankr. Rep. 42; In re Neely, 113 Fed. 210, 51 C. C. A. 167, 7 Am. Bankr. Rep. 312; American Trust & Savings Bank v. Ruppe, 237 Fed. 581, 150 C. C. A. 463, 38 Am. Bankr. Rep. 621.

[177] In re Adamo, 151 Fed. 716, 18 Am. Bankr. Rep. 180.

[178] Bluegrass Canning Co. v. Steward, 175 Fed. 537, 23 Am. Bankr. Rep. 726; Tucker v. Western Union Tel. Co., 94 Misc. Rep. 364, 157 N. Y. Supp. 873.

[179] Peck v. United States, 15 Ct. Cl. 364.

[180] Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; Heckscher v. Blanton, 111 Va. 648, 69 S. E. 1045, 37 L. R. A. (N. S.) 923; Chickering v. Failes, 26 Ill. 507; Mount v. Manhattan Co., 43 N. J. Eq. 25, 9 Atl. 114; Cleveland v. Boerum, 24 N. Y. 613.

[181] Norton v. Switzer, 93 U. S. 355, 23 L. Ed. 903.

[182] Stinson v. Fernald, 77 Me. 576, 1 Atl. 742. And see Toulmin v. Hamilton, 7 Ala. 362.

termination of the question of the bankrupt's discharge, no suit can be commenced against him in any court. He is civiliter mortuus, and the bankruptcy proceedings supersede the ordinary remedies of creditors.[183] Also it is said that the court of bankruptcy has jurisdiction to stay the prosecution of an action against the bankrupt in a state court, on a debt from which his discharge would be a release, pending the determination of the question of his discharge, although the action was not begun until after the filing of the petition in bankruptcy.[184] But on the application of a creditor the court of bankruptcy may grant him leave to begin a suit against the bankrupt in a state court, where there are special circumstances rendering such a proceeding necessary. But when the creditor has brought his suit, pursuant to such leave, and saved his rights thereby, the court of bankruptcy will then order a stay of further proceedings to await the determination of the question of discharge.[185] It is held in one state, however, that a person proving his claim in the bankruptcy court may sue for the same claim in a state court against the bankrupt, after the filing of the application for discharge, in order to obtain an attachment lien on the defendant's after-acquired and garnished property, though, where a discharge in bankruptcy would be a bar to any further proceeding on a claim filed therein, and an application for a discharge is pending, the state courts will be careful to protect the bankrupt's rights until his discharge is determined.[186]

We must also notice the provision of the statute that "unliquidated claims against the bankrupt may, pursuant to application to the court [that is, the court of bankruptcy], be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."[187] It may sometimes occur that the best method of liquidating such a claim would be by a suit against the bankrupt in a state court, and it appears that the court of bankruptcy might "direct" that such a course be pursued. This is further shown by the provision that "claims

[183] Greenwald v. Appell, 5 McCrary, 339, 17 Fed. 140; In re Williams, 6 Biss. 233, 11 N. B. R. 145, Fed. Cas. No. 17,700; In re Archenbrown, 11 N. B. R. 149, Fed. Cas. No. 504; Woolfolk v. Murray, 44 Ga. 133, 10 N. B. R. 540; Wilson v. Capuro, 41 Cal. 545, 4 N. B. R. 714; Rogers v. Wentworth, 58 N. H. 318; Collins v. Scheeline, 52 Cal. 450. Compare Hackett v. Supreme Council A. L. H., 206 Mass. 139, 92 N. E. 133; Davidson v. Fisher, 41 Minn. 363, 43 N. W. 79; Thompson v. Massie, 41 Ohio St. 307.

[184] In re Basch, 97 Fed. 761, 3 Am. Bankr. Rep. 235; In re Cohen, 19 N. B. R. 133, Fed. Cas. No. 2,961.

[185] In re Ghirardelli, 1 Sawy. 343, 4 N. B. R. 164, Fed. Cas. No. 5,376; Brooks v. Bates, 7 Colo. 576, 4 Pac. 1069; In re Whiting, Fed. Cas. No. 17,574; In re Scott, Fed. Cas. No. 12,520.

[186] Roth v. Pechin, 260 Pa. 450, 103 Atl. 894.

[187] Bankruptcy Act 1898, § 63b.

founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge," may be proved and allowed.[188] Moreover, the general rule must yield to the requirements of justice where the creditor would lose or forfeit his rights if an action were not brought. Thus, it is held that a creditor holding a promissory note, valid and enforceable against the maker at the date of the latter's adjudication in bankruptcy, but against which the statute of limitations has nearly run, may reduce the same to judgment by suit brought in a state court after such adjudication, and such judgment will establish the claim and stop the running of the statute, though it will not give the creditor any lien or priority nor entitle him to levy on the bankrupt's property.[189] And the same principle applies where it is necessary to begin a suit in order to preserve a mechanic's lien.[190] In no circumstances, however, can the creditor go further than judgment. The title of the trustee in bankruptcy attaches as of the date of the adjudication. It includes all property then owned by the bankrupt and of such a nature as to pass to the trustee. All such property comes within the custody and control of the court of bankruptcy, and no creditor can thereafter acquire a lien by judgment, execution, or otherwise upon such property,[191] or interfere with the possession of the trustee in bankruptcy by attachment,[192] or garnishment,[193] or replevin.[194] But the proceedings in bankruptcy do not bar an action against the bankrupt by one who was not a creditor at the time of the adjudication, though of course his judgment will not entitle him to levy execution upon any property except such as the bankrupt may have acquired since the adjudication.[195]

For similar reasons, one who has been adjudged a bankrupt cannot commence actions against third persons in the state courts in re-

188 Bankruptcy Act 1898, § 63a, cl. 5.

189 In re McBryde, 99 Fed. 686, 3 Am. Bankr. Rep. 729.

190 Clifton v. Foster, 103 Mass. 233, 4 Am. Rep. 539.

191 In re Franklin Lumber Co., 147 Fed. 852, 17 Am. Bankr. Rep. 443; McLean v. Rockey, 3 McLean, 235, Fed. Cas. No. 8,891; In re Dey, 3 Ben. 450, 3 N. B. R. 305, Fed. Cas. No. 3,870; In re Tifft, 19 N. B. R. 201, Fed. Cas. No. 14,034; Sicard v. Buffalo, N. Y. & P. R. Co., 15 Blatchf. 525, Fed. Cas. No. 12,831; Stuart v. Hines, 33 Iowa, 61, 6 N. B. R. 416; Manwarring v. Kouns, 35 Tex. 171; Clifton v. Foster, 103 Mass. 233, 4 Am. Rep. 539; Williams v. Merritt, 103 Mass. 184, 4 Am. Rep. 521, 4 N. B. R. 706.

192 In re Renda, 149 Fed. 614, 17 Am. Bankr. Rep. 521; In re John L. Nelson & Bro. Co., 149 Fed. 590, 18 Am. Bankr. Rep. 66; Williams v. Merritt, 103 Mass. 184, 4 Am. Rep. 521, 4 N. B. R. 706.

193 In re Cunningham, 19 N. B. R. 276, Fed. Cas. No. 3,478; McAfee v. Arnold, 155 Ala. 561, 46 South. 870.

194 White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, 4 Am. Bankr. Rep. 178; In re Platteville Foundry & Machine Co., 147 Fed. 828, 17 Am. Bankr. Rep. 291.

195 Miller v. Warden, 111 Pa. St. 300, 2 Atl. 90.

spect to any property or rights of action which are of such a nature as to vest in or be claimable by his trustee in bankruptcy. But where a promissory note due to the bankrupt (or a judgment recovered thereon) is set apart to him by the trustee in bankruptcy as a part of his exemption, the bankrupt can sue thereon in a state court in his own name.[196]

[196] Robinson v. Hall, 11 Gray (Mass.) 483.

CHAPTER XII

CUSTODY AND PROTECTION OF PROPERTY BEFORE APPOINTMENT OF TRUSTEE

§ 200. Custody and Control of Property.—The filing of a petition in bankruptcy is an assertion of jurisdiction, with a view to determining the status of the bankrupt and to a settlement and distribution of his estate; and the jurisdiction of the court in which the petition is filed is exclusive, and is so far in rem that the property of the bankrupt is regarded as being in custodia legis from the filing of the petition.[1] And after such filing, property of an alleged bankrupt may not be seized or attached without the consent of the court of bankruptcy, even though actual possession has not been taken by its officers.[2] Thus, the removal

[1] Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208, 27 Am. Bankr. Rep. 262; Franceschi v. Mercado (C. C. A.) 269 Fed. 954, 46 Am. Bankr. Rep. 667; Gage Lumber Co. v. McEldowney, 207 Fed. 255, 124 C. C. A. 641, 30 Am. Bankr. Rep. 251; Corbett v. Riddle, 209 Fed. 811, 126 C. C. A. 535, 31 Am. Bankr. Rep. 330; In re Diamond's Estate, 259 Fed. 70, 170 C. C. A. 138, 44 Am. Bankr. Rep. 268; Board of Road Com'rs of Monroe County v. Keil, 259 Fed. 76, 170 C. C. A. 144, 44 Am. Bankr. Rep. 259; In re Arctic Stores (D. C.) 258 Fed. 688; In re Wellmade Gas Mantle Co. (D. C.) 230 Fed. 502, 36 Am. Bankr. Rep. 354; In re Walsh Bros. (D. C.) 159 Fed. 560, 20 Am. Bankr. Rep. 472; Norin v. Scheldt Mfg. Co., 297 Ill. 521, 130 N. E. 791; Bank of Brookings v. Aurora Grain Co., 43 S. D. 591, 181 N. W. 909; Whittlesey v. Philip Becker & Co., 142 App. Div. 313, 126 N. Y. Supp. 1046; Smith v. Berman, 8 Ga. App. 262, 68 S. E. 1014.

[2] In re Wellmade Gas Mantle Co. (D. C.) 230 Fed. 502, 36 Am. Bankr. Rep. 354. The title to the bankrupt's property remains in him until his adjudication, and a transfer of property by him after the filing of the petition but before adjudication is not necessarily void. In re Perpall (C. C. A.) 271 Fed. 466, 46 Am. Bankr. Rep. 302. Though, prior to ad-

and concealment by third persons of property, in contemplation of the appointment of a receiver in bankruptcy, and after the filing of the petition, is a contempt against the court of bankruptcy.[3] But often a considerable interval elapses before the appointment and qualifications of a trustee. During this period, the bankrupt himself occupies the position of a temporary custodian or trustee of his property. The title remains unchanged; it is not divested until there is a trustee to take it.[4] Nor is the bankrupt to be regarded as "civilly dead" during this period.[5] The court may, in a proper case, enjoin him, as well as other persons, from disposing of the property or interfering with it in any way. But unless such action is taken, the bankrupt's possession of the estate will not be disturbed, although he will henceforth hold his property under the duty of preserving it intact until it can be handed over to a trustee duly appointed, and in the meantime the bankrupt will have the right to pursue all proper legal measures for securing and preserving the estate.[6] Thus, he may file a petition to enjoin the enforcement of a judg-

judication, the bankrupt has power to dispose of his property in the ordinary course of business, it is improper for him to use his money for gaming. In re Sternburg (D. C.) 249 Fed. 980, 41 Am. Bankr. Rep. 476. The taking possession of property under an instrument amounting to a chattel mortgage, but invalid as against creditors because not filed as required by law, when done between the filing of a petition in bankruptcy against the mortgagor and his adjudication, does not defeat the rights of the trustee subsequently appointed. Massachusetts Bonding & Ins. Co. v. Kemper, 220 Fed. 847, 136 C. C. A. 593, 34 Am. Bankr. Rep. 80.

[3] In re Iron Clad Mfg. Co. (D. C.) 193 Fed. 781.

[4] Schoenthaler v. Rosskam, 107 Ill. App. 427.

[5] Plant v. Gorham Mfg. Co., 174 Fed. 852, 23 Am. Bankr. Rep. 42.

[6] Hampton v. Rouse, 22 Wall. 263, 22 L. Ed. 755; Blake v. Francis-Valentine Co., 89 Fed. 691, 1 Am. Bankr. Rep. 372; March v. Heaton, 1 Low. 278, 2 N. B. R. 180, Fed. Cas. No. 9,061; Myers v. Callaghan, 10 Biss. 139, 5 Fed. 726; In re Bowie, 1 N. B. R. 628, Fed. Cas. No. 1,728; Jones v. Leach, 1 N. B. R. 595, Fed. Cas. No. 7,475; In re Jessup, 19 Fed. 94; In re Steadman, 8 N. B. R. 319, Fed. Cas. No. 13,330. In the case last cited, it was said: "Between the filing of the petition and the appointment of a trustee, it is the duty of the bankrupt to protect and preserve the estate for the benefit of his creditors, and if he has warning that it is threatened with invasion by strong hand, or he has knowledge of impending danger from local process, he may apply to the bankruptcy court for such apprehensive [preventive?] remedy as may avert the approaching wrong. So he may, I apprehend, institute actions for any trespass to or eloignment of the estate, when committed before the assignee has qualified, if the estate remains in his care, and he may do so whether he is specially designated to collect, preserve, and utilize the estate or not. It is a power incident to his trust, and the assignee may afterwards come in and be made plaintiff, for the rights of the creditors. * * * Before the appointment of the assignee, the bankrupt is the custodian of the estate (unless the court orders it into other hands) and his fiduciary relation to the general creditors requires affirmative action on his part to gather up, guard, and preserve the estate until it is conveyed to the assignee. His trust resembles the office of a temporary administrator, under the laws of this state, or of an administrator ad colligendum, whose duty it is to collect and keep the estate of the deceased until an administrator is appointed."

ment against the property,[7] or to restrain a sheriff from selling under a levy,[8] or he may redeem land from a tax sale,[9] or maintain a suit for damages occasioned by an unlawful judicial sale of a portion of the property,[10] and he is the proper person to be notified of the dishonor of notes or bills on which he is an indorser, and is competent to waive demand and notice.[11] Further, if the bankrupt dies before the appointment of a trustee, the trust and duty of holding and preserving the property devolve upon his heirs.[12] But under no circumstances whatever can the bankrupt, after the filing of the petition, be justified in selling any portion of his property, even for the purpose of raising money to pay lawful fees, unless by leave of the court.[13] If the property is perishable, or must be sold at once for fear of deterioration, the court will order the marshal to sell it, and the bankrupt cannot become the purchaser.[14]

The provision of the statute for seizure of the bankrupt's property on petition and warrant applies only to involuntary cases. The theory of the law apparently is that the voluntary bankrupt, filing his own petition and thereby manifesting his willingness to surrender all his property for distribution to creditors, will not remove or waste it in the mean time. But he places it under the control of the court, and his own subsequent possession is merely (as already stated) that of a trustee. Hence if circumstances should arise making it necessary or proper that the court should take actual charge of the property, by a receiver or the marshal, pending the appointment of a trustee, it seems that ample power exists to pursue that course.[15] When property of the bankrupt

[7] In re Bowie, 1 N. B. R. 628, Fed. Cas. No. 1,728.

[8] Jones v. Leach, 1 N. B. R. 595, Fed. Cas. No. 7,475.

[9] Hampton v. Rouse, 22 Wall. 263, 22 L. Ed. 755.

[10] Johnson v. Collier, 222 U. S. 538, 32 Sup. Ct. 104, 56 L. Ed. 306, 27 Am. Bankr. Rep. 454.

[11] Ex parte Tremont Nat. Bank, 2 Low. 409, 16 N. B. R. 397, Fed. Cas. No. 14,169.

[12] Ferguson v. Dent, 24 Fed. 412.

[13] In re Pryor, 4 Biss. 262, Fed. Cas. No. 11,457; In re Jessup, 19 Fed. 94. See Shipman v. Daubert, 7 Mo. App. 576. And compare In re Livingston & Turk, 205 Fed. 364, 30 Am. Bankr. Rep. 531. The bankruptcy court has no jurisdiction to punish the bankrupt as for contempt, where, subsequent to the adjudication, he sold and disposed of certain of his assets and converted the money to his own use, while holding his property subject generally to the orders of the court, but his act in selling it not being in violation of any particular order. In re Probst. 205 Fed. 512, 123 C. C. A. 580. 30 Am. Bankr. Rep. 600.

[14] March v. Heaton, 1 Low. 278, 2 N. B. R. 180, Fed. Cas. No. 9,061.

[15] The Ironsides, 4 Biss. 518, Fed. Cas. No. 7,069. Where a bankrupt, after the filing of the petition, absconded from the jurisdiction and was arrested in a distant city, and there subjected to search, resulting in the discovery on his person of a large sum of money belonging to his estate in bankruptcy, which was claimed by his receiver, it was held that the court was not required to order the restoration of the money to the bankrupt, on the ground that the search had been unlawful, since it would then have power immediately to order him to surrender it to the receiver. In re A. Musi-

was under attachment at the time of the filing of the petition, it will ordinarily remain in the possession of the officer until a trustee is appointed, although the lien of the writ was dissolved by the adjudication. But "an attaching creditor is not under any legal compulsion to keep the sheriff or other officer in possession after the dissolution of the attachment by the adjudication in bankruptcy; on the contrary, unless the court has appointed a receiver or directed the marshal to take charge of the estate, the property attached should, upon the dissolution of the attachment, be forthwith restored to the possession of the bankrupt, to be held by him in trust for the benefit of his creditors until the qualification of a trustee." [16]

§ 201. **Warrant and Seizure Before Adjudication.**—The provisions of the bankruptcy act relating to the seizure and custody of property of an alleged bankrupt, after the filing of a petition but before any adjudication thereon, are quoted and compared in the margin.[17] Under

ca & Son, 205 Fed. 413, 30 Am. Bankr. Rep. 555.

[16] In re Allen, 96 Fed. 512, 3 Am. Bankr. Rep. 38.

[17] Bankruptcy Act 1898, § 2, cl. 3, gives to the court of bankruptcy power to "appoint receivers or the marshals, upon the application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts, after the filing of the petition and until it is dismissed or the trustee is qualified." Section 3e provides that "whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties, * * * conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt." Although these two provisions are not precisely dovetailed, it is the evident meaning of Congress that they should be understood as relating to the same subject. The effect of reading them together is that the power of the court to appoint a receiver (or the marshal as receiver) is to be exercised on an application for that purpose, which may be made by the creditor who files the petition for adjudication or by any other creditor; it must be made to appear to the court that such action is absolutely necessary for the preservation of the estate; and a bond will be required, conditioned as specified in the act and with such sureties as the act designates. But the sixty-ninth section of the statute provides that "a judge may, upon satisfactory proof by affidavit that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about so to neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued, the petitioners applying therefor shall enter into a bond in such amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if the bankrupt shall give a bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the

the corresponding provisions in the act of 1867 (which were much less specific and detailed than those of the present act) it was held that a provisional warrant might issue where it was shown that the debtor had disposed of a portion of his assets and had expressed an intention of going abroad.[18] The proceedings to obtain a warrant for the seizure of the debtor's property, and in execution thereof, are separate and distinct from the petition for adjudication in bankruptcy, and must be prosecuted by separate petition. The practice of uniting these two matters in one petition has met with the condemnation of the courts.[19] The application for a warrant is to be supported by affidavits, and these must set forth fully and specifically all the essential facts, including the insolvency of the debtor and the facts constituting the alleged act of bankruptcy or neglect of his property by the debtor.[20] It is not a sufficient compliance with the statute where the creditor's application is supported merely by an affidavit of the bankrupt that he waives proof of the necessary facts and consents to the issuance of the warrant.[21] On the other hand, where the affidavits show the necessary facts, the

value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition." Since all parts of a statute must be read together, and the construction must be such as to give effect to every part and every word, if possible, it will be necessary to understand that two separate methods of seizing the property of a person against whom an involuntary petition is pending, for the purpose of preserving it for the creditors, are provided. The one is by the appointment of a receiver. The receiver may be some disinterested person not an officer of the court, or the marshal may be appointed to act as such receiver. To justify this, it must be shown to the satisfaction of the court that such a step is "absolutely necessary" for the preservation of the estate. The bond must conform to the requirements of section 3. The bankrupt cannot regain the possession of the property. But if the petition is dismissed or withdrawn, he may recover all costs, counsel fees, expenses, and damages occasioned by the seizure and detention of his property. The other method is by the issuance of a warrant empowering and directing the marshal to seize the property and hold it subject to further orders. To justify this course, it is not necessary to show the "absolute necessity" for seizing the estate, but it will be sufficient to make out a prima facie case in support of the petition in bankruptcy, that is, to offer satisfactory proof by affidavit that the respondent has committed an act of bankruptcy, or the creditor may secure the issuance of the warrant by showing that the conduct of the alleged bankrupt with reference to his property is, or has been, or will be so neglectful as to cause deterioration in value of the property. The bond should conform to the requirements of section 69. If it should prove that the seizure was "wrongfully obtained," the bankrupt may recover on the bond. The dismissal of the petition would probably make the seizure wrongful, and so, perhaps, would prove that the bankrupt had not been neglectful of his property. In this case the recovery is limited to "such damages as he shall sustain." The bankrupt may obtain the release of his property by giving a forthcoming bond.

[18] See Rev. Stat. U. S. § 5024; In re Hale, 18 N. B. R. 335, Fed. Cas. No. 5,911; In re Clark, 17 N. B. R. 554, Fed. Cas. No. 2,811.

[19] In re Kelly, 91 Fed. 504, 1 Am. Bankr. Rep. 306.

[20] In re Kelly, 91 Fed. 504, 1 Am. Bankr. Rep. 306.

[21] In re Sarsar, 120 Fed. 40, 9 Am. Bankr. Rep. 576.

warrant will not be vacated where such facts are not disproved, and it appears that the purpose of the bankrupt in moving to vacate the warrant is merely to deprive the marshal of his fees.[22] The application for the warrant will regularly be made to the judge, but it is provided that a referee in bankruptcy may "exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt, in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness or inability to act."[23] This will most probably include authority on the part of the referee, in the circumstances named, to fix the amount of the bond to be given by the petitioners and to approve the sureties thereon. The forms for the warrant, the marshal's return thereto, the bond of the petitioning creditors, and a bond of indemnity to the marshal, have been officially prescribed.[24] There is no official precedent for the forthcoming bond to be given by the alleged bankrupt, to obtain the release of his property, but it may be in the form usually followed in cases of attachment and the like. Upon breach of the condition of such a forthcoming bond, the court of bankruptcy has jurisdiction to proceed against the sureties on a summary petition.[25] If, however, the marshal, acting merely as the messenger of the court, has taken possession of the bankrupt's property, but without any order of court to that effect, his possession is not that of the court of bankruptcy.[26] Property in the custody of the marshal, under a warrant in bankruptcy, may be insured under the direction of the judge or referee.[27]

§ 202. **Seizure of Property in Hands of Third Person.**—Under a warrant such as is described in the preceding section, the marshal will be justified in taking possession not only of such property of the bankrupt as may remain in the latter's own hands, but also of all property actually belonging to the bankrupt which may be found in the possession of third persons holding it as the bankrupt's agents, custodians, or bailees.[28] But a more difficult question arises when the officer is asked

[22] In re Clark, 17 N. B. R. 554, Fed. Cas. No. 2,811.

[23] Bankruptcy Act 1898, § 38, cl. 3.

[24] Official Forms Nos. 8, 9, 10.

[25] In re Mayo, 4 Hughes, 384, Fed. Cas. No. 9,353a.

[26] The Ironsides, 4 Biss. 518, Fed. Cas. No. 7,069.

[27] In re Carow, 4 N. B. R. 543, Fed. Cas. No. 2,426.

[28] Feibelman v. Packard, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984; Sharpe v. Doyle, 102 U. S. 686, 26 L. Ed. 277; In re White, 205 Fed. 393, 29 Am. Bankr. Rep. 358; In re Franklin Suit & Skirt Co., 197 Fed. 591, 28 Am. Bankr. Rep. 278. A marshal appointed to take charge of the property of an alleged bankrupt has the right to seize property in the possession of a third person, even though the latter claims it adversely, where there is reason to believe that it actually belongs to the bankrupt's estate; and the bankruptcy court has jurisdiction to

to seize property in the hands of a third person who claims title thereto in his own right, under a transfer or conveyance from the bankrupt made before the commencement of the proceedings, but which is alleged by creditors to have been void because fraudulent at common law or preferential, or in pursuance of a general assignment for the benefit of creditors, or otherwise in a contravention of the bankruptcy act. A number of well-considered cases, both under the act of 1867 and the present statute, hold that the marshal acts at his own risk in taking possession of property thus claimed, and that the claimant cannot be deprived of the possession of the property on the ex parte application of the creditors, nor compelled to litigate his claims in summary proceedings in the bankruptcy court on the return of the warrant.[29] But the Supreme Court of the United States has unequivocally declared that property of a bankrupt in the hands of third persons is included within the provisions of the statute, so that it may be seized by the marshal, where the possessor's title rests upon a foundation which is void or voidable under the bankruptcy act, the case before the court being that of a purchaser from an assignee under a general assignment for creditors, which assignment was itself an act of bankruptcy, and the sale having been made before the appointment of a trustee in bankruptcy, but after and with notice of the filing of the petition in bankruptcy.[30] This decision not only agrees with rulings made under the former statute, but has been followed in later cases, and is understood as justifying the seizure of property in the hands of third persons, not only where the possessor claims under an assignment for creditors, but also where the transfer to him was fraudulent or preferential.[31] At any rate, it

determine the title thereto, and if the adverse claimant files a petition for its recovery in the bankruptcy court, he thereby assents to the jurisdiction of that court summarily to determine his rights. Further, the fact that property was unlawfully taken from one in possession of it by state officers, by an unreasonable or unlawful search and seizure, affords no reason why it may not be lawfully seized while in the possession of such authorities by the marshal acting as receiver in bankruptcy. Le Master v. Spencer (C. C. A.) 203 Fed. 210, 29 Am. Bankr. Rep. 264. But on motion in bankruptcy to require third parties to turn over property, alleged to belong to the bankrupt, to the receiver, specific proof must be made as to the identity or value of the property; and a search of a third person's premises for property belonging to the bankrupt is proper only as specific property or to obtain known assets of the bankrupt. In re Iron Clad Mfg. Co., 193 Fed. 781.

[29] In re Harthill, 4 Ben. 448, 4 N. B. R. 392, Fed. Cas. No. 6,161; In re Holland, Fed. Cas. No. 6,605; In re Manahan, Fed. Cas. No. 9,003; In re Rockwood, 91 Fed. 363, 1 Am. Bankr. Rep. 272; In re Kelly, 91 Fed. 504, 1 Am. Bankr. Rep. 306; Beach v. Macon Grocery Co., 116 Fed. 143, 53 C. C. A. 463, 8 Am. Bankr. Rep. 751; In re Kolin, 134 Fed. 557, 67 C. C. A. 481, 13 Am. Bankr. Rep. 531; In re Andre, 135 Fed. 736, 68 C. C. A. 374, 13 Am. Bankr. Rep. 132. And. see In re Gibson, 22 Okl. 867, 98 Pac. 923.

[30] Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, 5 Am. Bankr. Rep. 623.

[31] Sharpe v. Doyle, 102 U. S. 686, 26 L.

seems clear that a third person in the possession of property may be summarily ordered to surrender it, where the validity of the title which he sets up in himself depends on a question of law rather than one of fact.[32] It is perhaps more doubtful whether the jurisdiction of a court of bankruptcy to authorize the seizure of property under a warrant of this kind can be extended to property which is in the possession of an officer of a state court, such as a sheriff or constable, under a writ of execution or replevin.[33] But in one case, where a justice of the peace refused to regard an adjudication in bankruptcy, but proceeded to render judgment and order the sale of attached property which, by virtue of such adjudication had passed into the jurisdiction of the court of bankruptcy, the latter court was held justified in directing the seizure of the property by the marshal.[34] But if the property is in the hands of a receiver appointed by a state court, it cannot be seized on the warrant, as the possession of the receiver is that of the court which appointed him.[35] If property which really belongs to a third person is erroneously seized, the court of bankruptcy may order it to be returned to him. But this course should not be taken where his right to it is in good faith denied by creditors of the bankrupt; in that case the claimant will be required to assert his rights in a plenary action.[36] And in any case the restoration of the property to the claimant may be conditioned upon his compliance with proper terms imposed by the court of bankruptcy, when the circumstances justify it. Thus, where the property seized was in the possession of an assignee for the benefit of creditors (the assignment being rendered nugatory by the subsequent institution of the bankruptcy proceedings), it was said that it should be restored to him only on condition of his releasing the marshal from all damages, and his agreeing not to dispose of the property without the approval of the bankruptcy court.[37]

Ed. 277; Feibelman v. Packard, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984; In re Rochford, 124 Fed. 182, 59 C. C. A. 388, 10 Am. Bankr. Rep. 608; McNulty v. Feingold, 129 Fed. 1001, 12 Am. Bankr. Rep. 338; In re Moody, 131 Fed. 525, 12 Am. Bankr. Rep. 718; In re Knopf, 144 Fed. 245 16 Am. Bankr. Rep. 432; In re Smith, 1 Nat. Bankr. News, 61; In re Muller, Deady, 513, 3 N. B. R. 329, Fed. Cas. No. 9,912; In re Briggs, 3 N. B. R. 638, Fed. Cas. No. 1,869; Stevenson v. McLaren, 23 Minn. 111, 14 N. B. R. 403; In re Miller, 6 Biss. 30, Fed. Cas. No. 9,551.

[32] In re Michaelis & Lindeman, 196 Fed. 718.

[33] In re Hymes Buggy & Implement Co., 130 Fed. 977, 12 Am. Bankr. Rep. 477; In re L. Popkin & Co. (D. C.) 240 Fed. 848, 38 Am. Bankr. Rep. 20; Ansonia Brass & Copper Co. v. Babbitt, 8 Hun (N. Y.) 157. See supra, § 28.

[34] In re Tune, 115 Fed. 906, 8 Am. Bankr. Rep. 285.

[35] Carling v. Seymour Lumber Co., 113 Fed. 483, 51 C. C. A. 1, 8 Am. Bankr. Rep. 29. And see supra, § 27.

[36] In re Young, 111 Fed. 158, 49 C. C. A. 283, 7 Am. Bankr. Rep. 14.

[37] In re Manahan, 19 N. B. R. 65, Fed. Cas. No. 9,003.

§ 203. **Remedies Against Marshal Seizing Property of Stranger.**—Where the marshal, in the execution of a warrant of seizure in bankruptcy, has taken possession of property which did not belong to the bankrupt, but was owned by a third person, the most simple and direct remedy of the latter is to file a petition in the court of bankruptcy, setting up his title to the property in question, and praying for an order that it may be restored to him. On such intervention, the bankruptcy court has authority to grant him full protection and justice, and will order the immediate return to him of the property seized, or its proceeds if it has already been sold.[38] It has also been held that the claimant may be allowed costs, counsel fees, and damages occasioned by the seizure and detention of the property, to be paid by the creditors at whose instance his property was taken.[39] But the owner of the property has a right to trial by jury in the federal court, if he chooses to claim it, and he cannot be compelled to submit his claims to adjudication in a summary proceeding, on petition, rule to show cause, and reference of the case to a referee in bankruptcy. He may maintain a plenary action against the marshal in the bankruptcy court (or against the trustee, if a trustee has been appointed and has taken charge of the property) if he prefers to adopt that course.[40] If, on the other hand, he chooses to abandon the property and pursue his remedies against the marshal, he may maintain an action for damages against that officer, in the nature either of trespass or trover, in a state court. This involves no interference with the exclusive jurisdiction of the court of bankruptcy, and that court will not enjoin the proceedings at the instance of the trustee in bankruptcy, claiming the property.[41] If the petitioning creditors in the bankruptcy proceedings have given the marshal a bond of indemnity, they will of course be bound to defend such suit against him

[38] In re Harthill, 4 Ben. 448, 4 N. B. R. 392, Fed. Cas. No. 6,161; In re Davidson, 2 Ben. 506, 2 N. B. R. 114, Fed. Cas. No. 3,598; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Lammon v. Feusier, 111 U. S. 17, 4 Sup. Ct. 286, 28 L. Ed. 337; Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. 379, 31 L. Ed. 374. "It is a matter of everyday practice, where the marshal is called upon to seize the assets of a bankrupt, that he in this way becomes possessed of articles of property which do not in fact belong to the bankrupt, and the uniform practice in these cases is for the owner of the property to apply to the bankruptcy court for its possession, and orders are made causing the same to be delivered." In re Bender, 106 Fed. 873, 5 Am. Bankr. Rep. 632.

[39] In re Abraham, 93 Fed. 767, 35 C. C. A. 592, 2 Am. Bankr. Rep. 266.

[40] In re Russell (C. C. A.) 101 Fed. 248, 3 Am. Bankr. Rep. 658.

[41] Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257; In re Russell (C. C. A.) 101 Fed. 248, 3 Am. Bankr. Rep. 658; Marsh v. Armstrong, 20 Minn. 81 (Gil. 66), 18 Am. Rep. 355, 11 N. B. R. 125; In re Davidson, 2 Ben. 506, 2 N. B. R. 114, Fed. Cas. No. 3,598; In re Marks, 2 N. B. R. 575, Fed. Cas. No. 9,095. See Leroux v. Hudson, 109 U. S. 468, 3 Sup. Ct. 309, 27 L. Ed. 1000. Compare Hudson v. Schwab, 18 N. B. R. 480, Fed. Cas. No. 6,835.

in the state court.[42] The fact that the claimant may have applied to the bankruptcy court to stop proceedings for the sale of the property until he could establish his title will not make him a party to the bankruptcy proceedings, nor will the decision on such application make his title res judicata in his action against the marshal for trespass.[43] But if the marshal justifies under his warrant, and the state courts hold that he had no authority under the laws of the United States to levy on the property in controversy, the decision is one which may be reviewed by the Supreme Court of the United States.[44]

But while a state court may have jurisdiction of an action in personam against the marshal, this is not true of any proceeding which seeks to recover the property itself. The res being within the exclusive custody and possession of the court of bankruptcy through its officer, no other court can be permitted to interfere with that possession. Consequently, if the claimant desires to regain the property itself, there is but one court which can grant him that relief, namely, the court under whose process it was seized. He cannot maintain an action of replevin in any state court against the marshal or the trustee in bankruptcy for the restoration of the property. If such action is begun, its prosecution will be enjoined by the court of bankruptcy.[45] Further, if a United States marshal, under process from the federal court, seizes property which does not belong to the defendant in the writ, but to a third person, the latter cannot have a writ of injunction from a state court forbidding the marshal to sell the property. It is for the federal court to give him relief in that behalf.[46]

§ 204. Restraining Waste or Disposition of Property by Bankrupt. —Upon the making of an adjudication in voluntary bankruptcy, or upon the commencement of involuntary proceedings against a debtor; all his property comes within the jurisdiction of the court of bankruptcy for the purpose of the proceeding, and if the circumstances are such as to render it necessary, for the preservation of the estate, that the bankrupt himself or any third persons should be restrained from wast-

[42] In re Marks, 2 N. B. R. 575, Fed. Cas. No. 9,095.

[43] Marsh v. Armstrong, 20 Minn. 81 (Gil. 66), 18 Am. Rep. 355, 11 N. B. R. 125.

[44] Sharpe v. Doyle, 102 U. S. 686, 26 L. Ed. 277.

[45] In re Russell (C. C. A.) 101 Fed. 248, 3 Am. Bankr. Rep. 658; Freeman v. Howe, 24 How. 450, 16 L. Ed 749; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390; Petterson v. Mater, 26 Fed. 31; Summers v. White, 71 Fed. 106, 17 C. C. A. 631; Hannebutt v. Cunningham, 3 Ill. App. 353; Feusier v. Lammon, 6 Nev. 209; Lewis v. Buck, 7 Minn. 104 (Gil. 71), 82 Am. Dec. 73; Munson v. Harroun, 34 Ill. 422, 85 Am. Dec. 316.

[46] Brooks v. Montgomery, 23 La. Ann. 450.

ing, selling, or otherwise disposing of the property, an injunction may issue for that purpose, to be in force until a trustee is elected and qualified.[47] Thus, the alleged bankrupt may be enjoined from collecting accounts due him, from squandering his assets, or from making transfers or gifts or mortgages of his property.[48] He will not be permitted to convey away his property after the filing of the petition in bankruptcy,[49] and if he, thereafter, delivers property in his possession to a third person on the pretense that the latter is the owner of the property and the bankrupt only a bailee, it is a contempt of the court of bankruptcy and may be dealt with as such.[50] Further, a creditor of a bankrupt who receives a payment in money from him after the institution of the proceedings violates the spirit and purpose of the bankruptcy law, and if he does this knowingly and fraudulently, he may be proceeded against criminally and punished on conviction, under the twenty-ninth section of the act.[51] It may even be proper to enjoin the bankrupt from disposing of his exempt property, as where a plaintiff claims such property by virtue of a waiver of exemptions.[52] And where a petition in bankruptcy is filed against a corporation, its officers may be enjoined from withdrawing its funds from the bank where they are on deposit.[53]

§ 205. Restraining Interference with Property by Third Persons.—The filing of a bankruptcy petition is supposed to give notice to all the world of the pendency of the proceedings, and operates as an attachment of the bankrupt's property and as an injunction restraining all persons from intermeddling with it.[54] But besides this implied injunction, it is within the authority of the court of bankruptcy to issue its actual injunction, for the purpose of preserving the estate intact until a trustee can be appointed to take charge of it forbidding any third per-

[47] Hampton v Rouse, 22 Wall. 263, 22 L. Ed. 755; In re Ulrich, 6 Ben. 483, 8 N. B. R. 15, Fed. Cas. No. 14,328; Hyde v. Bancroft, 8 N. B. R. 24, Fed. Cas. No. 6,966; Ex parte Harris, Fed. Cas. No. 6,110; In re Muller, Deady, 513, 3 N. B. R. 329, Fed. Cas. No. 9,912; Johnson v. Price, 13 N. B. R. 523, Fed. Cas. No. 7,407; In re Camp, 1 N. B. R. 242, Fed. Cas. No. 2,346; In re Heleker Bros. Mercantile Co. (D. C.) 216 Fed. 963, 33 Am. Bankr. Rep. 503.

[48] In re Calendar, 5 Law Rep. 129, Fed. Cas. No. 2,308; In re Irving, 8 Ben. 463, 14 N. B. R. 289, Fed. Cas. No. 7,073.

[49] Muschel v. Austern, 43 Misc. Rep. 352, 87 N. Y. Supp. 235.

[50] In re Potteiger, 181 Fed. 640, 24 Am. Bankr. Rep. 648.

[51] Knapp & Spencer Co. v. Drew, 160 Fed. 413, 87 C. C. A. 365, 20 Am. Bankr. Rep. 355.

[52] Floyd v. Johnson, 142 Ga. 833, 83 S. E. 943.

[53] In re McGinley, 219 Fed. 159, 135 C. C. A. 57, 33 Am. Bankr. Rep. 612.

[54] Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, 7 Am. Bankr. Rep. 224; In re Krinsky, 112 Fed. 972, 7 Am. Bankr. Rep. 535; In re Breslauer, 121 Fed. 910, 10 Am. Bankr. Rep. 33; In re Mertens, 131 Fed. 507, 12 Am. Bankr. Rep. 698; In re Reynolds, 127 Fed. 760, 11 Am. Bankr. Rep. 758.

son whomsoever from interfering with the property, taking possession of any portion of it, selling it, or otherwise disturbing the status quo.[55] Removal or concealment by third persons of property, in contemplation of the appointment of a receiver or trustee in bankruptcy, after the filing of the petition, is in fact a contempt of the court; and any third person who has interfered with personalty which was in the bankrupt's possession when the petition in bankruptcy was filed, has the burden of showing the right under which he removed the property, and on his failure to make such showing, he is properly directed to surrender to the trustee possession of everything shown to have been in the bankrupt's possession.[56]

Thus, where the debtor had made an assignment for the benefit of his creditors (which is alleged as the act of bankruptcy upon which the petition is founded), and the assignee is in possession of the estate and is about to make sale thereof, the court of bankruptcy has jurisdiction to enjoin such assignee from proceeding further with the administration of the estate.[57] Again, pending the adjudication on an involuntary petition, the court of bankruptcy may enjoin any person from conveying away, disposing of, or interfering with any property once owned by the debtor and claimed to have been fraudulently transferred by him and concealed, upon prima facie proof of the fraud.[58] Moreover the authority of the court of bankruptcy to preserve the property intact until the proper person can be vested with its possession and control extends to cases where any portion of the bankrupt's estate is in the custody of an officer of a state court, who has levied a writ thereon. The sale or other disposition of such property, under the officer's authority may be stayed until a trustee in bankruptcy can intervene for the protection of the rights of the general creditors, or make out a case against the validity of the levy.[59] But these preliminary injunc-

[55] In re Lineberry, 183 Fed. 338, 25 Am. Bankr. Rep. 164; In re Berkowitz, 173 Fed. 1013, 22 Am. Bankr. Rep. 233; Beach v. Macon Grocery Co., 116 Fed. 143, 53 C. C. A. 463, 8 Am. Bankr. Rep. 751; In re Smith, 113 Fed. 993, 8 Am. Bankr. Rep. 55; In re Moses, 6 N. B. R. 181, Fed. Cas. No. 9,869; In re Ulrich, 6 Ben. 483, 8 N. B. R. 15, Fed. Cas. No. 14,328; Hyde v. Bancroft, 8 N. B. R. 24, Fed. Cas. No. 6,966; In re Muller, Deady, 513, 3 N. B. R. 329, Fed. Cas. No. 9,912; Johnson v. Price, 13 N. B. R. 523, Fed. Cas. No. 7,407; In re Schow (D. C.) 213 Fed. 514; Floyd v. Johnson, 142 Ga. 833, 83 S. E. 943.

[56] In re Iron Clad Mfg. Co., 193 Fed. 781.

[57] In re Gutwillig, 92 Fed. 337, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388; Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co., 99 Fed. 699, 3 Am. Bankr. Rep. 704; Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117.

[58] In re Abbott, 1 Hask. 250, Fed. Cas. No. 10; In re Holland, 12 N. B. R. 403, Fed. Cas. No. 6,605; In re Fendley, 10 N. B. R. 250, Fed. Cas. No. 4,728.

[59] Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83; In re

tions are only intended to hold the estate together until some person, whether a receiver or trustee, can be appointed to take charge of it. They are not meant, and cannot be used, as a means of settling adverse claims or avoiding preferences or fraudulent conveyances. Thus, after a receiver is appointed, if he finds goods in the possession of a third person, which creditors claim as a part of the bankrupt's estate, but which the holder claims as his own, under a title set up in good faith and supported by a prima facie case, the receiver cannot have him enjoined from selling or removing the property; he must proceed by a plenary action.[60]

In order to justify the issuance of an injunction, it must appear that a proceeding in bankruptcy has been commenced by the filing of a petition and is pending.[61] Attempts have sometimes been made to secure process from either a state court or a federal court to impound the assets of an insolvent debtor and hold them until bankruptcy proceedings against him can be instituted. But if power to take this course exists, it can only be exercised in a very strong case and where there is absolutely no other remedy.[62] It has also been held that a court of bankruptcy has no power to enjoin third persons from interfering with property within its territorial jurisdiction but claimed as assets of an estate in bankruptcy which is being administered in the federal court in another district;[63] and conversely, that such an injunction cannot be made to apply to persons who are outside of the jurisdiction of the court and who do not come within the district to participate in the administration of the estate.[64] But both these positions must be regarded as at least doubtful since the amendment of 1910, conferring ancillary jurisdiction on courts of bankruptcy.

The application for an injunction, in cases of this kind, will ordinarily be made by the creditors who have filed the petition in bankruptcy. But any party in interest may invoke the interposition of the court of bankruptcy, including creditors other than the petitioners,[65] or their attorney acting in their behalf,[66] or the bankrupt himself.[67] But this

Schloerb, 97 Fed. 326, 3 Am. Bankr. Rep. 224; In re Lutfy, 156 Fed. 873, 19 Am. Bankr. Rep. 614. But see In re Ogles, 93 Fed. 426, 1 Am. Bankr. Rep. 671.

[60] In re Glenn, 185 Fed. 554, 25 Am. Bankr. Rep. 806. And see In re Ward, 104 Fed. 985, 5 Am. Bankr. Rep. 215.

[61] In re Goldberg, 117 Fed. 692, 9 Am. Bankr. Rep. 156.

[62] Vietor v. Lewis, 24 Misc. Rep. 515, 53 N. Y. Supp. 944, affirmed, 34 App. Div. 631, 54 N. Y. Supp. 1118.

[63] In re Dempster, 172 Fed. 353, 22 Am. Bankr. Rep. 751.

[64] In re Isaac Harris Co., 173 Fed. 735, 23 Am. Bankr. Rep. 237.

[65] Depauli v. Espitallier, 3 Cal. App. 239, 84 Pac. 999.

[66] In re Goldberg, 117 Fed. 692, 9 Am. Bankr. Rep. 156.

[67] In re Wallace, Deady, 433, 2 N. B. R. 134, Fed. Cas. No. 17,049; In re Bowie, 1 N. B. R. 628, Fed. Cas. No. 1,728; Blake v. Francis-Valentine Co.,

power will not be exercised in aid of a purchaser of lands at a bankruptcy sale, who has been put in possession, and who, long after the estate is fully administered, is threatened with executions issued by a state court on judgments against the bankrupt.[68] No judgment can be rendered against a third person for contempt in disobeying an injunction issued in aid of the proceedings in bankruptcy, without proper proceedings taken against him, distinct from those against the bankrupt.[69]

§ 206. Enjoining Levy, Judicial Sale, or Replevin.—Between the filing of a petition in bankruptcy and the appointment of a trustee, all the property of the bankrupt is in the custody of the court of bankruptcy, and no creditor will be allowed to gain an advantage over others by appropriating any part of it under cover of judicial process. If judgment creditors are threatening to levy executions or attachments on the property, they will be enjoined from so doing.[70] If a sheriff has an execution in his hands, he will be enjoined from levying on the goods, or if he has already levied, it is in the authority of the court of bankruptcy to restrain him from making a sale.[71] But notice to a sheriff having an execution in his hands, that the judgment debtor is in bankruptcy, must come through official channels in order to be effective, and a notice of an intention to institute proceedings in bankruptcy is not enough; and the sheriff is not liable to the trustee in bankruptcy as for a conversion, though he sells property under the levy after the bankruptcy proceedings have begun, unless he had such notice.[72] It is not necessary, however, in all cases that the sheriff should be restrained from proceeding with the writ in his hands; as an alternative to this, he may be allowed to sell the property, but under the supervision and control of the court of bankruptcy, being then required

89 Fed. 691, 1 Am. Bankr. Rep. 372; Brock v. Terrell, 2 N. B. R. 643, Fed. Cas. No. 1,914; Jones v. Leach, 1 N. B. R. 595, Fed. Cas. No. 7,475.

[68] Sargent v. Helton, 115 U. S. 348, 6 Sup. Ct. 78, 29 L. Ed. 412.

[69] Creditors v. Cozzens, 3 N. B. R. 281, Fed. Cas. No. 3,378.

[70] Samson v. Burton, 5 Ben. 325, 4 N. B. R. 1, Fed. Cas. No. 12,285; In re Eastern Commission & Importing Co., 129 Fed. 847, 12 Am. Bankr. Rep. 305; Dittemore v. Cable Milling Co., 16 Idaho, 298, 101 Pac. 593, 133 Am. St. Rep. 98.

[71] Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83; In re Goldberg, 117 Fed. 692, 9 Am. Bankr. Rep. 156; Blake, Moffitt & Towne v. Francis-Valentine Co., 89 Fed. 691, 1 Am. Bankr. Rep. 372; In re Wallace, Deady, 433, 2 N. B. R. 134, Fed. Cas. No. 17,094; In re Bowie, 1 N. B. R. 628, Fed. Cas. No. 1,728; Brock v. Terrell, 2 N. B. R. 643, Fed. Cas. No. 1,914; Jones v. Leach, 1 N. B. R. 595, Fed. Cas. No. 7,475; In re Atkinson, 3 Pittsb. 423, 7 N. B. R. 143, Fed. Cas. No. 606; In re Mallory, 1 Sawy. 88, 6 N. B. R. 22, Fed. Cas. No. 8,991; In re Mellor, Fed. Cas. No. 9,402.

[72] Coppard v. Gardner (Tex. Civ. App.) 199 S. W. 650.

to hold the proceeds subject to the order of that court.[73] This latter course is sometimes taken where a majority of the creditors desire it, and it does not appear that the property is likely to be sacrificed or that the interests of the minority creditors will be injured.[74] But after process of execution issuing from a state court has been executed by a sale of the bankrupt's property, it is then too late for the bankruptcy court to interfere by injunction or otherwise, the purchaser having acquired a good title.[75] Nor will the court, in this case, have jurisdiction over the proceeds of the sale remaining in the hands of the sheriff, and he cannot be enjoined from paying over the same to the execution creditor.[76]

The same principles apply, and for the same reasons, to the seizure of the property under a writ of replevin. After the commencement of the proceedings in bankruptcy, though a trustee has not yet been appointed, property scheduled as a part of the bankrupt's estate cannot rightfully be seized by an officer acting under a writ of replevin from a state court. If it is so taken, the officer will be forbidden, by injunction, to sell the property under his writ, or deliver it to the claimant, or otherwise dispose of it, and will be ordered to restore it to the custody of the court of bankruptcy, and the consequences of his disobedience will recoil upon those who may have instigated his disregard of the authority of the court of bankruptcy.[77]

§ 207. Restraining Proceedings in State Courts.—In general, any suit or proceeding in a state court which threatens to take property of the bankrupt out of the custody of the court of bankruptcy, to give particular creditors an undue advantage, or to interfere with the administration of the estate, may be enjoined or stayed pending the appointment and qualification of a trustee in bankruptcy.[78] For instance, it is within the discretion of the court of bankruptcy to enjoin the prosecution of foreclosure proceedings in a state court under a mortgage covering property of the bankrupt, and such action is generally proper if it appears that the bankrupt's equity in the property is of any value.[79] But out of comity and respect to the jurisdiction of the state

[73] Allen v. Montgomery, 48 Miss. 101, 10 N. B. R. 503; In re Jackson, 9 Fed. 493.

[74] In re Edward Ellsworth Co., 173 Fed. 699, 23 Am. Bankr. Rep. 284.

[75] In re Fuller, 1 Sawy. 243, 4 N. B. R. 115, Fed. Cas. No. 5,148.

[76] In re Easley, 93 Fed. 419, 1 Am. Bankr. Rep. 715.

[77] In re Schloerb, 97 Fed. 326, 3 Am. Bankr. Rep. 224; In re Walsh Bros., 159 Fed. 560, 20 Am. Bankr. Rep. 472; In re Alton Mfg. Co., 158 Fed. 367, 19 Am. Bankr. Rep. 805; In re Gutwillig, 90 Fed. 481; In re Wilk, 155 Fed. 943, 19 Am. Bankr. Rep. 178.

[78] See Bankruptcy Act 1898, § 11. And see supra, §§ 29, 185–198. See also Murphy v. John Hofman Co., 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327, 21 Am. Bankr. Rep. 487.

[79] Pugh v. Loisel, 219 Fed. 417, 135 C. C. A. 221, 33 Am. Bankr. Rep. 580.

courts the court of bankruptcy will not take the strong step of enjoining proceedings in such courts as a mere matter of course or without a proper showing of necessity. Where a creditor has recovered a judgment in a state court against the bankrupt on a dischargeable debt, he should not be restrained from taking steps to enforce the judgment where there is no allegation or proof of any threatened invasion of the rights of any other creditor, because of the mere possibility of action being taken which might be injurious to the creditors as a whole, and especially where no application has been made to the state court for proper relief there.[80] Moreover, this provision of the Bankruptcy Act (§ 11) must be restricted to the cases which it was intended to cover. This is shown by a case in which a voluntary bankrupt had failed to schedule certain life insurance policies which had a cash surrender value and had concealed their existence from his trustee. He obtained his discharge, but the estate was not formally closed, nor was the trustee discharged as such. After the death of the bankrupt, his executor brought suit on the policies in a state court, joining the trustee in bankruptcy and also a receiver of the bankrupt's property who had been appointed by the state court in supplementary proceedings. Then the trustee began an action on the policies in the federal court, joining the executor and the receiver. An application to the federal court to enjoin the proceedings in the state court was refused, because the case was not one within the Bankruptcy Act, but one in which the two courts had concurrent jurisdiction.[81] On the other hand, where it is alleged that certain creditors have gained an unlawful preference by means of attachments levied on the debtor's property, the appointment of a receiver, and the sale of the property, the proceeds remaining in the hands of the receiver, they may be enjoined from taking proceedings in the state court for the distribution of the fund so held, at least where the necessity of prompt action is shown and it appears that the money would be lost by the policy of waiting until a trustee subsequently to be appointed could sue them for the avoidance of the alleged preference and the recovery of its fruits.[82] So where a building leased by the bankrupt and containing his stock in trade passes into the possession of a receiver in bankruptcy, and its occupation is necessary to the proper settlement of the estate, the landlord will not be allowed to prosecute an action of ejectment in a state court to recover the building, but

[80] In re Penn Development Co. (D. C.) 220 Fed. 222, 33 Am. Bankr. Rep. 759.

[81] Doolittle v. Mutual Life Ins. Co. of New York (D. C.) 249 Fed. 491, 41 Am. Bankr. Rep. 685.

[82] In re Ogles, 93 Fed. 426, 1 Am. Bankr. Rep. 671.

will be enjoined, and remitted to his proper remedy in the court of bankruptcy.[83]

§ 208. Indemnity Bond by Petitioning Creditors.—When application is made for the appointment of a receiver pending the adjudication of bankruptcy, the creditors must furnish the indemnifying bond required by the statute, and the authority of the court to grant their application is conditioned on this being done.[84] And where an order appointing a receiver requires the petitioner to give a bond, but fails to fix the time when the bond shall be filed, or fails to require such filing before the receiver is directed to take possession of the property, it is erroneous.[85] The creditors' bond protects a receiver in bankruptcy for his outlay in excess of the amount collected by him, but it is only in cases where the proceedings, resulting in a receivership, were instituted improvidently or without probable cause, or without good faith, or the like, that the petitioning creditors are liable for the payment of the excess of the cost of the receivership over the assets,[86] although, in a proper case, the court may require the bond to contain, as one of its conditions, that the creditors will pay the expenses of the receivership if sufficient assets applicable to that purpose are not discovered.[87] There is ordinarily no liability, on a bond of this kind, in the way of damages to the bankrupt, unless the creditors acted maliciously and without probable cause, and in that case the remedy is a suit in the nature of an action of malicious prosecution.[88] But so far as regards a right of action on the bond, if the order appointing the receiver is set aside, that is sufficient to show that the taking possession of the debtor's property was "wrongful," within the meaning of the statute, without showing malice, fraud, or lack of probable cause; and it is not necessary, to sus-

[83] In re Chambers, Calder & Co., 98 Fed. 865, 3 Am. Bankr. Rep. 537; In re Kleinhans, 113 Fed. 107, 7 Am. Bankr. Rep. 604.

[84] Beach v. Macon Grocery Co., 116 Fed. 143, 53 C. C. A. 463, 8 Am. Bankr. Rep. 751; In re Haff, 135 Fed. 742, 68 C. C. A. 380, 13 Am. Bankr. Rep. 354.

[85] In re Haff, 135 Fed. 742, 68 C. C. A. 380, 13 Am. Bankr. Rep. 354.

[86] In re Metals Extraction & Refining Co., 195 Fed. 226, 115 C. C. A. 178, 27 Am. Bankr. Rep. 11. A bond given by petitioners for the appointment of a receiver, conditioned to pay to the bankrupt all costs, expenses and damages occasioned by the appointment, in case the petition is dismissed and the receiver discharged, does not cover claims of the receiver for expenses incurred. In re El Sevilla Restaurant (D. C.) 253 Fed. 410, 41 Am. Bankr. Rep. 608. On the dismissal of an involuntary bankruptcy petition, which furnished the basis for the appointment of a receiver, neither the sureties nor the petitioning creditors are liable for a greater amount than that fixed in the bond. In re Weissbord (D. C.) 241 Fed. 516, 39 Am. Bankr. Rep. 243.

[87] In re McKane, 152 Fed. 733.

[88] In re Moehs & Rechnitzer, 174 Fed. 165, 22 Am. Bankr. Rep. 286; In re J. Ito Terusaki (D. C.) 238 Fed. 934, 39 Am. Bankr. Rep. 256.

tain an action in a state court, that the costs and damages should first have been fixed by the court of bankruptcy.[89]

As to the bond required when the property of the bankrupt is to be seized by the marshal under a warrant, that is only given as a prerequisite to the taking of the property of an alleged bankrupt at the instance of the petitioners pending adjudication; and where property had already been seized under an execution, a bond given to secure an injunction restraining the sale is not within this provision of the statute.[90] The liability on such a bond only runs in favor of the respondent or respondents who were such when it was given, any persons subsequently becoming respondents, if they desire to be protected, being required to move for an additional bond.[91] There is a right of recovery on the bond when the petition, being against several persons as partners, is dismissed as to one or more of them.[92] Though the bond covers "all costs, counsel fees, expenses, and damages occasioned by such seizure," the bankrupt is entitled to only one allowance which must include all such items as he claims, and if he makes no claim for damages, he cannot afterwards make a further claim therefor against the petitioners and their bondsmen.[93] The costs, expenses, and damages to be recovered are such as are incident to the taking and detention of the property, but not including costs, expenses, and damages incident to the institution of the bankruptcy proceedings.[94] As an illustration of the kind of damages thus allowed, we may cite a case where the marshal, while in possession of the property, allowed certain water pipes thereon to freeze and burst, and it was held that the bankrupt was entitled to recover the resultant damages, although he had free access to the premises, since the petitioning creditors, on taking possession of the property, assumed full responsibility for its care.[95]

§ 209. **Forthcoming Bond by Bankrupt.**—When property of an alleged bankrupt is seized on a warrant to the marshal, upon the filing of the petition and before an adjudication, he may obtain its release "if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the

[89] T. E. Hill Co. v. United States Fidelity & Guaranty Co., 250 Ill. 242, 95 N. E. 150.

[90] In re Hines, 144 Fed. 147, 16 Am. Bankr. Rep. 538.

[91] In re Spalding, 150 Fed. 120, 17 Am. Bankr. Rep. 667.

[92] In re Nixon, 110 Fed. 633, 6 Am. Bankr. Rep. 693.

[93] Nixon v. Fidelity & Deposit Co., 150 Fed. 574, 80 C. C. A. 336, 18 Am. Bankr. Rep. 174.

[94] Selkregg v. Hamilton Bros., 144 Fed. 557; In re J. Ito Terusaki, 238 Fed. 934, 39 Am. Bankr. Rep. 256.

[95] Selkregg v. Hamilton Bros., 144 Fed. 557.

event he is adjudged a bankrupt pursuant to such petition."[96] If the bankruptcy petition is dismissed, there is of course no further responsibility on the bond. On the other hand, if the adjudication is made, the condition of the bond requires the immediate surrender of the property, and it is not a good plea in an action on the bond that an appeal from the adjudication has been taken, without showing whether the appeal is still pending or has been determined.[97] It is a defense to such an action that the property has been actually surrendered to some one authorized to receive it, as a step in the bankruptcy proceeding, but it must be shown that such person possessed and acted in an official capacity, as, a receiver appointed in voluntary bankruptcy proceedings afterwards instituted by the bankrupt.[98] The case just cited shows that the state courts have jurisdiction of an action against the sureties on a forthcoming bond. But the court of bankruptcy also has jurisdiction to proceed against them, and the proceedings for that purpose may be based on a summary petition.[99]

§ 210. **Appointment of Receiver.**—The bankruptcy act invests the courts of bankruptcy with jurisdiction to "appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified."[100] And it is said that, both under the express grants of authority in the act, and in the exercise of the general equity powers possessed by a court of bankruptcy, such court has authority to appoint a receiver to take charge of the property of a person against whom a petition in involuntary bankruptcy has been filed and hold the same until a trustee in bankruptcy is appointed and qualified.[101] The jurisdiction to make such appointment attaches upon the filing of the petition, and though the petition may be afterwards dismissed or the adjudication refused, this does not make the order of appointment void or even erroneous.[102] And since the jurisdiction of the court of bankruptcy in this behalf is exclusive and final, the order

[96] Bankruptcy Act 1898, § 69.

[97] Moore Bros. v. Cowan, 173 Ala. 536, 55 South. 903.

[98] Moore Bros. v. Cowan, 173 Ala. 536, 55 South. 903.

[99] In re Mayo, 4 Hughes, 384, Fed. Cas. No. 9,353a.

[100] Bankruptcy Act 1898, § 2, cl. 3.

[101] In re Fixen & Co., 96 Fed. 748, 2 Am. Bankr. Rep. 822; Lansing v. Manton, 14 N. B. R. 127, Fed. Cas. No. 8,077; Horner-Gaylord Co. v. Miller & Bennett, 147 Fed. 295, 17 Am. Bankr. Rep. 257; In re De Lancey Stables Co., 170 Fed. 860, 22 Am. Bankr. Rep. 406. After an adjudication of voluntary bankruptcy, a receiver may be appointed, and where the application therefor is joined in by the bankrupt and the creditors, it will usually be granted in the absence of any charge of fraud and where no objection is made. In re Huddleston, 167 Fed. 428, 21 Am. Bankr. Rep. 669.

[102] In re T. E. Hill Co., 159 Fed. 73,

appointing a receiver cannot be collaterally attacked in the same or any other court,[103] and a state court, when asked to direct its own receiver to turn over property to the receiver in bankruptcy, has no jurisdiction to review the order of appointment and pass upon its wisdom or necessity.[104] The referee in bankruptcy may, in a proper case, make the appointment, and it has been held unnecessary that process should first issue against the bankrupt requiring him to show cause against such appointment.[105] But the better and more conservative opinion is that a receiver should not be appointed ex parte and without any notice or hearing, except in a case of imperious necessity, and when the petitioner's rights cannot be secured and protected in any other way.[106] And we call the attention of the reader to the very sensible observations made by one of the judges in a case where the action of a referee in appointing a receiver was condemned as precipitate, and the need of care and deliberation in taking such an important step was plainly pointed out.[107]

Whether a receiver should be appointed for a bankrupt, whether, if appointed, he should continue the bankrupt's business, whether he shall retain counsel, and the amount to be allowed to the receiver for his fees and for the services of counsel,—these are all matters which rest within the sound discretion of the court of bankruptcy.[108] No appointment will be made unless the court is satisfied that it is necessary for the protection of the property and that it will inure to the benefit of all the creditors.[109] Since Congress has explicitly required

86 C. C. A. 263, 20 Am. Bankr. Rep. 73; In re Wentworth Lunch Co., 189 Fed. 831.

103 Ross v. Stroh, 165 Fed. 628, 91 C. C. A. 616, 21 Am. Bankr. Rep. 644; Moore Bros. v. Cowan, 173 Ala. 536, 55 South. 903.

104 White v. Davis, 134 Ga. 274, 67 S. E. 716.

105 In re Standard Cordage Co., 184 Fed. 156, 30 Am. Bankr. Rep. 448; In re Abrahamson, 1 Nat. Bankr. News, 23.

106 T. S. Faulk & Co. v. Steiner, Lobman & Frank, 165 Fed. 861, 91 C. C. A. 547, 21 Am. Bankr. Rep. 623; Ingram v. Ingram Dart Lighterage Co. (D. C.) 226 Fed. 58, 34 Am. Bankr. Rep. 622.

107 In re Florcken, 107 Fed. 241, 5 Am. Bankr. Rep. 802.

108 In re Cash-Papworth Grow-Sir, 210 Fed. 24, 126 C. C. A. 604.

109 In re Desrochers, 183 Fed. 991, 25 Am. Bankr. Rep. 703; Horner-Gaylord Co. v. Miller & Bennett, 147 Fed. 295, 17 Am. Bankr. Rep. 257; M. & M. Nat. Bank of Pittsburgh v. Brady's Bend Iron Co., 8 Phila. 171, 5 N. B. R. 491, Fed. Cas. No. 9,018; In re Federal Mail & Express Co. (D. C.) 233 Fed. 691, 37 Am. Bankr. Rep. 240. Where, after the filing of a petition in involuntary bankruptcy against a retail trader, an application was made for the appointment of a receiver to take charge of his property until a trustee should be qualified, wherein it was alleged that he had been fraudulently induced to sell his entire stock in trade to a certain corporation for an entirely inadequate price, the major part of the same consisting of notes of such corporation, which it could not pay, and its own stock, which was worthless, and that the corporation, or its vendee, was rapidly selling off the stock at sacrifice prices, so that it would probably all be disposed of before a trustee could be ap-

an "absolute" necessity, the petition for the appointment of a receiver must clearly and positively allege the existence of such a necessity, and not merely a belief that the appointment will be for the benefit of parties in interest,[110] and it must be supported by clear, certain, and positive proof of the necessity,[111] and the consent of the alleged bankrupt does not justify the appointment of a receiver where it is not absolutely necessary for the preservation of the estate.[112] But a receiver may properly be appointed where the apparent titles to property are such, on their face, that the marshal cannot act efficiently under the usual warrant,[113] or where there is such delay in the prosecution of the bankruptcy proceedings as to make it necessary that measures should be taken for the conservation of the property.[114]

The appointment of a receiver to take possession of an alleged bankrupt's property is a conservatory proceeding, for the benefit both of the debtor and of his creditors.[115] But it must be remembered that an application for the appointment of a receiver is distinct from, and ancillary to, the proceedings in bankruptcy, and it may be made by any creditor who has a provable debt of a nature to be affected by the bankrupt's discharge.[116]

Under the words of the statute, the marshal may be appointed to act as receiver; otherwise some competent and disinterested person, not an officer of the court will be selected.[117] In one case, where the act of bankruptcy charged was the making of a general assignment for the benefit of creditors, the assignee was himself appointed receiver in bankruptcy, as it appeared that he was perfectly solvent and responsi-

pointed, leaving nothing for the creditors of the bankrupt but the inadequate remedy of actions for damages and for stockholders' liabilities, it was held that the petition showed sufficient grounds for the appointment of a receiver. In re Fixen & Co., 96 Fed. 748, 2 Am. Bankr. Rep. 822.

[110] T. S. Faulk & Co. v. Steiner, Lobman & Frank, 165 Fed. 861, 91 C. C. A. 547, 21 Am. Bankr. Rep. 623; In re Rosenthal, 144 Fed. 548, 16 Am. Bankr. Rep. 448. A petition for the appointment of a receiver in bankruptcy, merely alleging necessity therefore in the language of the statute, is not sufficient; it must allege facts which reasonably establish such necessity. Zeitinger v. Hargadine-McKittrick Dry Goods Co., 244 Fed. 719, 157 C. C. A. 167, 40 Am. Bankr. Rep. 324.

[111] In re Oakland Lumber Co., 174 Fed. 634, 98 C. C. A. 388, 23 Am. Bankr. Rep. 181; Badders Clothing Co. v. Burnham-Munger-Root Dry Goods Co., 228 Fed. 470, 143 C. C. A. 52, 36 Am. Bankr. Rep. 115.

[112] T. S. Faulk & Co. v. Steiner, Lobman & Frank, 165 Fed. 861, 91 C. C. A. 547, 21 Am. Bankr. Rep. 623.

[113] Keenan v. Shannon, 10 Phila. 219, 9 N. B. R. 441, Fed. Cas. No. 7,640.

[114] In re Cooke, Fed. Cas. No. 3,167.

[115] Harvey v. Gartner, 136 La. 411, 67 South. 197, Ann. Cas. 1915D, 900.

[116] T. E. Hill Co. v. United States Fidelity & Guaranty Co., 265 Ill. 534, 107 N. E. 194, Ann. Cas. 1917E, 78.

[117] "No clerk of a district court of the United States or his deputy shall be appointed a receiver or master in any case, except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment." Federal Judicial Code 1911, § 68.

ble, and was in possession of the assigned property and had had the same inventoried and appraised.[118] But where it appears that the receiver was in fact selected by the alleged bankrupt and nominated at his instance, he will not be appointed, or if the fact is shown after his appointment, he will be removed.[119] As to vacating the receivership or discharging the receiver, this rests very much in the discretion of the court, depending on the circumstances of the case and the necessity of continuing the receivership or the propriety of terminating it, as the case may be.[120] But the receivership will not necessarily be vacated or the property taken out of the hands of the receiver, though the court dismisses the petition in bankruptcy, where an appeal from its decision therein has been taken and is pending.[121]

§ 211. Powers and Duties of Receiver.—A receiver in bankruptcy is not invested with the bankrupt's title to his property, but he is a mere custodian of the estate, with authority to receive, collect, and retain all the assets, the purpose of his appointment being only to gather in and preserve the property and protect it from loss until a trustee can be appointed.[122] His authority dates from the entry of the decree appointing him,[123] and it is his duty to take into his possession and custody all the property of the bankrupt which may constitute assets of his estate,[124] including property held by a third person

[118] In re Etheridge Furniture Co., 92 Fed. 329, 1 Am. Bankr. Rep. 112.

[119] Birmingham Coal & Iron Co. v. Southern Steel Co., 160 Fed. 212, 20 Am. Bankr. Rep. 151.

[120] In re Church Const. Co., 157 Fed. 298, 19 Am. Bankr. Rep. 549; Latimer v. McNeal, 142 Fed. 451, 73 C. C. A. 567, 16 Am. Bankr. Rep. 43; In re Resnek (D. C.) 243 Fed. 417, 38 Am. Bankr. Rep. 759.

[121] In re Ward, 194 Fed. 179, 28 Am. Bankr. Rep. 36. The refusal or dismissal of a petition in bankruptcy, upon a composition effected with the creditors, without any adjudication being made or any trustee chosen, discharges the bankrupt's receiver and places the possession of the property back in the hands of the alleged bankrupt. Vaughn-Carlton Co. v. Studebaker Corp., 22 Ga. App. 684, 97 S. E. 99.

[122] In re Leonard, 177 Fed. 503, 24 Am. Bankr. Rep. 97; In re Rubel, 166 Fed. 131, 21 Am. Bankr. Rep. 566; Freehold Const. Co. v. Bernstein, 60 Misc. Rep. 363, 113 N. Y. Supp. 368. And see Greenhall v. Hurwitz, 80 Misc. Rep. 186, 141 N. Y. Supp. 914; Vaughn-Carlton Co. v. Studebaker Corp., 22 Ga. App. 684, 97 S. E. 99.

[123] In re Alton Mfg. Co. (D. C.) 158 Fed. 367, 19 Am. Bankr. Rep. 805. But the title of a receiver in bankruptcy relates back to the filing of the petition, so that the rights of the parties as to an incumbrance issued by the bankrupt to delay and hinder his creditors must be determined as of the time of the filing of the petition. Clement v. Saratoga Holding Co., 161 App. Div. 898, 145 N. Y. Supp. 628.

[124] Where the bankrupts, after absconding, were arrested and large sums of money were taken from them by an unlawful search and seizure, the court is not required (for the reason that the seizure was illegal) to order the money to be returned to the bankrupts themselves, before ordering it paid over to the receiver. In re A. Musica & Son (D. C.) 205 Fed. 413, 30 Am. Bankr. Rep. 555.

as the agent or bailee of the bankrupt,[125] and including property previously transferred by the bankrupt in fraud of his creditors, in case the court of bankruptcy so directs, which it has power to do if the fraudulent nature of the transaction clearly appears.[126] In receiving a surrender of property claimed by a conditional vendor of the bankrupt, the receiver has power to make a stipulation as to its nature and extent which will be binding on the trustee subsequently appointed.[127] And in pursuance of his duty to seek out and collect the assets, the receiver has the right to apply for an order summoning designated persons to appear and submit to examination in the bankruptcy proceedings.[128]

In general, the duties of a receiver of a bankrupt's assets are limited by the powers given him in the order for his appointment.[129] But there is also authority for the view that, after the adjudication, and pending the appointment of a trustee, the receiver is not only in custody of the property in his possession, but is also the proper person to carry out any orders of the court made in the exercise of its general powers in bankruptcy, and that it is also his duty to call to the court's attention any matters suggesting the advisability of orders.[130] In the discharge of his duty of taking care of the property and preserving it from loss or dissipation, the receiver has authority to employ a watchman or other custodian at the expense of the estate,[131] to pay the overdue wages of employés when necessary to prevent delay in carrying on a current piece of work,[132] to have the property appraised,[133] and to keep it insured.[134] If he continues to occupy premises leased by the

[125] In re Rieger, Kapnar & Altmark (D. C.) 157 Fed. 609, 19 Am. Bankr. Rep. 622. An attorney who has in his hands money belonging to the bankrupt has no right, after the appointment of a receiver, to convert the same into certificates of deposit and deliver them, indorsed in blank, to the bankrupt; he will be held liable for his act in so doing. Arnold v. Horrigan, 238 Fed. 39, 151 C. C A. 115, 38 Am. Bankr. Rep. 174. Where the assets of the estate passing into the hands of the receiver include an item which he claims as his own personal property, it is his duty to make to the court a full disclosure of all the circumstances connected with his claim. In re Stier March Contracting Co. (D. C.) 245 Fed. 223, 38 Am. Bankr. Rep. 74.

[126] In re Haupt Bros., 153 Fed. 239, 18 Am. Bankr. Rep. 585.

[127] Bryant v. Swofford Bros. Dry Goods Co., 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997, 22 Am. Bankr. Rep. 111.

[128] In re Fixen & Co., 96 Fed. 748, 2 Am. Bankr. Rep. 822.

[129] In re Metropolitan Motor Car Co. (D. C.) 225 Fed. 274, 35 Am. Bankr. Rep. 539.

[130] In re Gottlieb & Co. (D. C.) 245 Fed. 139, 40 Am. Bankr. Rep. 247.

[131] Weller v. Stengel, 146 App. Div. 317, 130 N. Y. Supp. 707; Rumsey v. Wolcott, 1 Wyom. 259.

[132] In re Ferguson Contracting Co., 187 Fed. 940, 109 C. C. A. 662.

[133] In re Kyte, 158 Fed. 121, 19 Am. Bankr. Rep. 768.

[134] In re Kyte, 158 Fed. 121, 19 Am. Bankr. Rep. 768; Simpson v. Kerkeslager, 41 Pa. Super. Ct. 347. Proofs of loss under a fire insurance policy running to a bankrupt who had absconded may lawfully be made by a receiver appointed by the court of bankruptcy, and expressly authorized and directed by the order appointing him to make such proofs. Sims v. Union Assur. Soc., 129 Fed. 804.

bankrupt, he should pay rent therefor at the reasonable value for the time he remains in possession.[135] Every receiver appointed by a court of the United States is required by law to "manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."[136] Without stopping to inquire into all the possible applications of this provision, it may be remarked that it evidently extends to federal receivers, and to the property in their charge, all the valid police regulations of the state and municipal corporation where the property is situated. The receiver has no authority to act officially outside the district of his appointment,[137] and it is at least doubtful whether he can delegate to another his authority originally to take possession of the property, although, after he has once reduced it to possession, he may probably deal with it through an agent.[138] He cannot be required to perform duties which might have been incumbent upon the bankrupt but which do not descend upon a mere custodian of his property.[139] Receivers are generally allowed to select and employ their own attorneys, without the order or direction of the court, but should observe strict propriety in the selection and conform to the policy of the law. Thus,

See, also, Day v. Home Ins. Co. (Ala.) 58 South. 549, 40 L. R. A. (N. S.) 652. A policy obtained by the receiver on the property of the bankrupt, who had personally covenanted to insure for the benefit of mortgagees, is a personal contract for the benefit of the receiver. Reilley v. Buffalo German Ins. Co., 86 Misc. Rep. 69, 147 N. Y. Supp. 1086. Where, after the commencement of bankruptcy proceedings, but before a receiver was appointed, the bankrupt transferred certain insurance policies to a state court's receiver, that court will require the policies to be transferred to the receiver in bankruptcy. Davis v. Williams, 144 Ga. 637, 87 S. E. 1050.

[135] In re Youdelman-Walsh Foundry Co., 166 Fed. 381, 21 Am. Bankr. Rep. 509; Alexis v. Koehler, 119 N. Y. Supp. 664. The court of bankruptcy has power to authorize an assignment of a leasehold belonging to the bankrupt's estate to be made by the receiver in bankruptcy. In re Sherwoods, 210 Fed. 754, 127 C. C. A. 304, 31 Am. Bankr. Rep. 769.

[136] Federal Judicial Code 1911, § 65.

[137] In re Benedict, 140 Fed. 55, 15 Am. Bankr. Rep. 232. Temporary receivers appointed for an alleged bankrupt corporation before adjudication have no such interest as entitles them to institute ancillary proceedings in the court of another district to secure a confirmation of their appointment and be put in possession of the property of the corporation in such district. In re Tygarts River Coal Co., 203 Fed. 178, 30 Am. Bankr. Rep. 183.

[138] Skubinsky v. Bodek, 172 Fed. 340, 22 Am. Bankr. Rep. 699.

[139] American Graphophone Co. v. Leeds & Catlin Co., 174 Fed. 158, 23 Am. Bankr. Rep. 337; where the bankrupt corporation was defendant in a suit for the infringement of a patent, and the receiver in bankruptcy was appointed after an interlocutory decree against it and a reference for an accounting as to damages and profits and it was held that the receiver could not be required to prepare a statement of profits, from the company's books for use before the master, or to render any other active assistance to the complainant at the expense of the estate in bankruptcy, unless he should elect to become a party to the suit.

the attorney for the petitioning creditor, at whose instance the receiver was appointed, should not be employed as attorney for the receiver,[140] and a bargain for a division of fees between the receiver, the attorney whom he desired to appoint, and the attorney for the petitioning creditors, is illegal and unprofessional, and will require the removal of the receiver and the appointment of a new one.[141] So also, the court of bankruptcy always has power to direct the receiver to dismiss the attorney employed by him and to retain other counsel, and will do so if it appears that the attorney originally employed is incompetent, or that he is acting in the interests of one creditor or set of creditors as against others, instead of for the good of all, or that he is seeking to serve some purpose of his own in any way antagonistic to the interests of general creditors.[142]

Upon the appointment of a trustee for the estate, the receiver in bankruptcy should at once turn over to him all assets and money in his hands, except such as will probably be required to pay the expenses of the receivership, and it is not necessary that he should wait until his accounts have been passed and he is discharged.[143] But a particular fund may be permitted to remain in the hands of the receiver, after the qualification of a trustee, when the final disposition of it is doubtful, on account of pending litigation, unsettled questions of title, or the assertion of a lien upon it.[144] And a balance remaining after all creditors have been satisfied by the carrying out of a composition approved by the court, may be ordered turned over to a claimant who is clearly entitled to it as against the bankrupt himself.[145]

§ 212. **Continuing Bankrupt's Business.**—A receiver in bankruptcy may be authorized to carry on the business of the bankrupt.[146] And this course is sometimes highly desirable where the business is of a kind which depends largely on its good will and loses value rapidly if it ceases to be a "going concern." But this authority is to be granted only when it is "necessary in the best interest of the estate," and only for a "limited period." Since a receiver is appointed only to take charge of

[140] In re Strobel (C. C. A.) 160 Fed. 916, 20 Am. Bankr. Rep. 22.

[141] In re Oshwitz, 183 Fed. 990, 25 Am. Bankr. Rep. 594.

[142] In re Champion Wagon Co., 193 Fed. 1004, 28 Am. Bankr. Rep. 51. As to the compensation of receiver's attorney, see Leman v. Steele, 167 Ill. App. 190.

[143] In re College Clothes Shop, 192 Fed. 80. Where a receiver of a bankrupt corporation withholds its books from inspection by the bankrupt's trustee, appointed in the same court, the latter may obtain access to the books by an order on an informal application. In re Lane Lumber Co., 206 Fed. 780, 30 Am. Bankr. Rep. 749.

[144] In re Vogt, 159 Fed. 317, 20 Am. Bankr. Rep. 243.

[145] In re J. C. Winship Co., 120 Fed. 93, 56 C. C. A. 45, 9 Am. Bankr. Rep. 638.

[146] Bankruptcy Act 1898, § 2, cl. 5.

the property until the trustee is qualified (supposing that the adjudication is made), it would seem that his authority to carry on the business should be limited to the time when there is a trustee competent to take charge of it. Thereupon the court may, in like circumstances, empower the trustee to conduct the business for a limited period. An order authorizing the receiver thus to carry on the business of the bankrupt rests largely in the discretion of the court and cannot be collaterally attacked, and "it would require a most extraordinary showing to persuade an appellate court to the conclusion that such discretion had been abused." [147] Where the receiver is thus authorized to go on with the business, he may either accept an unfilled contract for supplies to be furnished to the bankrupt, or reject it if he deems it burdensome, but in the latter case, the other party has his claim against the estate for damages for the breach of the contract.[148] The receiver is generally the person best able to judge of the advantage of continuing the business, and should exercise good sense and honesty in regard to it. If he persists in keeping on with the business, when he knew it to be unprofitable from the beginning and capable of being conducted only at a loss, he should be surcharged with a portion of the loss sustained.[149]

If the receiver needs funds for operating expenses, as is usually the case, the court of bankruptcy has power to authorize him to borrow money and to issue receiver's certificates therefor, having the usual priority of lien.[150] And a mortgagee who participates in the bankruptcy proceedings and makes no objection to the appointment of a receiver to carry on the business will be precluded from insisting on the priority of his mortgage over the operating expenses and other obligations incurred by the receiver under the orders of the court.[151] There is also an implied power in a receiver in bankruptcy, who is authorized to conduct the business, to purchase on credit and to borrow money, but this exists only in the absence of an express grant of authority to him by the court. Hence where the court authorizes the receiver to borrow a specified sum of money, any loans made in excess of that amount are made in violation of the authority conferred, and will bind the estate only on a showing that

147 In re Isaacson, 174 Fed. 406, 98 C. C. A. 614, 23 Am. Bankr. Rep. 98.

148 Southern Steel & Iron Co. v. Hickman, Williams & Co., 190 Fed. 888, 27 Am. Bankr. Rep. 203. And see In re Niagara Radiator Co., 164 Fed. 102, 21 Am. Bankr. Rep. 55.

149 In re Consumers' Coffee Co., 162 Fed. 786, 20 Am. Bankr. Rep. 835.

150 In re Restein, 162 Fed. 986, 20 Am. Bankr. Rep. 832; In re Erie Lumber Co., 150 Fed. 817, 17 Am. Bankr. Rep. 689.

151 In re Erie Lumber Co., 150 Fed. 817, 17 Am. Bankr. Rep. 689.

the proceeds were used in conducting the business, and then only ratably with the claims of other creditors of the receiver.[152]

§ 213. **Claims of Third Persons Against Receiver or Estate.**—Property in the possession of a receiver in bankruptcy is in the custody of the law, and an attachment or garnishment levied upon it is void.[153] Ordinarily claimants must work out their rights by application to the court of bankruptcy. Thus, an attorney who is in possession of securities belonging to a bankrupt corporation will be required to turn them over to the receiver, and if he claims a lien on them, his rights may be determined in the bankruptcy court.[154] So, if the receiver occupies a store or other building leased by the bankrupt, and the landlord desires to have the bankrupt's goods removed and the premises vacated by the receiver, his remedy is by petition to the court of bankruptcy.[155] Generally, the question of the right to property or funds in custodia legis is one which the bankruptcy court may determine summarily and without the formality of technical pleadings or a plenary suit.[156] And third persons may in this manner be required to surrender to the receiver property which they hold in possession as agents or bailees of the bankrupt.[157] But a receiver in bankruptcy is not vested with the powers of a trustee, but is a mere custodian, and has no authority to take possession of property held and claimed adversely by a third person; and on a petition by such adverse claimant to recover property alleged to have been taken from his possession by the receiver without his consent, the invalidity of his title is no defense.[158] Neither has the court of bankruptcy jurisdiction, on a mere summary petition, to determine the question of right and title as between a stranger holding property by an adverse claim, asserted in good faith, and a receiver alleging that he acquired it by a fraudulent or preferential transfer.[159] But the court has jurisdiction to enter-

[152] In re C. M. Burkhalter & Co., 182 Fed. 353, 25 Am. Bankr. Rep. 378.

[153] McAfee v. Arnold & Mathis, 155 Ala. 561, 46 South. 870.

[154] In re Eurich's Ft. Hamilton Brewery, 158 Fed. 644, 19 Am. Bankr. Rep. 798.

[155] In re Kleinhans, 113 Fed. 107, 7 Am. Bankr. Rep. 604.

[156] In re J. C. Winship Co., 120 Fed. 93, 56 C. C. A. 45, 9 Am. Bankr. Rep. 638.

[157] In re Muncie Pulp Co., 139 Fed. 546, 71 C. C. A. 530, 14 Am. Bankr. Rep. 70; In re Friedman, 161 Fed. 260, 20 Am. Bankr. Rep. 37.

[158] In re Kolin, 134 Fed. 557, 67 C. C. A. 481, 13 Am. Bankr. Rep. 531. But where one charged with conspiring with a bankrupt to conceal assets consented that the money in his possession be impounded by the bankruptcy court to decide whether it belonged to the bankrupt, the money should not be delivered on the petition of such person until the right thereto was adjudicated. In re Robinson (D. C.) 237 Fed. 102.

[159] In re Eurich's Ft. Hamilton Brewery, 158 Fed. 644, 19 Am. Bankr. Rep. 798; Copeland v. Martin, 182 Fed. 805, 25 Am. Bankr. Rep. 268; In re Darlington Co., 163 Fed. 389, 20 Am. Bankr. Rep. 805; Knapp & Spencer Co. v. Drew, 160

tain the proceeding so far as to ascertain whether the claimant is in fact an adverse claimant, or whether he holds the property as agent or bailee of the bankrupt.[160] And where property has once come into the possession of the receiver as a part of the bankrupt's estate, and has been taken from him by an adverse claimant, either with or without his consent, the court of bankruptcy has power to protect its possession by a summary order requiring the return of the property, or its proceeds if sold, and jurisdiction to adjudicate with respect to all claims thereto.[161]

Where a sheriff's levy of execution, on judgments rendered against the bankrupt more than four months before the bankruptcy, was insufficient, and the sheriff was attempting to sell property other than that subject to a purchase-money lien in favor of one of the judgment creditors, it was held that, as the property subject to the lien was not identified, it was proper for the bankruptcy court to refuse an order for delivery of any property to the sheriff, and instead to allow its own receiver to retain possession of all the property.[162] In another case, where the bankrupt would have been entitled to the possession of goods in the hands of a carrier consigned to him, on payment of the freight, on the day on which a demand was made by his receiver in bankruptcy, in case bankruptcy had not intervened, it was considered that the receiver was entitled to the same, and the wrongful refusal of the carrier's agent to deliver the goods constituted him the agent of the receiver, thus terminating the right of stoppage in transitu.[163] Where a New York mortgage provided that, in the event of default, the mortgagee should have the right to enter and take possession of the premises and to receive the rents and profits, it was held that the mortgagee was not entitled to the rents and profits until he had entered into possession or foreclosed the mortgage, and hence the receiver in bankruptcy of the mortgagor is entitled to the rents and profits collected before the mortgage was foreclosed.[164]

Fed. 413, 87 C. C. A. 365, 20 Am. Bankr. Rep. 355; In re Mundle, 139 Fed. 691, 14 Am. Bankr. Rep. 680.

160 In re Andre, 135 Fed. 736, 68 C. C. A. 374, 13 Am. Bankr. Rep. 132; In re Livingston & Turk, 205 Fed. 364, 125 C. C. A. 582, 30 Am. Bankr. Rep. 531.

161 In re Rose Shoe Mfg. Co., 168 Fed. 39, 93 C. C. A. 461, 21 Am. Bankr. Rep. 725; In re Dialogue (D. C.) 215 Fed. 462, 32 Am. Bankr. Rep. 183.

162 In re Brinn (D. C.) 262 Fed. 527, 45 Am. Bankr. Rep. 74.

163 In re White (D. C.) 205 Fed. 393, 29 Am. Bankr. Rep. 358.

164 In re Brose, 254 Fed. 664, 166 C. C. A. 162, 42 Am. Bankr. Rep. 543. But see In re Jarmulowsky (D. C.) 224 Fed. 141, 35 Am. Bankr. Rep. 514.

§ 214. Actions By and Against Receiver.—The functions of a receiver appointed to "take charge of the property of the bankrupt," as authorized by the statute, are not limited to the mere receipt and custody of such property as may be voluntarily surrendered to him, but it is his duty to collect and recover the property, by suit if necessary; and the court has jurisdiction, in appointing the receiver, to authorize him to institute all necessary actions at law or in equity for the recovery of the bankrupt's property.[165] He may maintain summary proceedings in the court of bankruptcy in a case proper for that mode of procedure,[166] or replevin, where that form of action would otherwise be appropriate,[167] and he may sue in state courts as well as federal courts, and the decree authorizing him to sue will not be open to collateral impeachment in an action brought by him.[168] But the receiver will not be authorized to bring suit for the collection of assets in a jurisdiction other than the one in which he was appointed; that is, he cannot maintain an action in a federal court in another district or in a state court of another state.[169] If assets of the bankrupt are discovered in another state, the proper course is for the petitioning creditors to apply to the proper court, federal or state, in such other state, setting up the pending proceedings in bankruptcy as the basis of their action, and asking for protection for their rights in the property of the debtor within that state, by injunction, receivership, or other appropriate remedy, in which proceedings the trustee in bankruptcy, subsequently appointed, may appear and take

[165] In re Fixen & Co., 96 Fed. 748, 2 Am. Bankr. Rep. 822. A receiver in bankruptcy may be authorized to sue a carrier for negligence in the handling of freight. Slaughter v. Louisville & N. R. Co., 125 Tenn. 292, 143 S. W. 603. A receiver in bankruptcy may sue out an attachment, or bring an action to prevent the statute of limitations from running, or sue at law to recover any debt or personal property which might otherwise be lost. McKenna v. Randle, 5 Alaska, 590. A receiver appointed in bankruptcy has no right to recover securities deposited by the bankrupt to secure a usurious loan, without tendering the amount lawfully due. Rice v. Schneck, 189 App. Div. 877, 179 N. Y. Supp. 335. A cause of action in favor of a receiver in bankruptcy for conversion of property wrongfully taken from his possession, is not assignable. Ellis v. Feeney & Sheehan Bldg. Co., 187 App. Div. 481, 176 N. Y. Supp. 61.

[166] In re Muncie Pulp Co., 139 Fed. 546, 71 C. C. A. 530, 14 Am. Bankr. Rep. 70.

[167] Unmack v. Douglass, 75 Conn. 633, 55 Atl. 12.

[168] Slaughter v. Louisville & N. R. Co., 125 Tenn. 292, 143 S. W. 603. But the order authorizing the receiver to sue is not conclusive on the question whether he has any cause of action. Greenhall v. Hurwitz, 80 Misc. Rep. 186, 141 N. Y. Supp. 914.

[169] Clark v. Booth, 17 How. 327, 15 L. Ed. 164; Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380; In re Dunseath & Son Co., 168 Fed. 973, 21 Am. Bankr. Rep. 742; 22 Am. Bankr. Rep. 75; In re National Mercantile Agency, 128 Fed. 639, 12 Am. Bankr. Rep. 189; In re Schrom, 97 Fed. 760, 3 Am. Bankr. Rep. 352. Compare In re Dempster, 172 Fed. 353, 22 Am. Bankr. Rep. 751. See Fletcher v. Murray Commercial Co., 72 Wash. 525, 130 Pac. 1140.

charge.[170] Or if the receiver is armed with an order of the court which appointed him, requiring the surrender of property in another state, it appears that he may apply to the court of bankruptcy in such other state for its assistance in the enforcement of the order.[171] It is not within the functions of such a receiver to attempt to vacate alleged preferential payments or transfers, to dissolve liens, or to recover property alleged to have been conveyed away in fraud of the bankrupt's creditors. Authority to take measures of this kind is indeed conferred by the bankruptcy act, but only upon the trustee in bankruptcy, not the receiver. The latter, therefore, has no authority to bring suits of this kind or for the purposes mentioned.[172]

As to actions against the receiver, an act of Congress provides that "every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed."[173] It has been pointed out that, while this section applies to receivers in bankruptcy, it does not authorize a suit without leave against such receiver unless he is carrying on the business of the bankrupt, or in respect to his acts relating merely to the care and preservation of the property of the estate.[174] It may be proper for him to enter his appearance in a suit pending against the bankrupt at the time of his appointment,[175] but in respect to claims which will be provable in the bankruptcy proceedings, the receiver is not the proper person to adjust such claims or to defend suits thereon, and an action on such a claim, against the receiver as such, will not be authorized or allowed by the

[170] In re Schrom, 97 Fed. 760, 3 Am. Bankr. Rep. 352.

[171] In re Peiser, 115 Fed. 199, 7 Am. Bankr. Rep. 690.

[172] Boonville Nat. Bank v. Blakey, 107 Fed. 891, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13; Frost v. Latham & Co., 181 Fed. 866, 25 Am. Bankr. Rep. 313; Guaranty Title & Trust Co. v. Pearlman, 144 Fed. 550, 16 Am. Bankr. Rep. 461; Lansing v. Manton, 14 N. B. R. 127, Fed. Cas. No. 8,077. Compare In re Alexander, 193 Fed. 749. Where the bankrupt had sold certain of his assets to his attorney, and the latter had sold the same to another person, it was held that a receiver in bankruptcy was entitled to sue to vacate such sales, without waiting for the appointment of a trustee. In re Alexander, 193 Fed. 749. And where goods of a bankrupt alleged to have been fraudulently conveyed had been taken into the possession of an ancillary receiver, it was held that the court appointing such receiver acquired jurisdiction to determine the validity of the transfer and the rights of the parties. In re Lipman, 201 Fed. 169, 29 Am. Bankr. Rep. 139.

[173] Federal Judicial Code 1911, § 66. And see In re Kelly Dry Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528.

[174] In re Kalb & Berger Mfg. Co., 165 Fed. 895, 91 C. C. A. 573, 21 Am. Bankr. Rep. 393; In re Lane Lumber Co. (D. C.) 206 Fed. 780, 30 Am. Bankr. Rep. 749.

[175] In re Muncie Pulp Co., 151 Fed. 732, 81 C. C. A. 116, 18 Am. Bankr. Rep. 56.

bankruptcy court in any event.[176] But as to the receiver's own acts and transactions, the case is different. The court of bankruptcy has no jurisdiction to stay or prevent the maintenance of an action against the receiver to enforce a personal liability against him for acts done beyond the scope of his authority.[177] Thus, if the receiver takes possession not only of the property designated in the order appointing him, but also of other goods, the property of a third person and which never were owned by the bankrupt, the owner thereof may maintain trespass in a state court against the receiver, as an individual, for thus interfering with property which was outside the order of the court.[178] So also, a state court has jurisdiction of an action against a receiver in bankruptcy to recover rent for premises occupied by the bankrupt under a lease which the receiver elected to accept.[179]

§ 215. Ancillary Receiverships.—Notwithstanding a few decisions to the contrary,[180] it is now quite well settled (especially since the amendment of 1910) that the statute invests courts of bankruptcy with ancillary jurisdiction to appoint receivers for property found within their territory and belonging to a debtor against whom a petition in involuntary bankruptcy has been filed in another district,[181] though it seems that this power ought not to be exercised without such notice to the persons in possession of the property and to other parties in interest as will answer the requirement of due process of law.[182] The court of bankruptcy thus appointing an ancillary receiver has jurisdiction to hear and determine the claims of third persons asserting title to the property or liens upon it,[183] and to settle the ancillary receiver's accounts, affording to creditors, or to the trustee of the primary juris-

176 In re Heim Milk Product Co., 183 Fed. 787, 25 Am. Bankr. Rep. 746.

177 In re Spechler Bros., 185 Fed. 311, 26 Am. Bankr. Rep. 97; In re Kalb & Berger Mfg. Co., 165 Fed. 895, 91 C. C. A. 573, 21 Am. Bankr. Rep. 393. But a receiver in bankruptcy is not personally liable for negligence of a person employed by him to remove property which he was authorized to remove, where the receiver was not guilty of any negligence in the selection of such employé. Frederick A. Stokes Co. v. Carell, 138 N. Y. Supp. 536.

178 In re Young, 7 Fed. 855; Dalton Adding Mach. Co. v. Sherrard, 207 Ill. App. 338. But see Quait v. Wortham Bros. Co., 176 Ill. App. 273, holding that the actions of a receiver in bankruptcy may not be attacked in the state courts, but resort must be had to the federal courts for relief.

179 Brooklyn Improvement Co. v. Lewis, 136 App. Div. 861, 122 N. Y. Supp. 111.

180 Ross-Meeham Foundry Co. v. Southern Car & Foundry Co., 124 Fed. 403, 10 Am. Bankr. Rep. 624; In re Dempster. 172 Fed. 353, 22 Am. Bankr. Rep. 751.

181 In re Dunseath & Son Co., 168 Fed. 973, 21 Am. Bankr. Rep. 742; 22 Am. Bankr. Rep. 75; In re John L. Nelson & Bro. Co., 149 Fed. 590, 18 Am. Bankr. Rep. 66; In re Benedict, 140 Fed. 55, 15 Am. Bankr. Rep. 232.

182 Ross-Meeham Foundry Co. v. Southern Car & Foundry Co., 124 Fed. 403, 10 Am. Bankr. Rep. 624.

183 Fidelity Trust Co. v. Gaskell (C. C. A.) 195 Fed. 865, 28 Am. Bankr. Rep. 4.

diction, an opportunity to question the correctness of the accounting in the ancillary court, the receiver not being bound to account to the court of primary jurisdiction.[184] But the ancillary receiver's duty is limited to the collection of assets and to holding the same to await the appointment of a trustee, and he will not ordinarily be authorized to sell any of the property in his custody.[185] An application to vacate the receivership, on a ground going to the root of the whole matter, as, that the alleged bankrupt was solvent and had not committed an act of bankruptcy, should not be made in the first instance to the court of ancillary jurisdiction (the same person having been appointed receiver in both districts), but to the court of original jurisdiction.[186]

§ 216. Accounts and Compensation of Receiver.—A receiver in bankruptcy, on the termination of his trust, should submit his account of receipts and disbursement, which will be audited and passed in the usual manner.[187] Exceptions to the account should be verified, though the omission of a verification is an amendable defect.[188] The receiver will be surcharged with the value of any property coming into his hands and not accounted for.[189] And though a petition is dismissed, on the ground that the alleged bankrupt was not amenable to the law, yet as the court had jurisdiction to determine that question, its appointment of a receiver was not void, and hence it may in its discretion allow and pay the expenses of the receivership out of the funds in the receiver's hands, where his services were beneficial to the estate.[190] As to allowing fees to an attorney representing the receiver, it has been said that, ordinarily, the duties of a statutory receiver for an alleged bankrupt neither require nor justify the employment of an attorney, and hence no claim for the services of an attorney so employed is chargeable per se against the estate, predicated alone on the fact of employment and service

[184] Loeser v. Dallas (C. C. A.) 192 Fed. 909, 27 Am. Bankr. Rep. 733.

[185] In re Brockton Ideal Shoe Co., 194 Fed. 233, 27 Am. Bankr. Rep. 577. Ancillary receivers in bankruptcy are officers of the court, and not successors in title to the bankrupt, and are therefore not charged with the bankrupt's knowledge of the contract under which he obtained title to the property, possession of which the receivers acquired from the bankrupt, though they may be charged with knowledge of the identity of the property with that claimed, if it was sufficiently described, so that its identity could be determined from inspection. In re Fosgate (D. C.) 268 Fed. 985, 45 Am. Bankr. Rep. 596.

[186] In re Hayes, 192 Fed. 1018, 27 Am. Bankr. Rep. 713.

[187] Where the accounts of a receiver in bankruptcy have been settled by a court having jurisdiction, he may be summarily ordered to pay over the balance due, and his surety may be held liable therefor. In re Reliable Bottle Box Co., 199 Fed. 670, 29 Am. Bankr. Rep. 371.

[188] In re Ketterer Mfg. Co., 156 Fed. 719, 19 Am. Bankr. Rep. 638.

[189] In re Consumers' Coffee Co., 162 Fed. 786, 20 Am. Bankr. Rep. 835.

[190] In re Wentworth Lunch Co., 189 Fed. 831.

rendered.[191] At any rate, if such fees are allowed, they should be allowed only to the extent that the services were rendered for the direct benefit of the entire estate, and not of any particular creditor.[192] And since the receiver is required to stand independent of the parties to the litigation, he will not be allowed to charge the estate for services rendered to him by the attorney for either party during the continuance of such relation.[193]

As to the receiver's own compensation, the bankruptcy act, as originally adopted, made no provision for this, except in the clause providing that the "actual and necessary cost of preserving the estate subsequent to filing the petition" should have priority and be paid in full out of the estate.[194] Accordingly it was held that the question of allowing commissions or compensation to the receiver, and the amount, was committed entirely to the sound judicial discretion of the court as in ordinary cases in courts of equity, to be determined upon consideration of the services rendered in the particular case.[195] But an amendment to the bankruptcy act adopted in 1910 provides on this subject that "receivers or marshals appointed pursuant to section two, subdivision three, of this act, shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustee from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided, that in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: Provided further, that when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this act, he shall not receive nor be allowed in any form or guise more than two per centum

[191] In re T. E. Hill Co., 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73. But compare In re Oppenheimer, 146 Fed. 140, 17 Am. Bankr. Rep. 59. And see infra, § 784.

[192] In re Ketterer Mfg. Co., 156 Fed. 719, 19 Am. Bankr. Rep. 638.

[193] In re T. L. Kelly Dry Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528.

[194] Bankruptcy Act 1898, § 64b.

[195] In re Schoenfeld, 183 Fed. 219, 105 C. C. A. 481, 25 Am. Bankr. Rep. 748; In re Kirkpatrick, 148 Fed. 811, 78 C. C. A. 501, 17 Am. Bankr. Rep. 594; In re Martin Borgeson Co., 151 Fed. 780, 18 Am. Bankr. Rep. 178; In re Gerson, 2 Nat. Bankr. News, 493.

on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: Provided further, that before the allowance of compensation notice of application therefor, specifying the amount asked shall be given to creditors in the manner indicated in section fifty-eight of this act.

"Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: Provided that in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: Provided further, that before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act." [196]

§ 217. **Sale of Property Pending Proceedings.**—A receiver appointed by a court of bankruptcy to take charge of the property of a bankrupt, pending the election and qualification of a trustee, may be ordered to sell the property, or any part of it, when such a course is necessary for the preservation of its value.[197] But in view of the temporary nature of the receiver's functions, such sales are justified only when the property is perishable or is rapidly depreciating in value.[198] Thus, where the receiver acquires possession of a leasehold as part of the bankrupt's

[196] Act Cong. June 25, 1910, § 9, 36 Stat. 838.

[197] In re Becker, 98 Fed. 407, 3 Am. Bankr. Rep. 412; In re B. D. Garner & Co., 153 Fed. 914, 18 Am. Bankr. Rep. 733; In re De Lancey Stables Co., 170 Fed. 860, 22 Am. Bankr. Rep. 406. Where a corporation is adjudged bankrupt in Massachusetts and an ancillary receiver appointed in New York, he will not be authorized to sell the bankrupt's stock in trade in New York, in absence of any proceedings therefor in the domiciliary jurisdiction. In re Brockton Ideal Shoe Co., 194 Fed. 233, 27 Am. Bankr. Rep. 577.

[198] In re Desrochers, 183 Fed. 991, 25 Am. Bankr. Rep. 703; In re Harris, 156 Fed. 875, 19 Am. Bankr. Rep. 635. "Perishable" property, in this connection is not restricted to property which deteriorates physically, but includes that which is liable to deteriorate in value

estate, he should not attempt to make a sale of it.[199] And whatever be the nature of the property, he can act only under the direction of the court. A sale by a receiver in bankruptcy without the order of the court conveys no title.[200] The sale of goods as perishable is for the benefit of all concerned, the money realized standing in place of the property itself, against which the parties interested may assert their rights the same as if the sale had not taken place.[201] If the receiver is not in possession of particular property, the court of bankruptcy has no jurisdiction to order its sale and determine the rights of adverse claimants in the proceeds,[202] unless, it may be, with the consent of the claimant who has the possession of the property.[203]

and price by reason of delay in disposing of it. In re Pedlow, 209 Fed. 841, 126 C. C. A. 565, 31 Am. Bankr. Rep. 761.

[199] In re Fulton (D. C.) 153 Fed. 664, 18 Am. Bankr. Rep. 591.

[200] In re Styer (D. C.) 98 Fed. 290, 3 Am. Bankr. Rep. 424; In re Fulton (D. C.) 153 Fed. 664, 18 Am. Bankr. Rep. 591; Muschel v. Austern, 43 Misc. Rep. 352, 87 N. Y. Supp. 235. But it is within the discretion and power of the court of bankruptcy, by confirmation of a sale made by the receiver without a prior order, to ratify and validate the sale, as it can of course subsequently ratify what it could have authorized in advance. Klintz v. Marx, 205 Ill. App. 376; Ellis v. Feeney & Sheehan Bldg. Co., 187 App. Div. 481, 176 N. Y. Supp. 61. Of course a receiver in bankruptcy has no authority to sell at private sale on his own responsibility. But if he reports to the court an offer made by an outside party for the purchase of property in his charge, and the court makes an order authorizing him to accept the offer and sell the property, the transaction becomes a judicial sale, and the purchaser can be compelled, by rule or attachment, to comply with its terms. In re J. Jungmann, Inc., 186 Fed. 302, 108 C. C. A. 380, 26 Am. Bankr. Rep. 401.

[201] Gealey v. South Side Trust Co., 249 Fed. 189, 161 C. C. A. 225, 41 Am. Bankr. Rep. 645; In re Le Vay (D. C.) 125 Fed. 990, 11 Am. Bankr. Rep. 114.

[202] First Nat. Bank v. Chicago Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, 14 Am. Bankr. Rep. 102. One who purchases property from a receiver in bankruptcy, which is listed in the receiver's inventory as property alleged to belong to a third person, must be deemed to have notice of the ownership of the property. Dalton Adding Machine Co. v. Sherrard, 207 Ill. App. 338.

[203] Ommen v. Talcott (D. C.) 175 Fed. 261, 23 Am. Bankr. Rep. 572; In re Hollingsworth & Whitney Co., 242 Fed. 753, 155 C. C. A. 341, 39 Am. Bankr. Rep. 678.

CHAPTER XIII

THE BANKRUPT, HIS RIGHTS AND DUTIES

§ 218. **Status of Bankrupt During Proceedings.**—During the pendency of the proceedings, the bankrupt is regarded as "civiliter mortuus" so far as concerns all his property and estate which is subject to administration in bankruptcy. From the date of the adjudication in bankruptcy, he loses all power of disposing of any portion of such property, and any subsequent deed, conveyance, incumbrance, transfer, or agreement which he may make is a nullity and absolutely void as against his trustee in bankruptcy.[1] He can make no binding agreement with credi-

[1] In re Anderson, 23 Fed. 482; In re Gregg, 1 Hask. 173, 3 N. B. R. 529, Fed. Cas. No. 5,796; Johnson v. Geisriter, 26 Ark. 44; Hamilton v. Smith, 36 Mont. 1, 92 Pac. 32, 122 Am. St. Rep. 330; Redman v. Gould, 7 Blackf. (Ind.) 361. It is doubtful whether a person who has been adjudged bankrupt, pending the proceedings, has such a possibility coupled with an interest in property discovered after his death as will enable such property to pass under a general devise by him. In re Morris, Crabbe, 70, Fed. Cas. No. 9,825. Without the aid of a saving clause in the statute, it appears that the widow of a bankrupt dying before his discharge would not be entitled to dower in lands belonging to him at the time of filing the petition, since, his title thereto having vested in his trustee in bankruptcy, it could not be said that he died "seised and possessed" of the lands. Bostick v. Jordan, 7 Heisk. (Tenn.) 370. But the present bankruptcy act (section 8) saves to the widow and children "all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence." The bankruptcy of the lessee under a lease demising the premises for a fixed term with the privilege of renewal occurring during the fixed term does not dissolve the agreement so as to authorize a court of equity to cancel the renewal clause. Olden v. Sassman, 67 N. J. Eq. 239, 57 Atl. 1075, affirmed, 68 N. J. Eq. 799, 64 Atl. 1134.

tors or others as to the distribution of his estate.[2] If the bankrupt executes a mortgage upon his property, pending the proceedings, the trustee may have it set aside summarily, on petition; he need not resort to a bill in equity.[3] If the bankrupt undertakes to make an assignment of a judgment standing in his name, it passes no right or title available against the trustee.[4] The doctrine of the law is that, upon the institution of proceedings in bankruptcy against a debtor (or upon his voluntary petition), all persons are so far affected with constructive notice of the proceedings that they cannot deal with the bankrupt or his estate to the prejudice of the proceedings, or in derogation of the title of the trustee in bankruptcy.[5] Accordingly it is held that payment of a debt made to a bankrupt after the commencement of proceedings against him, though made in good faith and in the usual course of business, and without any knowledge or actual notice of the bankruptcy proceedings, is not effectual to discharge the debt, but the debtor may be required to pay the money again to the trustee in bankruptcy, unless, indeed, the bankrupt should surrender the amount of it.[6]

But the bankrupt's exempt property is brought into the proceeding only so far as to be valued and set apart by the trustee. The title does not pass to the trustee, nor is the title of the owner impaired or affected by the proceedings. He may mortgage or sell it, and he may bring and maintain suits in respect to it, without regard to the pendency of the bankruptcy proceedings.[7] Further, there are some kinds of property, or rights of property, which are not of a character to be affected by the bankruptcy proceedings and do not pass to the trustee, and as to property of this description, the bankrupt, even pending the proceedings, has the right to deal with it as he sees fit, or to sue upon and arbitrate claims in regard to it.[8] This is the case, for example, in regard to the right of action for a purely personal tort against the bankrupt, such as libel or slander or malicious prosecution or false imprison-

[2] In re Anderson, 2 Hughes, 378, 9 N. B. R. 360, Fed. Cas. No. 351.

[3] In re Sims, 16 N. B. R. 251, Fed. Cas. No. 12,888.

[4] Harris v. England, 1 Ky. Law Rep. 271.

[5] Page v. Waring, 76 N. Y. 463. Even a transfer of promissory notes by the payee, pending bankruptcy proceedings against him which result in an adjudication and an injunction against disposing of his property, vests no title in the purchaser, though he had no actual notice of the proceedings. In re Lake, 3 Biss. 204, 6 N. B. R. 542, Fed. Cas. No. 7,992.

[6] Howard v. Crompton, 14 Blatchf. 328, Fed. Cas. No. 6,758; In re Hayden, 7 N. B. R. 192, Fed. Cas. No. 6,257; Mays v. Manufacturers' Nat. Bank, 64 Pa. St. 74, 3 Am. Rep. 573. See Babbitt v. Burgess, 2 Dill. 169, 7 N. B. R. 561, Fed. Cas. No. 693; Ex parte Goodwin, 1 Atk. Ch. 100. And see infra, § 340.

[7] Henley v. Lanier, 75 N. C. 172; Winn v. Morse, 59 N. H. 210; Seiling v. Gunderman, 35 Tex. 545; Bush v. Lester, 55 Ga. 579.

[8] Tallman v. Tallman, 5 Cush. (Mass.) 325.

ment.[9] And finally, as will more fully appear in another chapter, a trustee in bankruptcy is not bound to take any property which he deems likely to be more of a burden than a benefit to the estate; and when he manifests his election not to assume the administration of such property, it reverts to the bankrupt, and the latter is of course free to deal with it as he may please.[10]

Although the bankrupt is for most purposes, as above stated, civiliter mortuus during the proceedings, yet the individual bankruptcy of a person who is a stockholder and director and officer of a corporation (which is not in bankruptcy) does not prevent him from voting on stock still standing in his name, nor incapacitate him from exercising his functions as such officer of the corporation, nor render void as to third persons the acts and conveyances of the corporation done and executed through him as its representative.[11] Also it should be observed that a bankrupt is competent to take, hold, and execute a trust. A trust estate already confided to him does not pass to his trustee in bankruptcy, nor does his discharge release him from any fiduciary debts or obligations.[12]

§ 219. **Bankrupt Subject to Orders of Court.**—From the time of the filing of a petition in bankruptcy until the discharge of the bankrupt (and perhaps even until the final closing of the estate), the bankrupt is always within the jurisdiction of the court of bankruptcy and subject to its orders in respect to the performance of all duties laid upon him by the law itself or arising out of the peculiar circumstances of his estate. This principle would be easily deducible from the very nature of the proceeding, but it is enacted as law by the provision of the act that the bankrupt shall "comply with all lawful orders of the court."[13] And lest there should be any lack of authority to enforce compliance, it is provided that the court of bankruptcy shall have jurisdiction to "enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment."[14]

§ 220. **Duties With Relation to Estate, and Assistance to Trustee.**—Prior to the appointment of the trustee, the bankrupt has sufficient interest in his property, and it is his duty, to do whatever may be necessary to protect and save it, and he may, for that purpose, institute all

[9] In re Haensell, 91 Fed. 355, 1 Am. Bankr. Rep. 286; Stanly v. Duhurst, 2 Root (Conn.) 52; Noonan v. Orton, 34 Wis. 259, 17 Am. Rep. 441, 12 N. B. R. 405; In re Crockett, 2 Ben. 514, 2 N. B. R. 208, Fed. Cas. No. 3,402; Dillard v. Collins, 25 Gratt. (Va.) 343.

[10] See infra, § 320.

[11] Atlas Nat. Bank v. Gardner, 8 Biss. 537, 19 N. B. R. 213, Fed. Cas. No. 635; State v. Ferris, 42 Conn. 560.

[12] 1 Perry, Trusts, § 58; Bankruptcy Act 1898, § 17.

[13] Bankruptcy Act 1898, § 7.

[14] Bankruptcy Act 1898, § 2, cl. 13.

necessary actions.[15] After the trustee is chosen and qualified, it is made the duty of the bankrupt (by the seventh section of the statute) to "examine the correctness of all proofs of claims filed against his estate; execute and deliver such papers as shall be ordered by the court;[16] execute to his trustee transfers of all his property in foreign countries; immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this act, coming to his knowledge; and, in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee." As to transfers of property, it should be remarked that, under the act of 1867, it was held that, as a bankruptcy law has no ex-territorial operation, the courts of bankruptcy had no jurisdiction over property of the bankrupt in a foreign country and could not compel him to make a conveyance of it to his trustee.[17] This difficulty seems to have been met by the quoted provision of the present statute. As to property within the United States, the court of bankruptcy has jurisdiction to require the bankrupt to do whatever is necessary to make the legal transfer of it to the trustee valid and effectual.[18] Thus, he may be compelled to join in an application for the transfer of a liquor license formerly belonging to him and sold by the trustee,[19] or in such proceedings as are necessary to transfer a seat on the stock exchange.[20] And where a devise has been made to a bankrupt and accepted by him, it is a fraud upon his creditors for him to disclaim or renounce it, and the court of bankruptcy will compel him to do all acts necessary to perfect his title to the devised estate.[21] As to disclosing attempts to prove false claims, it is held that the fact that no trustee has yet been appointed will not relieve the bankrupt from the duty, or deprive him of the right, of objecting to the allowance of any false or unjust claim against his estate, or of moving for its expunction.[22]

It has been held that a claim by a bankrupt for compensation for rendering extraordinary services and assistance to his trustee, beyond

[15] Johnson v. Collier, 222 U. S. 538, 32 Sup. Ct. 104, 56 L. Ed. 306, 27 Am. Bankr. Rep. 454; Hickcock v. Bell, 46 Tex. 610; In re Banks (D. C.) 207 Fed. 662, 31 Am. Bankr. Rep. 270.

[16] Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969, 23 Am. Bankr. Rep. 519 (compelling delivery of records and stock books of bankrupt corporation); In re Wilson, 116 Fed. 419, 8 Am. Bankr. Rep. 612 (punishment for contempt for refusing to turn over books of account).

[17] Phelps v. McDonald, 2 MacArthur, 375, 16 N. B. R. 217.

[18] In re Lattimer, 174 Fed. 824, 23 Am. Bankr. Rep. 388; In re Hudson River Water Power Co., 148 Fed. 877, 17 Am. Bankr. Rep. 778.

[19] In re Wiesel, 173 Fed. 718, 23 Am. Bankr. Rep. 59.

[20] In re Hurlbutt, Hatch & Co., 135 Fed. 504, 68 C. C. A. 216, 13 Am. Bankr. Rep. 50.

[21] Ex parte Fuller, 2 Story, 327, Fed. Cas. No. 5,147.

[22] In re Aukeny, 100 Fed. 614, 4 Am. Bankr. Rep. 72.

what was required to make the property, rights, credits, and effects available, cannot be allowed by the court, though it may be allowed by the creditors as an act of grace on their part.[23] But on the other hand, a man's professional skill, ability, and education are his own, and cannot be claimed by creditors in their own interest without compensation. Hence a bankrupt is under no obligation to render services, in his capacity as an attorney at law, in proceedings to realize his estate for the benefit of his creditors, and if he does so, he will be entitled to the payment of a fair compensation therefor out of the funds so secured.[24]

§ 221. **Schedule of Assets; Preparation and Filing.**—The statute makes it the duty of a bankrupt to prepare and file in court a verified schedule of his property. This paper must show the amount and kind of property, its location, and its money value in detail. It must accompany the petition for adjudication if the proceedings are voluntary, and in the case of an involuntary bankrupt, it must be filed within ten days after the adjudication, unless further time is granted. The schedule is further required to be in triplicate, one copy being for the clerk, one for the referee, and one for the trustee. Forms to be followed in the preparation of this schedule have been officially provided.[25] It is the evident intention of the rules and forms that each of the two divisions of the schedule (that is, the schedule properly so called, being the inventory of property, and the list of creditors, inappropriately called "Schedule A.,") should be separately signed and verified by the bankrupt, but there is ground to contend that a single signature and verification, at the end of the whole, would be sufficient at least to protect the proceedings against collateral attack.[26] It is, in most cases, absolutely necessary to the successful administration of the estate that the bankrupt should fully comply with his duty in this respect, thus bringing to the knowledge of the trustee and others in interest those details in regard to his property and his obligations which are, perhaps, within his exclusive knowledge.[27] The court is not without the means to compel his performance of this duty. If an explanation of the state of his affairs is necessary to enable the trustee to settle the estate, it may be obtained on an examination of the bankrupt, or the court may force him to file

[23] In re Barnes, 1 Wkly. Notes Cas. 21, Fed. Cas. No. 1,013.

[24] Blythe v. Thomas, 55 Fed. 961, 5 C. C. A. 356, affirming 45 Fed. 784.

[25] Bankruptcy Act 1898, § 7; Form No. 1.

[26] Brewster v. Ludekins, 19 Cal. 162. The schedule may be verified before a notary public. In re Bailey, 15 N. B. R. 48, Fed. Cas. No. 727.

[27] Where a partnership and one member of it are adjudged bankrupt, and the other member not, the latter must file a schedule and inventory within ten days. Armstrong v. Fisher, 224 Fed. 97, 139 C. C. A. 653, 34 Am. Bankr. Rep. 701.

satisfactory schedules by withholding his discharge until this is done.[28] A bankrupt is not relieved from the duty of filing a schedule on the ground that its contents would tend to incriminate him, or could be used in evidence against him in a criminal prosecution; but even though he is under indictment at the time, he is required in good faith to make an effort to file a schedule which will comply with the requirements of the bankruptcy act, up to the point where the court can see that further obedience would violate his constitutional privilege. But he will be excused from making any statement in his schedule with reference to a transaction between himself and a third person, where it is apparent that there is immediate danger of a criminal prosecution against the bankrupt arising out of such transaction.[29] Where the bankrupt sent through the mail in June, 1911, a false financial statement, and after proceedings in bankruptcy were instituted, he was indicted for misuse of the mails in sending out such statement, it was held that there was no such connection between his condition in June and in October of the same year, when he was adjudged bankrupt, as would entitle him to refuse to file a schedule in bankruptcy, on the theory that to do so would tend to incriminate him. And at any rate, where a bankrupt claims that to furnish information will tend to incriminate him, "it must at least appear to the court from the character of the information sought or the question propounded, that his claim is justified, or the bankrupt must produce facts on which he bases such claim, in order that the court may judge of their sufficiency to support it." [30]

§ 222. **Form and Contents of Schedule.**—A bankrupt's schedule of property should contain a full and accurate inventory of all of his property which is of such a nature as to pass to the trustee in bankruptcy, and which the bankrupt himself could have made available for the satisfaction of his creditors.[31] He is not to decide whether it is worth including in the schedule; if there is any possibility of its having value, it must not be omitted. Nor can the bankrupt anticipate possible claims to the ownership of the property by third persons, or omit it from his schedule on the theory of his title being defeasible; these questions are for the trustee to settle at the proper time.[32] But where the bank-

[28] In re Walther, 95 Fed. 941, 2 Am. Bankr. Rep. 702; In re Schulman & Goldstein, 164 Fed. 440, 20 Am. Bankr. Rep. 707. And see In re Brockton Ideal Shoe Co., 200 Fed. 745, 29 Am. Bankr. Rep. 76.

[29] In re Podolin, 202 Fed. 1014, 29 Am. Bankr. Rep. 406; 205 Fed. 563, 30 Am. Bankr. Rep. 576.

[30] Podolin v. Lesher Warner Dry Goods Co., 210 Fed. 97, 126 C. C. A. 611, 31 Am. Bankr. Rep. 796.

[31] Pollack v. Meyer Bros. Drug Co., 233 Fed. 861, 147 C. C. A. 535, 36 Am. Bankr. Rep. 835.

[32] Corporate stock standing in the name of a bankrupt should be included in his schedule, although hypothecated

rupt has no property except what he claims as exempt, and his creditors are all of one class, he is required, in making up his schedule, to use only such forms as are appropriate to and descriptive of the debts and property he is required to list.[33] Property which is exempt by the law of the state must of course be included in the schedule. This does not involve any surrender of it. On the contrary, it is necessary as a means of identifying the property which the bankrupt will claim.[34] But property or rights which are of such a character that they will not vest in the trustee need not of course be included in the schedule. This is the case with regard to a right of action for damages for a purely personal tort, and a few other interests. Not being assets in any sense that would make them available for creditors, nor included in the descriptions of property which the statute transfers to the trustee, they need not appear in the schedule.[35] Further, it must be remembered that this schedule speaks from the date of the filing of the petition, and the bankrupt is bound to set forth only such property as he has a right or interest in at the commencement of the proceedings.[36] With regard to property which the bankrupt has transferred or assigned, or

for its full value. In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715. Growing crops unmatured must be entered on the schedule. In re Schumpert, 8 N. B. R. 415, Fed. Cas. No. 12,491. So also must a claim of the bankrupt for damages on a contract for the sale of goods. In re Orne, 1 Ben. 361, 1 N. B. R. 57, Fed. Cas. No. 10,581. If the bankrupt has property in his possession and has the actual use of it as his own, although his title to it may be defeasible, he must set it out in his schedule and turn it over to his trustee. "It is not for him to rely on the title of a third person which he has not himself respected." In re Beal, 1 Low. 323, 2 N. B. R. 587, Fed. Cas. No. 1,156. The bankrupt's wilfull omission from his schedule of his interest in a vested estate in remainder to take effect in possession after the termination of a precedent life estate, is such a fraud as will vitiate his discharge. Edwards v. Gibbs, 39 Miss. 166. A grantor in an unrecorded deed, who becomes bankrupt, properly includes in his schedule the property conveyed thereby. Davis v. Pursel (Colo.) 134 Pac. 107.

[33] Anonymous, 1 N. B. R. 122, Fed. Cas. No. 457.

[34] Money received from the United States as a pension, and remaining in the pensioner's hands at the time of filing his petition in bankruptcy, should be listed in his schedule of assets under the heading of "cash on hand," with a statement that he claims it as exempt. If omitted without fraudulent intent, he may be permitted to insert it by amendment. In re Bean, 100 Fed. 262, 4 Am. Bankr. Rep. 53.

[35] In re Brick, 4 Fed. 804. Where a proposed voluntary bankrupt, who has no property except such as is exempt, borrows $50 wherewith to pay the fees and costs of his attorney, just before filing his petition, he is not required to list the sum so borrowed in his schedule of assets, and his omission to do so is no ground of opposition to his discharge. Sellers v. Bell (C. C. A.) 94 Fed. 801, 2 Am. Bankr. Rep. 529. An interest in the net profits of a business as additional compensation for the services of a bankrupt need not be scheduled by him. In re Brown, 5 Law Rep. 121, Fed. Cas. No. 1,978.

[36] Ex parte Robertson, 5 Law Rep. 321, Fed. Cas. No. 11,921. The proceedings in bankruptcy are not constructive notice to any one of facts not necessary to appear therein, and this is true of a statement in the bankrupt's schedule as to property formerly, but not then, owned by him. Page v. Waring, 76 N. Y. 463.

covered up in the name of some relative, wtih a fraudulent design of placing it beyond the reach of his creditors, it is not to be included in the schedule. Such a conveyance or transfer may, indeed, be voidable as to the creditors. It may be set aside or annulled at the instance of a trustee in bankruptcy, either on common-law grounds or because in contravention of the bankruptcy law. But as against the bankrupt himself—and he is the person who makes and verifies the schedule—it is valid and binding.[37] This same rule applies to property which has already been sold under execution or other process, and the mere fact that property of the bankrupt, when sold at judicial sale, was bought by members of his family does not afford presumptive evidence of an ownership remaining in the bankrupt which will require him to account for the property in his schedule.[38]

The schedule must contain a substantially accurate description of each item of property, or interest, or claim listed, and the description must identify the property with such reasonable certainty as to advise the trustee of its nature and location, its value and the nature of the title or interest of the bankrupt. If these requirements are met, unimportant errors of detail, not materially misleading and not fraudulently designed, will not vitiate the schedule nor convict the bankrupt of making a false oath, and if deemed necessary they may be corrected by amendment.[39] In setting forth interests in real estate, it is probably not necessary that the schedule should describe the property with all the particularity of a deed or mortgage, but there must be a sufficient description to fix the location of the property and enable the trustee to identify it with certainty.[40] The forms officially promulgated for schedules in bankruptcy require a statement showing "what portion of debtor's property has been conveyed, by deed of assignment or otherwise,

[37] In re Crenshaw, 95 Fed. 632, 2 Am. Bankr. Rep. 623; In re Schreck, 1 Nat. Bankr. News, 334; In re Warne, 12 Fed. 431; In re Freeman, 4 Ben. 245, 4 N. B. R. 64, Fed. Cas. No. 5,082; Ex parte Robertson, 5 Law Rep. 321, Fed. Cas. No. 11,921. But compare In re Skinner, 97 Fed. 190, 3 Am. Bankr. Rep. 163.

[38] In re Bailey, 1 N. Y. Leg. Obs. 18, Fed. Cas. No. 726; In re Pomeroy, 2 N. B. R. 14, Fed. Cas. No. 11,258; In re Hummitsch, 2 N. B. R. 12, Fed. Cas. No. 6,866.

[39] See In re Soper, 1 Nat. Bankr. News, 182; Phelps v. McDonald, 2 MacArthur, 375. The schedule should set forth the separate items of household furniture and wearing apparel, but a defect in this particular may be remedied by amendment. In re Hill, 1 Ben. 321, 1 N. B. R. 16, Fed. Cas. No. 6,481. See Sellers v. Bell (C. C. A.) 94 Fed. 801, 2 Am. Bankr. Rep. 529. Judgments in favor of the bankrupt should be entered under the heading "personal property" in the schedule, and not under the head of "unliquidated claims." In re Sallee, 2 N. B. R. 228, Fed. Cas. No. 12,256.

[40] See In re Shenberger, 102 Fed. 978, 4 Am. Bankr. Rep. 487; Woods v. Little, 134 Fed. 229, 67 C. C. A. 157, 13 Am. Bankr. Rep. 742; In re Gailey, 127 Fed. 538, 62 C. C. A. 336, 11 Am. Bankr. Rep. 539; In re Frisbee, Fed. Cas. No. 5,130; In re Dodge, Fed. Cas. No. 3,946a.

for benefit of creditors," together with the date of such deed and the name and address of the grantee or assignee, and also a statement of the amount realized from the assigned property and the disposal of the same, so far as known to the debtor.[41] The bankrupt must also state whether or not any note has been given, or any judgment rendered, for each of the debts listed, and whether or not any person is liable with him as a partner or joint contractor.[42] Under former bankruptcy laws, it was held that, in the bankrupt's schedule or list, everything that was required to be stated or set forth must be printed or written out in full; that the sign "do.," or dots, or inverted commas, could not be used in the schedule by way of reference to indicate anything necessary to be stated.[43] And this rule was maintained notwithstanding the provisions of a general order in bankruptcy (No. 14) which declared that "all petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference." This rule of court, or general order, has been again put in force, under the present statute, in identically the same language.[44]

§ 223. **Preparation of Schedule on Bankrupt's Default.**—We have seen that it is the statutory duty of the bankrupt to prepare, verify, and file in court a schedule of his property and a list of his creditors, with his petition if the proceeding is voluntary, or, in an involuntary case, within ten days after the adjudication. Congress also has made provision for the case of a debtor failing or refusing to perform this duty, for it is enacted that it shall be the duty of referees to "prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, neglect, or refuse to do so."[45] Moreover, the general orders in bankruptcy provide that "in all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such sched-

[41] Form No. 1, Schedule B., 4. See In re Plimpton, 4 Law Rep. 488, Fed. Cas. No. 11,227; In re Mott, Fed. Cas. No. 9,878b.

[42] In re Orne, 1 Ben. 420, 1 N. B. R. 79, Fed. Cas. No. 10,582.

[43] In re Orne, 1 Ben. 420, 1 N. B. R. 79, Fed. Cas. No. 10,582.

[44] General orders in Bankruptcy No. 5.

[45] Bankruptcy Act 1898, § 39, cl. 6.

ule as aforesaid."[46] It would seem that the "schedule" referred to in this general order is the same as the "list of creditors" mentioned in the statute. Reading these various provisions together, their apparent effect is this: If the bankrupt is found and is within the reach of the court, and fails to file his list of creditors within the time limited (or within a proper time after the discovery of his whereabouts), he must be served with notice to comply with his duty in this respect. If he disregards the notice, the creditor has an option either to prepare and file the list himself, or to apply for an attachment against the bankrupt to compel his obedience to the notice. Such attachment may be issued by the referee, if the case has been referred; for he has authority to "cause" the list to be prepared and filed. If the bankrupt is absent or cannot be found, the duty of making up the list of creditors falls upon the petitioning creditor in the first instance. If that creditor also neglects the duty, it devolves upon the referee either to order the creditor to perform it, or else himself to prepare and file both the schedule of property and the list of creditors, according to the best information he can obtain.

§ 224. Mistakes and Omissions in Schedule.—If the schedule of the bankrupt does not contain a full, true, and accurate inventory of his assets and liabilities, and if the omissions or falsifications are material and were made by the bankrupt knowingly and with a fraudulent design to conceal property which should pass to his trustee, or otherwise to evade the provisions of the bankruptcy law, then there is not only ground for withholding his discharge, but also for criminal prosecution and punishment.[47] But, to have these consequences, there must have been a willful and intentional omission or false entry in the schedule. If the omission or other error was the result of mere mistake, accident, or inadvertence on the part of the bankrupt or the attorney who prepared the schedule, without fraudulent design, it will not sustain a prosecution against him, nor furnish a reason for refusing to discharge him.[48] And the same rule holds good where the bankrupt's reason for not including particular property in the schedule was his honest, though mistaken, belief that he had no title to it or interest in it, or that it was worthless, or that the incumbrances upon it were so great as to leave no margin of value for the general creditors.[49] It should also be observ-

[46] General Order No. 9.

[47] Bankruptcy Act 1898, §§ 14, 29.

[48] In re Crenshaw, 95 Fed. 632, 2 Am. Bankr. Rep. 623; In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; Sellers v. Bell (C. C. A.) 94 Fed. 801, 2 Am. Bankr. Rep. 529; In re Bushnell, 1 Nat. Bankr. News, 528; In re Winsor, 16 N. B. R. 152, Fed. Cas. No. 17,885.

[49] In re Barrow, 98 Fed. 582, 3 Am.

ed that mistakes, omissions, or falsifications in the schedule, while they may require amendment and correction, and while they may, if fraudulent, expose the bankrupt to very serious consequences, do not affect the jurisdiction of the court of bankruptcy, nor open any of its decrees or orders made in the case to collateral attack. This doctrine is held with regard to the insolvency laws of the States, and should apply with even greater force to proceedings under the bankruptcy act.[50] A proceeding in bankruptcy is in rem. Jurisdiction is founded upon the residence of the bankrupt within the territory of the court, and upon the presentation of a proper and sufficient petition, sustained if need be by evidence, on which an adjudication is made. This brings all the estate of the bankrupt within the jurisdiction of the court, without any regard to the fullness or accuracy of the schedule. Hence neither the adjudication of bankruptcy, nor the decree of the court upon the bankrupt's application for discharge, can be assailed collaterally by reason of anything contained in the schedule or anything omitted from it.[51]

But the fact that the bankrupt omitted to include a particular item of property in his schedule of assets may raise an estoppel against his subsequently claiming it as his, or at least furnish evidence or an admission that, at the time, he regarded it as belonging to another person.[52]

§ 225. **List of Creditors.**—Together with the schedule of his property, and under the same requirements as to signature and verification and time of filing, the bankrupt is required to furnish a list of his creditors. This list must show the residences of the creditors if known; if not known, the fact must be stated. It must also state the amount due to each of them, the consideration for the debt, and the security held by the creditor, if any.[53] It may be remarked in passing that the listing of

Bankr. Rep. 414; In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Winsor, 16 N. B. R. 152, Fed. Cas. No. 17,885; In re Cushman, 7 Ben. 482, Fed. Cas. No. 3,512. But if the bankrupt describes a claim as worthless when he knows it to be of considerable value, or has reason to believe it valuable, a purchase made by him, or for his benefit, of his assets for a nominal sum, even after his discharge, at a sale by the trustee, would be considered fraudulent and void. Phelps v. McDonald, 2 MacArthur, 375. As to including debts due to the bankrupt, but which are barred by the statute of limitations or otherwise not collectible, see Pope v. Kirchner, 77 Cal. 152, 19 Pac. 264; In re Cushman, 7 Ben. 482, Fed. Cas. No. 3,512. An erroneous claim of certain articles mentioned as exempt does not affect the truth of the affidavit to the schedule which states that it contains a statement of all the bankrupt's estate. In re Whetmore, Deady, 585, Fed. Cas. No. 17,508.

[50] Bennett v. His Creditors, 22 Cal. 38; Brewster v. Ludekins, 19 Cal. 162; Pope v. Kirchner, 77 Cal. 152, 19 Pac. 264.

[51] Fuller v. Pease, 144 Mass. 390, 11 N. E. 694; Graves v. Wright, 53 Mich. 425, 19 N. W. 129.

[52] See Honaker v. Honaker, 182 Ky. 38, 206 S. W. 12; Hooker v. Peterson, 140 Tenn. 280, 204 S. W. 858.

[53] Bankruptcy Act 1898, § 7a, cl. 8.

a debt or claim does not amount to an admission by the bankrupt which any one can take advantage of. Thus, a bankrupt is not estopped from alleging the invalidity of a judgment because he has placed it on his schedule in the list of claims against him.[54] The reason of the requirement that the list of creditors shall include their residences is that all notices to creditors are to be sent to their respective addresses as they appear in this list, or as afterwards filed with the paper in the case by the creditors.[55] Hence the statements of the residences of creditors in the bankrupt's list should be such as will insure due delivery of notice by mail or service in person.[56] If the names and addresses of creditors are so illegibly written that the referee cannot determine with certainty who are the persons entitled to notice of the first meeting and where they are to be served, it is his duty to refuse to take any action until he has been furnished with a fair and legible copy of the list.[57] But excessive strictness should not be indulged, nor exactly literal accuracy required. It is enough if the exercise of reasonable intelligence and common sense, brought to bear on the bankrupt's list, will prevent mistake as to the persons of the creditors or their addresses.[58] A judgment due to a firm should be listed in the firm's name, without setting forth the names of its members, but giving their individual names will not vitiate the paper.[59] On the other hand, in listing a debt due to a newspaper, the name of its proprietor should be given, and not merely the name of the

The purpose of scheduling claims in bankruptcy is to inform the court of the persons who are entitled to notice, to inform trustees of the claims which will or may be proved, and to limit the effect of the bankrupt's discharge. Merchants' Bank of Brooklyn v. Miller, 176 App. Div. 412, 162 N. Y. Supp. 999. It is expressly provided that a debt which has not been duly scheduled in time for proof and allowance will not be released by the discharge of the bankrupt, unless the creditor has notice or actual knowledge of the proceedings in bankruptcy. Bankruptcy Act 1898, § 17. A creditor objecting that the bankrupt does not set forth a full list of his creditors, with their residences and the amounts due, must point out the omission. In re Plimpton, 4 Law Rep. 488, Fed. Cas. No. 11,227.

[54] King v. Pickett, 32 La. Ann. 1006.

[55] Bankruptcy Act 1898, § 58a.

[56] In re Pulver, 1 Ben. 381, 1 N. B. R. 46, Fed. Cas. No. 11,466. Where a creditor's address is erroneously given in the list filed, and notice is sent to that address and his true address might easily have been ascertained from the city directory, no proper notice has been given. In re Quackenbush, 122 App. Div. 456, 106 N. Y. Supp. 773.

[57] In re Hall, 2 N. B. R. 192, Fed. Cas. No. 5,922.

[58] Gatliff v. Mackey, 104 S. W. 379, 31 Ky. Law Rep. 947; In re Orne, 1 Ben. 420, 1 N. B. R. 79, Fed. Cas. No. 10,582; Merchants' Bank of Brooklyn v. Miller, 176 App. Div. 412, 162 N. Y. Supp. 999. Where a bankrupt in his schedule sets forth a debt represented by a promissory note to be due to one who is the equitable owner thereof though not the legal payee, it is sufficient. Ross-Lewin v. Goold, 113 Ill. App. 499.

[59] Anonymous, 1 N. B. R. 122, Fed. Cas. No. 457. And see New York Institution for Instruction of Deaf and Dumb v. Crockett, 117 App. Div. 269, 102 N. Y. Supp. 412.

newspaper.[60] Where a schedule in voluntary bankruptcy stated the present residences of certain creditors to be unknown, but gave their former residences, it was held that the statement as to the present residences was sufficient, and that the statement as to their former residences was surplusage, but the bankrupt could show, either in the list or by separate affidavit, what efforts he had made to ascertain the residences of such creditors.[61] The statement of the amount due to each creditor is sufficient if the sum and the date of the debt or judgment is given.[62] And where a judgment previously recovered against the bankrupt still appears on the records of the court which rendered it as an unsatisfied obligation against him in favor of the judgment creditor, it is rightly included in his schedule as a debt due to that creditor, although it has actually been sold to another creditor, and the bankrupt is chargeable with knowledge of the sale.[63] A contingent liability, it is said, need not be scheduled where it does not appear that the person primarily liable will not pay in full.[64] If the bankrupt willfully places upon his schedule a debt which he knows to be false, he will be guilty (the schedule being duly verified) of having "made a false oath in a proceeding in bankruptcy," and the consequence will be not merely the loss of his discharge, but also liability to punishment as for a criminal offense.[65]

§ 226. Amendment of Schedule and List.—"The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper refer-

[60] Anonymous, 2 N. B. R. 141, Fed. Cas. No. 462.

[61] In re Pulver, 1 Ben. 381, 1 N. B. R. 46, Fed. Cas. No. 11,466. In a case arising under the insolvency law of California, it was held that, when the insolvent is liable as indorser on a promissory note, it is not sufficient for him merely to state the fact, with the name of his indorsee, in the list of debts, if such indorsee has already transferred the note to another person; it is the duty of the insolvent to ascertain, if he can, and state, who is the present holder of the note, and if he cannot ascertain it he should state that the name of such creditor is unknown to him. McAllister v. Strode, 7 Cal. 428. The note at the end of part 3 of "Schedule A.," of the official forms, provides that when the name and residence of the drawer, maker, indorser or holder of a bill or note are unknown to the bankrupt, the fact must be stated, and also the name and residence of the last holder known to the debtor. A question of diligence in ascertaining the correct residence of a creditor of a bankrupt enters into the question as to whether the debt has been properly scheduled only so far as it affects the good faith of the debtor's statement in the schedule that such residence is unknown. Lutz v. Kalmus, 115 N. Y. Supp. 220.

[62] In re Hill, 1 Ben. 321, 1 N. B. R. 16, Fed. Cas. No. 6,481.

[63] Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

[64] In re Greenebaum, Fed. Cas. No. 5,769.

[65] See Bankruptcy Act 1898, §§ 14b, and 29b. And see In re Delevan, Fed. Cas. No. 3,758.

ences. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed." [66] Where creditors are omitted from the list of debts, or property omitted from the inventory of assets, or either wrongly stated, but as the result of accident, mistake, or mere inadvertence, or where there is a lack of form or of compliance with the statutory requisites, this general order authorizes corrections to be made in the manner prescribed.[67] And if the bankrupt, without any fraudulent intent, has omitted from his schedule property which he means to claim as exempt, he will be allowed to insert it by amendment.[68] The phrase "the court," in the general order, of course includes the referee.[69] In fact, under the present statute, it might almost be said to exclude the judge; for it is made the express and specific duty of the referee, when the schedule and list filed by the bankrupt are incomplete or defective, to "cause them to be amended." [70] Applications for leave to amend will usually proceed from the bankrupt himself, and this is apparently all that is contemplated by the general order. But it has also been held that any creditor who has proved his claim has the right to ask that the bankrupt be required to amend defects in his petition or schedule.[71] Under the former bankruptcy law (and it would seem that the same rule applies at present) it was held that an application by the bankrupt for leave to amend and correct his list of creditors, by inserting the name of a creditor inadvertently omit-

[66] General Order in Bankruptcy No. 11. A voluntary petitoner in bankruptcy, in applying for leave to amend his schedule, must state the cause of the error in that originally filed. In re Brincat (D. C.) 233 Fed. 811, 37 Am. Bankr. Rep. 587.

[67] In re Perry, 1 N. B. R. 220, Fed. Cas. No. 10,998; In re Hill, 1 Ben. 321, Fed. Cas. No. 6,481; In re Frisbee, Fed. Cas. No. 5,130. If a bankrupt fails to schedule property which should be surrendered to his trustee, and this fact is shown upon his examination, he may then be permitted to correct his schedule. In re Harrell (D. C.) 222 Fed. 160, 34 Am. Bankr. Rep. 809. Where a tract of land has been fraudulently conveyed by the bankrupt to his wife as her separate property in fraud of creditors, it may properly be added to his schedule by amendment as assets of his estate. Strong v. Durdle, 94 Wash. 157, 162 Pac. 6.

[68] In re Bean, 100 Fed. 262, 4 Am. Bankr. Rep. 53; Harrelson v. Webb, 124 La. 1007, 50 South. 833, 134 Am. St. Rep. 529.

[69] In re Morford, 1 Ben. 264, 1 N. B. R. 211, Fed. Cas. No. 9,796.

[70] Bankruptcy Act 1898, § 39, cl. 2. Under the former act and rules, it was held that the register might, of his own motion, and not on the petition of the trustee or a creditor, order an amendment of the banukrupt's schedule, when the same was found to be incomplete or defective or otherwise insufficient. In re Orne, 1 Ben. 420, 1 N. B. R. 79, Fed. Cas. No. 10,582. The present rule, which provides only that amendments may be "allowed," might not be broad enough to authorize such action, but spontaneous action of this character on the part of the referee, when he finds the proceedings embarrassed by an insufficient schedule of property or list of creditors, is not only permitted but enjoined by the section of the act above quoted.

[71] In re Jones, 2 N. B. R. 59, Fed. Cas. No. 7,447.

ted, was ex parte and grantable of course, and required no notice to creditors, and that creditors had no right to object to such amendment, and no issue of fact or law could be raised or contested in regard to it.[72] An order authorizing or requiring an amendment in the bankrupt's schedule should specify particularly the respects in which it is to be amended.[73] The right of amendment may of course be conditioned on such terms as will prevent any injustice or inequality.[74] As to the time or stage of the proceedings at which amendments may be allowed, it is held that they do not come too late if made after the filing of specifications of opposition to the discharge of the bankrupt (based on errors or omissions in the schedules), and even though a hearing may have been had on such specifications, yet if it can be shown to the court that the bankrupt was guilty of no greater fault than inadvertence or mistake, and that there is no ground for withholding the discharge by reason of any fraud or perjury, proper amendments may be ordered and the case continued, with leave to renew the application for discharge at a future time.[75] Even the granting of a discharge and the closing of the estate are not insuperable obstacles to the allowance of a proper amendment. Such a course was sanctioned in one case where the bankrupt discovered assets of substantial value, of which he had previously been unaware, and desired to claim the balance of his exemption out of the fund thus brought in.[76] But where a considerable time has elapsed since the granting of a discharge, the bankrupt will not be permitted to reopen the proceedings and amend the schedule for the purpose of including an omitted creditor who had not been made a party to the proceedings and had no notice or knowledge of them.[77] A peculiar condition arises where the bankrupt applies for leave to amend his list of creditors, after the first meeting and after the election

[72] In re Hill, 5 Fed. 448; In re Watts, 3 Ben. 166, 2 N. B. R. 447, Fed. Cas. No. 17,293; In re Heller, 5 N. B. R. 46, Fed. Cas. No. 6,339. But in the case last cited, it was said to be "the better practice to issue an order requiring the party to show cause why the amendments as asked for should not be allowed, specifying particularly the points in which the schedules are defective. The bankrupt or creditor will then have the right to oppose the application, and appeal from the order if dissatisfied with the decision of the register."

[73] In re Orne, 1 N. B. R. 79, 1 Ben. 420, Fed. Cas. No. 10,582.

[74] In re Ratcliffe, 6 Phila. 466, 1 N. B. R. 400, Fed. Cas. No. 11,578.

[75] In re Preston, 3 N. B. R. 103, Fed. Cas. No. 11,392; In re Heller, 5 N. B. R. 46, Fed. Cas. No. 6,339; In re Townsend, 2 Fed. 559. But see In re Kittler, 176 Fed. 655, 23 Am. Bankr. Rep. 585. It is said that the allowance of an amendment to the schedule, by adding property omitted, does not preclude a creditor from availing himself of any ground of opposition to the bankrupt's application for discharge arising out of such omission. In re Watts, 3 Ben. 166, 2 N. B. R. 447, Fed. Cas. No. 17,293.

[76] In re Irwin, 177 Fed. 284, 22 Am. Bankr. Rep. 165.

[77] In re Spicer, 145 Fed. 431, 16 Am. Bankr. Rep. 802.

of a trustee, and the object of the amendment is to introduce the names of other creditors holding such an amount of claims that their votes would have changed the result of the election of the trustee. In this case it has generally been considered necessary to hold a new meeting of creditors, based on new notices, and to hold a new election for trustee. If the person now chosen for trustee is a different person from the trustee previously appointed, an application to the court should be made for the removal of the present incumbent and the appointment of the newly chosen trustee in his place.[78]

An amendment of the bankrupt's list of creditors so as to include a given claim relates back to the date of filing the petition in bankruptcy, so that the owner of the claim will be affected by the bankrupt's discharge in just the same way as if the claim had been properly listed at first. If the bankrupt afterwards sues him, on a transaction occurring after the filing of the petition in bankruptcy, he cannot use that claim as a set-off.[79]

§ 227. Surrender of Money or Assets to Trustee; Jurisdiction and Power to Order.—The present bankruptcy statute does not in explicit terms require the bankrupt to surrender his property and effects to the trustee. That such a surrender must be made is, however, quite clear by implication from various clauses of the act. Thus, it is provided that the trustee shall be vested by operation of law with the title of the bankrupt to all of the latter's property which is of a nature to be administered under the act, and that the bankrupt must execute to his trustee transfers of all his property in foreign countries, a procedure which is rendered necessary by the fact that the bankruptcy law can have no extraterritorial efficacy. Further, if the bankrupt conceals from his trustee any of his property, it is a criminal offense.[80] This duty of sur-

[78] See In re Perry, 1 N. B. R. 220, Fed. Cas. No. 10,998; In re Ratcliffe, 6 Phila. 466, 1 N. B. R. 400, Fed. Cas. No. 11,578; In re Morgenthal, 6 Phila. 468, 1 N. B. R. 402, Fed. Cas. No. 9,813; In re Carson, 5 Ben. 277, 5 N. B. R. 290, Fed. Cas. No. 2,460.

[79] Bramham v. Lanier Bros., 138 Tenn. 702, 200 S. W. 830.

[80] Bankruptcy Act 1898, § 70a; § 7, cl. 5; § 29b. Compare Rev. Stat. U. S. §§ 5044, 5051, 5055. Under the British statute of 5 Geo. II, c. 30, which was in force at the beginning of the nineteenth century, the bankrupt was required to appear before the commissioners for an examination, and upon this examination, was bound "upon pain of death to make a full discovery of all his estate and effects as well in expectancy as in possession, and how he has disposed of the same, together with all books and writings relating thereto and is to deliver up all in his own power to the commissioners (except the necessary wearing apparel of himself, his wife, and his children), and in case he conceals or embezzles any effects to the amount of twenty pounds, or withholds any books or writings with intent to defraud his creditors, he shall be guilty of felony without benefit of clergy, and his goods and estates shall be divided among his creditors." 2 Bl. Comm. 482. Students

render on the part of the bankrupt the court has ample power to enforce. It is now well settled that, if the court is satisfied, either from the examination of the bankrupt himself or from other evidence, that he has in his possession and control money or other property which belongs to his estate in bankruptcy and should be administered by the trustee, and if the bankrupt has neglected or refused to surrender such money or property to his trustee, or fails or refuses to give any account of his disposition of it, or attempts to account for its loss by a story which is incredible in itself or is contradicted by trustworthy evidence, then it is within the power and jurisdiction of the court of bankruptcy summarily to order the bankrupt to pay the money or surrender the property to the trustee, and his obedience to this order may be enforced by committing him to prison, as for a contempt of court, where he may be held until he will comply with the command of the court, or until it becomes evident that it is impossible for him to yield such obedience.[81] The fact that a bankrupt who knowingly and fraudulently conceals from his trustee any property belonging to his estate in bankruptcy thereby commits a crime, for which he is liable to be prosecuted and punished by imprisonment, does not deprive the court of jurisdiction to order him to surrender the property and to deal with him as for contempt if he does not obey.[82] And since such an order is not an order for the payment of a debt, it cannot be said that a commitment of the bankrupt to jail to enforce his obedience to it is in any sense imprisonment for debt.[83] But two essential facts condition the law-

of the progress of civilization may well compare the barbarous severity of this enactment with the indulgent kindness of the act of Congress of 1898.

[81] Schweer v. Brown (C. C. A.) 130 Fed. 328, 12 Am. Bankr. Rep. 178; In re Rosser, 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153; In re Schlesinger, 102 Fed. 117, 42 C. C. A. 207, 4 Am. Bankr. Rep. 361; In re Purvine, 96 Fed. 192, 37 C. C. A. 446, 2 Am. Bankr. Rep. 787; In re Shachter, 119 Fed. 1010, 9 Am. Bankr. Rep. 499; In re Gerstel, 123 Fed. 166, 10 Am. Bankr. Rep. 411; Ripon Knitting Works v. Schreiber, 101 Fed. 810, 4 Am. Bankr. Rep. 299; In re Mayer, 98 Fed. 839, 3 Am. Bankr. Rep. 533; In re Logan, 196 Fed. 678, 28 Am. Bankr. Rep. 543; Wayne Knitting Mills v. Nugent, 2 Nat. Bankr. News, 714; In re Schlesinger, 97 Fed. 930, 3 Am. Bankr. Rep. 342; In re Wilson, 116 Fed. 419, 8 Am. Bankr. Rep. 612; In re Shaffer & Stern, 185 Fed. 549, 26 Am. Bankr. Rep. 54; Cummings v. Synnott, 184 Fed. 718, 25 Am. Bankr. Rep. 859; In re De Gottardi, 114 Fed. 328, 7 Am. Bankr. Rep. 723; In re Greenberg, 106 Fed. 496, 5 Am. Bankr. Rep. 840; In re Felson, 124 Fed. 288, 10 Am. Bankr. Rep. 716; In re Tudor, 96 Fed. 942, 2 Am. Bankr. Rep. 808; In re Pevear, 21 Fed. 121; In re Salkey, 6 Biss. 269, 11 N. B. R. 423, Fed. Cas. No. 12,253, affirmed 6 Biss. 280, 11 N. B. R. 516, Fed. Cas. No. 12,254; In re Peltasohn, 4 Dill. 107, 16 N. B. R. 265, Fed. Cas. No. 10,912; In re Kempner, 6 N. B. R. 521, Fed. Cas. No. 7,689; In re Speyer, 6 N. B. R. 255, Fed. Cas. No. 13,239; In re How, 18 N. B. R. 565, Fed. Cas. No. 6,747; In re Dresser, 3 N. B. R. 557, Fed. Cas. No. 4,077.

[82] Ripon Knitting Works v. Schreiber, 101 Fed. 810, 4 Am. Bankr. Rep. 299.

[83] In re Rosser, 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153.

ful exercise of this power by the court; first, that the money or property directed to be delivered to the trustee shall be a part of the bankrupt's estate, and second, that the bankrupt has it in his possession or under his control at the time the order for delivery is made.[84] In speaking of the "court," in this connection, it is to be understood that the referee is included. That officer has jurisdiction of an application for an order requiring such a surrender of property, and to make an order in accordance with his findings on such application.[85]

It is not necessary that the money or property should be physically in the possession of the bankrupt. It is enough if it is held for him by some person whom he can control. Thus, where a bankrupt, within a few days before the filing of the petition in bankruptcy, sold property and handed the proceeds over to his wife, she will be regarded as holding the same as his agent, and the facts will warrant an order requiring him to pay the money over to his trustee.[86] It is likewise the duty of the bankrupt to turn over to the trustee any money which he may have collected from his debtors since the commencement of the bankruptcy proceedings, and he may be constrained to do so in the same manner and by the same process as above indicated.[87] Where a devise has been made to a bankrupt and accepted by him, it is a fraud upon his creditors for him to disclaim or renounce it, and the bankruptcy court will compel him to do all acts necessary to perfect his title to the devised estate.[88]

Where a bankrupt, having been engaged in business in one state absconds with money belonging to his estate, and is arrested in another state, the federal District Court in the latter state has ancillary jurisdiction, at the suit of the receiver in bankruptcy, to require the surrender of the money.[89]

§ 228. Same; Petition, Order, and Proceedings Thereon.—In order to obtain a surrender of property or money by a bankrupt, it is not necessary to resort to a plenary suit, but the matter may be determined summarily, that is, on a petition by the trustee and a rule on the bank-

[84] In re Rosser, 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153.

[85] In re Mayer, 98 Fed. 839, 3 Am. Bankr. Rep. 533; In re Oliver, 96 Fed. 85, 2 Am. Bankr. Rep. 783. And see supra, § 67.

[86] In re Eddleman, 154 Fed. 160, 19 Am. Bankr. Rep. 45. So where the owner of patents for inventions has assigned them to a corporation in exchange for its stock, he holds them thereafter merely as an agent or officer of the company, and must surrender them to its trustee. In re Cantelo Mfg. Co., 201 Fed. 158, 29 Am. Bankr. Rep. 704.

[87] Howard v. Crompton, 14 Blatchf. 328, Fed. Cas. No. 6,758; In re Ettinger, 18 N. B. R. 222, Fed. Cas. No. 4,543.

[88] Ex parte Fuller, 2 Story, 327, Fed. Cas. No. 5,147.

[89] Musica v. Prentice, 211 Fed. 326, 127 C. C. A. 525, 31 Am. Bankr. Rep. 687, affirming In re A. Musica & Son (D. C.) 205 Fed. 413, 30 Am. Bankr. Rep. 555.

rupt to show cause why he should not be ordered as prayed.[90] This application can be made only by the trustee in bankruptcy, acting for the benefit of the creditors at large; a motion will not be entertained if made by a creditor or creditors independently of the trustee.[91] And if the money or property in question is supposed to be in the possession of some third person, holding as an agent or bailee of the bankrupt, the bankrupt should be dealt with first, and proceedings cannot be taken against the alleged agent to compel him to account for the property until it has been specifically traced into his hands.[92] It is of course proper before applying to the court, to make demand upon the bankrupt for the property in question, but he cannot complain of the omission of such a demand if the order for its delivery is served on him in ample time to allow of his compliance before steps are taken to punish him.[93] The trustee's petition for such an order should contain definite averments and state specifically what sum of money or what particular property the bankrupt is supposed to be concealing or withholding,[94] but it need not allege affirmatively that he is able to comply with an order requiring its surrender.[95] The bankrupt must have notice of the application and a full and fair opportunity to be heard in his own behalf, to make his defense, to produce evidence, and to cross-examine the witnesses. Failure to accord him his fundamental rights in these particulars is more than a mere irregularity. It is a fault which will render the order, if made, entirely unlawful and void.[96] The bankrupt may either demur

[90] In re Cunney (D. C.) 225 Fed. 426. 35 Am. Bankr. Rep. 617; Jones v. Blair, 242 Fed. 783, 155 C. C. A. 371, 39 Am. Bankr. Rep. 569; In re Joseph R. Marquette, Jr., Inc., 254 Fed. 419, 166 C. C. A. 51, 42 Am. Bankr. Rep. 555; In re Adler (D. C.) 129 Fed. 502, 12 Am. Bankr. Rep. 19; In re Pevear (D. C.) 21 Fed. 121; In re McKenna, 9 Fed. 27; In re Thompson, 13 N. B. R. 300, Fed. Cas. No. 13,938. Though an order is made in summary proceedings of this kind, it may have the effect of a bar or estoppel. Thus, an order denying the petition of the trustee to require the bankrupt to deliver up a policy of life insurance or pay its surrender value is a bar to a later application to require him to surrender the policy or pay its loan value. In re Samuels (C. C. A.) 263 Fed. 561, 45 Am. Bankr. Rep. 13.

[91] In re Eliowich (D. C.) 148 Fed. 510, 17 Am. Bankr. Rep. 419; In re Pearson, 1 Nat. Bankr. News, 474.

[92] In re Fogelman, 188 Fed. 755, 26 Am. Bankr. Rep. 742. And see Richter v. Rockhold, 253 Fed. 941, 165 C. C. A. 383, 42 Am. Bankr. Rep. 384.

[93] In re D. Levy & Co., 142 Fed. 442, 73 C. C. A. 558, 15 Am. Bankr. Rep. 166.

[94] In re Ruos, 164 Fed. 749, 21 Am. Bankr. Rep. 257; In re Greer, 189 Fed. 511, 26 Am. Bankr. Rep. 811; Ripon Knitting Works v. Schreiber, 101 Fed. 810, 4 Am. Bankr. Rep. 299. A petition of the trustee, alleging that at the time of the filing of the petition in bankruptcy a certain sum was due, owing, and unpaid to the bankrupt by a corporation, but alleging no facts, and supported by no evidence warranting the inference that the bankrupt ever had the money in his possession or under his control, is insufficient to sustain an order on him to pay it over as a concealed asset. In re Levy (D. C.) 259 Fed. 316, 43 Am. Bankr. Rep. 590.

[95] In re Stavrahn, 174 Fed. 330, 98 C. C. A. 202, 23 Am. Bankr. Rep. 168.

[96] In re Atwater, 227 Fed. 511, 36 Am.

or answer to the trustee's petition,[97] but his answer, although under oath, is not conclusive on the court, but it may proceed to inquire into all the facts and circumstances.[98] Proceedings on the petition are usually had before the referee, but the court may refer the matter to a special master for hearing and examination of the bankrupt.[99] If money is found to be withheld by the bankrupt, the order should require it to be paid over to the trustee, and not into the registry of the court.[100] And if property other than money is involved, the order should describe it with reasonable certainty and as particularly as practicable, though in such a case as a stock of merchandise a general description will be sufficient, and should require its surrender in specie.[101] Where an order of a referee requiring a bankrupt thus to surrender or turn over property to his trustee was based on a mistake of fact, the referee has power, on the petition of the bankrupt, filed within the time limited for a review of his decision, and the mistake being shown, to reconsider and set aside such order.[102]

§ 229. **Same; Evidence to Sustain Order.**—In a proceeding to compel a bankrupt to surrender money or property alleged to be withheld or concealed by him, it is first of all necessary for the trustee to make out a prima facie case by showing that the bankrupt had such money or property in his possession or under his control at or about the time of his bankruptcy, and that it was not included in his schedule and has not since been turned over to the trustee.[103] Such a case is usually established by presumptions drawn from the facts, and positive proof is not

Bankr. Rep. 109; In re Rosser, 101 Fed. 562, 41 C. C. A. 497, 4 Am. Bankr. Rep. 153; In re Frank, 182 Fed. 794, 25 Am. Bankr. Rep. 486; Boyd v. Glucklich, 116 Fed. 131, 53 C. C. A. 451, 8 Am. Bankr. Rep. 393; In re Cole, 163 Fed. 180, 20 Am. Bankr. Rep. 761; In re Baum, 169 Fed. 410, 94 C. C. A. 632, 22 Am. Bankr. Rep. 295; In re Thiessen, 2 Nat. Bankr. News, 625.

97 In re Koplin, 179 Fed. 1013, 24 Am. Bankr. Rep. 534.

98 In re Gerstel, 123 Fed. 166, 10 Am. Bankr. Rep. 411.

99 In re Herskovitz, 152 Fed. 316, 18 Am. Bankr. Rep. 247. But compare In re Nankin, 246 Fed. 811, 159 C. C. A. 113, 40 Am. Bankr. Rep. 459.

100 In re Baum, 169 Fed. 410, 94 C. C. A. 632, 22 Am. Bankr. Rep. 295. Where the trustee in bankruptcy claimed as against the bankrupt income arising under a testamentary trust for the bankrupt's benefit, the trustee could not be required to accept a bond and allow the payment of the money to the bankrupt. In re Reynolds (D. C.) 243 Fed. 272, 40 Am. Bankr. Rep. 139.

101 Samel v. Dodd, 142 Fed. 68, 73 C. C. A. 254, 16 Am. Bankr. Rep. 163; In re Lesaius, 163 Fed. 614, 21 Am. Bankr. Rep. 23.

102 In re Brenner, 190 Fed. 209, 26 Am. Bankr. Rep. 646.

103 Henkin v. Fousek, 246 Fed. 285, 159 C. C. A. 15, 40 Am. Bankr. Rep. 701; Schmid v. Rosenthal, 230 Fed. 818, 145 C. C. A. 128, 36 Am. Bankr. Rep. 548; In re Ricciardelli (D. C.) 224 Fed. 638, 35 Am. Bankr. Rep. 35; In re Kalmanowitz (D. C.) 211 Fed. 167, 32 Am. Bankr. Rep. 210; In re Barton Bros. (D. C.) 149 Fed. 620, 18 Am. Bankr. Rep. 98; In re Reynolds (D. C.) 190 Fed. 967, 27 Am. Bankr. Rep. 200.

required.[104] The trustee, for instance is not required to prove by eye-witnesses that the bankrupt has in his possession the goods alleged to be concealed or that the money unaccounted for is in the bank or on the bankrupt's person.[105] Evidence showing the recent possession by the bankrupt of money or property, with no satisfactory explanation of what was done with it or what has become of it, will sustain the burden of proof resting on the trustee.[106] And when the trustee's prima facie case is established either by evidence or by the admission of the bankrupt or his failure to deny it, the burden is then shifted to the bankrupt, and it is incumbent on him to give a satisfactory reason for his failure to produce the property, by explaining in a clear, explicit, and credible manner what became of it, what disposition he made of it, or how it passed out of his possession or control.[107] If he fails to appear before the referee when cited for this purpose, or if, when under examination, he refuses to give any account of the money or property in question, there is sufficient ground for an order requiring him to surrender it to the trustee in bankruptcy.[108] Ordinarily, however, the bankrupt will attempt to meet the issue and rebut the presumption that he still holds the property. But his mere denial under oath that he has the money or property is not conclusive, and does not prevent the court from proceeding to a further investigation and making the order for surrender if sufficient contrary evidence is adduced.[109] His positive denial is of course entitled to its due weight, but this amounts to very little where it is inconsistent with the only reasonable conclusion to be drawn from the evidence, and where there are circumstances tending to discredit the bankrupt, as, that he has destroyed the books of account which would have shown the true fact,[110] or where his testimony is entirely uncor-

[104] In re Graning, 229 Fed. 370, 143 C. C. A. 490, 36 Am. Bankr. Rep. 162.

[105] In re Silverman (D. C.) 206 Fed. 960, 30 Am. Bankr. Rep. 798.

[106] In re Dixon, 224 Fed. 624, 35 Am. Bankr. Rep. 482; In re Silverman (D. C.) 206 Fed. 960, 30 Am. Bankr. Rep. 798; Shea v. Lewis, 206 Fed. 877, 124 C. C. A. 537, 30 Am. Bankr. Rep. 436; In re Katz (D. C.) 216 Fed. 949; In re Edelman (D. C.) 251 Fed. 429, 42 Am. Bankr. Rep. 229.

[107] In re Chavkin, 249 Fed. 342, 161 C. C. A. 350, 41 Am. Bankr. Rep. 36; In re Pennell, 214 Fed. 337, 130 C. C. A. 645, 32 Am. Bankr. Rep. 241; In re Bass (D. C.) 257 Fed. 137, 43 Am. Bankr. Rep. 280; In re Stavrahn, 174 Fed. 330, 98 C. C. A. 202, 23 Am. Bankr. Rep. 168; In re Deuell, 100 Fed. 633, 4 Am. Bankr. Rep. 60; In re Nisenson, 182 Fed. 912, 24 Am. Bankr. Rep. 915; In re Lesaius, 163 Fed. 614, 21 Am. Bankr. Rep. 23; In re Schlesinger, 97 Fed. 930, 3 Am. Bankr. Rep. 342; In re Averick, 170 Fed. 521, 22 Am. Bankr. Rep. 518; In re De Gottardi, 114 Fed. 328, 7 Am. Bankr. Rep. 723; In re Rosenthal, 200 Fed. 190, 29 Am. Bankr. Rep. 515.

[108] In re Smith, 185 Fed. 983, 26 Am. Bankr. Rep. 399; In re D. Levy & Co., 142 Fed. 442, 73 C. C. A. 558, 15 Am. Bankr. Rep. 166; In re Rosser, 96 Fed. 308, 2 Am. Bankr. Rep. 746.

[109] Moody v. Cole, 148 Fed. 295, 17 Am. Bankr. Rep. 818; Schweer v. Brown, 130 Fed. 328, 64 C. C. A. 574, 12 Am. Bankr. Rep. 178; Kirsner v. Taliaferro, 202 Fed. 51, 29 Am. Bankr. Rep. 832.

[110] In re Goodman, 196 Fed. 566, 27 Am. Bankr. Rep. 697.

roborated, although he was given ample opportunity to obtain corroborating testimony and it appears that this could easily have been done if his own testimony was true.[111] As on the trial of other civil issues, any pertinent evidence, having a material bearing on the question, may be introduced.[112] Thus, stenographic notes of the testimony of the bankrupt when under examination at a creditors' meeting, held for the general purpose of inquiring into his affairs are admissible.[113] And circumstances showing a general disposition on the part of the bankrupt to be secretive and unfair towards his creditors, or to entertain a fraudulent purpose of overreaching them or concealing assets from them, may be admissible as tending to discredit his own story of the loss or disappearance of the property in question.[114]

Yet it must be remembered that an order imperatively requiring the bankrupt to surrender money or property, against his own denial that he has it, is a very strong measure, especially as the consequence of his failure to comply will be his incarceration. Hence, notwithstanding an occasional ruling that a fair preponderance of the evidence is enough to justify the court in making such an order,[115] it is held by the great majority of the decisions that the court must be satisfied beyond a reasonable doubt that the bankrupt has the present possession or control of the money or property in question and the present ability to comply with an order for its surrender.[116] Circumstances which merely create a strong suspicion that he is concealing assets,[117] or even a strong prob-

[111] In re Henderson, 130 Fed. 385, 12 Am. Bankr. Rep. 351; In re Leinweber, 128 Fed. 641, 12 Am. Bankr. Rep. 175.

[112] In re Jacobs, 235 Fed. 706, 149 C. C. A. 126, 38 Am. Bankr. Rep. 96. A financial statement, made by the bankrupts a short time before the bankruptcy, showing a surplus of assets not scheduled, is admissible in evidence in proceedings by the trustee to require them to turn over such assets. In re Chavkin, 249 Fed. 342, 161 C. C. A. 350, 41 Am. Bankr. Rep. 36.

[113] In re Wiesen Bros. (D. C.) 135 Fed. 442, 14 Am. Bankr. Rep. 347; Good v. Kane, 211 Fed. 956, 128 C. C. A. 454.

[114] In re De Gottardi, 114 Fed. 328, 7 Am. Bankr. Rep. 723.

[115] In re Cramer, 175 Fed. 879, 23 Am. Bankr. Rep. 637.

[116] In re Krueger, 197 Fed. 124, 28 Am. Bankr. Rep. 890; In re Krall, 182 Fed. 191, 24 Am. Bankr. Rep. 941; In re Berman, 165 Fed. 383, 21 Am. Bankr. Rep. 139; In re Sax, 141 Fed. 223, 15 Am. Bankr. Rep. 455; In re Adler, 129 Fed. 502, 12 Am. Bankr. Rep. 19; Moody v. Cole, 148 Fed. 295, 17 Am. Bankr. Rep. 818; Boyd v. Glucklich, 116 Fed. 131, 53 C. C. A. 451, 8 Am. Bankr. Rep. 393; In re Walder, 142 Fed. 784, 16 Am. Bankr. Rep. 41; Samel v. Dodd, 142 Fed. 68, 73 C. C. A. 254, 16 Am. Bankr. Rep. 163; In re De Gottardi, 114 Fed. 328, 7 Am. Bankr. Rep. 723; In re Anderson, 103 Fed. 854, 4 Am. Bankr. Rep. 640; Ripon Knitting Works v. Schreiber, 101 Fed. 810, 4 Am. Bankr. Rep. 299; In re Mayer, 98 Fed. 839, 3 Am. Bankr. Rep. 533; In re McCormick, 97 Fed. 566, 3 Am. Bankr. Rep. 340; In re Thiessen, 2 Nat. Bankr. News, 625; Kirsner v. Taliaferro, 202 Fed. 51, 29 Am. Bankr. Rep. 832; In re Holden (C. C. A.) 203 Fed. 229, 29 Am. Bankr. Rep. 387; Shea v. Lewis (C. C. A.) 206 Fed. 877, 30 Am. Bankr. Rep. 436; Stuart v. Reynolds (C. C. A.) 204 Fed. 709, 29 Am. Bankr. Rep. 412; In re Mitchell, 202 Fed. 806.

[117] In re Switzer, 140 Fed. 976, 15 Am. Bankr. Rep. 468; In re Adler, 170 Fed. 634, 21 Am. Bankr. Rep. 371.

ability,[118] will not do. The court must not take this step in a doubtful case. Particularly where the issue turns upon comparative estimates of the value of a stock of goods at different times, great care must be exercised, and an order of surrender should not be made unless the discrepancy is great and such as cannot be explained except on the theory that the bankrupt is keeping back a part.[119]

But to stay the hand of the court, the doubt which it entertains must be "reasonable." In deciding issues of this kind, "a court, when called upon to pass upon the weight of testimony and the credibility of witnesses, is not to be deprived of those faculties of judgment and discrimination as to what is true or probable, on the one hand, and untrue, improbable, or absurd, upon the other, which are permitted to be exercised by juries in similar cases." [120] Hence although the bankrupt's explanation of the loss or disappearance of his property is entirely uncontradicted by any testimony, yet the court is not bound to believe him, but may refuse to accept the explanation and make its order for the surrender of the property, when the story told by the bankrupt is so evidently manufactured for the occasion or so incredible that it would not deceive any person of reasonable sagacity.[121] That the courts are often confronted with this sort of dilemma may be seen from the cases cited in the margin. Without pursuing in detail the various surprising narratives brought forward by fraudulent bankrupts, it may be remarked that it appears to be a favorite device to allege that the money in question was stolen from them in the street or that burglars looted the home or the store. The courts have frequently declined to lend their ear to this easy falsehood.[122] And yet if the bankrupt attempts to explain the loss of the money or property by a story which, though difficult to believe, is not impossible nor an obvious fabrication, the court should not be hasty in deciding against him. It is the more prudent course to

[118] In re Goldfarb Bros., 131 Fed. 643, 12 Am. Bankr. Rep. 386.

[119] In re Reese, 170 Fed. 986, 22 Am. Bankr. Rep. 521. While an inventory taken by a bankrupt merchant prior to his bankruptcy may be made the basis of an order requiring him to turn over property, it should be used with caution on account of its very probable unreliability. Kirsner v. Taliaferro (C. C. A.) 202 Fed. 51, 29 Am. Bankr. Rep. 832.

[120] Schweer v. Brown, 130 Fed. 328, 64 C. C. A. 574, 12 Am. Bankr. Rep. 178.

[121] In re Stokes, 185 Fed. 994, 26 Am. Bankr. Rep. 255; In re Lippman, 184 Fed. 551, 25 Am. Bankr. Rep. 874; In re Robert Greenberg & Bro., 179 Fed. 413, 24 Am. Bankr. Rep. 943; In re Weinreb, 146 Fed. 243, 76 C. C. A. 609, 16 Am. Bankr. Rep. 702; In re Kane, 125 Fed. 984, 10 Am. Bankr. Rep. 478; In re Frankfort, 144 Fed. 721, 15 Am. Bankr. Rep. 210.

[122] See, for example, In re Chamelin, 184 Fed. 553, 25 Am. Bankr. Rep. 570; In re De Gottardi, 114 Fed. 328, 7 Am. Bankr. Rep. 723; In re Levin, 113 Fed. 498, 6 Am. Bankr. Rep. 743; Schweer v. Brown, 130 Fed. 328, 64 C. C. A. 574, 12 Am. Bankr. Rep. 178.

order him before the judge or referee for further examination as to whether or not he has made a full disclosure of the facts.[123]

§ 230. Same; Excuses, Defenses, and Allowances.—Although money or property not turned over to the trustee may be proved or admitted to have been in the recent possession of the bankrupt, still an order for its surrender by him will not be made unless it is within his ability presently to comply. Physical inability to obey such an order will be a good plea in defense, and though his bare denial will not be enough to establish the fact, yet if he succeeds in demonstrating it, no order will be made.[124] Thus, he may show that, since the time the money is shown to have been in his hands, it has passed into the possession of others and is no longer under his control.[125] This method of proceeding cannot be employed, for instance, to reach property which is in the hands of third persons, claiming title thereto by conveyance or transfer from the bankrupt prior to the bankruptcy, although such transfer was manifestly fraudulent.[126] But money of a married woman received by her husband, but which by the law of the state is her separate property and subject to her absolute control, is presumably held by him as her agent, and the fact of his possession furnishes no excuse for her failure to deliver it to her trustee in bankruptcy, unless she shows as a matter of fact that she is unable to obtain the actual possession of it.[127] And a bankrupt cannot escape the duty of turning over to his trustee money which he has invested in his business on the pretense that he holds it as a trustee.[128] Again, since the question is not whether the bankrupt has made a proper use of his money or not, but whether he actually has it now in possession or not, it is a good defense that he has paid it away to his creditors, regardless of the fact that such payments were not justified and resulted in giving preferences.[129] In fact, it may be said that it is entirely immaterial what the bankrupt has done with his money (so far as regards a proceeding of this kind) so long as

[123] In re McCormick, 97 Fed. 566, 3 Am. Bankr. Rep. 340.

[124] In re Cummings, 186 Fed. 1020, 26 Am. Bankr. Rep. 130; In re Richards, 183 Fed. 501, 25 Am. Bankr. Rep. 176; In re Davison, 143 Fed. 673, 16 Am. Bankr. Rep. 337; Crawford v. Sternberg, 220 Fed. 73, 135 C. C. A. 641, 36 Am. Bankr. Rep. 677; Epstein v. Steinfeld, 210 Fed. 236, 127 C. C. A. 54, 32 Am. Bankr. Rep. 6.

[125] American Trust Co. v. Wallis, 126 Fed. 464, 61 C. C. A. 342, 11 Am. Bankr. Rep. 360.

[126] In re Mayer, 98 Fed. 839, 3 Am. Bankr. Rep. 533.

[127] In re Cole, 144 Fed. 392, 75 C. C. A. 330, 16 Am. Bankr. Rep. 302.

[128] In re Smith Longbottom & Sons, 142 Fed. 291, 15 Am. Bankr. Rep. 437.

[129] In re Laplume Condensed Milk Co., 145 Fed. 1013, 16 Am. Bankr. Rep. 729; In re Smith Longbottom & Sons, 142 Fed. 291, 15 Am. Bankr. Rep. 437; In re Kane, 125 Fed. 984, 10 Am. Bankr. Rep. 478; In re Anderson, 103 Fed. 854, 4 Am. Bankr. Rep. 640; In re Cunney (D. C.) 225 Fed. 426, 35 Am. Bankr. Rep. 617.

he satisfies the court that he has actually parted with it.[130] The object of the proceeding is to force the bankrupt to disgorge assets which he is concealing or withholding, not to punish him for improvident or even dishonest conduct. If he has wasted his money or paid it away, no matter for what purpose, he cannot be ordered to pay it over to his trustee. As remarked by the court in such a case: "These sums appear to have been paid out by the bankrupt for very worthy and commendable purposes, but if they had been paid out for unworthy purposes, or lost at gaming or other immoral purposes, the bankrupt could not be committed for not restoring the amounts to his trustee."[131] It should be said, however, that in at least one case a much more severe rule was applied, and the court held that, in determining what sum of money the bankrupt should be ordered to pay over to his trustee, he might be allowed credit for so much as he had spent in the reasonable cost of his living, if he had conducted himself economically and properly, but not for sums spent in a debauch, nor in journeying to a remote place in search of employment.[132] But whatever may be the excuse or explanation set up, it must be made out by a straightforward and convincing story, and will be disregarded if too improbable for belief or discredited by other and better testimony.[133] In one case, where the bankrupt had an interest in growing crops, but omitted to list them in his schedule under the honest belief that they would not vest in the trustee, and he completed their cultivation and harvesting after his adjudication, and was then ordered to surrender the crops, or the proceeds of their sale, to the trustee, it was held that he should be allowed a reasonable compensation for his work and care bestowed on them from the date of the adjudication.[134]

§ 231. **Same; Commitment for Contempt.**—Where a bankrupt fails or refuses to comply with a lawful order of the court of bankruptcy, requiring him to surrender a designated sum of money or certain specified property to his trustee, he is in contempt of the court, and his obedience to the order may be enforced by committing him to prison until

[130] One who was nominally a member of the bankrupt firm, but really a mere clerk, should not be ordered to pay to the trustee money which he had turned over to his partner. And so, the trustee is not entitled to proceed directly against the bankrupt to require the payment of money which he had delivered to his sister, although his claim that it was delivered in payment of a debt was preposterous. In re Vyse (D. C.) 220 Fed. 727, 34 Am. Bankr. Rep. 378.

[131] Boyd v. Glucklich, 116 Fed. 131, 53 C. C. A. 451, 8 Am. Bankr. Rep. 393.

[132] In re Tudor, 100 Fed. 796, 4 Am. Bankr. Rep. 78.

[133] In re Kempner, 6 N. B. R. 521, Fed. Cas. No. 7,689; In re Friedman, 1 Nat. Bankr. News, 332.

[134] In re Barrow, 98 Fed. 582, 3 Am. Bankr. Rep. 414.

he will purge his contempt by obedience to the order.[135] Such an order is not a judgment for the payment of a debt, and therefore the commitment of the bankrupt for failure of compliance with it is not "imprisonment for debt" within the meaning of the state and federal laws abolishing that method of collecting debts.[136]

It should be observed that the sole purpose of a contempt proceeding of the kind now under consideration is to reach and compel the surrender of money or property in the bankrupt's actual possession or control, and not to punish him for concealing his assets.[137] In view of the fact that the twenty-ninth section of the Bankruptcy Act makes it a criminal offense for a bankrupt to conceal property from his trustee, it is at least doubtful whether an attachment for contempt can be used as a means of punishing him for such a concealment.[138] Even when the bankrupt has been indicted for this crime, and has pleaded guilty and served the sentence imposed upon him, the question of his obedience to a "turnover" order requiring him to surrender the same assets alleged to have been concealed remains unsettled. If such an order was lawfully made and he is able to comply with it and refuses to do so, he is in contempt, and the contempt is not purged by the serving of the sentence.[139] Again, a contempt proceeding to enforce obedience to a "turnover" order is a different thing from a proceeding to punish the bankrupt for having squandered his assets or put them out of his reach. When a bankrupt, after having been ordered to pay over to his trustee assets which he has withheld, deals with them in such a manner as to make it impossible for him to comply with the order, he

[135] In re Cole, 163 Fed. 180, 90 C. C. A. 50, 23 L. R. A. (N. S.) 255, 20 Am. Bankr. Rep. 761; In re Krichevsky (D. C.) 219 Fed. 347, 34 Am. Bankr. Rep. 362; In re Stanny (D. C.) 226 Fed. 517, 36 Am. Bankr. Rep. 79; Power v. Fuhrman, 220 Fed. 787, 136 C. C. A. 393, 34 Am. Bankr. Rep. 418; Clay v. Waters, 178 Fed. 385, 101 C. C. A. 645, 24 Am. Bankr. Rep. 293; In re Gerstel, 123 Fed. 166, 10 Am. Bankr. Rep. 411; In re Rosser, 96 Fed. 308, 2 Am. Bankr. Rep. 746; In re Salkey, 6 Biss. 269, 11 N. B. R. 423, Fed. Cas. No. 12,253; In re Speyer, 6 N. B. R. 255, Fed. Cas. No. 13,239. See Mallory Mfg. Co. v. Fox, 20 Fed. 409; In re Fogelman, 204 Fed. 351, 30 Am. Bankr. Rep. 348; In re Star Spring Bed Co., 203 Fed. 640, 30 Am. Bankr. Rep. 208.

[136] Samel v. Dodd, 142 Fed. 68, 73 C. C. A. 254, 16 Am. Bankr. Rep. 163; Schweer v. Brown, 130 Fed. 328, 64 C. C. A. 574, 12 Am. Bankr. Rep. 178; Ripon Knitting Works v. Schreiber, 101 Fed. 810, 4 Am. Bankr. Rep. 299; In re Schlesinger (C. C. A.) 102 Fed. 117, 4 Am. Bankr. Rep. 361; In re Anderson, 103 Fed. 854, 4 Am. Bankr. Rep. 640.

[137] In re Kane, 125 Fed. 984, 10 Am. Bankr. Rep. 478. A motion to commit the treasurer of a bankrupt corporation for contempt for failure to obey an order of the referee requiring him to turn over money to the trustee will not be considered where he is under bail to appear and answer to indictments in the state court for the embezzlement of such money from the corporation, until after the indictments are disposed of. In re Hooks Smelting Co., 146 Fed. 336, 17 Am. Bankr. Rep. 141.

[138] In re Elias (D. C.) 240 Fed. 448, 39 Am. Bankr. Rep. 441.

[139] In re Sobol, 242 Fed. 487, 155 C. C. A. 263, 39 Am. Bankr. Rep. 252.

cannot be committed for failure to obey the order, since his present inability to do so is a complete defense; but his conduct, being in fraud of his creditors and in defiance of the authority and jurisdiction of the court, constitutes a criminal contempt, for which he may be punished.[140]

Where, however, the bankrupt is brought before the court for the explicit purpose of being dealt with for his disobedience to a "turn-over" order, the proceedings need not be formal, but may be based on a petition of the trustee setting forth the facts so as to inform the bankrupt of the charge he is to meet.[141] The bankrupt should be cited to show cause before being committed for contempt,[142] but it is not a proceeding in which he is entitled to claim a trial by jury.[143] It is an entirely separate and distinct proceeding from that which resulted in the order requiring him to yield up the property. That order will be conclusive of the fact that, at the time it was made, the bankrupt had in his possession or control money or property which he was then able to surrender to his trustee, and this question will not be reviewed or re-examined.[144] But it is not conclusive that he still is able to make the payment or surrender, because he may in the meantime have paid away the money or lost the property; and on this question the bankrupt is entitled to a hearing and cannot be committed until he has had an opportunity to present this defense.[145] For whatever may have been the state of the case when the order for surrender was made, the court will not send the bankrupt to jail unless it is shown that he still continues in a position of present and continuous ability to make the surrender,[146] and of this fact the court must be satisfied by clear and convincing proof,

[140] In re Mardenfeld (D. C.) 256 Fed. 920, 43 Am. Bankr. Rep. 613; In re Stern (D. C.) 215 Fed. 979.

[141] In re Cole, 163 Fed. 180, 90 C. C. A. 50, 23 L. R. A. (N. S.) 255, 20 Am. Bankr. Rep. 761.

[142] In re Rosen's Estate (C. C. A.) 263 Fed. 704, 45 Am. Bankr. Rep. 5.

[143] Ripon Knitting Works v. Schreiber (D. C.) 101 Fed. 810, 4 Am. Bankr. Rep. 299.

[144] In re Frankel (D. C.) 184 Fed. 539, 25 Am. Bankr. Rep. 920; In re Marks (D. C.) 176 Fed. 1018, 23 Am. Bankr. Rep. 911; In re Richards (D. C.) 183 Fed. 501, 25 Am. Bankr. Rep. 176. But compare In re Elias (D. C.) 240 Fed. 448, 39 Am. Bankr. Rep. 441.

[145] In re Hausman, 121 Fed. 984, 58 C. C. A. 260, 10 Am. Bankr. Rep. 64; In re Davison, 143 Fed. 673, 16 Am. Bankr. Rep. 337; In re Cole, 144 Fed. 392, 75 C. C. A. 330, 16 Am. Bankr. Rep. 302; Frederick v. Silverman, 250 Fed. 75, 162 C. C. A. 247, 42 Am. Bankr. Rep. 24; In re Kramer (D. C.) 210 Fed. 977, 31 Am. Bankr. Rep. 525; In re Myerson (D. C.) 253 Fed. 510, 42 Am. Bankr. Rep. 337.

[146] In re Dickens, 175 Fed. 808, 23 Am. Bankr. Rep. 660; In re Davison, 143 Fed. 673, 16 Am. Bankr. Rep. 337; In re Marks, 176 Fed. 1018, 23 Am. Bankr. Rep. 911; In re Richards, 183 Fed. 501, 25 Am. Bankr. Rep. 176; In re Mize, 172 Fed. 945, 22 Am. Bankr. Rep. 577; In re Reynolds, 190 Fed. 967, 27 Am. Bankr. Rep. 200; In re Ruos, 164 Fed. 749, 21 Am. Bankr. Rep. 257; In re Holden, 203 Fed. 229, 29 Am. Bankr. Rep. 387; In re Heyman (D. C.) 225 Fed. 1000, 34 Am. Bankr. Rep. 108; Freed v. Central Trust Co., 215 Fed. 873, 132 C. C. A. 7, 33 Am. Bankr. Rep. 64; In re McNaught (D. C.) 225 Fed. 511, 35 Am. Bankr. Rep. 609.

or, as sometimes stated, beyond a reasonable doubt.[147] The cases differ as to whether proof of the recent possession of money or property by the bankrupt is enough to warrant committing him for contempt unless he satisfactorily explains its disappearance; but generally it may be stated that if the contempt proceeding follows close on the heels of the order for surrender, it may be presumed that the ability to pay or surrender continues, and then the bankrupt must overcome this presumption by proof.[148]

In such cases, the bankrupt's contempt is a continuing contempt, and therefore the court is not confined to committing him for a definite and limited time, as it would be in the case of a specific act, complete in itself, constituting a contempt. And if he is released on bail, he may be recommitted by order of the court, on the trustee's showing that his contumacy still continues, and if he leaves the district, he may be pursued and arrested on warrant and again recommitted until the further order of the court or until he complies.[149] But as the object is not punishment, but only to enforce obedience, the imprisonment should not be continued indefinitely, and the bankrupt should be discharged after a reasonable time when it appears that he is really unable to comply with the order.[150]

§ 232. Detention and Extradition of Bankrupts.—The present bankruptcy statute authorizes the arrest and detention of a bankrupt, after the filing of the petition and not more than one month after the qualification of a trustee, on satisfactory proof by the affidavits of at least two persons that the bankrupt "is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy."[151] A com-

[147] Stuart v. Reynolds, 204 Fed. 709, 123 C. C. A. 13, 29 Am. Bankr. Rep. 412; In re Dickens, 175 Fed. 808, 23 Am. Bankr. Rep. 660; McNeil v. McCormack (C. C. A.) 182 Fed. 808; In re Davison, 143 Fed. 673, 16 Am. Bankr. Rep. 337; In re Mize, 172 Fed. 945, 22 Am. Bankr. Rep. 577.

[148] See In re Banzai Mfg. Co. (C. C. A.) 183 Fed. 298, 25 Am. Bankr. Rep. 497; First Nat. Bank v. Cole, 144 Fed. 392, 75 C. C. A. 330, 16 Am. Bankr. Rep. 302; In re Stavrahn, 174 Fed. 330, 98 C. C. A. 202, 23 Am. Bankr. Rep. 168; In re Marks, 176 Fed. 1018, 23 Am. Bankr. Rep. 911; In re Haring, 193 Fed. 168, 174, 175, 27 Am. Bankr. Rep. 285; In re Reynolds, 190 Fed. 967, 27 Am. Bankr. Rep. 200.

[149] United States v. Sowles, 16 Fed. 536.

[150] In re Karp, 196 Fed. 998, 28 Am. Bankr. Rep. 559; In re Taylor, 114 Fed. 607, 7 Am. Bankr. Rep. 410; In re Cummings, 188 Fed. 767, 26 Am. Bankr. Rep. 477.

[151] Bankruptcy Act 1898, § 9b. Upon this part of the statute it may be remarked, in the first place, that it applies alike to voluntary and involuntary cases, whereas the corresponding provisions of the act of 1867 were restricted to involuntary proceedings. In re Hale, 18 N. B. R. 335, Fed. Cas. No. 5,911. In the next place, it will be noticed that the warrant here authorized may be issued by "the judge." This word does not include the referee, and consequently that

parison of these provisions with the only corresponding section of the act of 1867 (Rev. St. § 5024) will show radical differences. Under the earlier law, the warrant for the bankrupt's arrest might issue if there was "probable cause for believing that he is about to leave the district, or to remove or conceal his goods, or to make any fraudulent conveyance or disposition thereof;" but now, only when his object in leaving the district is to "avoid examination," and not then unless his departure will "defeat the proceedings in bankruptcy." The act of 1867 authorized the arrest of the debtor to secure his attendance at the hearing and adjudication;[152] that of 1898 is concerned only with securing the examination of the bankrupt. Still it must be noted that there are some decisions to the effect that the power of the court of bankruptcy to order the detention of a bankrupt, who is about to abscond from the jurisdiction with his assets, is not limited to the particular circumstances and specific purposes mentioned in this clause of the act, and that, under the authority to "make such orders and issue such process, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of the act," the court has authority to issue an order in the nature of a writ of ne exeat, when the arrest of the bankrupt is shown to be necessary for the enforcement of the statute as applied to his case.[153] But the court has no authority to issue a warrant for the arrest of a bankrupt who is not within the district.[154]

The former law provided that the marshal, executing this warrant, should "arrest and safely keep" the alleged bankrupt. The present statute, with remarkable tenderness for the debtor, provides that the marshal shall "keep such bankrupt in custody, but not imprison him." The meaning of this term may not be easy to determine. It has been held that, in a sentence that the defendant "be in custody until," etc., the word "custody" imports actual imprisonment, and the duty of a sheriff under such a sentence is not performed by allowing the defendant to go at large under his general watch and control, but so doing renders him liable for an escape.[155] But in the statute under consideration the words

officer has no jurisdiction to authorize the arrest of the bankrupt, although, it would appear, he may hear the evidence when the bankrupt is in custody and decide whether to detain him or not. Bankruptcy Act 1898, § 1, cl. 16. As to the requisites of the petition and preliminary proof to authorize the issuance of the warrant, see In re Lipke, 98 Fed. 970, 3 Am. Bankr. Rep. 569; In re McKibben, 12 N. B. R. 97, Fed. Cas. No. 8,859.

[152] Usher v. Pease, 116 Mass. 440, 17 Am. Rep. 169, 12 N. B. R. 305. See Marble v. Fulton, 1 Hask. 462, Fed. Cas. No. 9,059.

[153] In re Lipke, 98 Fed. 970, 3 Am. Bankr. Rep. 569; In re Berkowitz, 173 Fed. 1012, 22 Am. Bankr. Rep. 231.

[154] In re Hassenbusch, 108 Fed. 35, 47 C. C. A. 177, 5 Am. Bankr. Rep. 532.

[155] Smith v. Commonwealth, 59 Pa. St. 320.

"custody" and "imprison" are carefully placed in opposition to each other, whence it would appear that the statute would be satisfied if the marshal or his deputy remained constantly in the physical presence of the bankrupt, or so situated with reference to him as to be able to prevent his escape, and that the bankrupt might be kept in custody in his own house, or even allowed to go about his business if the officer was constantly with him.

If the bankrupt has already made his escape from the district, he may be brought back on a process similar to extradition. The statute provides that "whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another." [156] Another section of the act provides that the courts of bankruptcy shall have jurisdiction to "extradite bankrupts from their respective districts to other districts." [157] As to the manner of effecting such extradition, it has been enacted that "only one writ or warrant is necessary to remove a prisoner from one district to another. One copy thereof may be delivered to the sheriff or jailer from whose custody the prisoner is taken, and another to the sheriff or jailer to whose custody he is committed, and the original writ, with the marshal's return thereon, shall be returned to the clerk of the district to which he is removed." [158]

§ 233. Privilege from Arrest on Civil Process.—The statute provides that the bankrupt shall not be liable to arrest on civil process, except where such process issues from a court of bankruptcy for contempt or disobedience of its lawful orders, or unless the process issues from a state court having jurisdiction, and is served within the state, and is founded upon a debt or claim "from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act." [159] The general orders in bankruptcy provide that "if the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned on process in any civil action, the district court, upon his application, may issue a writ of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bank-

[156] Bankruptcy Act 1898, § 10.
[157] Bankruptcy Act 1898, § 2, cl. 14.
[158] Rev. Stat. U. S. § 1029.
[159] Bankruptcy Act 1898, § 9.

ruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be." [160] The discrepancy between these two enactments will be at once apparent. The statute exempts the bankrupt from arrest in cases where the debt or claim on which the process is founded is of such a nature that it will be released by the discharge in bankruptcy. The general order exempts him from arrest in cases where the debt or claim is provable in bankruptcy. Now, several kinds of debts which are provable are not affected by a discharge. Such are judgments in actions for frauds, taxes, debts created by the bankrupt's fraud or breach of duties as a trustee or a public officer. In this conflict, the inferior federal courts have not hesitated to hold that the order must give way to the statute, the latter being of superior authority.[161] The test, therefore, is not the provable character of the debt, but the effect upon it of a discharge in bankruptcy. The bankrupt, if the laws of the state so provide, may be arrested in an action on a claim from which his discharge would not release him, and the bankruptcy court will not interfere to prevent the enforcement, by arrest and imprisonment, of a judgment founded on such a claim, unless such action is necessary to enable the bankruptcy court to exer-

[160] General Order No. 30. This order and the ninth section of the act are in pari materia and should be construed as a whole. United States v. Peters, 166 Fed. 613, 22 Am. Bankr. Rep. 177. But it is a noteworthy circumstance that the order, in one respect at least, does not go nearly so far, in extending the benefits intended, as the act itself. The order, by its express terms, is applicable only to cases of voluntary bankruptcy. It provides for the release of the debtor if he is committed after the filing of "his" petition, or where "the petitioner" —that is, a voluntary petitioning bankrupt—is arrested or imprisoned during the pendency of the proceedings. If a petition in bankruptcy is filed against a debtor by his creditors, it cannot with any propriety be spoken of as "his" petition, nor can he be called "the petitioner." The order, therefore, will not apply in compulsory cases. But the district courts will be justified in acting independently of it in such cases, for the statute itself provides that "a bankrupt" shall be exempt from arrest on civil process, etc., and that the term "bankrupt" shall include "a person against whom an involuntary petition has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt."

[161] In re Baker, 96 Fed. 954, 3 Am. Bankr. Rep. 101, General Order No. 30 was copied, with a few slight verbal changes, from the corresponding general order (No. 27) made under the act of 1867. And of that order it was said: "It would seem that the general order carries the exemption of the bankrupt from arrest further than is warranted by the statute; for the latter, by plain implication, allows an arrest for a debt or claim from which the bankrupt would not be released by his discharge. The rule was perhaps inadvertently framed, and was intended merely to prescribe the mode in which the immunity given by the act might be secured and enforced, but not to extend that immunity to cases where the act clearly shows that none was to be allowed; or perhaps the Supreme Court referred in this rule to cases of preliminary arrest at the commencement of a suit. As the twenty-first section [the eleventh section of the present act] provides for a stay of all suits for debts provable under the act [but now only where the suit is founded

cise its proper authority and jurisdiction in the case.[162] On this principle it is held that, if the laws of the state authorize the arrest and detention of a defaulting taxpayer, a bankrupt in that plight will not be released on habeas corpus, since taxes due to a state or municipality are not affected by a discharge in bankruptcy.[163] The same is true of claims sounding in tort, when the torts are of the nature excepted by the statute from the effects of a discharge.[164] And if the debtor is held under arrest in a civil action in a state court founded on a debt contracted by his defalcation while acting in a fiduciary capacity, that is a claim from which his discharge in bankruptcy would not release him, and therefore he is not entitled to be released on habeas corpus from the court of bankruptcy.[165] Also, it has been decided that a judgment in a bastardy proceeding, brought against the putative father in the name of the state and by the public prosecutor, according to the

upon a claim from which a discharge would be a release], the general order requires the discharge of the bankrupt when arrested in any such suit; otherwise the proceedings might be stayed, but the bankrupt would remain in prison. But where the arrest is one on final process issued after judgment, the discharge of the bankrupt would depend on whether the arrest was for a debt from which his discharge in bankruptcy would release him." In re Ghirardelli, 1 Sawy. 343, 4 N. B. R. 164, Fed. Cas. No. 5,376. And see In re Whitehouse, 1 Low. 429, Fed. Cas. No. 17,564; In re Seymour, 1 Ben. 348, 1 N. B. R. 29, Fed. Cas. No. 12,684; In re Glaser, 2 Ben. 180, 1 N. B. R. 336, Fed. Cas. No. 5,474; In re Alsberg, 16 N. B. R. 116, Fed. Cas. No. 261. Some justification for the extreme breadth of the order may be found in the words of the statute, that, even in the case of a debt from which the bankrupt would not be released by his discharge, "he shall be exempt from arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act." Section 9. The Supreme Court, in framing the order in question, may well have taken the view that a bankrupt, from the time of filing his petition until the discharge is granted, is always "in attendance upon a court of bankruptcy," either actually, or constructively by reason of the necessity of being able to command his presence at any and all times for purposes connected with the settlement and administration of the estate, which might be seriously interfered with if he were liable to be restrained of his liberty on civil process from a state court. Thus, in one of the cases, it was said: "A bankrupt is within the jurisdiction of the court by the proceedings in bankruptcy, and being bound at all times to abide its orders and decrees in the matter of his petition, he is entitled to its protection, by being privileged from arrest on civil process pending the proceedings on his application for relief under the bankruptcy law." United States v. Dobbins, Fed. Cas. No. 14,971. And see In re Lewensohn, 99 Fed. 73, 3 Am. Bankr. Rep. 594.

[162] In re Pettis, 2 N. B. R. 44, Fed. Cas. No. 11,046; In re Baker, 96 Fed. 954, 3 Am. Bankr. Rep. 101.

[163] Aldrich v. Aldrich, 8 Metc. (Mass.) 102.

[164] In re Devoe, 1 Low. 251, 2 N. B. R. 27, Fed. Cas. No. 3,843; In re Simpson, 2 N. B. R. 47, Fed. Cas. No. 12,879; In re Whitehouse, 1 Low. 429, 4 N. B. R. 63, Fed. Cas. No. 17,564.

[165] In re Seymour, 1 Ben. 348, 1 N. B. R. 29, Fed. Cas. No. 12,684; Kavanaugh v. McIntyre, 128 App. Div. 722, 112 N. Y. Supp. 987. But a bankrupt arrested and held on a capias in an action to recover from him the value of property which he is alleged to have embezzled and fraudulently converted to his own use, is entitled to release on habeas corpus, where no facts are pleaded which show such embezzlement to have been committed

state law, adjudging him to pay a certain sum monthly to the mother of the child for the period of ten years, and to secure such payment by a bond with sureties, is not such a debt as will be released by his discharge in bankruptcy, and hence, if he is arrested, during the bankruptcy proceedings, for failure to furnish the bond required, and committed, the court of bankruptcy will not set him at liberty on habeas corpus.[166] On the other hand, if alimony, fixed by a decree of a state court, is a provable debt in bankruptcy (which is an unsettled question), it is of a nature to be released by the discharge, and the state court cannot lawfully cause the bankrupt to be arrested and imprisoned for a contempt of its authority in omitting to pay installments of the alimony due.[167] The same is true of his arrest on a capias under a judgment recovered against him in a suit for breach of promise of marriage.[168] And again, a bankrupt cannot be held in the custody of a sheriff of the county on account of a judgment obtained against him for costs in an action in a state court,[169] unless in cases where the judgment for costs was not rendered until after the adjudication in bankruptcy.[170]

Under the act of 1867, in a case where the bankrupt, while on his way to be examined as a witness in the bankruptcy proceedings under an order of the register, was arrested on mesne process issuing from a state court, it was held that the arrest was a violation of his privilege as a party and witness, and that he was entitled to be released therefrom on application to the court of bankruptcy, without reference to the question whether the debt on which the arrest was based was one which would be affected by his discharge in bankruptcy; although, if the debt were fraudulent or fiduciary, he would be liable to be again arrested as soon as the privilege ceased.[171] The same rule is equally applicable under the present statute,[172] and moreover it is expressly provided by the ninth section of the act that, even in those cases where an arrest of the bankrupt would be lawful, having regard to the nature of the debt, he shall be exempt from such arrest "when in attendance

while he was acting in a fiduciary capacity. Barrett v. Prince, 143 Fed. 302, 74 C. C. A. 440, 16 Am. Bankr. Rep. 64.

166 In re Baker, 96 Fed. 954, 3 Am. Bankr. Rep. 101.

167 In re Houston, 94 Fed. 119, 2 Am. Bankr. Rep. 107. See In re Van Orden, 96 Fed. 86, 2 Am. Bankr. Rep. 801; In re Smith, 1 Nat. Bankr. News, 471; In re Lachemeyer, 18 N. B. R. 270, Fed. Cas. No. 7,966; In re Foye, 2 Low. 399, Fed. Cas. No. 5,021.

168 In re Fife, 109 Fed. 880, 6 Am. Bankr. Rep. 258.

169 In re Borst, 2 N. B. R. 171, Fed. Cas. No. 1,665.

170 In re Marcus, 105 Fed. 907, 45 C. C. A. 115, 5 Am. Bankr. Rep. 365.

171 In re Kimball, 2 Ben. 38, 1 N. B. R. 193, Fed. Cas. No. 7,767; Ex parte Mifflin, 1 Pa. Law Jour. 29, Fed. Cas. No. 9,537.

172 United States v. Flynn, 179 Fed. 316, 23 Am. Bankr. Rep. 294.

upon a court of bankruptcy or engaged in the performance of a duty imposed by this act." This clause is liberally construed, and it is held that the bankrupt's exemption is not restricted to particular occasions when his physical attendance in court is required or when he is actually engaged in performing some required duty.[173]

The exemption from arrest begins at the time of the filing of the petition in bankruptcy,[174] and extends until the final decision on the bankrupt's application for discharge.[175] After that, his discharge, if granted, will be a sufficient protection against arrest for any debt which the discharge affects, and whether it is granted or withheld, his duties under the bankruptcy act will have been performed, so that it will no longer be necessary for the court of bankruptcy to be able to command his instant attendance. The reader will not fail to note that this privilege against arrest extends only to the apprehension of the bankrupt on "civil process." In any criminal proceeding against him, he remains of course liable to arrest and imprisonment. Where a state statute authorizes a judgment creditor, upon alleging that his debtor has fraudulently disposed of his property, to institute proceedings which begin with the arrest and imprisonment of the debtor, but such arrest is not intended as a punishment of the debtor, but as a means of obtaining a full disclosure as to his property, the proceeding is not criminal but civil, and its primary object is the collection of the creditor's judgment. Such proceedings are therefore in direct conflict with the bankruptcy law, as respects any property which has passed to a trustee in bankruptcy, and a bankrupt cannot be arrested in proceedings founded on such statute.[176] On the other hand, the bankruptcy law does not prevent a state court from committing the bankrupt to prison for a contempt, where such commitment is intended as a punishment and not as a means of collecting a debt.[177]

[173] In re Dresser, 124 Fed. 915, 10 Am. Bankr. Rep. 270.

[174] State v. Rollins, 13 Mo. 179; In re Winthrop, 5 Law Rep. 24, Fed. Cas. No. 17,900. See Robb v. Powers, 7 Ala. 658; Gibson v. Holmes, 78 Vt. 110, 62 Atl. 11, 4 L. R. A. (N. S.) 451; Turgeon v. Bean, 109 Me. 189, 83 Atl. 557.

[175] United States v. Peters, 166 Fed. 613, 22 Am. Bankr. Rep. 177; Herschman v. Bolster, 220 Mass. 137, 107 N. E. 543. But the court of bankruptcy, having granted a discharge, may protect the bankrupt from arrest on a judgment rendered by another court after the discharge, but only to allow him to make application to that court for relief. In re Lockwood (D. C.) 240 Fed. 161, 39 Am. Bankr. Rep. 482.

[176] Goodwin v. Sharkey, 5 Abb. Prac. N. S. (N. Y.) 64.

[177] In re Fritz, 152 Fed. 562, 18 Am. Bankr. Rep. 244; In re Collins, 39 Misc. Rep. 753, 80 N. Y. Supp. 1119; In re Meggett, 105 Wis. 291, 81 N. W. 419. A proceeding for the punishment of the bankrupt for contempt; of a state court will not be stayed because he might be imprisoned, for his attendance before the bankrupty court could be procured by habeas corpus. In re Francisco (D. C.) 245 Fed. 216, 41 Am. Bankr. Rep. 87.

In addition to these provisions of the statute, General Order No. 12 provides that the bankrupt "may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court." And it is held that the court may impose terms on granting such protection, and hence, in a proper case, may require the bankrupt to furnish a bond with sureties, conditioned that during its continuance he will obey all orders of the court and not meanwhile depart from its jurisdiction.[178]

§ 234. Release from imprisonment.—A court of bankruptcy has jurisdiction to enforce the protection against arrest on civil process accorded to bankrupts by the statute, and for this purpose may issue the writ of habeas corpus, requiring the production of the bankrupt before it in order that it may inquire and determine whether or not the case is one within the statute, and in the former alternative, discharge the bankrupt. It is so provided by the general orders in bankruptcy,[179] and has been so ruled by the courts.[180] But the authority thus given to the district courts can be exercised only by that court in which the particular bankruptcy proceedings are pending.[181] Where a bankrupt is under arrest under process from a state court, he should first apply to

[178] In re Lewensohn, 99 Fed. 73, 3 Am. Bankr. Rep. 594.

[179] General Order No. 30. "Before granting the order for discharge, the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order." Idem. In addition to the provisions of this order it is enacted that "the Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty." Rev. St. U. S. §§ 751, 752. The following section (753) declares that the writ of habeas corpus "shall in no case extend to a prisoner in jail." But this does not oust the federal courts of jurisdiction to release on habeas corpus, for the purpose of bringing him before a commissioner (or a referee in bankruptcy) for examination, a debtor who is in jail under executions in civil actions, for such debtor is not confined at the suit of the state, but of his creditors. In re Mineau, 45 Fed. 188. That the writ may issue to inquire into the cause of commitment under a civil process, as well as in a case of a criminal process, see Ex parte Randolph, 2 Brock. 447, Fed. Cas. No. 11,558. The power to issue the writ may be exercised by the judge of the district court at chambers and in vacation (see Bennett v. Bennett, Deady, 299, Fed. Cas. No. 1,318; Ex parte Benedict, Fed. Cas. No. 1,292; Ex parte Barnes, 1 Sprague, 133, Fed. Cas. No. 1,010), especially in view of the fact that the bankruptcy act invests the district courts with such powers "as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms." Bankruptcy Act 1898, § 2. But it does not appear to have been intended that this writ should be granted by a referee in bankruptcy.

[180] In re Glaser, 2 Ben. 180, 1 N. B. R. 336, Fed. Cas. No. 5,474; United States v. Dobbins; 1 Pa. Law Jour. 9, Fed. Cas. No. 14,971.

[181] In re Seymour, 1 Ben. 348, 1 N. B. R. 29, Fed. Cas. No. 12,684.

that court before coming into the court of bankruptcy to obtain his release. For this practice is less likely to produce conflicts of jurisdiction, and if he is entitled to be released under the bankruptcy act, though on no other ground, he may urge that privilege in the state court as well as in any other, for all courts, both state and federal, are bound to obey the act of congress.[182] But if the state court being thus applied to, decides against the petitioner's application for release from custody, the bankruptcy court is not in any manner bound by its determination. If, in the judgment of the latter court, the arrest and detention of the bankrupt are in violation of his statutory rights, it will not hesitate to release him from the arrest, notwithstanding that the state court has already refused to do so. The jurisdiction of the federal court is exclusive and its authority paramount, and it will protect the bankrupt in the manner contemplated by the law.[183] Further, it is immaterial whether the process on which the arrest is effected issues from a state court or from a circuit court of the United States.[184]

But the writ of habeas corpus may not always be necessary to obtain the release of a bankrupt held under civil process. Where a simple order to show cause why he should not be released from custody can be made to answer the same purpose, it will be employed instead of the writ. It will be an order in bankruptcy, and the court may compel obedience to it by the process of attachment for contempt.[185] Moreover, the court of bankruptcy has power to protect the bankrupt from imprisonment in a case where the law exempts him from arrest, not only by releasing him from actual custody, by means of the writ of habeas corpus, but also by orders staying further proceedings in the state court, or staying the issue of any capias or attachment against the bankrupt, or by enjoining the creditor from suing out such a writ, or forbidding him to execute a writ already out.[186] If the bankrupt is arrested in a foreign country, under process from its courts, it would seem that he could not obtain his release under habeas corpus from the court of bankruptcy, because the bankruptcy law has no exterritorial effect and because process from our courts does not run

[182] In re O'Mara, 4 Biss. 506, Fed. Cas. No. 10,509. And see United States v. McAleese (C. C. A.) 93 Fed. 656, 1 Am. Bankr. Rep. 650.

[183] Knott v. Putnam, 107 Fed. 907, 6 Am. Bankr. Rep. 80; In re Wiggers, 2 Biss. 71, Fed. Cas. No. 17,623.

[184] In re Wenham, 153 Fed. 910, 16 Am. Bankr. Rep. 690.

[185] In re Glaser, 2 Ben. 180, 1 N. B. R. 336, Fed. Cas. No. 5,474; In re Jacoby, 1 N. B. R. 118, Fed. Cas. No. 7,165.

[186] Knott v. Putnam, 107 Fed. 907, 6 Am. Bankr. Rep. 80; In re Pettis, 2 N. B. R. 44, Fed. Cas. No. 11,046; In re Jacoby, 1 N. B. R. 118, Fed. Cas. No. 7,165; In re Migel, 2 N. B. R. 481, Fed. Cas. No. 9,538; In re Goldstein, 52 How. Prac. (N. Y.) 426, Fed. Cas. No. 5,523.

into a foreign jurisdiction. But it has been suggested that the bankruptcy court may have power, under some circumstances, to enjoin a citizen within its jurisdiction from holding a bankrupt under arrest in a foreign country.[187]

On an application for the release of a bankrupt who is held under arrest upon process from a state court, if the debt, obligation, or liability which is sought to be thus enforced is one which is dischargeable in bankruptcy, he will generally be entitled to deliverance on habeas corpus.[188] But it is otherwise if the debt or obligation would not be so released. And if a judgment has been rendered in the state court and the record shows that the debt was one contracted by the fraud of the bankrupt, or in a fiduciary capacity, or otherwise was of such a nature as not to be affected by his discharge in bankruptcy, the federal court will accept the record as importing absolute verity and will not inquire further into the question, and will refuse the application.[189] But if the case has not proceeded to judgment, and the capias or order of arrest was issued merely upon the preliminary showing of the plaintiff,—that is, upon the declaration or complaint, or upon an affidavit stating such facts as to bring the defendant within the state statute,—it is open to dispute how far the bankruptcy court should proceed to inquire into the facts. Some of the decisions hold that there is only a question of law before the federal court, that is, the question whether the debt, assuming it to be of the nature shown by these papers, is dischargeable in bankruptcy, and that the court should not enter upon any inquiry as to the truth of the facts alleged in the complaint or affidavit.[190] On the other hand, certain of the cases maintain the principle

[187] Hazleton v. Valentine, 1 Low. 270, 2 N. B. R. 31, Fed. Cas. No. 6,287.

[188] A bankrupt in custody under a body execution upon a judgment dischargeable in bankruptcy will be released on habeas corpus, though arrested before the petition was filed. Ex parte Margiasso (D. C.) 242 Fed. 990, 38 Am. Bankr. Rep. 524. A bankrupt imprisoned on process issued in an action for breach of promise of marriage (unaccompanied by seduction), before the filing of his petition, is entitled to discharge. In re Komar (D. C.) 234 Fed. 378, 37 Am. Bankr. Rep. 683. So, where a bankrupt, having recklessly driven an automobile, was arrested under order of the state court made prior to the filing of his voluntary petition in bankruptcy, and judgment was recovered against him, he may be released by the bankruptcy court having jurisdiction pending his application for discharge, such a judgment being dischargeable in bankruptcy. In re Madigan (D. C.) 254 Fed. 221, 41 Am. Bankr. Rep. 770.

[189] In re Robinson, 6 Blatchf. 253, 2 N. B. R. 341, Fed. Cas. No. 11,939; In re Patterson, 2 Ben. 155, 1 N. B. R. 307, Fed. Cas. No. 10,817.

[190] In re Kimball, 2 Ben. 554, 2 N. B. R. 204, Fed. Cas. No. 7,768, affirmed 6 Blatchf. 292, 2 N. B. R. 354, Fed. Cas. No. 7,769; In re Valk, 3 Ben. 431, 3 N. B. R. 278, Fed. Cas. No. 16,814; In re Devoe, 1 Low. 251, 2 N. B. R. 27, Fed. Cas. No. 3,843. In the case last cited it was ruled that evidence cannot be received to contradict the declaration in the action in which the order of arrest was granted and to show that no such cause of action really exists as is there-

that the bankruptcy court is not bound by the case made by the pleadings or affidavits in the proceedings in the state court, nor obliged to accept the plaintiff's allegations as conclusive on the question of fact, but may make original inquiry into the question whether or not the debt is one liable to be released by the discharge of the bankrupt, and to this end may consider all legal evidence brought before it.[191] Whatever may be the proper solution of this question, it should be remarked that the writ of habeas corpus, though it is a writ of right, does not issue as a matter of course, and it may be refused if it appears, on the showing made by the petition, that the applicant for the writ, if brought into court by its means, would have to be remanded.[192]

§ 235. Arrest Prior to Bankruptcy Proceedings.—The protection from arrest granted to a bankrupt during the pendency of the bankruptcy proceedings does not relieve him from an arrest existing at the time of the commencement of the bankruptcy proceedings. That is to say, a bankrupt who was arrested under process from a state court, civil or criminal, before the filing of the petition in bankruptcy, and is held in custody under such arrest, cannot obtain his release from such imprisonment by application to the federal court, on petition for the writ of habeas corpus; and in this case it makes no difference whether the debt or claim for which he was arrested is of such a character as to be provable in bankruptcy or released by the discharge, for irrespective of any such question, the pending arrest will not be superseded by the bankruptcy proceedings.[193] If, as a matter of fact, the claim sought to be enforced by the arrest is one which is affected by the discharge in bankruptcy, then the defendant will be entitled to regain his liberty, but only after the discharge is granted, and only on application to the proper state court.[194] But it may be necessary during the proceedings in

in set forth, for the bankruptcy court cannot undertake to decide whether the plaintiff's claim is well or ill founded; that must be left to the determination of the court where the suit is pending.

191 In re Alsberg, 16 N. B. R. 116, Fed. Cas. No. 261; In re Glaser, 2 Ben. 180, 1 N. B. R. 336, Fed. Cas. No. 5,474; In re Williams, 6 Biss. 233, 11 N. B. R. 145, Fed. Cas. No. 17,700; In re Jacoby, 1 N. B. R. 118, Fed. Cas. No. 7,165.

192 See In re King, 51 Fed. 434; In re Haskell, 52 Fed. 795.

193 In re Claiborne, 109 Fed. 74, 5 Am. Bankr. Rep. 812; Ex parte Ziegenfuss, 24 N. C. 463; Ex parte Rank, Crabbe, 493, Fed. Cas. No. 11,566; In re Walker, 1 Low. 222, 1 N. B. R. 318, Fed. Cas. No. 17,060; Hazleton v. Valentine, 1 Low. 270, 2 N. B. R. 31, Fed. Cas. No. 6,287; Minon v. Van Nostrand, 1 Low. 458, 4 N. B. R. 108, Fed. Cas. No. 9,642, affirmed Holmes, 251, Fed. Cas. No. 9,641; Brandon Nat. Bank v. Hatch, 57 N. H. 460, 16 N. B. R. 468. Per Contra, see Turgeon v. Emery, 182 Fed. 1016, 25 Am. Bankr. Rep. 694; People v. Erlanger, 132 Fed. 883, 13 Am. Bankr. Rep. 197. And see Ex parte Harrison (D. C.) 272 Fed. 543, 47 Am. Bankr. Rep. 80, holding that the word "arrest" in this part of the statute includes "imprisonment," and a bankrupt is entitled to discharge from imprisonment under a previous arrest on a dischargeable debt.

194 Brandon Nat. Bank v. Hatch, 57 N. H. 460, 16 N. B. R. 468.

bankruptcy to have the bankrupt before the referee or judge, particularly for the purpose of examination. This contingency has been met by the general order, which provides that "if, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon habeas corpus, by the jailer or other officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy." [195] Upon this rule it is necessary to remark, in the first place that, taken literally, it applies only to a voluntary bankrupt, but that cases of involuntary bankruptcy are equally within the spirit and reason of the rule. And secondly, the habeas corpus here referred to is not the great writ of that name used as a means of obtaining deliverance from illegal imprisonment, but rather the writ of "habeas corpus ad testificandum" which is used to bring the body of a prisoner into court when he is needed as a witness in a pending cause.

§ 236. **After-Acquired Property.**—The estate which vests in a trustee in bankruptcy, to be collected and distributed to creditors, is that which belonged to the bankrupt at the time of the commencement of the proceedings in bankruptcy. Whatever the bankrupt may acquire after that date, whether by inheritance, devise, or gift, or as the fruit of his own industry and skill, even though it may be acquired while the bankruptcy proceedings are still pending and before the discharge, is his own peculiar property. It is not subject to be administered in the bankruptcy proceedings; it is not within the jurisdiction of the bankruptcy court; it is not liable to the claims of any creditors whose claims were provable (whether actually proved or not) in the bankruptcy proceedings. The only limitation upon this rule is that, if the bankrupt fails to secure his discharge (or, as to any debts not released by his discharge) his after acquisitions may be subjected to the satisfaction of creditors, but by the ordinary processes of law, and not with any relation to the proceedings in bankruptcy.[196] We have spoken of the

[195] General Order No. 30. See In re Cheney, 5 Law Rep. 19, Fed. Cas. No. 2,636; In re Gilbert, 2 Nat. Bankr. News, 378.

[196] Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915; Traer v. Clews, 115 U. S. 528, 6 Sup. Ct. 155, 29 L. Ed. 467; Clay v. Waters (C. C. A.) 161 Fed. 815, 20 Am. Bankr. Rep. 561; In re Harper, 155 Fed. 105, 83 C. C. A. 565, 18 Am. Bankr. Rep. 741; In re Rennie, 1 Nat. Bankr. News, 335; In re Grant, 2 Story, 312, Fed. Cas. No. 5,693; In re Levy, 1 Ben. 496, 1 N. B. R. 136, Fed. Cas. No. 8,296; In re Patterson, 1 Ben. 508, 1 N. B. R. 125, Fed. Cas. No. 10,815; Day v. Superior Court, 61 Cal. 489; Bond v. Baldwin, 9 Ga. 9; Mays v. Manufacturers' Nat. Bank, 64 Pa. St. 74, 3 Am. Rep. 573; Sosnowski v. Rape, 69 Ga. 548; Bank of Missouri v. Franciscus, 10 Mo. 27; Turner v. Gatewood, 8 B. Mon. (Ky.) 613; McLendon v. Turner, 65 Ga. 577; In re Swift (D. C.) 259 Fed. 612, 44 Am. Bankr. Rep. 211; In re Green (D. C.) 213 Fed. 542.

"commencement of the proceedings in bankruptcy" as the moment from which the bankrupt may begin to acquire property for himself, and this is most probably to be understood, under the peculiar language of the present statute (though the point may not be free from doubt) as the date of the filing of the petition in bankruptcy, so that property which might be acquired by the bankrupt after the presentation of the petition, but before even the adjudication, would not pass to his trustee as assets.[197]

As to all his after-acquired property the bankrupt has the unrestricted right of disposing of it as he wills, and the ordinary remedies for its protection, independently of the bankruptcy proceedings. He may maintain trover for its recovery,[198] or if his creditors seize upon it, while his application for a discharge is pending, a court of equity will interfere, by injunction, to protect his rights, and will restrain proceedings until the question of his discharge has been decided.[199] Furthermore, the bankrupt himself may become a purchaser at the trustee's sale of his own property and assets, and is not disqualified from thus buying back as much of his former belongings as he can pay for out of his exempt property, his earnings, or his subsequent acquisitions.[200] While the possession of property by a bankrupt at the time of

[197] Bankruptcy Act 1898, § 70, provides that the trustee of the estate of a bankrupt "shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, * * * to property which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold under judicial process against him." There are two clauses here which stand in apparent antagonism. But the phrase "as of the date he was adjudged a bankrupt" probably has no other office than to make the trustee's title relate back to the date mentioned, since, without this provision, that title could not of course accrue any earlier than the appointment and qualification of the trustee. In other words, it fixes the date of the adjudication as the date when "by operation of law" the title passes, but it does not in any way define or limit the quantum of the estate which the trustee is to take. The other phrase, "prior to the filing of the petition," does not relate to the accrual of the trustee's title, but, in the connection in which it is found, serves to define and still further limit the property which the trustee will take. That property (with certain exceptions) must be property which the bankrupt could have transferred by his voluntary act, or which his creditors could have seized on judicial process against him, and further, it must be property to which he had such a title or claim, at the time of the filing of the petition, that it could at that moment have been so transferred or seized. If this interpretation is correct,—and it seems the only construction which gives sense and intelligibility to the statute,—then no property which the bankrupt may acquire after the filing of the petition, though it be before the adjudication, will pass to the trustee. See In re Judson, 192 Fed. 834, 113 C. C. A. 158, 27 Am. Bankr. Rep. 704; In re Burka, 104 Fed. 326, 5 Am. Bankr. Rep. 12; Sibley v. Nason, 196 Mass. 125, 81 N. E. 887, 12 L. R. A. (N. S.) 1173, 124 Am. St. Rep. 520, 12 Ann. Cas. 938. A contrary rule prevailed under the act of 1841. See Ex parte Newhall, 2 Story, 360, Fed. Cas. No. 10,159.

[198] Webb v. Fox, 7 Durn. & E. 387.

[199] Mosby v. Steele, 7 Ala. 299. See In re Rogers, 1 Nat. Bankr. News, 211.

[200] Sparhawk v. Yerkes, 142 U. S. 1,

his discharge, or immediately after, which by industry he might reasonably have acquired, does not warrant the presumption that he did not make a full surrender of his estate, yet, if the value of the property is so great as to make it improbable that it was earned since the filing of the petition in bankruptcy, it devolves upon the bankrupt to show how he became the proprietor of such property, when his discharge is impeached for fraudulent and wilfull concealment of property.[201]

All property is to be regarded as after-acquired property, in this sense and for these purposes, to which the bankrupt's title or right accrues, from any source or in any manner, so as to be available for his own uses, after the bankruptcy.[202] Thus, where an estate was conveyed to a husband and wife to be held in entirety, and the husband went into bankruptcy, and, between the adjudication and his discharge, he obtained a divorce from his wife, it was held that, when the adjudication was made, he had no interest in the real estate which could pass to the trustee, and if he gained an alienable interest by the divorce, it was a new acquisition which could not be claimed by the trustee.[203] So where a wife, being possessed of a separate estate, procured a policy of insurance on her own life, payable on her death to her husband, and paid the premiums out of her own estate for a year, before the end of which time he was adjudicated a bankrupt, and she paid out of her own estate the premiums for the two following years and then died, it was

12 Sup. Ct. 104, 35 L. Ed. 915; Traer v. Clews, 115 U. S. 528, 6 Sup. Ct. 155, 29 L. Ed. 467; Phelps v. McDonald, 2 MacArthur, 375, 16 N. B. R. 217; Gates v. Fraser, 9 Ill. App. 624. A bankrupt who, after his discharge, becomes the bona fide holder of a note payable to himself, which had been returned in his schedule and sold by the assignee, is remitted to his original title, and may transfer it by indorsement so as to vest the right of action in his indorsee. Birch v. Tillotson, 16 Ala. 387.

201 Hargroves v. Cloud, 8 Ala. 173. See Mays v. Manufacturers' Nat. Bank, 64 Pa. St. 74, 3 Am. Rep. 573.

202 Wages of a bankrupt, earned after the adjudication, are not properly a part of the assets to be administered. Progressive Building & Loan Co. v. Hall, 220 Fed. 45, 135 C. C. A. 613, 33 Am. Bankr. Rep. 313. After his adjudication, the bankrupt may pay on a mortgage money earned after the filing of the petition or obtained from relatives or friends. Cohen v. Bacharach, 229 Fed. 385, 143 C. C. A. 505, 36 Am. Bankr. Rep. 166. But property is not "after acquired" property merely because, after the termination of the bankruptcy proceedings, it acquires a value which it did not possess at their inception. Thus, a bankrupt owned a claim against a third person, who had made an assignment for the benefit of his creditors. This claim was listed by the bankrupt in his schedule of assets, but all parties at that time regarded it as entirely worthless. The trustee took no action in regard to it. But after the bankrupt had obtained his discharge, circumstances occurred which made the claim valuable, and a dividend upon it was paid by the assignee. It was held that this money was not after acquired property of the bankrupt, but that it belonged to his estate in bankruptcy, which could be reopened for the purpose of administering it. In re Lighthall (D. C.) 221 Fed. 791, 34 Am. Bankr. Rep. 594.

203 In re Benson, 8 Biss. 116, Fed. Cas. No. 1,328.

held that the husband was entitled to the proceeds of the policy, and not his trustee in bankruptcy.[204] So where a devise or bequest, vesting by the death of the testator after the filing of a petition in bankruptcy against the heir, is coupled with a provision for the deduction of any indebtedness then existing from the heir to the testator, this does not prevent the bankrupt from being entitled to the benefit of the bequest in full so far as concerns his general creditors, subject only to the contingency of his not obtaining a discharge.[205] Again, crops planted by a bankrupt after the filing of the petition in bankruptcy do not pass to the trustee as assets for the use of creditors.[206] And a liquor license granted to one after he has been adjudicated a bankrupt belongs to him personally and not to his receiver or trustee in bankruptcy.[207] Where the bankrupt, who was indorser on a promissory note falling due after the filing of his petition in bankruptcy, pays the same, his claim against the maker is after-acquired property accruing to himself and not to the benefit of his creditors, and he may be permitted to prove such claim against the estate of the maker, the latter being also bankrupt.[208] On the other hand, income or profits accruing to the bankrupt after the adjudication, but from property in which he had a fixed and vested interest before the bankruptcy, is not to be regarded as after-acquired property.[209] So the share of a bankrupt in a trust estate is not after-acquired property, though it was decreed to him after the filing of the petition in bankruptcy, the rights of the parties in the trust estate being adjudicated by such decree as of a date prior to the filing of such petition.[210] And where one held land by an unrecorded deed prior to his bankruptcy, and his grantor thereafter sold the land to another, his right of action against the grantor for the proceeds of such sale is not property acquired after the bankruptcy, so as to entitle him to sue therefor in his own name.[211]

§ 237. Right to Surplus of Estate.—Where all the claims duly proved against the bankrupt's estate have been paid in full, together

[204] In re Murrin, 2 Dill. 120, 8 N. B. R. 6, Fed. Cas. No. 9,968.

[205] In re Woods, 133 Fed. 82, 13 Am. Bankr. Rep. 240.

[206] Conley v. Nelin (Tex. Civ. App.) 128 S. W. 424; In re Barnett, 3 Pittsb. 559, Fed. Cas. No. 1,024; Jackson v. Jetter (Iowa) 142 N. W. 431.

[207] In re Whitlock's License, 39 Pa. Super. Ct. 34.

[208] In re Smith, 1 Nat. Bankr. News, 136.

[209] In re Baudouine, 96 Fed. 536, 3 Am. Bankr. Rep. 55; In re Wright, 177 Fed. 578, 24 Am. Bankr. Rep. 437.

[210] McNaboe v. Marks, 51 Misc. Rep. 207, 99 N. Y. Supp. 960. But where the conditions upon which the bankrupt was to become entitled to a trust fund were not performed until after his adjudication, it was held that his trustee had no title thereto for the use of the creditors. Hull v. Palmer, 155 App. Div. 636, 140 N. Y. Supp. 811.

[211] Simpson v. Miller, 7 Cal. App. 248, 94 Pac. 252.

with the costs and expenses of the proceedings and the fees and commissions of the officers, if there remains any surplus in money, or any property not disposed of by the trustee, it belongs to the bankrupt, and upon the closing of the estate and the discharge of the trustee, such surplus will be ordered turned over to the bankrupt.[212] Or if the bankrupt has died in the mean time, such surplus should be paid or delivered to his executor or administrator.[213] On the same principle, when a composition is accepted by the creditors and confirmed by the court, the estate thereupon revests in the bankrupt.[214] And after the bankrupt has been discharged, he may sue for and recover property which was not administered in the bankruptcy proceedings, and the attorney who prosecutes such suit and pays over to the bankrupt the money recovered is not, in the absence of fraud, liable for the amount so paid on the estate being reopened.[215]

It is probably not necessary that the trustee should execute a formal conveyance or assignment to the bankrupt of such surplus property, though some of the decisions intimate that this is required,[216] for the title would revest by operation of law, or rather, perhaps, the bankrupt is to be regarded as retaining a reversionary interest, which develops into a full title upon the discharge of the trustee. Even in the case where no trustee is appointed, a chose in action belonging to the bankrupt will revert to him after his creditors have satisfied themselves out of his other property.[217] There are certain cases in which it has been held that, after the trustee in bankruptcy has paid in full the debts prov-

[212] Bankruptcy Act 1898, § 66b; In re Hoyt, 3 N. B. R. 55, Fed. Cas. No. 6,806; Colie v. Jamison, 4 Hun (N. Y.) 284, 13 N. B. R. 1; Dewey v. Moyer, 9 Hun (N. Y.) 473, 16 N. B. R. 1; Jones v. Pyron, 57 Tex. 43; Herndon v. Davenport, 75 Tex. 462, 12 S. W. 1111; Steevens v. Earles, 25 Mich. 40; Boyd v. Olvey, 82 Ind. 294; Page v. Waring, 76 N. Y. 463; Hunter v. Hodgson (Tex. Civ. App.) 95 S. W. 637; Wade v. Goza, 78 Ark. 7, 96 S. W. 388; Robertson v. Schard, 142 Iowa, 500, 119 N. W. 529, 134 Am. St. Rep. 430; Robertson v. Howard, 82 Kan. 588, 109 Pac. 696; Bracklee Co. v. O'Connor, 67 Misc. Rep. 599, 122 N. Y. Supp. 710; Johnson v. Norris, 190 Fed. 459, 111 C. C. A. 291, 27 Am. Bankr. Rep. 107. A conveyance by the bankrupt alleged to be fraudulent as to creditors will not be set aside at the suit of the trustee, when there are no provable debts, as the estate, after satisfying the claims against it, belongs to the bankrupt. Nicholas v. Murray, 5 Sawy. 320, 18 N. B. R. 469, Fed. Cas. No. 10,223.

[213] In re Ohl (D. C.) 260 Fed. 338, 44 Am. Bankr. Rep. 328.

[214] In re McNeil Corp. (D. C.) 249 Fed. 765, 41 Am. Bankr. Rep. 162.

[215] Watson v. Motley, 201 Ala. 25, 75 South. 147.

[216] Scruby v. Norman, 91 Mo. App. 517; Kempner v. Bauer, 53 Misc. Rep. 109, 104 N. Y. Supp. 76; Kruegel v. Murphy & Bolanz (Tex. Civ. App.) 126 S. W. 680. But see Frazier v. Desha's Adm'r, 40 S. W. 678, 19 Ky. Law Rep. 407. And see Raley v. D. Sullivan & Co. (Tex. Com. App.) 207 S. W. 906, holding that the title of a bankrupt to land, though not scheduled as an asset, passes to his trustee, and, notwithstanding the bankrupt's discharge, he cannot recover the same, no facts being shown revesting the title in him.

[217] Roberts v. Martin, 158 Ky. 124, 164

ed against the estate, the surplus, instead of being returned to the bankrupt, should be applied in payment of debts which, though not proved, were listed by the bankrupt in his schedule.[218] But this doctrine has been disapproved,[218] and does not commend itself to legal reason. For creditors who do not prove their claims are not parties to the proceedings, and should not be forced to reap an advantage from them which they have not sought, but should be left to their ordinary remedies at law. The court of bankruptcy is to do justice, and make a distribution of property, between the bankrupt on the one hand and, on the other hand, those of his creditors who choose to come in and make themselves parties to the suit by proving their claims. But where a preference, voidable under the act, has been wrested from the creditor at the suit of the trustee, and the creditor then makes proof of his debt, and the assets are enough to pay all the other creditors in full and leave a surplus, in this case the preferred creditor's proof may be allowed to stand, and he may be paid out of such surplus; for, as between the bankrupt and himself, he is entitled to the money.[220] So also, it is ruled that the surplus remaining after the payment of all proved claims, with interest thereon to the date of adjudication, should not be returned to the bankrupt until there has been further paid out of it interest on the proved claims from the date of adjudication to the day of payment.[221]

After the estate has been closed, the trustee discharged, and the bankrupt himself discharged, property which comes to light, not having been discovered in time to be administered in the bankruptcy proceedings, belongs to the bankrupt as a surplus of his estate, and if there are no representations of fraud or concealment on his part, or of such mistake as would vitiate the discharge, the court has no authority to appoint a new trustee to take possession of such surplus.[222] But on the other hand, a discharged bankrupt can assert no title, nor can he maintain any

S. W. 369; Griffin v. Mutual Life Ins. Co., 119 Ga. 664, 46 S. E. 870.

[218] In re Haynes, 2 N. B. R. 227, Fed. Cas. No. 6,269; In re James, 2 N. B. R. 227. These were decisions by the Supreme Court of the District of Columbia sitting as a court of bankruptcy.

[219] In re Hoyt, 3 N. B. R. 55, Fed. Cas. No. 6,806, per Lowell, J. And see People's Nat. Bank of Independence v. Maxson, 168 Iowa, 318, 150 N. W. 601.

[220] In re McGuire, 8 Ben. 452, Fed. Cas. No. 8,813.

[221] In re Town, 8 N. B. R. 40, Fed. Cas. No. 14,112; In re Hagan, 6 Ben. 407, 10 N. B. R. 383, Fed. Cas. No. 5,898; In re Bank of North Carolina, 12 N. B. R. 130, Fed. Cas. No. 895.

[222] See Hanson v. First Nat. Bank (Tex. Civ. App.) 128 S. W. 1147; Lasater v. First Nat. Bank, 96 Tex. 345, 72 S. W. 1057; Mayer v. Gourden, 26 Fed. 742; Burton v. Perry, 146 Ill. 71, 34 N. E. 60; In re Pintard, Fed. Cas. No. 11,170; In re Graff (D. C.) 242 Fed. 577, 40 Am. Bankr. Rep. 205; Davis v. Findley, 201 Ala. 515, 78 South. 869. Compare In re Lighthall (D. C.) 221 Fed. 791, 34 Am. Bankr. Rep. 594.

action, in respect to property which he wilfully concealed from his trustee or failed to surrender for the benefit of his creditors.[223]

Where the trustee in bankruptcy elects not to take and charge the estate with property of the bankrupt which is incumbered, or where he abandons it, the property or right, whatever it is, remains in or reverts to the bankrupt.[224]

[223] First Nat. Gank v. Lasater, 196 U. S. 115, 25 Sup. Ct. 206, 49 L. Ed. 408, 13 Am. Bankr. Rep. 698; Laing v. Fish, 119 Ill. App. 645; Hunt v. Doyal, 128 Ga. 416, 57 S. E. 489. See Rand v. Iowa Cent. Ry. Co., 96 App. Div. 413, 89 N. Y. Supp. 212; Rand v. Sage, 94 Minn. 344, 102 N. W. 864; Jones v. Barnes, 107 Miss. 800, 66 South. 212; Perkins v. Alexander (Tex. Civ. App.) 209 S. W. 789.

[224] Abo Land Co. v. Tenorio (N. M.) 191 Pac. 141.

CHAPTER XIV

EXEMPTIONS OF BANKRUPT

§ 238. **Exemptions Under Federal Laws.**—The bankruptcy act of 1898 makes no specific exemptions to bankrupts except such as may be allowed them by the law of the state of their domicile. In this respect it differs from the act of 1867, which granted to bankrupts an exemption of household and kitchen furniture, wearing apparel, and "other articles and necessaries" to the value of $500, to be set apart by the assignee.[1] But there are certain laws of the United States, not repealed by the bankruptcy act, under which specific property may be claimed as exempt from liability for the debts of the bankrupt. Thus, his military uniform, arms, and equipment are exempted by an early act of Congress from seizure on judicial process or distress.[2] Again, since the bankruptcy law invests the trustee in bankruptcy with title to the bankrupt's property, except "property which is exempt," it is held that land acquired by the bankrupt under the United States homestead law cannot be subjected, in the bankruptcy proceedings, to the payment of any debt contracted by him before the issuance of the patent for such land, it being exempt as to all such debts by the terms of the

[1] Rev. Stat. U. S. § 5045. See In re Friend, 3 Woods, 388, Fed. Cas. No. 5,120. A homestead exemption can be claimed under the Bankruptcy Act only where given by the laws of the state. Edgington v. Taylor (C. C. A.) 270 Fed. 48, 46 Am. Bankr. Rep. 566.

[2] Rev. Stat. U. S. § 1628. This exemption is recognized in the official form No. 1, Schedule B, 5.

homestead act.[3] And a similar decision has been made with reference to land to which an Indian bankrupt was entitled, under an act of Congress allotting in severalty the agricultural lands of the tribe, but providing that the government should hold the lands for twenty-five years in trust for the sole use and benefit of the several Indian allottees, who were not allowed to convey or incumber the lands during that period of time.[4]

§ 239. **Pension Money.**—An act of Congress provides that "no sum of money due or to become due to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office, or any agent or officer thereof, or is in course of transmission to the pensioner entitled thereto, but shall enure wholly to the benefit of such pensioner."[5] In pursuance of this statute it is held that money received from the United States as a pension, and remaining unchanged in the pensioner's hands at the time of filing his petition in bankruptcy, is exempt from liability for his debts, and does not pass to his trustee in bankruptcy as assets of his estate.[6] But after a United States pension check, or the money it represents, has been deposited in a bank,[7] or placed in the hands of a third person for safe keeping,[8] or invested in any species of property,[9] it is no longer exempt from liability for the pensioner's debts, but may be reached by ordinary judicial process,

[3] In re Daubner, 96 Fed. 805, 3 Am. Bankr. Rep. 368; In re Cohn, 171 Fed. 568, 22 Am. Bankr. Rep. 761; In re Auge (D. C.) 238 Fed. 621, 39 Am. Bankr. Rep. 39. See Rev. Stat. U. S. § 2296.

[4] In re Russie, 96 Fed. 609, 3 Am. Bankr. Rep. 6. And see In re Grayson, 3 Ind. Ter. 497, 61 S. W. 984.

[5] Rev. Stat. U. S. § 4747. In New York it is held that money due to a debtor from the public authorities as a pension, granted under state or municipal law, cannot be reached by a creditor of the pensioner until actually paid over to the latter. Nagle v. Stagg, 15 Abb. Prac. N. S. (N. Y.) 348. And an annuity or pension payable to the bankrupt as a retired civil employee, under either the laws of the state or of the City of New York, as it is not a vested right, but a revocable bounty, is not an asset of his estate in bankruptcy. In re Hoag (D. C.) 227 Fed. 478, 480, 36 Am. Bankr. Rep. 142, 145.

[6] In re Bean, 100 Fed. 262, 4 Am. Bankr. Rep. 53. But see, contra, In re Jones, 166 Fed. 337, 21 Am. Bankr. Rep. 536. In the former case it was held that such money should be listed in the bankrupt's schedule of assets under the heading of "cash on hand," with the statement that he claims it as exempt; if it is omitted without fraudulent intent, the bankrupt may be allowed to insert it by amendment; but the liability of a voluntary bankrupt to pay the filing fees required by the statute does not depend upon his having property which is not exempt, but he is excused from such payment only in case of absolute inability. Hence he may be ordered to pay such fees out of pension money remaining in his hands at the time of filing his petition.

[7] Martin v. Hurlburt, 60 Vt. 364, 14 Atl. 649.

[8] Rozelle v. Rhodes, 116 Pa. St. 129, 9 Atl. 160, 2 Am. St. Rep. 591; Sims v. Walsham (Ky.) 7 S. W. 557.

[9] Faurote v. Carr, 108 Ind. 123, 9 N. E. 350; Robion v. Walker, 82 Ky. 60, 56 Am Rep. 878; Jardain v. Fairton Sav-

and will therefore vest in the trustee in bankruptcy as assets of the pensioner's estate. It should be noted, however, that in one state (Iowa) a statute provides that all money received from the United States government as a pension shall be exempt from execution, whether it be in the actual possession of the pensioner "or deposited, loaned, or invested by him." [10] Also under the laws and decisions of New York, pension money "may be applied to his support and maintenance, may be saved intact for future use, or may be invested by the beneficiary in real or personal property necessary for the maintenance and support of himself and family. Such property is exempt so long as it can be strictly identified as the actual proceeds of the pension. But if the pension is embarked in business enterprises or employed in speculation, which results in intermingling the bounty of the government with other property interests and rendering the pension funds incapable of identification, then the statutory exemption is lost." And therefore a bankrupt pensioner cannot claim as exempt real property which was purchased in the first instance partly with pension money, but out of which he has withdrawn, by way of mortgage, more than the pension money originally put in, and used the money so withdrawn in other ventures.[11]

§ 240. Exemption Under State Laws.—The bankruptcy statute of 1898 provides that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition." [12] This adoption of the various state laws as the measure of the exemption to be allowed to bankrupts is not beyond the power of Congress. On the contrary, the constitutional validity of such a provision, in reference to the requirement that laws on the subject of bankruptcy shall be "uniform" throughout the United States has been fully sustained by the courts.[13] And it is held that the section in question is to be liberally construed to ac-

ings Fund Ass'n, 44 N. J. Law, 376; Friend v. Garcelon, 77 Me. 25, 52 Am. Rep. 739.

10 See Diamon v. Palmer, 79 Iowa, 578, 44 N. W. 819.

11 In re Ellithorpe, 111 Fed. 163, 7 Am. Bankr. Rep. 18, citing Bank v. Carpenter, 119 N. Y. 550, 23 N. E. 1108, 7 L. R. A. 557, 16 Am. St. Rep. 855.

12 Bankruptcy Act 1898, § 6. See In re Cobb, 1 N. B. R. 414, Fed. Cas. No. 2,920. "Exempt" property is property which is not subject to be taken under process for the enforcement of a demand. Stratton v. Ermis (C. C. A.) 268 Fed. 533, 46 Am. Bankr. Rep. 125.

13 Darling v. Berry, 4 McCrary, 470, 13 Fed. 659; Harlin v. American Trust Co. 67 Ind. App. 213, 119 N. E. 20. And see supra, § 2, and other cases there cited.

complish the purpose of the exemption.[14] The bankruptcy act, it will be observed, neither enlarges nor diminishes the exemption laws of the states. It simply takes the law of the particular state where the bankrupt is domiciled, as it exists at the time the proceeding is begun, and adopts it as the measure of the exemption to be allowed.[15] Thus, the extent and the duration of a homestead allotment made in a court of bankruptcy will be the same as prescribed by the law of the state.[16] And the nature and extent of the state exemption must be ascertained in the mode designated by the state law.[17] Further, it must be noticed that when the act of Congress speaks of the "state laws," as measuring the exemption, it means the statutory law of the state only. Hence an item of property having an actual market value (such as a seat in a stock exchange) which, if exempted from liability to satisfy the debts of the owner, is so exempted by decisions of the state courts, not resting on any exemption by reason of a state statute, but purely on definitions of property, will not be deemed exempt under the bankruptcy act.[18]

In construing the state exemption laws, for the purposes of the bankruptcy act, the federal courts will follow the decisions of the highest court of the state, if any applicable rulings are to be found,[19] but they

[14] In re Tilden, 91 Fed. 500, 1 Am. Bankr. Rep. 300; Smith v. Thompson, 213 Fed. 335, 129 C. C. A. 637, 32 Am. Bankr. Rep. 165; In re Lenters (D. C.) 225 Fed. 878, 35 Am. Bankr. Rep. 3.

[15] In re Bassett, 189 Fed. 410, 26 Am. Bankr. Rep. 800; In re Boyd, 120 Fed. 999, 10 Am. Bankr. Rep. 337; In re Staunton, 117 Fed. 507, 9 Am. Bankr. Rep. 79; In re Wunder, 133 Fed. 821, 13 Am. Bankr. Rep. 701; In re Manning, 112 Fed. 948, 7 Am. Bankr. Rep. 571; Steele v. Buel, 104 Fed. 968, 44 C. C. A. 287, 5 Am. Bankr. Rep. 165; In re Andrews & Simonds, 193 Fed. 776, 27 Am. Bankr. Rep. 116; In re Bitner, 255 Fed. 48, 166 C. C. A. 376, 42 Am. Bankr. Rep. 175; In re Hewit (D. C.) 244 Fed. 245, 40 Am. Bankr. Rep. 6; In re Gunzberger (D. C.) 268 Fed. 673, 45 Am. Bankr. Rep. 690.

[16] In re Woodard, 95 Fed. 260, 2 Am. Bankr. Rep. 339; Windley v. Tankard, 88 N. C. 223. But where the exemption law of the state has been amended by a new statute allotting additional exemptions, but such later act is void for want of conformity to the constitutional requirements as to amending statutes, a bankrupt who has had set apart to him all the exemptions allowed by the original act cannot claim anything further under the amending statute. In re Buelow, 98 Fed. 86, 3 Am. Bankr. Rep. 389.

[17] In re Feeley, 3 N. B. R. 66, Fed. Cas. No. 4,714; Sutman v. Hogsett, 70 Pa. Super. Ct. 180; People's Nat. Bank of Independence v. Maxson, 168 Iowa, 318, 150 N. W. 601.

[18] Page v. Edmunds, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318, 9 Am. Bankr. Rep. 277.

[19] Libby v. Beverly (C. C. A.) 263 Fed. 63, 44 Am. Bankr. Rep. 605; In re Scheier, 188 Fed. 744, 26 Am. Bankr. Rep. 739; In re National Grocer Co. (C. C. A.) 181 Fed. 33, 24 Am. Bankr. Rep. 360; In re Cochran, 185 Fed. 913, 26 Am. Bankr. Rep. 459; In re Meriwether, 107 Fed. 102, 5 Am. Bankr. Rep. 435; In re McCrary Bros., 169 Fed. 485, 22 Am. Bankr. Rep. 161; In re Stone, 116 Fed. 35, 8 Am. Bankr. Rep. 416; In re Owings, 140 Fed. 739, 15 Am. Bankr. Rep. 472; In re Downing, 148 Fed. 120, 15 Am. Bankr. Rep. 423; In re Stevenson, 93 Fed. 789, 2 Am. Bankr. Rep. 230; In re Camp, 91 Fed. 745, 1 Am. Bankr. Rep. 165; In re Beauchamp, 101 Fed. 106, 4 Am. Bankr. Rep. 151; In re Wyllie, 2 Hughes, 449, Fed. Cas. No. 18,112; Southern Irr. Co. v. Wharton Nat. Bank (Tex. Civ. App.) 144 S. W. 701. But the decision

are not bound to follow a mere obiter dictum.[20] It should also be remarked that, in setting out the exemption to the bankrupt, it is the "lex domicilii" which governs;[21] and property which is exempt by the laws of the state where the debtor resides and where the petition is filed will be protected wherever it may actually be situated, and if it is situated in another state, the court will not inquire into the laws of that state to see if it would be there exempt, for that question is entirely immaterial.[22] But the adoption by the bankruptcy act of the state exemption laws extends so far only as to accord the property to the debtor. Collateral provisions in the state laws, particularly in relation to the method of allotting or setting apart the exempt property, are not made a part of the bankruptcy act. In these respects it is the national law, and not the state law, which governs.[23] By this it is not meant to imply that any substantive provisions of the state law, made a prerequisite to the right to claim an exemption, may be disregarded. On the contrary, such provisions are to be strictly observed. Thus, if the state law grants the exemption to "residents of the state," the bankrupt must answer this condition or he cannot claim the exemption,[24] and one who is not a citizen of the United States or of the particular state is not entitled to exemptions.[25] It is so also in regard to the common requirement that the person claiming an exemption must be "the head of a family," [26] or a "citizen householder having a family." [27]

The right of exemption must exist, if at all, at the date of the commencement of the proceedings in bankruptcy.[28] But where the bankrupt is entitled to the exemption at that date, his subsequent removal from the state does not deprive him of the right, though the exemption

is for the federal court, and when it is about to order sale of the bankrupt's property, a state court will not recognize given property as exempt from seizure and sale, since it should not interfere with the federal court's jurisdiction, and could not enforce its decree. Aubrey v. Guillaumin, 144 La. 177, 80 South. 241.

[20] In re Sullivan, 148 Fed. 815, 78 C. C. A. 505, 17 Am. Bankr. Rep. 578.

[21] Duncan v. Ferguson-McKinney Dry Goods Co. (C. C. A.) 150 Fed. 269, 18 Am. Bankr. Rep. 155.

[22] In re Stevens, 2 Biss. 373, 5 N. B. R. 298, Fed. Cas. No. 13,392. Compare Gibbs v. Logan, 22 W. Va. 208; Campbell-Thorpe Grocer Co. v. Watkins, 135 Ark. 433, 205 S. W. 826.

[23] In re Lynch, 101 Fed. 579, 4 Am. Bankr. Rep. 262; Farmer v. Taylor, 56 Ga. 559, 15 N. B. R. 515. And see In re Culwell, 165 Fed. 828, 21 Am. Bankr. Rep. 614; In re Lenters (D. C.) 225 Fed. 878, 35 Am. Bankr. Rep. 3.

[24] In re Dinglehoef, 109 Fed. 866, 6 Am. Bankr. Rep. 242; In re O'Hara, 162 Fed. 325, 20 Am. Bankr. Rep. 714.

[25] In re Kaplan, 186 Fed. 242, 24 Am. Bankr. Rep. 376.

[26] In re Finklea, 153 Fed. 492, 18 Am. Bankr. Rep. 738; In re Yonngstrom, 153 Fed. 98, 82 C. C. A. 232, 18 Am. Bankr. Rep. 572; In re Glisson, 182 Fed. 287, 25 Am. Bankr. Rep. 911; In re McGowan, 170 Fed. 493, 22 Am. Bankr. Rep. 469.

[27] In re Rainwater, 191 Fed. 738, 25 Am. Bankr. Rep. 419.

[28] In re Duerson, 13 N. B. R. 183, Fed. Cas. No. 4,117.

is only given to residents by the state law.[29] So a bankrupt who was engaged in farming until a short time before the adjudication is entitled to the exemptions given by the state law to farmers, though he afterwards engages, temporarily, in another pursuit.[30] But where, executions being levied on his property, a debtor claims and receives the money allowed to him as exempt, and directly afterwards files his petition in bankruptcy, he cannot then claim another exemption of like amount, to be set apart to him under the bankruptcy law.[31]

§ 241. Same; Exemption by Value.—Where the state statute, as is often the case, does not specify the items of property which may be claimed as exempt, but grants to the debtor an exemption of personal property generally (or of property either real or personal) to a value not exceeding a certain sum, it is held that the exemption is in property and not in money, so that a bankrupt must select the items of property which he wishes set apart to him, not exceeding the designated value, and cannot simply claim an exemption of that much money out of the proceeds of his estate in bankruptcy.[32] But subject to this condition, the exemption may be taken out of cash remaining in the hands of the bankrupt at the time of the adjudication,[33] or in a vested expectant interest of the bankrupt in a sum of money payable at his death or at the death of another person,[34] or in real estate if the statute so provides.[35] Where the state statute is intended primarily for the benefit of the family rather than of the individual debtor, and grants an exemption to either the husband or wife, but with a proviso that the amount allowed to them jointly shall not exceed a certain sum, the rights of a married bankrupt will be determined by the same rule which would govern them in the state courts, and may thus depend on the financial condition of his wife.[36] But in the absence of a provision of

[29] In re Donahey, 176 Fed. 458, 23 Am. Bankr. Rep. 796.

[30] In re Fly, 110 Fed. 141, 6 Am. Bankr. Rep. 550.

[31] In re Miller, 1 Nat. Bankr. News, 263.

[32] In re Ansley Bros., 153 Fed. 983, 18 Am. Bankr. Rep. 457; In re Baughman, 183 Fed. 668, 25 Am. Bankr. Rep. 167; In re Pfeiffer, 155 Fed. 892, 19 Am. Bankr. Rep. 230; In re Staunton, 117 Fed. 507, 9 Am. Bankr. Rep. 79; In re Prince & Walter, 131 Fed. 546, 12 Am. Bankr. Rep. 675. Where the state law allows an exemption to a certain amount out of personal property, but only in case the debtor is "not the owner of a homestead," a bankrupt comes within this description where, although he had a homestead at the beginning of the proceedings, yet the proceeds of its sale were not sufficient to pay off the incumbrances upon it. In re Stitt, 252 Fed. 1, 164 C. C. A. 113, 41 Am. Bankr. Rep. 777.

[33] In re Wilson, 108 Fed. 197, 6 Am. Bankr. Rep. 287.

[34] In re Bennett, 6 Phila. (Pa.) 472, 2 N. B. R. 181, Fed. Cas. No. 1,315.

[35] In re Edwards, 2 N. B. R. 349, Fed. Cas. No. 4,293.

[36] In re McCutchen, 100 Fed. 779, 4 Am. Bankr. Rep. 81.

this kind, the bankrupt is entitled to claim the full amount of the exemption specified in the statute, irrespective of the fact that his wife may own unincumbered property.[37] The court of bankruptcy will also give to a bankrupt the benefit of a state statute exempting his wages earned within a limited time or to a limited amount.[38]

§ 242. Same; Exemption of Specific Property.—In many of the states the exemption laws save to the debtor certain specified articles or kinds of property, such as wearing apparel, tools and implements of his trade, domestic animals, or household furniture. So great is the diversity of these statutes that it would not be profitable here to enter upon a discussion either of their terms or of their interpretation. In each state a bankrupt will be entitled to receive what the state law allows, and the court of bankruptcy, on any disputed construction of the law, will be guided by the decisions of the local courts.[39]

The phrase "wearing apparel" has given rise to much controversy, and particularly as between bankrupts who own watches and jewelry and claim them as exempt and creditors who seek to subject them to their claims. The general weight of authority is to the effect that a gold watch and chain, habitually carried upon the person in the ordinary mode of use, is exempt as wearing apparel, at least where the value of the time-piece is not so great as to make it primarily an article of

[37] In re Tonne, 13 N. B. R. 170, Fed. Cas. No. 14,095.

[38] In re Holden, 127 Fed. 980, 12 Am. Bankr. Rep. 96.

[39] As to a specific exemption of a lot in a cemetery, see Burdette v. Jackson, 179 Fed. 229, 102 C. C. A. 481, 24 Am. Bankr. Rep. 127. As to claiming an exemption out of a stock of goods in trade, see In re Wilson, 108 Fed. 197, 6 Am. Bankr. Rep. 287. Concerning the effect of a state insolvency law, granting to the debtor an allowance for the support of his family, see In re Anderson, 110 Fed. 141, 6 Am. Bankr. Rep. 555. As to a state law exempting "wages or salary," see In re Pears, 205 Fed. 255, 30 Am. Bankr. Rep. 563; In re Vonhee (D. C.) 238 Fed. 422, 38 Am. Bankr. Rep. 799. On the construction of a statute exempting the "best swine or meat of a swine," see In re Libby, 103 Fed. 776, 4 Am. Bankr. Rep. 615; Bank of Nez Perce v. Pindel, 193 Fed. 917, 113 C. C. A. 545, 28 Am. Bankr. Rep. 69. On the exemption of earnings necessary for the support of a debtor's family, see In re Condon, 198 Fed. 947, 29 Am. Bankr. Rep. 907. On the question of exempting a membership in a stock exchange or chamber of commerce, having a market value, by reason of certain benefit or insurance features in its charter or rules, see In re Neimann, 124 Fed. 738, 10 Am. Bankr. Rep. 739. As to whether a liquor license can be claimed as a part of the exemption, see In re Olewine, 125 Fed. 840, 11 Am. Bankr. Rep. 40; In re Myers, 102 Fed. 869, 4 Am. Bankr. Rep. 536. As to the exemption of growing crops, see In re T. C. Burnett & Co., 201 Fed. 162, 29 Am. Bankr. Rep. 872; In re Friedrich, 199 Fed. 193, 28 Am. Bankr. Rep. 656. Where the bankrupt is a "polyartist," or pursues several different mechanical trades at the same time, he is not required to limit his claim for exemption of tools and implements to those appropriate for the pursuit of any one of his trades, but may select those suitable for all his trades, provided he does not exceed the total amount of the exemption in value. In re Robinson, 206 Fed. 176, 30 Am. Bankr. Rep. 686.

ornament rather than of mere utility.[40] But it seems that if the statute only exempts "necessary wearing apparel," a watch is not included.[41] The question also occurs whether a watch carried by a mechanic may be regarded as a tool or implement of his trade, so as to be exempt under that designation. The few authorities on this point have held that, if the bankrupt can show that it is necessary for him to have a watch in order to carry on his trade, he will be allowed to claim as exempt such a watch as would be proper and sufficient for that purpose, but that if the watch which he owns is more valuable than it need be for use in his trade, he must account to his creditors for the difference.[42] As to articles of jewelry, if they are only carried as ornaments, they are not exempt under the description of "wearing apparel."[43] But in one instance the court allowed the bankrupt to retain as exempt a diamond stud which he habitually wore in the front of his shirt and for the purpose of fastening the shirt together (thus giving at least the color of usefulness to the article in question), there being no circumstances connected with its acquisition or use tending to show fraud or bad faith towards his creditors.[44] The term "wearing apparel" may also include the uniform or regalia of a fraternal order to which the bankrupt belongs, although he does not wear it as an ordinary and usual dress, but only on special occasions.[45]

Where the statute exempts the tools or implements of a mechanic or artisan necessary to the carrying on of his trade, the term is understood to apply only to such simple instruments as are operated by hand, and it cannot be stretched so as to allow the bankrupt to claim an exemption of expensive and complicated machinery propelled by steam,

[40] In re H. L. Evans & Co., 158 Fed. 153, 19 Am. Bankr. Rep. 752; In re Jones, 97 Fed. 773, 3 Am. Bankr. Rep. 259; In re Freeman, 2 Nat. Bankr. News, 569; In re Steele, 2 Flip. 324, Fed. Cas. No. 13,346; Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529; Stewart v. McClung, 12 Or. 431, 8 Pac. 447, 53 Am. Rep. 374; Brown v. Edmonds, 5 S. Dak. 508, 59 N. W. 731. Contra, In re Everleth, 129 Fed. 620, 12 Am. Bankr. Rep. 236.

[41] In re Turnbull, 106 Fed. 667, 5 Am. Bankr. Rep. 549.

[42] In re Coller, 111 Fed. 503, 7 Am. Bankr. Rep. 131; In re Turnbull, 106 Fed. 667, 5 Am. Bankr. Rep. 549. And see In re Everleth, 129 Fed. 620, 12 Am. Bankr. Rep. 236.

[43] In re Gemmell, 155 Fed. 551; In re Kasson, Fed. Cas. No. 7,616. But see In re H. L. Evans & Co., 158 Fed. 153, 19 Am. Bankr. Rep. 752, where the court allowed as exempt, under the statutory description of "wearing apparel," not only a gold watch and chain, but also rings and scarf-pins set with diamonds, sapphires, rubies, and pearls, aggregating over $400 in value. But later decisions refuse to recognize diamond rings as allowably exempt under the description of wearing apparel or otherwise. Rivas v. Noble, 241 Fed. 673, 154 C. C. A. 431, 39 Am. Bankr. Rep. 785; Langever v. Stitt, 237 Fed. 83, 150 C. C. A. 285, 38 Am. Bankr. Rep. 446.

[44] In re Smith, 96 Fed. 832, 3 Am. Bankr. Rep. 140.

[45] In re Jones, 97 Fed. 773, 3 Am. Bankr. Rep. 259. But compare In re Everleth, 129 Fed. 620, 12 Am. Bankr. Rep. 236.

electricity, or other power.[46] But within the meaning of such a statute, a baker is a mechanic,[47] and so is an undertaker and embalmer,[48] and a farmer may claim as exempt a mechanical cream separator.[49] A professional guide in the Maine woods is entitled to the exemption of a canoe as a tool of his trade, but (so the court seriously held) not his rifle.[50] A horse and wagon may be so strictly necessary to the conduct of the bankrupt's business as to be exempt under the designation of implements of his trade.[51] But where the statute exempts "two horses kept and used for team work," a bankrupt is not entitled to claim as exempt a horse kept and used only as a racer.[52] Where the statute exempts "one dray or truck, by the use of which a drayman or truckman habitually earns his living," it is possible that an automobile truck may be exempt, but not unless it is clearly shown that the bankrupt habitually earns his living by the use of it.[53]

The burden of proving that an article alleged to be exempt is within the provisions of the statute rests upon the bankrupt.[54] And he must select his exemption in kind, and cannot ordinarily wait until the property has been sold and then claim the maximum value of his exemption in money from the proceeds.[55] And a bankrupt who does not happen to own any articles of the kind or class mentioned in the statute (tools, domestic animals, or the like) will not be entitled to receive out of his estate a commutation of their value in money.[56] But if articles strictly within the exemption law have been wrongfully taken by creditors, before the bankruptcy proceedings, on attachment, execution, or distress, and sold, the bankrupt will still be entitled to claim and receive the allowance of his exemptions, the sale being declared void or the money ordered refunded by the creditors or by the sheriff if still in the latter's hands.[57] And there is also authority for holding that a

[46] Peyton v. Farmers' Nat. Bank of Hillsboro (C. C. A.) 261 Fed. 326, 44 Am. Bankr. Rep. 295.

[47] In re Osborn, 104 Fed. 780, 5 Am. Bankr. Rep. 111; In re Petersen, 95 Fed. 417, 2 Am. Bankr. Rep. 630.

[48] Steiner v. Marshall, 140 Fed. 710, 72 C. C. A. 103, 15 Am. Bankr. Rep. 486.

[49] In re Hemstreet, 139 Fed. 958, 14 Am. Bankr. Rep. 823.

[50] In re Mullen, 140 Fed. 206, 15 Am. Bankr. Rep. 275.

[51] In re Conley, 162 Fed. 806, 19 Am. Bankr. Rep. 200; In re Hindman, 104 Fed. 331, 43 C. C. A. 558, 5 Am. Bankr. Rep. 20.

[52] In re Libby, 103 Fed. 776, 4 Am. Bankr. Rep. 615.

[53] In re Schumm (D. C.) 232 Fed. 414, 36 Am. Bankr. Rep. 427.

[54] In re Turnbull, 106 Fed. 667, 5 Am. Bankr. Rep. 549.

[55] In re Blanchard, 161 Fed. 793, 20 Am. Bankr. Rep. 417; In re Grady, 138 Fed. 935, 14 Am. Bankr. Rep. 738; In re Gunzberger (D. C.) 268 Fed. 673, 45 Am. Bankr. Rep. 690.

[56] In re Harrington, 1 Nat. Bankr. News, 513; In re Williams, 2 Nat. Bankr. News, 419. And see In re Buelow, 98 Fed. 86, 3 Am. Bankr. Rep. 389.

[57] In re Martin, 2 Hughes, 418, 13 N. B. R. 397, Fed. Cas. No. 9,152; In re Ellis, 1 N. B. R. 555, Fed. Cas. No. 4,400; Williams v. Miller, 16 Conn. 144.

judgment recovered by a debtor against one who has unlawfully levied upon and sold his exempt property stands in place of the exemption and cannot be reached by creditors.[58] And it appears that the same doctrine applies to money due to the bankrupt from an insurance company as indemnity for the loss of his exempt property by fire.[59]

§ 243. Policies of Life Insurance.—The seventieth section of the present bankruptcy act, which describes the property the title to which is vested in a trustee in bankruptcy, contains the following proviso: "That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets." At first the courts were disposed to hold that this proviso was a specific limitation upon the sixth section of the act, which secures to the bankrupt in general terms the benefit of the exemption law of the state, and that therefore the title to such a policy would vest in the trustee, notwithstanding the fact that it was exempt under the state laws.[60] But a contrary doctrine has prevailed. Attention has been given to the important phrase in the seventieth section which restricts the general language vesting the trustee with title to the bankrupt's property, by adding "except in so far as it is property which is exempt." And it is now held that the entire seventieth section is limited in its application, by its own terms and by section six, to property which is not exempt under the law of the state, and that the proviso above quoted applies only to insurance policies which are not so exempt. The proviso is intended to give the bankrupt the preferred right to retain a non-exempt policy on paying its cash surrender value. But if the policy is exempt under the state law, it is exempt in the bankruptcy proceeding, and the bankrupt is not obliged to pay or secure its surrender value in order to retain it as his own.[61] But if the laws of the

[58] Tillotson v. Wolcott, 48 N. Y. 188.

[59] Sands v. Roberts, 8 Abb. Prac. (N. Y.) 343.

[60] In re Scheld, 104 Fed. 870, 44 C. C. A. 233, 52 L. R. A. 188, 5 Am. Bankr. Rep. 102; In re Lange, 91 Fed. 361, 1 Am. Bankr. Rep. 189; In re Steele, 98 Fed. 78, 3 Am. Bankr. Rep. 549.

[61] Holden v. Stratton, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018, 14 Am. Bankr. Rep. 94; In re Johnson, 176 Fed. 591, 24 Am. Bankr. Rep. 277; In re Holden, 114 Fed. 650, 52 C. C. A. 346; Steele v. Buel, 104 Fed. 968, 44 C. C. A. 287, 5 Am. Bankr. Rep. 165; Pulsifer v. Hussey, 97 Me. 434, 54 Atl. 1076; Dreyfus v. Barton, 98 Miss. 758, 54 South. 254; Chandler v. Traub, 159 Ala. 519, 49

state exempt from execution all money arising from insurance, but only to the amount of $500, a bankrupt, being the owner of a life insurance policy having a large cash surrender value, can claim only $500 of its value as exempt.[62] If, on the other hand, the bankrupt's life policy has no cash surrender value, this provision of the bankruptcy act does not apply, and if such a policy is exempt under the law of the state it will be exempt in bankruptcy.[63] A policy, if exempt, is none the less so because it has been assigned as collateral security, and even though the assignment makes it payable to the assignee absolutely.[64]

Where the state law provides that a policy of insurance expressed to be for the benefit of or payable to the wife of the assured shall inure to her benefit as against the claims of his creditors, a policy on the life of a bankrupt but payable to his wife is exempt in the bankruptcy proceedings and does not vest in his trustee.[65] But though the law may provide that insurance effected by a husband on his own life shall inure to the benefit of his widow free from the claims of his creditors, this does not exempt in favor of the husband, during his lifetime, insurance payable either to himself or to his estate.[66] And the same rule has been applied to a policy which is made payable to the assured at the end of twenty years if living, and in case of his prior death, to his wife if living, and otherwise to his legal representatives or assigns,[67] though this last ruling has been controverted.[68] But where a policy is made payable on the death of the insured to his wife by name, it is one expressed to be for her benefit, within the meaning of the statute, notwithstanding the fact that by its terms, as in most modern policies, the insured is given the right to change the beneficiary or to enjoy certain collateral rights in his lifetime in the way of obtaining loans thereon or its surrender value, and such a policy, which was so payable at the time of the bankruptcy of the insured, whether it be regarded as the property of the wife, or as exempt property of the husband, does

South. 240; In re Sawyer, 2 Hask. 153, Fed. Cas. No. 12,393; Young v. Thomason (Ala.) 60 South. 272; Elledge v. Sumpter, 140 Tenn. 11, 203 S. W. 346.

[62] In re Jones (D. C.) 249 Fed. 487, 41 Am. Bankr. Rep. 299, 467.

[63] In re Rosenberg-Oldstein Co. (D. C.) 236 Fed. 812, 37 Am. Bankr. Rep. 669.

[64] King v. Kellogg, 114 Miss. 375, 75 South. 134.

[65] In re Whelpley, 169 Fed. 1019, 22 Am. Bankr. Rep. 433; In re Carlon, 189 Fed. 815, 27 Am. Bankr. Rep. 18; Allen v. Central Wisconsin Trust Co., 143 Wis. 381, 127 N. W. 1003, 139 Am. St. Rep. 1107. See In re Morse, 206 Fed. 350; Frederick v. Metropolitan Life Ins. Co. (D. C.) 235 Fed. 639, 37 Am. Bankr. Rep. 737.

[66] In re Moore, 173 Fed. 679, 23 Am. Bankr. Rep. 109.

[67] In re Loveland, 192 Fed. 1005, 27 Am. Bankr. Rep. 765; In re Churchill. 198 Fed. 711, 29 Am. Bankr. Rep. 153.

[68] In re Booss, 154 Fed. 494, 18 Am. Bankr. Rep. 658; Eldredge v. Mutual Life Ins Co., 217 Mass. 444, 105 N. E. 361; In re Churchill, 209 Fed. 766, 126 C. C. A. 490, 31 Am. Bankr. Rep. 1.

not pass to his trustee and the latter cannot recover the same, even though the right of the wife may be subsequently extinguished, or though she does not set up any claim thereto.[69]

§ 244. **Homstead Exemption.**—Where the law of the state in which the bankruptcy proceeding is pending allows a homestead exemption to the debtor, the same exemption may be claimed and set apart to him in the bankruptcy proceeding; and all questions in regard to the acquisition of the homestead, the steps necessary to make it effective, its measure and duration, the kinds of debts enforceable against it, and its retention or abandonment, will be determined in accordance with the laws of the state, the court of bankruptcy following the decisions of its highest courts where they are applicable.[70] And where the right of a bankrupt to a homestead exemption has been adjudicated by a state court in proceedings under a general assignment made in accordance with a state law, after a contest by creditors, and before the court of bankruptcy acquired jurisdiction by the filing of the petition in bankruptcy, such adjudication cannot be reviewed or set aside in the bankruptcy proceedings.[71] Since the rights of the parties are fixed at the date of the adjudication of bankruptcy, if no homestead was allowed by the law of the state at that time, none can be set apart to the bankrupt afterwards.[72] Moreover, the bankrupt must be in position to claim the homestead, so far as it depends upon himself, at that day. If he has merely expressed an intention to claim as a homestead a certain

[69] In re Orear, 189 Fed. 888, 111 C. C. A. 150, 26 Am. Bankr. Rep. 521; In re Fetterman (D. C.) 243 Fed. 975, 39 Am. Bankr. Rep. 834. But compare In re Jens (D. C.) 273 Fed. 606.

[70] See In re Rippa, 180 Fed. 603; In re Marquette, 103 Fed. 777, 4 Am. Bankr. Rep. 623; In re Baker, 182 Fed. 392, 24 Am. Bankr. Rep. 411; In re Stone, 116 Fed. 35, 8 Am. Bankr. Rep. 416; In re Reinhart, 129 Fed. 510, 12 Am. Bankr. Rep. 78; In re Buelow, 98 Fed. 86, 3 Am. Bankr. Rep. 389; In re Dawley, 94 Fed. 795, 2 Am. Bankr. Rep. 496; In re Harrington, 99 Fed. 390, 3 Am. Bankr. Rep. 639; In re Pope, 98 Fed. 722, 3 Am. Bankr. Rep. 525; In re Pratt, 1 Flip. 353, Fed. Cas. No. 11,370; Daughters v. Christy, 223 Ill. 612, 79 N. E. 292; Rushin v. Gause, 41 Ga. 180; Murray v. Hazell, 99 N. C. 168, 5 S. E. 428; Martin v. Lile, 63 Ala. 406. Compare Darling v. Berry, 4 McCrary, 470, 13 Fed. 659. Where a bankrupt claims property as a homestead, and proceedings are taken before the referee to subject it to the payment of a prior debt, the bankrupt should be allowed an opportunity to set up the statute of limitations against such debt. In re Bean, 100 Fed. 262, 4 Am. Bankr. Rep. 53. The value of personal property exemptions allowed to a bankrupt cannot be set off against a homestead exemption to which he is entitled, for the purpose of diminishing the latter. In re Strauch (D. C.) 208 Fed. 842, 31 Am. Bankr. Rep. 36.

[71] In re Rhodes, 109 Fed. 117, 6 Am. Bankr. Rep. 173.

[72] In re Kerr, 9 N. B. R. 566, Fed. Cas. No. 7,729. See In re Vogler, 2 Hughes, 297, 8 N. B. R. 132, Fed. Cas. No. 16,986; In re Smith, 2 Woods, 458, 14 N. B. R. 295, Fed. Cas. No. 12,996; In re Crum (D. C.) 221 Fed. 729, 34 Am. Bankr. Rep. 586.

tract of land belonging to him, but has taken no steps to make the intention effective, he cannot have the land set apart to him as exempt under the bankruptcy law. "A homestead cannot, any more than a domicile, be acquired by a mere naked intention." An intention formed before the bankruptcy cannot be linked to acts of occupation done after the adjudication, so as to make a complete right to a homestead.[73] The trustee in bankruptcy should include the homestead in his report of exempt property.[74]

Since the right to a homestead depends on the state law, and not primarily on the bankruptcy law, it devolves upon a bankrupt who claims this exemption to show that his situation answers the requirements of the state statute. This becomes important where, for instance, the statute grants the homestead only to one who is a "householder" or the "head of a family."[75] Thus a bankrupt (because his rights are fixed as of the date of the adjudication) cannot claim a homestead under a statute allowing such exemptions to a "householder having a family," by virtue of a marriage contracted after his adjudication.[76] And a wife cannot have a homestead on the land of her bankrupt husband, as against the trustee, nor against those claiming title thereto under a sale made by the trustee.[77] And in this connection, the question of the status of a divorced person, with reference to the right to claim a homestead, arises not infrequently and will be decided according to the laws and judicial decisions of the state.[78] Again, it is necessary that the debtor should own the property claimed as a homestead, at the time of the adjudication in bankruptcy, and have a present legal right to the occupancy of it.[79] No such claim can be set up in re-

[73] In re Duerson, 13 N. B. R. 183, Fed. Cas. No. 4,117; In re Hatch, 1 Nat. Bankr. News, 293; In re Youngstrom, 153 Fed. 98, 82 C. C. A. 232, 18 Am. Bankr. Rep. 572.

[74] In re Sinnett, 4 Sawy. 250, Fed. Cas. No. 12,907.

[75] See Richardson v. Woodward, 104 Fed. 873, 44 C. C. A. 235, 5 Am. Bankr. Rep. 94; In re Morrison, 110 Fed. 734, 6 Am. Bankr. Rep. 488; In re Mussey, 179 Fed. 1007, 25 Am. Bankr. Rep. 91; In re Eash, 157 Fed. 996, 19 Am. Bankr. Rep. 738.

[76] In re Rainwater, 191 Fed. 738, 25 Am. Bankr. Rep. 419.

[77] Lumpkin v. Eason, 44 Ga. 339, 10 N. B. R. 549.

[78] See In re Le Claire, 124 Fed. 654, 10 Am. Bankr. Rep. 733; In re Pope, 98 Fed. 722, 3 Am. Bankr. Rep. 525; In re Giles, 158 Fed. 596, 85 C. C. A. 418, 19 Am. Bankr. Rep. 306; In re Rhodes, 109 Fed. 117, 6 Am. Bankr. Rep. 173.

[79] In re Sale, 143 Fed. 310, 74 C. C. A. 448, 16 Am. Bankr. Rep. 235. But a homestead interest in lands in Ohio is none the less exempt because it is mortgaged. Marine Nat. Bank v. Swigart (C. C. A.) 262 Fed. 854, 45 Am. Bankr. Rep. 162. Nor (in Georgia) because the property is subject to taxes and to unpaid purchase money, although, after being set aside as a homestead, it is subject to the payment of the purchase money. In re Johnson (D. C.) 247 Fed. 135, 40 Am. Bankr. Rep. 687. In some states, where the bankrupt is the owner of an estate in remainder in farm lands, on which he lives with his family, his

spect to given property where he has divested himself of the title to it, in any way or for any purpose, before the bankruptcy proceedings.[80] But this rule does not apply where the bankrupt has merely contracted to sell the property without parting with the title,[81] or where he has leased the property to a third person, provided that he has not abandoned it as a home, but has always intended to resume his occupancy of it.[82] Again, it is almost always required that the premises claimed as a homestead shall be actually occupied by the debtor and his family as their residence, and this point may be contested in the bankruptcy proceedings and the bankrupt's claim of exemption determined in accordance with its solution.[83] Thus, a bankrupt who resides in a city cannot claim a homestead in a tract of rural land on which he has not actually lived for several years.[84] But a debtor may change his homestead by removing from one residence and taking up another, and may

mother being the tenant for life and a nonresident, he is entitled to the farm as an exemption. Grattan v. Trego, 225 Fed. 705, 140 C. C. A. 579, 34 Am. Bankr. Rep. 889.

[80] Hill v. Oxendine, 79 N. C. 331; In re Everitt, 9 N. B. R. 90, Fed. Cas. No. 4,579. One who, about two months before filing a petition in bankruptcy, divested himself of title to realty, to protect it against the children of his first marriage, in the interest of children of the present marriage, cannot claim the property as his homestead. Kinder v. Trotti, 130 La. 360, 57 South. 1005.

[81] In re Carmichael (D. C.) 108 Fed. 789, 5 Am. Bankr. Rep. 551.

[82] In re Pope (D. C.) 98 Fed. 722, 3 Am. Bankr. Rep. 525. Under the laws of Texas, a bankrupt was allowed to claim as a homestead exemption two separate parcels of land, not contiguous, but not in the aggregate exceeding the number of acres limited for homestead purposes, where she lived on one tract and leased the other on a crop rent arrangement, using her share of the crops for her sustenance. Woodward v. Sanger Bros., 246 Fed. 777, 159 C. C. A. 79, 40 Am. Bankr. Rep. 578. Under the laws of Iowa, a bankrupt was held entitled to exemption as a homestead of an entire building, one room of which was rented for business purposes. In re Coles (D. C.) 224 Fed. 170, 35 Am. Bankr. Rep. 339.

[83] In re Malloy, 188 Fed. 788, 110 C. C. A. 494, 26 Am. Bankr. Rep. 31; Cowan v. Burchfield, 180 Fed. 614, 25 Am. Bankr. Rep. 293; In re Irvin, 120 Fed. 733, 57 C. C. A. 147, 9 Am. Bankr. Rep. 689; In re Dawley, 94 Fed. 795, 2 Am. Bankr. Rep. 496; In re Downing, 148 Fed. 120, 15 Am. Bankr. Rep. 423; Martin v. Lile, 63 Ala. 406; Peyton v. Farmers' Nat. Bank of Hillsboro (C. C. A.) 261 Fed. 326, 44 Am. Bankr. Rep. 295. A bankrupt is entitled to have set off as a homestead property which in area and value is within the limitations of the state law, and which he purchased for a home, though he was unable to occupy it because of an existing lease running for a year. Gregory v. Pritchard, 240 Fed. 414, 153 C. C. A. 340, 39 Am. Bankr. Rep. 415. A bankrupt owning property used for hotel purposes, and in which he and his family reside as their home, is entitled (in Washington) to have $2,000 of the value thereof exempt to him as a homestead. In re Robison (D. C.) 215 Fed. 662, 33 Am. Bankr. Rep. 27. As to allowing a homestead (in Alabama) in a two-story building, part of which is occupied as a residence, and part leased for business purposes, see Burrow, Jones & Dyer Shoe Co. v. Wallace (C. C. A.) 268 Fed. 532, 42 Am. Bankr. Rep. 107.

[84] In re Buelow (D. C.) 98 Fed. 86, 3 Am. Bankr. Rep. 389. See Patten v. Sturgeon, 214 Fed. 65, 130 C. C. A. 505, 32 Am. Bankr. Rep. 250.

claim the new homestead as against his trustee in bankruptcy, even though the change was made just prior to the commencement of the bankruptcy proceedings, provided it is done in good faith and without fraud, and the former homestead is surrendered to the trustee.[85] But if he abandons his homestead, without taking up a new one, his right to claim it as exempt in the bankruptcy proceedings is lost. This is always a question of fact, or a mixed question of fact and intention, and will be determined by the circumstances of the particular case.[86] It is held, however, that a homestead right will be protected for the benefit of the debtor's family, as against his trustee in bankruptcy, if they continue to reside on the premises, notwithstanding that the bankrupt has absconded.[87] As to the circumstances under which the homestead was acquired, it is held that, in the absence of a local rule on the subject, the bankrupt's right to claim a homestead exemption in given property is not defeated by the fact that he moved his family into the premises after he became insolvent and in contemplation of bankruptcy,[88] or even that he bought the property claimed as a homestead with funds or assets which would not be exempt in bankruptcy and when he was insolvent.[89] If the state law prescribes any particular manner of claiming or designating the homestead claimed, it must be at least substantially complied with in the bankruptcy proceedings.[90]

As a rule, the term "homestead" implies an estate in real property occupied as a home. But in some states there exists the singular anomaly known as a "business homestead," and in others a "homestead" may be allowed out of a stock of merchandise.[91] Whatever is thus available

[85] Huenergardt v. J. S. Brittain Dry Goods Co., 116 Fed. 31, 53 C. C. A. 505, 8 Am. Bankr. Rep. 341; In re Carlon, 189 Fed. 815, 27 Am. Bankr. Rep. 18; In re Carmichael, 108 Fed. 789, 5 Am. Bankr. Rep. 551; In re Johnson, 118 Fed. 312, 9 Am. Bankr. Rep. 257.

[86] In re Mayer, 108 Fed. 599, 47 C. C. A. 512, 6 Am. Bankr. Rep. 117; In re Thompson, 140 Fed. 257, 15 Am. Bankr. Rep. 283; In re Harrington, 99 Fed. 390, 3 Am. Bankr. Rep. 639; In re Schulz, 135 Fed. 228, 14 Am. Bankr. Rep. 317; In re O'Brien, 203 Fed. 1012, 30 Am. Bankr. Rep. 151.

[87] In re Pratt, 1 Flip. 353, Fed. Cas. No. 11,370; In re Luby, 155 Fed. 659, 18 Am. Bankr. Rep. 801.

[88] In re Stone, 116 Fed. 35, 8 Am. Bankr. Rep. 416. Where a husband before bankruptcy transferred his homestead interest to his wife, the fact that on bankruptcy proceedings he claimed a homestead exemption does not prevent the wife from asserting her homestead exemption in the same property. Morrow v. Zane, 185 Mo. App. 111, 170 S. W. 918.

[89] In re Letson, 157 Fed. 78, 84 C. C. A. 582, 19 Am. Bankr. Rep. 506; In re Wood, 147 Fed. 877, 17 Am. Bankr. Rep. 93; Rushin v. Gause, 41 Ga. 180. Compare McGahan v. Anderson, 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641.

[90] Edgington v. Taylor, 270 Fed. 48; In re Irving (D. C.) 220 Fed. 969, 34 Am. Bankr. Rep. 399; In re Tobias, 103 Fed. 68, 4 Am. Bankr. Rep. 555.

[91] In re Tobias, 103 Fed. 68, 4 Am. Bankr. Rep. 555. See Laderburg v. Miller, 210 Fed. 614, 127 C. C. A. 250, 31 Am. Bankr. Rep. 335.

under the state law will be available in bankruptcy. Where that law grants a homestead of a certain value, "to be valued at the time it is set apart," improvements or accretions made by the owner after the homestead is set apart become a part of it, and are not subject to the claims of creditors in bankruptcy, although they may so enhance the value of the property as to make it worth much more than it was originally.[92] As to whether unmatured crops growing on the homestead lands constitute a part of it, and so belong to the bankrupt, or are not included in it, and therefore vest in the trustee, the question depends entirely on the terms of the state statute, which will be applied in the bankruptcy proceedings.[93] It should be here added that a court of bankruptcy has no jurisdiction to allot to a bankrupt, domiciled within its district, a homestead in lands situated in another district or state.[94]

If the state law gives a homestead in real property, but not to exceed a certain designated value, and the trustee finds that the property occupied and claimed by the bankrupt as a homestead is worth more in the market than the specified sum, he will not be entitled to take possession of the premises,[95] but he may call upon the bankrupt to pay the excess value of the property over the limit of exemption, and if this is done, the bankrupt may retain the land.[96] But if it is refused, and the property is not susceptible of division for purposes of sale without a loss, the trustee should apply to the court for an order for its sale, the bankrupt being then entitled to receive out of the proceeds a sum equal to the statutory amount of the homestead exemption.[97] Where the state law provides that the homestead shall continue exempt from the payment of any debt, after the death of the owner and during the widowhood of his wife and the majority of any of his children, it is a doubtful question whether or not the reversionary interest or title in

[92] In re Wardlaw, 192 Fed. 449.

[93] In re Sullivan, 148 Fed. 815, 78 C. C. A. 505, 17 Am. Bankr. Rep. 578; s. c., 142 Fed. 620, 16 Am. Bankr. Rep. 87; In re Daubner, 96 Fed. 805, 3 Am. Bankr. Rep. 368; In re Coffman, 93 Fed. 422, 1 Am. Bankr. Rep. 530; In re Hoag, 97 Fed. 543, 3 Am. Bankr. Rep. 290; In re Hussey, 2 Hask. 244, Fed. Cas. No. 6,945; Olmsted-Stevenson Co. v. Miller, 231 Fed. 69, 145 C. C. A. 257, 36 Am. Bankr. Rep. 816; In re Miller (D. C.) 221 Fed. 690, 34 Am. Bankr. Rep. 614. See Stratton v. Ermis (C. C. A.) 268 Fed. 533, 46 Am. Bankr. Rep. 125.

[94] In re Owings, 140 Fed. 739, 15 Am. Bankr. Rep. 472.

[95] In re Nye, 133 Fed. 33, 66 C. C. A. 139, 13 Am. Bankr. Rep. 142. A bankrupt in Ohio is entitled to exemption in lieu of homestead out of personal property, and the fact that he owns a homestead incumbered for more than its value does not bar him. In re Radcliffe (D. C.) 243 Fed. 716, 39 Am. Bankr. Rep. 612.

[96] In re Manning, 123 Fed. 180, 10 Am. Bankr. Rep. 498. See Hatfield v. Cline, 143 Ky. 565, 137 S. W. 212.

[97] In re Nye, 133 Fed. 33, 66 C. C. A. 139, 13 Am. Bankr. Rep. 142; In re Oderkirk, 103 Fed. 779, 4 Am. Bankr. Rep. 617.

land set apart to a bankrupt as his homestead, to accrue upon the termination of the homestead estate, is assets of his estate in bankruptcy vesting in the trustee. This question has been answered in the affirmative,[98] and with about equal authority in the negative.[99]

§ 245. Title to Exempt Property.—Property which the bankrupt is entitled to claim as exempt does not pass to or vest in his trustee; the title thereto remains in the bankrupt. It would not be correct to say that the trustee receives the title and then imparts it to the bankrupt; he merely admeasures and sets apart the property. The title of the bankrupt to such property is not affected by the proceedings.[100] In point of fact, it is expressly provided by the statute that the trustee shall not be invested with title to the exempt property of the bankrupt.[101] It follows from this rule that the bankrupt may bring and maintain suits in respect to such property without regard to the pendency of the bankruptcy proceedings. For example, he may maintain an action of replevin for the recovery of exempt property in specie, or trespass for wrongs done in respect to it, independently of the trustee in bankruptcy.[102] Moreover, the bankrupt may deal with his exempt property as he pleases.[103] He may lawfully mortgage it or convey it away. If he transfers it, or part of it, to one particular creditor, to secure a debt, even though his intention is to give that creditor an advantage

[98] In re Woodard, 95 Fed. 260, 2 Am. Bankr. Rep. 339; Williams v. Scott, 122 N. C. 545, 29 S. E. 877.

[99] In re Wardlaw, 192 Fed. 449; McAllister v. Bodkin, 76 Va. 809.

[100] Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, 10 Am. Bankr. Rep. 107; Ingram v. Wilson, 125 Fed. 913, 60 C. C. A. 618, 11 Am. Bankr. Rep. 192; In re Nye, 133 Fed. 33, 66 C. C. A. 139, 13 Am. Bankr. Rep. 142; Bank of Nez Perce v. Pindel, 193 Fed. 917, 28 Am. Bankr. Rep. 69; In re Cale, 191 Fed. 31, 111 C. C. A. 89, 26 Am. Bankr. Rep. 938; In re Orear, 189 Fed. 888, 111 C. C. A. 150, 26 Am. Bankr. Rep. 521; In re Bass, 3 Woods, 382, 15 N. B. R. 453, Fed. Cas. No. 1,091; In re Hester, 5 N. B. R. 285, Fed. Cas. No. 6,437; In re Griffin, 2 N. B. R. 254, Fed. Cas. No. 5,813; McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433; Bush v. Lester, 55 Ga. 579, 15 N. B. R. 36; Felker v. Crane, 70 Ga. 484; Morgenstein v. Commercial Nat. Bank, 125 Ill. App. 397; Fellows v. Dow, 58 N. H. 21; Pollard v. Noyes, 60 N. H. 184; Finnin v. Malloy, 1 Jones & S. (N. Y.) 382; Wilkinson v. Wait, 44 Vt. 508, 8 Am. Rep. 391; Robinson v. Wilson, 15 Kan. 595, 22 Am. Rep. 272, 14 N. B. R. 565; Walker v. Carroll, 65 Ala. 61; Morris v. Covey (Ark.) 148 S. W. 257; Drees v. Armstrong, 180 Iowa, 29, 161 N. W. 40. Notes taken by a bankrupt after adjudication, for the future rental of land which is exempt, do not constitute assets of his estate in bankruptcy. In re Oleson, 110 Fed. 796, 7 Am. Bankr. Rep. 22.

[101] Bankruptcy Act 1898, § 70a. The authority of a trustee in bankruptcy to recover property conveyed by the bankrupt in fraud of his creditors is limited by the provision that such recovery shall not apply to property which is "exempt from execution and liability for debts by the law of his domicile." Id. § 67e.

[102] Winn v. Morse, 59 N. H. 210; Henly v. Lanier, 75 N. C. 172, 15 N. B. R. 280; Scott v. Wilkie, 65 N. C. 376; Seiling v. Gunderman, 35 Tex. 545.

[103] Hunter v. Forrest, 115 Miss. 7, 75 South. 753.

which the others will not obtain, it is not a "preference" within the meaning of the law nor a fraud upon the statute.[104] The trustee cannot maintain a bill to set aside a prior mortgage on the bankrupt's homestead, otherwise valid, as giving a preference contrary to the act, nor to restrain the foreclosure of such mortgage in the state courts.[105]

But although the trustee is not invested with title to the exempt property, he has, like a sheriff levying execution, the temporary control of it until it can be set apart from the rest.[106] "The title to exempt property does not pass to the trustee; it is vested in the bankrupt. He may sell it or mortgage it. But while this is true, property of the second class cannot be considered exempt property until it is selected and set apart. It must necessarily pass to the trustee, who has temporary dominion over it until the exemptions are made. His title may be termed a defeasible title. When the exemptions are formally set apart by the trustee and affirmed by the court, the title of the bankrupt then becomes superior to that of the trustee and absolute." [107]

§ 246. **Forfeiture of Exemptions.**—In several of the courts of bankruptcy it has been held that a bankrupt cannot claim any exemption in property which, prior to the commencement of the proceedings in bankruptcy, he had conveyed away in fraud of his creditors, or transferred to a particular creditor by way of preference, and which is afterwards recovered for the estate. The sale or conveyance, say these decisions, is good as against the bankrupt, and in attempting to place his property beyond the reach of his creditors, he has placed his exemption beyond his own reach.[108] Notwithstanding the plausibility of this reason-

[104] In re Scott, 6 Sawy. 234, 11 Fed. 133; Schlitz v. Schatz, 2 Biss. 248, Fed. Cas. No. 12,459; Anderson v. Brown, 72 Ga. 713; Jackson v. Jetter (Iowa) 142 N. W. 431. But it is held that, in Pennsylvania, according to the law of that state, a bankrupt's exemption is personal to himself and not assignable, and hence an assignment of his exempt property will operate as an abandonment of his right to it. In re Sloan, 135 Fed. 873, 14 Am. Bankr. Rep. 435.

[105] Rix v. Capitol Bank, 2 Dill. 367, Fed. Cas. No. 11,869.

[106] Sheldon v. Rounds, 40 Mich. 425; In re Vonhee (D. C.) 238 Fed. 422, 38 Am. Bankr. Rep. 799; Brandt v. Mayhew, 218 Fed. 422, 134 C. C. A. 210, 33 Am. Bankr. Rep. 845.

[107] In re Grimes, 95 Fed. 529; In re Seabolt, 113 Fed. 766, 8 Am. Bankr. Rep. 57; Pincus v. S. H. Meinhard & Bro., 139 Ga. 365, 77 S. E. 82.

[108] In re Wishnefsky, 181 Fed. 896, 24 Am. Bankr. Rep. 798; In re Yost, 117 Fed. 792, 9 Am. Bankr. Rep. 153; In re Coddington, 126 Fed. 891, 11 Am. Bankr. Rep. 122; In re Long, 116 Fed. 113, 8 Am. Bankr. Rep. 591; In re Evans, 116 Fed. 909, 8 Am. Bankr. Rep. 730; In re White, 109 Fed. 635, 6 Am. Bankr. Rep. 451; In re Tollett, 105 Fed. 425, 5 Am. Bankr. Rep. 305; In re Graham, 2 Biss. 449, Fed. Cas. No. 5,660; Gibbs v. Logan, 22 W. Va. 208. And see In re Denson, 195 Fed. 857, 28 Am. Bankr. Rep. 162; Kinder v. Trottl, 130 La. 360, 57 South. 1005; In re Libby (D. C.) 253 Fed. 278; In re Hardy (D. C.) 229 Fed. 825, 36 Am. Bankr. Rep. 358.

ing, the rule has been felt to be a harsh one, and the apparent tendency is not to extend but to restrict it. Thus, it is held that the allegation of facts relied on to defeat the bankrupt's claim to exemptions must be specific and the evidence complete and convincing;[109] that a bankrupt cannot be charged with a fraudulent disposition of his property, where he has sold it for a fair consideration and with an honest motive, though it has the effect of leaving nothing for creditors,[110] or merely because he has sold goods from his stock without keeping track of all such sales and the proceeds thereof;[111] that there is no actual fraud in a general assignment for the benefit of creditors, and the bankrupt may claim his exemptions out of property so assigned after it has been voluntarily surrendered to the trustee or recovered by him.[112] So, where the local law expressly forbids the claim of a homestead exemption in any property the conveyance of which by the claimant has been set aside on the ground of fraud or want of consideration, it is held that where there has been a conveyance by the head of a family, a reconveyance and claim of homestead in the property, before the rendition of any decree setting aside the conveyance as fraudulent, makes the claim a valid one, although a creditor's suit to set aside the conveyance for fraud was instituted before the reconveyance and was then pending.[113]

Nor does the general rule above stated pass unchallenged. On the contrary, there is a formidable body of authority to the effect that, although the bankrupt has made a fraudulent or preferential conveyance of his property, and the same is set aside at the instance of his trustee, the bankrupt, if otherwise entitled, is not estopped to claim an exemption in the property so recovered by the trustee.[114] The theory, as

[109] In re Tobias, 103 Fed. 68, 4 Am. Bankr. Rep. 555.

[110] In re Duffy, 118 Fed. 926, 9 Am. Bankr. Rep. 358.

[111] In re McUlta, 189 Fed. 250, 26 Am. Bankr. Rep. 480.

[112] Bashinski v. Talbott, 119 Fed. 337, 56 C. C. A. 241, 9 Am. Bankr. Rep. 513; In re Talbott, 116 Fed. 417, 8 Am. Bankr. Rep. 427.

[113] In re W. C. Allen & Co., 134 Fed. 620, 13 Am. Bankr. Rep. 518; In re Tollett, 106 Fed. 866, 46 C. C. A. 11, 54 L. R. A. 222, 5 Am. Bankr. Rep. 404; In re Najour (D. C.) 246 Fed. 167.

[114] In re Cotton & Preston, 183 Fed. 190, 25 Am. Bankr. Rep. 532; In re Soper, 173 Fed. 116, 22 Am. Bankr. Rep. 868; In re Thompson, 140 Fed. 257, 15 Am. Bankr. Rep. 283; In re Falconer, 110 Fed. 111, 49 C. C. A. 50, 6 Am. Bankr. Rep. 557; In re Park, 102 Fed. 602, 4 Am. Bankr. Rep. 432; Feilbach Co. v. Russell, 233 Fed. 412, 147 C. C. A. 348, 37 Am. Bankr. Rep. 285; In re French (D. C.) 231 Fed. 255, 37 Am. Bankr. Rep. 289; In re Elkin (D. C.) 218 Fed. 971, 34 Am. Bankr. Rep. 134; In re Harrell (D. C.) 222 Fed. 160, 34 Am. Bankr. Rep. 809. In re Noee, 2 Nat. Bankr. News, 789; Bartholomew v. West, 2 Dill. 290, 8 N. B. R. 12, Fed. Cas. No. 1,071; McFarland v. Goodman, 6 Biss. 111, 11 N. B. R. 134, Fed. Cas. No. 8,789; In re Detert, 11 N. B. R. 293, Fed. Cas. No. 3,829; Smith v. Kehr, 2 Dill. 50, 7 N. B.

stated in one of the cases, is that a bankrupt cannot be denied his exemptions as a punishment for fraudulent conduct on his part, however reprehensible it may be.[115] But where a debtor who is insolvent and contemplates bankruptcy makes an exchange of property, giving articles which would not be exempt for specific property which is exempt under the laws of the state, the transaction will be held void, and the trustee will take title to the property so attempted to be alienated.[116] and so also where the debtor, under similar conditions as to insolvency and approaching bankruptcy, converts property into cash and invests it in a homestead.[117] So where a partner takes notes belonging to the firm, and with these purchases a homestead, immediately before the bankruptcy of the firm and with knowledge of its insolvent condition, he will not be entitled to retain the homestead as exempt.[118] Moreover, in several of the states (as, Georgia, Pennsylvania, and Indiana) the exemption law provides that a debtor shall forfeit his right to the exemption ordinarily allowed, if he is guilty of willful fraud in concealing from his creditors any part of the property of which he is possessed at the time he seeks the benefit of the exemption. Since the bankruptcy law gives to a bankrupt exactly what is exempted by the law of the state of his domicile, no more and no less, it follows that, in states where this rule prevails, a bankrupt who does not make a full and fair disclosure of all the property owned by him at the time of filing his petition in bankruptcy is not entitled to have any exemption set apart to him by his trustee in bankruptcy.[119] And where the amount

R. 97, Fed. Cas. No. 13,071; Fisher v. Henderson, 8 N. B. R. 175, Fed. Cas. No. 4,820; Penny v. Taylor, 10 N. B. R. 200, Fed. Cas. No. 10,957; In re Peterson, 1 Nat. Bankr. News, 215; Hatcher v. Crew, 83 Va. 371, 5 S. E. 221; Vogler v. Montgomery, 54 Mo. 577. And see In re Denson, 195 Fed. 857, 28 Am. Bankr. Rep. 162.

115 In re Denson, 195 Fed. 857, 28 Am. Bankr. Rep. 162.

116 In re Parker, 5 Sawy. 58, 18 N. B. R. 43, Fed. Cas. No. 10,724; Pratt v. Burr, 5 Biss. 36, Fed Cas. No. 11,372.

117 In re Gerber, 186 Fed. 693, 108 C. C. A. 511, 26 Am. Bankr. Rep. 608; In re Majors (D. C.) 241 Fed. 538, 39 Am. Bankr. Rep. 642; Kangas v. Robie (C. C. A.) 264 Fed. 92, 45 Am. Bankr. Rep. 209.

118 In re Boothroyd, 14 N. B. R. 223, Fed. Cas. No. 1,652.

119 In re Rice, 164 Fed. 589, 21 Am. Bankr. Rep. 202; In re Dobbs, 172 Fed. 682, 22 Am. Bankr. Rep. 801; In re Schafer, 151 Fed. 505, 18 Am. Bankr. Rep. 361; In re Alex, 141 Fed. 483, 15 Am. Bankr. Rep. 450; In re Cochran, 185 Fed. 913, 26 Am. Bankr. Rep. 459; In re Leverton, 155 Fed. 925, 19 Am. Bankr. Rep. 426; In re Sussman, 183 Fed. 331, 24 Am. Bankr. Rep. 909; In re Boorstin, 114 Fed. 696, 8 Am. Bankr. Rep. 89; In re Stephens, 114 Fed. 192, 8 Am. Bankr. Rep. 53; In re Williamson, 114 Fed. 190, 8 Am. Bankr. Rep. 42; In re West, 116 Fed. 767, 8 Am. Bankr. Rep. 564; In re Waxelbaum, 101 Fed. 228, 4 Am. Bankr. Rep. 120; In re Woollcott, 140 Fed. 460, 15 Am. Bankr. Rep. 386; In re Simon & Sternberg, 151 Fed. 507, 18 Am. Bankr. Rep. 204; In re Hadden (D. C.) 242 Fed. 284, 40 Am. Bankr. Rep. 24; In re Powell (D. C.) 230 Fed. 316, 36 Am. Bankr. Rep. 367; In re Collins (D. C.) 213 Fed. 543; In re Anderson (D. C.) 224 Fed. 790, 35 Am.

of assets which he has concealed cannot be ascertained, the trustee should not allow his personal property exemption until all of the personal property has been accounted for.[120] But while courts of bankruptcy proceed on equitable principles, and will not sustain a positive fraud committed by the bankrupt in an endeavor to extend his exemptions, any more than it would be sustained by a court of equity,[121] yet it is only for gross fault on the part of the bankrupt that a claim for exemptions should be denied.[122] Further, it is felt that such statutes as those just mentioned are penal in their character and ought not to be extended by a loose construction or by mere analogy.[123] Under the law in Georgia, for example, the courts restrict the forfeiture clause of the statute to the claim for a homestead exemption, and will not extend it to the three hundred dollar exemption.[124] So, the good faith of a debtor required by this statute consists in making a full and fair disclosure of his property, and a court of bankruptcy would not be justified in denying his exemption because of his fraud in other respects.[125] For instance, the fact that he squandered money in gambling and other wasteful practices does not establish such fraud as will deprive him of his exemptions.[126] Nor can he be denied the right to his homestead exemption because he once conveyed the land claimed to his wife in a vain attempt to evade a debt, where it was reconveyed prior to the bankruptcy proceedings and was scheduled by him as his property.[127]

It has also been held that a bankrupt who is a fugitive from justice, and who has failed to account to his trustee for a large amount of property in his hands, has no right, after years of acquiescence, to claim an exemption out of cash in the hands of the trustee, the proceeds of property sold by him.[128] And a bankrupt who has made way with the

Bankr. Rep. 487; In re Liby (D. C.) 218 Fed. 90, 33 Am. Bankr. Rep. 312. If the law of the state contains no such provision as the one under consideration, the trustee in bankruptcy has no authority to make deductions from the exemptions of the bankrupt on the ground that he has concealed or has not surrendered part of his assets. In re Humphreays (D. C.) 221 Fed. 997, 34 Am. Bankr. Rep. 655.

120 In re Ansley Bros. (D. C.) 153 Fed. 983, 18 Am. Bankr. Rep. 457; In re Aronson (D. C.) 233 Fed. 1022.

121 In re Gerber, 186 Fed. 693, 108 C. C. A. 511, 26 Am. Bankr. Rep. 608.

122 In re Irwin (D. C.) 177 Fed. 284, 22 Am. Bankr. Rep. 165; In re Ziff (D. C.) 225 Fed. 323, 35 Am. Bankr. Rep. 83.

123 Under the Florida law, a preferential payment by a bankrupt of a debt due to his wife will not justify a charge of an equal amount against the bankrupt's exemptions, unless he also conceals such payment. Libby v. Beverly (C. C. A.) 263 Fed. 63, 44 Am. Bankr. Rep. 605.

124 In re West, 116 Fed. 767, 8 Am. Bankr. Rep. 564.

125 In re Castleberry, 143 Fed. 1018, 16 Am. Bankr. Rep. 159.

126 In re Berman, 165 Fed. 383, 21 Am. Bankr. Rep. 139.

127 In re Thompson, 115 Fed. 924, 8 Am. Bankr. Rep. 283.

128 In re Moyer, 15 Fed. 598.

greater part of his assets and gotten them out of the jurisdiction, cannot ask to have an exemption set apart to him out of such property as is in the court's possession.[129] It should also be noted that a bankrupt may lose his exemptions by abandoning his claim thereto or abandoning the premises occupied as a homestead.[130] And without denying the claim of exemptions in toto, it is proper to deduct from the sum allowed by the state law any cash which the bankrupt has converted to his own use after the filing of the petition and before the property is taken into the custody of the court.[131]

§ 247. **Abandonment and Waiver of Exemptions.**—A bankrupt may ordinarily abandon or waive his right to exemptions. Thus, where an owner of a business homestead assigned it for the benefit of creditors, and the assignee conducted the business, and the owner, for nearly two years and until adjudged a bankrupt, did not engage in any business in which the premises would have been useful to him, it was held that he could not then claim the property as a business homestead.[132] So, where a debtor's stock in trade was destroyed by fire shortly before his bankruptcy, and he wrote to his creditors promising to apply the insurance money on their claims as far as it would go, as soon as he collected it, but instead of so doing he invested the money in a piece of property, it was held that he had created an equitable lien on the fund, and that he could not, in his bankruptcy proceedings, claim the property as a homestead.[133] But merely because a bankrupt lists in his schedule of assets a particular item of property which is exempt, such as an insurance policy, he does not thereby waive the exemption.[134] But he will be deemed to have abandoned or waived his right to exemptions when he fails to assert it and make claim for what the state law allows him in due and proper time, unless it appears that the omission resulted from mere oversight, misunderstanding, or inattention, or in consequence of the trustee's unjustifiable demand for a bond of indemnity.[135] This, however, relates to claiming the exemption in the bank-

[129] In re Taylor, 114 Fed. 607, 7 Am. Bankr. Rep. 410.

[130] In re Mayer, 108 Fed. 599, 47 C. C. A. 512, 6 Am. Bankr. Rep. 117; In re Baughman, 183 Fed. 668, 25 Am. Bankr. Rep. 167. See In re Crocker (D. C.) 217 Fed. 167, 33 Am. Bankr. Rep. 293.

[131] In re Ansley Bros., 153 Fed. 983, 18 Am. Bankr. Rep. 457.

[132] In re Martin (D. C.) 214 Fed. 1012.

[133] Parlin & Orendorff Implement Co. v. Moulden, 228 Fed. 111, 142 C. C. A. 517, L. R. A. 1917B, 130, 35 Am. Bankr. Rep. 782.

[134] King v. Miles, 108 Miss. 732, 67 South. 182.

[135] In re Webb (D. C.) 219 Fed. 349, 34 Am. Bankr. Rep. 204; In re Stern (D. C.) 208 Fed. 488, 30 Am. Bankr. Rep. 694; In re Strauch (D. C.) 208 Fed. 842, 31 Am. Bankr. Rep. 36; In re Exum (D. C.) 209 Fed. 716, 31 Am. Bankr. Rep. 691; Sutman v. Hogsett, 70 Pa. Super. Ct. 180; In re Brown, 100 Fed. 441, 4

ruptcy proceedings. A waiver or abandonment of it may also result from failure to comply with what the state law prescribes as necessary. But a bankrupt is not precluded from claiming a homestead as exempt because prior to the adjudication he had failed to designate the same under the state laws, if he perfects his claim thereunder within a reasonable time after claiming the homestead.[136] And where the law of the state provides that a debtor who makes a deed of trust in the nature of an assignment for the benefit of his creditors, and omits to claim in the deed the exemption to which he is entitled under the state law, loses his right to such exemption, a debtor who has taken such action and is afterwards adjudged a bankrupt is nevertheless entitled to claim his exemptions, because the bankruptcy proceeding strikes down the deed of trust, and the court of bankruptcy deals with the estate as though no such deed had been made.[137]

Moreover, by the laws in force in many of the states, it is the privilege of a debtor to waive the benefit of the exemption law with respect to any particular debt, and usually by a written agreement to that effect. Such a waiver constitutes a contract, and when once given is irrevocable. It will be recognized in the bankruptcy proceedings, and will affect particular property in the hands of the trustee before setting it apart to the bankrupt, or in the hands of the latter after allotment.[138] But it is said that the court of bankruptcy should not uphold a bankrupt's claim of homestead exemption, where that would merely enable him to prefer one of several creditors for whose benefit he had waived the exemption.[139] And although it is the right of the bankrupt to surrender or waive the right of exemption in favor of general creditors or execution creditors, or in favor of the trustee in bankruptcy as the rep-

Am. Bankr. Rep. 46; In re Osborn, 104 Fed. 780, 5 Am. Bankr. Rep. 111; Harrelson v. Webb, 124 La. 1007, 50 South. 833, 134 Am. St. Rep. 529; In re Eash, 157 Fed. 996, 19 Am. Bankr. Rep. 738; In re Maxson, 170 Fed. 356, 22 Am. Bankr. Rep. 424. And see Meyer v. Perkins (Cal. App.) 130 Pac. 206.

136 Brandt v. Mayhew, 218 Fed. 422, 134 C. C. A. 210, 33 Am. Bankr. Rep. 845.

137 In re Gorman (D. C.) 226 Fed. 361, 35 Am. Bankr. Rep. 638; In re Dautz (D. C.) 272 Fed. 348.

138 In re Hoover, 113 Fed. 136, 7 Am. Bankr. Rep. 330; Sharp v. Woolsware, 25 Pa. Super. Ct. 251; First Nat. Bank v. Bartlett, 35 Pa. Super. Ct. 593; In re Pfeiffer, 155 Fed. 892, 19 Am. Bankr. Rep. 230; Citizens' Bank v. Hargraves, 164 Fed. 613, 21 Am. Bankr. Rep. 323; Jackson v. Edwards, 136 Ga. 888, 72 S. E. 341; In re Harber, 2 Nat. Bankr. News, 449. But see In re Garner, 115 Fed. 200, 8 Am. Bankr. Rep. 263. Under a statute which, in case of a sale in bulk of a stock of merchandise, makes the purchaser responsible for the application of the purchase price on the seller's debts, the seller by making such sale must be deemed to have assented to such application, and on his adjudication as a bankrupt he cannot claim his statutory exemptions out of the money due from the purchaser. In re Connor, 146 Fed. 998, 16 Am. Bankr. Rep. 784.

139 In re Anderson (D. C.) 224 Fed. 790, 35 Am. Bankr. Rep. 487.

resentative of all creditors, he should not be permitted to do so as against a mortgagee in good faith and for value who, under his mortgage, has succeeded to the bankrupt's title and interest.[140]

In regard to landed property which constitutes the debtor's homestead, the waiver may be made in the form of a mortgage upon it. This will of course give a specific lien on the property, which must be respected and enforced in the subsequent bankruptcy of the mortgagor, provided it is otherwise valid; and a creditor so situated will be required to exhaust the mortgage security before coming upon the general estate of the bankrupt.[141] So also, a discharge in bankruptcy does not release the lien of a judgment obtained within four months prior to the adjudication on a note waiving the homestead exemption allowed by the state laws.[142] But where a creditor's attempt to collect a note containing a waiver of exemptions results in giving him an unlawful preference, which is frustrated by the proceedings in bankruptcy, the waiver will fall with the preference.[143] And a creditor holding a judgment-note against the bankrupt, but who has not reduced his note to judgment, is not entitled to take advantage of a waiver of exemptions provided in such note.[144] It should also be observed that a waiver of the debtor's statutory exemption in favor of a particular creditor does not inure to the benefit of the trustee in bankruptcy, nor confer any special rights upon the other creditors, nor operate in their favor so as to throw the whole property, exempt and unexempt, open to the satisfaction of their claims, nor will it prevent the bankrupt from claiming any balance of the exemption which may remain after the discharge of the particular debt as to which the waiver of exemption was made.[145]

§ 248. Same; Rights and Remedies of Creditors Holding Waivers. —The fact that the obligation evidencing the debt due to a particular creditor contains a waiver of the benefit of the exemption laws does not create any such lien on specific property as will be preserved by the bankruptcy act,[146] nor does it make that creditor a "secured" creditor, within the meaning of the law.[147] It merely gives him an individual

[140] In re French (D. C.) 231 Fed. 255, 37 Am. Bankr. Rep. 289.

[141] In re Sauthoff, 7 Biss. 167, 14 N. B. R. 364, Fed. Cas. No. 12,379.

[142] McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433; Smith v. Zachry, 121 Ga. 467, 49 S. E. 286.

[143] In re Bolinger, 108 Fed. 374, 6 Am. Bankr. Rep. 171.

[144] In re Brown, 1 Nat. Bankr. News, 230.

[145] In re Nye, 133 Fed. 33, 66 C. C. A. 139, 13 Am. Bankr. Rep. 142; Hallman v. Hallman, 124 Pa. St. 347, 16 Atl. 871; Hall v. Fulgham, 86 Tenn. 451, 7 S. W. 121; In re Poleman, 5 Biss. 526, 9 N. B. R. 376, Fed. Cas. No. 11,247; In re Becker, 2 Nat. Bankr. News, 202.

[146] In re Moran, 105 Fed. 901, 5 Am. Bankr. Rep. 472; In re Hopkins, 1 Nat. Bankr. News, 71; Coffey v. Mitchell, 139 Ga. 430, 77 S. E. 561.

[147] First Nat. Bank v. Hollinsworth, 78 Iowa, 575, 43 N. W. 536, 6 L. R. A. 92.

right of recourse against the property which is or will be set apart to the bankrupt as his exemption.[148] And even this right must be worked out independently of the proceedings in bankruptcy. Since the debtor's exempt property does not vest in the trustee, the court of bankruptcy has nothing to do with it except to allot and set it apart to the bankrupt. Before it is so ascertained and set apart, it is in the temporary possession and control of the trustee and therefore in the custody of the law, and a creditor having recourse against it by virtue of a waiver will not be allowed to attach it or levy an execution on i,,[149] alhough, where he holds a mortgage waiving exemptions and coupled with a delegation of authority to him to select the exempt property, which is permitted under the law of the particular state, the mortgagee will be entitled to select and hold the property which the bankrupt might otherwise have chosen as his exemption.[150] Also it is held that where the bankrupt's exemption is to be set apart to him, not in the form of specific articles of property, but as so much out of a fund in court realized from the sale of his assets, the court of bankruptcy has jurisdiction to determine the claims of creditors holding waivers and to order their payment out of the sum which otherwise would have been turned over to the bankrupt.[151] But this is nearly as far as its authority can be made to extend. When the bankrupt has no other property except such as is exempt under the state law, or when the property which he is entitled to hold as exempt has been set apart to him, or is definitely ascertained and ready for relinquishment to him, then the court of bankruptcy has no jurisdiction or authority to retain the possession or control of such property for the purpose of administering it for the benefit of creditors holding waivers, or of adjudicating and enforcing their claims against it.[152] Such creditors must therefore obtain their redress in the state

148 Scott v. Cheatham, 78 Va. 82.

149 Byrd v. Harrold, 18 N. B. R. 433, Fed. Cas. No. 2,269; In re Sorg, 155 Fed. 550. See In re MacKissic, 171 Fed. 259, 22 Am. Bankr. Rep. 817.

150 In re National Grocer Co. (C. C. A.) 181 Fed. 33, 24 Am. Bankr. Rep. 360.

151 In re MacKissic, 171 Fed. 259, 22 Am. Bankr. Rep. 817; In re Highfield, 163 Fed. 924, 21 Am. Bankr. Rep. 92; In re Renda, 149 Fed. 614, 17 Am. Bankr. Rep. 521; In re Sloan, 135 Fed. 873, 14 Am. Bankr. Rep. 435. Compare In re Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730; In re Goldberg (D. C.) 254 Fed. 440, 42 Am. Bankr. Rep. 299.

152 Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, 10 Am. Bankr. Rep. 107; In re Remmerde, 206 Fed. 822, 30 Am. Bankr. Rep. 701; In re Batten, 170 Fed. 688; Bell v. Dawson Grocery Co., 120 Ga. 628, 48 S. E. 150; In re Black, 104 Fed. 289, 4 Am. Bankr. Rep. 776; Woodruff v. Cheeves, 105 Fed. 601, 44 C. C. A. 631, 5 Am. Bankr. Rep. 296; In re Moore, 112 Fed. 289, 7 Am. Bankr. Rep. 285; In re Swords, 112 Fed. 661, 7 Am. Bankr. Rep. 436; In re Hill, 96 Fed. 185, 2 Am. Bankr. Rep. 798; In re Camp, 91 Fed. 745, 1 Am. Bankr. Rep. 165; In re Bass, 3 Woods, 382, 15 N. B. R. 453, Fed. Cas. No. 1,091; In re Haas (D. C.) 213 Fed. 694, 32 Am. Bankr. Rep. 284; In re Cheatham (D. C.) 210 Fed. 370, 31 Am. Bankr. Rep. 520; In re Anderson (D. C.)

courts. To enable them to do this, the court of bankruptcy may stay the proceedings in bankruptcy until the rights of such creditors shall have been determined in the proper forum,[153] or withhold the bankrupt's discharge (the granting of which would extinguish the debt) until the waiver creditors have opportunity to resort to such remedies as may be granted by the state courts,[154] and the bankruptcy court will not enjoin such a creditor from prosecuting an attachment suit in a state court against property claimed by the bankrupt as exempt, or at any rate, not longer than until the property shall have been set apart as exempt by the trustee.[155]

As to the nature of the creditor's remedy in the state courts there has been some difference of opinion, diverse rules being established in the two states where these questions seem chiefly to have arisen, viz., Georgia and Pennsylvania. In the former state, the Supreme Court has reached the conclusion that the creditor holding a waiver has no remedy at law, not being allowed to sue the debtor while the proceedings in bankruptcy are pending. But he has a remedy in equity, by means of a bill praying a special decree (in the nature of a judgment in rem) against the exempt property, together with the appointment of a receiver to take charge of the property if it is perishable or in danger of being wasted, and also an injunction to forbid the debtor from demanding and receiving it from the hands of his trustee in bankruptcy.[156] And the creditor is not precluded from taking this course by the fact

224 Fed. 790, 35 Am. Bankr. Rep. 487; Schexnailder v. Fontenot, 147 La. 467, 85 South. 207. There have been a number of decisions of the federal courts contrary to the rule stated in the text, but they are inconsistent with the decision in Lockwood v. Exchange Bank, supra. See In re Sisler, 96 Fed. 402, 2 Am. Bankr. Rep. 760; In re Poleman, 5 Biss. 526, 9 N. B. R. 376, Fed. Cas. No. 11,247; In re Garden, 93 Fed. 423, 1 Am. Bankr. Rep. 582; In re Graves, 2 Nat. Bankr. News, 469; In re Bragg, 2 Nat. Bankr. News, 82; In re Solomon, 2 Hughes, 164, 10 N. B. R. 9, Fed. Cas. No. 13,166; In re Judkins, 2 Hughes, 401, Fed. Cas. No. 7,560.

[153] In re W. C. Allen & Co., 154 Fed. 620, 13 Am. Bankr. Rep. 518.

[154] Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, 10 Am. Bankr. Rep. 107; Bell v. Dawson Grocery Co., 120 Ga. 628, 48 S. E. 150; H. S. Meinhard & Bro. v. Pincus (C. C. A.) 200 Fed. 736, 29 Am. Bankr. Rep. 619.

[155] B. F. Roden Grocery Co. v. Bacon, 133 Fed. 515, 66 C. C. A. 497, 13 Am. Bankr. Rep. 251.

[156] Fidelity Produce Co. v. Perdue, 134 Ga. 778, 68 S. E. 503; Arnwine v. Beaver, 134 Ga. 377, 67 S. E. 937; Perry v. Britt-Carson Shoe Co., 129 Ga. 560, 59 S. E. 216, 121 Am. St. Rep. 232; Bell v. Dawson Grocery Co., 120 Ga. 628, 48 S. E. 150; Hudson v. Lamar, Taylor & Riley Drug Co., 121 Ga. 835, 49 S. E. 735; Wright v. Horne, 123 Ga. 86, 51 S. E. 30; Brandt v. Hofmayer Dry Goods Co., 146 Ga. 649, 92 S. E. 53. A judgment on three notes, one of which was usurious, and all of which waived homestead exemption, was held enforceable against property set apart as exempt in bankruptcy for the amount of the two notes not affected by usury, the waiver in the usurious note being invalid. Floyd v. Johnson, 142 Ga. 833, 83 S. E. 943.

that he filed his claim in the court of bankruptcy and had notice of the setting apart of the exemption and did not object thereto.[157] In Pennsylvania, on the strength of the doctrine that the title to exempt property never vests in the trustee in bankruptcy, it is held that a judgment creditor holding a waiver may have the sheriff levy upon and sell the exempt property at any time before the final discharge of the bankrupt,[158] but he must first file his claim in the bankruptcy proceedings.[159]

Where a debtor has waived his right of exemption as to one of his creditors, but not as to others, the equitable principle of marshalling assets will require the creditor having a right to resort to the exempt property to exhaust his remedies against that fund before coming upon the general estate of the debtor in competition with the creditors who have no such rights against the exempt estate.[160] Where a bankrupt assigns a fund in the hands of his trustee in bankruptcy which has been set apart to him under his exemption claim, and notice of such assignment is given to the trustee and also to the attorney of a creditor of the bankrupt who subsequently issued an attachment against the fund under a judgment waiving exemption, the assignee has priority in the distribution of the fund over the attaching creditor, and the attachment will be dissolved.[161]

§ 249. **Liens on and Claims Against Exempt Property.**—Proceedings in bankruptcy do not destroy existing liens on the bankrupt's exempt property. On the contrary, such liens, attaching before the commencement of the proceedings, and whether created by legal proceedings or by the act of the debtor, follow the property into the bankruptcy and are not obliterated or extinguished by the setting apart to him of such property as exempt,[162] nor by his discharge in bankrupt-

[157] Jackson v. Edwards, 136 Ga. 888, 72 S. E. 341.

[158] First Nat. Bank of Sayre v. Bartlett, 35 Pa. Super. Ct. 593; Greenfield v. Golder, 42 Pa. Super. Ct. 462. But see In re Gunzberger (D. C.) 268 Fed. 673, 45 Am. Bankr. Rep. 690, holding that a creditor in whose favor the debtor had before bankruptcy waived exemption, and who had secured an execution lien upon the property within four months before bankruptcy, cannot claim under his lien on the exempt property, which alone was unaffected by the bankruptcy proceedings, the difference in money between the value of the exempt property claimed by the bankrupt and the $300 allowed by the state law, since he cannot follow the proceeds of exempt property, any more than the bankrupt himself could.

[159] Claster v. Soble, 22 Pa. Super. Ct. 631.

[160] Hallman v. Hallman, 124 Pa. 347, 16 Atl. 871; Shelley's Appeal, 36 Pa. 373; In re Sauthoff, 7 Biss. 167, Fed. Cas. No. 12,379.

[161] La Barre v. Doney, 53 Pa. Super. Ct. 435.

[162] Kener v. La Grange Mills, 231 U. S. 215, 34 Sup. Ct. 83, 58 L. Ed. 189; In re Lightstone (D. C.) 253 Fed. 456, 41 Am. Bankr. Rep. 619; In re J. E. Maynard & Co., 183 Fed. 823, 25 Am. Bankr. Rep. 732; Northern Shoe Co. v. Cecka, 22 N. D. 631, 135 N. W. 177; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770; Dozier v.

cy.[163] This, of course, is on the assumption that the lien would have been valid if attaching to other property. For a lien by attachment, garnishment, etc., which is avoided by the adjudication of the debtor as a bankrupt within four months after its creation, is none the less avoided because it concerns or attaches to exempt property.[164] Granting this premise, the mortgaging of exempt property to a creditor is not against public policy, and a mortgage of such property, good against the debtor under the law of the state, will be good as against his trustee in bankruptcy.[165] And it is no defense to an action to foreclose a mortgage that the mortgaged premises were allotted to the mortgagor as a homestead by proceedings in the court of bankruptcy.[166] But if a mortgage covers an aggregate of property, only a part of which is exempt from execution, and its lien is avoided by the subsequent institution of proceedings in bankruptcy, and the bankrupt waives his right of exemption, the lien is divested as to all the property, for the mortgagee cannot claim for the debtor a benefit which he waives for himself.[167] And one taking a mortgage on a parcel of land claimed as a homestead, after a decree declaring that it is not exempt as such, may be summarily ordered to release his security, and without the formality of a plenary proceeding at law or in equity.[168]

The extent of the jurisdiction of the court of bankruptcy over exempt property on which creditors claim liens has been involved in some confusion and uncertainty. But it may be said, in the first place, that the mere fact that homestead or other exempt property has been mortgaged to certain creditors does not make it assets to be administered

McWhorter, 113 Ga. 584, 39 S. E. 106; Currier v. King, 81 Vt. 285, 69 Atl. 873; Gregory Co. v. Cale, 115 Minn. 508, 133 N. W. 75, 37 L. R. A. (N. S.) 156; Newberry Shoe Co. v. Collier, 111 Va. 288, 68 S. E. 974; Thole v. Watson, 6 Mo. App. 592; Dixon v. Lawson, 65 Ga. 661; Hiley v. Bridges, 60 Ga. 375; Bush v. Lester, 55 Ga. 579, 15 N. B. R. 36; Robinson v. Wilson, 15 Kan. 595, 22 Am. Rep. 272, 14 N. B. R. 565. In granting an exemption to a bankrupt, the court will order that it shall not affect or prejudice the wife's rights to alimony chargeable upon real estate claimed as a homestead. In re Garrett, 2 Hughes, 235, 11 N. B. R. 493, Fed. Cas. No. 5,252.

[163] Long v. Bullard, 117 U. S. 617, 6 Sup. Ct. 917, 29 L. Ed. 1004; In re Weaver (D. C.) 144 Fed. 229, 16 Am. Bankr. Rep. 265; Fowler v. Wood, 26 S. C. 169, 1 S. E. 597; Watters v. Hedgpeth, 172 N. C. 310, 90 S. E. 314; F. Mayer Boot & Shoe Co. v. Ferguson, 19 N. D. 496, 126 N. W. 110. Compare Groves v. Osburn, 46 Or. 173, 79 Pac. 500.

[164] Chicago, B. & Q. R. Co. v. Hall, 229 U. S. 511, 33 Sup. Ct. 885, 57 L. Ed. 1306, 30 Am. Bankr. Rep. 619; Southern Pacific Co. v. I. X. L. Furniture & Carpet Installment House, 44 Utah, 472, 140 Pac. 665. Compare Bank of Mendon v. Mell, 185 Mo. App. 510, 172 S. W. 484.

[165] In re National Grocer Co. (C. C. A.) 181 Fed. 33, 24 Am. Bankr. Rep. 360; In re Bitner, 255 Fed. 48, 166 C. C. A. 376, 42 Am. Bankr. Rep. 175.

[166] Brady v. Brady, 71 Ga. 71; Brown v. Hoover, 77 N. C. 40.

[167] In re Schuller, 108 Fed. 591, 6 Am. Bankr. Rep. 278. And see In re Tune, 115 Fed. 906, 8 Am. Bankr. Rep. 285.

[168] In re Boothroyd, 15 N. B. R. 368, Fed. Cas. No. 1,653.

in bankruptcy.[169] And a court of bankruptcy has no authority to allot the bankrupt's exemption in specie, or order the payment of the amount of his exemption in money, to a mortgagee or to any one but the bankrupt himself.[170] Yet as the court has jurisdiction to "determine the claims of bankrupts to their exemptions," it has power to decide questions incidental thereto and hence may, in a proper case, adjudicate the question whether or not a legal or equitable lien claimed by a creditor upon exempt property is valid.[171] And, to do justice to all concerned, where it is necessary to send the creditor to the state court for relief, the court of bankruptcy may so far aid him as to withhold the granting of a discharge to the bankrupt until the creditor shall have been afforded a reasonable opportunity to test his rights,[172] or direct the trustee in bankruptcy to hold the fund out of which the exemption is claimed until proceedings to determine the right thereto can be instituted in a court of competent jurisdiction.[173] But the court has no authority to hold in custody the exempt property of a bankrupt to await the determination of an action in tort against him in a state court, since his discharge would not be a bar to a recovery therein.[174] Neither will it entertain the bankrupt's petition for an injunction to restrain a creditor from selling the exempt property on an execution issued before the bankruptcy, the remedy, if any, being in the state court.[175] Where a homestead exemption is claimed out of property of larger value than the limit of the exemption as fixed by the state law, or where the lien of a creditor covers both exempt and non-exempt property, the circumstances of the case may make it proper for the bankruptcy court to partition the property, incidentally adjudging the creditor's lien to attach to the specific parcel set apart as exempt, or to order its sale as a whole and satisfy the lien-creditor out of the proceeds.[176] Or, if the homestead has been sold under foreclosure of a mortgage upon it, and it is thought that the property is more valuable than the amount

169 In re Bailey, 176 Fed. 990, 24 Am. Bankr. Rep. 201; In re Sinnett, 4 Sawy. 250, Fed. Cas. No. 12,907.

170 In re Blanchard & Howard, 161 Fed. 797, 20 Am. Bankr. Rep. 422; In re Paramore & Ricks, 156 Fed. 211, 19 Am. Bankr. Rep. 130.

171 In re Lucius, 124 Fed. 455, 10 Am. Bankr. Rep. 653; Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786. Compare In re Little, 110 Fed. 621, 6 Am. Bankr. Rep. 681.

172 In re Brumbaugh, 128 Fed. 971, 12 Am. Bankr. Rep. 204. See In re Tune, 115 Fed. 906, 8 Am. Bankr. Rep. 285.

173 In re Castleberry, 143 Fed. 1018, 16 Am. Bankr. Rep. 159.

174 In re Hartsell & Son, 140 Fed. 30, 15 Am. Bankr. Rep. 177.

175 In re Hunt, 5 N. B. R. 493, Fed. Cas. No. 6,883; In re Pohlig (D. C.) 236 Fed. 606, 38 Am. Bankr. Rep. 2.

176 In re Gordon, 115 Fed. 445, 8 Am. Bankr. Rep. 255; In re Thomas, 96 Fed. 828, 3 Am. Bankr. Rep. 99; In re Betts, 4 Dill. 93, 15 N. B. R. 536, Fed. Cas. No. 1,371; Blood v. Munn, 155 Cal. 228, 100 Pac. 694; In re Stout, 109 Fed. 794, 6 Am. Bankr. Rep. 505. But compare Ingram v. Wilson, 125 Fed. 913, 60 C. C. A. 618, 11 Am. Bankr. Rep. 192.

allowed by the state law as exempt, the court may authorize the trustee in bankruptcy to redeem from the foreclosure, and in that case the bankrupt will have the same right to redeem from the trustee that he would have had to redeem from the foreclosure purchaser.[177] A mortgage covering both exempt and non-exempt property, and which constitutes an unlawful preference, is voidable by the mortgagor's trustee in bankruptcy only as to the non-exempt property.[178] But the law will not sanction any dishonest attempt on the part of the debtor to reduce the indebtedness on his homestead at the expense of his general creditors. Hence, where it appeared that the debtor, shortly before filing his voluntary petition in bankruptcy, and in contemplation thereof, had sold property which was not exempt from execution and applied the proceeds in part payment of a debt secured by a mortgage on property claimed to be exempt as a homestead, it was held that the transaction was in fraud of the bankruptcy law, and that the trustee in bankruptcy, for the benefit of the creditors, should be subrogated to the rights of the mortgagee to the extent of the money so paid.[179] But generally, when the trustee has set apart property to the bankrupt as exempt, and his action has been approved, and the bankrupt has taken possession, such property passes out of the jurisdiction of the court of bankruptcy, and that court cannot thereafter entertain proceedings either to defend the property against adverse claims or liens or to subject it to liens or adjudicate the rights of claimants thereto.[180]

But the state courts have jurisdiction to enforce any specific lien upon exempt property of a bankrupt,[181] and proceedings for the foreclosure of a mortgage on property which the bankrupt claims as a homestead should be brought against the bankrupt himself, and not against his trustee.[182] On the other hand, the action of a federal court in bankruptcy in setting apart to a bankrupt the exemption which the state law allows him has exactly the same effect as if it had been granted and allowed by the proper state court in a proceeding before it, and the property is not any more subject to levy and sale on the part of subsequent creditors in the one case than in the other.[183]

[177] Swenson v. Halberg, 1 McCrary, 96, 1 Fed. 444.

[178] In re Bailey, 176 Fed. 990, 24 Am. Bankr. Rep. 201; Morris v. Covey (Ark.) 148 S. W. 257.

[179] In re Boston, 98 Fed. 587, 3 Am. Bankr. Rep. 388. But compare In re Henkel, 2 Sawy. 305, Fed. Cas. No. 6,362. And see In re Jackson, 116 Fed. 46, 8 Am. Bankr. Rep. 594.

[180] In re Little, 110 Fed. 621, 6 Am. Bankr. Rep. 681; In re Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730; In re Hatch, 102 Fed. 289; Bogart v. Cowboy State Bank & Trust Co. (Tex. Civ. App.) 182 S. W. 678. But see In re Hassler, 204 Fed. 139, 29 Am. Bankr. Rep. 502.

[181] Robinson v. Wilson, 15 Kan. 595, 22 Am. Rep. 272.

[182] Dendel v. Sutton, 20 Fed. 787.

[183] Smith v. Zachry, 115 Ga. 722, 42 S. E. 102; Evans v. Rounsaville, 115 Ga.

§ 250. Same; Claims for Unpaid Purchase Money.—In several states it is provided by law that the grant of an exemption of property to a debtor shall not prevail as against a claim for the unpaid purchase money of the property in question. Where this is the case, the debtor's rights are not enlarged by his adjudication in bankruptcy. The federal statute was not intended to override a provision of this character. On the contrary, it adopts the state exemption law as a whole, and therefore, in such states, a bankrupt cannot claim to have property set apart to him as exempt when he has not paid for it.[184] But as the exemption law is a remedial and beneficial statute, any exception to it should be construed with some strictness. Hence it is held that an indebtedness for borrowed money which was used in the purchase of the property claimed as exempt is not an "obligation contracted for its purchase," within the meaning of the state law,[185] and that a bankrupt is entitled to goods exempted by the state statute, although they were paid for out of the proceeds of goods which were not paid for.[186] Moreover the particular creditor, to be entitled to object to the bankrupt's claim, must have taken the steps required by the state law, such as reducing his claim to a judgment.[187] And the unpaid creditor is the only proper person to raise the objection, not the trustee in bankruptcy.[188] An allowance of exemptions in bankruptcy out of a stock of

684, 42 S. E. 100; Collier v. Simpson, 74 Ga. 697; Murphey v. Smith, 16 Ga. App. 472, 85 S. E. 791.

184 Mullinix v. Simon, 196 Fed. 775, 116 C. C. A. 399, 28 Am. Bankr. Rep. 1; Cannon v. Dexter Broom & Mattress Co., 120 Fed. 657, 57 C. C. A. 119, 9 Am. Bankr. Rep. 724; McGahan v. Anderson, 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641; In re Wells, 105 Fed. 762, 5 Am. Bankr. Rep. 308; In re Perdue, 2 N. B. R. 183, Fed. Cas. No. 10,975; In re Whitehead, 2 N. B. R. 599, Fed. Cas. No. 17,562; In re Brown, 3 N. B. R. 250, Fed. Cas. No. 1,980; Camp v. Young, 119 Ga. 981, 47 S. E. 560; In re Peacock, 203 Fed. 191, 30 Am. Bankr. Rep. 179. See In re Hammonds, 198 Fed. 574, 28 Am. Bankr. Rep. 811; In re Phillips (D. C.) 209 Fed. 490, 31 Am. Bankr. Rep. 597; In re Nunemaker (D. C.) 208 Fed. 491, 30 Am. Bankr. Rep. 697; Sheridan State Bank v. Rowell (D. C.) 212 Fed. 529; Pace v. Berry, 176 Ky. 61, 195 S. W. 131.

185 In re Bailes, 176 Fed. 460, 23 Am. Bankr. Rep. 789.

186 In re Tobias, 103 Fed. 68, 4 Am. Bankr. Rep. 555; Peyton v. Farmers' Nat. Bank of Hillsboro (C. C. A.) 261 Fed. 326, 44 Am. Bankr. Rep. 295.

187 In re Butler, 120 Fed. 100, 9 Am. Bankr. Rep. 539. As regards superiority to a claim of homestead exemption, an alternative judgment for the money value of property, in an action of tort such as trover, is not a "judgment for purchase money," purchase money being the original debt or consideration which the purchaser agrees to pay for a thing in money. Williams v. American Slicing Mach. Co., 148 Ga. 770, 98 S. E. 270.

188 In re Boyd, 120 Fed. 999, 10 Am. Bankr. Rep. 337. But see In re Campbell, 124 Fed. 417, 10 Am. Bankr. Rep. 723. And compare In re Stitt, 252 Fed. 1, 164 C. C. A. 113, 41 Am. Bankr. Rep. 777, holding that where the bankrupt proved that he was a married man living with his wife and not the owner of a homestead, when filing his claim for exemption under the laws of Ohio, the burden was then on the trustee in bankruptcy to show affirmatively that personalty in question had not been paid for by the bankrupt, and hence was subject to prior claims for the purchase price.

goods cannot be defeated on the theory that the stock being made up by commingling goods paid for with goods not paid for, must be treated as a unit, and that since it is not all paid for no part of it can be exempted, or that, since the assets are less than the liabilities, presumably nothing has been paid for, but in this case it is for the creditor to point out the items not paid for.[189] But the fact that property claimed as exempt is in this situation,—with a demand for unpaid purchase money standing against it,—does not bring such property within the jurisdiction of the bankruptcy court, nor entitle the creditor to have the trustee take possession of it and administer it for his benefit,[190] nor has the creditor a right to enforce his vendor's lien in the court of bankruptcy,[191] but the trustee will be directed to surrender the property to the bankrupt in order that it may be taken on attachment or other process from the state court,[192] and the fact that the goods in question have been set apart to the bankrupt as exempt is no ground for quashing an attachment in an action for their price.[193] In some states, however, it is held that the remedy of a creditor in this situation is in equity.[194]

§ 251. **Jurisdiction of Bankruptcy Court.**—The jurisdiction of a court of bankruptcy to "determine all claims of bankrupts to their exemptions," and to set apart to them the property which they are entitled to claim as exempt, includes the consideration of preliminary questions as to the right of the bankrupt to claim the property and as to whether he has taken the steps required by the state law to make his

[189] In re Rippa, 180 Fed. 603. But compare In re Tobias, 103 Fed. 68, 4 Am. Bankr. Rep. 555. Where a bankrupt bought a stock of goods with borrowed money, and also incurred debts for goods purchased to renew the stock, he was not entitled to exemptions as against creditors for the goods so purchased but only as against the claimants for borrowed money. In re Stern (D. C.) 208 Fed. 488, 30 Am. Bankr. Rep. 694.

[190] In re Seydel, 118 Fed. 207, 9 Am. Bankr. Rep. 255. See In re Boyd, 120 Fed. 999, 10 Am. Bankr. Rep. 337. While the bankruptcy court will follow and adopt the statutes of the state as construed by its highest courts in determining the nature and extent of a bankrupt's exemptions, still the manner in which such exemptions are to be claimed, set apart, and awarded is regulated by the federal courts as a matter of procedure in the course of bankruptcy administration. In re Moore (D. C.) 274 Fed. 645.

[191] In re Wells, 105 Fed. 762, 5 Am. Bankr. Rep. 308. Since the title to a homestead exempt under state laws remains in the bankrupt, and does not pass except for the purpose of ascertaining his homestead right therein, the bankruptcy court may not order a sale of it because a vendor has a right under the state law to subject the homestead to the payment of a purchase-money note, but the vendor must prosecute his claim in the proper state court. Hughes v. Sebastian County Bank, 129 Ark. 218, 195 S. W. 364.

[192] In re Durham, 104 Fed. 231, 4 Am. Bankr. Rep. 760.

[193] Northern Shoe Co. v. Cecka, 22 N. D. 631, 135 N. W. 177.

[194] Brooks v. Britt-Carson Shoe Co., 133 Ga. 191, 65 S. E. 411.

claim effective,[195] and the action of the trustee in setting apart property to the bankrupt as exempt is not final, but is subject to the determination of the court on the application of the bankrupt or any party in interest,[196] such jurisdiction being exercised originally by the referee, but subject to review by the judge if desired by the bankrupt or the creditors.[197] This jurisdiction to determine claims to exemptions is exclusive, and in the performance of this duty the court of bankruptcy will not be interfered with by any other court, nor can any independent proceedings in a state court for the same purpose be lawfully taken.[198] A wrongful allowance by the bankruptcy court of the property claimed as exempt by the bankrupt cannot be remedied in the state courts.[199] Nor can the order of the court of bankruptcy in that behalf be collaterally questioned. Where the trustee sells property to which the bankrupt had title at the time of the adjudication, no state court can entertain any inquiry as to whether such property was exempt to the bankrupt.[200] Furthermore the general opinion appears to be that the action of the court of bankruptcy has the same effect, in removing specific property from the reach of ordinary judicial process, that would attend the judgment of a state court setting apart such property as exempt, under the course of procedure prescribed by the state statute.[201]

But when once the bankrupt's exempt property has been designated and set apart to him by the trustee in bankruptcy, with the approval of the court, it has been administered, so far as the proceedings in bankruptcy are concerned, and passes out of the control of the bankruptcy court, and thereafter such court has no jurisdiction either to defend such property from adverse claims or liens or to enforce liens or claims against it.[202] But it is the duty of the court to see that the bankrupt's

[195] In re Highfield, 163 Fed. 924, 21 Am. Bankr. Rep. 92.

[196] In re White, 103 Fed. 774, 4 Am. Bankr. Rep. 613.

[197] In re Dobbs, 175 Fed. 319, 23 Am. Bankr. Rep. 569.

[198] McGahan v. Anderson, 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641; In re Gibbs, 103 Fed. 782, 4 Am. Bankr. Rep. 619; Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786; In re Overstreet, 1 Nat. Bankr. News, 408; In re Askew, 3 N. B. R. 575, Fed. Cas. No. 585; Woolfolk v. Murray, 44 Ga. 133, 10 N. B. R. 540.

[199] Brengle v. Richardson, 78 Va. 406.

[200] Steele v. Moody, 53 Ala. 418, 16 N. B. R. 558.

[201] Evans v. Rounsaville, 115 Ga. 684, 42 S. E. 100; Smith v. Zachry, 115 Ga. 722, 42 S. E. 102; Collier v. Simpson, 74 Ga. 697; Ross v. Worsham, 65 Ga. 624; Brady v. Brady, 71 Ga. 71. Compare Felker v. Crane, 70 Ga. 484; Adams v. Dickson, 72 Ga. 846; Youngblood v. Lathen, 20 S. C. 370.

[202] Sullivan v. Mussey (C. C. A.) 184 Fed. 60, 25 Am. Bankr. Rep. 781; In re Yeager, 182 Fed. 951, 25 Am. Bankr. Rep. 51; In re MacKissic, 171 Fed. 259, 22 Am. Bankr. Rep. 817; In re Culwell, 165 Fed. 828, 21 Am. Bankr. Rep. 614; In re Sorg, 155 Fed. 550; In re Reese, 115 Fed. 993, 8 Am. Bankr. Rep. 411; In re Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730; Jeffries v. Bartlett, 20 Fed. 496; In re Featherston, 3 Pittsb. 480, Fed. Cas. No. 4,753; King v. Neill, 26 Fed. 721; Phillips v. Bass, 65 Ga. 427; Lathrop v. Pate, 136 Ga. 36, 70 S. E.

exempt property is secured to him. If, for instance, such property is under an attachment at the time of the adjudication of bankruptcy, the lien of which is dissolved by the adjudication, the attaching creditor cannot hold the property on the theory that, being exempt, it is not subject to be administered in the bankruptcy proceedings. On the contrary, the court should require the officer having possession under the attachment to surrender the property to the trustee, in order that he may set it apart to the bankrupt.[203]

§ 252. Claim of Exemptions.—The bankruptcy law provides that the bankrupt must prepare, verify, and file in court "a claim for such exemptions as he may be entitled to."[204] The official form prescribed for a debtor's petition contains a recital that he is "willing to surrender all his property for the benefit of his creditors except such as is exempt by law," and the accompanying schedule is to contain "a particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation, and, if any portion of it is real estate, its location, description, and present use."[205] It is the duty of the bankrupt, no less than his interest, to comply with these directions. While his right to

569; McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433; Brooks v. Eblen, 106 S. W. 308, 32 Ky. Law Rep. 543; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770; Newberry Shoe Co. v. Collier, 111 Va. 288, 68 S. E. 974; Watters v. Hedgpeth, 172 N. C. 310, 90 S. E. 314; In re Elkin (D. C.) 218 Fed. 971, 34 Am. Bankr. Rep. 134.

[203] In re Stevens, 2 Biss. 373, 5 N. B. R. 298, Fed. Cas. No. 13,392.

[204] Bankruptcy Act 1898, § 7, cl. 8.

[205] Form No. 1, Schedule B, 5. And see In re Duffy, 118 Fed. 926, 9 Am. Bankr. Rep. 358; In re J. E. Maynard & Co., 183 Fed. 823, 25 Am. Bankr. Rep. 732; In re Irwin, 174 Fed. 642, 98 C. C. A. 396, 23 Am. Bankr. Rep. 487; In re Kelly, 199 Fed. 984, 28 Am. Bankr. Rep. 730; In re Diamond, 158 Fed. 370, 19 Am. Bankr. Rep. 811. But it has been held that it is not necessary for the bankrupt to specify the articles specially claimed to be exempt, as the official form is not intended to be mandatory, but to be altered to suit the circumstances of the particular case. Burke v. Guarantee Title & Trust Co., 134 Fed. 562, 67 C. C. A. 486, 14 Am. Bankr. Rep. 31. But a claim by a bankrupt of an exemption out of a stock of goods, claiming the stock in bulk, is not a sufficient compliance. In re Wilson, 108 Fed. 197, 6 Am. Bankr. Rep. 287. So, where a bankrupt is possessed of property capable of being divided, from which he could make his selection, he must do so in his schedule, and a claim to the exemption from "proceeds of personal property" to the amount limited is not sufficient. In re Donahey, 176 Fed. 458, 23 Am. Bankr. Rep. 796. So if a bankrupt includes in his schedule all his lands, claiming, as a homestead exemption therein, "real estate to the value of $500," but without designating any particular portion, it is a defect, but one which is amendable, and of which advantage cannot be taken in a subsequent collateral proceeding. Walker v. Carroll, 65 Ala. 61. As a claim for exemptions is sufficient if made generally under the exemption laws of the state, an allowance of exemptions properly made will not be set aside merely because the claim erroneously designated the statute meant to be referred to. In re Dittmar, 249 Fed. 606, 161 C. C. A. 532, 41 Am. Bankr. Rep. 690.

exemptions must be deduced from the state law, yet his claim must be made at the time and in the manner pointed out by the bankruptcy law, which is exclusive and controlling on these points.[206] Ordinarily it is sufficient if he makes his claim to exemptions in his schedule, and an extension of time for filing the schedule will also extend the time for making such claim.[207] But a mere claim made by a bankrupt to his trustee, asserting a right to a homestead exemption, but not incorporated in the schedule nor allowed by the trustee or the court, will not be available against a purchaser of the property at the trustee's sale.[208] If the bankrupt makes an erroneous claim to property mentioned in the schedule as being exempt, it is the duty of the trustee to correct or disregard it.[209] It is of course in the power of the bankrupt to waive the exemption, and he will generally be taken to have done so if he omits to set up the claim in his schedule, either originally or by seasonable amendment,[210] and if he does not assert his privilege, it cannot be claimed by any one else. Thus, a mortgagee of the bankrupt cannot set up the latter's rights of exemption in the mortgaged property, in order to validate his mortgage against the charge that it constituted a preference or a fraudulent conveyance.[211] But the failure of the bankrupt to claim his exemptions in his original petition will not be taken as a waiver of his right afterwards to claim the property which is exempt, by an amendment properly filed, provided, of course, that the amendment can be allowed without causing any loss or injury to persons who have acquired rights in the property in question in conse-

[206] Lipman v. Stein, 134 Fed. 235, 67 C. C. A. 17, 14 Am. Bankr. Rep. 30; In re Andrews & Simonds, 193 Fed. 776, 27 Bankr. Rep. 116; In re Le Vay, 125 Fed. 990, 11 Am. Bankr. Rep. 114; In re Kane, 127 Fed. 552, 62 C. C. A. 616, 11 Am. Bankr. Rep. 533; In re W. S. Jennings & Co., 166 Fed. 639, 22 Am. Bankr. Rep. 160; In re Burnham, 202 Fed. 762, 30 Am. Bankr. Rep. 270. But compare In re Fisher, 142 Fed. 205, 15 Am. Bankr. Rep. 652; In re Garner, 115 Fed. 200, 8 Am. Bankr. Rep. 263; Northern Alabama Ry. Co. v. Feldman, 1 Ala. App. 334, 56 South. 16. In the Fisher Case, supra, it was held that the statute does not show an intent that the claim of exemption must have been made prior to adjudication, but such claim may be allowed if perfected thereafter within the time allowed by the state law. The only question to be determined on a bankrupt's application for his exemptions under the state law is whether he is entitled to the same against general creditors. In re Brumbaugh, 128 Fed. 971, 12 Am. Bankr. Rep. 204.

[207] In re O'Hara, 162 Fed. 325, 20 Am. Bankr. Rep. 714; Brandt v. Mayhew, 218 Fed. 422, 134 C. C. A. 210, 33 Am. Bankr. Rep. 845; In re Brincat (D. C.) 233 Fed. 811, 37 Am. Bankr. Rep. 587.

[208] Steele v. Moody, 53 Ala. 418, 16 N. B. R. 558.

[209] In re Whetmore, Deady, 585, Fed. Cas. No. 17,508.

[210] In re Gerber, 186 Fed. 693, 108 C. C. A. 511, 26 Am. Bankr. Rep. 608; In re Moran, 105 Fed. 901, 5 Am. Bankr. Rep. 472; In re Von Kerm, 135 Fed. 447, 14 Am. Bankr. Rep. 403; In re Harrington, 200 Fed. 1010, 29 Am. Bankr. Rep. 666.

[211] Mitchell v. Mitchell, 147 Fed. 280, 17 Am. Bankr. Rep. 382; Edmondson v. Hyde, 2 Sawy. 205, 7 N. B. R. 1, Fed. Cas. No. 4,285; In re French (D. C.) 231 Fed. 255, 37 Am. Bankr. Rep. 289.

quence of the bankrupt's neglect seasonably to assert his claims,[212] and provided the amendment is asked in good faith and for the purpose contemplated by the law. Thus, it will be refused where it is avowedly sought for the purpose of preferring certain creditors to whom the bankrupt had given notes containing a waiver of the exemption law.[213] And such action can be taken only in the court of bankruptcy, which has, in the language of the statute, jurisdiction to "determine all claims of bankrupts to their exemptions." If a bankrupt, instead of incorporating a claim for his exemptions in his schedule, goes into a state court and there sets up a claim and has the exemption allowed, he will not be entitled to have the exemption set off to him by the trustee in bankruptcy on his filing a record of the proceedings in the state court.[214] And for even stronger reasons it is held that, if the bankrupt omits to claim his exemptions in the proceedings in bankruptcy, as required by the law, but allows the trustee to sell the property, he cannot afterwards assert his right to it as exempt in a proceeding to set aside the sale or in a suit against the purchaser.[215] But here it must be noted that the statute expressly grants to an involuntary bankrupt a period of ten days after the adjudication in which to claim his exemptions, and if such claim is made before the expiration of the ten days, it is in time, and the bankrupt cannot be deprived of his exemptions by the fact that, in

[212] In re Fisher, 142 Fed. 205, 15 Am. Bankr. Rep. 652; In re Berman, 140 Fed. 761, 15 Am. Bankr. Rep. 463; In re Moran, 105 Fed. 901, 5 Am. Bankr. Rep. 472; In re Kaufmann, 142 Fed. 898, 16 Am. Bankr. Rep. 118; In re White, 128 Fed. 513, 11 Am. Bankr. Rep. 556; Goodman v. Curtis, 174 Fed. 644, 98 C. C. A. 398, 23 Am. Bankr. Rep. 504; In re Harrington, 1 Nat. Bankr. News, 513; In re Williams, 2 Nat. Bankr. News, 419; In re Radcliffe (D. C.) 243 Fed. 716, 39 Am. Bankr. Rep. 612; In re Herrin & West (D. C.) 215 Fed. 250; In re Lenters (D. C.) 225 Fed. 878, 35 Am. Bankr. Rep. 3. As to diligence in claiming a homestead exemption, and as to perfecting such an exemption under the state law, after having claimed it in bankruptcy, see In re Burnham, 202 Fed. 762, 30 Am. Bankr. Rep. 270.

[213] Moran v. King, 111 Fed. 730, 49 C. C. A. 578, 7 Am. Bankr. Rep. 176; In re Merry, 201 Fed. 369, 29 Am. Bankr. Rep. 829.

[214] In re Nunn, 1 Nat. Bankr. News, 427; Gayle v. Randall, 71 Ala. 469.

[215] In re Oderkirk, 103 Fed. 779, 4 Am. Bankr. Rep. 617; In re Wunder, 133 Fed. 821, 13 Am. Bankr. Rep. 701; Steele v. Moody, 53 Ala. 418, 16 N. B. R. 558. But the right of the bankrupt to the property exempted by the law of the state is a fixed and determinate right, not dependent upon the discretion of the trustee and where it is claimed and illegally refused before the trustee's sale of the property, it may be asserted against the proceeds of the property while in the hands of the court for distribution. In re Jones, 2 Dill. 343, Fed. Cas. No. 7,445. And see In re Rodenhagen, 2 Nat. Bankr. News, 674. Where the law of the state does not require that exemptions be claimed by way of selection before the sale of specific articles of personal property, a bankrupt who had been depending for an exemption out of the proceeds of a sale of the homestead, which proceeds however, did not cover the mortgage debts upon it, may claim his exemption out of the proceeds of personalty after its sale. In re Stitt, 252 Fed. 1, 164 C. C. A. 113, 41 Am. Bankr. Rep. 777. And see Smith v. Thompson, 213 Fed. 335, 129 C. C. A. 637, 32 Am. Bankr. Rep. 165.

the meantime, the property has been sold and converted into money by a receiver in bankruptcy appointed at the time of filing the petition.[216] But while the bankrupt must claim his exemption as prescribed by the statute, a severance of the exempted articles or property is not to be made by the debtor before adjudication, but by the trustee when appointed; and the valuation of exempt property is to be made in the first instance by the trustee. The bankruptcy act, while allowing to debtors the exemptions provided by the state law, itself regulates the manner in which such exemptions are to be claimed, set apart, and awarded.[217]

§ 253. **Setting Apart Exempt Property.**—It is made the duty of trustees in bankruptcy to "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment." [218] This provision of the statute is mandatory and the duties which it enjoins upon the trustee cannot be performed by any one else.[219] And where a claim has been duly and properly made for the exemption allowed by the law of the state, the trustee has no right or power to refuse to set the property apart. If he persists in selling the property, the court has jurisdiction to award the proceeds to the bankrupt.[220] There are some cases, however, where no trustee is appointed. Omission to appoint a trustee is authorized by General Order No. 15, when "the schedule of a voluntary bankrupt discloses no assets, and no creditor appears at the first meeting." The term "assets" means property available for distribution to creditors, and the conditions of the general order are met when the schedule shows no property except such as is claimed as exempt. When this condition of affairs occurs, it is the practice in some districts for the referee to make an order setting off the exemptions, based on an affidavit of the bankrupt. While this practice is informal and not in accordance with the regular course of procedure, it may be sanctioned by the court, in the exercise of its equity powers, where it is satisfied that the bankrupt has no property except such as is exempt, and that therefore there is

[216] Lipman v. Stein, 134 Fed. 235, 67 C. C. A. 17, 14 Am. Bankr. Rep. 30; In re Coddington, 126 Fed. 891, 11 Am. Bankr. Rep. 122; In re Gunzberger (D. C.) 268 Fed. 673, 45 Am. Bankr. Rep. 690.

[217] In re Friederich (C. C. A.) 100 Fed. 284, 3 Am. Bankr. Rep. 801; Burke v. Guarantee Title & Trust Co., 134 Fed. 562, 67 C. C. A. 486, 14 Am. Bankr. Rep. 31. And see Cowan v. Burchfield, 180 Fed. 614, 25 Am. Bankr. Rep. 293.

[218] Bankruptcy Act 1898, § 47a, cl. 11.

[219] In re Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730. An agreement between a bankrupt and his creditors that the exemptions shall be valued and allotted by three appraisers, whose decision shall be final and not subject to exception, is void, and an order made by the referee, by consent of parties, in the terms of such agreement, will be set aside. Idem.

[220] In re Finkelstein, 192 Fed. 738, 27 Am. Bankr. Rep. 229.

no occasion for the appointment of a trustee.[221] But when a trustee has been appointed and qualified, the referee has no authority to set apart the bankrupt's exemptions, nor to direct the trustee in the matter.[222] The trustee has no right to demand from the bankrupt, as a condition upon his delivering to him the property claimed as exempt and appraised for that purpose, a bond of indemnity, and where, upon demand and refusal of such a bond, the trustee sells the property in question, the bankrupt may claim the amount of his exemptions from the proceeds.[223]

If exemptions have recently been claimed and allowed to the bankrupt in proceedings under the state law, it is permissible for the trustee to adopt and sanction the allotment, if no circumstances of fraud or mistake appear.[224] But it is not the duty of the trustee to wait until exemptions have been allowed and set apart by state officers according to the procedure prescribed by the laws of the state.[225] Since, however, the bankruptcy act merely gives the debtor what the state statute allows him, he must observe any directions of that statute, which are imposed as conditions upon the allowance. If the state law withholds the exemption from him until he shall have complied with certain requirements as to the mode of claiming and securing its allowance, he must pursue the same course before he can make good his claim to the exemptions in the bankruptcy proceeding.[226] And it is said, generally, that trustees in bankruptcy, in valuing and setting apart the exemptions of bankrupts, should conform as nearly as may be to the method provided by the state law for that purpose.[227] Thus, where the state law exempts to a debtor personal property to a certain value, "to be se-

[221] In re W. C. Allen & Co., 134 Fed. 620, 13 Am. Bankr. Rep. 518; Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786.

[222] In re Peabody, 16 N. B. R. 243, Fed. Cas. No. 10,866.

[223] In re Brown, 100 Fed. 441, 4 Am. Bankr. Rep. 46.

[224] In re Vogler, 2 Hughes, 297, 8 N. B. R. 132, Fed. Cas. No. 16,986. See In re Wilson, 101 Fed. 571, 4 Am. Bankr. Rep. 260.

[225] In re Camp, 91 Fed. 745, 1 Am. Bankr. Rep. 165. A bankrupt to whom personalty claimed as exempt has been set apart, may thereafter execute and file for record a declaration of homestead, as required by state law, and have the same set apart as exempt. In re Lehfeldt (D. C.) 225 Fed. 681, 35 Am. Bankr. Rep. 716.

[226] See In re Farish, 2 N. B. R. 168, Fed. Cas. No. 4,647; In re Jackson, 2 N. B. R. 508, Fed. Cas. No. 7,127; Baltimore Bargain House v. Busby, 143 Ga. 734, 85 S. E. 875.

[227] In re McCutchen, 100 Fed. 779, 4 Am. Bankr. Rep. 81; In re Woodard, 95 Fed. 955, 2 Am. Bankr. Rep. 692. But compare In re Lynch, 101 Fed. 579, 4 Am. Bankr. Rep. 262. Where the state statute provides that the homestead shall be appraised by three persons, chosen respectively by the debtor, the creditor, and the officer holding the writ, a trustee in bankruptcy, when a claim of homestead is made by the bankrupt, should cause the property to be appraised by three persons, one named by himself, one by the bankrupt, and one by the creditors, and an appraisement made by three persons all chosen by the trustee, the bankrupt not being represented in

lected by him," the debtor, on being adjudged bankrupt, has the right to select specific personal property, to that value, from the estate in the hands of his trustee, even though the property is not divisible without loss nor salable except as a whole.[228] On the other hand, where the state law provides that the exempt property shall be selected by the debtor, it is not permissible to allow the bankrupt to select a trifling amount of personal property and receive the entire difference in cash from the trustee.[229] A mistake made by the trustee in valuing or setting off the property may be corrected by amendment, or by a revaluation of the property, where that is the proper course.[230] When the trustee has set apart the property to be allowed as exempt and made report of his doings, and his action is either approved by the court or passes without exceptions being taken, it is then his further duty to deliver the possession to the bankrupt.[231] But he is not authorized to dispense with the requirements of the statute and simply pay the bankrupt a sum of money equivalent to the value of the exemptions, where no proper steps have been taken to select and set apart the exempt property, and especially where it does not appear that the money was placed in a designated depository and drawn out according to the rules in bankruptcy.[232] It should also be noted that the bankrupt is entitled to receive the full amount of his exemption, and it cannot be diminished by deducting from it any costs and expenses made in the proceedings,

their selection, will be set aside on objections by the latter, and a new appraisement ordered. In re McCutchen, supra. But it has been ruled that there is no provision of the bankruptcy law authorizing the valuation by appraisers of the property claimed by the bankrupt as exempt, and that, where the appraisers value the entire estate of the bankrupt, as provided by law, their inventory is not binding on the trustee as respects the exempt property nor can he adopt it as his own. In re Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730. And see In re Andrews & Simonds, 193 Fed. 776, 27 Am. Bankr. Rep. 116; Bank of Nez Perce v. Pindel, 193 Fed. 917, 113 C. C. A. 545, 28 Am. Bankr. Rep. 69, holding that the time and manner of setting apart the bankrupt's exemptions must be determined by and in accordance with the bankruptcy act. And see In re Crum (D. C.) 221 Fed. 729, 34 Am. Bankr. Rep. 586.

[228] In re Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730.

[229] In re Woodard, 95 Fed. 955, 2 Am. Bankr. Rep. 692. But when property claimed by the bankrupt as exempt has been sold by the trustee, the exemption should be set apart out of the proceeds of the sale. In re Park, 102 Fed. 602, 4 Am. Bankr. Rep. 432.

[230] Brady v. Brady, 71 Ga. 71. Where a trustee in bankruptcy, in setting off to the bankrupt the property claimed as his homestead, has adopted the value placed upon it by appraisers fifteen years before, when it was allotted to the bankrupt as a homestead under process of a state court, but it appears that the property has since increased in value beyond the amount allowed as exempt by the laws of the state, the court of bankruptcy will direct the trustee to re-value the property and set apart to the bankrupt so much thereof as shall not exceed in value the amount so allowed. In re McBryde, 99 Fed. 686, 3 Am. Bankr. Rep. 729.

[231] In re Soper, 173 Fed. 116, 22 Am. Bankr. Rep. 868.

[232] In re Hoyt, 119 Fed. 987, 9 Am. Bankr. Rep. 574.

even the necessary cost of selling perishable property,[233] though it appears that an exception may be made as to storage charges on the specific property pending its delivery to the bankrupt.[234]

It is ordered that "the trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the 47th section of the act, with the estimated value of each article."[235] The time here limited, however, may be extended by the court, for good cause shown, and leave given to the trustee to make a later or further report.[236] The action of the court on this report is of course subject to review in the ordinary manner, but is not open to collateral inquiry. If the court of bankruptcy wrongfully allows and sets apart to a bankrupt the property which he claims as exempt, the remedy is not in the state courts.[237] It is remarkable that neither the act nor the general order specially provides for the taking of exceptions to the trustee's determination, as to exempt property, by the bankrupt himself. But the courts hold that if he is dissatisfied with the allowance made by the trustee, he may except to the latter's decision and have the question heard by the referee, and if necessary certified to the court.[238] It is provided that "any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report."[239] Under his provision a creditor is not precluded from objecting to the allowance

[233] In re Le Vay, 125 Fed. 990, 11 Am. Bankr. Rep. 114; In re Hopkins, 103 Fed. 781, 4 Am. Bankr. Rep. 619.

[234] In re Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730.

[235] General Order No. 17. This order requires a specification of items and a separate appraisal of the property set apart to the bankrupt. In re Manning, 112 Fed. 948, 7 Am. Bankr. Rep. 571. And under the laws of Pennsylvania, a trustee in bankruptcy, in setting aside as exempt household goods and book accounts, must itemize them and value each item separately. Idem. But under the corresponding provision of the act of 1867, it was held that the reference was to articles of personal property exempt by the laws of the state, and not to real estate held as a homestead, the title to which does not pass to the trustee. In re Hunt, 5 N. B. R. 493, Fed. Cas. No. 6,883.

[236] In re Shields, 1 N. B. R. 603, Fed. Cas. No. 12,785. The setting apart of exempt property to the bankrupt, and the sale of real estate in which a homestead is claimed, if indivisible, should always be done promptly, and the referee should see that this is done. In re Brown (D. C.) 228 Fed. 533, 35 Am. Bankr. Rep. 826.

[237] Brengle v. Richardson's Adm'r, 78 Va. 406. And see Brady v. Brady, 71 Ga. 71.

[238] In re Sloan, 135 Fed. 873, 14 Am. Bankr. Rep. 435; Richardson v. Trubey, 250 Ill. 577, 95 N. E. 971; In re Pryor, 4 Biss. 262, Fed. Cas. No. 11,457; In re Thiell, 4 Biss. 241, Fed. Cas. No. 13,882; In re Smith, 93 Fed. 791, 2 Am. Bankr. Rep. 190.

[239] General Order No. 17. See McGahan v. Anderson, 113 Fed. 115, 51 C. C. A. 92, 7 Am. Bankr. Rep. 641; E. B. Taylor Co. v. Williams (Ga.) 77 S. E. 386. The homestead exemption claimed by a bankrupt cannot be transferred until approved by the referee or until 20 days have passed without objections by creditors being filed. In re Anderson (D. C.) 224 Fed. 790, 35 Am. Bankr. Rep. 487.

of exemptions because he is not armed with any process,[240] nor does it exclude the trustee, who may except on behalf of all the creditors to the bankrupt's claim or the decision of the referee thereon.[241] As to the limitation of time, it is held that the word "may" in this connection is not imperative, in the sense that exceptions must be taken within twenty days or not at all, but that a certain measure of discretion is left to the courts of bankruptcy, so that, in cases of fraud or mistake or for other good cause, they may consider the objections of creditors even after the time limited,[242] though a creditor seeking this privilege must excuse his delay and clear himself of the imputation of laches.[243] As to the form of the exceptions, such a paper is not strictly speaking a pleading, and if the want of verification is a defect, at any rate it is not jurisdictional.[244]

It has been held by some of the courts that, where the bankrupt makes out a prima facie case in support of his claim to exemptions, the objecting creditors must sustain the burden of proving that he is not entitled to what he demands.[245] But there are also rulings that the burden is on the bankrupt to prove his right to the exemptions claimed, and by conclusive evidence.[246] However this may be, the issues on a hearing of this kind will be strictly confined. For instance, the court will not enter upon an inquiry as to whether or not the bankrupt had made a fraudulent conveyance of property such as would bar his right to a discharge.[247] And the rulings of the referee on questions of fact in allowing exemptions will not be reversed unless clearly erroneous.[248]

[240] In re Campbell, 124 Fed. 417, 10 Am. Bankr. Rep. 723.

[241] In re Rice, 164 Fed. 589, 21 Am. Bankr. Rep. 202; In re Bonvillain (D. C.) 232 Fed. 370, 36 Am. Bankr. Rep. 761.

[242] In re Perdue, 2 N. B. R. 183, Fed. Cas. No. 10,975. But compare In re Cotton & Preston, 183 Fed. 190, 25 Am. Bankr. Rep. 532. And see In re Gainey, 2 N. B. R. 525, Fed. Cas. No. 5,181. Where the trustee has not filed his report within the time limited for that purpose, creditors are not bound to except to the same within twenty days after its filing. In re Peabody, 16 N. B. R. 243, Fed. Cas. No. 10,866. A mere report by the trustee that the bankrupt has made a claim for certain exemptions does not constitute a "setting off" of exemptions to the bankrupt, such that creditors must file their exceptions to it within the limited time. Objection by a creditor to the allowance of the exemption claimed, interposed at the first meeting of creditors, would be sufficient to preserve his right to make such objection at a subsequent stage of the proceedings. In re Harber, 2 Nat. Bankr. News, 449. And see In re Krecum, 229 Fed. 711, 144 C. C. A. 121, 36 Am. Bankr. Rep. 172; In re Libby (D. C.) 253 Fed. 278.

[243] In re Reese, 115 Fed. 993, 8 Am. Bankr. Rep. 411.

[244] In re Campbell, 124 Fed. 417, 10 Am. Bankr. Rep. 723.

[245] In re Rippa, 180 Fed. 603; In re Grimes, 94 Fed. 800, 2 Am. Bankr. Rep. 160. In re Auge (D. C.) 238 Fed. 621, 39 Am. Bankr. Rep. 39.

[246] In re Rainwater, 191 Fed. 738, 25 Am. Bankr. Rep. 419; In re Campbell, 124 Fed. 417, 10 Am. Bankr. Rep. 723.

[247] In re W. C. Allen & Co., 134 Fed. 620, 13 Am. Bankr. Rep. 518.

[248] In re Rutland Grocery Co., 189 Fed. 765, 26 Am. Bankr. Rep. 942.

The decision of the court of bankruptcy will be accepted as conclusive by the state courts.[249]

§ 254. Sale of Property and Allowance of Exemptions Out of Proceeds.—Where the law of the state exempts to the debtor personal property to a certain value, "to be selected by him," the debtor, on being adjudged bankrupt has the right to select specific personal property to that value from the estate in the hands of his trustee, and although his personal estate consists of a stock of goods not divisible without loss, nor salable except as a whole, yet the court cannot order the trustee to sell the whole stock and pay the bankrupt the value of his exemptions out of the proceeds.[250] And if the trustee takes the goods selected by the bankrupt and mixes them with others and sells the whole indiscriminately, the bankrupt will not be entitled to claim out of the proceeds the maximum value allowed by the exemption law, but only the price brought by the specific goods which he had selected.[251] It has been held, however, that if the bankrupt, after making the selection, allows the selected articles to be sold with the rest, by an agreement to that effect with his trustee, that course being for the benefit of the estate, in that it makes the stock as a whole more salable the trustee should allow to the bankrupt, as his exemption, out of the proceeds of the sale, a sum of money equal to the value of the goods originally selected.[252] But under the laws of Pennsylvania, the trustee cannot set apart as exempt cash out of the proceeds of a future sale of the bankrupt's personal property.[253] If, before the appointment of a trustee, the property

[249] Morton v. Jones, 136 Ky. 797, 125 S. W. 247; McKinley v. Morgan, 36 Wash. 561, 79 Pac. 45. And see Drees v. Armstrong, 180 Iowa, 29, 161 N. W. 40; McCurry v. Sledge, 48 Okl. 27, 149 Pac. 1124. Compare Seedig v. First Nat. Bank of Clifton (Tex. Civ. App.) 168 S. W. 445.

[250] In re Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730; In re Shrimer (D. C.) 228 Fed. 794, 36 Am. Bankr. Rep. 404. Where the exemption law of the state does not exempt money, or any sum in money, but only property to a certain value, the trustee has no right, where the bankrupt's property has been seized and sold under execution and distress for rent, leaving him no property to claim as exempt, to allow money, the proceeds of debts due to the bankrupt, for the purpose of making good the property which would have been exempted if it had not been sold. In re Lawson, 2 N. B. R. 54, Fed. Cas. No. 8,149.

[251] In re Arnold, 169 Fed. 1000, 22 Am. Bankr. Rep. 392; In re Friend, 3 Woods, 388, Fed. Cas. No. 5,120.

[252] In re Richard, 94 Fed. 633, 2 Am. Bankr. Rep. 506; In re Hutchinson, 197 Fed. 1021, 28 Am. Bankr. Rep. 405; In re Hargraves, 160 Fed. 758, 20 Am. Bankr. Rep. 186; In re Renda, 149 Fed. 614, 17 Am. Bankr. Rep. 521. Where personal property which the bankrupt was entitled to claim as exempt was sold, on his request that cash should be allowed him instead of the property, he should be charged with his percentage of the difference between the proceeds of the property and its appraised value as against the amount of his exemptions. In re Ansley Bros., 153 Fed. 983, 18 Am. Bankr. Rep. 457.

[253] In re Manning, 112 Fed. 948, 7 Am. Bankr. Rep. 571.

has come into the hands of a receiver in bankruptcy, who proposes to sell the same, the proper course is for the court to direct the receiver to set aside the specific property which the bankrupt claims as exempt, to await the determination of his claim.[254] But if the receiver has sold the property (as being perishable or for other good reasons) before the appointment of a trustee, and the bankrupt has duly made his claim for his exemptions, it will be his right to receive the proper amount out of the proceeds of the sale.[255] Where the statute does not give the debtor this right of selection of property, but only fixes the value of the exemption to be allowed, the rule is that, if the property in the hands of the trustee is not capable of division into parts without injury to the whole, or if it is of such a nature that it cannot advantageously be sold except as a whole, the court may order a sale of the whole, and an allowance to the bankrupt of the value of his statutory exemption, to be set apart to him out of the proceeds.[256] On a similar principle, it is held that where a bankrupt claims the property on which he resides as a homestead, but it is alleged that it exceeds in value the limit fixed by the homestead law of the state, and the evidence on the subject of value is conflicting, or responsible parties offer to bid a larger sum for the property, the proper course is to order the property sold by the trustee at public sale after due advertisement. At such sale, the bankrupt will be considered as bidding the amount fixed by the statute as the maximum value of a homestead exemption, and it will be knocked down to him at that price if no better offer is made. But if the property brings more than that amount, the bankrupt will be allotted a sum of money, out of the proceeds, equal to the value of a homestead exemption under the statute, and this will be considered as his exemption.[257] So, where a mortgage, recognized as valid in the

[254] In re N. Shaffer & Son, 128 Fed. 986, 11 Am. Bankr. Rep. 717; In re Joyce, 128 Fed. 985, 11 Am. Bankr. Rep. 716.

[255] In re Zack, 196 Fed. 909, 28 Am. Bankr. Rep. 138; In re Le Vay, 125 Fed. 990, 11 Am. Bankr. Rep. 114; In re Haskin, 109 Fed. 789, 6 Am. Bankr. Rep. 485; In re Bolinger, 108 Fed. 374, 6 Am. Bankr. Rep. 171; In re Sloan, 135 Fed. 873, 14 Am. Bankr. Rep. 435.

[256] In re Kane, 127 Fed. 552, 62 C. C. A. 616, 11 Am. Bankr. Rep. 533; In re Yeager, 182 Fed. 951, 25 Am. Bankr. Rep. 51; In re Luby, 155 Fed. 659, 18 Am. Bankr. Rep. 801; In re Grimes, 1 Nat. Bankr. News, 426; In re Diller, 100 Fed. 931, 4 Am. Bankr. Rep. 45; In re Beede, 19 N. B. R. 68, Fed. Cas. No. 1,226; In re Poleman, 5 Biss. 526, 9 N. B. R. 376, Fed. Cas. No. 11,247.

[257] In re Lynch, 101 Fed. 579, 4 Am. Bankr. Rep. 262; In re Watson, 2 N. B. R. 570, Fed. Cas. No. 17,271; Bank of Nez Perce v. Pindel, 193 Fed. 917, 28 Am. Bankr. Rep. 69; In re Paramore & Ricks, 156 Fed. 208, 19 Am. Bankr. Rep. 126. And see Dunlap Hardware Co. v. Huddleston, 167 Fed. 433, 21 Am. Bankr. Rep. 731; Norwood v. Watson, 242 Fed. 885, 155 C. C. A. 473, 39 Am. Bankr. Rep. 348; In re Crum (D. C.) 221 Fed. 729, 34 Am. Bankr. Rep. 586; McBride v. Gibbs, 148 Ga. 380, 96 S. E. 1004. Compare In re Yungbluth, 220 Fed. 110, 136 C. C. A. 202, 34 Am. Bankr. Rep. 299.

bankruptcy proceedings, covers an undivided fractional part of the real estate out of which the bankrupt claims his homestead exemption, the court will not order the trustee to partition the land as between the bankrupt and the mortgagee, and set apart to the former a designated portion to be held by him as his homestead in severalty and free from the mortgage, as this would change, and might impair, the security of the mortgagee. But the bankrupt may apply for an order to sell portions of the land not actually occupied as a homestead, and apply the proceeds in payment of the mortgage.[258]

§ 255. Exemptions in Partnership Cases.—A partnership, as such, cannot claim exemptions out of the firm assets. It cannot be a "head of a family" or a "housekeeper," within the meaning of those and similar terms used in the state exemption laws.[259] And moreover, the adjudication in bankruptcy dissolves the firm absolutely and for every purpose, and thereafter there is no firm in existence to claim or receive the exemption.[260] But a more difficult question arises when the individual members of a bankrupt partnership claim the right to receive, each for himself, the statutory exemption out of the assets of the firm, there being no individual estate sufficient to yield the amount allowed as exempt. On this question, the courts of bankruptcy will follow the rule established by the decisions of the highest courts of the state, if any such have been rendered.[261] In many of the states, this point has been determined by the court of last resort. But in the absence of any such determination, when the bankruptcy court must put its own construction on the state law, the tendency is to hold that the individual members of the firm are not entitled to any exemption out of the partnership property, unless there should remain a surplus of such property after the payment of all firm debts.[262]

In North Carolina, the federal courts, following the decisions of the courts of the state, have decided that, in case of the bankruptcy of a partnership, where there are firm assets but no individual estate, each partner is entitled to receive, out of the partnership assets, the exemption allowed by the law of the state, provided the other partner consents thereto, and the fact that the petition in bankruptcy is signed

[258] In re Thomas, 96 Fed. 828, 3 Am. Bankr. Rep. 99.

[259] In re Lentz, 97 Fed. 486; In re Smith, 2 Hughes, 307, Fed. Cas. No. 12,979.

[260] In re Lentz, 97 Fed. 486; In re Blodgett, 10 N. B. R. 145, Fed. Cas. No. 1,555.

[261] In re Beauchamp, 101 Fed. 106, 4 Am. Bankr. Rep. 151; In re Camp, 91 Fed. 745, 1 Am. Bankr. Rep. 165; In re Stevenson, 93 Fed. 789, 2 Am. Bankr. Rep. 230.

[262] Jennings v. Stannus (C. C. A.) 191 Fed. 347, 27 Am. Bankr. Rep. 384; In re Scheier, 188 Fed. 744, 26 Am. Bankr. Rep. 739; In re Beauchamp, 101 Fed. 106, 4 Am. Bankr. Rep. 151.

by both partners is conclusive evidence of such consent mutually given.[263] And in this state a surviving partner may have his personal exemption set apart to him out of the partnership effects, with the consent of the administrator of the deceased partner.[264] But where a firm consists of several partners, all must consent to the allowance of exemptions out of the firm property, and if any object it cannot be done.[265] Nor can this course be taken with reference to any partner unless it appears that he has no individual estate out of which to claim and receive the exemption, for it is not intended that a bankrupt partner should have his exemptions duplicated.[266] A similar rule, allowing partners to claim their exemptions out of firm property, in case they have no separate estate, prevails in Georgia,[267] Wisconsin,[268] Missouri,[269] New York,[270] and Michigan.[271] In these and other states, it becomes important for the bankrupt claiming exemptions to establish his actual status as a member of the firm, and this question may turn upon the effect of an executory contract to sell his interest to his copartners, his renunciation of membership in the firm, the legal consequences of a conditional sale of his interest, or his participation in the conduct of the firm's business.[272]

[263] In re Gartner Hancock Lumber Co., 173 Fed. 153, 22 Am. Bankr. Rep. 898; In re Seabolt, 113 Fed. 766, 8 Am. Bankr. Rep. 57; In re Stevenson, 93 Fed. 789, 2 Am. Bankr. Rep. 230; In re Grimes, 94 Fed. 800, 2 Am. Bankr. Rep. 160; In re Duguid, 100 Fed. 274, 3 Am. Bankr. Rep. 794; In re Wilson, 101 Fed. 571, 4 Am. Bankr. Rep. 260. A partner having an equal interest with his copartner in the firm property is entitled to claim his statutory exemption therefrom, in case of the bankruptcy of the firm, although the amount contributed by him to the capital of the firm was less than the amount of such exemption. In re Grimes, 94 Fed. 800, 2 Am. Bankr. Rep. 160. But compare In re Rutland Grocery Co., 189 Fed. 765, 26 Am. Bankr. Rep. 942.

[264] In re Seabolt, 113 Fed. 766, 8 Am. Bankr. Rep. 57; In re Dinglehoef, 109 Fed. 866, 6 Am. Bankr. Rep. 242.

[265] In re J. M. Monroe & Co., 156 Fed. 216, 19 Am. Bankr. Rep. 255.

[266] In re Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73.

[267] In re Rutland Grocery Co., 189 Fed. 765, 26 Am. Bankr. Rep. 942; In re Camp, 91 Fed. 745, 1 Am. Bankr. Rep. 165. Compare In re Stewart, 13 N. B. R. 295, Fed. Cas. No. 13,420.

[268] In re Friederich, 100 Fed. 284, 40 C. C. A. 378, 3 Am. Bankr. Rep. 801; In re Friederick, 95 Fed. 282; Ex parte Robinson, 7 Biss. 125, Fed. Cas. No. 11,933; In re Zimmerman, 202 Fed. 812, 30 Am. Bankr. Rep. 361. The earlier decisions were to the contrary. See In re Sauthoff, 8 Biss. 35, 16 N. B. R. 18, Fed. Cas. No. 12,380; In re Hughes, 8 Biss. 107, 16 N. B. R. 464, Fed. Cas. No. 6,842.

[269] In re Young, 3 N. B. R. 440, Fed. Cas. No. 18,148; In re Richardson, 11 N. B. R. 114, Fed. Cas. No. 11,776.

[270] Stewart v. Brown, 37 N. Y. 350, 93 Am. Dec. 578.

[271] In re Andrews & Simouds, 193 Fed. 776, 27 Am. Bankr. Rep. 116; In re Parks, 9 N. B. R. 270, Fed. Cas. No. 10,765. Compare In re Blodgett, 10 N. B. R. 145, Fed. Cas. No. 1,555; In re Boothroyd, 14 N. B. R. 223, Fed. Cas. No. 1,652. See In re Solomon & Johnson (D. C.) 254 Fed. 503, 43 Am. Bankr. Rep. 18.

[272] See In re E. M. Fowler & Co., 145 Fed. 270, 16 Am. Bankr. Rep. 580; In re Wilson, 101 Fed. 571, 4 Am. Bankr. Rep. 260; In re W. J. Floyd & Co., 154 Fed.

On the other hand, it is held that the individual members of a bankrupt partnership are not entitled to claim any separate exemption out of the partnership assets in Ohio,[273] South Dakota,[274] Pennsylvania, [275] Arkansas,[276] Alabama,[277] New Jersey,[278] Vermont,[279] Mississippi,[280] Indiana,[281] and Washington.[282] Here again the question of the existence of a partnership, or of the membership in it of the claimant, may become important. One is not deprived of his right to exemptions by the mere fact that he has conducted his business under a name indicating that it was owned by a firm or a corporation, if in fact he was the sole owner of it.[283] So, during the continuance of a partnership business, the partners have a right, by a transfer from one to the other, to transform the partnership property into the individual property of one of the partners, and to apply it to the payment of his individual debts, provided it is done in good faith and before creditors intervene and bring the property of the firm into court. And where this is done, and there is no fraud in the transaction, and no showing of the insolvency of the firm, the assets belong to the continuing partner as an individual, and he is entitled to claim his exemptions out of them in bankruptcy proceedings subsequently brought against him.[284] But on the other hand, where a firm which is insolvent dissolves, but there is no transfer of the property by the retiring partner to the liquidating partner, but the former simply abandons his interest in the firm, the liquidating partner will not be allowed to claim an individual exemption

757, 18 Am. Bankr. Rep. 827. An alleged partner who escapes adjudication on the ground of his being an infant cannot claim exemptions as a partner. In re Ellenbecker, 205 Fed. 396, 30 Am. Bankr. Rep. 537.

[273] In re Rosenbaum, 1 Nat. Bankr. News, 541; In re Tonne, 13 N. B. R. 170, Fed. Cas. No. 14,095. Compare In re Rupp, 4 N. B. R. 95, Fed. Cas. No. 12,141.

[274] In re Abrams, 193 Fed. 271; In re Novak, 150 Fed. 602, 18 Am. Bankr. Rep. 236; In re Lentz, 97 Fed. 486; In re I. S. Vickerman & Co., 199 Fed. 589, 29 Am. Bankr. Rep. 298. Compare In re McKercher, 8 N. B. R. 409.

[275] In re Prince & Walter, 131 Fed. 546, 12 Am. Bankr. Rep. 675; In re Hafer, 1 N. B. R. 547, Fed. Cas. No. 5,896.

[276] In re Head, 114 Fed. 489, 7 Am. Bankr. Rep. 556; In re Meriwether, 107 Fed. 102, 5 Am. Bankr. Rep. 435; In re Handlin, 3 Dill. 290, 12 N. B. R. 49, Fed. Cas. No. 6,018.

[277] In re McCrary Bros., 169 Fed. 485, 22 Am. Bankr. Rep. 161.

[278] In re Demarest, 110 Fed. 638, 6 Am. Bankr. Rep. 232.

[279] In re Mosier, 112 Fed. 138, 7 Am. Bankr. Rep. 268.

[280] In re H. W. Bundy & Co. (D. C.) 218 Fed. 711, 33 Am. Bankr. Rep. 289.

[281] In re Turnock & Sons, 230 Fed. 985, 145 C. C. A. 179, 36 Am. Bankr. Rep. 316.

[282] Jennings v. Stannus (C. C. A.) 191 Fed. 347, 27 Am. Bankr. Rep. 384; In re Rudnick, 2 Nat. Bankr. News, 769.

[283] In re Carpenter, 109 Fed. 558, 48 C. C. A. 545, 6 Am. Bankr. Rep. 465.

[284] In re Kolber, 193 Fed. 281, 27 Am. Bankr. Rep. 414, citing Sargent v. Blake, 160 Fed. 57, 87 C. C. A. 213, 20 Am. Bankr. Rep. 115, 17 L. R. A. (N. S.) 1040. And see In re Bjornstad, 9 Biss. 13, 18 N. B. R. 382, Fed. Cas. No. 1,453; Crawford v. Sternberg, 220 Fed. 73, 135 C. C. A. 641, 33 Am. Bankr. Rep. 677.

out of the assets of the firm, on the theory that he is now the sole owner.[285]

§ 256. Dower and Allowances to Bankrupt's Widow.—The eighth section of the bankruptcy act provides that a proceeding in bankruptcy shall not be abated by the death of the bankrupt, but that, in that event, "the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence." This does not create or extend any right of dower or allowance, but makes the right of a bankrupt's widow, and its nature and extent, depend entirely upon the local law.[286] She will therefore have the same right of dower and the same allowances as are granted by the laws of the state of his domicile under similar circumstances.[287] But if the bankrupt dies seised of realty in various states, the court of bankruptcy of the bankrupt's residence will have exclusive jurisdiction after his death to determine the right of the widow to dower in such lands.[288] As to real estate, the wife's inchoate right of dower is not defeated by the vesting of title thereto in the bankrupt's trustee. For this is only for purposes of administration, and the bankrupt himself remains seised of the land until his death for the purposes of inheritance and within the meaning of the statute.[289] And the trustee in bankruptcy may not sell the real estate free from the widow's rights, after the death of the bankrupt, nor divest her of her dower right without her consent.[290] But it is held otherwise as to personal property. After it has been delivered into the possession of a duly qualified trustee, the bankrupt ceases to be "seised or possessed" of it, so that his subsequent death will not entitle the widow to claim a third of it, as she might have done if he had not been adjudged bankrupt.[291] But it is not the duty of a trustee in bankruptcy to protect the dower rights of the bank-

285 In re Abrams, 193 Fed. 271.

286 In re McKenzie, 132 Fed. 986, 13 Am. Bankr. Rep. 227. And see Kelly v. Strange, 3 N. B. R. 8, Fed. Cas. No. 7,676; In re Hester, 5 N. B. R. 285, Fed. Cas. No. 6,437. Compare Hurley v. Devlin, 151 Fed. 919, 18 Am. Bankr. Rep. 627.

287 In re McKenzie, 142 Fed. 383, 73 C. C. A. 483, 15 Am. Bankr. Rep. 679. See In re Dicks, 198 Fed. 293, 28 Am. Bankr. Rep. 845.

288 Hurley v. Devlin, 151 Fed. 919, 18 Am. Bankr. Rep. 627.

289 Thomas v. Woods, 173 Fed. 585, 97 C. C. A. 535, 23 Am. Bankr. Rep. 132; In re Slack, 111 Fed. 523, 7 Am. Bankr. Rep. 121; Cravens v. Shippen, 77 S. W. 929, 25 Ky. Law Rep. 1322; Warford v. Noble, 9 Biss. 320, 2 Fed. 202.

290 Porter v. Lazear, 109 U. S. 84, 3 Sup. Ct. 58, 27 L. Ed. 865; In re McKenzie, 142 Fed. 383, 73 C. C. A. 483, 15 Am. Bankr. Rep. 679; Smith v. Smith, 5 Ves. 189; In re Angier, 4 N. B. R. 619, Fed. Cas. No. 388; In re Bartenbach, 11 N. B. R. 61, Fed. Cas. No. 1,068.

291 In re McKenzie, 142 Fed. 383, 73 C. C. A. 483, 15 Am. Bankr. Rep. 679; In re McKenzie, 132 Fed. 986, 13 Am. Bankr. Rep. 227; In re Slack, 111 Fed. 523, 7 Am. Bankr. Rep. 121.

rupt's wife against the consequences of her own acts prior to the bankruptcy.[292]

As to other grants made to a widow under the general name of "allowances," the court of bankruptcy has power and jurisdiction to give her what the state law allows and a state court would give. Thus, in Connecticut, the judge of the court of bankruptcy may make a reasonable allowance to the bankrupt's widow, from his estate in bankruptcy, for her support during the settlement of the estate.[293] In Ohio, the widow of a bankrupt having his domicile in that state is entitled to reside for a year in the mansion house of her deceased husband, if dower is not sooner assigned, and also to the allowance of a year's support for herself and children, these grants being in lieu of the exemptions which the husband would have been entitled to claim from the estate in bankruptcy if he had lived.[294] The widow must assert her claims in some proper way before the court of bankruptcy. To entitle her to dower it is not sufficient for her merely to intervene in a suit by the trustee in bankruptcy to set aside an alleged fraudulent conveyance, and file a suggestion of her husband's death without any further action.[295] And where a state statute provides that a wife who is granted a divorce shall be entitled to one-third of the husband's personal property absolutely, a wife who has begun an action for divorce has no such claim upon the husband's personalty, before decree, as will entitle her to enjoin the distribution of the proceeds of the property in the hands of his trustee in bankruptcy.[296]

Where the local law allows a year's support to the widow and children of a decedent out of his "estate," their right is not lost because of the fact that his estate had vested in a trustee in bankruptcy before his death,[297] nor by the fact that he had made an assignment for the benefit of his creditors within four months before his adjudication in bankruptcy.[298]

[292] Dudley v. Easton, 104 U. S. 99, 26 L. Ed. 668.

[293] In re Newton, 122 Fed. 103, 10 Am. Bankr. Rep. 345. Compare In re Seabolt, 113 Fed. 766, 8 Am. Bankr. Rep. 57.

[294] In re Parschen, 119 Fed. 976, 9 Am. Bankr. Rep. 389.

[295] Gray v. Chase, 184 Mass. 444, 68 N. E. 676.

[296] Hawk v. Hawk, 102 Fed. 679, 4 Am. Bankr. Rep. 463.

[297] Hull v. Dicks, 235 U. S. 584, 35 Sup. Ct. 152, 59 L. Ed. 372, 34 Am. Bankr. Rep. 1.

[298] In re Scott, 226 Fed. 201, 141 C. C. A. 653, 35 Am. Bankr. Rep. 746.

CHAPTER XV

EXAMINATIONS IN BANKRUPTCY

§ 257. **When Examinations May be Ordered.**—The act of Congress provides that "a court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act."[1] Moreover, with special reference to the examination of the bankrupt, it is made his duty "when present at the first meeting of his creditors and at such other times as the court shall order, to submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate."[2] The estate of an alleged bankrupt is considered as being "in process of administration" from the time of the filing of a petition in involuntary bankruptcy against him, and therefore an examination of the bankrupt or any other witness may be ordered by the court of bankruptcy, on the application of the receiver, or on the application of creditors if no receiver has been appointed, although no adjudication has yet been made,[3] more especially, it appears,

[1] Bankruptcy Act 1898, § 21a, as amended by Act Congress Feb. 5, 1903, 32 Stat. 797.

[2] Bankruptcy Act 1898, § 7, clause 9.

[3] Cameron v. United States, 231 U. S. 710, 34 Sup. Ct. 244, 58 L. Ed. 448, 31 Am. Bankr. Rep. 604; In re Weidenfeld, 254 Fed. 677, 166 C. C. A. 175, 42

if the bankrupt has delayed the making of an adjudication by his dilatory tactics.[4] But the making of an order for the examination of any other witness than the bankrupt, or of the bankrupt himself at any other time than at the first meeting of his creditors, is in the sound discretion of the court of bankruptcy, and will not be reviewed by the appellate court unless an abuse of that discretion is shown.[5]

§ 258. Who May Apply for Examination.—In providing that an application for the examination of a witness may be made by any "officer," Congress undoubtedly meant the referee and the trustee, for either of these officers may need further information to enable him to discharge his duties in any particular case. The term is also broad enough to cover the case of a receiver of the bankrupt's property appointed under the act, as he is within the definition of an "officer."[6] The bankrupt himself has the right to apply for an order for the examination of any designated witness. This may be necessary to enable him to repel fictitious or exaggerated claims against his estate, or to defeat the aims of hostile creditors who are fishing for facts on which to specify grounds of opposition to his discharge. Further, the right of application is given to creditors. Any person who has connected himself with the proceedings in that capacity, and established his status as a creditor by proving his debt, clearly has the right to call for an examination of the bankrupt or any other witness,[7] and when the bankrupt is summoned to an examination at the instance of a creditor who has proved his claim, counsel for other creditors have no right to interpose any objections to his examination.[8] But it is not necessary that the applicant should have proved his debt in the bankruptcy proceedings. It

Am. Bankr. Rep. 425; Rawlins v. Hall-Epps Clothing Co., 217 Fed. 884, 133 C. C. A. 594, 33 Am. Bankr. Rep. 237. But to warrant an order for the examination of the alleged bankrupt before adjudication, where no receiver has been appointed, the application must show some unusual situation with reference to the estate which makes an examination necessary at that time for the purpose of securing or preserving the assets of the estate. In re Stell (D. C.) 269 Fed. 1008, 46 Am. Bankr. Rep. 492.

[4] In re Weidenfeld, 254 Fed. 677, 166 C. C. A. 175, 42 Am. Bankr. Rep. 425.

[5] In re Weidenfeld, 254 Fed. 677, 166 C. C. A. 175, 42 Am. Bankr. Rep. 425.

[6] In re Fixen & Co., 96 Fed. 748, 2 Am. Bankr. Rep. 822.

[7] See Ex parte Jewett, 2 Low. 393, 11 N. B. R. 443, Fed. Cas. No. 7,303. A bankrupt summoned at the instance of a creditor who has proved his claim cannot refuse to be sworn and examined on the ground that the claim is not valid unless such invalidity has been proved. In re Winship, 7 Ben. 194, Fed. Cas. No. 17,878. Nor on the ground that he has a set-off which will extinguish the claim of the creditor at whose instance the order for examination issued. In re Kingsley, 6 Ben. 300, 7 N. B. R. 558, Fed. Cas. No. 7,818. Creditors whose claims have been protested against, if duly proved, will be entitled to an order for the examination of the bankrupt. In re Belden, 4 N. B. R. 194, Fed. Cas. No. 1,241.

[8] In re Winship, 7 Ben. 194, Fed. Cas. No. 17,878.

is held that any person who has a provable debt and who shows that he is actually a creditor of the bankrupt, by being named as a creditor in the bankrupt's schedule, or by other evidence satisfactory to the referee, is entitled to an order for the examination of the bankrupt, although he has not formally proved his claim.[9]

§ 259. Application and Order for Examination and Notice.—By the express terms of the statute, the issuance of an order to the bankrupt, or a summons to a witness, to appear and be examined must be based upon an "application." Under the act of 1867, it was decided that a creditor who desired to obtain an examination of the bankrupt must make a written application therefor, supporting the same by either a duly verified petition or an affidavit showing good cause for the granting of the order,[10] but that when the application was made by the assignee in bankruptcy, it was not necessary that it should be verified or supported, as the assignee was an officer of the court, and it was only necessary that the court should be satisfied of the bona fides of his application.[11] There is nothing in the present bankruptcy law which requires the verification of such an application, or even that it should be in writing. A creditor applying for an order for examination will do well to make a formal written application, but it is in the discretion of the referee to order the examination on a mere oral application.[12] In the case of a receiver or trustee in bankruptcy, it is held that his simple application or demand for an order or summons is all that is required to support it, and that, when a third person is to be examined, it is not necessary for the trustee to set forth, in the form of an application for the summons, the questions which are to be asked upon the examination, or the particular facts or transactions as to which he proposes to interrogate the witness.[13]

[9] In re Samuelsohn, 174 Fed. 911, 23 Am. Bankr. Rep. 528; In re Rose, 163 Fed. 636, 19 Am. Bankr. Rep. 169; In re Kuffler, 153 Fed. 667, 18 Am. Bankr. Rep. 587; In re Jehu, 94 Fed. 638, 2 Am. Bankr. Rep. 498; In re Walker, 96 Fed. 550, 3 Am. Bankr. Rep. 35. On a similar principle, where the proposed examination of the bankrupt has a bearing on the question of his discharge, it is not a necessary prerequisite to the order for such examination that the creditor applying therefor should have filed specifications in opposition to the discharge. In re Baum, 1 Ben. 274, 1 N. B. R. 5, Fed. Cas. No. 1,116. But the right of a creditor to examine the bankrupt is suspended by the creditor's acceptance of a proposed composition. In re Tifft, 18 N. B. R. 177, Fed. Cas. No. 14,032.

[10] In re Adams, 2 Ben. 503, 2 N. B. R. 95, Fed. Cas. No. 39. See In re Vetterlein, 5 Ben. 7, 4 N. B. R. 599, Fed. Cas. No. 16,926.

[11] In re McBrien, 2 Ben. 513, 2 N. B. R. 197, Fed. Cas. No. 8,665; In re Lanier, 2 N. B. R. 154, Fed. Cas. No. 8,070.

[12] In re Abbey Press, 134 Fed. 51, 67 C. C. A. 161, 13 Am. Bankr. Rep. 11. But see Craddock-Terry Co. v. Kaufman, 175 Fed. 303, 23 Am. Bankr. Rep. 724.

[13] In re Bryant, 188 Fed. 530, 26 Am. Bankr. Rep. 504; In re Fixen & Co., 96 Fed. 748, 2 Am. Bankr. Rep. 822; In re Howard, 95 Fed. 415, 2 Am. Bankr. Rep. 582.

When a petition in involuntary bankruptcy has been filed, which the bankrupt means to contest, denying the acts of bankruptcy charged, and the petitioning creditors apply for an examination of the bankrupt before any adjudication is made, the bankrupt is entitled to notice of the application and to an opportunity to resist the making of the order asked for.[14] But when the bankrupt is cited before the referee for examination before any meeting of his creditors has been held and before the appointment of a trustee, and the object of the examination is merely to obtain information on which to prepare the schedules, it is not essential to the validity of the proceeding that notice should have been given to the creditors.[15] But after the list of creditors has been filed, all those whose names appear on it, or who have otherwise made themselves parties to the proceeding, are entitled to at least ten days' notice by mail of any proposed examination of the bankrupt.[16] It is usual to combine this notice with the notice of the first meeting of creditors, by incorporating in the latter a statement that creditors may, at such meeting, examine the bankrupt. It is also proper that an examination of the bankrupt should be had to enable creditors to prepare specifications in opposition to his discharge. Notice of this examination must be given, it must be open to all creditors, and ordinarily it will be had once for all. To avoid expense and delay, the notice to creditors to attend in opposition to the discharge may embrace a notice of examination of the bankrupt.[17] But while creditors must have notice of examinations of the bankrupt, the converse is not true. When the trustee desires to examine a witness for the purpose of discovering property of the bankrupt, and causes a summons to issue, it is not necessary to give notice to the bankrupt of the time and place of such examination.[18] As to informing third parties, whose interests may be affected by an examination in bankruptcy and the orders which may be founded on it, it is said that the proceeding is administrative in character, and one in which the jurisdiction of the court is not dependent on the service of regular process, as it would be in a suit, and hence a

[14] Rawlins v. Hall-Epps Clothing Co., 217 Fed. 884, 133 C. C. A. 594, 33 Am. Bankr. Rep. 237.

[15] In re Franklin Syndicate, 101 Fed. 402, 4 Am. Bankr. Rep. 244.

[16] Bankruptcy Act 1898, § 58.

[17] In re Price, 91 Fed. 635, 1 Am. Bankr. Rep. 419.

[18] In re Levy, 1 Ben. 454, 1 N. B. R. 107, Fed. Cas. No. 8,295; In re Duncan, 8 Ben. 541, Fed. Cas. No. 4,132. Probably the bankrupt, if present, would be allowed to cross-examine the witness, particularly if evidence were being elicited which might be used against him on his application for discharge. But as neither the act nor the general orders provide for notice to the bankrupt of the examination of a third party, it would seem that he has no such right to be present and take part as will make it necessary for the trustee to give him previous notice.

notice given by mail a reasonable time before the hearing is sufficient.[19] The order for an examination is to be made by "the court." But as this term ordinarily includes the referee, unless otherwise specified, it is held that, where a bankruptcy proceeding has been referred generally to a given referee, he has jurisdiction to order a third person, such as a secured creditor, to appear before him for examination.[20] It should be noticed that the authority to summon persons for examinations in bankruptcy includes the power to order the production of books and papers.[21]

§ 260. **Process to Secure Attendance of Witness.**—Power and jurisdiction to make an order requiring the bankrupt or any other competent witness to appear and submit to examination are vested in the referee in bankruptcy.[22] In case the bankrupt is the person to be examined, an order for his attendance is made by the referee and a copy of the same is to be delivered to the bankrupt forthwith.[23] He may be required in the same order, or by a separate similar order, to produce his books of account or other papers needed for the investigation of his affairs, and a formal subpœna duces tecum is neither necessary nor proper for this purpose.[24] In the rare case where the bankrupt is a prisoner in jail, his attendance may be secured by means of the writ of habeas corpus ad testificandum. But this writ does not issue as a matter of right, on the request of creditors, but its employment rests in the discretion of the court, and it will not be granted except where it is strictly necessary, and especially when the prisoner is confined by authority of a state court.[25] If a person other than the bankrupt is to be the witness, the case is governed by General Order No. 3, which provides that "all process, summons, and subpœnas shall issue out of the court, under the seal thereof, and be tested by the clerk." The process to secure the attendance of such a witness is therefore a writ which is in the nature of a subpœna, but which is officially designated a "summons," sealed and tested as required; and which must be served

[19] In re Lewin, 103 Fed. 850, 4 Am. Bankr. Rep. 632. And see Swartz v. Frank, 183 Mo. 438, 82 S. W. 60.

[20] In re Abbey Press, 134 Fed. 51, 67 C. C. A. 161, 13 Am. Bankr. Rep. 11.

[21] In re Mendenhall, 9 N. B. R. 285, Fed. Cas. No. 9,423; In re Soloway & Katz, 195 Fed. 100, 103, 28 Am. Bankr. Rep. 225, 228; In re Ironclad Mfg. Co. (C. C. A.) 201 Fed. 66.

[22] In re Pioneer Paper Co., 7 N. B. R. 250, Fed. Cas. No. 11,178; In re Brandt, 2 N. B. R. 215, Fed. Cas. No. 1,812; In re Lanier, 2 N. B. R. 154, Fed. Cas. No. 8,070; In re Abbey Press, 134 Fed. 51, 67 C. C. A. 161, 13 Am. Bankr. Rep. 11.

[23] Official Form No. 28.

[24] In re Soloway & Katz, 195 Fed. 103, 28 Am. Bankr. Rep. 228.

[25] In re Thaw, 166 Fed. 71, 91 C. C. A. 657, 21 Am. Bankr. Rep. 561; In re Thaw, 172 Fed. 288, 22 Am. Bankr. Rep. 687.

on the witness in the usual manner.[26] If the witness fails or refuses to appear, he is to be dealt with by the judge, on a certificate of the facts from the referee, and may be punished as for contempt; but an application to the court for an attachment in the first instance, without such certificate, is irregular and improper.[27] It has also been held that orders requiring the attendance of the bankrupt or other witnesses, at a designated time and place, for the statutory examination, may be considered as "process" within the meaning of the last clause of General Order No. 3, that "blanks, with the signature of the clerk and the seal of the court, may, upon application, be furnished to the referees." And where applications to the referee for summons to witnesses, in cases before him, become so numerous that it would be exceedingly irksome to fill out each summons and send it by a messenger to the clerk's office to procure the signature of the clerk and the seal of the court, it will be a proper case for directing the clerk to furnish the blanks to the referee.[28]

§ 261. **Examination of Non-Resident Witnesses.**—In the matter of securing the attendance of a witness in bankruptcy proceedings, the court may exercise all the power conferred upon it in ordinary civil cases, and hence the process may run into another district.[29] But the bankruptcy law provides that no person shall be required to attend as a witness before a referee "at a place outside of the state of his residence and more than one hundred miles from the place of such residence." [30] The courts have virtually reconstructed this clause by reading it disjunctively instead of conjunctively. And it is held that a person cannot be compelled to leave the state where he resides, to be a witness before a referee in bankruptcy, though his residence is less than one hundred miles from the place of the hearing,[31] and that one cannot be compelled to attend an examination in bankruptcy at a distance of

[26] Official Form No. 30. See In re Bellamy, 1 Ben. 390, 1 N. B. R. 64, Fed. Cas. No. 1,266. Where a witness is actually present before the referee in bankruptcy for examination when an order that he shall be sworn is made, the fact that the subpœna issued and served upon him was not under seal is immaterial. In re Abbey Press, 134 Fed. 51, 67 C. C. A. 161, 13 Am. Bankr. Rep. 11.

[27] In re Kerber, 125 Fed. 653, 10 Am. Bankr. Rep. 747.

[28] In re Bellamy, 1 Ben. 390, 1 N. B. R. 64, Fed. Cas. No. 1,266.

[29] In re Woodward, 8 Ben. 112, 12 N. B. R. 297, Fed. Cas. No. 18,000. See Rev. Stat. U. S. § 876.

[30] Bankruptcy Act 1898, § 41. An alleged bankrupt, although he has removed from the district where involuntary proceedings are pending against him, yet, when in the district in attendance on such proceedings, is subject to all lawful orders of the court therein, including an order to appear for examination. In re Havens, 255 Fed. 478, 166 C. C. A. 554, 42 Am. Bankr. Rep. 734.

[31] In re Cole, 133 Fed. 414, 13 Am. Bankr. Rep. 300.

more than one hundred miles from where he lives, though it is within the same state.[32] But where this condition exists, the witness may be required to appear before a designated referee in the district where the witness lives, and in this case the referee conducts the examination in the capacity and with the powers of a referee in bankruptcy, and not merely as an examiner with the powers granted under the general equity rules.[33] Or the trustee or a creditor may apply to the court of bankruptcy in the district where the witness lives, and that court will have ancillary jurisdiction to order the examination within its own territory.[34] Another course is to take the evidence of the witness by deposition,[35] as to which the statute provides that the right to take depositions in bankruptcy proceedings shall be determined and enjoyed according to the general laws of the United States relating to the same subject, except that notice of the taking of depositions shall always be filed with the referee, and that when depositions are to be taken in opposition to the allowance of a claim, notice shall also be served upon the claimant, and when in opposition to a discharge, notice shall also be served upon the bankrupt.[36] It is in this connection that we discover the significance of the twenty-first section of the act, which provides that a witness in bankruptcy proceedings may be ordered to appear for examination "in court or before a referee or the judge of any state court." For it is only when the evidence of the witness is to be taken by deposition that the examination could be conducted by a state judge.[37] When a commission is issued by a court of bankruptcy and sent into another state, the circuit court in such state may compel a witness to testify or punish him for refusal.[38] If the witness resides in

[32] In re Hemstreet, 117 Fed. 568, 8 Am. Bankr. Rep. 760.

[33] In re Sturgeon, 139 Fed. 608, 71 C. C. A. 592, 14 Am. Bankr. Rep. 681; In re Williams, 123 Fed. 321, 10 Am. Bankr. Rep. 538; In re Kyler, 2 Ben. 414, 2 N. B. R. 649, Fed. Cas. No. 7,956.

[34] In re Sutter Bros., 131 Fed. 654, 11 Am. Bankr. Rep. 632. Compare In re Williams, 123 Fed. 321, 10 Am. Bankr. Rep. 538.

[35] Under Bankruptcy Act 1898, § 21b, taken in connection with Rev. Stat. § 863, the court of bankruptcy is authorized to take the depositions of witnesses who reside more than 100 miles from the place of trial, whether within or without the state. In re Washington Steel & Bolt Co. (D. C.) 210 Fed. 984, 32 Am. Bankr. Rep. 153.

[36] Bankruptcy Act 1898, § 21b. See In re Robinson (D. C.) 179 Fed. 724, 24 Am. Bankr. Rep. 617. The laws of the United States relating to the taking of depositions are found in Rev. Stat. §§ 863–870, 875, 1750.

[37] Rev. Stat. U. S. § 863, provides that depositions may be taken before "any chancellor, justice, or judge of a supreme or superior court, or judge of a county court or court of common pleas of any of the United States."

[38] In re Johnston, 14 N. B. R. 569, Fed. Cas. No. 7,423. On an application for attachment of witnesses for contempt in not making answers on examination under a commission sent by the bankruptcy court into another district and state, the attachment will be refused where no written interrogatories

a foreign country, his testimony cannot be taken upon a deposition, but a commission must issue.[39]

§ 262. **Who Subject to Examination; The Bankrupt.**—The bankrupt, "when present at the first meeting of his creditors, and at such other times as the court shall order," is required to "submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate."[40] Disobedience on the part of a bankrupt to an order of the court requiring him to appear for examination, or refusal to be sworn or to answer a proper question, or to produce books and papers, is a contempt of court which may be punished, and the bankrupt's compliance compelled, by fine and imprisonment.[41] If the bankrupt attempts to leave the district, in order to avoid examination, he may be arrested and held until he has been examined or given bail for his appearance.[42] On the other hand, he cannot be required to attend for the purpose of an examination at any place more than one hundred and fifty miles distant from his home or principal place of business, unless ordered by the court for cause shown, and although he cannot demand the fees of a witness, as a condition to his being sworn,[43] yet, by the express terms of the statute, he "shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence." (Section 7, clause 9, proviso.) Creditors must have at last ten days' notice by mail of all examinations of the bankrupt (Section 58), and the bankrupt cannot offer terms of composition to his creditors until after he has been examined in open court or at a meeting of creditors (Section 12).

As to the stage of the proceedings at which an examination of the

accompanied the commission, and no information is furnished as to the particular inquiry. In re Glaser, 2 N. B. R. 398, Fed. Cas. No. 5,476.

[39] Cortes Co. v Tannhauser, 18 Fed. 667.

[40] Bankruptcy Act 1898, § 7, cl. 9.

[41] Bankruptcy Act 1898. § 2, cl. 13. See In re Carpenter, 1 N. B. R. 299, Fed. Cas. No. 2,427; In re Holt, 3 N. B. R. 241, Fed. Cas. No. 6,646; In re Rosenfield, 1 N. B. R. 319, Fed. Cas. No. 12,059; In re Allen, 13 Blatchf. 271, Fed. Cas. No. 208; In re Winship, 7 Ben. 194, Fed. Cas. No. 17,878; In re Rosenblum (D. C.) 268 Fed. 381, 45 Am. Bankr. Rep. 584.

[42] Bankruptcy Act 1898, § 9b. And where a bankrupt who has been ordered to submit to a further examination departs from the district before the time appointed, without an examination, his discharge will not be granted until he has duly submitted to the examination. In re Kingsley, 16 N. B. R. 301, Fed. Cas. No. 7,820.

[43] In re Okell, 2 Ben. 144, 1 N. B. R. 303, Fed. Cas. No. 10,474.

bankrupt may be had, it was shown above (§ 257) that he may be summoned for this purpose at any time after the filing of a petition against him, even though no adjudication has yet been made. Under the former law, it was held that the bankrupt could not be compelled to submit to an examination after he had received his discharge, or at least after the expiration of the time within which an application to set aside the discharge might be made.[44] Under the present act, the opinion has been advanced that a creditor or the trustee has the right, even after the discharge of the bankrupt, to examine him to ascertain whether he has concealed any property from his trustee, and this right continues for a year, or during the period within which the discharge could be revoked.[45]

§ 263. Same; The Bankrupt's Wife.—The bankruptcy statute of 1867 provided that "for good cause shown, the wife of any bankrupt may be required to attend before the court to the end that she may be examined as a witness; and if she does not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he proves to the satisfaction of the court that he was unable to procure her attendance."[46] No such provision was found in the act of 1898 as originally enacted, but the wife of the bankrupt was undoubtedly included in the power of the court to order the appearance for examination of "any designated person." But she could not be examined unless she was, in the words of the law, a "competent witness" (that is, for or against her husband) "under the laws of the state in which the proceedings are pending."[47] And where, by the law of the state, a wife could not be a witness for or against her husband, it was held that she could not be required, in proceedings in bankruptcy against her husband, to testify concerning property in her possession alleged to have been conveyed to her in fraud of the bankrupt's creditors, though it was thought that the trustee in bankruptcy, seeking to recover such property, might proceed by a bill of discovery against the wife.[48] But on the other hand, if competent as a witness, the wife of the bankrupt might be interrogated as to money or other property in her possession,

[44] In re Jones, 6 N. B. R. 386, Fed. Cas. No. 7,449; In re Witkowski, 10 N. B. R. 209, Fed. Cas. No. 17,290; In re Dole, 11 Blachf. 499, 9 N. B. R. 193, Fed. Cas. No. 3,964. Compare, In re Heath, 7 N. B. R. 448, Fed. Cas. No. 6,304.

[45] In re Peters, 1 Nat. Bankr. News, 165, per Olmstead, Referee.

[46] Rev. Stat. U. S. § 5088. See In re Van Tuyl, 3 Ben. 237, 2 N. B. R. 579. Fed. Cas. No. 16,879; In re Selig, 1 N. B. R. 186, Fed. Cas. No. 12,641.

[47] Bankruptcy Act 1898, § 21.

[48] In re Fowler, 93 Fed. 417, 1 Am. Bankr. Rep. 555; In re Jefferson, 96 Fed. 826, 3 Am. Bankr. Rep. 174; In re Mayer, 97 Fed. 328, 3 Am. Bankr. Rep. 222.

and as to how and when the same was received or acquired, provided only that the testimony showed such questions to be reasonably pertinent to the subject of inquiry, which is, in a general sense, the nature and location of the assets of the bankrupt.[49]

But an amendment to the bankruptcy law was enacted by Congress in 1903, which materially changed the law on this point. On the one hand, it removed the requirement that the wife should be a competent witness under the laws of the state. On the other hand, it limited the scope of her examination. As at present in force, the statute provides that the court of bankruptcy may "require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: Provided, that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt." [50] It is said, however, that a certain latitude must be permitted in her examination, and if there is reasonable ground therefor, she may be interrogated to determine whether a business conducted in her name is in fact hers or the bankrupt's, and may be asked such questions as are pertinent to that inquiry.[51] But the bankrupt's wife cannot be required to testify as to mere confessions or admissions of her husband in regard to his dealings with third persons. There is nothing in the act to destroy the privilege of such confidences.[52] If the wife of the bankrupt, being duly summoned to appear and be examined, fails or refuses to attend before the referee, or declines to be sworn or to answer any proper question, she is to be dealt with as any other witness, that is, by an attachment to enforce her attendance, and punishment as for contempt if she will not respond to the questions. [53]

§ 264. **Same; Other Witnesses.**—Any person who possesses information concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under the law, may be summoned for examination as a witness. This process is meant primarily

[49] In re Foerst, 93 Fed. 190, 1 Am. Bankr. Rep. 259; In re Post, 1 Nat. Bankr. News, 527.

[50] Act Cong. Feb. 5, 1903, 32 Stat. 797, amending Bankruptcy Act 1898, § 21a.

[51] In re Worrell, 125 Fed. 159, 10 Am. Bankr. Rep. 744.

[52] In re Jefferson, 96 Fed. 826, 3 Am. Bankr. Rep. 174; In re Gilbert, 1 Low, 340, Fed. Cas. No. 5,410.

[53] In re Bellis, 38 How. Prac. (N. Y.) 88, 3 N. B. R. 270, Fed. Cas. No. 1,276; In re Woolford, 4 Ben. 9, 3 N. B. R. 444, Fed. Cas. No. 18,029; In re Van Tuyl, 2 N. B. R. 70, Fed. Cas. No. 16,881.

to aid the trustee in discovering and collecting the assets. But any creditor of the estate may also apply for the examination of a third person, though his right to do so is not unqualified, it being the duty of the court to exercise its discretion as to awarding the summons asked for.[54] This examination of a third person is a proceeding entirely independent of the examination of the bankrupt himself at the instance of the creditors; and a witness cannot object to being examined on the ground that there has not yet been any examination of the bankrupt.[55] Nor can he object to being sworn and examined on the ground that no issue has been made up for determination, or that there is no fact in dispute, and that therefore he cannot be questioned in the character of a "witness." The object of such an examination is to obtain information as to the bankrupt's property and conduct, not to prove or disprove some controverted fact.[56] A person summoned for examination in a proceeding in bankruptcy, on the application of a temporary receiver appointed by the court of bankruptcy, cannot refuse to attend or be examined on the ground that the order appointing the receiver was erroneous or improvidently made.[57] A creditor, as well as any other person, may be subject to this examination and may be interrogated as to his own claim against the bankrupt, to the end that it may be stricken out if the evidence shows that it cannot be supported.[58] So also, an assignee for the benefit of creditors or a trustee in insolvency appointed by a state court, though more than four months before the bankrutcy proceedings, may be summoned for examination and interrogated concerning the disposition made by him of the bankrupt's assets.[59] Also the trustee in bankruptcy may be subpœnaed and required to testify in the same manner as any other witness. But he is not subject to examination at any time on the mere motion of a creditor, and an order for his examination will not be granted unless it is asked upon

[54] In re Andrews, 130 Fed. 383, 12 Am. Bankr. Rep. 267.

[55] In re Levy, 1 Ben. 454, 1 N. B. R. 107, Fed. Cas. No. 8,295; In re Fredenberg, 2 Ben. 133, 1 N. B. R. 268, Fed. Cas. No. 5,075.

[56] In re Blake, 2 N. B. R. 10, Fed. Cas. No. 1,492.

[57] In re Fixen & Co., 96 Fed. 748, 2 Am. Bankr. Rep. 822. See In re Feinberg, 3 Ben. 162, 2 N. B. R. 425, Fed. Cas. No. 4,716.

[58] In re Kyler, 2 Ben. 414, 2 N. B. R. 649, Fed. Cas. No. 7,956; In re Cliffe, 97 Fed. 540, 3 Am. Bankr. Rep. 257. Where a witness is the assignee of certain debts due from the bankrupt to his creditors, it is not a sufficient reason for him to refuse to testify before the referee as to the actual consideration paid for the claims, that the consideration did not come from the bankrupt or his estate, and that to answer would be revealing the private business of the witness unnecessarily and prejudice him in another suit then pending. In re Trask, 7 Ben. 60, Fed. Cas. No. 14,141.

[59] In re Pursell, 114 Fed. 371, 8 Am. Bankr. Rep. 96.

some issue regularly referred to the referee.[60] The law also provides that a person shall be liable to punishment as for contempt, if he shall "neglect to produce, after having been ordered to do so, any pertinent document," and that the word "document" shall include any book, deed, or instrument in writing.[61] A receiver appointed by a state court, against whom a suit is pending by the trustee in bankruptcy for the possession of the bankrupt's books, is not privileged to refuse to produce the books and testify before the referee.[62] And it is held that, where it is alleged that the bankrupt's stock of goods was sold by him to a certain corporation without adequate consideration, the sale being induced by the fraud of the vendee, a receiver of the bankrupt's estate has the right, under process from the court of bankruptcy, to examine any books or documents of such corporation showing or tending to show its receipt or disposition of said stock, or in any other way relating thereto.[63] So also, where a corporation organized as the successor of a partnership is a mere fiction, its business and assets being those of the partnership, and the firm is adjudged bankrupt, the books of the corporation must be submitted for examination in the bankruptcy proceedings, if demanded.[64]

The officers of a corporation represent it and may be required to submit to an examination in bankruptcy proceedings against the corporation.[65]

§ 265. Second Examination of Bankrupt.—It is the right of creditors to have a full disclosure, on oath, by the bankrupt of everything relating to his estate, and with such detail as may be necessary or useful to the trustee in the discharge of his duties, and it is the duty of the bankrupt to submit to such examination promptly on reasonable application. Moreover, each of the creditors has equally the right to examine the bankrupt, and the fact that one of the creditors has already exercised this privilege is not necessarily a reason why the bankrupt should not again be examined at the instance of another creditor. A full and fair opportunity must be allowed to all the creditors to inquire into the

[60] In re Smith, 14 N. B. R. 432, Fed. Cas. No. 12,988.

[61] Bankruptcy Act 1898, § 41a; and § 1, cl. 13. And see In re United States Graphite Co., 159 Fed. 300, 20 Am. Bankr. Rep. 280.

[62] In re Hulst, 7 Ben. 40, Fed. Cas. No. 6,864. But a state prosecuting officer will not be required to deliver to a receiver or trustee in bankruptcy books and papers which he is about to use, and needs for use, in a criminal proceeding. In re Mandel (D. C.) 224 Fed. 642, 35 Am. Bankr. Rep. 386.

[63] In re Fixen & Co., 96 Fed. 748, 2 Am. Bankr. Rep. 822.

[64] In re Horgan, 97 Fed. 319; affirmed, 98 Fed. 414, 39 C. C. A. 118, 3 Am. Bankr. Rep. 253.

[65] Powell v. Pangborn, 161 App. Div. 453, 145 N. Y. Supp. 1073; In re Fred C. Henderson, Inc. (D. C.) 266 Fed. 254, 44 Am. Bankr. Rep. 446.

matters pertinent to such investigation, and it is unquestionably within the authority of the court to order the bankrupt to appear and be examined a second time, or as often as proper occasion for it may be found to exist.[66] At the same time, the court, in the exercise of a sound discretion, should so regulate the time and manner and course of the examinations as to protect the bankrupt from unnecessary annoyance or oppression and delay. Thus, the court may order all the creditors to unite in one and the same examination, if that seems the proper course. And when the bankrupt has once fully submitted to an examination, he has a right to be protected against unreasonable demands upon his time for further examination, and after ample opportunity has been afforded and an apparently full examination had, a second examination will not be ordered unless some substantial reason for such an order is presented and established.[67] Where an examination of the bankrupt is abruptly terminated by the failure of the trustee's counsel to appear, and an order for a new examination is taken, the bankrupt cannot refuse to attend or to testify.[68]

§ 266. Conduct of the Examination.—It is provided by the general orders in bankruptcy that "the examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witness shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law."[69] In examinations in bankruptcy, as in oth-

[66] In re Bryant, 188 Fed. 530, 26 Am. Bankr. Rep. 504; In re Mellen, 97 Fed. 326, 3 Am. Bankr. Rep. 226; In re Vogel, 5 N. B. R. 393, Fed. Cas. No. 16,984; In re Brandt, 2 N. B. R. 345, Fed. Cas. No. 1,813.

[67] In re Frisbie, 13 N. B. R. 349, Fed. Cas. No. 5,131; In re Adams, 3 Ben. 7, 2 N. B. R. 272, Fed. Cas. No. 40; In re Isidor, 2 Ben. 123, 1 N. B. R. 264, Fed. Cas. No. 7,105; In re Gilbert, 1 Low. 340, 3 N. B. R. 152, Fed. Cas. No. 5,410.

[68] In re Van Tuyl, 2 N. B. R. 70, Fed. Cas. No. 16,881.

[69] General Order No. 22. See In re Dunn, 9 N. B. R. 487, Fed. Cas. No. 4,173. Explicit authority to the referee to administer the oath to witnesses, and to conduct the examination generally, is found in section 38, clause 2, of the act. And see United States v. Ambrose, 2 Fed. 556. The attorney for the trustee in bankruptcy may act as attorney for the creditors in the examination of the bankrupt. In re Levy, 1 N. B. R. 184, Fed. Cas. No. 8,299. Where an attorney offers to examine the bankrupt in behalf of a creditor, and it appears that his power of attorney has been revoked, it is not error for the referee to refuse the attorney the right to examine the bankrupt as to the circumstances under which the revocation of his power of attorney had been obtained. In re Tifft, 17 N. B. R. 550, Fed. Cas. No. 14,030. On the examination of a witness respecting the bankrupt's estate, on the application of a creditor, it is held that other creditors have no right to intervene and object to questions asked. In re Stuyvesant Bank, 6 Ben. 33, 7 N. B. R. 445, Fed. Cas. No. 13,582. As to the right of counsel for one witness to cross-examine another witness, and the referee's discretion in allowing or refusing it, see In re Jordan, 2 Nat. Bankr. News, 640.

er proceedings, the trustee is the trustee of all the creditors, and primarily represents them all.[70] But an examination of witnesses before a referee is a "proceeding in bankruptcy" before a court, and every creditor of the bankrupt is a party in interest and entitled to participate therein.[71] But the word "creditor" does not include the agent, attorney in fact, or proxy of a creditor, and a creditor cannot appoint a representative who is not an attorney at law, to examine the witnesses before the referee.[72] Although the Bankruptcy Act gives latitude in an examination of this kind, it does not otherwise abrogate the rule as to the examination and cross-examination of witnesses which prevails in the federal courts.[73] And it is held that this rule applies to the examination of the bankrupt himself as well as to that of any other witness, and consequently, when the bankrupt has been examined by a creditor or by the trustee, he may be cross-examined by his own counsel so far as may be necessary to explain or qualify any matters brought out on the direct examination which may seem to bear unfavorably upon his conduct or dealings, or which are obscure.[74] The rules also provide that "a deposition taken upon an examination before a referee shall be taken down in writing by him or under his direction, in the form of a narrative, unless he determines that the examination shall be by question and answer. When completed, it shall be read over to the witness and signed by him in the presence of the referee." [75] It has been held that the referee, as a judicial officer, is not required either by custom, the bankruptcy act, or the rules, to take the notes of testimony personally, or to incur the expense of clerical or stenographic aid therein for the benefit of a creditor examining the bankrupt, without indemnity therefor. He should supervise or direct the taking of testimony at the expense of the parties desiring it, or he may allow it to be taken by the parties themselves.[76] But the referee, upon the application of the trus-

[70] Mechanics' & Traders' Ins. Co. v. McVay, 142 Ark. 522, 219 S. W. 34.

[71] The Prussian (D. C.) 255 Fed. 857, 43 Am. Bankr. Rep. 13.

[72] In re Looney (D. C.) 262 Fed. 209, 44 Am. Bankr. Rep. 542.

[73] In re Kinnane Co. (D. C.) 217 Fed. 488, 33 Am. Bankr. Rep. 243.

[74] In re Noyes, 2 Low. 352, 11 N. B. R. 111, Fed. Cas. No. 10,370; In re Leachman, 1 N. B. R. 391, Fed. Cas. No. 8,157; In re Levy, 1 Ben. 496, 1 N. B. R. 136, Fed. Cas. No. 8,296. Compare In re Bragg, Fed. Cas. No. 1,799.

[75] General Order No. 22. In this order, the word "deposition" applies to all hearings in bankruptcy matters before a referee, in which the bankrupt or other witnesses are examined, and all such hearings must be taken down in writing, read over to the witness, and signed by him. In re Post (D. C.) 256 Fed. 236, 43 Am. Bankr. Rep. 136. The examining party has the right to insist that the examination shall be reduced to writing. In re Jackson, 8 N. B. R. 424, Fed. Cas. No. 7,128. A witness, having been examined and his testimony taken down, is entitled to read over his testimony before being required to sign it. In re Waters-Colver Co. (D. C.) 212 Fed. 761, 32 Am. Bankr. Rep. 379.

[76] In re Warszawiak, 1 Nat. Bankr. News, 135.

tee in bankruptcy, may authorize the employment of a stenographer to report and transcribe the proceedings at the expense of the estate.[77] When this is done, the testimony of the witness will be taken down by question and answer, and the hearing will be adjourned until the stenographer has transcribed his notes, after which the deposition should be read over to the witness and signed by him in the presence of the referee. If a witness should refuse to sign his deposition after it has been transcribed and read to him, it is probable that he might be required to do so by an order, disobedience to which would be a contempt.[78] The bankrupt cannot require the referee to have his testimony taken down in longhand when the trustee furnishes a stenographer.[79]

The referee has a general control over the conduct and course of the examination; but it is said that he has no authority to limit in advance the time within which the examination must be concluded.[80] He may adjourn the examination for sufficient cause,[81] and although he is required to certify to the judge for decision questions arising in the course of the proceeding, he may properly refuse to suspend the examination which is pending until the decision of such questions, at least where no creditor is at that time entitled to priority.[82]

§ 267. Same; Right to Counsel.—A stranger to the proceedings (that is, one who is neither the bankrupt himself nor a creditor) when summoned to appear and be examined in bankruptcy, at the instance of the trustee or the creditors, has no right to have the attendance and advice of counsel at his examination.[83] Neither is a creditor of the bankrupt a "party" to the proceeding, in any such sense as to entitle him to interfere with it or be represented in it by counsel, or at least it is in the judicial discretion of the referee to permit or refuse such representation.[84] But in the case of the bankrupt himself, it is different. The rule is well settled that he is entitled to be attended by his counsel on his examination, and that the attorney may interpose objections to

77 Bankruptcy Act 1898, § 38, cl. 5.

78 See Bankruptcy Act 1898, § 41; Arnold v. Kearney, 29 Fed. 820.

79 In re Frey, 9 Ben. 185, Fed. Cas. No. 5,114.

80 In re Tift, 17 N. B. R. 421, Fed. Cas. No. 14,036; In re Waitzfelder, 8 Ben. 423; Fed. Cas. No. 17,047.

81 In re Robinson, 2 N. B. R. 516, Fed. Cas. No. 11,942.

82 In re Tifft, 17 N. B. R. 550, Fed. Cas. No. 14,030.

83 In re Emigh (D. C.) 243 Fed. 988, 40 Am. Bankr. Rep. 277. In re Feinberg, 3 Ben. 162, 2 N. B. R. 425, Fed. Cas. No. 4,716; In re Fredenberg, 2 Ben. 133, 1 N. B. R. 268, Fed. Cas. No. 5,075; In re Feeny, 1 Hask. 304, Fed. Cas. No. 4,715; In re Stuyvesant Bank, 6 Ben. 33, 7 N. B. R. 445, Fed. Cas. No. 13,582; In re Schonberg, 7 Ben. 211, Fed. Cas. No. 12,477; In re Comstock, 3 Sawy. 517, Fed. Cas. No. 3,080; In re Howard, 95 Fed. 415, 2 Am. Bankr. Rep. 582.

84 In re Abbey Press, 134 Fed. 51, 67 C. C. A. 161, 13 Am. Bankr. Rep. 11; In re Comstock, 3 Sawy. 517, 13 N. B. R. 193, Fed. Cas. No. 3,080. But see The Prussian (D. C.) 255 Fed. 857, 43 Am. Bankr. Rep. 13, holding that the exam-

any improper questions propounded to the bankrupt.[85] But the bankrupt has no absolute right to consult with his counsel before answering any given questions, or to take his advice as to the necessity of his answering the question or the form of his answer. This privilege may be allowed to him by the referee, if the circumstances render it proper, but it cannot be claimed as of right. The referee has a discretionary power to allow such a consultation of the bankrupt with his counsel, and whether or not it shall be allowed must be determined by him according to the circumstances of each particular case.[86] On this point it has been said: "There may be a case in which such a privilege might or should be allowed, as, for example, where the examination might implicate the bankrupt in a criminal charge, or require the disclosure of facts against which he is protected by law. But even in such a case, the presence of the bankrupt's counsel will generally, if not always, furnish all the protection needed without the allowing of a private consultation." [87]

§ 268. **Objections to Questions and Rulings Thereon.**—Objections to questions may be raised in the usual manner and by any one qualified to object. Where the bankrupt is an attorney, he has the right to raise any question on his examination which an attorney for him could raise, and he is not in contempt for refusal to answer questions to which he presents in good faith well-founded objections.[88] The general orders in bankruptcy provide that the referee "shall note upon the deposition any question objected to, with his decision thereon, and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just." [89] The corresponding general order (No. 10) under the act of 1867 provided that the register should note upon the deposition the objections made to any question, but should not have power to decide on the competency, materiality, or relevancy of the question, and consequently he could not overrule or exclude any question.[90] The present practice is for the referee, when an objection is interposed, to incorporate in the deposition the question

ination of witnesses before a referee is a "proceeding in bankruptcy" before a court, and that every creditor of the bankrupt is a party in interest and entitled not only to participate in the examination but to the presence of counsel in his behalf

[85] In re Tanner, 1 Low. 215, 1 N. B. R. 316, Fed. Cas. No. 13,745.

[86] In re Patterson, 1 N. B. R. 150, Fed. Cas No. 10,819; In re Tanner, 1 Low. 215, 1 N. B. R. 316, Fed. Cas. No. 13,745; In re Judson, 2 Ben. 210, 1 N. B. R. 364, Fed. Cas. No. 7,562; In re Collins, 1 N. B. R. 551, Fed. Cas. No. 3,008; In re Lord, 3 N. B. R. 243, Fed. Cas. No. 8,502.

[87] In re Collins, 1 N. B. R. 551, Fed. Cas. No. 3,008.

[88] In re Shaffer, 104 Fed. 982, 4 Am. Bankr. Rep. 728.

[89] General Order No. 22.

[90] In re Levy, 1 Ben. 496, 1 N. B. R. 136, Fed. Cas. No. 8,296; In re Patterson, 1 N. B. R. 147, Fed. Cas. No. 10,818;

asked, the fact and grounds of objection, and his ruling on the objection, and then, even though he decides the question to be inadmissible, to allow and require it to be answered and the answer to be entered in the deposition. But an exception is made in the case of clearly privileged testimony, and also as to evidence which is so unmistakably incompetent, irrelevant, or immaterial that it would be an abuse of process or of the power of the court to compel its production or permit its introduction.[91]

§ 269. **Scope of the Inquiry.**—In reference to the examination of the bankrupt, it is provided that he may be interrogated "concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate."[92] Under this broad provision, the bankrupt may be examined substantially as under a reference upon a creditor's bill, or in proceedings supplementary to execution.[93] All questions are proper which elicit answers tending to show an interest of the bankrupt in property at the time the petition was filed.[94] And it is the duty of the bankrupt to disclose whatever it may concern any parties interested to know concerning his debts, business, or estate.[95] Thus, he may be required to make known to the trustee the combination of a safe alleged to contain property of his.[96] But there are limits to the range which this examination may take, and no questions are proper which are not relevant to the matters described in the statute as the subjects of the inquiry. Thus, if the bankrupt has testified that he is not the owner of certain property, questions relating to the identity

In re Rosenfield, 1 N. B. R. 319, Fed. Cas. No. 12,059; In re Bond, 3 N. B. R. 7, Fed. Cas. No. 1,618; In re Koch, Fed. Cas. No. 7,916. See In re Reakirt, 7 N. B. R. 329, Fed. Cas. No. 11,614.

[91] Supra, § 72.

[92] Bankruptcy Act 1898, § 7, clause 9. The examination of an alleged bankrupt which can be ordered under § 21a of the Act is to show the condition of the estate, and enable the court to discover its extent and whereabouts and get possession of it, and such examination cannot be employed to obtain evidence for use on the controverted issue of insolvency, examination for the latter purpose being authorized by § 3d. In re Stell (D. C.) 269 Fed. 1008, 46 Am. Bankr. Rep. 492.

[93] In re Pioneer Paper Co., 7 N. B. R. 250, Fed. Cas. No. 11,178.

[94] In re Carson, 2 N. B. R. 107, Fed. Cas. No. 2,461. A question as to whether a bankrupt did not make a certain statement in writing as to his assets within a few months prior to his bankruptcy, on which he obtained property on credit from certain of his creditors, is material and proper to be asked him on his examiuation. In re Jacobs & Roth, 154 Fed. 988, 18 Am. Bankr. Rep. 728.

[95] In re Cooke, 10 N. B. R. 126, Fed. Cas. No. 3,168. He may be examined on the question whether a composition offered to his creditors should be accepted by them and confirmed by the court, as being for the best interest of all concerned. In re Ash, 17 N. B. R. 19, Fed. Cas. No. 571.

[96] In re Hooks Smelting Co., 138 Fed. 954, 15 Am. Bankr. Rep. 83.

of the owner, and the duration, extent, and character of the ownership of such property, are not relevant.[97] But while the debtor cannot be interrogated as to property in which he clearly has no interest, he is subject to examination as to all property in which he may have an interest. That is, it is not necessary for the examining creditor or trustee first to show that the bankrupt actually has an interest in the property, before questioning him about it, but only to show that he may have such an interest.[98] For similar reasons, it is held that a creditor who has filed proof of a debt, claiming that it was contracted by fraud, cannot examine the bankrupt as to the facts constituting the alleged fraud, the inquiry being irrelevant to the scope and purpose of the examination.[99] Neither is it proper, on the examination of the bankrupt, to interrogate him as to any property which he may have acquired since the commencement of the proceedings. For any such property is his own, and is not affected by the bankruptcy[100] Nor can he be questioned as to his prospects or future plans or expectations, since these have no bearing on the proceeding in bankruptcy.[101] But on the other hand, a creditor who is examining the bankrupt is not limited in his questions to transactions taking place since his own debt accrued,[102] and generally, the examination is not limited to facts and transactions occurring within four months prior to the bankruptcy, but may be directed to matters anterior to that time, if the circumstances in question

[97] In re Van Tuyl, 1 N. B. R. 636, Fed. Cas. No. 16,880.

[98] In re Bonesteel, 2 N. B. R. 330, Fed. Cas. No. 1,628. Where the examination has shown that the wife of the bankrupt holds valuable property transferred to her by third persons after his insolvency, and enough has come out to furnish reasonable support for the theory that the consideration for such transfer moved from the bankrupt himself, or that the transfer to the wife was a mere cover, then it is the right of the creditor to examine the bankrupt fully and minutely with reference to the whole transaction, and the bankrupt must answer all pertinent questions. Idem. And see In re Clark, 4 N. B. R. 237, Fed. Cas. No. 2,805. So where a bankrupt stated that he had sold certain property and used part of the proceeds in paying a debt for money borrowed, all the circumstances of the transaction are open to inquiry on the bankrupt's examination by his creditors. In re Brundage, 100 Fed. 613, 4 Am. Bankr. Rep. 47.

[99] In re Wright, 2 Ben. 509, 2 N. B. R. 142, Fed. Cas. No. 18,065. Compare In re Koch, 1 N. B. R. 549, Fed. Cas. No. 7,916.

[100] In re Levy, 1 Ben. 496, 1 N. B. R. 136, Fed. Cas. No. 8,296; In re Rosenfield, 1 N. B. R. 319, Fed. Cas. No. 12,059. But he may be asked questions tending to show that, within a short time after filing his petition, he had money in his possession not acquired by the transaction of any business subsequent to such filing. In re McBrien, 3 Ben. 481, 3 N. B. R. 344, Fed. Cas. No. 8,666. And if he has acquired valuable property during the proceedings under suspicious circumstances, he may be questioned concerning it. In re Walton, 1 Nat. Bankr. News, 533. And see In re Tudor, 96 Fed. 942, 2 Am. Bankr. Rep. 808.

[101] In re White, 2 Nat. Bankr. News, 536.

[102] In re Craig, 3 Ben. 333, 3 N. B. R. 100, Fed. Cas. No. 3,322.

will throw any light upon the facts or issues pertinent to the proceedings.[103]

As to witnesses other than the bankrupt himself, the law provides that they may be examined concerning the "acts, conduct, or property of the bankrupt." The examination of a third person in a bankruptcy proceeding differs from the examination of a witness on the trial of a case. In the latter, there can be no examination of "witnesses" until there has been an issue made up and some point of fact in controversy, and then the examination must be confined to such issue or fact. But in bankruptcy, the witness may be interrogated generally as to the "acts, conduct, and property of the bankrupt," the object being to obtain information touching the estate of the bankrupt, its condition and location, and his conduct as affecting his property and his disposal of it, in order that the necessary steps may be taken for its recovery and preservation.[104] The trustee may use the right of examining a creditor or other person for the purpose of discovering the particulars of a transaction with the bankrupt which he suspects to have been fraudulent, and of getting evidence which will enable him to maintain a suit to set aside the judgment or transfer impeached. Thus, the witness may be required to give information as to property of the bankrupt fraudulently held in his name, as to preferences alleged to have been given, as to his knowledge of any property concealed by the bankrupt, as to any secret trust or other arrangement between the bankrupt and himself, so far as it affects the estate or the rights of other creditors, as to alleged liens on the property, and so forth.[105] But here, as in all judicial examinations, questions propounded must be relevant to the subject of inquiry. The course of the examination must be confined within legal limits, and though the court is vested with a wide measure of discretion as to its scope, it must not be pushed so far as to encroach upon the witness' right of privacy in relation to his own affairs, where the concerns of the bankrupt are not involved.[106] While the statute

[103] In re Brundage, 100 Fed. 613, 4 Am. Bankr. Rep. 47.

[104] In re Blake, 2 N. B. R. 10, Fed. Cas. No. 1,492; In re Fixen & Co., 96 Fed. 748, 2 Am. Bankr. Rep. 822. This provision of the statute does not authorize the interrogating of a witness concerning an alleged contract regarding the bankrupt's property made, not with the bankrupt, but with the trustee himself. In re Madero Bros. (D. C.) 256 Fed. 859, 43 Am. Bankr. Rep. 669.

[105] In re Lathrop, Haskins & Co., 184 Fed. 534, 24 Am. Bankr. Rep. 911; In re Pioneer Paper Co., 7 N. B. R. 250, Fed. Cas. No. 11,178; Garrison v. Markley, 7 N. B. R. 246, Fed. Cas. No. 5,256.

[106] In re Horgan, 98 Fed. 414, 39 C. C. A. 118, 3 Am. Bankr. Rep. 253; In re Howard, 95 Fed. 415, 2 Am. Bankr. Rep. 582. See In re Earle, 3 N. B. R. 304, Fed. Cas. No. 4,244; In re Stuyvesant Bank, 6 Ben. 33, 7 N. B. R. 445, Fed. Cas. No. 13,582; In re Lathrop, 4 N. B. R. 94, Fed. Cas. No. 8,106. Where the person examined is the principal stockholder and manager of an alleged bankrupt corporation, it is imperative that

should be liberally construed, so as to enforce full and frank answers by a witness in aid of the bankruptcy proceedings, yet it does not authorize an inquiry into his private affairs which have no relation to the "acts, conduct, or property" of the bankrupt, nor can the court require him to produce private papers having no relation thereto; and a mere affidavit of belief on the part of creditors or others is not sufficient to overcome a positive statement of the witness that the transactions inquired about or papers demanded have no relation to the bankrupt, so as to authorize the court to compel him to answer or to produce the papers.[107] So, the court cannot compel an officer of a corporation in which the bankrupt had stock, the same being admittedly in the bankrupt's possession, to give evidence as to his opinion of the value of the stock and to produce in support thereof the records relating to the financial condition of the company.[108] Again, a witness cannot be compelled to answer as to the original consideration for a negotiable bond issued by the bankrupt where the creditor is a bona fide holder for value.[109] And where the bankrupt, more than a year before the enactment of the bankruptcy law, had made an assignment for the benefit of his creditors under the state law, it is not material or proper, in his examination in the bankruptcy proceedings, to inquire into the circumstances under which the assignment was made, nor to require the assignee to produce the books and papers turned over to him at the time, unless a foundation is first laid for the belief that property of the bankrupt was withheld by him at the time of such assignment and was still held as his at the time of the enactment of the bankruptcy law.[110] But it is not left to the judgment of the witness to decide whether or not the question put to him is relevant. If he declines to answer any question on this ground, he does so at his peril, for the decision as to relevancy of any question or line of inquiry is for the court.[111] Moreover, in these examinations in bankruptcy, saving the right of the witness to refuse to criminate himself, and respecting the inviolability of privileged communications, the courts will generally rule on the side of relevancy, and require the witness to answer if it seems even probable that the facts to be elicited

much latitude be permitted in the examination, even though some personal affairs of the witness may be revealed, keeping in mind as the test of its scope that the inquiry concerns, primarily and objectively, the "acts, conduct, or property of the bankrupt." In re Standard Aero Corporation (C. C. A.) 270 Fed. 783, 46 Am. Bankr. Rep. 517.

107 In re Carley, 106 Fed. 862, 5 Am. Bankr. Rep. 554; In re E. S. Wheeler & Co., 151 Fed. 542, 18 Am. Bankr. Rep. 421.

108 In re Seligman, 192 Fed. 750, 26 Am. Bankr. Rep. 664.

109 In re Leland, 6 Ben. 175, Fed. Cas. No. 8,229.

110 In re Hayden, 96 Fed. 199, 1 Am. Bankr. Rep. 670.

111 People's Bank of Buffalo v. Brown,

may be relevant.[112] But creditors cannot use the process of examinations in bankruptcy for the purpose of obtaining information (from persons other than the bankrupt himself) which they can use in opposition to his discharge. In regard to such witnesses, and the facts they may know, a creditor must be left to the risk of establishing them upon the trial of the issues as parties are in ordinary trials at law.[113]

§ 270. Privileged Communications.—The rule which forbids the disclosure, as matter of evidence, of confidential communications passing between an attorney and his client will be respected and enforced in examinations in bankruptcy no less than in other judicial investigations.[114] At the same time, counsel for the bankrupt, when examined as a witness, will be bound to answer all questions except such as require him to disclose information as to the affairs of the bankrupt which he received, as such counsel, from the bankrupt or from persons to whom he was referred by the bankrupt for the purpose of obtaining information.[115] In other words, an attorney cannot refuse to answer unless the facts which he is asked to disclose came to his knowledge while acting in his professional capacity and came from the client or from some one acting for the client.[116] A witness summoned for examination in a bankruptcy proceeding cannot refuse to be sworn merely on the ground that he had been counsel for the bankrupt and was still his legal adviser. "The right to refuse to answer a question on the ground of privilege does not warrant a refusal to be sworn as a witness. The privilege cannot be interposed until a question is asked which invades the privilege."[117] Nor will it be permitted to the attorney of the bankrupt to add to his oath as a witness a reservation as to privileged communications.[118] Whether the privilege is properly claimed and should be allowed is a question which must be determined by the court and not by the witness, and hence, by way of preliminary investigation, the witness may be subjected to such an interrogation as will put the court in position to decide the question.[119]

112 Fed. 652, 50 C. C. A. 411, 7 Am. Bankr. Rep. 475; In re Fixen & Co., 96 Fed. 748, 2 Am. Bankr. Rep. 822.

112 People's Bank of Buffalo v. Brown, 112 Fed. 652, 50 C. C. A. 411, 7 Am. Bankr. Rep. 475. See Robinson v. Philadelphia & R. R. Co., 28 Fed. 340; Johnson Steel Street-Rail Co. v. North Branch Steel Co., 48 Fed. 196.

113 In re Brandt, 2 N. B. R. 215, Fed. Cas. No. 1,812.

114 In re Krueger, 2 Low. 182, Fed. Cas. No. 7,942.

115 In re Aspinwall, 7 Ben. 433, 10 N. B. R. 448, Fed. Cas. No. 591; In re Donohue, 2 Hask. 17, Fed. Cas. No. 3,990; In re Bellis, 3 Ben. 386, 3 N. B. R. 199, Fed. Cas. No. 1,274.

116 In re O'Donohoe, 3 N. B. R. 245, Fed. Cas. No. 10,435.

117 In re Woodward, 4 Ben. 102, 3 N. B. R. 719, Fed. Cas. No. 17,999.

118 In re Adams, 6 Ben. 56, Fed. Cas. No. 42.

119 People's Bank of Buffalo v. Brown,

§ 271. Privilege Against Self-Criminating Testimony.—The fifth amendment to the Constitution of the United States provides that "no person shall be compelled in any criminal case to be a witness against himself," and in the great case of Counselman v. Hitchcock,[120] it was held that this provision was not to be confined to a criminal case against the party himself, that its object was to insure that no one should be compelled, when acting as a witness in any investigation, to give testimony which might tend to show he had committed a crime. It was also held that the act of Congress which provides that no evidence given by a witness shall be in any manner used against him in any court of the United States in any criminal proceedings,[121] does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, inasmuch as it affords no protection against that use of testimony wrung from a witness which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.

These principles apply to the case of an examination in bankruptcy, and the constitutional safeguard may be appealed to by any witness undergoing such examination, whether it be the bankrupt himself or another. No witness, under such examination, can be compelled to reply to questions, when his answers would tend to criminate him, in the sense of the constitutional provision as above explained, or would furnish information or evidence which might be used against him in a criminal prosecution, and although the seventh section of the bankruptcy act (relating to the bankrupt and his examination) provides that "no testimony given by him shall be offered in evidence against him in any criminal proceeding," this does not take away the right of the bankrupt to decline answering questions which tend to criminate him, because it is not a sufficient protection, not being as broad and comprehensive as the constitutional provision, and therefore not to be taken as a substitute for it or as equivalent to it.[122] Thus, where a

112 Fed. 652, 50 C. C. A. 411, 7 Am. Bankr. Rep. 475.

120 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.

121 Rev. Stat. U. S. § 860.

122 In re Hess, 134 Fed. 109, 14 Am. Bankr. Rep. 559; United States v. Goldstein, 132 Fed. 789, 12 Am. Bankr. Rep. 755; In re Nachman, 114 Fed. 995, 8 Am. Bankr. Rep. 180; In re Franklin Syndicate, 114 Fed. 205, 4 Am. Bankr. Rep. 511; In re Feldstein, 103 Fed. 269, 4 Am. Bankr. Rep. 321; In re Gilbert, 2 Nat. Bankr. News, 378; In re Rosser, 96 Fed. 305, 2 Am. Bankr. Rep. 755; In re Scott, 95 Fed. 815, 1 Am. Bankr. Rep. 49; In re Patterson, 1 Ben. 544, 1 N. B. R. 152, Fed. Cas. No. 10,816; In re Graham, 8 Ben. 419, Fed. Cas. No. 5,659; In re Koch, 1 N. B. R. 549, Fed. Cas. No. 7,916. Contra, Mackel v. Rochester, 102 Fed. 314, 42 C. C. A. 427, 4 Am. Bankr. Rep. 1. This provision of the statute has reference only to crimes committed previous to the giving of such testimony, and not to any criminal proceeding bas-

person against whom indictments are pending in a state court is adjudged bankrupt on an involuntary petition, and brought before the referee in bankruptcy for examination, he cannot be compelled to answer any questions propounded on such examination where his answers would tend to criminate him on the trial of the pending indictments.[123]

The constitutional privilege, however, is to be claimed only when necessary, and only with reference to some particular question propounded to the witness. It does not exempt a witness from being sworn, nor permit him to add to his oath a reservation as to criminating matters; it only enables him to decline a particular question.[124] And further a witness cannot avoid answering a question by the mere statement that his answer would tend to criminate him, without regard to whether the statement is reasonable or not.[125] On the contrary, it is for the judge before whom the question arises to decide whether an answer thereto may reasonably have a tendency to criminate the witness, or to furnish proof of an element or link in the chain of evidence necessary to convict him of a crime. Where, from the course of the evidence and the nature of the question, the court can definitely see that the question, if answered in a particular way, will have that effect, the privilege claimed by the witness must be allowed.[126] On the other hand, if it is apparent that the answer could not possibly tend to criminate the

ed on a crime inherent in the bankrupt's examination, and it does not protect him from a prosecution for perjury committed by false swearing during the course of his examination. And in such a prosecution, not only may the alleged false testimony be given in evidence, but any other testimony of the defendant given in the examination may be put in evidence, provided it is relevant to the issue and tends to establish the falsity of that on which the prosecution is based. Glickstein v. United States, 222 U. S. 139, 32 Sup. Ct. 71, 56 L. Ed. 128, 27 Am. Bankr. Rep. 786; Daniels v. United States, 196 Fed. 459, 27 Am. Bankr. Rep. 790; United States v. Brod, 176 Fed. 165, 23 Am. Bankr. Rep. 740; Cameron v. United States, 192 Fed. 548, 113 C. C. A. 20, 27 Am. Bankr. Rep. 657. Further, it is to be noted that the protection afforded to the bankrupt by section 7, clause 9, of the bankruptcy act, extends only to the testimony given by the bankrupt upon his examination under that clause and section, and does not render inadmissible, on a criminal prosecution, the schedules filed by him in the bankruptcy proceedings, or the testimony of an expert accountant based upon an examination of his books which he had turned over to the trustee. Ensign v. Pennsylvania, 227 U. S. 592, 33 Sup. Ct. 321, 57 L. Ed. 658, 30 Am. Bankr. Rep. 408. But see Arndstein v. McCarthy, 254 U. S. 71, 41 Sup. Ct. 26, 65 L. Ed. —.

[123] In re Scott, 95 Fed. 815, 1 Am. Bankr. Rep. 49; In re Hooks Smelting Co., 138 Fed. 954, 15 Am. Bankr. Rep. 83; In re Kanter, 117 Fed. 356, 9 Am. Bankr. Rep. 104; In re Gilbert, 2 Nat. Bankr. News, 378. There are a few cases in the reports in which these principles, as applied to examinations in bankruptcy, are denied or not admitted to their full extent. See In re Bromley, 3 N. B. R. 686; In re Sapiro. 92 Fed. 340.

[124] In re Scott, 95 Fed. 815, 1 Am. Bankr. Rep. 49.

[125] In re Rosenblatt, 143 Fed. 663, 16 Am. Bankr. Rep. 306; In re Tobias, Greenthal & Mendelson (D. C.) 215 Fed. 815.

[126] Ex parte Irvine, 74 Fed. 954; In re Feldstein, 103 Fed. 269, 4 Am. Bankr. Rep. 321; In re Shera, 114 Fed. 207, 7 Am. Bankr. Rep. 552.

witness, it must be given, notwithstanding the claim of privilege.[127] This point is further illustrated by the cases, so frequently arising in practice, where a bankrupt attempts to withhold his books of account and other papers from his trustee or receiver, on the assertion that they contain matter which might be used against him in a criminal proceeding and so tend to criminate him. In this event, the rule is that the bankrupt must produce and deposit the books, in order that the question of privilege may be determined by the court or referee, and if it appears that they do contain such criminating evidence, the court will make such an order as will protect the bankrupt from its use in any criminal case, and at the same time give the trustee the use of the books in the administration of the estate.[128]

Again, it is only against criminal or penal consequences of his disclosures that the constitution protects a witness. A person undergoing an examination in bankruptcy cannot refuse to answer questions concerning his dealings with the bankrupt on the ground that his answers may furnish evidence against him in a civil action pending or to brought on behalf of the trustee in bankruptcy, and in point of fact, such examinations are generally held for the precise purpose of enabling the trustee to obtain evidence for such suits, or to ascertain that there is no such evidence.[129] And the constitutional privilege of refusing to give self-criminating testimony was not intended to shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime, but only from actual prosecution and punishment. Hence, if the crime in which he was implicated was such that a prosecution against him would be barred by the statute of limitations, or if he has already received a pardon for it, he may be compelled to answer.[130] Nor is it a sufficient reason for refusing to answer a proper and pertinent question that the answer will expose the witness to the contempt of the community, or humiliate him, or bring him into general disgrace, if he would not also be liable to prosecution.[131] But if the question does not relate to any matter of fact in issue, or to any matter contained in his direct testimony, the witness need not answer it, and will not be

[127] In re Levin, 131 Fed. 388, 11 Am. Bankr. Rep. 382; In re Edward Hess & Co., 136 Fed. 988.

[128] In re Harris, 221 U. S. 274, 31 Sup. Ct. 557, 55 L. Ed. 732, 26 Am. Bankr. Rep. 302; In re Harris, 164 Fed. 292, 20 Am. Bankr. Rep. 911; In re Hark, 136 Fed. 986, 14 Am. Bankr. Rep. 624; In re Hess, 134 Fed. 109, 14 Am. Bankr. Rep. 559; United States v. Rhodes (D. C.) 212 Fed. 518.

[129] In re Cliffe, 97 Fed. 540, 3 Am. Bankr. Rep. 257; In re Fay, 3 N. B. R. 660, Fed. Cas. No. 4,708; In re Danforth, Fed. Cas. No. 3,560.

[130] Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819.

[131] In re Richards, 4 Ben. 303, 4 N. B. R. 93, Fed. Cas. No. 11,769.

compelled, to answer it, where he states that a truthful answer would tend to degrade him.[132]

The constitutional privilege may be waived. And if the bankrupt volunteers a disclosure concerning property, assets, or business dealings, he can be compelled to go into the matter fully. He cannot stop short at his own discretion, and refuse to answer further questions, on the assertion that he might be criminated.[133] So he cannot claim the protection of the constitution where the question objected to is clearly in the line of cross-examination on what he has volunteered himself, either in his petition and schedules or in testimony already given.[134] So again, he waives the privilege if he makes no objection to testifying before the referee, but answers the questions put to him, so that any admissions made by him in the course of the examination can properly be used on his cross-examination in a criminal proceeding against him.[135] And where, at the commencement of the proceedings in bankruptcy, he surrenders his books to the receiver without raising any question of privilege as to their use against him, so far as it is a proper use of the books by the trustee in bankruptcy to allow prosecuting authorities to use them, the bankrupt is chargeable with knowledge of that right and has waived his privilege.[136] And it has been held that no constitutional or statutory right of an accused person (either under the constitutional provisions against unreasonable searches and seizures and against the compelling of self-criminating testimony, or under the Act of Congress prohibiting the use of a party's pleading or evidence to his prejudice in a subsequent criminal proceeding against him) are infringed by the use by a grand jury, in the investigation of the charges contained in an indictment, of his books and papers procured from his receiver or trustee in bankruptcy, to whom they had been delivered under an unconditional order of the bankruptcy court, and which books and papers contain information with respect to the matters charged in the indictment against him. And further, these constitutional and statutory provisions do not prohibit the use of the books and papers of a bankrupt, in the hands of his receiver or trustee in bankruptcy, as evidence against him in a criminal prosecution for embezzlement and false pretenses, based upon disclosures in such books and papers.[137]

[132] In re Danforth, Fed. Cas. No. 3,560; In re Lewis, 4 Ben. 67, 3 N. B. R. 621, Fed. Cas. No. 8,312.

[133] In re Bendheim, 180 Fed. 918, 24 Am. Bankr. Rep. 254.

[134] In re Walsh, 104 Fed. 518, 4 Am. Bankr. Rep. 693.

[135] State v. Burrell, 27 Mont. 282, 70 Pac. 982, affirmed, Burrell v. Montana, 194 U. S. 572, 24 Sup. Ct. 787, 48 L. Ed. 1122, 12 Am. Bankr. Rep. 132.

[136] In re Tracy & Co. (D. C.) 177 Fed. 532, 23 Am. Bankr. Rep. 438.

[137] United States v. Halstead, 38 App. D. C. 69.

On the principle of waiver or estoppel, it has further been held that when the bankrupt has filed schedules of his assets, it is a representation that he has no other property, and therefore he cannot object to legitimate cross-examination with reference thereto, on the ground that it may incriminate him, so long as it does not tend to develop any independent fact.[138] But it is the doctrine of the Supreme Court that the mere voluntary filing of schedules in bankruptcy, which, standing alone, do not amount to an admission of guilt or furnish clear proof of crime, does not waive the bankrupt's privilege to stop short and refuse to answer questions concerning the schedules when he can fairly claim that to answer might tend to incriminate him.[139]

Aside from such questions, however, it is clear that the Bankruptcy Act itself protects the bankrupt against the subsequent prejudicial use of the testimony elicited from him on his examination in bankruptcy. Thus, an accused person, on trial for the crime of defrauding a national bank, cannot be cross-examined regarding the testimony given on his examination in bankruptcy.[140] And so, on a trial for embezzlement, the defendant's testimony previously given upon an examination into the affairs of the corporation whose funds he was alleged to have embezzled, given before a referee in bankruptcy, cannot be admitted.[141]

§ 272. **Use and Effect of Evidence.**—The testimony of a bankrupt, taken on his examination before the referee, is a part of the record, to which creditors generally are entitled to access while it remains in the custody of the referee, and this remains true although the interests of the creditor seeking to examine the testimony are antagonistic to those of the trustee, in that the latter intends to sue the former to recover an alleged preference, and though a disclosure of the bankrupt's testimony, in view of his hostility to the trustee, may result prejudicially to the creditor.[142] On the other hand, statements made by a bankrupt on his examination concerning the ownership of a particular article of property in his possession at the time of the filing of the petition, and in the absence of any documentary evidence as to the capacity in which he held it, are competent evidence, as admissions, though not conclusive, against his trustee on the hearing of a petition by an adverse claimant to reclaim the property, the trustee being at least to this ex-

138 In re Tobias, Greenthal & Mendelson (D. C.) 215 Fed. 815.

139 Arndstein v. McCarthy, 254 U. S. 71, 41 Sup. Ct. 26, 65 L. Ed. ——.

140 Bain v. United States (C. C. A.) 262 Fed. 664, 45 Am. Bankr. Rep. 79.

141 People v. Lay, 193 Mich. 476, 160 N. W. 467.

142 In re Samuelsohn, 174 Fed. 911, 23 Am. Bankr. Rep. 528.

tent in privity with the bankrupt.[143] So the testimony of the bankrupt taken on his examination and reduced to writing, is admissible against him in a subsequent proceeding by the trustee to require him to surrender money or property of the estate alleged to be in his possession or under his control, and when the bankrupt is a corporation, the same rule applies to the testimony of any of its officers; but this does not apply in the case of any third person examined as a witness in the bankruptcy proceedings.[144] When a creditor's claim is contested by the trustee, the creditor may make use of testimony elicited from the bankrupt at an examination in which the trustee participated, although the record does not show that due notice was given to creditors (as this fact may be inferred), and although the creditor had not filed or formally presented his claim at the time of the examination, as that fact did not deprive him of the right to take part in the examination.[145]

§ 273. Witness Fees and Costs of Examination.—The statute provides that no person shall be required to attend as a witness before a referee in bankruptcy unless "his lawful mileage and fee for one day's attendance shall be first paid or tendered to him," [146] and that the fees and mileage of witnesses shall be considered as a part of the "cost of administration" of an estate in bankruptcy, and shall be entitled to priority of payment.[147] The fees of a witness must be paid or tendered at the time of the service of the summons or subpœna upon him.[148] If the witness attends without the prepayment of the fees, the fees are to be collected as in ordinary actions and according to the practice of the courts therein.[149] If there is an adjournment, the witness is entitled to be paid his attendance fee for the adjourned day before he is obliged to

[143] In re Thompson, 197 Fed. 681, 28 Am. Bankr. Rep. 794. But see Breckons v. Snyder, 211 Pa. St. 176, 60 Atl. 575, holding that, where a trustee in bankruptcy sues to recover money of a bankrupt said to be in the hands of the defendant, the testimony of the bankrupt at the preliminary examination before the referee as to his assets and liabilities is not admissible in evidence, the issue not being between the same parties.

[144] In re Alphin & Lake Cotton Co. (D. C.) 131 Fed. 824, 12 Am. Bankr. Rep. 653.

[145] Beaven v. Stuart, 250 Fed. 972, 163 C. C. A. 222, 41 Am. Bankr. Rep. 81.

[146] Bankruptcy Act 1898, § 41. The fees of witnesses in the courts of the United States are fixed by law as follows: "For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing and five cents a mile for returning." Rev. Stat. U. S. § 848. A witness is entitled to fees only for the days of actual attendance, and not for the days on which he was ready to attend. In re Crane, 15 N. B. R. 120, Fed. Cas. No. 3,352. Fees and mileage, at the fixed rate, are allowed to the witness whether his evidence is taken at a hearing before the judge or referee or on deposition. Rev. Stat. U. S. §§ 848, 870, 874.

[147] Bankruptcy Act 1898, § 64 b, cl. 3.

[148] In re Griffen, 1 N. B. R. 371, 2 Ben. 209, Fed. Cas. No. 5,810; In re Kerber, 125 Fed. 653, 10 Am. Bankr. Rep. 747.

[149] In re Griffen, 2 Ben. 209, 1 N. B. R. 371, Fed. Cas. No. 5,810.

return on such adjourned day, and also travel fees, if it is reasonable for him to return to his home in the interval, as to which the referee is to judge.[150] The wife (or husband) of the bankrupt, if attending under an order and being examined as a witness, is entitled to the same fee and mileage as any other witness.[151] But it is doubtful whether the statute would apply in favor of a creditor who had proved his claim and was afterwards cited to appear and be examined, not concerning the affairs of the bankrupt, but concerning his own claim, the trustee desiring to discover grounds for moving to expunge it. Under the act of 1867, it was held that the creditor in such a case was not entitled to witness fees.[152] The bankrupt himself, when ordered to appear for examination in the usual course, or at the instance of the trustee or a creditor, is not entitled to fees as a witness, but the law directs that he "shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence."[153] In regard to "expert witnesses," it has been decided that extra compensation to such persons, over and above the statutory witness fee and mileage, cannot be taxed as costs or allowed against a losing party in a court of bankruptcy, nor will the court be bound to make such an allowance because counsel have so agreed.[154]

In regard to the hire of a clerk or stenographer to take down the testimony upon an examination in bankruptcy, the statute allows the referee to "authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings," but only "upon the application of the trustee."[155] Except, therefore, in cases where the trustee will make an application to this effect, the general rule will apply, that the cost of taking testimony must be defrayed by the party at whose instance it is taken, whether it be creditors seeking for information which will enable them to prepare opposition to the bankrupt's application for discharge, or the bankrupt himself desiring to have additional statements or explanations appear in the testimony after the

[150] In re Griffen, 2 Ben. 209, 1 N. B. R. 371, Fed. Cas. No. 5,810.

[151] In re Marcus, 160 Fed. 229, 20 Am. Bankr. Rep. 397; In re Griffen, 2 Ben. 209, 1 N. B. R. 371, Fed. Cas. No. 5,810.

[152] In re Kyler, 2 Ben. 414, 2 N. B. R. 649, Fed. Cas. No. 7,956; In re Paddock, 6 N. B. R. 396, Fed. Cas. No. 10,658.

[153] Bankruptcy Act 1898, § 7, proviso. See In re McNair, 2 N. B. R. 219, Fed. Cas. No. 8,907.

[154] In re Carolina Cooperage Co., 96 Fed. 604, holding also that any extra compensation to such witness may be a matter of private arrangement between the witness and the party calling him.

[155] Bankruptcy Act 1898, § 38, cl. 5. The laws of the United States provide that a "folio," in written or printed documents, shall mean 100 words, counting each figure as a word. When there are more than 50 and less than 100 words, they shall be counted as one folio, but a less number of words than

examining creditors have finished their questions.[156] But it has been held that this provision of the statute does not apply to hearings on the examination of the bankrupt before a special commissioner, and that, in such cases, the stenographer may be allowed a larger compensation if his bill is approved by the receiver and it is shown that all the examination was necessary and resulted in benefit to the estate.[157]

§ 274. **Contempts by Witnesses.**—The bankruptcy act (Section 41) provides that it shall be punishable as a contempt if any person shall "misbehave during a hearing, or so near the place thereof as to obstruct the same,[158] or neglect to produce, after having been ordered to do so, any pertinent document,[159] or refuse to appear after having been subpœnaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law." If the witness, after being duly summoned and after he has had a reasonable time in which to make his appearance, does not attend before the referee as ordered, the proper method of securing his presence is by an attachment.[160] But this applies only to ordinary witnesses, and compulsory measures of this kind will not be directed, unless strictly necessary, against one called as an expert or one wanted only in the character of an interpreter.[161] Nor can this process be resorted to in any case unless the witness was duly ordered to appear by a summons, subpœna, rule to show cause, or other proper process,[162] and was ten-

50 shall not be counted, except when the whole document contains less than 50 words. Rev. Stat. U. S. §§ 854, 828. And see Jerman v. Stewart, 12 Fed. 271.

156 In re Price, 91 Fed. 635, 1 Am. Bankr. Rep. 419; In re Mealy, 2 N. B. R. 128, Fed. Cas. No. 9,378; In re Eidom, 3 N. B. R. 160, Fed. Cas. No. 4,315; Scofield v. Moorhead, 2 N. B. R. 1, Fed. Cas. No. 12,510. Where, in an examination in bankruptcy, the testimony of a large number of witnesses was taken stenographically, the bankrupt is entitled to a stenographic copy of such testimony, on paying the charge fixed, as he must be deemed a party in interest. Petition of Moulthrop, 249 Fed. 468, 161 C. C. A. 426, 41 Am. Bankr. Rep. 654.

157 In re Stark, 155 Fed. 694, 18 Am. Bankr. Rep. 467.

158 It is a contempt of court to interrupt and violently break up the examination of a witness by persisting in the attempt to dictate to and prompt the witness and control his answers, when this is done in an overbearing and violent manner and so as to prevent the further continuance of the examination. United States v. Anonymous, 21 Fed. 761.

159 As to contempt of court by refusal to produce books, papers, and other documents, see In re Herr, 182 Fed. 715, 25 Am. Bankr. Rep. 141; In re Sorkin, 166 Fed. 831, 20 Am. Bankr. Rep. 637; In re Alper, 162 Fed. 207, 19 Am. Bankr. Rep. 612; In re Fellerman, 149 Fed. 244, 17 Am. Bankr. Rep. 785; In re Johnson & Knox Lumber Co., 151 Fed. 207, 80 C. C. A. 259, 18 Am. Bankr. Rep. 50; In re Soloway & Katz, 196 Fed. 132, 28 Am. Bankr. Rep. 345; In re Ironclad Mfg. Co. (C. C. A.) 201 Fed. 66: In re Cantor, 215 Fed. 61, 131 C. C. A. 369.

160 Bowen v. Thornton, 9 Wkly. Notes Cas. (Pa.) 575.

161 In re Roelker, Sprague, 276 Fed. Cas. No. 11,995.

162 In re Johnson & Knox Lumber Co., 151 Fed. 207, 80 C. C. A. 259, 18 Am. Bankr. Rep. 50.

dered his proper fees and mileage,[163] nor unless the summons or order for examination was duly served within the jurisdiction of the bankruptcy court.[164] When the contumacious conduct on the part of the witness consists in his refusal to answer a proper question, without any legal excuse or justification therefor, he may be committed as for a criminal contempt, to stand committed until he will answer the question which was propounded to him.[165] But it must appear that the matter in regard to which he was interrogated was material and relevant to the point in issue, and that his answer would not require him to criminate himself or to disclose privileged communications.[166]

But when the witness has given an answer to a question put to him, but a false one, thereby committing perjury, the authority to punish him as for a contempt is not so clear. This case is not specifically covered by the statute, for such behavior is not "refusing to be examined according to law," and it has been held that while a refusal to answer is contumacy and a contempt, yet when an answer has been given, the judge in bankruptcy cannot assume or decide that the answer was false and punish the witness for perjury as for a contempt.[167] Yet it must be admitted that the great preponderance of authority is to the effect that false swearing in an examination in bankruptcy is a contempt of the court and punishable as such, notwithstanding that it is also a crime and punishable on indictment.[168]

[163] In re Johnson & Knox Lumber Co., 151 Fed. 207, 80 C. C. A. 259, 18 Am. Bankr. Rep. 50.

[164] In re Hodges, 11 N. B. R. 369, Fed. Cas. No. 6,562. But where a federal court orders the arrest of a witness charged with having failed to obey a subpœna issued by it, and duly served, and the witness departs into another district before he can be arrested, any judge of the United States having jurisdiction in the district to which the witness has removed, may order his arrest and removal back to the district in which he is charged with the offense. In re Ellerbe, 13 Fed. 530.

[165] People v. Davidson, 35 Hun (N. Y.) 471; People v. Fancher, 4 Thomp. & C. (N. Y.) 467. Where a witness fails to appear at the appointed time, and, after contempt proceedings are instituted against him, appears, apologizes, and offers himself freely for examination, he thereby purges himself of the civil contempt, and the only question remaining is the punishment to be imposed to secure respect for the court's authority. In re Farkas, 204 Fed. 343, 30 Am. Bankr. Rep. 337.

[166] In re Romine, 138 Fed. 837, 14 Am. Bankr. Rep. 785; Ex parte Peck, 3 Blatchf. 113, Fed. Cas. No. 10,885.

[167] State v. Lazarus, 37 La. Ann. 314.

[168] In re Michaels, 194 Fed. 552, 28 Am. Bankr. Rep. 38; In re Wiesebrock, 188 Fed. 757, 26 Am. Bankr. Rep. 745; In re Shear, 188 Fed. 677; Magen v. Campbell, 186 Fed. 675, 108 C. C. A. 531, 26 Am. Bankr. Rep. 594; In re Bronstein, 182 Fed. 349, 24 Am. Bankr. Rep. 524; In re Magen, 179 Fed. 572, 24 Am. Bankr. Rep. 63; In re Schulman, 177 Fed. 191, 101 C. C. A. 361, 23 Am. Bankr. Rep. 809; In re Singer, 174 Fed 208, 23 Am. Bankr. Rep. 28; In re Schulman, 167 Fed. 237, 21 Am. Bankr. Rep. 288; In re Gordon, 167 Fed. 239, 21 Am. Bankr. Rep. 290; In re Gitkin, 164 Fed. 71, 21 Am. Bankr. Rep. 113; Ex parte Bick, 155 Fed. 908, 19 Am. Bankr. Rep. 68; In re Fellerman, 149 Fed. 244, 17 Am. Bankr. Rep. 785.

The provision of the Bankruptcy Act that no testimony given by the bankrupt on his examination "shall be offered in evidence against him in any criminal proceeding" has reference only to crimes committed previous to the giving of such testimony, and not to any criminal proceeding based on a crime inherent in the bankrupt's examination or any contempt of court committed in the course of such examination. Hence it does not make such testimony inadmissible in a proceeding to punish him for contempt in giving evasive answers.[169] And it does not protect him from a prosecution for perjury committed by false swearing during the course of his examination.[170]

But as to the power to punish perjury in such an examination as a contempt of the court an examination of the cases cited will show that the question has seldom arisen in its naked form. Almost always the adjudication of contempt has been based upon the conduct and behavior of the witness through the whole course of his examination, and upon the fact that such conduct shows a settled purpose to thwart the objects of the examination, to defeat the operation of the law by concealing property, and otherwise to set the authority of the court at defiance. So that convictions for contempt of this sort have been grounded not so much on the fact that the answer to a particular question was false, as on the fact that the witness repeatedly gave vague, ambiguous, or incomplete answers to questions which he might have answered clearly, or persisted in professing ignorance or want of recollection of matters which he certainly must have known and remembered.

It is also a question how far a witness may purge a contempt by showing that it was committed under the advice or direction of counsel. The result of the authorities appears to be that if the witness refuses to answer questions or to produce books or papers, but does so under the direction of counsel who in good faith advise him to pursue that course, the circumstance will palliate though it does not excuse his contumacy, and he should not be punished (except, perhaps, to the extent of paying costs) if he will profess his readiness to submit to the examination, produce the books, etc., on the decision being rendered against him.[171]

[169] In re Kaplan Bros., 213 Fed. 753, 130 C. C. A. 267, 32 Am. Bankr. Rep. 305.

[170] Glickstein v. United States, 222 U. S. 139, 32 Sup. Ct. 71, 56 L. Ed. 128, 27 Am. Bankr. Rep. 786; Daniels v. United States, 196 Fed. 459, 116 C. C. A. 233, 27 Am. Bankr. Rep. 790; United States v. Brod (D. C.) 176 Fed. 165, 23 Am. Bankr. Rep. 740; Cameron v. United States, 192 Fed. 548, 113 C. C. A. 20, 27 Am. Bankr. Rep. 657; State v. Frasier, 94 Or. 90, 184 Pac. 848; United States v. Coyle (D. C.) 229 Fed. 256.

[171] United States v. Goldstein, 132 Fed. 789, 12 Am. Bankr. Rep. 755; In re Fixen & Co., 96 Fed. 748, 2 Am. Bankr. Rep. 822; In re Rosenfield, 1 N. B. R.

The referee in bankruptcy has no power to punish for contempts committed by witnesses before him,[172] but must certify the facts to the judge. But if the judge shall find that the facts warrant the punishment of the witness, he may punish him in the same manner and to the same extent as for a contempt committed before the court of bankruptcy.[173] A rule requiring a bankrupt to show cause why he should not be punished for contempt for refusing to answer "sundry questions" put to him during his examination before the referee is not insufficient, although it does not set out the questions, where it refers to the transcript filed with the certificate of the referee, from which they fully appear.[174]

319, Fed. Cas. No. 12,059; In re Winship, 7 Ben. 194, Fed. Cas. No. 17,878.

[172] Bank of Ravenswood v. Johnson, 143 Fed. 463, 74 C. C. A. 597, 16 Am. Bankr. Rep. 206; In re Schulman, 177 Fed. 191, 101 C. C. A. 361, 23 Am. Bankr. Rep. 809.

[173] Bankruptcy Act 1898, § 41b.

[174] United States v. Goldstein, 132 Fed. 789, 12 Am. Bankr. Rep. 755.

CHAPTER XVI

RIGHTS AND DUTIES OF CREDITORS

§ 275. Notices to Creditors.—By the provisions of the statute, creditors of a bankrupt shall have at least ten days' notice by mail, unless they waive notice in writing, of

1. All examinations of the bankrupt.

2. All hearings upon applications for the confirmation of compositions.

3. All meetings of creditors.

4. All proposed sales of property.

5. The declaration and time of payment of dividends.

6. The filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon.

7. The proposed compromise of any controversy.

8. The proposed dismissal of the proceedings.

9. All applications for the discharge of bankrupts, but in this last case only the law provides for thirty days' notice.[1]

In addition to these enumerated cases, it is also held, in general, that any step which in effect would end the proceedings should not be taken without notice to creditors. So, where an assignee in bankruptcy sought to renounce his trust by making an application for his discharge, based on his own affidavit, alleging that no tangible assets had come to his hands and that he had no information of any property belonging to the bankrupt other than a chose in action in favor of the estate, it was held that notice to creditors of such application was necessary.[2] In the case of the notice of the first meeting, the law directs that it shall not only be sent to the creditors by mail, but shall also be "published at least

[1] Bankrtupcy Act 1898, § 58, as amend .l by Act Cong. June 25, 1910, 36 Stat. 838.
[2] In re Savage, 12 Fed. 719.

once, and may be published such number of additional times as the court may direct, the last publication to be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct."[3] All notices are to be given by the referee in bankruptcy unless otherwise ordered by the judge.[4] Notices by mail are to be issued at least ten days before the meeting, hearing, or other proceeding to which they relate.[5] The address of each creditor, for the purpose of such notices, is to be taken from the list of creditors furnished by the bankrupt, or from the information given by the creditor himself in the papers he files in the case.[6] Such written notice by mail is to be given to foreign creditors, as well as to those who reside within the United States,[7] and to secured as well as unsecured creditors.[8] If the name of a given creditor appears in the bankrupt's list, but with a statement that his residence is unknown, the failure to give him notice will not vitiate the proceedings.[9] It has also been ruled that notices of meetings of creditors subsequent to the first should be sent to all the known creditors, whether they have proved their debts or not.[10] The form of the notice for the first meeting of creditors has been officially prescribed. It recites the fact and date of the adjudication in bankruptcy, designates the time and place for the creditors' meeting, and provides that "said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting."[11] Clerical errors or minor inac-

[3] Bankruptcy Act 1898, § 58b.

[4] Bankruptcy Act 1898, § 58c.

[5] Bankruptcy Act 1898, § 58a. It is also provided that "Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last day fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday." Idem, § 31.

[6] Bankruptcy Act 1898, § 58a. But "any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post office box or street number, as he may appoint, and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed, and in other cases notices shall be addressed as specified in the proof of debt." General Order No. 21. If the creditor has appeared and acted in the prior proceedings by a "duly authorized agent, attorney, or proxy," as is authorized by the statute, it would seem that the notice should be sent to the latter.

[7] In re Heys, 1 Ben. 333, 1 N. B. R. 21, Fed. Cas. No. 6,447.

[8] This may be inferred from the requirement that the names of all secured creditors, with the securities held by them, shall appear on the bankrupt's schedule, one copy of which is to be given to the referee. Bankruptcy Act 1898, § 7, cl. 8.

[9] In re Pulver, 1 Ben. 381, 1 N. B. R. 46, Fed. Cas. No. 11,466.

[10] In re Mills, 7 Ben. 452, 11 N. B. R. 117, Fed. Cas. No. 9,610; Russell v. Phelps, 42 Mich. 377, 4 N. W. 1.

[11] Official Form No. 18.

curacies in the notice will not vitiate the proceedings, provided they are not such as to mislead or deceive creditors.[12]

The requirement of the statute that notice shall be given to the creditors of the various steps in the proceeding is mandatory, in such sense that the failure to give notice of any particular meeting or other matter enumerated in the statute as requiring notice may be cause for setting aside the proceedings taken therein, or in such sense that the creditors who should have been notified, and were not, may not be bound by anything done at the meeting or in relation to the matter in hand.[13] But the jurisdiction of the court, either over the proceedings in general or over the bankrupt's application for discharge, is not made dependent upon the correctness of the bankrupt's list of creditors or upon the actual receipt of notice by the creditors. Jurisdiction is acquired by the petition and adjudication, and if the notices required by the act were duly and regularly published and served, the regularity of the proceedings, or the jurisdiction of the court to proceed with the case, is not affected by the failure of any creditor, or any number of creditors, to receive the notice.[14]

Where notice of the first meeting of creditors has been given to all those who appear on the bankrupt's list of creditors, and they have proceeded to choose a trustee, and afterwards the bankrupt is allowed to amend such list by the addition of other creditors not previously named therein, the rights of the creditors thus brought in are, as the authorities now stand, somewhat doubtful. But it has generally been thought that this development would require the calling of a new meeting, of which notice must be given to all creditors new and old, and that, at the meeting thus summoned, those creditors who may appear and prove their debts should proceed to elect a trustee. If their choice falls upon a person other than the one previously selected, they may apply to the court to remove the latter and confirm the new nominee.[15]

§ 276. Designation of Newspapers.—The statute provides that "courts of bankruptcy shall, by order, designate a newspaper published

[12] In re Hill, 1 Ben. 321, 1 N. B. R. 16, Fed. Cas. No. 6,481.

[13] In re Gilbert, 2 Nat. Bankr. News, 378; In re Hall, 2 N. B. R. 192, Fed. Cas. No. 5,922; Anonymous, 1 N. B. R. 122, Fed. Cas. No. 457. In an action against an assignee in bankruptcy for willful neglect to give notice of creditors' meetings, it is sufficient for him to show that he placed the notice in the mail, and it is not material to show that it was received. Russell v. Phelps, 42 Mich. 377, 4 N. W. 1.

[14] In re Archenbrown, 11 N. B. R. 149, Fed. Cas. No. 504; In re Stetson, 4 Ben. 147, 3 N. B. R. 726, Fed. Cas. No. 13,381. See In re Schiller, 96 Fed. 400, 2 Am. Bankr. Rep. 704.

[15] See supra, § 226.

within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published."[16] Power given to a court to "designate" a newspaper as the organ for the publication of judicial and legal notices is continuous. It is not exhausted by one exercise, but may be exercised from time to time, as may seem necessary and expedient to the court. It may be exercised by revoking a designation once made and making another.[17] Where the referee in bankruptcy, pursuant to a rule of the court, designates certain newspapers, approved by the court, wherein all notices required under the bankruptcy law shall be published, this amounts to a designation of such papers by the court for each particular notice therein published.[18] A referee may also, in the exercise of a wise discretion, select additional newspapers, published elsewhere than in the district, for the publication of such notices. Thus, where many of the creditors of a particular bankrupt lived in other states, it was held entirely proper for the referee to require the publication of notices, for that estate, in papers published in those other states, as well as in the papers designated by the court within the district.[19]

§ 277. **Meetings of Creditors.**—The first meeting of the creditors of a bankrupt is directed to be held "not less than ten nor more than thirty days after the adjudication, at the county seat of the county in

[16] Bankruptcy Act 1898, § 28. When legal notices are directed to be published in a newspaper, one printed in the English language is always intended, unless otherwise specified. Graham v. King, 50 Mo. 22, 11 Am. Rep. 401. As to what constitutes a "newspaper," especially with reference to the official organs of the courts and periodicals devoted to legal news and legal advertising, including the publication of court notices and notices of foreclosures and judicial sales, and as to what constitutes the place of "publication" of a newspaper, the reader will find instruction in the following cases: Hanscom v. Meyer, 60 Neb. 68, 82 N. W. 114, 48 L. R. A. 409, 83 Am. St. Rep. 507; Maass v. Hess, 41 Ill. App. 282; Kellogg v. Carrico, 47 Mo. 157; Kerr v. Hitt, 75 Ill. 51; Lynch v. Durfee, 101 Mich. 171, 59 N. W. 409, 24 L. R. A. 793, 45 Am. St. Rep. 404; Turney v. Blomstrom, 62 Neb. 616, 87 N. W. 339; Lynn v. Allen, 145 Ind. 584, 44 N. E. 646, 33 L. R. A. 779, 57 Am. St. Rep. 223; In re Application for Charter, 11 Phila. (Pa.) 200; Railton v. Lauder, 126 Ill. 219, 18 N. E. 555; Beecher v. Stephens, 25 Minn. 146; Benkendorf v. Vincenz, 52 Mo. 441; Taylor v. Reid, 103 Ill. 349; Hull v. King, 38 Minn. 349, 37 N. W. 792; Leroy v. Jamison, 3 Sawy. 369, Fed. Cas. No. 8,271.

[17] Daily Register Printing & Pub. Co. v. Mayor of New York, 52 Hun, 542, 6 N. Y. Supp. 10.

[18] Hills v. Alden, 2 Hask. 299, Fed. Cas. No. 6,507.

[19] In re Robinson, 1 Ben. 270, 1 N. B. R. 8, Fed. Cas. No. 11,936.

which the bankrupt has had his principal place of business, resided, or had his domicile, or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for the parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held." [20] A creditors' meeting should not be held on a public holiday, but the fact that it was so held will not be cause for setting aside the proceedings taken at that meeting where it appears that no one was injured thereby.[21] The bankrupt must attend this first meeting if so directed by the court, and, if present at the meeting, he must submit to an examination. But he is not required to attend a meeting at a place more than 150 miles distant from his home or principal place of business, unless ordered by the court for cause shown.[22] "At the first meeting of creditors, the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor." [23] The meeting being organized, the first step is for those who present themselves and claim to be creditors of the estate to make proof of their claims. A claim duly proved will be allowed on its filing, unless objection is made. In the latter event, the referee may forthwith decide upon its admissibility, his decision being subject to review by the judge, or postpone it for further consideration. A creditor who holds a voidable preference has a "provable" claim, in the sense that formal written proof of it may be made and filed, but it is a claim on which he cannot be allowed to vote until he has surrendered his preference.[24] And where objections are filed to a claim, on the ground that the claimant has received a preference, he should not be permitted to take any part in the creditors' meeting until the matter has been heard and determined.[25] Where, after a decision by the referee between two parties as to the right to vote upon a claim, the person aggrieved allows the vote to be taken without further objection, he cannot again reopen the question.[26] Next in order comes the ex-

[20] Bankruptcy Act 1898, § 55a.

[21] In re McGlynn, 2 Low. 127, Fed. Cas. No. 8,804.

[22] Bankruptcy Act 1898, § 7.

[23] Bankruptcy Act 1898, § 55b.

[24] Stevens v. Nave-McCord Mercantile Co. (C. C. A.) 150 Fed. 71, 17 Am. Bankr. Rep. 609.

[25] In re Columbia Iron Works, 142 Fed. 234, 14 Am. Bankr. Rep. 526.

[26] In re Spencer, 18 N. B. R. 199, Fed. Cas. No. 13,229.

amination of the bankrupt, and if the latter desires to offer terms of composition to his creditors, he may now do so. It is next in order for the creditors to appoint the trustee and fix the amount of his bond. They may also at this meeting, as well as at subsequent meetings, "take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of the act." [27] In the absence of any specific provisions of law, the conduct of a creditors' meeting is properly guided by the rules and usages of parliamentary bodies.[28]

It is provided that "creditors shall pass upon matters submitted to them at their meeting by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided. Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess." [29] This provision is obviously intended for the protection of minorities. Its effect is that a few heavy creditors cannot force action against the wishes of the small creditors, if the latter constitute a numerical majority. Neither can a numerical majority of the creditors control the administration of the estate unless they also represent a majority in amount of the claims proved. The two kinds of majority must concur. If, however, the numerical majority of creditors in favor of any proposed action or policy (on which they are competent to act with binding effect) also control the major amount of the claims, they will be able to force their will upon a dissenting minority.

If there were irregularities in the calling of the first meeting or in the notices to creditors, or if, for any other cause affecting the common interest of all in the estate, it seems to the referee proper to adjourn the meeting to a future fixed day, he has power to do so.[30] But in order to take this action, the referee must himself be present at the

[27] Bankruptcy Act 1898, § 55c.

[28] In re Merchants' Ins. Co., 6 Biss. 252, Fed. Cas. No. 9,442.

[29] Bankruptcy Act 1898, § 56. After the selection of a trustee, a secured creditor cannot participate in creditors' meetings, except in so far as the security which he holds fails to cover his entire claim. Merchants' Nat. Bank v. Continental Building & Loan Ass'n, 232 Fed. 828, 147 C. C. A. 22, 37 Am. Bankr. Rep. 439.

[30] In re Cheney, 19 N. B. R. 16, Fed. Cas. No. 2,637; In re Devlin, 1 Ben. 335, 1 N. B. R. 35, Fed. Cas. No. 3,841; In re Rosenfeld-Goldman Co. (D. C.) 228 Fed. 921, 36 Am. Bankr. Rep. 520.

meeting. If he is prevented from attending, he cannot adjourn the meeting by letter. In that case, the meeting wholly fails and a new meeting must be called.[31]

§ 278. Same; Special and Final Meetings.—The act provides that "a meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place. The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such a request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request." [32] In addition to this, the general orders direct that "whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called." [33]

A final meeting of creditors shall be ordered "whenever the affairs of the estate are ready to be closed." [34]. Creditors, as in regard to other meetings, are to have at least ten days' notice by mail. Fifteen days before the date fixed for this final meeting, the trustee will make a final report and file a final account with the court, and at the meeting itself he is to lay before the creditors a detailed statement of the administration of the estate. The creditors now have an opportunity to scrutinize the accounts of the trustee, and determine whether any objections to his discharge are to be based thereon.[35] A final dividend will be de-

[31] In re Dickinson, 18 N. B. R. 514, Fed. Cas. No. 3,895.

[32] Bankruptcy Act 1898, §§ 55d, 55e. See In re Back Bay Automobile Co. (D. C.) 158 Fed. 679, 19 Am. Bankr. Rep. 835.

[33] General Order No. 25. It is undoubtedly in the discretion of the referee to direct that a creditors' meeting shall be called to consider whether the trustee shall be authorized to file objections to the bankrupt's application for discharge. In re Whitney (D. C.) 250 Fed. 1005, 41 Am. Bankr. Rep. 548; In re Hockman (D. C.) 205 Fed. 330, 30 Am. Bankr. Rep. 921. So, the referee may properly call a meeting of creditors, if he deems it advisable, to consider the course to be taken with respect to property of the bankrupt which is subject to liens. In re Cutler & John (D. C.) 228 Fed. 771, 36 Am. Bankr. Rep. 420. The meeting for the declaration of a dividend should be combined with that for the payment of the dividend so declared, and if there is to be but one dividend, the final meeting can and should in proper cases be combined with such dividend meeting. In re Smith, 1 Nat. Bankr. News, 404.

[34] Bankruptcy Act 1898, § 55f.

[35] See In re Merchants' Ins. Co., 6 Biss. 252, Fed. Cas. No. 9,442.

clared by the referee and paid by the trustee, and thereupon the court will close the estate, if satisfied that it has been fully administered, by approving the final account of the trustee and discharging him.[36]

§ 279. **Representation by Attorney or Proxy.**—The act provides that the term "creditor" shall include "any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy," [37] from which it appears that creditors may act at their meetings by agent or attorney. And the Supreme Court has promulgated forms for a "general letter of attorney in fact when a creditor is not represented by attorney at law" and for a "special letter of attorney in fact." [38] These powers of attorney must be acknowledged before a referee in bankruptcy, a United States commissioner, or a notary public, and "when executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof." [39] If the letter of attorney is given to two or more persons jointly, its authority cannot be exercised by one of the attorneys alone.[40] And if one of the joint proxies is disqualified (as, because he is the bankrupt's attorney) neither of them can vote under the power of attorney at a creditors' meeting.[41] If the acts which may be performed in behalf of the creditor are specifically enumerated in the power of attorney, its scope will be limited to such acts. Thus, a letter of attorney merely empowering the agent to attend and vote at meetings of creditors will not authorize him to file opposition to the bankrupt's application for discharge.[42] The question whether one constituted the creditor's general attorney by such an instrument can appoint a third person to act for the creditor in particular details will depend upon the wording of the authorization. It has been thought that such a delegation might be made under a power of attorney which authorized the attorney to sign the creditor's name to any writing proper or necessary to collect or receive debts due, with power of substitution.[43]

[36] Bankruptcy Act 1898, § 47, clauses 7 and 8; Idem, § 2, clause 8. See In re Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73.

[37] Bankruptcy Act 1898, § 1, cl. 9.

[38] Official Forms Nos. 20 and 21.

[39] General Order No. 21, par. 5. See In re Butterfield, 14 N. B. R. 195, Fed. Cas. No. 2,248; In re McDuffee, 2 Hask. 76, 14 N. B. R. 336, Fed. Cas. No. 8,778.

[40] In re Phelps, 1 N. B. R. 525, Fed. Cas. No. 11,071.

[41] In re Columbia Iron Works, 142 Fed. 234, 14 Am. Bankr. Rep. 526.

[42] Creditors v. Williams, 4 N. B. R. 579, Fed. Cas. No. 3,379.

[43] In re Knoepfel, 1 Ben. 398, 1 N. B. R. 70, Fed. Cas. No. 7,892.

Where the person who appears on behalf of a creditor, and proposes to act in his interest, is an attorney at law, a member of the bar of the particular court, he need not produce a written and acknowledged authority. His right to appear in behalf of his client will be presumed, and he will not be required to prove it unless it is challenged by some party in interest. This applies, however, only to such acts as fall within the ordinary scope of an attorney's duties and employment, such as filing proofs of debt or other papers, examining witnesses, objecting to the claims of other creditors, or making any ordinary motion or request.[44] But the right to cast his client's vote in the election of a trustee stands upon a different footing. This is a function which the attorney cannot exercise without showing an express authorization. "Voting for a trustee in bankruptcy is an act so essentially different in its nature and character from an attorney's ordinary duties in the conduct of litigation, and the business considerations that enter into the choice of a trustee are so foreign to a lawyer's ordinary functions or presumed special knowledge and skill, that the right to vote cannot be deemed to be a part of his implied authority, nor presumed to be conferred upon a lawyer from his mere retainer in a bankruptcy proceeding."[45]

§ 280. Assignment of Claims.—A provable claim against the estate of a bankrupt may be sold and assigned either before or after proving it. "Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings setting forth the true consideration of the debt and that it is entirely unsecured, or, if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment, and if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter."[46] But if the assignee of the claim is also a debtor to the bankrupt, he cannot be permitted to set off such claim against his debt to the estate, provided the claim "was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to

[44] In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12,519; In re Hill, 1 Ben. 321, 1 N. B. R. 16, Fed. Cas. No. 6,481; In re Pauly, 1 Nat. Bankr. News, 405.

[45] In re Blankfein, 97 Fed. 191, 3 Am. Bankr. Rep. 165; In re Christley, 6 Biss. 154, 10 N. B. R. 268, Fed. Cas. No. 2,702.

[46] General Order No. 21, par. 3.

such use and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy." [47] Generally, where a provable claim against the bankrupt existed at the time the petition was filed, the subsequent assignment of it will carry with it all the rights and remedies which the assignor had, including the right to intervene in the bankruptcy proceedings.[48] And claims which have been proved, and then sold and assigned, before the election of a trustee must be voted upon in such election by the actual owner at the time and not by the original creditor.[49] But such an instrument as a certificate of deposit is dishonored after the bankruptcy of the maker, and after it is proved as a claim, it no longer possesses the qualities of negotiable paper.[50] It is also held that one taking an assignment of a proved claim as security for an antecedent liability of the person in whose name it is proved, who is apparently, though not really, the owner thereof, is not a purchaser for value, and cannot hold the claim against the true owner.[51]

§ 281. **Participation of Creditors in the Proceedings.**—Generally speaking, and for most purposes, the right of creditors to participate in the proceedings, by motion or petition or otherwise, depends upon the proof and allowance of their claims, It is by this step that the status of the creditor is asserted and recognized. It is essential to enable a creditor to vote at any creditors' meeting, and in most other respects it may be said that the rights of creditors, as parties to the proceeding, arise and accrue upon proof of their claims.[52] A non-resident creditor subjects himself to the jurisdiction of the court by proving his debt, and is thereafter bound to obey all the orders of the court touching his claim, and the court can, in case he disobeys its orders, deprive him of all the benefit of the act, and can reject and expunge his claim.[53] It should also be noted that the provision of the statute (Section 59f) allowing other creditors than the original petitioners to enter their appearance and join in the petition, has reference only to proceedings before the adjudication in bankruptcy. After the adjudication, all creditors are in effect parties to the proceeding, and they are equally entitled to be heard without any special order permitting them to intervene.[54]

[47] Bankruptcy Act 1898, § 68b.

[48] In re Fitzgerald, 191 Fed. 95, 26 Am. Bankr. Rep. 773.

[49] In re Frank, 5 Ben. 164, 5 N. B. R. 194, Fed. Cas. No. 5,050.

[50] In re Sime, 3 Sawy. 305, 12 N. B. R. 315, Fed. Cas. No. 12,861.

[51] In re Sime, 3 Sawy. 305, 12 N. B. R. 315, Fed. Cas. No. 12,861.

[52] See In re Jones, 2 N. B. R. 59, Fed. Cas. No. 7,447. "Until a creditor has proved his claim, he ought not to be heard as a creditor, and he has no right to be heard in any other character." In re Brisco, 2 N. B. R. 226, Fed. Cas. No. 1,886.

[53] In re Kyler, 2 Ben. 414, 2 N. B. R. 649, Fed. Cas. No. 7,956.

[54] In re Schwartz, 1 Nat. Bankr. News, 266.

As a general rule, the rights of creditors, after their claims have been proved and allowed, must be worked out through the trustee, and not by independent action on their part. Still, there are some circumstances in which creditors will be justified in acting for the common interest independently of the trustee, or even in opposition to him. Thus, if no trustee has yet been appointed, any creditor may petition the court to enjoin another creditor from proceeding with a pending suit, or enforcing a voidable lien or attachment against the bankrupt, and injunction may issue on such petition.[55] So also, any creditor may object to the allowance of another creditor's claim, and if it is allowed, the objecting creditor may move the court to direct the trustee to appeal, or to allow him to appeal in the name of the trustee.[56] So, if the trustee sells property of the bankrupt for a grossly inadequate price, himself discouraging competition, and refuses to have the sale set aside, a dissatisfied creditor may take action in that behalf.[57] So, while the trustee is the one in whom the title to the bankrupt's property is vested and therefore the proper person to bring all necessary actions for its recovery, yet the creditors are interested in having the assets brought in and realized upon, and the trustee cannot complain of the institution by creditors of suits to recover assets which he, the trustee, might intentionally or unintentionally permit to escape.[58]

§ 282. Advising Trustee.—Energetic creditors, who desire to promote the efficient working of the bankruptcy law, as well as to protect their own interests, will not rest satisfied with selecting a competent person to act as trustee in bankruptcy. They will be ready to advise and assist him in collecting the assets, unearthing frauds, keeping down the expenses, and securing the largest possible dividend. But the question may be asked, how far have the creditors a right to instruct the trustee in his administration of the estate? Is he bound to comply with advice or directions given to him by a majority of those in interest? If the acts or omissions of the trustee result in loss or damage to the estate, can he save himself from personal liability by showing that he acted in pursuance of directions given him by the creditors, or by a major part of those in interest? On the one hand, the trustee is required to collect and reduce to money the property of the estate "under the direction of the court." He may intervene in suits pending by or against the bankrupt by order, or with the approval, of the court,

[55] See In re Carrier, 51 Fed. 900.

[56] Chatfield v. O'Dwyer (C. C. A.) 101 Fed. 797, 4 Am. Bankr. Rep. 313.

[57] In re Groves, 2 Nat. Bankr. News, 466.

[58] Davis v. W. F. Vandiver & Co., 143 Ala. 202, 38 South. 850.

and his sales of both real and personal property shall, when practicable, be subject to the approval of the court. On the other hand, creditors are not only empowered but required, at each of their meetings, to "take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act." [59] Upon this is may be remarked that, while the trustee's administration of the estate is to be under the "direction" of the court, directions to the trustee will not generally be issued by the court sua sponte. Directions, leave, or authority for any particular action, is usually sought and obtained upon an application to the court, and such applications are commonly prompted by the creditors. In the analogous case of receiverships, when the question presented by such an application is one of expediency, the court is much influenced by the number or proportion of the creditors who urge the action to be taken or who consent to it. Unanimous consent of creditors will almost certainly induce the court to grant the authority or leave asked, provided the course proposed to be taken is not contrary to law. On the other hand, a court will be reluctant to coerce an unwilling minority, and will not do so unless thoroughly satisfied that the course proposed is clearly for the best interests of all.[60]

In so far as the modern decisions have dealt with this question, they appear to leave the matter balanced between the duty of the trustee to exercise his independent judgment and discretion and the legitimate influence of the creditors in persuading him to the course they think best. In one case it was said: "Equally removed from the interference of the creditors is the action of the trustee, so long as that officer shall act with fidelity to his trust. He is chosen to represent all the creditors, not a majority however great. The purpose of vesting the estate of the bankrupt in him is to commit to an impartial administration its management for the benefit of each and all the creditors. The creditors are the cestuis que trustent. He gives a bond for the faithful performance of his duty to all the beneficiaries. His office is one of personal confidence and cannot be delegated. He has no right to impose his duty on others, and if he does he will be responsible to the cestuis

[59] Bankruptcy Act 1898, § 55c. On this point the bankruptcy law at present in force in Great Britain makes specific provision. It directs that "the trustee shall, in the administration of the property of the bankrupt, and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting. The trustee may from time to time summon general meetings of the creditors for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors may direct." English Bankruptcy Act 1883, § 89.

[60] See Keenan v. Shannon, 10 Phila. (Pa.) 219, 9 N. B. R. 441, Fed. Cas. No. 7,640; In re Treadwell, 23 Fed. 442.

que trustent. Subject to the control of the court and statutory limitations, the entire administration of the trust estate is in his hands. He cannot therefore yield his judgment to that of a majority of the creditors, merely because they are a majority, without a breach of his trust. To thus abdicate his duties is to make himself a mere passive trustee. It is proper that he should consult with the creditors upon important matters and get the benefit of their knowledge and experience, but the responsibility of decision rests upon him."[61] On the other hand, highly respectable authorities hold that, when the trustee is in serious doubt as to the expediency of some proposed step in the administration of the estate,—as, for example, the bringing of a suit the issue of which may be doubtful, or which may prove costly out of all proportion to the amount finally recovered,—he should first exercise his own intelligence and judgment and take the advice of counsel, and if still in doubt, the proper course is for him to assemble the creditors in special meeting, under the presidency of the referee and put the question to their discussion and decision by vote. Their instructions will be authoritative and will save the trustee from any personal responsibility. If he has not enough funds in hand to conduct the proposed litigation, he may also require the creditors to come to his assistance with such money as may be required.[62] But the trustee should be careful not to act (and the court will not allow him to act) under the control of any particular creditor or group of creditors. Where there is evidence of such control or attempted control, the court will direct him to report fully to a special meeting of all the creditors, to be called for the purpose, and to be governed by such directions as the meeting shall adopt.[63]

§ 283. **Furnishing Indemnity for Expenses.**—There may be circumstances in which it will be incumbent upon the creditors to advance the money required for the expense of legal proceedings, if they desire such proceedings to be instituted with the idea that they may result in benefit to themselves. Thus, generally, where creditors of an estate desire the trustee to bring suit to set aside alleged preferences or fraudulent conveyances, or otherwise to recover property alleged to belong to the bankrupt, they may be required to guaranty to the trustee all the probable costs and expenses likely to be incurred in the prosecution of such suit, if there are no funds of the estate to pay such expenses, or

[61] In re Columbia Iron Works, 142 Fed. 234, 14 Am. Bankr. Rep. 526. And see In re Meadows, Williams & Co., 181 Fed. 911, 25 Am. Bankr. Rep. 100.

[62] See In re Baber, 119 Fed. 520, 9 Am. Bankr. Rep. 406; In re Kearney, 184 Fed. 190, 25 Am. Bankr. Rep. 757; In re Harper, 175 Fed. 412, 23 Am. Bankr. Rep. 918.

[63] In re Arnett, 112 Fed. 770, 7 Am. Bankr. Rep. 522.

if the money in hand is not more than enough for the creditors having priority, or if the wish of those creditors is opposed by the trustee himself or by a considerable body of other creditors.[64] But though a trustee in bankruptcy is not required to litigate every question called to his notice by creditors, however frivolous or apparently lacking in support, yet he cannot, by requiring indemnity in every instance against costs and expenses, cast the risk of a controversy respecting alleged preferences, etc., on the particular creditor requesting him to undertake it.[65]

§ 284. Right to Information as to Estate.—The bankruptcy act clearly recognizes and fully provides for the right of creditors to require all legitimate information in regard to the estate in which they are interested and its administration by the trustee, and to inspect records, accounts, and papers relating to it, to the end that they may be fully advised as to all matters affecting their interests and competent to "take such steps as may be pertinent and necessary for the best interests of the estate." Thus, it is made the duty of the trustee to "furnish such information concerning the estate and its administration as may be requested by parties in interest." (Section 47, clause 5.) The accounts and papers of trustees "shall be open to the inspection of officers and parties in interest." (Section 49.) Referees, also, must "furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest." (Section 39, clause 3.) And if any person, while acting as referee or trustee, shall "refuse to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in their charge, by parties in interest, when directed by the court so to do," he is liable to punishment by fine and the forfeiture of his office. (Section 29, c. 3.) But it has been held that the refusal by the referee of permission to take a copy of the inventory, which is at all times accessible to the creditor, is not prejudicial to the latter, and is no ground for opposition to the recording of a resolution of composition.[66]

[64] In re Barrett, 132 Fed. 362, 12 Am. Bankr. Rep. 626; In re Barnes, 18 Fed. 158; In re Griffith, 1 Nat. Bankr. News, 546; In re Hughes, 2 Ben. 85, 1 N. B. R. 226, Fed. Cas. No. 6,841; In re Sawyer, 2 Low. 551, 16 N. B. R. 460, Fed. Cas. No. 12,396; In re McNamara, 2 Nat. Bankr. News, 341.

[65] In re Baird, 112 Fed. 960, 7 Am. Bankr. Rep. 448.

[66] In re Tifft, 18 N. B. R. 227, Fed. Cas. No. 14,033.

CHAPTER XVII

APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEES

§ 285. Qualifications of Trustees.—The forty-fifth section of the bankruptcy act provides that trustees in bankruptcy may be individuals who are competent to perform the duties of the office and who reside, or have an office, in the judicial district within which they are appointed, or corporations authorized by their charters or by law to act in such a capacity and having an office in the judicial district within which they are appointed. Nothing appearing to the contrary in the statute, it would seem that a woman might be elected or appointed trustee, if otherwise qualified and competent. And it has been held that a person is not disqualified from acting in this capacity because he is an alien.[1] Under the second clause of the statute, a trust company or other suitable corporation may act as a trustee in bankruptcy, and the selection or appointment of such companies has not been uncommon.[2]

The requirement that the trustee must be "competent" to perform the duties of his office probably has reference to business competence and skill. But it must be noted that this is a question for the creditors to determine in the first instance. It is for their own sake that a competent trustee must be chosen, and while their choice is subject to the approval or disapproval of the court, it is not believed that any court of bankruptcy would set aside an election of trustee on the ground that the appointee was not competent, unless at the instance of a respectable minority and upon very strong representations of his unfitness.[3] In the cases where it becomes necessary for the court to name the trustee,

[1] In re Coe, 154 Fed. 162, 18 Am. Bankr. Rep. 715.

[2] See, for instance, In re Howe Mfg. Co., 193 Fed. 524, 27 Am. Bankr. Rep. 477, where it appears from the report that the trustee in bankruptcy was a trust company, though the case itself is not concerned with this question.

[3] In re Clairmont, 1 Low. 230, Fed. Cas. No. 2,781.

regard must be had to the business experience and skill of the person to be appointed, very much as in the case of the appointment of a receiver. The court should here take into account the nature of the bankrupt's property and business, and select for its administration a person whose experience in that business or with property of that nature will enable him to dispose of it to the best advantage.[4]

A trustee in bankruptcy does not act in the interest of the bankrupt, but, as a rule, adversely to him. For this reason he must not be under the influence or control of the bankrupt, and it is said that a near relative of the bankrupt is not eligible as trustee of his estate, or at least, while such relationship may not be an absolute disqualification, it is a circumstance which should have great weight in determining the question of his confirmation.[5] But there is nothing to prevent the creditors from electing one of their own number, or the court from appointing one of them, to be trustee. The fact of his interest in the estate does not disqualify him. There is no requirement that the trustee should be a disinterested third party, and as a matter of fact, it will frequently be highly expedient to choose one of the heavier creditors.[6] And since his successful administration of the estate, in view of the extraordinary powers and remedies with which he is vested, does not depend on the good will of the bankrupt, it is no objection to his approval by the court that he has incurred the violent hostility of the

[4] In the analogous case of the appointment of a receiver, it has been said that it is not proper to appoint a person as receiver over a kind of property (such as a mill) the management of which he does not understand, with an undertaking that he will act under the direction of a person who does understand it. The receiver should be a person competent to manage the particular property and to act on his own responsibility. Lupton v. Stephenson, 11 Ir. Eq. 484.

[5] In re Powell, 2 N. B. R. 45, Fed. Cas. No. 11,354; In re Zinn, 40 How. Prac. (N. Y.) 461, 4 N. B. R. 370, Fed. Cas. No. 18,216; In re Bogert, 3 N. B. R. 651, Fed. Cas. No. 1,600; In re Zinn, 4 Ben. 500, 4 N. B. R. 436, Fed. Cas. No. 18,215. See, as to the analogous case of receivers, Wetter v. Schlieper, 7 Abb. Prac. (N. Y.) 92; Williamson v. Wilson, 1 Bland. Ch. (Md.) 418, 427.

[6] In re Lazoris, 120 Fed. 716, 10 Am. Bankr. Rep. 31; In re Lewisohn, 98 Fed. 576, 3 Am. Bankr. Rep. 299; In re Clairmont, 1 Low. 230, Fed. Cas. No. 2,781. The act of 1867 provided that "no person who has received any preference contrary to the provisions of this act shall be eligible as assignee." Rev. Stat. U. S. § 5035. As to this prohibition, see In re Powell, 2 N. B. R. 45, Fed. Cas. No. 11,354; In re Stuyvesant Bank, 5 Ben. 566, 6 N. B. R. 272, Fed. Cas. No. 13,581. In the case of a trustee in bankruptcy, as in the case of a receiver in equity, it is not invariably necessary, or even proper, that he should be an entirely disinterested person. There may be circumstances in which one of the creditors would be an eminently suitable person for the office. When the work to be done is the unearthing of concealed preferences, meeting and baffling fraudulent designs in relation to the secreting or transfer of property, exposing fraudulent conspiracies, and the like, it is probable that the interests of all concerned will be best served by the active labor of one who has a direct and personal interest in realizing the greatest possible amount of assets. In an analo-

latter.[7] Neither is there anything in the act to prevent the attorney for the creditors, or for one or some of them, from being chosen as trustee, and if he is duly elected by the creditors, and is not otherwise objectionable, he will be confirmed.[8] But on the other hand, no trustee will be approved or confirmed by the court who has plainly been elected under the influence or control of the bankrupt or in his interest.[9] Thus, the bankrupt's own attorney is not eligible. And even one who has no apparent connection with the bankrupt's attorneys, other than having an office in the same building with them, may be set aside as unsuitable for the office of trustee when objected to by the minority creditors and when the votes which elected him were cast under powers of attorney held by the bankrupt's attorneys.[10] One who has acted as attorney for the bankrupt, in matters not connected with the bankruptcy, may be eligible as trustee, but a person who has a direct interest adverse to that of the creditors generally, or who is the attorney of such person, is disqualified.[11] No debtor of the bankrupt should be appointed trustee, and hence the court will disapprove the selection of the bankrupt's common-law assignee, the assignment being the act of bankruptcy relied on, and the assignee having an unsettled account and a claim for his services.[12] But the mere fact that one who is chosen

gous case, on a motion to appoint a receiver, a federal court has said: "He is not, and ought not to be, indifferent between the parties. His duty requires him to be the active adversary of this fraudulent debtor and his accomplices. In the selection of a person to discharge these duties, the respondent [corresponding to the bankrupt] in the position he now occupies, should have no voice, any more than the criminal should have in the choice of a detective to ferret out and recover the fruits of his crime. A person, therefore, who, by relationship or other connection, may be supposed to feel in some degree the desire felt by the complainant to collect the sum decreed to be due, would seem, if otherwise unobjectionable, to be eminently fit to be appointed a receiver in a case like the present." Shainwald v. Lewis, 8 Fed. 878. And see further, Cookes v. Cookes, 2 De G., J. & S. 526; Taylor v. Life Association of America, 3 Fed. 465; Matter of Knickerbocker Bank, 19 Barb. (N. Y.) 602; Chamberlain v. Greenleaf, 4 Abb. New Cas. (N. Y.) 92.

[7] In re Mangan, 133 Fed. 1000, 13 Am. Bankr. Rep. 303.

[8] W. A. Liller Bldg. Co. v. Reynolds, 247 Fed. 90, 159 C. C. A. 308, 40 Am. Bankr. Rep. 371; In re Margolies, 191 Fed. 369, 27 Am. Bankr. Rep. 398; In re Lawson, 2 N. B. R. 112, Fed. Cas. No. 8,150; In re Barrett, 2 Hughes, 444, 2 N. B. R. 533, Fed. Cas. No. 1,043; In re Clairmont, 1 Low. 230, Fed. Cas. No. 2,781; Redick v. Woolworth, 17 Neb. 260, 22 N. W. 693, 52 Am. Rep. 410. When an attorney accepts the office of trustee, he surrenders for the time his standing in the court of bankruptcy as an attorney for creditors. In re Evans, 116 Fed. 909, 8 Am. Bankr. Rep. 730.

[9] In re Van De Mark, 175 Fed. 287, 23 Am. Bankr. Rep. 760.

[10] In re Sitting, 182 Fed. 917, 25 Am. Bankr. Rep. 682; In re Rekersdres, 108 Fed. 206, 5 Am. Bankr. Rep. 811; compare In re Fisher, 193 Fed. 104, 26 Am. Bankr. Rep. 793.

[11] In re Clairmont, 1 Low. 230, Fed. Cas. No. 2,781. See In re Dayville Woolen Co., 114 Fed. 674, 8 Am. Bankr. Rep. 85; In re Wink, 206 Fed. 348, 30 Am. Bankr. Rep. 298.

[12] In re Kellar (C. C. A.) 192 Fed. 830. As a trustee in bankruptcy may be called

by the creditors as the trustee advised the voluntary assignment under the state law which constituted the act of bankruptcy does not render him incompetent.[13]

The reason for the requirement that the trustee must be a resident of the judicial district in which he is appointed, or at least have an office therein, is obvious. And this requirement is imperative. A person who does not reside within the district is absolutely disqualified from being trustee, unless he has a fixed place of daily business within the district.[14] But mere remoteness of the trustee's residence from the place where the trust property is to be administered (as, for instance, where he lives in another county) is no ground for disapproving the election if he satisfies the requirements of the statute and is the free choice of the creditors.[15]

There is a rule in relation to the selection of a person to be receiver of a corporation which might very well be applied, and probably would be applied, in parallel cases under the bankruptcy law. It is that, when the condition of an insolvent corporation shows fraud, recklessness, or gross negligence in the conduct of its affairs the court, in selecting a receiver, will not appoint any of the officers or directors who have taken an active part in its former management.[16] But aside from questions of this kind, where three trustees are elected for a bankrupt corporation, it is no ground of objection that one of them is a director of the corporation, and in case it becomes the duty of the trustees to bring an action against the directors, it may be done by the other two, making

upon to sue to set aside transfers, to compel persons to account for property belonging to the bankrupt estate, etc., a trust company, which was trustee of mortgages belonging to the bankrupt, and which was intimately associated with the bankrupt's business should not be appointed trustee, since it might be compelled to assume inconsistent positions. Wilson v. Continental Bldg. & Loan Ass'n, 232 Fed. 824, 147 C. C. A. 18, 37 Am. Bankr. Rep. 444.

[13] In re Blue Ridge Packing Co., 125 Fed. 619, 11 Am. Bankr. Rep. 36.

[14] In re Havens, 1 N. B. R. 485, Fed. Cas. No. 6,231; In re Clairmont, 1 Low. 230, Fed. Cas. No. 2,781; In re Loder, 2 N. B. R. 515, Fed. Cas. No. 8,459. In one case, where the trustee elected did not reside in the same city with the bankrupt, and certain creditors objected to him on this ground, the court suggested that the parties should agree on some suitable person, living in that city, to be associated with the chosen trustee as co-trustee. In re Jacoby, Fed. Cas. No. 7,166.

[15] In re Kreuger, 196 Fed. 705, 27 Am. Bankr. Rep. 440; In re Jacobs & Roth, 154 Fed. 988, 18 Am. Bankr. Rep. 728.

[16] Buck v. Piedmont & A. L. Ins. Co., 4 Fed. 849; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Attorney General v. Bank of Columbia, 1 Paige (N. Y.) 511. See In re Stuyvesant Bank, 5 Ben. 566, 6 N. B. R. 272, Fed. Cas. No. 13,581. And see In re Gordon Supply & Mfg. Co., 129 Fed. 622, 12 Am. Bankr. Rep. 94. A stockholder and officer of a bankrupt corporation is not, for that reason alone, incompetent to act as its trustee in bankruptcy. In re Merritt Const. Co., 219 Fed. 555, 133 C. C. A. 323, 33 Am. Bankr. Rep. 616.

their cotrustee a defendant as director.[17] It is also held that a man who is himself a bankrupt and undischarged is not a proper person to be appointed trustee of the estate of another bankrupt, and the referee should not receive votes cast for such a person.[18]

§ 286. Election of Trustee.—"The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate."[19] As to the time of making the appointment, there can be no trust estate for administration, and consequently no authority to choose a trustee, until after an adjudication has been made.[20] As to the number of trustees, they must be either one or three. If the creditors elect two trustees, there is a vacancy in the office of third trustee, which the creditors should fill at a subsequent meeting to be called by the referee, but if they fail to do so, the referee himself may fill it.[21] In case of the bankruptcy of a partnership and also the individual partners, it is thought to be the intention of the statute that the same person (or the same three persons) should be appointed trustee for both the firm and the separate estates.[22] But it is held that the court has discretionary power to appoint separate trustees for the estate of the firm and that of an individual partner or partners, but it is not customary, is seldom necessary, and is likely to lead to greater expense and to undesirable complications. Hence this power should be exercised only in cases of special and peculiar necessity, and for the protection of rights which cannot be adequately secured by the action of a common trustee or by the creditors directly.[23]

[17] In re Syracuse Paper & Pulp Co., 164 Fed. 275, 21 Am. Bankr. Rep. 174.

[18] In re Smith, 1 Nat. Bankr. News, 136.

[19] Bankruptcy Act 1898, § 44. The forty-fifth word in this section—the word "or" occurring after the word "revoked"—is superfluous and the sentence should be read as if it were omitted. The meaning is that if there is a vacancy in the office of trustee at the time when the creditors hold their next meeting after the reopening of an estate, or the setting aside of a composition, or the revocation of a discharge (that is, if the court, at the time of confirming the composition or granting the discharge, also discharged the trustee), then a new trustee must be appointed. Compare the language of section 50, c, where the same phrases are repeated but with the omission of this word.

[20] In re Back Bay Automobile Co., 158 Fed. 679, 19 Am. Bankr. Rep. 835.

[21] In re William F. Fisher & Co., 135 Fed. 223, 14 Am. Bankr. Rep. 366.

[22] In re Coe, 154 Fed. 162, 18 Am. Bankr. Rep. 715.

[23] In re Currie, 197 Fed. 1012, 28 Am. Bankr. Rep. 834.

The statute does not prescribe any particular manner of conducting the election of a trustee in bankruptcy. It is not necessary that the creditors should first take an informal vote and then follow it by a formal ballot, in fact, there is no such thing known in the law as an informal vote. Any manner of expressing their choice of a trustee, provided it is free from doubt and ambiguity, will be a sufficient vote.[24] The election may be by ballot, viva voce, or by calling the name of each creditor or by calling upon the persons representing them to name their choice.[25] But while the manner of proceeding is left very much to the determination of the creditors themselves it should conform to the general practice of meetings; and Form No. 22, prescribed by the general orders, "seems to contemplate that each creditor shall vote, and that his name, residence, and amount of debt shall be recorded. If on the first vote no choice is made, by reason of a greater part in number and value failing to concur, a second, third, or any number of ballots may be had, until the required concurrence is obtained."[26] If no choice of a trustee is made at the first session of the creditors, the meeting may be adjourned to another day, and the trustee then chosen; it continues to be the "first meeting" notwithstanding such adjournment.[27] So also, if objections are raised to proxies offering to vote, and the referee decides that they are disqualified, he may adjourn the meeting, in order to enable the creditors affected to appear in person or by valid proxies, but he is not bound to do so, and if he directs the creditors present to proceed forthwith to an election, the result will not be set aside for that reason unless it is shown that he abused his discretion.[28] It is also sufficient cause for adjourning the meeting that the person chosen as trustee declines to act (although creditors should try to avoid this emergency by first obtaining the consent of the trus-

[24] In re Pearson, 2 N. B. R. 477, Fed. Cas. No. 10,878.

[25] In re Lake Superior Ship Canal Co., 7 N. B. R. 376, Fed. Cas. No. 7,997.

[26] In re Phelps, 1 N. B. R. 525, Fed. Cas. No. 11,071.

[27] In re Phelps, 1 N. B. R. 525, Fed. Cas. No. 11,071; In re Nice & Schreiber, 123 Fed. 987, 10 Am. Bankr. Rep. 639. Where objections are filed to certain claims, and no person receives the votes of an undisputed majority in number and amount for trustee, the referee is authorized to postpone the election, and on his doing so, the election should be treated as tentative. In re Knox, 221 Fed. 36, 136 C. C. A. 562, 34 Am. Bankr. Rep. 461. So also, it is in the discretion of the referee to adjourn the first meeting of creditors from time to time, in order that disputed claims may be investigated before the voting for trustee is completed. In re Show (D. C.) 248 Fed. 295, 41 Am. Bankr. Rep. 481. Or he may adjourn the meeting to permit claimants to amend their statements of claim. In re Eisenberg (D. C.) 251 Fed. 427, 40 Am. Bankr. Rep. 864.

[28] In re McGill, 106 Fed. 57, 45 C. C. A. 218, 5 Am. Bankr. Rep. 155.

tee whom they expect to elect), or that objections are presented against the person elected and are taken under advisement by the referee.[29]

The meeting should be organized at the hour designated in the official notice, and should be kept open for a proper length of time, to enable all the creditors who desire to participate to come in and cast their votes. The law does not prescribe the length of time for which the meeting must be kept open, but under any ordinary circumstances an hour is not too long. It was the general practice under the act of 1867, as also under the English bankruptcy law and the insolvency laws of some of the states, to accord that much time to parties interested to appear.[30] Where, at the first meeting, the bankrupt proposes to offer terms of composition to his creditors, the referee, in a proper case, should postpone the choice of a trustee, to give opportunity for the filing of the proposed composition, and if it is filed, he should further postpone the selection of a trustee until the entry of an order refusing to confirm such agreement.[31] It will be noticed that the statute provides (Section 56) that "creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present." In the absence of any more specific direction, this provision must be understood as applicable to the choice of a trustee, and a majority of those creditors who are present at the meeting, and have had their claims allowed, must concur in his selection, as well as a majority in value of the claims of such creditors.[32]

§ 287. Same; Cases Where no Trustee Appointed.—The general orders in bankruptcy provide that "if the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable."[33] This order is within the power granted by the act to the Supreme Court to prescribe necessary rules for carrying the statute into effect.[34] And a case for its application arises where the schedule of a voluntary bankrupt shows no other assets than

[29] In re Lewensohn, 98 Fed. 576, 3 Am. Bankr. Rep. 299.

[30] In re Gilley, 2 Low. 250, Fed. Cas. No. 5,438; In re Phelps, 1 N. B. R. 525, Fed. Cas. No. 11,071.

[31] In re Rung, 1 Nat. Bankr. News, 406.

[32] In re Henschel, 109 Fed. 861, 6 Am. Bankr. Rep. 305.

[33] General Order No. 15. Under the act of 1867, it was held that, even though no creditors proved their debts and no assets were shown, still an assignee should be appointed, because creditors might appear and assets might be found. Anonymous, 1 N. B. R. 122, Fed. Cas. No. 457.

[34] Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786.

such as are exempt by law.[35] Even though some available assets may be disclosed, but no substantial amount, the appointment of a trustee is not indispensable, and no person elected to that office can be compelled to serve without compensation, so that, if creditors insist upon the appointment of a trustee, they must advance the statutory fees or otherwise arrange for his remuneration.[36] But if assets afterwards come to light, a trustee must be appointed. This step is essential to divest the bankrupt of title to his property, and so make it available for administration in bankruptcy.[37] Hence if the referee, after ordering that no trustee should be appointed, for the causes set forth in the general order, shall learn that property of the bankrupt has been found which creditors can claim as assets of the estate, he should then take measures for the appointment of a trustee.[38]

§ 288. Same; Rights of Creditors as Voters.—Generally speaking, and for most purposes, the right of a creditor to participate in the bankruptcy proceedings against his debtor does not depend upon his being named as a creditor in the bankrupt's list or schedule,[39] but upon the proof and allowance of his claim. It is by this step that the status of the creditor is asserted and recognized. This is necessary to entitle him to vote as a creditor in the election of a trustee, to challenge the right of any other voter, or to take any other part in the proceedings.[40] And since the right to elect a trustee belongs to the proving creditors, the vote will not be postponed to allow other creditors to prove their claims, unless by consent of those who have already proved.[41] If objection is

[35] Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786. Probably also, a case arises in which no trustee need be appointed where there are valid mortgage or other liens which will absorb all of the bankrupt's available property; but even in this case the petitioning creditors are entitled to an adjudication of bankruptcy if they have made out their case, and the question of appointing a trustee cannot be taken up until after an adjudication has been made. Vulcan Sheet Metal Co. v. North Platte Valley Irr. Co., 220 Fed. 106, 136 C. C. A. 198, 33 Am. Bankr. Rep. 686.

[36] In re Levy, 101 Fed. 247.

[37] Miller v. Barto, 247 Ill. 104, 93 N. E. 140. But in the absence of proof to the contrary, it will be presumed that, after the institution of a bankruptcy proceeding, a trustee was appointed, thus divesting the bankrupt's title to real estate. Stern v. Bradner Smith & Co., 225 Ill. 430, 80 N. E. 307, 116 Am. St. Rep. 151.

[38] In re Smith, 93 Fed. 791, 2 Am. Bankr. Rep. 190.

[39] In re Evening Standard Pub. Co., 164 Fed. 517, 21 Am. Bankr. Rep. 156.

[40] See In re Jones, 2 N. B. R. 59, Fed. Cas. No. 7,447; In re Hill, 1 Ben. 321, 1 N. B. R. 16, Fed. Cas. No. 6,481; In re Brisco, 2 N. B. R. 226, Fed. Cas. No. 1,886. To entitle a creditor to vote at the election of a trustee, his statement of claim should show the date of the indebtedness, so as to exclude the possibility of the defense of limitation. In re Eisenberg (D. C.) 251 Fed. 427, 40 Am. Bankr. Rep. 864.

[41] In re Lake Superior Canal Co., 7 N. B. R. 376, Fed. Cas. No. 7,997. But compare In re Rosenfeld-Goldman Co. (D. C.) 228 Fed. 921, 36 Am. Bankr. Rep. 520.

made to the reception of the vote of any creditor, the question will be decided by the referee and certified to the judge for review, if desired. It is the duty of the referee at least to hear the objections sufficiently to determine whether they are made in good faith, and if so, and if they appear to be well founded, the claim should not be allowed for voting purposes.[42] If the claim has not yet been proved or allowed, the referee may, on a good case against it being made, postpone the question of allowance until after the vote for trustee.[43] And creditors whose proofs of claims have been thus postponed may have the proceedings certified to the court, and if the postponement is held to have been erroneous, the election may be set aside and a new vote taken, provided it appears that the result would be changed by allowing votes to be cast on such claims.[44] But mere oral unverified objections to claims of creditors, not supported by any proof offered or produced, are not sufficient to require the referee to adjourn the meeting until such objections can be tried before proceeding with the election.[45] If some of the creditors object to the votes offered to be cast by other creditors, on the ground that they were procured by the influence of the bankrupt and in collusion with him, or that they are controlled by him and meant to be cast in his interest, the referee has power to hear and decide the question thus raised, and to exclude such votes from the election if he finds the facts to be as stated.[46] But it is no reason for excluding a claim, unquestionably valid, from the right to vote, that it is due to the bankrupt's attorney or his clerk, and therefore may be voted in his interest.[47] And so where, by want of proper advice, creditors have named as their agent and attorney a person who has acted for the bankrupt, and whom mere judicial policy discourages from acting for them, they should not for that reason be denied a voice in the selection of the trustee.[48]

[42] In re Malino, 118 Fed. 368, 8 Am. Bankr. Rep. 205; In re Kelly Dry Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528. As to allowing a creditor to vote upon so much of his claim as is undisputed, see In re Wenatchee-Stratford Orchard Co., 205 Fed. 964, 30 Am. Bankr. Rep. 540.

[43] In re Noble, 3 Ben. 332, 3 N. B. R. 96, Fed. Cas. No. 10,282; In re Northern Iron Co., 14 N. B. R. 356, Fed. Cas. No. 10,332.

[44] In re Eagles, 99 Fed. 695, 3 Am. Bankr. Rep. 733; In re Lake Superior Ship Canal Co., 7 N. B. R. 376, Fed. Cas. No. 7,997.

[45] In re Syracuse Paper & Pulp Co., 164 Fed. 275, 21 Am. Bankr. Rep. 174.

[46] In re McGill, 106 Fed. 57, 45 C. C. A. 218, 5 Am. Bankr. Rep. 155; In re Van De Mark, 175 Fed. 287, 23 Am. Bankr. Rep. 760. See In re Noble, 3 Ben. 332, 3 N. B. R. 96, Fed. Cas. No. 10,282.

[47] In re Floyd, 183 Fed. 791, 25 Am. Bankr. Rep. 194.

[48] In re Kaufman, 179 Fed. 552, 24 Am. Bankr. Rep. 117. Where majority creditors of a bankrupt were represented by attorneys, who had previously represented the bankrupt, and who had solicited the claims, and for this reason were not allowed to vote in the election of a trus-

There is no reason in law or in morals why a relative of the bankrupt, provided he is a legitimate creditor, should not have the same right to vote for a trustee as any other creditor.[49] But the purity and freedom of the election being the main consideration, the referee is not without a certain measure of discretion in this matter. Thus, where there was a struggle over the election of a trustee, and the wife of the bankrupt presented a claim and asserted herself to be a creditor, and the contest was so close that her vote, if allowed, would determine the choice of the trustee, it was held that it was not improper for the referee to disallow it, basing his objection on the insufficiency of the statement of claim to show that it was not barred by limitations, although the claim (which was not finally disallowed) might have been amended so as to make it good on its face.[50] An analogous question is as to the right of stockholders to vote for trustee in the bankruptcy of their corporation. It appears that where the corporation is in voluntary bankruptcy, any of the stockholders who have legitimate and provable claims against it may take part in the selection of the trustee, or at least, that where the claims of stockholders constitute so large a part of the corporation's indebtedness that it would be entirely solvent if they were disregarded, then other creditors have no title to complain because the votes of the stockholders were allowed.[51] A shareholder in a building and loan association who is entitled at any time to withdraw and to demand the book value of his stock is a creditor of the association in its bankruptcy and entitled to vote for trustee.[52]

The act provides (section 56) that "creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess." [53] One who holds a note made by the bankrupt and indorsed by a third person, which is secured by collateral belonging to the indorser, is not a secured creditor within

tee, the referee should have granted a continuance, in order that they might secure other proper representation and participate and proceed to the election of a trustee by the majority, and it was error for him to refuse. In re E. A. Walker & Co., 204 Fed. 132, 29 Am. Bankr. Rep. 499.

[49] In re Rothleder (D. C.) 232 Fed. 398, 37 Am. Bankr. Rep. 116.

[50] In re Ballantine (D. C.) 232 Fed. 271, 37 Am. Bankr. Rep. 111.

[51] In re Continental Bldg. & Loan Ass'n (D. C.) 232 Fed. 413, 36 Am. Bankr. Rep. 412, affirmed, Wilson v. Continental Bldg. & Loan Ass'n, 232 Fed. 824, 147 C. C. A. 18, 37 Am. Bankr. Rep. 444.

[52] Merchants' Nat. Bank v. Continental Bldg. & Loan Ass'n, 232 Fed. 828, 147 C. C. A. 22, 37 Am. Bankr. Rep. 439.

[53] See In re Eagles (D. C.) 99 Fed. 695, 3 Am. Bankr. Rep. 733.

the definition of the statute, and is therefore entitled to vote for trustee.[54] But one who has furnished material to a bankrupt building contractor, and who has served an attested account on the owner of a building under construction, which, under the laws of the state, effects an attachment on any money then or subsequently due the contractor, is a secured creditor, and is not entitled to vote unless it is shown that no money was due or became due to which his lien could attach.[55]

Where a secured creditor makes a purely formal proof of claim and does not allege any insufficiency in the security or take any steps to have his security valued, he is not entitled to have the claim allowed in any amount, so as to enable him to participate in the creditors' meetings.[56] And a creditor holding a mortgage as security, who, in the proof of his debt, states upon information and belief, that the mortgage is worth less than the amount of the debt, is not entitled to vote on the difference between its value as stated by him and the amount of his debt.[57] But where the referee in bankruptcy ascertained that the security held by a creditor would be insufficient to satisfy his claim, and no exception was taken to the method of liquidation, which was not favorable to the creditor, it was held that the referee did not err in permitting him to vote in the selection of a trustee, for the amount of the deficit, without surrendering the collateral.[58] Where the security held by the creditor covers the entire debt, though it may be insufficient in amount, he cannot vote at a creditors' meeting unless his security has been valued in the manner prescribed by the act and the excess thus ascertained. But where a specific portion or amount of the debt is secured, so that the debt secured can be separated from the entire debt, at once and with certainty, the creditor may vote and act, as to the residue, as a general creditor.[59] As to preferred creditors, it should be noted that their claims cannot be "allowed" until they have surrendered their preferences (Section 57g), and that the voters at these meetings are defined as "creditors whose claims have been allowed and are present" (Section 56). Consequently a preferred creditor cannot participate in the choice of a trustee unless he has surrendered his preference. This he may do, however, at the first meeting, and then vote for the trustee, when the preference is of such a nature as to be effectually destroyed by such

[54] In re Pan-American Match Co. (D. C.) 242 Fed. 995, 39 Am. Bankr. Rep. 805.

[55] In re Ferrand (D. C.) 263 Fed. 908, 45 Am. Bankr. Rep. 36.

[56] In re North Star Ice & Coal Co. (D. C.) 252 Fed. 301, 42 Bankr. Rep. 76

[57] In re Hanna, 5 Ben. 5, 7 N. B. R. 502, Fed. Cas. No. 6,027.

[58] In re Milne, Turnbull & Co. (D. C.) 159 Fed. 280, 20 Am. Bankr. Rep. 248.

[59] In re Parkes, 10 N. B. R. 82, Fed. Cas. No. 10,754.

surrender.[60] For somewhat similar reasons, a creditor of a bankrupt who is also a debtor to the bankrupt's estate is not entitled to vote in the election of a trustee where he has not made his indebtedness good.[61]

If only a single creditor appears at the first meeting and proves his debt, he is entitled to name the trustee.[62] Where the creditor is a firm, either of the partners may vote the full amount of the claim; but if the debt is owned by joint creditors who are not partners, or by joint trustees, neither can vote or act without the authority or consent of the other.[63] A corporation may vote by its proper officers or by any person specially authorized.[64] Claims which have been proved and then sold and assigned, before the election of a trustee, must be voted upon in such election by the actual owner at the time and not by the original creditor.[65] A creditor may change his vote as often as he sees fit until he has signed the certificate of choice of trustee, but not after that has been done and the meeting has adjourned, at least where such a change would cause a failure to elect, but if a mistake has been made, he may present his objection to the judge.[66]

The majority required to elect a trustee is thus defined by the statute: "A majority vote in number and amount of claims of all creditors whose claims have been allowed and are present." This requires, therefore, a majority not merely of the votes cast but of all the creditors who are present and have had their claims allowed.[67] And creditors are not to be counted as present merely because their claims have been allowed, but they must attend in person or by duly authorized agent or attorney,

[60] In re Saunders, 2 Low. 444, 13 N. B. R. 164, Fed. Cas. No. 12,371.

[61] In re Duryea Power Co., 159 Fed. 783, 20 Am. Bankr. Rep. 219. But an unliquidated claim for damages which the bankrupt proposes to set off against the claim of a creditor must be wholly disregarded in the proceedings for the choice of a trustee. That is, the creditor is entitled to vote, and for the full amount of his claim, as it is not competent at this stage of the proceedings to consider the question of set-off. In re Orne, 1 Ben. 361, 1 N. B. R. 57, Fed. Cas. No. 10,581.

[62] Anonymous, 1 N. B. R. 216, Fed. Cas. No. 458; In re Haynes, 2 N. B. R. 227, Fed. Cas. No. 6,269. And where, in the course of the proceedings, one creditor has become the sole creditor, he may apply for the appointment of a new trustee in place of the one acting, and such person will be appointed as he and the bankrupt may agree upon, or, if they do not agree, the matter may be referred to the referee. In re Sacchi, 10 Blatchf. 29, 6 N. B. R. 497, Fed. Cas. No. 12,200.

[63] In re Purvis, 1 N. B. R. 163, Fed. Cas. No. 11,476.

[64] Ex parte Bank of England, 1 Swanst. 10. The managing officers of a bankrupt corporation, when bona fide creditors of the company, have the same right to vote for the trustee as any other claimant. In re Northern Iron Co., 14 N. B. R. 356, Fed. Cas. No. 10,322.

[65] In re Frank, 5 Ben. 164, 5 N. B. R. 194, Fed. Cas. No. 5,050.

[66] In re Pfromm, 8 N. B. R. 357, Fed. Cas. No. 11,061; In re Scheiffer, 2 N. B. R. 591, Fed. Cas. No. 12,445.

[67] In re Purvis, 1 N. B. R. 163, Fed. Cas. No. 11,476; In re Scheiffer, 2 N. B. R. 591, Fed. Cas. No. 12,445. See In re Portsmouth Savings Fund Soc., 2 Hughes, 238, Fed. Cas. No. 11,297.

and those creditors who do so attend constitute the meeting.[68] And even though the creditor may be present by a proxy, still if the latter's power of attorney is invalid because given under the influence or control of the bankrupt for the purpose of being voted for a trustee of his choice, the creditor will not be counted as present and necessary for a choice.[69] Where a firm is the creditor, and the vote of the firm for the trustee is cast by one member thereof, in computing the number of votes such vote can be counted only as one; it would be incorrect to count each member of the creditor firm as a separate creditor who has voted.[70] And so where creditors, before the institution of the bankruptcy proceedings, assigned their claims to a committee in trust for the purpose of purchasing the bankrupt's assets from the trustee and selling them for the benefit of such assignors as distinguished from the bankrupt's general creditors, the committee is entitled to only a single vote in the selection of a trustee, and not to a vote for each of the claims so assigned.[71]

In case of the bankruptcy of a partnership, the right to appoint the trustee is in "the creditors of the partnership," that is, as distinguished from the creditors of the individual partners. (Section 5b.) But where a separate adjudication is made against a bankrupt who is or has been a member of a firm, both the separate creditors and the firm creditors have a right to vote for the trustee.[72] In case of the bankruptcy of a corporation, where a creditor has a bona fide claim against it, and there is no evidence of collusion or improper influence, the fact that the creditor is also a stockholder and director of the bankrupt corporation will not disqualify him from voting for a trustee.[73]

§ 289. Same; Representation by Agent or Attorney.—In the election of a trustee, as in all other proceedings in bankruptcy, the statute permits a creditor to act by his "duly authorized agent, attorney, or proxy." (Section 1, clause 9.) The vote of a creditor may therefore be cast by an attorney in fact, on producing a written authority from the creditor for that purpose, which authority will be filed by the referee

[68] In re Kaufman, 179 Fed. 552, 24 Am. Bankr. Rep. 117; In re Mackellar 116 Fed. 547, 8 Am. Bankr. Rep. 669; In re Henschel, 113 Fed. 443, 51 C. C. A. 277, 7 Am. Bankr. Rep. 662.

[69] In re McGill, 106 Fed. 57, 45 C. C. A. 218, 5 Am. Bankr. Rep. 155.

[70] In re Purvis, 1 N. B. R. 163, Fed. Cas. No. 11,476.

[71] In re E. T. Kenney Co., 136 Fed. 451, 14 Am. Bankr. Rep. 611.

[72] In re Beck, 110 Fed. 140, 6 Am. Bankr. Rep. 554; In re Falkner, 16 N. B. R. 503, Fed. Cas. No. 4,624; Wilkins v. Davis, 2 Low. 511, Fed. Cas. No. 17,664; In re Webb, 4 Sawy. 326, Fed. Cas. No. 17,317. A court of bankruptcy has discretionary power to appoint separate trustees for the estates of a bankrupt partnership and of an individual partner, but such power should be exercised only in cases of special and peculiar necessity. In re Currie, 197 Fed. 1012, 28 Am. Bankr. Rep. 834.

[73] In re Stradley & Co., 187 Fed. 285, 26 Am. Bankr. Rep. 149; In re Syracuse Paper & Pulp Co., 164 Fed. 275, 21 Am. Bankr. Rep. 174. Compare In re L. W.

as a part of his record in the case.[74] But the power of attorney must be actually produced and exhibited. One claiming that such a paper was executed to him, but that it has been lost or mislaid, is properly excluded from participating in the election.[75] And one in this situation, or whose proxy has been ruled invalid, has no interest or standing which gives him a right to object to the action of the referee on behalf of his alleged principal.[76] The letter of attorney must be acknowledged before a competent officer, and it has been held that an acknowledgment before a foreign consul may be sufficient.[77]

In regard to the authority of an attorney at law, it is generally agreed that an attorney in good standing need not produce a written authority from his client when he desires to appear in a bankruptcy proceeding for such ordinary purposes as filing a petition, making a request of the court, interposing an objection to some proceeding, or making a motion, but his authority will be presumed until successfully challenged by some party in interest.[78] But these are matters pertaining to the employment of the attorney in his professional capacity. In regard to the special matter of voting for a trustee, where the attorney does not act as the legal adviser of the creditor, but merely as his substitute, the decisions are to the effect that he must be duly constituted his attorney in fact.[79] If a power of attorney is given to a firm, and not to either member of it, one alone is not authorized to vote upon it in the election of a trustee.[80] But one member of a partnership, on behalf of the firm, may execute a power of attorney to a third person, authorizing him to cast the vote of the firm in such election.[81] In this special case, the rule requires the letter of attorney to show that the person executing it is a member of the firm. But if a statement to that effect

Day & Co., 174 Fed. 164, 23 Am. Bankr. Rep. 56.

[74] In re Eagles, 99 Fed. 695, 3 Am. Bankr. Rep. 733.

[75] In re Blue Ridge Packing Co., 125 Fed. 619, 11 Am. Bankr. Rep. 36.

[76] Falter v. Reinhard, 104 Fed. 292, 4 Am. Bankr. Rep. 782.

[77] In re Sugenheimer, 91 Fed. 744, 1 Am. Bankr. Rep. 425.

[78] In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12,519; In re Hill, 1 Ben. 321, 1 N. B. R. 16, Fed. Cas. No. 6,481; In re Pauly, 1 Nat. Bankr. News, 405.

[79] In re Lazoris, 120 Fed. 716, 10 Am. Bankr. Rep. 31; In re Scully, 108 Fed. 372, 5 Am. Bankr. Rep. 716; In re Blankfein, 97 Fed. 191, 3 Am. Bankr. Rep. 165; In re Purvis, 1 N. B. R. 163, Fed. Cas. No. 11,476; In re Christley, 6 Biss. 154, Fed. Cas. No. 2,702; In re Capitol Trading Co. (D. C.) 229 Fed. 806, 36 Am. Bankr. Rep. 339. Where a trustee in bankruptcy was removed, and a meeting of creditors held for the election of a new trustee, it was held that an attorney who represented conflicting interests as between the trustee and an assignee for creditors should not be permitted to represent any creditor in the election. In re Forestier (D. C.) 222 Fed. 537, 35 Am. Bankr. Rep. 51.

[80] In re Frank, 5 Ben. 164, 5 N. B. R. 194, Fed. Cas. No. 5,050.

[81] In re Barrett, 2 Hughes, 444, 2 N. B. R. 533, Fed. Cas. No. 1,043; Ex parte Mitchell, 14 Vesey, 497.

is contained in the proof of debt accompanying the letter, though absent from the letter itself, it is sufficient to entitle the attorney to represent the creditor.[82]

§ 290. Same; Corrupt Practices and Improper Influences in Election.—It is important that the action of creditors, in their choice of a trustee, should be free and unbiased. Any secret and corrupt influences brought to bear upon them, any tampering with the freedom of their choice, even, in some cases, mere solicitation of their votes, will be sufficient to warrant the court in refusing to confirm the trustee chosen, or even in annulling the election. The referee, for instance, should not attempt to influence creditors in their choice of a trustee, or in any manner interfere with their free action in that matter. If he endeavors to secure the election of a particular person by soliciting and urging the creditors to vote for him, it is an improper and unwarrantable interference on his part, and if creditors complain to the court of such conduct on the part of the referee, the judge will be justified in taking the case out of his hands and sending it to another referee.[83] More especially where it appears that the choice of the trustee has been influenced by the bankrupt himself, by bribery, soliciting votes, electioneering, packing the meeting with his own friends, or any other form of active interference with the free choice of the creditors, the court will not hesitate to disapprove or vacate the election.[84] Yet this rule, founded though it is on good sense and good policy, should not be pushed to an absurd extreme. Where the trustee chosen is a perfectly competent and trustworthy person, and is elected by a large majority of creditors apparently exercising their independent judgment in his selection, and it does not appear that his administration would be in any way detrimental to the estate, it is no sufficient reason for setting him aside that the bankrupt urged his creditors to vote for him, giving reasons for his belief that he would be the best person to have charge of the estate.[85] Generally, however, what is said above of the

[82] In re Blue Ridge Packing Co., 125 Fed. 619, 11 Am. Bankr. Rep. 36.

[83] In re Smith, 2 Ben. 113, 1 N. B. R. 243, Fed. Cas. No. 12,971.

[84] In re Ployd, 183 Fed. 791, 25 Am. Bankr. Rep. 194; In re L. W. Day & Co., 178 Fed. 545, 101 C. C. A. 461, 24 Am. Bankr. Rep. 252; Falter v. Reinhard, 104 Fed. 292, 4 Am. Bankr. Rep. 782; In re Lloyd, 148 Fed. 92, 17 Am. Bankr. Rep. 96; In re Hanson, 156 Fed. 717, 19 Am. Bankr. Rep. 235; In re Houghton, 2 Low. 243, Fed. Cas. No. 6,729; In re Bliss, 1 Ben. 407, 1 N. B. R. 78, Fed. Cas. No. 1,543; In re Wetmore, 16 N. B. R. 514, Fed. Cas. No. 17,466; In re Pfromm, 8 N. B. R. 357, Fed. Cas. No. 11,061; In re Stowe (D. C.) 235 Fed. 463, 38 Am. Bankr. Rep. 76. In one case the court refused to confirm the election of a trustee who was the bankrupt's bookkeeper, when it appeared that a large number of the creditors could not be present at the meeting, though the election was almost unanimous. In re Wetmore, 16 N. B. R. 514, Fed. Cas. No. 17,466.

[85] In re Eastlack, 145 Fed. 68, 16 Am.

bankrupt applies equally to his attorney. The latter should not attempt to control or influence the election in the interest of his client, and if he does so, it will be ground for refusing to confirm the trustee chosen.[86] But where an attorney's retainer for a bankrupt was limited to the filing of the bankrupt's petition, for which he received no fee, he is not disqualified to accept claims from creditors sent to him thereafter without his solicitation or the procurement of the bankrupt, and to vote such claims in the election of a trustee.[87]

Again, it is not in accordance with good policy or the spirit of the law that an election of this kind should be determined by the desire of a particular person to be chosen as the trustee, and even if no corrupt practices are charged, nor any secret or improper influences brought to bear on the creditors, the mere fact that the trustee secured his election by the solicitation of votes will be sufficient reason why the judge should refuse to confirm it,[88] more especially where the same person appears as trustee in numerous bankruptcies, and makes it his business to seek out creditors and secure their votes, though he does not wield any sinister influence and seeks only the legitimate profits of the office.[89] But facts such as these must be shown, not merely conjectured. It is not proper to disapprove an election made by the creditors on a mere suspicion that the appointment of the trustee was procured by improper considerations, based on the frequency with which the same person has been selected as trustee in bankruptcy under the influence of the same attorneys who have procured his appointment in the present case.[90]

The case is somewhat different where one or more of the creditors, not acting under the influence of the bankrupt nor in any kind of collusion with him, put up a candidate for the office of trustee and en-

Bankr. Rep. 529; In re Ketterer Mfg. Co., 155 Fed. 987, 19 Am. Bankr. Rep. 225. And see In re Morton, 118 Fed. 908, 9 Am. Bankr. Rep. 508.

[86] In re Blue Ridge Packing Co., 125 Fed. 619, 11 Am. Bankr. Rep. 36; In re Lamont, 2 Nat. Bankr. News, 291; In re Wink, 206 Fed. 348, 30 Am. Bankr. Rep. 298. But a mere suggestion by the bankrupt's attorney to creditors, that the receiver in the case should be chosen trustee, does not show any abuse of discretion by the referee in appointing the receiver as trustee. In re Rothleder (D. C.) 232 Fed. 398, 37 Am. Bankr. Rep. 116.

[87] In re Cooper (D. C.) 135 Fed. 196, 14 Am. Bankr. Rep. 320. But where the bankrupt's former attorney, with the bankrupt's assistance, had been active in obtaining powers of attorney to be used in the election of a trustee, it was held that the referee properly determined that he was disqualified to vote such powers himself. In re Wink (D. C.) 206 Fed. 348, 30 Am. Bankr. Rep. 298.

[88] In re Fisher, 193 Fed. 104, 26 Am. Bankr. Rep. 793; In re Mallory, 4 N. B. R. 153, Fed. Cas. No. 8,990; In re Doe, 3 Ben. 66, 2 N. B. R. 308, Fed. Cas. No. 3,957; In re Haas, 8 N. B. R. 189, Fed. Cas. No. 5,884. See In re Brown, 2 Nat. Bankr. News, 590.

[89] In re Doe, 2 N. B. R. 308, Fed. Cas. No. 3,957; In re Mallory, 4 N. B. R. 153, Fed. Cas. No. 8,990.

[90] In re Kreuger, 196 Fed. 705, 27 Am. Bankr. Rep. 440.

deavor by legitimate means to persuade other creditors to vote for him. There seems to be no solid legal objection to this course, and it must frequently happen that the best way to secure the effective administration of an estate in bankruptcy is for one or more of the larger creditors to select a well-equipped person for the trustee, induce him to serve, and persuade the other creditors to vote for him. And the courts have sometimes sanctioned this sort of legitimate canvassing, especially where resorted to for the purpose of defeating another candidate already in the field and justly suspected of being a tool of the bankrupt or unduly inclined to his interest.[91] But where both parties or factions in the contest over the choice of a trustee went beyond what was proper in soliciting claims to vote in the election, it is not proper action on the part of the referee to disfranchise the claims of one side and allow those of the other party to be voted.[92]

§ 291. Confirmation or Disapproval by the Court.—General Order No. 13 provides that "the appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge." And one elected to be a trustee in bankruptcy does not become a trustee in fact, or have any power to act as such, until his selection is so approved.[93] And the decision of the referee approving the choice of the creditors in the election of a trustee is subject to review by the judge.[94] On the other hand, if the referee is satisfied that any reason exists why a trustee selected by the creditors should not be approved by the court, it is his duty to state such reasons fully in submitting to the judge the question of approval.[95] The proper method of reviewing the proceedings in the election of a trustee is by a petition for review of the order of the referee approving or disapproving the selection made by the creditors.[96] On such a review, in the absence of the evidence on which the referee acted in making his decisions as to the claims to be voted, his findings of fact as to all claims must be confirmed.[97] While it is undoubted that the referee has a considerable discretion in the matter of approving or disapproving the selection of

[91] In re Callahan, 242 Fed. 479, 155 C. C. A. 255, 39 Am. Bankr. Rep. 419; Bollman v. Tobin, 239 Fed. 469, 152 C. C. A. 347, 38 Am. Bankr. Rep. 504. See In re Duryea Power Co., 159 Fed. 783, 20 Am. Bankr. Rep. 219. Compare In re Anson Mercantile Co., 185 Fed. 993, 25 Am. Bankr. Rep. 429.

[92] In re Parsons Mfg. Co. (D. C.) 247 Fed. 126, 39 Am. Bankr. Rep. 275, 858.

[93] In re Kellar, 192 Fed. 830, 113 C. C. A. 154; In re Scheiffer, 2 N. B. R. 591, Fed. Cas. No. 12,445.

[94] In re Hanson, 156 Fed. 717, 19 Am. Bankr. Rep. 235.

[95] In re Bliss, 1 Ben. 407, 1 N. B. R. 78, Fed. Cas. No. 1,543.

[96] In re Arti-Stain Co. (D. C.) 216 Fed. 942.

[97] In re Snow (D. C.) 248 Fed. 295, 41 Am. Bankr. Rep. 481.

a trustee, his discretion cannot be exercised arbitrarily.[98] He must exercise care to protect the interests of all the creditors.[99] His decision will not be set aside except for an unjust and injurious abuse of discretion or a clear mistake of law.[100] But where error of a fundamental character appears, such as to affect the rights of a substantial body of the creditors, the referee's decision cannot be upheld.[101] On the other hand, where the referee and the district judge concur in disapproving the election of a trustee effected by the creditors, their action will be sustained by the reviewing court, unless an abuse of discretion is shown.[102]

The general order vests in the court a discretion to confirm the creditors' choice of a trustee or to set it aside. But the power to annul an election is not to be exercised arbitrarily nor merely because the reviewing authority would have chosen a different person. The selection of a trustee is the peculiar right and privilege of the creditors. The court cannot undo their action save in the exercise of a sound legal discretion, based upon good and sufficient reasons. The person who is chosen by the requisite majority of creditors is entitled to be confirmed in the office of trustee, unless it is satisfactorily shown that he is disqualified under the statute, or is an incompetent person, or that the election was determined by improper or corrupt influences.[103] Objections to the confirma-

[98] Wilson v. Continental Bldg. & Loan Ass'n, 232 Fed. 824, 147 C. C. A. 18, 37 Am. Bankr. Rep. 444.

[99] In re Ballantine (D. C.) 232 Fed. 271.

[100] In re Grat (D. C.) 228 Fed. 925, 36 Am. Bankr. Rep. 524. On purely administrative matters, such as the appointment of a trustee in bankruptcy, the judgment of the referee is entitled to great weight, and it is not to be assumed that he disregarded the votes of the creditors without strong reason for so doing. Hence, his refusal to appoint as trustee the person first elected by the creditors, because that person did not reside at the place of the bankrupt's business, will be confirmed where the evidence was not reported, and the referee's report did not show whether the duties of the trustee would be such as to require some one who would be in daily contact with the business. In re Jaffee (D. C.) 272 Fed. 899, 46 Am. Bankr. Rep. 714.

[101] In re Parsons Mfg. Co. (D. C.) 247 Fed. 126, 39 Am. Bankr. Rep. 275, 858.

[102] M. C. Kiser Co. v. Georgia Cotton Oil Co., 208 Fed. 548, 125 C. C. A. 550, 31 Am. Bankr. Rep. 376.

[103] In re Margolies, 191 Fed. 369, 27 Am. Bankr. Rep. 398; In re Eastlack, 145 Fed. 68, 16 Am. Bankr. Rep. 529; In re Blue Ridge Packing Co., 125 Fed. 619, 11 Am. Bankr. Rep. 36; In re Funkenstein, Fed. Cas. No. 5,157; In re Clairmout, 1 Low, 230, Fed. Cas. No. 2,781; In re Grant, 2 N. B. R. 106, Fed. Cas. No. 5,692; In re Merritt Const. Co., 219 Fed. 555, 135 C. C. A. 323, 33 Am. Bankr. Rep. 616. "While the choice of an assignee is vested by law in a majority in number and amount of the creditors, it is subject, nevertheless, to the approval of the district judge—a provision which implies a discretionary power to disapprove the choice so made. While the judge ought not arbitrarily, capriciously, or from dislike or partiality, to overrule the decision of the creditors, he is bound to see that the rights of the minority are properly protected, and to refuse confirmation where he has good reason to suspect that the assignee has been chosen in the interest of the bankrupt. I think he is not bound to find as a fact that the assignee is incom-

tion of a person chosen trustee are usually presented by a dissenting minority of the creditors, and indeed it is hardly too much to say that this is one of the numerous devices of the law to protect and save the rights of the minority. Thus, for example, on the representations of such a minority, the court will refuse to approve the election of a trustee who was elected by the influence of the bankrupt or in his interest.[104] But any person in interest may present objections to the approval of the trustee. The bankrupt himself has a standing in court to object to the confirmation of the person selected by the creditors.[105] But the court will not take the step of disapproving the choice of the creditors, when the objections presented for its consideration would not have affected the result if recognized at the time.[106] When the judge refuses to approve the appointment of the trustee selected by the creditors, he may order a new election to be held.[107]

§ 292. **Appointment of Trustee by Court.**—If the creditors, by inaction or by disagreement, fail to exercise their right to select the trustee in bankruptcy, it will devolve upon the court to appoint a trustee.[108] In the early days of the law's administration, there was serious question whether the word "court" in this connection included the referee, or whether the appointment vested in the judge only. But these doubts were removed upon the promulgation of the official forms in bankruptcy, No. 23 being a form of appointment of the trustee by the referee in

petent, corrupt, or unfit, but may decline to approve if the circumstances are such as to indicate that the election was not a fair one, or that the assignee will not truly represent the body of the creditors." In re Wetmore, 16 N. B. R. 514; Fed. Cas. No. 17,466, per Brown, J., afterwards Mr. Justice Brown.

[104] In re Bliss, 1 Ben. 407, 1 N. B. R. 78, Fed. Cas. No. 1,543; In re Wetmore, 16 N. B. R. 514, Fed. Cas. No. 17,466; In re Houghton, 2 Low. 243, Fed. Cas. No. 6,729; In re Continental Bldg. & Loan Ass'n (D. C.) 232 Fed. 413, 36 Am. Bankr. Rep. 412; In re Rothleder (D. C.) 232 Fed. 398, 37 Am. Bankr. Rep. 116; supra, § 290.

[105] In re McGlynn, 2 Low. 127, Fed. Cas. No. 8,804. The bankrupt may move to set aside the election of a trustee on the ground that the persons whose votes elected him were not creditors of the bankrupt. In re Stokes, 1 N. B. R. 489, Fed. Cas. No. 13,475.

[106] In re Jackson, 7 Biss. 280, 14 N. B. R. 449, Fed. Cas. No. 7,123; In re Pfromm, 8 N. B. R. 357, Fed. Cas. No. 11,061.

[107] In re Scheiffer, 2 N. B. R. 591, Fed. Cas. No. 12,445.

[108] Section 44 of the bankruptcy act provides that the creditors shall "appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so." If this were all, the law would be perfectly intelligible and consistent, and its effect would be to give to creditors the unrestricted right to choose and appoint the trustee, without any question of the approval of the court, and to give to the court, not a right of approval, but a right of appointment in the case where the creditors do not act. But the second section of the act also provides that the courts of bankruptcy shall be invested with jurisdiction to "appoint trustees pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees." Now it is a well-known rule

consequence of the failure of creditors to elect.[109] The forty-fourth section of the statute gives to creditors the right to appoint "one trustee or three trustees" of the estate, and provides that "if the creditors do not appoint a trustee or trustees as herein provided, the court shall do so." Hence it appears that, when the appointment devolves upon the court, three trustees may be named if any sufficient reason appears for appointing more than one.[110] And upon a petition to a court of bankruptcy showing good grounds therefor an additional trustee may be appointed to act in conjunction with the one previously appointed.[111] But care has been taken to provide that each trustee in bankruptcy appointed by the court shall be selected in, and with reference to, the particular estate in liquidation. General Order No. 14 provides that "no official trustee shall be appointed by the court, nor any general trustee to act in classes of cases." This order would probably not prevent the same person from being appointed and acting as trustee in two or more bankruptcies at the same time, if he is chosen by the creditors (or appointed by the court) in each case as a separate and distinct matter, and not appointed generally to act as trustee in all cases, or all cases of a given class, which may be instituted in that court.

of statutory construction that a law must be so interpreted, if possible, as to prevent conflicts between its different provisions, to give force and effect to every clause and word of it, and to make it consistent with itself throughout its whole extent. In obedience to this rule, the courts would have been compelled to put one of two constructions upon these clauses of the bankruptcy act. First, they might have held that two courses were open to creditors when called upon to choose a trustee, viz., that they might either "appoint" a trustee absolutely or "recommend" an individual to the court for appointment as trustee. But if creditors had the power to appoint, there is no conceivable reason why they should rest satisfied with recommending an appointment. Secondly, the courts might have held that the action of the creditors in choosing a trustee, though final as to them, and an "appointment" so far as they were concerned, was no more than a "recommendation" as to the court, so that the court, if not satisfied with the recommendation, could refuse to approve the choice made by the creditors. This last is the interpretation put upon the act by General Order No. 13, for, in declaring that the "appointment" of a trustee by the creditors shall be "subject to be approved or disapproved by the referee or by the judge," it in effect makes such appointment equivalent merely to a "recommendation" and thereby harmonizs the two sections of the law.

[109] And see In re Knox, 221 Fed. 36, 136 C. C. A. 562, 34 Am. Bankr. Rep. 461; In re Rosenfeld-Goldman Co. (D. C.) 228 Fed. 921, 36 Am. Bankr. Rep. 520; Crocker v. United States, 48 Ct. Cl. 383.

[110] In a case where a corporation holding property and carrying on business in three different states was adjudged bankrupt and assignees were appointed who were respectively citizens of two of the states in which the proceedings in bankruptcy were pending, but none was appointed in the third state, it was considered that it ought to have been so arranged that each of the districts could have an assignee within it a resident thereof. In re Boston, H. & E. R. Co., 5 N. B. R. 233, Fed. Cas. No. 1,680.

[111] In re Overton, 5 N. B. R. 366, Fed. Cas. No. 10,625. The court has discretion to appoint different trustees for the bankrupt estates of a partnership and of its members, which is properly exercised where a partner's individual debts exceed his individual estate and the pro-

We have said that the creditors may lose their right to name the trustee by inaction or by disagreement.[112] And these are the two cases in which, ordinarily, the court will be called upon to make the appointment. If no creditors appear and prove their claims at the time and place appointed for the first meeting, then a trustee must usually be appointed by the court.[113] And the same result follows if the creditors fail to agree upon a trustee, no person receiving the majority required by the statute. When this happens at the first meeting of the creditors, it is usual and proper to ask for an adjournment of the meeting, or for the calling of a second meeting at a future day, for the purpose of taking another ballot, and the referee should grant the request. But if no such motion is made, or if a second election still results in a deadlock, and it appears impossible for the requisite majority to agree, while there is evidently need of an immediate selection of a trustee, the referee will take the matter into his own hands and appoint a trustee of his own selection, not being confined to the candidates already voted for, but being properly influenced by the wishes of any considerable body of the creditors.[114]

But if the requisite majority of creditors concur in the election of a trustee, the referee has no authority to disregard their action and select a trustee and appoint him, merely because he disapproves of the choice made by the creditors. He may, in the exercise of a sound discretion and for cause, refuse to confirm their choice. But when this action is taken, it creates a vacancy in the office of trustee, and it is the right of the creditors to fill it, wherefore it becomes the duty of the ref-

ceeding against the partnership has arrived at the stage of declaring a dividend when the proceeding against the partner is instituted. In re Wood, 248 Fed. 246, 160 C. C. A. 324, 40 Am. Bankr. Rep. 810.

[112] Where a majority in amount of the creditor's claims were disputed, causing considerable delay, but there was need of the immediate appointment of a trustee, it was held that the referee was empowered to appoint one. In re Knox, 221 Fed. 36, 136 C. C. A. 562, 34 Am. Bankr. Rep. 461.

[113] In re Cogswell, 1 Ben. 388, 1 N. B. R. 62, Fed. Cas. No. 2,959.

[114] In re Goldstein, 199 Fed. 665, 29 Am. Bankr. Rep. 301; In re Cohen, 131 Fed. 391, 11 Am. Bankr. Rep. 439; In re Machin, 128 Fed. 315, 11 Am. Bankr. Rep. 449; In re Brooke, 100 Fed. 432, 4 Am. Bankr. Rep. 50; In re Kuffler, 97 Fed. 187, 3 Am. Bankr. Rep. 162; In re Richards, 103 Fed. 849, 4 Am. Bankr. Rep. 631; In re Jackson, 7 Biss. 280, 14 N. B. R. 449, Fed. Cas. No. 7,123; In re Portsmouth Savings Fund Soc., 2 Hughes, 238, Fed. Cas. No. 11,297. The appellate court will not set aside the appointment of a trustee by the district judge where the only error claimed is in holding that no election had been made by the creditors, there being no allegation against the fitness of the person appointed. Woods v. Buckewell, 2 Dill. 38, 7 N. B. R. 405, Fed. Cas. No. 17,991. Where the referee is called upon to appoint a trustee because of the failure of the creditors to elect one, a suitable person is not ineligible for appointment merely because he was one of the unsuccessful candidates voted for by the creditors. In re F. & D. Co., 242 Fed. 69, 155 C. C. A. 13, 39 Am. Bankr. Rep. 378.

eree to call a new election and give the creditors the opportunity of uniting upon a different candidate.[115] But if the creditors, at the second election, fail or refuse to make a second choice, then it is proper for the referee to appoint a trustee.[116] But in any case the appointment of a trustee in bankruptcy by a court having jurisdiction, though it may be erroneous, is not void, and therefore cannot be assailed collaterally.[117]

§ 293. **Acceptance and Resignation of Trustee.**—The bankruptcy act itself does not require any written or otherwise formal acceptance of the office of trustee by one elected or appointed thereto. And at common law, his acceptance might be constructive and based on his dealing with the property of the estate.[118] But General Order No. 16 provides that "it shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust." Furthermore, the act requires the trustee to qualify within ten days (unless the time is extended by the court), by executing the required bond, and if he fails to do so, "he shall be deemed to have declined his appointment." [119]

It is a rule applicable to trustees generally (and it seems to be applicable in the case of trustees in bankruptcy) that, when the trustee has once accepted the appointment and assumed the duties of the office, he has no absolute right to resign and withdraw from the trust, or to relieve himself from its duties and responsibilities by renunciation. He may do this by obtaining the consent of all parties interested (provided they are all sui juris) or the court, by its order, may accept his resignation, even against the wishes of some of those interested, if the trustee shows to the court good and sufficient cause why he should be relieved from the duties of the trust. But it does not rest in his own simple choice.[120] However, in a case where a trustee in bankruptcy abscond-

[115] In re Margolies, 191 Fed. 369, 27 Am. Bankr. Rep. 398; In re Van De Mark, 175 Fed. 287, 23 Am. Bankr. Rep. 760; In re Kaufman, 179 Fed. 552, 24 Am. Bankr. Rep. 117; In re Morris, 154 Fed. 211, 18 Am. Bankr. Rep. 828; In re Mangan, 133 Fed. 1000, 13 Am. Bankr. Rep. 303; In re Mackellar, 116 Fed. 547, 8 Am. Bankr. Rep. 669; In re Hare, 119 Fed. 246, 9 Am. Bankr. Rep. 520; In re Lewensohn, 98 Fed. 576, 3 Am. Bankr. Rep. 299; In re Forestier (D. C.) 222 Fed. 537, 35 Am. Bankr. Rep. 51.

[116] In re Kellar (C. C. A.) 192 Fed. 830.

[117] Raymond v. Morrison, 59 Iowa, 371, 13 N. W. 332.

[118] See Maccubbin v. Cromwell, 7 Gill & J. (Md.) 157.

[119] Bankruptcy Act 1898, §§ 50b, 50k. See Ex parte Bryan, 2 Hughes, 273, 14 N. B. R. 71, Fed. Cas. No. 2,061.

[120] As to the case of trustees generally, see Crüger v. Halliday, 11 Paige (N. Y.) 314. Under the bankruptcy act of 1867, an assignee might, "with the consent of the judge, resign his trust and be discharged therefrom." Rev. Stat. U. S. § 5038. But we find no such provision in the present statute. As to the power to

ed, after embezzling the funds of the estate, it was held that such conduct amounted to an abandonment of his office, so that it thereby became vacant, and a new trustee might be appointed without formal steps for the removal of the former one, and without the necessity of notifying him.[121]

§ 294. **Bonds of Trustees.**—The principal provisions of the statute relating to the bonds of trustees in bankruptcy are found in the fiftieth section. It is a general rule, applicable to receivers and to all classes of trustees, that when such a person is required by law to give a "bond," this means an obligation under seal; nothing else will answer the description. The execution and filing of an instrument in the form of a bond, but not sealed, will not authorize the trustee to act.[122] Further, a trustee in bankruptcy must give a separate and distinct bond in each case in which he may be appointed trustee; a general bond, conditioned for the due performance of his duties in all cases in which he may be appointed, is not sufficient.[123] As to the sureties upon the bond, it is said that the clause of the act requiring two sureties upon the bond of a trustee is not applicable to a bond with a corporate surety given under Section 50g. The act of Congress of August 13, 1894, authorizing the approval of a corporation (which has complied with its provisions) as a sole surety, is in pari materia with this clause of the bankruptcy act.[124] The mere fact that the sureties are not residents of the district is not a sufficient reason for rejecting a bond which is in all other respects unobjectionable.[125] And where the principal becomes liable for the full amount, and the bond is executed by several sureties, who become liable in smaller sums aggregating the whole amount of the bond, this is a good and sufficient bond.[126] But the wife of the trustee should not be accepted as a surety on his bond, if the law of the particular state is such that a married woman cannot bind herself or her separate property as a surety on a bond.[127]

The condition of a trustee's bond is that he "shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of

fill a vacancy in the office of trustee created by the resignation of the incumbent, see Hull v. Burr, 64 Fla. 83, 59 South. 787.

[121] Scofield v. United States, 174 Fed. 1, 98 C. C. A. 39, 23 Am. Bankr. Rep. 259.

[122] Johnson v. Martin, 1 Thomp. & C. (N. Y.) 504.

[123] In re McFaden, 3 N. B. R. 104, Fed. Cas. No. 8,785.

[124] In re Kalter, 1 Nat. Bankr. News, 384.

[125] Ex parte Milwaukee R. Co., 5 Wall. 188, 18 L. Ed. 676.

[126] Bradley Fertilizer Co. v. Pace, 80 Fed. 862, 26 C. C. A. 198.

[127] In re McFaden, 3 N. B. R. 104, Fed. Cas. No. 8,785.

the said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee." The bond must be approved by an order in writing, which may be made by the referee.[128] The condition of such an obligation is construed with some strictness, and it is held that if a trustee in bankruptcy makes payments of money in his hands without an order of the court, and in violation of the rules, a liability on his bond will accrue, notwithstanding the fact that the payments were such as the court might have authorized if it had been applied to.[129] Generally speaking, an accounting by the trustee, under an order in that behalf is a necessary prerequisite to an action on his bond, as fixing the measure of his responsibility.[130] But this does not apply where the trustee has absconded and cannot be located or where he is a fugitive from justice,[131] in which case he is not even a necessary party to the action on the bond.[132] As provided in the statute, the bond may be sued on in the name of the United States for the use of any person injured by the breach of its condition, and it is not necessary for the party so injured to obtain leave of court to sue.[133] Where a trustee in bankruptcy has been removed from his office for mismanagement and default, and a new trustee appointed, the latter may be considered as a "person injured" by the breach of condition of the bond of the former trustee and may sue thereon, and a district court of the United States has jurisdiction of the action.[134] But a state court of general original jurisdiction will also have jurisdiction of an action on the bond of a trustee in bankruptcy.[135]

In regard to the provisions of the act that "trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act," some further remark seems necessary. There is nothing to which this provision can apply except (1) a fine imposed on the bankrupt by the court of bankruptcy, as a punishment for a contempt of the court or before a referee, or for disobedience to its lawful orders; (2) a breach of the condition of a bail bond or a forthcoming bond given by the

[128] Official Forms Nos. 25 and 26.

[129] In re Hoyt & Mitchell, 127 Fed. 968, 11 Am. Bankr. Rep. 784.

[130] United States v. Sindheim, 188 Fed. 378.

[131] Scofield v. United States, 174 Fed. 1, 98 C. C. A. 39, 23 Am. Bankr. Rep. 259.

[132] Alexander v. Union Surety & Guaranty Co., 89 App. Div. 3, 85 N. Y. Supp. 282.

[133] Alexander v. Union Surety & Guaranty Co., 89 App. Div. 3, 85 N. Y. Supp. 282.

[134] United States v. Union Surety & Guaranty Co., 118 Fed. 482, 9 Am. Bankr. Rep. 114. But see contra, Alexander v. Union Surety & Guaranty Co., 89 App. Div. 3, 85 N. Y. Supp. 282.

[135] Alexander v. Union Surety & Guaranty Co., 89 App. Div. 3, 85 N. Y. Supp. 282.

bankrupt to release his person or property from arrest. In the latter case, the loss would fall upon the bondsmen or sureties in the bail bond or other bond, as the case might be; but neither the trustee nor his sureties, nor the estate in his hands, would be liable. It should be noted that criminal offenses by bankrupts are not punishable by penalty or fine, but by imprisonment only.

§ 295. Death of Trustee.—When a person elected trustee in bankruptcy dies without having qualified, there is a vacancy in the office of trustee which must be filled by the creditors by a new election, and when this is done at a continuation or adjournment of the first meeting, it is not necessary to send out new notices to the creditors.[136] If the trustee dies after having entered upon the discharge of his duties, it is provided by the statute (Section 46) that his decease shall not abate any suit or proceeding which he is prosecuting or defending at the time, but the same may be proceeded with or defended by his joint trustee or his successor. At common law, upon the death of a trustee in bankruptcy, it seems that the right of action for a debt due to the bankrupt would vest in the trustee's executor.[137] But the present statute expressly declares that the title to the assets and estate of the bankrupt shall be vested by operation of law in the trustee "and his successor or successors if he shall have one or more." Consequently the estate remaining undisposed of passes to the successor of the trustee and not to his personal representatives,[138] and a state court has no authority to appoint a new trustee or to direct the execution of the trust under its statutory equitable powers.[139] The court of bankruptcy, however, has authority to appoint a new trustee where evidence of the existence of unadministered assets is produced after the death of the original trustee, even though his right to recover such assets may be doubtful, depending upon disputed questions of law and fact.[140] A cause of action against a trustee in bankruptcy, for wrongfully paying the assets in his hands to other creditors than the plaintiff, in disregard of the latter's right of priority, does not abate by the death of the trustee.[141]

136 In re Wright, 1 Nat. Bankr. News, 405.

137 Richards v. Maryland Ins. Co., 8 Cranch, 84, 3 L. Ed. 496.

138 Howes v. Carlisle, 52 S. W. 936, 21 Ky. Law Rep. 613.

139 Lloyd v. Davis, 123 Cal. 348, 55 Pac. 1003.

140 In re Mahoney, 5 Fed. 518. The settlement of an estate in bankruptcy by the trustee does not divest the jurisdiction of the federal district court which made the adjudication in bankruptcy, and where the trustee dies, that court has power to take such steps as the circumstances may require, so that a mistake as to the proper step to be taken does not warrant a collateral attack on its judgment. Lloyd v. Davis, 123 Cal. 348, 55 Pac. 1003.

141 United States v. Dewey, 39 Fed. 251.

§ 296. Removal of Trustee.—The second section of the act, regulating the jurisdiction of the courts of bankruptcy, provides that they may remove trustees for cause, but only after notice to the trustee proposed to be removed and upon a hearing, and only in case complaint is made in that behalf by the creditors.[142] This power of removal can be exercised by the judge only; it is not given to the referee.[143] And although the facts disclosed in a proceeding relative to the settlement of the bankrupt's estate may be such as would justify the removal of the trustee, this step cannot be taken except in pursuance of an application made in accordance with the forms prescribed.[144] The act provides that a trustee may be removed "upon complaints of creditors." This must be construed to mean any creditor of the particular estate, for the form of petition for the removal of a trustee set forth by the Supreme Court recites that it is presented by "one of the creditors of said bankrupt." The trustee is to have a "hearing," which means a full and fair opportunity to disprove the allegations against him. But the proceeding is summary, and the power of the court is similar to that exercised by courts of equity in the removal of receivers or trustees under a will.[145] The act provides for notice only to the trustee. Complaining creditors are of course before the court. But it seems that notice should be given to the other creditors, for many of them—even a majority—might desire the continuance of the trustee in office, as against one or a few complaining. The court would probably have a discretion to order notice to be given. An order of the district court removing a trustee does not present such a case or question as can be reviewed by the appellate court, as it rests wholly in the discretion of the court of bankruptcy.[146]

A trustee in bankruptcy may be removed from his office for fraud or criminal conduct in respect to the estate committed to his trust, for mismanagement resulting in loss to the beneficiaries, for careless-

142 The corresponding clause of the act of 1867 provided that the creditors might, with the consent of the court, remove any assignee by such a vote as was provided for the choice of an assignee. Rev. Stat. U. S. § 5039. See In re Dewey, 1 Low. 493, 4 N. B. R. 412, Fed. Cas. No. 3,849; In re New York Mail S. S. Co., 2 N. B. R. 74, Fed. Cas. No. 10,209.

143 General Order No. 13; In re Holden (D. C.) 258 Fed. 720. In re Berree & Wolf, 185 Fed. 224. But it seems that a referee may have a rule issued on a trustee to show cause why he should not be removed. In re Price, 4 N. B. R. 406, Fed. Cas. No. 11,409; In re Stokes, 1 N. B. R. 489, Fed. Cas. No. 13,475.

144 See In re Schapter, 9 N. B. R. 324, Fed. Cas. No. 12,438. The forms relating to a proceeding for the removal of a trustee are Nos. 52, 53, and 54.

145 See Bruns v. Stewart Mfg. Co., 31 Hun (N. Y.) 195. The referee may be directed to employ counsel to represent the estate of the bankrupt at the hearing of the order to show cause why the trustee should not be removed. In re Price, 4 N. B. R. 406, Fed. Cas. No. 11,409.

146 In re Adler, 2 Woods, 571, Fed. Cas. No. 82.

ness, incompetence, and, generally, for neglect or breach of his duty.[147] But he will not be removed for every mistake or neglect of his duty, especially where the consequences complained of were brought about by misunderstanding on his part, without wrongful or reckless intention, or by his following bad professional advice. Mistakes or negligence sufficient to justify his removal must be such as show a want of honesty or capacity to perform the duties of his office, or a lack of reasonable fidelity to the trust, and really endanger the trust property.[148] Thus, involving the estate in unnecessary litigation, if caused by erroneous legal advice, is no ground for removing the trustee.[149] Nor will he be removed for unsuccessfully attacking mortgages given by the bankrupt, when it appears that such action was justifiable.[150] But a trustee who has embezzled the funds of the estate and absconded must be removed,[151] and also one who is a fugitive from justice,[152] or who has mismanaged the estate and wholly failed to account.[153] So a trustee may be removed, and at his own cost, for neglecting to take proper measures to secure the bankrupt's property and for allowing it to be sold for taxes.[154] Ground for the removal of a trustee is also found in his dilatoriness in letting slip an opportunity to dispose of assets of the estate at great advantage, which resulted in protracted litigation and substantial injury to the interests of creditors.[155] So where the trustee has failed in properly informing creditors in regard to their rights and the value of the assets, and the information has been suppressed in the interest of one class of creditors, it is the duty of the court to remove him.[156] But where it appears that the trustee, though he ought to be removed, because of his mismanagement of the estate, has acted in entire good faith throughout, he should not be charged

[147] A trustee in bankruptcy who fails, without reason, to carry out the wishes of the creditors by whom he was chosen, thus preventing their necessary co-operation, should be removed. Bollman v. Tobin, 239 Fed. 469, 152 C. C. A. 347, 38 Am. Bankr. Rep. 504. It is also cause for removing a trustee that he employs as his attorney one who is also the legal representative of interests which may be antagonistic to the estate. In re Forestier (D. C.) 222 Fed. 537, 35 Am. Bankr. Rep. 51. But compare In re Archbold & Hamilton (D. C.) 237 Fed. 408, 38 Am. Bankr. Rep. 256. See, generally, In re Sweetser (D. C.) 240 Fed. 167; In re Holden (D. C.) 258 Fed. 720.

[148] Williams v. Nichol, 47 Ark. 254, 1 S. W. 243; Matthews v. Murchison, 17 Fed. 760; Putnam v. Timothy Dry Goods Co., 79 Fed. 454.

[149] In re Blodget, 5 N. B. R. 472, Fed. Cas. No. 1,552.

[150] In re Sacchi, 43 How. Prac. (N. Y.) 250, 6 N. B. R. 398, Fed. Cas. No. 12,201.

[151] Scofield v. United States, 174 Fed. 1, 98 C. C. A. 39, 23 Am. Bankr. Rep. 259.

[152] Alexander v. Union Surety & Guaranty Co., 89 App. Div. 3, 85 N. Y. Supp. 282.

[153] United States v. Union Surety & Guaranty Co., 118 Fed. 482, 9 Am. Bankr. Rep. 114.

[154] In re Morse, 7 N. B. R. 56, Fed. Cas. No. 9,852.

[155] In re Prouty, 24 Fed. 554.

[156] Ex parte Perkins, 5 Biss. 254, Fed. Cas. No. 10,982.

with the costs of the proceeding for his removal.[157] Deterioration of his personal character or capacity may also be ground for his removal. Thus a trustee who, from long-continued intemperance, has become unfit to have charge of the trust property may be removed.[158] And if the trustee becomes insolvent, or himself applies for the benefit of the bankruptcy act, this will be good cause for removing him from office.[159] But one who, at the time of his appointment, resided in the district and who still maintains an office therein, should not be removed merely because he has changed his legal residence to another district, unless it is shown that the change interferes with the performance of his duties or renders it difficult for interested parties to communicate with him or serve notices on him.[160] As the trustee holds a fiduciary relation to the creditors, he should not be interested in any scheme of composition. And his joining with the bankrupt to effect a composition, to the detriment of the creditors, by means of false representations as to the assets, is ground, not only for setting aside the composition, but also for removing the trustee from his office.[161]

[157] In re Mallory, 4 N. B. R. 153, Fed. Cas. No. 8,990.

[158] Bayles v. Staats, 5 N. J. Eq. 513.

[159] Harris v. Harris, 29 Beav. 107.

[160] In re Seider, 163 Fed. 138, 20 Am. Bankr. Rep. 708.

[161] In re Allen B. Wrisley Co., 133 Fed. 388, 66 C. C. A. 450, 13 Am. Bankr. Rep. 193.

CHAPTER XVIII

POWERS AND DUTIES OF TRUSTEE

§ 297. **Effect of Appointment and Qualification of Trustee.**—An adjudication in bankruptcy and the appointment of a trustee operate to divest the bankrupt of all title to his property and of the right to possess and dispose of it.[1] Thereafter all the property which was in the bankrupt's possession or control is regarded as in the custody of the law and in the actual or constructive possession of the court of bankruptcy.[2] It becomes the duty of the bankrupt to surrender to his trustee all the property in his possession and also such property of his as he can reclaim from the hands of third persons holding it as his agents or bailees, and the duty of the trustee to claim and secure the possession of it.[3] Further, not only the right of possession, but the title to the bankrupt's property is vested by operation of law in the trustee upon his appointment, but as of the date of the adjudication,[4] and in this respect the trustee differs from a receiver appointed by a court of equity, the latter being a mere temporary custodian of the property, and not regarded as having any legal title to it.[5] As the title

[1] Kempner v. Bauer, 53 Misc. Rep. 109, 104 N. Y. Supp. 76.

[2] Crosby v. Spear, 98 Me. 542, 57 Atl. 881, 99 Am. St. Rep. 424; Devendorf v. Dickinson, 21 How. Prac. (N. Y.) 275; Rogers v. Voss, 1 Wils. (Ind.) 376.

[3] Supra, § 227.

[4] In re Youngstrom, 153 Fed. 98, 82 C. C. A. 232, 18 Am. Bankr. Rep. 572; In re Walsh Bros., 159 Fed. 560, 20 Am. Bankr. Rep. 472; In re Rosenberg, 3 Ben. 366, 3 N. B. R. 130, Fed. Cas. No. 12,055.

[5] Yeager v. Wallace, 44 Pa. St. 294.

descends upon the trustee "by operation of law," no other act is necessary to vest it than the adjudication and the qualification of a duly elected or appointed trustee,[6] no assignment, deed, or transfer from the bankrupt being requisite, except as to property in foreign countries (which of course is beyond the territorial operation of the bankruptcy law) and as to some peculiar forms of property (such as licenses or franchises) which require the indorsement of the bankrupt for their transfer.[7] If the trustee needs formal evidence of his official capacity and rights, in dealing with third persons or state courts, the law provides that "a certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened." [8] The trustee, however, acts under the direction or at least the control of the court of bankruptcy, and must obey its orders even though the particular subject-matter is in litigation in a state court.[9] And further, to give him fuller authority and an even stronger title than the bankrupt had, an amendment to the statute adopted in 1910 provides that "trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." [10] This statute, though not retroactive, applied to all future cases, and is held to be consistent with the other provisions of the act and to be valid.[11]

§ 298. **Trustee as Representative of Creditors.**—Although a trustee in bankruptcy succeeds to the title of the bankrupt, he does not for that reason act as the agent or representative of the bankrupt in the subsequent proceedings, except only in the matter of setting apart to

For this reason a receiver (unlike a trustee in bankruptcy) cannot maintain trover for the property included in his charge, without leave of the court, except after it has actually passed into his possession. Singerly v. Fox, 75 Pa. St. 112; Boyle v. Townes, 9 Leigh (Va.) 158.

[6] Hough v. City of North Adams, 193 Mass. 290, 82 N. E. 46.

[7] Supra, § 220.

[8] Bankruptcy Act 1898, § 21e.

[9] Capital Nat. Bank v. Wilkerson, 36 Ind. App. 550, 76 N. E. 258.

[10] Act Cong. June 25, 1910, c. 412, § 8, 36 Stat. 840, amending Bankruptcy Act 1898, § 47a. See Bean v. Parker, 89 Vt. 532, 96 Atl. 17.

[11] In re Calhoun Supply Co., 189 Fed. 537, 26 Am. Bankr. Rep. 528; In re Gartman, 186 Fed. 349.

him the exemptions allowed by law.[12] For all other purposes and in all other matters the trustee is the representative of the creditors, and of them only, and not in any sense of the bankrupt.[13] And by analogy, where the bankrupt is a corporation, the trustee represents its creditors only, and not its stockholders.[14] This distinction is important, because it follows from it that the trustee is free to assert or contest claims and rights to property, maintain or defend proceedings, collect assets, and avoid preferences, in circumstances where the bankrupt himself would not be at liberty to act, either on the ground of estoppel or of public policy.[15] But when it is said that the trustee represents the creditors, it is meant that he represents only those who were creditors at the time of the filing of the petition, because they alone become parties to the proceeding.[16] But as to those creditors, the trustee represents them all equally and alike. He must not advocate the cause of one against another, or give to any creditor an advantage which the law does not give, nor allow himself to be controlled in his administration of the trust by any creditor or group or class of creditors. As he owes a like duty to all, he must hold himself indifferent, and give to all like opportunities and absolutely impartial treatment.[17]

[12] Aiken v. Edrington, 15 N. B. R. 271, Fed. Cas. No. 111; American Woolen Co. of New York v. Samuelsohn, 226 N. Y. 61, 123 N. E. 154. But se In re Lenters (D. C.) 225 Fed. 878, 35 Am. Bankr. Rep. 3, in which it is said that a trustee in bankruptcy occupies a fiduciary capacity and is to some extent a stakeholder, having duties to the bankrupt as well as to the creditors.

[13] In re Kessler, 186 Fed. 127, 108 C. C. A. 239; In re Kreuger, 196 Fed. 705, 27 Am. Bankr. Rep. 440; In re Doran, 148 Fed. 327, 17 Am. Bankr. Rep. 799; Aiken v. Edrington, 15 N. B. R. 271, Fed. Cas. No. 111; Cartwright v. West, 173 Ala. 198, 55 South. 917. See Edwards v. Schillinger, 245 Ill. 231, 91 N. E. 1048, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308. And see Jones v. Dugan, 124 Md. 346, 92 Atl. 775, where it is said that the trustee in bankruptcy for some purposes stands in the position of the creditors and for others in the position of the bankrupt himself, and this rule is not affected by the 1910 amendment to the Bankruptcy Act, giving him the status of a lien creditor. Compare also Riggs v. Price, 277 Mo. 333, 210 S. W. 420, holding that while the trustee, suing to set aside a fraudulent conveyance, may be said to be the alter ego of the creditors, in that his action is for their benefit, still he is, in law and fact, but an arm of the court, and acts, not for creditors individually or collectively, but for the estate.

[14] In re V. & M. Lumber Co. (D. C.) 182 Fed. 231.

[15] In re Kessler, 186 Fed. 127, 108 C. C. A. 239; In re Gurney, 7 Biss. 414, 15 N. B. R. 373, Fed. Cas. No. 5,873; In re St. Helen Mill Co., 3 Sawy. 88, 10 N. B. R. 414, Fed. Cas. No. 12,222.

[16] Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 355, 58 C. C. A. 517, 10 Am. Bankr. Rep. 641.

[17] West v. Bank of Lahoma, 16 Okl. 508, 86 Pac. 59; People v. Security Life Ins. Co., 79 N. Y. 267; In re Sully, 142 Fed. 895, 15 Am. Bankr. Rep. 304. It is also to be noted that in general the trustee represents the general creditors of the estate, as against secured creditors or those claiming liens or special interests. In re Imperial Textile Co. (D. C.) 239 Fed. 775, 39 Am. Bankr. Rep. 534. But there may be circumstances under which it would be right and his duty to enforce equitable rights in favor of certain creditors only. In re Desnoyers Shoe Co. (D.

§ 299. **Instructions of Court or Referee.**—The trustee, as an officer of the court, is subject to its orders and directions at all times from his appointment to his discharge, and may be controlled in his administration of the property by orders made in summary proceedings;[18] and will be treated as in contempt if he acts in contravention of the rulings and orders of the court.[19] He may submit for the sanction or approval of the court arrangements or agreements made with adverse claimants of property or other third persons.[20] And where he applies for the directions of the court, and a reference is ordered to ascertain the necessary facts, but the trustee fails to attend the hearing and acts independently, he will be held to the strictest accountability.[21]

Undoubtedly the trustee may, in any proper emergency, apply to the court of bankruptcy for directions as to the course to be pursued. But neither the judge nor the referee is the general adviser of the trustee in his dealings with the property of the estate.[22] And where the trustee's duty is plain, or where the question is simply one of expediency or of probable advantage or disadvantage to the estate, or where the proposed act is entirely within his own discretion and power, he cannot as a matter of right obtain the instructions of the court, but should act on his own responsibility, or, if he prefers to take no risk, he should submit the matter to the creditors and be governed by their vote.[23] Such, for example, is the question whether it is necessary or desirable for him to retain an attorney,[24] or whether he should file a petition to have the claim of a creditor expunged for fraud.[25] On this

C.) 210 Fed. 533, 32 Am. Bankr. Rep. 51; Sanborn-Cutting Co. v. Paine, 244 Fed. 672, 157 C. C. A. 120, 40 Am. Bankr. Rep. 525.

[18] In re Cadenas & Coe (D. C.) 178 Fed. 158, 24 Am. Bankr. Rep. 135; In re Howard (D. C.) 130 Fed. 1004, 12 Am. Bankr. Rep. 462.

[19] In re Smith, 2 Hughes, 284, Fed. Cas. No. 12,978.

[20] Mulford v. Fourth Street Nat. Bank (C. C. A.) 157 Fed. 897, 19 Am. Bankr. Rep. 742.

[21] In re Schapter, 9 N. B. R. 324, Fed. Cas. No. 12,438.

[22] In re Sturgeon, 1 N. B. R. 498, Fed. Cas. No. 13,564.

[23] In re Franklin Sav. Fund Soc., 10 Phila. (Pa.) 276, Fed. Cas. No. 5,058. As to the authority and duty of the court to disapprove an improvident bargain proposed to be made by the trustee, and officially to inform creditors of the jeopardy in which their interests are thereby placed, though not applied to for instructions, but only to grant a petition for the carrying out of the bargain, see Henry v. Harris, 191 Fed. 868. See In re Cutler & John (D. C.) 228 Fed. 771, 36 Am. Bankr. Rep. 420, holding that when the trustee finds that the bankrupt owns property which is subject to liens, he should petition the court (referee) for instructions as to the course which he should pursue, and the referee, if he deems it advisable, may call a meeting of the creditors to consider what is best to be done.

[24] In re Abram, 103 Fed. 272, 4 Am. Bankr. Rep. 575; In re Columbia Iron Works, 142 Fed. 234, 14 Am. Bankr. Rep. 526.

[25] In re Baber, 119 Fed. 520, 9 Am. Bankr. Rep. 406.

subject it has been said: "Undoubtedly, by the very terms of the bankruptcy statute, the trustee acts at all times technically under the direction of the court, and no doubt he has, on proper occasions and under proper circumstances, the right to apply to the court for its instructions in the premises. But this does not mean that he can shovel the administration of his trusteeship into the court, unload his responsibility upon the referee or the judge of the court, and evade or shirk his plain duties by asking the advice and directions of the court. Properly, he should be a man of affairs, ready to act upon his own responsibility and intelligence, as business men do in their affairs, if necessary resort to the advice of counsel, and still more, if the further necessity exist, resort to the tribunal of the body of the creditors assembled in general or special meeting called for the purpose under the presidency of the referee or judge, as provided in the scheme of the act. It is for such purposes that meetings of creditors are provided for, and, until resort has been had to these appliances to guide his judgment, and complications of a serious nature have arisen, it is disserviceable that a trustee should be applying to the court for its instructions and advice." [26]

§ 300. **Inventory and Appraisal of Property.**—The seventeenth general order in bankruptcy makes it the duty of the trustee, "immediately upon entering upon his duties," to "prepare a complete inventory of all the property of the bankrupt that comes into his possession." In addition to this, the statute explicitly requires that all the property, whether real or personal, shall be appraised by three disinterested appraisers, who shall be appointed by, and report to, the court.[27] The object of the appraisement is to secure for the benefit and protection of all parties concerned a designation and estimate of the property which passes into the hands of the trustee, and for which in the first instance he is to be accountable.[28] And since it is the policy of the law that all steps in the administration of the estate should be taken by persons who are disinterested and will act for all the creditors, rather than for the benefit of any faction or clique, the referee should make the appointment of the appraisers in the exercise of his independent judgment, and their selection should not be submitted to a vote of the creditors, especially where there is a sharp conflict of views and interests between the creditors.[29]

[26] In re Baber, 119 Fed. 520, 9 Am. Bankr. Rep. 406.

[27] Bankruptcy Act 1898, § 70b.

[28] In re Gordon Supply & Mfg. Co., 133 Fed. 798, 13 Am. Bankr. Rep. 352.

[29] In re Columbia Iron Works, 142 Fed. 234, 14 Am. Bankr. Rep. 526. A person is not disqualified for appointment as appraiser of a bankrupt's property merely because some of the officers

The particularity with which the appraisement is to be made is not specified in the statute, and it must depend somewhat on circumstances. But usually it should be general and not special, and should not go into the detail practised by a merchant in taking an account of stock, only such particularity being indulged in as is sufficient for a reasonable identification of the property in character and quantity and to give a fair idea of its value.[30] The compensation of the appraisers is not fixed by the law, and rests in the discretion of the court. But in at least one district the rule has been established that, in any ordinary case, no more than $5 a day for three days' work will be allowed to each appraiser, the trustee being required to justify any greater allowance, and the court declares that "it must be an extraordinary case where over two or three days are necessary."[31]

§ 301. **Custody and Care of Property.**—While the property of the estate remains in the hands of the trustee, that is to say, until it is finally disposed of by sale or otherwise, it is his duty to exercise such care in the custody and preservation of it, and in saving it from loss or deterioration, as would be exacted of a receiver, guardian, or other fiduciary. He has an insurable interest in the property, and if he considers it a necessary precaution, he may effect an insurance on it to its full value. Even if he omits to obtain the previous authorization of the court, or the consent of the creditors, before taking this step, the premiums paid for a reasonable amount of insurance will be allowed in his accounts, as a part of the necessary expense of preserving the estate.[32] If the trustee finds some of the property to be in bad physical condition, the circumstances may be such as to justify him in spending part of the cash in hand for the purpose of such repairs as will make the property salable. Ordinarily the property will remain in his custody only for a very short time, as the predominant purpose of the bankrupt-

and directors of a corporation creditor are also officers and directors of another corporation of which such appraiser is president. Idem. A lessee of a bankrupt mining company is not disqualified, merely by reason of his lease, to serve as an appraiser of the bankrupt's property. Clark Hardware Co. v. Sauve, 220 Fed. 102, 136 C. C. A. 194, 33 Am. Bankr. Rep. 674.

[30] In re Gordon Supply & Mfg. Co., 133 Fed. 798, 13 Am. Bankr. Rep. 352. But see In re Mills Tea & Butter Co. (D. C.) 235 Fed. 812, 37 Am. Bankr. Rep. 154, holding that the inventory must be careful, accurate, and complete.

[31] In re E. I. Fidler & Son, 172 Fed. 632, 23 Am. Bankr. Rep. 16. In a case where the bankrupt was the owner of 30 stores scattered through four different states, it was held that an award of $250 to each of the three appraisers was not clearly excessive. In re Mills Tea & Butter Co. (D. C.) 235 Fed. 812, 37 Am. Bankr. Rep. 154.

[32] In re Hamilton, 102 Fed. 683, 4 Am. Bankr. Rep. 543; Thompson v. Phenix Ins. Co., 136 U. S. 293, 10 Sup. Ct. 1019, 34 L. Ed. 408; Insurance Co. v. Chase, 5 Wall. 509, 18 L. Ed. 524; In re Carow, 4 N. B. R. 543, Fed. Cas. No. 2,426; In re Fortune, 1 Low. 306, 2 N. B. R. 662, Fed. Cas. No. 4,955. See Dortch v. Dortch, 71 N. C. 224.

cy act is to settle estates as quickly as possible. Yet, in exceptional cases, the same rule might be applied to a trustee in bankruptcy which governs the case of receivers, viz., that they will be allowed for money spent in reasonable and necessary repairs, even without previous authority granted.[33] There is this difference, however, that a trustee in bankruptcy always has it in his power to consult the body of creditors and to cast upon them the responsibility of deciding upon the propriety or necessity of such action, and this he should not fail to do when the object of the proposed expenditure is not so much to save the property from actual destruction as to enhance its value and make it more attractive to possible purchasers.

As to the management of the cash in hand, it is the duty of the trustee to place it in one of the designated depositories, and withdraw it only in the manner specified in the act and the rules, as will appear in a later section. Occasionally, however, the question may arise whether it is not the duty of the trustee to invest the funds, where it appears that the final settlement of the estate will be long delayed, so that the money may earn some interest in the meantime. There is no provision of the statute covering this point, unless it be found in the clause which directs trustees to "account for and pay over to the estates under their control all interest received by them upon property of such estates." [34] But probably this is only intended to prevent trustees from making their possession and control of the money a source of profit to themselves. Previous bankruptcy laws made provision for the temporary investment of the funds of estates under the sanction of the court,[35] and it has been intimated that, under the present statute, in cases where an estate is involved in protracted litigation or there are other circumstances to postpone its settlement, it might be proper to invest the funds, at least to the extent of placing them in some bank paying interest on deposits and taking a time certificate of deposit for them, but that this could be done only with the consent of all the creditors.[36]

[33] Attorney General v. Vigor, 11 Ves. 563; Hooper v. Winston, 24 Ill. 353; Hynes v. McDermott, 3 N. Y. St. Repr. 582.

[34] Bankruptcy Act 1898, § 47a. cl. 1.

[35] The act of 1867 provided that "when it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or register, or may authorize it to be deposited in any convenient bank, upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon." Rev. Stat. U. S. § 5060. And the Torrey bankruptcy bill, which was so long and seriously considered by Congress, provided that "whenever an estate is involved in litigation which is likely to be prolonged, the judge may order the investment of the cash, if any, at interest upon approved security, pending such litigation."

[36] Huttig Mfg. Co. v. Edwards, 160

§ 302. Carrying on Bankrupt's Business.—The statute provides that the courts of bankruptcy may "authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates." [37] Practically it often happens that the creditors take this matter into their own hands and vote to direct the trustee to continue the business, sometimes specifically limiting the amount to be expended for this purpose, the time it is to continue, or the branch of the business to be conducted, and occasionally exercising a close supervision over the trustee by giving him detailed instructions for the running of the business.[38] But such a course is not proper. Authority for this purpose is explicitly confided to the court of bankruptcy, and that court should invariably pass upon such a question. While undoubtedly the judge would be influenced by the expressed wish of a large proportion of the creditors, still he is bound to exercise his own judgment and discretion. And it has even been said that, if the transaction proposed is one of any magnitude, or involves the raising of money by means of trustees' certificates, the referee should not undertake to exercise the authority granted to the "court," but refer the matter to the judge.[39]

Permission to carry on the business of the bankrupt should rarely be granted. The object of a proceeding in bankruptcy is not to save a failing or unprofitable concern and nurse it into productiveness, or to convert a financial wreck into a paying investment, but to secure all the available assets of the debtor, convert them into cash, and divide them among the creditors as quickly as possible. The trustee may find it necessary to ask for leave to carry on the business for a short time, in order that the fruits of valuable contracts may become available as assets, or that grants may be earned or franchises preserved. Yet it is expressly made his duty to "close up the estate as expeditiously as is compatible with the best interests of the parties in interest." And aside from this specific injunction, the purpose and policy of the act should be considered as putting a limitation upon the discretion of the trustee

Fed. 619, 87 C. C. A. 521, 20 Am. Bankr. Rep. 349. As to the investment of funds by receivers and guardians (whose position is analogous to that of a trustee in bankruptcy), see Attorney General v. North American Life Ins. Co., 89 N. Y. 94; Coffin v. Bramlitt, 42 Miss. 194, 97 Am. Dec. 449.

[37] Bankruptcy Act 1898, § 2, clause 5. As to authorizing a receiver in bankruptcy to carry on the business, see supra, § 212.

[38] See, for example, United States v. Union Surety & Guaranty Co., 118 Fed. 482, 9 Am. Bankr. Rep. 114; In re Plummer, 2 Nat. Bankr. News, 292.

[39] Bray v. Johnson, 166 Fed. 57, 91 C. C. A. 643, 21 Am. Bankr. Rep. 383. If a trustee in bankruptcy continues the bankrupt's business without being thereto authorized by the court of bankruptcy, he will be personally liable. McAuley v. Jackson, 165 App. Div. 846, 151 N. Y. Supp. 120.

in these particulars and upon the authority of the court in granting him permission. Hence authority to continue the business of the bankrupt should not be granted unless the gain to the estate from such a course is very clear and very certain. Such cases do sometimes occur. Thus, where the assets of the bankrupt coming into the hands of the trustee include commodities in process of construction or preparation, such as unfinished machinery in the bankrupt's work-shops, not so far completed as to be salable, but it is shown that they could be finished and made ready for the market in a short time, and at a comparatively small cost, and would then command such a price as would result in substantial benefit to the estate, the court may authorize the trustee to finish such goods for sale and to defray the necessary cost thereof out of the funds of the estate.[40] Such a course is also proper where the business must be continued in operation because it can only be sold to good advantage as a going concern, as, for instance, in the case of a hotel.[41]

The trustee should be required to pay all bills properly and legitimately contracted by him in the conduct of the bankrupt's business,[42] including the wages of skilled employés whom it is necessary to retain as being the only persons acquainted with the business.[43] But it seems that he is not liable to an action for damages for the negligence of an employé resulting in injury to a stranger, where it is not shown that he held himself out as conducting the business in any other capacity than as an officer of the court, and where no personal negligence is imputable to him.[44]

§ 303. **Collection of Assets.**—It is made the duty of trustees in bankruptcy to "collect and reduce to money the property of the estates for which they are trustees."[45] And first it is incumbent on the trustee

[40] Foster v. Ames, 1 Low. 313, 2 N. B. R. 455, Fed. Cas. No. 4,965. Where a bankrupt orchard company, having contracted to plant, cultivate, and irrigate orchards pending payment of the price, had assigned all but one of such contracts before adjudication, the trustee was held not entitled to continue cultivation against the objection of a creditor. In re Wenatchee Heights Orchard Co. (D. C.) 212 Fed. 787, 32 Am. Bankr. Rep. 369.

[41] In re Bayley, 177 Fed. 522, 22 Am. Bankr. Rep. 249. The receivers in bankruptcy of the famous New York restaurant "Delmonico's", after operating the business for three months at a substantial and increasing profit, were granted leave to continue the same until it could be sold or until a trustee was appointed. In re Delmonico's (D. C.) 256 Fed. 414, 43 Am. Bankr. Rep. 519.

[42] In re Pattee, 143 Fed. 994, 16 Am. Bankr. Rep. 450.

[43] J. I. Case Plow Works v. Edwards, 176 Ill. 34, 51 N. E. 618.

[44] Cardot v. Barney, 63 N. Y. 281, 20 Am. Rep. 533.

[45] Bankruptcy Act 1898, § 47a. See Barrett v. Kaigler, 200 Ala. 404, 76 South. 320. The mere designation of a person as "special master" in the order of appointment in bankruptcy proceedings does not deprive him of the express authority conferred by such order to sue for and collect the assets of the estate. Royal Ins. Co. v. Miller, 199 U. S. 353, 26 Sup. Ct. 46, 50 L. Ed. 226. In

to exercise diligence in discovering the available assets of the bankrupt. Ordinarily he will rely in the first instance on the bankrupt's schedule of property and on information given to him by the creditors. And probably he is not required to make a search for possible interests of the bankrupt in property which the latter either does not know of or does not mention and which is not suspected by any creditor.[46] But on the other hand, a trustee would certainly not be justified in relying on the schedule alone. He must act upon any information, hint, or suggestion coming to him from a reliable source. And he can generally obtain the information necessary to follow up any such clue, by asking for an order to have any designated person appear and submit to examination.[47] If, in fact, he could learn of the existence of available assets by proper inquiry, and fails to do so, he is chargeable with negligence,[48] and he may be charged in his account with the value of assets which never came into his possession if he failed in his duty to recover them.[49]

When informed of the existence and whereabouts of assets, the trustee is armed with ample remedies to secure them. In the first place, if he can do so without a breach of the peace, he may take physical possession of any property of the bankrupt, wherever it may be found, and if money has been converted into goods, they may be taken in the same manner, provided they can be certainly identified.[50] He may also maintain replevin for goods of the bankrupt to which he is entitled as trustee,[51] or ejectment for the recovery of real property.[52] And when fortified by an order or decree of the court for the delivery of possession, he may have the help of a writ of attachment, or of sequestration, or of assistance, according as one or the other may be the

the bankruptcy of a corporation, amounts remaining due and unpaid on subscriptions to its stock are "assets" of its estate in bankruptcy, and if it is necessary to realize on them, in order to raise sufficent money to pay the debts of the estate, the court of bankruptcy has power and jurisdiction, on a proper application by the trustee, to levy an assessment on the delinquent subscribers, and to enforce its payment. Enright v. Heckscher, 240 Fed. 863, 153 C. C. A. 540; In re M. Stipp Const. Co., 221 Fed. 372, 137 C. C. A. 180, 34 Am. Bankr. Rep. 333; In re Louis J. Bergdoll Motor Co. (D. C.) 260 Fed. 234, 43 Am. Bankr. Rep. 593; In re Canister Co., 252 Fed. 70, 164 C. C. A. 182, 42 Am. Bankr. Rep. 278; Johnson v. Canfield-Swigart Co., 211 Ill. App. 423. And see supra, § 148.

[46] See In re Mott, Fed. Cas. No. 9,878a.

[47] Bankruptcy Act 1898, § 21a.

[48] Avery v. Cleary, 132 U. S. 604, 10 Sup. Ct. 220, 33 L. Ed. 469; Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915; In re Kuhn Bros., 234 Fed. 277, 148 C. C. A. 179.

[49] In re Reinboth, 157 Fed. 672, 19 Am. Bankr. Rep. 15.

[50] Brush v. Blanchard, 19 Ill. 31.

[51] Gordon v. Farrington, 46 Mich. 420, 9 N. W. 456; Coats v. Farrington, 46 Mich. 422, 9 N. W. 456.

[52] Kirkpatrick v. Clark, 132 Ill. 342, 24 N. E. 71, 8 L. R. A. 511, 22 Am. St. Rep. 531.

appropriate remedy.[53] If part of the assets of the bankrupt consists of a provable claim against the estate of another bankrupt, it is the duty of the trustee to prove the claim in such other bankruptcy and secure its allowance and collect the dividends which may be payable on it.[54] It may even be the duty of the trustee to institute proceedings in bankruptcy against his bankrupt's insolvent debtor, as the only available means of collecting any portion of the debt. He could not be allowed to secure a preference for the estate which he is administering, and his only available remedy may be the filing of a petition in bankruptcy.[55] Without resorting to legal proceedings, he may, in proper cases, advance the interests of the estate by a bargain or compromise with an adverse claimant or other party,[56] provided that it is not contrary to law or to morality or public policy.[57] The power of the court of bankruptcy is also behind the trustee, and he may summarily apply for an order requiring the bankrupt to surrender to him any property which the latter has in his possession or under his control,[58] or even property in the hands of third persons which is claimed by him as assets of the estate.[59] But if he is satisfied that property which comes into his hands did not belong to the bankrupt, he should at once return it to the true owner.[60] In suitable cases, also, the possessor of property which belongs to the estate in bankruptcy may be enjoined from disposing of it or transferring it,[61] or ordered to withdraw an unlawful claim to it.[62] But if it is in the hands of a receiver appointed by a state court, his proper course is to apply to the court which appointed the receiver for an order for its surrender.[63] He may also sue to set aside fraudulent conveyances or transfers and recover the property affected,[64]

[53] Equity Rules Nos. 7 and 9.

[54] Bankruptcy Act 1898, § 57m.

[55] In re Jones, 7 N. B. R. 506, Fed. Cas. No. 7,450.

[56] In re E. M. Newton & Co., 153 Fed. 841, 83 C. C. A. 23, 18 Am. Bankr. Rep. 567.

[57] In re Rosenblatt, 153 Fed. 335, 18 Am. Bankr. Rep. 663.

[58] In re Wright, 177 Fed. 578, 24 Am. Bankr. Rep. 437; In re E. I. Fidler & Son, 163 Fed. 973, 21 Am. Bankr. Rep. 101. And see supra, § 227.

[59] Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, 7 Am. Bankr. Rep. 224; In re Gill (C. C. A.) 190 Fed. 726, 26 Am. Bankr. Rep. 885; In re Peacock, 178 Fed. 851, 24 Am. Bankr. Rep. 159; In re Holbrook Shoe & Leather Co., 165 Fed. 973, 21 Am. Bankr. Rep. 511; In re Davis, 119 Fed. 950, 9 Am. Bankr. Rep. 670; In re Mills, 179 Fed. 409, 25 Am. Bankr. Rep. 278; In re Famous Clothing Co., 179 Fed. 1015, 24 Am. Bankr. Rep. 780; In re Meier, 182 Fed. 799, 25 Am. Bankr. Rep. 272; In re Friedman, 161 Fed. 260, 20 Am. Bankr. Rep. 37; Floyd v. Layton, 172 N. C. 64, 89 S. E. 998; Bynum v. Scott (D. C.) 217 Fed. 122, 33 Am. Bankr. Rep. 436. And see supra, § 67.

[60] In re Noakes, 1 N. B. R. 592, Fed. Cas. No. 10,281.

[61] In re Jackson, 94 Fed. 797, 2 Am. Bankr. Rep. 501. And see supra, § 205.

[62] In re Home Discount Co., 147 Fed. 538, 17 Am. Bankr. Rep. 168.

[63] Seligman v. Ferst, 57 Ga. 561. And see supra, § 27.

[64] Falls City Tinware Co.'s Trustee v. Levine, 104 S. W. 716, 31 Ky. Law Rep. 1103. And see infra, ch. 23.

and may proceed against a creditor to recover money received by him from the bankrupt after the institution of the proceedings.[65]

§ 304. Arbitration and Compromise.—A trustee is authorized, "pursuant to the direction of the court, to submit to arbitration any controversy arising in the settlement of the estate." [66] And he may also, "with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate." [67] But when a trustee applies for authority either to arbitrate or to compromise a controversy, "the application shall clearly and distinctly set forth the subject-matter of the controversy and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise." [68] Generally speaking, no such action should be taken by the trustee without first obtaining leave of the court. But if the circumstances are such that the sanction of the court would have been given if applied for, the compromise may be sustained if afterwards questioned.[69] It is also provided that creditors shall have notice of "the proposed compromise of any controversy." [70] But the initiative in this matter is given only to the trustee, who acts as the representative of the creditors. If a compromise is offered, he may indeed submit it to the judgment of the creditors assembled in a meeting, but their vote in favor of accepting it is neither a sufficient warrant to the trustee nor conclusive on the court. It may still be disapproved by the judge or

[65] Knapp & Spencer Co. v. Drew, 160 Fed. 413, 87 C. C. A. 365, 20 Am. Bankr. Rep. 355.

[66] Bankruptcy Act 1898, § 26. Under the act of 1867, a disputed claim might be submitted to the decision of the register by stipulation, but his judgment was not final, but was subject to review by the court. In re Ford, 18 N. B. R. 426, Fed. Cas. No. 4,932.

[67] Bankruptcy Act 1898, § 27.

[68] General Order No. 33. See In re Hoole, 3 Fed. 496. An order of the bankruptcy court made upon the ex parte application of the trustee, approving the terms of an agreement of compromise, and authorizing the trustee to consummate the same, has no binding effect upon the other party to the proposed compromise. Duff v. Hopkins, 33 Fed. 599. But compare Lake v. Dredge (Iowa) 138 N. W. 869.

[69] Bacot v. Heyward, 5 S. C. 441. And see Simmons v. Richards, 28 Tex. Civ. App. 112, 66 S. W. 687. A trustee in bankruptcy has no power to give his consent to a decree of a state court, in a suit to which he is made defendant, brought for the purpose of determining the right and title to property scheduled by the bankrupt as part of his assets. In re Anderson, 23 Fed. 482.

[70] Bankruptcy Act 1898, § 58a. When the court has been misled into making an order authorizing the compromise of a controversy by misrepresentations as to the true state of the facts in question, an application to have such order vacated may be made by any creditor of the estate. In re Hoole, 3 Fed. 496. Where a creditor had actual notice of a proposed compromise, which was fair and made in good faith, he cannot attack it five years later for the want of a formal notice. Petition of Baxter (C. C. A.) 269 Fed. 344, 46 Am. Bankr. Rep. 453.

referee.[71] And no binding bargain can be made by the creditors or part of them directly with the bankrupt. He no longer has control of his property or debts, and any such agreement must have the concurrence of the trustee and the approval of the court.[72]

Leave to compromise a controversy is not granted as of course. It will be refused where the claim of the trustee can apparently be collected in full if proper measures are taken, or where it is secured.[73] And the expense and delay of a litigation will not justify a compromise in a case where public interests and the due administration of the bankruptcy law require the settlement of the questions of law involved by the judgment of the court,[74] nor where the proposed settlement would result in creating an illegal preference, contrary to the spirit and purpose of the statute.[75] Nor can the provision of the law relating to compromises be stretched so as to include a scheme for the reorganization of a bankrupt corporation, under which dissenting creditors would be compelled to accept stock in a new corporation in exchange for their claims and submit to the creation of a prior mortgage lien to provide a working capital.[76] And it should be remarked that, although the law does not require the consent of the creditors to a proposed compromise, or any proportion of them, yet the court will carefully consider the rights and interests of any who may dissent. Thus, stockholders of a bankrupt corporation, at whose instance a suit has been brought by the trustee against officers and directors to recover damages for the alleged wrecking of the corporation, are entitled to have an offer of compromise rejected by the bankruptcy court, on giving security to protect the estate against any loss consequent upon the failure to realize the amount offered.[77] Undoubtedly, however, there are cases where the interests of all concerned will be promoted by a judicious settlement out of court, as where a claim against a third person for money and property alleged to belong to the bankrupt is contested, and the evidence is

[71] In re Heyman, 108 Fed. 207, 5 Am. Bankr. Rep. 808. The trustee's authority to compromise a controversy is not limited to cases in which all the creditors of the bankrupt have the same interest. Petition of Stuart (C. C. A.) 272 Fed. 938.

[72] In re Ford, 18 N. B. R. 426, Fed. Cas. No. 4,932; In re Anderson, 2 Hughes, 378, 9 N. B. R. 360, Fed. Cas. No. 351.

[73] In re Furbish, 2 Hask. 120, Fed. Cas. No. 5,159. In re Stier-March Contracting Co. (D. C.) 245 Fed. 223, 38 Am. Bankr. Rep. 74.

[74] In re Rowe, 18 N. B. R. 429, Fed. Cas. No. 12,092.

[75] In re Geiselhart, 181 Fed. 622, 25 Am. Bankr. Rep. 318.

[76] In re Northampton Portland Cement Co., 185 Fed. 542, 25 Am. Bankr. Rep. 565. And see In re Woodend, 133 Fed. 593, 12 Am. Bankr. Rep. 768. In re Prudential Outfitting Co. (D. C.) 250 Fed. 504, 41 Am. Bankr. Rep. 621.

[77] In re John H. Woodbury Dermatological Institute (C. C. A.) 191 Fed. 819, 27 Am. Bankr. Rep. 497.

conflicting, and it is apparent that if the trustee could recover at all, it would only be at the end of a long and costly suit.[78] So also, by the terms of the statute, where the trustee and a secured creditor cannot agree upon the value of the security, for the purpose of crediting such value upon the claim, they may be directed by the court either to compromise the matter or to submit it to arbitration.[79]

In case of submission of any controversy to arbitration, the statute directs that "three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment, the court shall appoint the third arbitrator."[80] This method of selection must be followed. It is an irregularity if one of the arbitrators is selected by the trustee, one by the other party, and the third agreed upon by the two contending parties.[81] As to the award, the direction of the statute is that "the written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury."[82] But their finding, when so filed, has no greater effect, and is subject to be set aside or adjudged upon by the court in like manner as a verdict would be.[83]

§ 305. Redemption of Property.—When it is thought to be for the advantage of the estate in bankruptcy that the trustee should redeem property from a mortgage, pledge, or other lien, the course prescribed is that a petition for authority to take that step should be filed in the court of bankruptcy by either the trustee or the bankrupt or by any creditor who has proved his debt, and the court will decide the question upon a hearing, of which interested parties are to be notified and at which they shall have an opportunity to show cause against the proposed redemption.[84] Subject to these provisions a trustee in bankruptcy may redeem land from a conveyance which, though absolute in form, was intended as a mortgage and was accompanied by a parol defeasance,[85] or from a foreclosure sale under a decree rendered after the adjudication, if, by the law of the state, such a right of redemption remains in the bankrupt mortgagor.[86] And he may redeem property of

[78] In re Kranich, 174 Fed. 908, 23 Am. Bankr. Rep. 550. See Matter of Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642.

[79] Bankruptcy Act 1898, § 57h.

[80] Bankruptcy Act 1898, § 26b.

[81] In re McLam, 97 Fed. 922, 3 Am. Bankr. Rep. 245.

[82] Bankruptcy Act 1898, § 26c.

[83] In re McLam, 97 Fed. 922, 3 Am. Bankr. Rep. 245.

[84] General Order No. 28. See In re East Stroudsburg Supply & Const. Co. (D. C.) 248 Fed. 356, 41 Am. Bankr. Rep. 57.

[85] Foraast v. Hyman, 138 Ill. 423, 28 N. E. 800.

[86] In re Novak, 111 Fed. 161, 7 Am. Bankr. Rep. 27. See Wittmeier v. Cran-

the bankrupt which has been sold on execution to the judgment creditor, without paying the unsatisfied balance of the judgment or taking the property subject to the lien of the judgment.[87] As to redeeming from a tax sale, the law is not clear. So far as concerns the bankruptcy law, a step so necessary for the preservation of assets which may be valuable would surely be authorized by the court, and warrant might easily be found for the necessary expenditure. But the right of a trustee in bankruptcy must depend upon the wording of the state statute, and if the right of redemption is given only to the "owner" of the property, it might be doubtful whether he would come within this description. Generally, however, the tax laws of the states are so construed as to give a right of redemption to almost any one who can show a substantial interest in the property.[88]

§ 306. **Performance of Bankrupt's Contracts and Obligations.**—It has been stated that a trustee in bankruptcy is bound to carry out the bankrupt's valid contracts made in good faith and not in fraud of his creditors,[89] and that the trustee is estopped by the acts of the bankrupt, and bound by his conduct and agreements to the same extent that the bankrupt would be bound before the adjudication.[90] Probably these statements are too broad, especially in view of the provision of the statute giving the trustee the rights of a lien creditor. But certainly he may, if he so elects, assume the bankrupt's contracts and fulfil them, provided that any benefit to the estate will result from his doing so. While a trustee in bankruptcy is not bound to accept property or take over contracts which are onerous and unprofitable, he is required to elect whether to assume an existing executory contract and to continue its performance and ultimately dispose of it for the benefit of the estate, or to renounce it, and leave the injured party to such legal remedies for the breach as the case affords. If he elects to assume a contract, and completes it, he is entitled to whatever the bankrupt would have received, but on the other hand he takes the contract cum onere, as the bankrupt

ford, 199 Ala. 1, 73 South. 981; Brown v. Crawford (D. C.) 252 Fed. 248, 42 Am. Bankr. Rep. 263.

[87] Lloyd v. Hoo Sue, 5 Sawy. 74, 17 N. B. R. 170, Fed. Cas. No. 8,432.

[88] See Black, Tax Titles (2d ed.) § 365. And see In re William F. Fisher & Co., 148 Fed. 907, 17 Am. Bankr. Rep. 404; In re Clark Realty Co., 234 Fed. 576, 148 C. C. A. 342, 37 Am. Bankr. Rep. 129.

[89] In re Stewart (D. C.) 193 Fed. 791, 27 Am. Bankr. Rep. 529. And see Mankins v. Forward Movement Syndicate, 28 Cal. App. 285, 152 Pac. 313. Compare Park, Grant & Morris v. Shannon & Mott Co., 140 Minn. 60, 167 N. W. 285. The holder of an option from the bankrupt for the purchase of land was held entitled to specific performance by the bankruptcy court, on an offer to pay sufficient to satisfy all claims against the estate and costs. Dunlop v. Baker, 239 Fed. 193, 152 C. C. A. 181, 38 Am. Bankr. Rep. 369.

[90] Watson v. Proximity Mfg. Co., 147 N. C. 478, 61 S. E. 273.

held it, subject to all of its provisions and conditions.[91] This course is often proper with regard to property held by the bankrupt under a contract of conditional sale, where the assets of the estate will be increased by the completion of the conditions by the trustee and the consequent vesting of full title to the article in question.[92] So where the bankrupt was a building contractor, and had an unfinished contract on hand at the time of his adjudication, the trustee may be directed by the court to complete the contract and collect the balance due under it.[93] But where the bankrupt corporation held property under a lease, which required it to erect an expensive building on the leased land, and had failed to perform the condition, and had received notice of a forfeiture of the lease for breach of such condition, all before its adjudication in bankruptcy, the court of bankruptcy, on petition of the lessor, decreed the enforcement of the forfeiture and directed the trustee to surrender possession, this being the only effective means of protecting the rights of the lessor.[94] What has been said above of the assumption of contracts by the trustee naturally does not apply to such executory contracts as relate to purely personal services or involve the element of personal trust or confidence.[95]

[91] Dushane v. Beall, 161 U. S. 513, 16 Sup. Ct. 637, 40 L. Ed. 791; United States Trust Co. v. Wabash Ry., 150 U. S. 289, 14 Sup. Ct. 86, 37 L. Ed. 1085; Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915; American File Co. v. Garrett, 110 U. S. 288, 4 Sup. Ct. 90, 28 L. Ed. 149; In re Chambers, Calder & Co., 98 Fed. 865, 3 Am. Bankr. Rep. 537; Atchison, T. & S. F. Ry. Co. v. Hurley, 153 Fed. 503, 82 C. C. A. 453, 18 Am. Bankr. Rep. 396; Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 14 Am. Bankr. Rep. 453; In re Nicholas, 122 Fed. 299, 10 Am. Bankr. Rep. 291; Wilkins v. Tourtellott, 28 Kan. 825; First Trust & Savings Bank v. Bitter Root Valley Irr. Co. (D. C.) 251 Fed. 320; In re Berry (D. C.) 247 Fed. 700, 41 Am. Bankr. Rep. 357; Barr v. Youngeville Sugar Factory, 141 La. 869, 75 South. 805, L. R. A. 1917F, 654. Whether or not a bankruptcy court will authorize its trustee to complete an unperformed contract, or will permit a surety of the bankrupt to make use of the property of the estate in so doing, is a matter within the discretion of the court, the surety not being entitled as a matter of right. In re Schilling (D. C.) 251 Fed. 966, 41 Am. Bankr. Rep. 705. The trustee must exercise his option to accept or reject an uncompleted contract within a reasonable time. Brown v. Rushton, 223 Mass. 80, 111 N. E. 884. But where a corporation purchased goods for future delivery, and later went into voluntary bankruptcy, the fact that the trustee waited until he could ascertain whether there was a profit in the contract before accepting it would not make his action dilatory. Planters' Oil Co. v. Gresham (Tex. Civ. App.) 202 S. W. 145.

[92] See In re Grainger, 160 Fed. 69, 87 C. C. A. 225, 20 Am. Bankr. Rep. 166; Hurley v. Allman Gas Engine & Machine Co., 144 App. Div. 300, 129 N. Y. Supp. 14; Tierney v. Butler, 144 Iowa, 553, 123 N. W. 213.

[93] Davis v. Fidelity & Deposit Co., 75 App. Div. 518, 78 N. Y. Supp. 336; Ford v. State Board of Education, 166 Mich. 658, 132 N. W. 467.

[94] Lindeke v. Associates Realty Co., 146 Fed. 630, 77 C. C. A. 56, 17 Am. Bankr. Rep. 215.

[95] In re Schiermann, 2 Nat. Bankr. News, 118.

§ 307. Leased Property and Leasehold Interests of Bankrupt.—A leasehold interest in property, if salable and possessing a market value, is assets of the bankrupt's estate which passes to the trustee.[96] But the trustee is not bound to accept anything which may be more burdensome than beneficial to the estate in his charge, and therefore is not required to assume a lease made to the bankrupt unless he thinks it will be for the benefit of the creditors. He has his option either to accept it or to abandon it,[97] and he cannot be charged with the obligations of the lease without some affirmative act of acceptance on his part.[98] The trustee must be accorded a reasonable length of time after his appointment in which to decide whether he will take over the lease or not.[99] But in a case where the bankrupt's landlord repeatedly inquired of the trustee as to when he would surrender the possession, and was ready to accept a surrender, having negotiated with a new tenant, but the trustee gave him no information, but continued to occupy the premises, it was held that the trustee was liable for the rents whether or not he had any funds in his hands to reimburse himself.[100] If the trustee elects to assume the lease, he may continue to occupy the premises to the end of the stipulated term,[101] or sell the lease if he can do so to advantage. But he is of course liable for the stipulated rent,[102] including a share of the crops raised on the land if that is among the conditions of the lease.[103] But the mere fact of the bankruptcy of a lessee does not sever the relation of landlord and tenant, and the tenant's obligation to pay rent under his lease is not discharged as to the future if his trustee abandons or does not assume the lease.[104] If the rent was in arrear at the time

[96] In re Thiessen, 2 Nat. Bankr. News, 628.

[97] In re Chambers, Calder & Co., 98 Fed. 865, 3 Am. Bankr. Rep. 537; Summerville v. Kelliher, 144 Cal. 155, 77 Pac. 889; Rosenblum v. Uber, 256 Fed. 584, 167 C. C. A. 614, 43 Am. Bankr. Rep. 480.

[98] In re Frazin, 183 Fed. 28, 105 C. C. A. 320, 24 Am. Bankr. Rep. 903. While the trustee may at his election decline to continue a lease to the bankrupt for the benefit of the estate, and thus relieve himself and the estate from further liability thereon, a referee has no power to order its cancellation. In re J. Sapinsky & Sons, 206 Fed. 523, 30 Am. Bankr. Rep. 416.

[99] In re Rubel, 166 Fed. 131, 21 Am. Bankr. Rep. 566; In re Ells, 98 Fed. 967, 3 Am. Bankr. Rep. 564; In re Scruggs, 205 Fed. 673; Rosenblum v. Uber, 256 Fed. 584, 167 C. C. A. 614, 43 Am. Bankr. Rep. 480.

[100] In re Metals Extraction & Refining Co. (C. C. A.) 195 Fed. 226, 27 Am. Bankr. Rep. 11.

[101] In re Schwartzman, 167 Fed. 399, 21 Am. Bankr. Rep. 885.

[102] Matter of Otis, 101 N. Y. 580, 5 N. E. 571; Brooklyn Improvement Co. v. Lewis, 136 App. Div. 861, 122 N. Y. Supp. 111; Rosenblum v. Uber, 256 Fed. 584, 167 C. C. A. 614, 43 Am. Bankr. Rep. 480.

[103] Summerville v. Kelliher, 144 Cal. 155, 77 Pac. 889.

[104] In re Roth & Appel (C. C. A.) 181 Fed. 667, 24 Am. Bankr. Rep. 588; In re Scruggs, 205 Fed. 673; Rosenblum v. Uber, 256 Fed. 584, 167 C. C. A. 614, 43 Am. Bankr. Rep. 480; In re Sherwoods, 210 Fed. 754, 127 C. C. A. 304, Ann. Cas. 1916A, 940, 31 Am. Bankr. Rep. 769.

of the bankruptcy of the tenant, but the landlord had not taken the necessary steps to regain possession, he cannot oust the trustee.[105] In such a case, however, the bankruptcy court has full jurisdiction to determine the lessor's rights and remedies; and a forfeiture of the lease for the past default in the payment of rent should not be restrained unless the lessor's just claims can be fully met and his rights protected in the administration of the estate in bankruptcy, nor unless, after satisfying such claims, something may probably be realized for the general creditors.[106]

A trustee in bankruptcy may also, if the landlord will consent, surrender a lease held by the bankrupt, and if this is done, the landlord regains possession of the premises, and all unmatured obligations between the parties depending upon the continuance of the leasehold estate are terminated. But in surrendering the lease, the trustee has no greater right than the tenant would have had if he had attempted to make the surrender before his bankruptcy. In a case in which the foregoing principles were laid down, it was further held that where the trustee had attempted to surrender the leased premises to the landlord, but the latter accepted only upon the express condition that he would care for the building and rent it if possible "for the benefit of the estate," the effect of the transaction, although the trustee thought that he had surrendered the premises and terminated the liability of the estate under the lease, was in reality a refusal to accept and administer the lease as an asset of the estate, and left the obligation of the bankrupt tenant under the lease just where it was before the attempt to surrender.[107]

It is often important for a trustee in bankruptcy to continue in the occupation of the premises leased by the bankrupt, at least for a limited time, until he shall have a reasonable opportunity to dispose of the bankrupt's stock in trade or other property in the leased premises, especially where removing the goods would injure them or involve unreasonable expense, yet without assuming the lease for the whole of the unexpired term. Where this situation arises, it is said that the court of bankruptcy has power to enjoin the landlord from interfering with the trustee's possession of the premises.[108] But of course the landlord is entitled to fair compensation for the use of the premises by the trustee, for as long a

[105] In re Adams, 134 Fed. 142, 14 Am. Bankr. Rep. 23.

[106] In re Elk Brook Coal Co. (D. C.) 261 Fed. 445, 44 Am. Bankr. Rep. 283.

[107] Rosenblum v. Uber, 256 Fed. 584, 167 C. C. A. 614, 43 Am. Bankr. Rep. 480.

[108] In re Schwartzman, 167 Fed. 399, 21 Am. Bankr. Rep. 885; In re Crawford Plummer Co. (D. C.) 253 Fed. 76, 42 Am. Bankr. Rep. 92. A trustee in bankruptcy represents other creditors as well as the landlord, and his occupancy of demised premises after the adjudication cannot be construed as adverse to the landlord for the purpose of defeat-

time as the latter shall continue in the occupation of them, the amount thereof being chargeable as a part of the expense of administering the estate.[109] And if the trustee and the landlord have not made any agreement as to the amount of such compensation, the latter is entitled to recover on a quantum meruit.[110] But if the trustee occupies only a part of the premises, the rest having been sublet by the bankrupt, the landlord can demand rent only for the portion actually occupied.[111] Where the trustee, with knowledge of the expiration of the lease, holds over for several days, notwithstanding a notice to quit, he becomes a trespasser and is personally liable for the damages sustained.[112]

§ 308. **Expenditures.**—The statute makes provision for the allowance and payment of "the actual and necessary expenses incurred by officers in the administration of estates."[113] And the general orders provide for the allowance to trustees in bankruptcy of "expenses necessarily incurred in the performance of their duties."[114] Both the amounts and the items of such allowable expenses will naturally vary with the circumstances of each case. But it may be stated as a general rule that expenditures by a trustee, to be allowed by the court, must have been actually made, reasonably necessary, and beneficial to the estate, having regard, on the one hand, to economy in the administration of the estate, and, on the other hand, to the necessity of realizing all that is possible for the creditors.[115] And first, the trustee is allowed to incur

ing his lien for rent. Lontos v. Coppard, 246 Fed. 803, 159 C. C. A. 105, 40 Am. Bankr. Rep. 575.

[109] Bray v. Cobb, 100 Fed. 270, 3 Am. Bankr. Rep. 788; In re Luckenbill, 127 Fed. 984, 11 Am. Bankr. Rep. 455; In re Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206; In re Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730; In re Secor, 18 Fed. 319; In re Budd, 239 Fed. 307, 152 C. C. A. 295, 38 Am. Bankr. Rep. 643.

[110] In re Grignard Lithographic Co., 155 Fed. 699, 19 Am. Bankr. Rep. 101; In re Adams Cloak, Suit & Fur House, 199 Fed. 337, 28 Am. Bankr. Rep. 923. The rent reserved in a lease to the bankrupt is, under ordinary conditions, the fair measure of what should be paid by a trustee remaining in possession. In re Crawford Plummer Co. (D. C.) 253 Fed. 76, 42 Am. Bankr. Rep. 92. But neither the rent reserved in the lease nor the rent which had previously been paid by the bankrupt as a tenant at will is conclusive in determining what rental should be allowed the owners during the occupancy of their premises by a trustee in bankruptcy, although evidence of the rent which had previously been paid, either under the lease or under a verbal letting, may be of great assistance in determining what fairly and equitably ought to be allowed. Gardner v. Gleason, 259 Fed. 755, 170 C. C. A. 555, 43 Am. Bankr. Rep. 644.

[111] In re J. Frank Stanton Co. (D. C.) 162 Fed. 169, 20 Am. Bankr. Rep. 549.

[112] In re Hunter, 151 Fed. 904, 18 Am. Bankr. Rep. 477.

[113] Bankruptcy Act 1898, § 62.

[114] General Order No. 35, par. 3. After an offer of composition, the expenses of conducting the bankruptcy proceeding should be secured by the bankrupt, and, if necessary, paid out of the amount deposited for the purpose of the composition. In re Miller (D. C.) 243 Fed. 242, 40 Am. Bankr. Rep. 155.

[115] In re Krause, 155 Fed. 702, 19 Am. Bankr. Rep. 93; In re Criblier, 184 Fed. 338, 25 Am. Bankr. Rep. 765; Akers v. Veal, 66 Ga. 302.

all necessary expenses for the care and custody of the bankrupt's property so long as it remains in his hands.[116] Thus, where a part of the estate consists of horses, sheep, or cattle, the trustee must pay the proper charges of an agistor with whom they were pastured,[117] or of an officer who had them in his charge under a foreclosure or attachment, which was dissolved by the bankruptcy proceedings.[118] Again, it is clear that the trustee is warranted in charging the estate with necessary office expenses of his administration. Thus, a reasonable allowance will be made to him for expense incurred in stationery and postage,[119] and likewise for the rent of an office and the wages of a book-keeper, in so far as these items are shown to have been necessary for the efficient administration of the trust.[120] So also, the rent of premises temporarily occupied by the trustee, under an unexpired lease to the bankrupt, for the purpose of storing the bankrupt's property or keeping it together until it can be sold, is chargeable as part of the expense of administration.[121] Again, it is the duty of a trustee in bankruptcy to pay all taxes assessed or becoming due on the property of the bankrupt while it remains in his hands for administration, and he will be allowed credit for such payments.[122] And where he finds the bankrupt to be the owner of imported merchandise, he may and should pay the customs duties on it, in order to release it from bond, and so make it available as assets.[123] The estate in bankruptcy must also bear the cost of actions or proceedings properly undertaken by the trustee for the purpose of recovering assets or contesting spurious claims, but he will not be allowed the costs of unfounded and unnecessary litigation.[124] In regard to paying out the money of the estate for any other purpose than that of administration expenses, the trustee must have the warrant or order of the court, and without it he acts at his own peril, as, for example, where

[116] Gardner v. Cook, 7 N. B. R. 346, Fed. Cas. No. 5,226.

[117] In re Mitchell, 8 N. B. R. 47, Fed. Cas. No. 9,657.

[118] Zeiber v. Hill, 1 Sawy. 268, 8 N. B. R. 239, Fed. Cas. No. 18,206; In re Davis, 155 Fed. 671, 19 Am. Bankr. Rep. 98.

[119] In re Pegues, 3 N. B. R. 80, Fed. Cas. No. 10,907; In re Tulley, 3 N. B. R. 82, Fed. Cas. No. 14,235.

[120] In re Barnes, 18 Fed. 158.

[121] In re Hunter, 151 Fed. 904, 18 Am. Bankr. Rep. 477; Louisville Woolen Mills v. Tapp, 239 Fed. 463, 152 C. C. A. 341, 38 Am. Bankr. Rep. 529. And see supra, § 307.

[122] Swarts v. Hammer, 120 Fed. 256, 56 C. C. A. 92, 9 Am. Bankr. Rep. 691; In re William F. Fisher & Co., 148 Fed. 907, 17 Am. Bankr. Rep. 404; Ex parte Sherwin, 16 N. B. R. 535, Fed. Cas. No. 9,658; C. B. Norton Jewelry Co. v. Hinds, 245 Fed. 341, 157 C. C. A. 533, 40 Am. Bankr. Rep. 320.

[123] J. I. Case Plow Works v. Edwards, 176 Ill. 34, 51 N. E. 618.

[124] In re Josephson, 121 Fed. 146, 9 Am. Bankr. Rep. 608. Under the Bankruptcy Act of 1867, it was held that an assignee in bankruptcy need not, for the protection of the estate, advance money to defend a suit. In re Sweetser (D. C.) 240 Fed. 174.

he pays to a lien creditor his distributive share of the estate without noticing an attorney's lien upon it for services in securing its allowance.[125]

To justify the trustee in paying out money of the estate for services rendered it is necessary that they should have been rendered to him in his capacity of trustee or to the estate. For instance, where a person was employed by a corporation to go to a distant state and there make an investigation of the conduct of its business and affairs in that state, and pending the conclusion of his investigation, the corporation went into bankruptcy, after which he made his report to the directors as instructed by them, it was held that his claim for payment for his services could not be allowed as a claim for services rendered in the administration of the estate in bankruptcy.[126] And it is also necessary to distinguish between expenses incurred for the benefit of the estate in general and those incurred for the benefit of particular creditors. Thus, in the bankruptcy of a stockbroker who had large amounts of stocks and other securities belonging to his various customers, supposedly in his own hands, but which in fact he had pledged without authority to another broker, it became necessary to engage an accountant to unravel the details contained in the books of the pledgee, so as to enable the various claimants to trace their securities; and it was held that the resulting expense should be apportioned among the claimants, excepting, however, those claimants who could trace their stock without the aid of the accountant.[127] In another case, the trustee in bankruptcy and his counsel, after a successful prosecution of the bankrupt and others for concealing property of the estate, made a settlement by which the defendants restored the property, and also paid a sum in cash to be used in paying the cost of the criminal case, including attorneys' fees, and also the expenses of administration of the estate, and the money was so used by the attorneys with the knowledge of the creditors. It was held that the trustee must be held to this arrangement and could not be credited in his accounts with any expenses of administration over and above the amount so paid by the defendants.[128]

§ 309. Employment and Compensation of Attorney for Trustee.— It is not by any means the first duty of a trustee in bankruptcy to employ an attorney. Where the affairs of the estate committed to his

[125] In re Rude, 101 Fed. 805, 4 Am. Bankr. Rep. 319.

[126] In re Union Dredging Co. (D. C.) 225 Fed. 188, 35 Am. Bankr. Rep. 555.

[127] In re J. C. Wilson & Co. (D. C.) 252 Fed. 631, 42 Am. Bankr. Rep. 350.

[128] In re Di Cola, 217 Fed. 743, 133 C. C. A. 437, 33 Am. Bankr. Rep. 389.

charge are simple, and require no more than the application of intelligence and good business judgment, he is not justified in charging the estate with fees for professional advice or assistance.[129] But on the other hand, where the situation of the estate is such that he really requires legal assistance, the trustee may employ counsel, and their fees for services properly and actually rendered to the trustee, to a reasonable amount, may be allowed as part of the cost of administering the estate.[130] This is the case, for instance, where the trustee believes that certain property belongs to the bankrupt, but cannot recover it without litigation, and needs advice as to the existence of a cause of action and the probable chances of success.[131] And an attorney's bill is evidence of his services and their payment, but must be supported by proof of the occasion, necessity, and value thereof.[132] And it is said that the trustee (at least without authority from the court) cannot retain an attorney to conduct a suit for a contingent fee.[133]

As to the choice of an attorney for the trustee, it is the policy of the bankruptcy law to leave the selection entirely to the trustee himself, subject to the authority of the court to interfere if it appears that the attorney selected is acting under improper influences or for his own advantage.[134] In some jurisdictions it has been the practice to allow the creditors, when assembled in their first meeting, to elect an attorney for the trustee.[135] But this is wrong, and referees should not allow it. The trustee should be left free to choose his own attorney and creditors have no right to dictate to him in the matter.[136] More particularly is this the case where there are disagreements between factions of creditors as to the manner of administering the estate, or matters in controversy between different classes of the creditors. Where this situation exists, the trustee will not be authorized to retain as his counsel one who also represents and continues to act for any of the creditors.[137] And the court may refuse to allow any fee to an attorney rep-

[129] In re Muldaur, 8 Ben. 65, Fed. Cas. No. 9,905; In re New York Mail S. S. Co., 2 N. B. R. 423, Fed. Cas. No. 10,210; In re Noyes, 6 N. B. R. 277, Fed. Cas. No. 10,371.

[130] In re Stotts, 93 Fed. 438, 1 Am. Bankr. Rep. 641; In re Davenport, 3 N. B. R. 77, Fed. Cas. No. 3,587; In re Comstock, 3 Sawy. 517, 13 N. B. R. 193, Fed. Cas. No. 3,080.

[131] In re McKenna, 137 Fed. 611, 15 Am. Bankr. Rep. 4; In re Waterloo Organ Co., 154 Fed. 657, 83 C. C. A. 481, 18 Am. Bankr. Rep. 752.

[132] In re Staff, 5 Ben. 574, Fed. Cas. No. 13,273.

[133] In re Brinker, 19 N. B. R. 195, Fed. Cas. No. 1,882.

[134] In re Champion Wagon Co., 193 Fed. 1004, 28 Am. Bankr. Rep. 51.

[135] In re Little River Lumber Co., 101 Fed. 558.

[136] In re Columbia Iron Works, 142 Fed. 234, 14 Am. Bankr. Rep. 526; In re Rusch, 105 Fed. 607, 5 Am. Bankr. Rep. 565.

[137] In re Rusch, 105 Fed. 607, 5 Am.

resenting the trustee, when he has already been allowed a fee as attorney for the petitioning creditors, which covers any services rendered to the trustee or the estate.[138] But while the fact that an attorney had acted for the bankrupt may affect the propriety of his employment as counsel for the trustee, yet it does not deprive him of the right to compensation for services actually rendered.[139] Where the trustee is himself an attorney at law, it has been said that the court may, in its discretion, allow him additional compensation for his services rendered in that capacity in the conduct of necessary litigation for the estate.[140] But the weight of authority is the other way. The trustee is not bound to place his professional knowledge and skill at the service of the estate, but if he does, he cannot have compensation therefor, as he cannot, in the character of a trustee, employ himself, in the character of a lawyer.[141]

As to the nature and occasion of the professional services for which fees may be allowed, no compensation can be claimed for services not rendered under the employment of the trustee, though they may have been beneficial to the estate,[142] nor for services rendered prior to the appointment of the trustee,[143] nor for assistance in the performance of the ordinary duties of a trustee, such as making up reports, statements, and accounts,[144] unless, perhaps, where these cover so long a period, or involve transactions of such magnitude and complexity, as to require the services of a professional adviser.[145] Neither should an attorney be allowed a fee for conducting the examination of the bankrupt or a witness,

Bankr. Rep. 565; In re Columbia Iron Works, 142 Fed. 234, 14 Am. Bankr. Rep. 526. But see In re Smith (C. C. A.) 203 Fed. 369, 29 Am. Bankr. Rep. 628; where it is said that the general rule that a receiver may not employ the solicitor of either party to the suit in which he is appointed is applicable to trustees in bankruptcy, but it is only when the trustee is acting adversely to one of the parties that there is any impropriety in his employing the counsel of the other; and that, in general, a trustee or receiver in bankruptcy should not employ an attorney who represents the bankrupt, or an interest in litigation having an interest adverse to that represented by the trustee, but the fact that attorneys represent creditors of the bankrupt, whose interests are not adverse to the estate generally, does not so far disqualify them to act for the trustee as to preclude an allowance for their services to the trustee out of the estate.

[138] In re Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154.

[139] In re Dimm & Co., 146 Fed. 402, 17 Am. Bankr. Rep. 119.

[140] In re Welge, 1 Fed. 216, 1 McCrary, 46; In re Mitchell, 1 Nat. Bankr. News, 264.

[141] In re McKenna, 137 Fed. 611, 15 Am. Bankr. Rep. 4; In re Muldaur, 8 Ben. 65, Fed. Cas. No. 9,905; In re Drake, 14 N. B. R. 150, Fed. Cas. No. 4,058; In re Cook, 17 Fed. 328; Matter of Bank of Niagara, 6 Paige (N. Y.) 213.

[142] In re Hamburger, 8 Ben. 189, Fed. Cas. No. 5,974.

[143] In re New York Mail S. S. Co., 2 N. B. R. 423, Fed. Cas. No. 10,210.

[144] In re Averill, 1 Nat. Bankr. News, 544.

[145] Lape's Adm'r v. Jones (Ky.) 15 S. W. 658.

from which no benefit to the estate has resulted, where he virtually acted for certain creditors who were his clients.[146] Again, if it is suspected that the bankrupt is concealing property which belongs to his estate, or has fraudulently conveyed it away, or that there have been preferential payments or transfers which may be avoided, it is the duty of the trustee to make due search for such property, and to make all reasonable and necessary preliminary inquiries as regards the facts of the alleged concealment or transfer. If he employs an agent or attorney to do this portion of his work for him, it must be at his own expense. Whatever may be his right to employ legal assistance for the prosecution of proceedings in the courts, he cannot expect to have the assets of the estate applied in payment of professional services rendered merely in preliminary searches or investigations.[147] On the other hand, the trustee may retain counsel not only to prosecute actions which he brings, but also to defend suits brought against him by creditors or claimants,[148] but he cannot charge the estate with attorneys' fees incurred in an unsuccessful attempt to retain particular property as against its equitable owner.[149]

The trustee's charges for the fees of his attorney must be included in his accounts and submitted to the meeting of the creditors,[150] and allowed or disallowed by the court of bankruptcy, which has jurisdiction to determine, in a summary manner, all questions as to the propriety of making the allowance and the amount thereof.[151] And a dismissal of the proceedings, though not opposed by the creditors, will not be ordered until payment of the reasonable and proper fees of the trustee's attorney.[152] As to the amount to be allowed to the trustee's attorney, it will naturally vary with the circumstances of the particular case, the only general rule being that it must not exceed the reasonable value of his services, having regard to the nature of the work performed and also to the amount involved and the circumstances of the estate.[153]

[146] In re Rozinsky, 101 Fed. 229, 3 Am. Bankr. Rep. 830.

[147] In re Cook, 17 Fed. 328.

[148] Gazin v. Norton, 38 Fed. 200.

[149] Gillespie v. Piles, 178 Fed. 886, 102 C. C. A. 120, 24 Am. Bankr. Rep. 502.

[150] In re Hubbel, 9 N. B. R. 523, Fed. Cas. No. 6,820.

[151] In re Brinker, 19 N. B. R. 195, Fed. Cas. No. 1,882; In re Noyes, 6 N. B. R. 277, Fed. Cas. No. 10,371. An attorney for the trustee in a successful action is not entitled to retain his compensation from the amount recovered, but he must pay the entire recovery into the court of bankruptcy and submit to the court his claim for compensation. In re Stemper (D. C.) 222 Fed. 690, 34 Am. Bankr. Rep. 806.

[152] In re Salaberry, 107 Fed. 95, 5 Am. Bankr. Rep. 847.

[153] In re Cook, 17 Fed. 328; In re Hoffman, 173 Fed. 234, 23 Am. Bankr. Rep. 19; In re McKenna, 137 Fed. 611, 15 Am. Bankr. Rep. 4; In re Byerly, 128 Fed. 637, 12 Am. Bankr. Rep. 186; In re Bignall, 9 Fed. 385; In re Drake, 14 N. B. R. 150, Fed. Cas. No. 4,058. While it may be the rule in some courts of bankruptcy to allow the trustee's attorney 15 per cent. of the sum recovered in suits involving considerable but not very great sums, this does not apply where the amount of the recovery is very great,

§ 310. Deposit and Disbursement of Funds.—The statutory provision with reference to the safe-keeping of the funds of estates in bankruptcy is as follows: "Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order, increase the number of depositories or the amount of any bond or change such depositories." [154] It is further provided that the bonds of the designated depositories shall be filed of record in the office of the clerk of the court, and may be sued on in the name of the United States for the use of any person injured by a breach of their conditions.[155] It is further made the duty of trustees in bankruptcy to "deposit all money received by them in one of the designated depositories." [156] This duty of the trustee is absolute and imperative. His compliance with the directions of the statute cannot be waived even by the consent of all the creditors and other parties in interest.[157] And though he may himself have claims against the estate, as, for disbursements in

since the work done is the real thing to be paid for, and the amount recovered is only to be considered as showing the responsibility involved and the success accomplished. In re J. M. Fiske & Co. (D. C.) 209 Fed. 982, 31 Am. Bankr. Rep. 736.

[154] Bankruptcy Act 1898, § 61. On this provision, it may be remarked, in the first place, that although the depository is to be a "banking institution," it need not be a national bank, but may be a trust company authorized to do a banking business, or a state bank, or even a private banker. In the next place, they are to be designated by "order." But this does not mean a separate order in each case in bankruptcy, designating a depository for the funds of that particular estate. The court may, by an order made with reference to all future proceedings in bankruptcy before it, designate one or more banks within its district as the authorized depositories for the money of estates in bankruptcy. If they are found to be insufficient in number, with reference to the volume of bankruptcy business in the court or the magnitude of the estates involved, authority is given to "increase" the number. If those originally designated prove to be inconvenient or unsatisfactory for any reason, the court has power to "change such depositories." They are required to be as convenient as may be to the residences of trustees, and this requirement will probably be answered by designating one or more depositories in each city or principal town within the district. Probably the court might in each separate case, either on its own motion or on the application of the trustee for instructions, indicate which of the designated depositories is to be used by him for the deposit of funds. But if this is not done, it is the duty of the trustee to inform himself, by reference to the records of the court and the order of designation, as to the bank or banks in which it will be lawful for him to make his deposits.

[155] Bankruptcy Act 1898, § 50h. See Illinois Surety Co. v. United States, 226 Fed. 665, 141 C. C. A. 421, 36 Am. Bankr. Rep. 82.

[156] Bankruptcy Act 1898, § 47a. Where the bonds of the authorized depositories did not extend to savings accounts on which interest was paid, it was held that the trustee could not deposit funds of a bankrupt estate as a savings account. In re Dayton Coal & Iron Co. (D. C.) 239 Fed. 737, 38 Am. Bankr. Rep. 657.

[157] In re Michel, 6 Fed. 706.

cash, he cannot simply retain the amount out of funds coming into his hands, but must first deposit such funds as required.[158] Besides exposing himself to animadversion and possible removal from office, a trustee who omits altogether to deposit the money of the estate may be charged with interest on it, at least if the proper depository would have paid interest.[159] As to the manner of making the deposit, the statute makes no explicit provision, but it was probably the intention of the legislators that the funds of each estate in bankruptcy should be separately deposited to the credit of the trustee as such, designating the estate.[160] At any rate this is much the best practice, especially as it is the means of avoiding the complications which arose under the act of 1867, where the funds of all estates in bankruptcy were deposited to the credit of the court and drawn out on the court's check, and it was held that the depository was not bound to keep a separate account for each estate, but checks might be paid out of any funds then to the credit of the court, and if the clerk of the court neglected to deposit all moneys coming into his hands, the debts and dividends of one estate might be paid out of the funds of another.[161]

Further, a trustee in bankruptcy is undoubtedly subject to the general rule applicable to all other classes of trustees, viz., that if a trustee, on receiving money of the trust estate, deposits it in a bank in his own name and to his own credit, thus mingling it with his own funds and making the bank simply his individual debtor for the amount, and the bank subsequently fails, the resulting loss will fall upon the trustee personally.[162] And this rule applies even though the bank selected by the trustee was the very one in which he was ordered or required to make the deposit, if he failed to keep the fund separate and apart from his own money.[163] And though the trust fund may not be lost or impaired by being deposited to the trustee's own credit, still he may be chargeable

158 In re Kyle, 181 Fed. 617.

159 In re Newcomb, 32 Fed. 826; In re Burt, 27 Fed. 548; In re Thorp, 2 Ware, 294, Fed. Cas. No. 14,002.

160 In re Carr, 117 Fed. 572, 9 Am. Bankr. Rep. 58; Utica Ins. Co. v. Lynch, 11 Paige (N. Y.) 520.

161 See State Nat. Bank v. Dodge, 124 U. S. 333, 8 Sup. Ct. 521, 31 L. Ed. 458; State Nat. Bank v. Reilly, 124 Ill. 464, 14 N. E. 657.

162 Salway v. Salway, 2 Russ. & M. 215; Fletcher v. Walker, 3 Madd. Ch. 73; Jenkins v. Walter, 8 Gill. & J. (Md.) 218, 29 Am. Dec. 539; Comm. v. McAlister, 28 Pa. St. 480; Naltner v. Dolan, 108 Ind. 500, 8 N. E. 289; Norris v. Hero, 22 La. Ann. 605; Mason v. Whitthorne, 2 Cold. (Tenn.) 252; Robinson v. Ward, 2 Car. & P. 59; Williams v. Williams, 55 Wis. 300, 12 N. W. 465, 13 N. W. 274, 42 Am. Rep. 708; Shaw v. Bauman, 34 Ohio St. 25; Whitehead v. Whitehead, 85 Va. 870, 9 S. E. 10; Matter of Stafford, 11 Barb. (N. Y.) 353; School Dist. v. First Nat. Bank, 102 Mass. 174; Coffin v. Bramlitt, 42 Miss. 194, 97 Am. Dec. 449; Brackenridge v. Holland, 2 Blackf. (Ind.) 377, 20 Am. Dec. 123. And see In re Barnett (D. C.) 214 Fed. 263, 32 Am. Bankr. Rep. 585.

163 Corya v. Corya, 119 Ind. 593, 22 N. E. 3.

with interest upon it if it appears that he has made any private gain from the course pursued.[164]

Concerning the disbursement of the funds of estates, the rules made by the Supreme Court provide that "no moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn." [165] This also is imperative, and the disbursement of money in any other manner is irregular, and may subject both the trustee and the depository to liability on their bonds as well as to attachment for contempt of court.[166] Even the court itself cannot violate this rule, and it has been held error for a court of bankruptcy to withdraw the proceeds of a sale of a bankrupt's property from the designated depository and have the money deposited in another bank, though it was done for the purpose of securing interest on the fund while it was tied up by litigation.[167] For similar reasons, no state court can require a depository to pay a judgment against a trustee in bankruptcy out of the funds deposited by him.[168] But if there is apprehension that the money may be lost through the insolvency of the depository, the court may hear the suggestions of parties in interest with reference to removing it, or may do the same ex officio and without application.[169] But where an officer of a court of bankruptcy deposits money in a designated depository, the same relation of debtor and creditor is created as in the case of an ordinary bank deposit, so that the court no longer has the same jurisdiction over the money as it has over funds in the hands of a receiver or trustee, and hence it cannot summarily order the payment of money out of the depository after the institution has passed into the hands of the superintendent of banks for liquidation.[170] In regard to the duty of the referee in coun-

[164] Hinckley v. Railroad Co., 100 U. S. 153, 25 L. Ed. 591; Livermore v. Wortman, 25 Hun (N. Y.) 341.

[165] General Order No. 29.

[166] In re Cobb, 112 Fed. 655, 7 Am. Bankr. Rep. 202. See Louisville Woolen Mills v. Tapp, 239 Fed. 463, 152 C. C. A. 341, 38 Am. Bankr. Rep. 529. It is irregular, but perhaps permissible in some cases, for the trustee to agree with a creditor that securities held by the creditor shall be retained by him and applied as a general payment upon his claim. In re American Paper Co. (D. C.) 255 Fed. 121, 42 Am. Bankr. Rep. 716.

[167] Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 87 C. C. A. 521, 20 Am. Bankr. Rep. 349.

[168] Havens v. National City Bank, 4 Hun (N. Y.) 131, 13 N. B. R. 95.

[169] Ex parte Shipley, 4 Md. 493.

[170] In re Bologh, 185 Fed. 825, 25 Am. Bankr. Rep. 726. Possibly the depository may be regarded as an officer of the court, and so liable for misconduct in misappropriating the funds, as in case of contempt, but this cannot be true of each of the employés or servants of the bank. See Southern Development Co. v. Houston & T. C. Ry. Co., 27 Fed. 344; In re Western Marine & Fire Ins. Co., 38 Ill. 289.

tersigning checks, it is to be observed that this is a judicial function and not a mere ministerial duty, and the referee will be justified in refusing his signature if he has cause to believe that the amount of the check is too great, or that the proposed payment is fraudulent or for an invalid claim. In such circumstances, he should withhold his signature until he has investigated the matter, and he will not be constrained by mandamus.[171]

§ 311. Responsibility for Negligence or Misconduct.—It is a criminal offense if a trustee in bankruptcy shall knowingly and fraudulently appropriate to his own use, embezzle, spend, or unlawfully transfer any property, or secrete or destroy any document, belonging to the estate in bankruptcy and coming into his charge as trustee.[172] Besides this, he is personally responsible, in an action on his bond, for property converted to his own use,[173] and possibly for the embezzlement or misappropriation of funds by his agents or employés.[174] It is the paramount duty of a trustee in bankruptcy to conserve and advance the interests of the estate, and if he fails to keep himself clear of alliances which tempt to make the estate's interest subordinate to his own, he must account, not only for losses suffered, but for gains made by him; and hence, when a trustee, through the medium of his wife as a dummy, entered into partnership with a salesman and made profits in dealing with the trust estate, he must account therefor.[175] If the trustee knowingly appropriates to the benefit of the estate property which he knows is not the property of the bankrupt, but of a third person, and mingles it or its proceeds with the proceeds of the bankrupt's property, so that they cannot be distinguished, he must pay the claimant the value of such property out of the proceeds of the estate in bankruptcy.[176] And where a trustee in bankruptcy refused to surrender property, which had been in the possession of the bankrupt, to a claimant who was its rightful owner, it was held that both the trustee and the estate were liable for such of the property as subsequently disap-

[171] In re Clark, 9 N. B. R. 67, Fed. Cas. No. 2,810; People v. Wood, 35 Barb. (N. Y.) 653.

[172] Bankruptcy Act 1898, § 29a.

[173] Griswold v. Watkins, 20 Hun (N. Y.) 114.

[174] See In re Union Bank, 37 N. J. Eq. 420, where it appeared that money of a trust estate was collected and misappropriated by an attorney at law who was employed by the receiver in the business of the trust, and the circumstances were such that it was proper and necessary for the receiver to act by an attorney, and the attorney employed was one in good standing at the time, and there was no evidence of any negligence on the part of the receiver. It was held that he should not be held accountable for the money so lost.

[175] In re Webster Loose Leaf Filing Co. (D. C.) 252 Fed. 959, 42 Am. Bankr. Rep. 125.

[176] Bramble v. Brett, 230 Fed. 385, 144 C. C. A. 527, 36 Am. Bankr. Rep. 526.

peared, whether or not this happened through any negligence of the trustee.[177]

In regard to the performance of such duties of his office as are merely ministerial in character, and do not involve the exercise of discretion, he is liable in damages to any person injured by his neglect or omission of them.[178] And as to those duties which require the exercise of judgment and prudence, it is a general rule of law that a trustee is not accountable for an honest mistake, but where his duty is so plain that no man of ordinary intelligence could mistake it, he is responsible if he has that intelligence, and cannot shield himself from responsibility by doubts which he takes no measures either to verify or to dispel.[179] It has been held as to various classes of trustees (and no doubt the rule is applicable to trustees in bankruptcy) that such a fiduciary is bound to exercise such a degree of care and diligence in the administration of his trust as would be expected from a provident owner in regard to his own affairs, and is liable for a loss occasioned by ordinary negligence, but not for acts or omissions which would not be deemed culpable in the management of his own concerns.[180] Thus, executors, guardians, and other classes of trustees are not generally held responsible for loss occasioned to the estate, provided they have exercised such a measure of care and prudence, when valuable animals die, or when property is destroyed or lost by unavoidable accident or casualty, or by theft or burglary.[181] The failure of a trustee to effect insurance on property of the estate may be negligence such as to render him liable for the loss, but the burden of proving negligence is on those who seek to charge him with it.[182] As to intangible assets, it is the duty of the trustee to use all necessary means, by action or otherwise, to realize the debts due to the estate, and if a debt is lost by his neglect of this duty, when the debtor had property sufficient to pay, he is personally responsible for the loss, although he may have acted without any improper motive.[183] The rule is the same where he al-

177 In re Reeves (D. C.) 227 Fed. 711, 36 Am. Bankr. Rep. 130.

178 Russell v. Phelps, 42 Mich. 377, 4 N. W. 1.

179 Gilbert v. Sutliff, 3 Ohio St. 129.

180 Litchfield v. White, 7 N. Y. 438, 57 Am. Dec. 534; Burr v. McEwen, Baldw. 154, Fed. Cas. No. 2,193.

181 Stevens v. Gage, 55 N. H. 175, 20 Am. Rep. 191; State v. Meagher, 44 Mo. 356, 100 Am. Dec. 298; Seawell v. Greenway, 22 Tex. 691, 75 Am. Dec. 794; Carpenter v. Carpenter, 12 R. I. 544, 34 Am. Rep. 716; 1 Perry, Trusts, § 441; 2 Beach, Trusts, § 502. See Crosse v. Smith, 7 East, 246, 258.

182 Estate of Johnson, 11 Phila. (Pa.) 83. See Croft's Ex'rs v. Lyndsey, Freem. Ch. 1. In the latter case (decided A. D. 1676) an administrator was relieved from responsibility for the loss of property of the estate, consisting of certain houses, which were destroyed by the great fire in London. The question of his duty to insure them did not come up, the system of fire insurance not being very well established at that day.

183 Royall's Adm'r v. McKenzie, 25

lows money in which the bankrupt has an interest to be paid out and dissipated by a bank and certain joint owners without objection, when he could have prevented it.[184] At the same time it must be remembered that the trustee is not allowed willfully or recklessly to incur costs and expenses in litigation, when the exercise of ordinary prudence and foresight would have taught him that litigation was unnecessary or would fail, and if he does, he is personally chargeable with such costs, and cannot cast them upon the estate.[185] But the estate of the bankrupt is not liable to third persons injured by the torts, negligence, or misconduct of the trustee.[186]

§ 312. Joint Trustees.—It is a general rule that, "in the administration of a trust, where there is more than one trustee, all must concur, but the entire body can direct one of their number to transact business which it may be inconvenient for the others to perform, and the acts of the one thus authorized are the acts of all and binding on all. The trustee thus acting is to be considered the agent of all the trustees, and not as an individual trustee."[187] But where several trustees leave the entire performance of the trust to one co-trustee, they are all equally responsible for his performance of the duties which they have thus delegated to him.[188] And a majority of the trustees cannot, by any rule or resolution which they may adopt, exclude one of their number and so divest him of his rights as to make his subsequent act of obtaining possession of the trust property a tort.[189] Under former bankruptcy acts it was held that where two of the three trustees of a bankrupt enter into an agreement, in the absence of the third, the contract is not binding upon the absent trustee, unless he had previously given authority to make it, or unless he subsequently recognizes and acknowledges it.[190] But this rule appears to be changed by the provision of the present statute that, when three trustees have been appointed, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.[191]

§ 313. Accounts and Reports of Trustee.—Trustees in bankruptcy are required by law to "keep regular accounts showing all amounts

Ala. 363. And see In re Kuhn Bros., 234 Fed. 277, 148 C. C. A. 179.

184 In re Kane, 161 Fed. 633, 20 Am. Bankr. Rep. 616.

185 Kingsbury v. Powers, 131 Ill. 182, 22 N. E. 479; In re Preston, 6 N. B. R. 454, Fed. Cas. No. 11,394; In re Brinkman, 6 N. B. R. 541, Fed. Cas. No. 1,883.

186 Adams v. Meyers, 1 Sawy. 306, 8 N. B. R. 214, Fed. Cas. No. 62; King v. Deitz, 12 Pa. St. 156.

187 Insurance Co. v. Chase, 5 Wall. 509, 18 L. Ed. 524.

188 Maccubbin v. Cromwell, 7 Gill & J. (Md.) 157.

189 Trustees of First Society v. Stewart, 27 Barb. (N. Y.) 553.

190 Blight v. Ashley, Pet. C. C. 15, Fed. Cas. No. 1,541.

191 Bankruptcy Act 1898, § 47b.

received and from what sources, and all amounts expended and on what accounts," to "report to the courts in writing the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts," to "make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors," and to lay before such final meetings "detailed statements of the administration of the estate." [192] Creditors must also have notice of the filing of the final accounts of the trustee and the time when and the place where they will be examined and passed upon.[193] Trustees (being included in the general term "officers," as used in the act) are also required to report statistics of bankruptcy proceedings to the Attorney General within ten days after being requested to do so.[194] It is also provided that "the accounts and papers of trustees shall be open to the inspection of officers and all parties in interest," [195] and if a trustee refuses to permit a reasonable opportunity for the inspection of the accounts, papers, and records relating to the estate, when directed by the court so to do, it is a punishable offense, and he forfeits his office on conviction.[196] And generally, failure of the trustee to inform creditors of their rights and of the condition of the estate, when the suppression of facts is in the interest of one class of creditors, is good cause for the removal of the trustee.[197] Among those who are entitled to demand proper and necessary information from the trustee are the referee,[198] the bankrupt,[199] and any creditor of the bankrupt, even though the latter has not formally proved his claim,[200] or though he has instituted proceedings against the trustee for the reclamation of specific property.[201]

In case of the bankruptcy of a partnership, the trustee is required to keep separate accounts of the partnership property and of the property belonging to the individual partners.[202] But except for this, no particular form or manner of keeping the trustee's accounts is prescribed, and probably any system would be sufficient which clearly showed the receipts and disbursements and from which the condition of the estate could be easily ascertained.[203] But upon the final settlement, a clear

[192] Bankruptcy Act 1898, § 47a.
[193] Idem, § 58a, cl. 6.
[194] Idem, § 54.
[195] Idem, § 49.
[196] Idem, § 29c, cl. 3.
[197] Ex parte Perkins, 5 Biss. 254, 8 N. B. R. 56, Fed. Cas. No. 10,982.
[198] In re Clark, 6 N. B. R. 194, Fed. Cas. No. 2,807.
[199] In re Blaisdell, 5 Ben. 420, 6 N. B. R. 78, Fed. Cas. No. 1,488.
[200] In re Samuels, 174 Fed. 911, 23 Am. Bankr. Rep. 528.
[201] In re Saur, 122 Fed. 101, 10 Am. Bankr. Rep. 353.
[202] Bankruptcy Act 1898, § 5d.
[203] See Solomons v. Kursheedt, 3 Dam-

balance sheet should be presented, and proper vouchers should be filed, and the balance shown by such sheet must correspond with that shown by the statement of the designated depository.[204] In the accounts of trustees generally, inaccuracies arising from inadvertence, oversight, miscalculation, or palpable mistake, may be corrected in proper cases when returned into court.[205] But "any omissions or inaccuracies in the accounts of a trustee, inimical to the interest of his cestui que trust, give rise to presumptions against him which are decisive unless overcome by collateral proofs affirmatively establishing his perfect fairness and equity in the premises." [206]

If the trustee fails to file any account or report at the time when he is required by law to do so, it is cause for his removal from office.[207] And it is always within the power of the court, on the application of a party in interest or on its own motion, to make an order requiring the trustee to file an account, report, or statement which is due from him,[208] which order may be made by the referee,[209] and to compel his obedience by commitment as for contempt.[210]

The final account of the trustee, as above stated, is to be submitted to the final meeting of the creditors, and it is usually exhibited and read to them, though they may dispense with this by vote, where the account has been on file long enough for all to inform themselves of its terms.[211] But it is the referee, and not the creditors, who must pass upon the accounts of the trustee; and it is the duty of the referee to examine and pass upon every item of the account, without regard to whether or not objections to particular items are raised by the creditors.[212] And any person who desires to object to the decision of the referee in allowing or disallowing a particular item, whether it be the trustee himself or a creditor, should promptly file exceptions to the account as passed, and bring the matter before the judge by petition for review of the referee's rulings.[213] But the exceptant must move promptly, or he will be

arest (N. Y.) 307; Hutchinson's Appeal, 34 Conn. 300.

[204] In re Carr, 116 Fed. 556, 8 Am. Bankr. Rep. 635.

[205] Coffin v. Bramlitt, 42 Miss. 194, 97 Am. Dec. 449.

[206] Hottel v. Mason, 16 Colo. 43, 26 Pac. 335; Landis v. Scott, 32 Pa. St. 495.

[207] General Order No. 17.

[208] Adams v. Woods, 8 Cal. 306; Mabry v. Harrison, 44 Tex. 286.

[209] In re Bellamy, 1 Ben. 390, 1 N. B. R. 64, Fed. Cas. No. 1,266.

[210] O'Conor v. Sunseri (C. C. A.) 184 Fed. 712, 26 Am. Bankr. Rep. 1.

[211] In re Merchants' Ins. Co., 6 Biss. 252, Fed. Cas. No. 9,442.

[212] In re Baginsky, 1 Nat. Bankr. News, 360; In re Sawyer, 2 Low. 551, 16 N. B. R. 460, Fed. Cas. No. 12,396. The district judge has jurisdiction to investigate the condition of the trustee's account on petition of a creditor, to ascertain what dividends, if any, are due and payable. In re Sand, Fed. Cas. No. 12,302.

[213] In re Reliance Storage & Warehouse Co., 100 Fed. 619, 4 Am. Bankr. Rep. 49; In re Clark, 9 N. B. R. 67, Fed. Cas. No. 2,810. See In re Byerly, 128 Fed. 637, 12 Am. Bankr. Rep. 186.

deemed to have acquiesced.[214] The decision of the judge on such exceptions is also subject to review by the appellate court, but proceedings for its review must be taken in due season, and if not, the order of the court will become final and cannot be set aside or modified on motion.[215]

§ 314. Discharge of Trustee.—When the estate has been fully administered and is ready to be closed, and the final account of the trustee has been filed, examined, and allowed, he will thereupon be discharged by a written order, which may be made by the referee.[216] But as all orders of the referee are expressly made subject to review by the judge, the latter has power to vacate an order for the discharge of the trustee.[217] Objections to the allowance of the account and the discharge of the trustee may undoubtedly be filed by any creditor who alleges fraud or embezzlement on the part of the trustee or any such mismanagement of the estate as would render him liable to be surcharged with losses or wasting of assets.[218] The court may set aside a discharge of the trustee which has inadvertently found its way into the files of the court, and may order him to proceed.[219] But after receiving his discharge, and unless it is vacated, the trustee has no power to convey property which came into his hands as assets of the estate, and the mere fact that his conveyance recites that it is executed to correct a former deed gives it no additional effect.[220] But it seems that an order made by the referee authorizing a discharged trustee to sell subsequently acquired assets is equivalent to opening the discharge or reappointing the trustee.[221]

§ 315. Closing and Reopening Estate.—The court of bankruptcy has jurisdiction to "close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered."[222] The referee to whom the case was

The referee has no authority to surcharge the account of a trustee, unless exceptions thereto filed by parties in interest are sustained. In re Kenny (D. C.) 269 Fed. 54, 46 Am. Bankr. Rep. 214.

214 In re Scherr, 138 Fed. 695, 14 Am. Bankr. Rep. 794.

215 In re Hoyt & Mitchell, 127 Fed. 968, 11 Am. Bankr. Rep. 784.

216 Official Form No. 51.

217 Brown v. Persons, 122 Fed. 212, 58 C. C. A. 658, 10 Am. Bankr. Rep. 416.

218 In re Peabody, 16 N. B. R. 243, Fed. Cas. No. 10,866.

219 Maybin v. Raymond, 15 N. B. R. 353, Fed. Cas. No. 9,338.

220 Richards v. Northwestern Coal & Mining Co., 221 Mo. 149, 119 S. W. 953.

221 Geisreiter v. Sevier, 33 Ark. 522.

222 Bankruptcy Act 1898, § 2, clause 8. As to the proceedings on closing an estate, see In re De Ran, 260 Fed. 732, 171 C. C. A. 470, 44 Am. Bankr. Rep. 409; In re Levy (D. C.) 261 Fed. 432, 44 Am. Bankr. Rep. 248. The estate of a bankrupt is never technically closed, and a discharge of the trustee is of no effect, where there has been no final meeting of

originally referred has jurisdiction of a petition to reopen it and may make the necessary order.[223] And where a bankrupt has concealed property which he should have surrendered, the title thereto does not revest in him upon his discharge in such sense as to deprive the court of jurisdiction upon the reopening of the estate.[224] A petition to reopen can be filed only by one who has an interest and will be benefited thereby.[225] And this does not include a creditor who had not proved his claim within the time allowed,[226] but may include the original trustee in bankruptcy,[227] and the bankrupt himself in a voluntary case.[228] As the statute provides no limitation of time within which closed estates may be reopened, the application must be made within a reasonable time, and the doctrine of laches applies if there has been unreasonable delay.[229] The granting of such an application rests very much in the discretion of the court, and its decision will not be reversed unless an abuse of discretion is shown.[230] Generally the application is made on the ground of the discovery of unadministered assets and if the sum is considerable, it will be proper to reopen the case,[231] but not if the assets in question are so inconsiderable as not to justify the trouble and expense.[232] It appears that the estate may properly be reopened on the petition of a purchaser of real estate from the trustee, where it appears that the

creditors and settlement of the trustee's accounts. Levy v. Schorr (C. C. A.) 266 Fed. 207, 45 Am. Bankr. Rep. 324. As to reopening an estate, it is said that the proceedings for that purpose need not be formal, and a petition is sufficient to support an order for the reopening of the estate if it contains sufficient information to satisfy the court of the jurisdictional fact that the estate was closed before being fully administered. In re Carlucci Stone Co. (D. C.) 269 Fed. 795, 46 Am. Bankr. Rep. 272.

223 Bilafsky v. Abraham, 183 Mass. 401, 67 N. E. 318.

224 Fowler v. Jenks, 90 Minn. 74, 95 N. W. 887, 96 N. W. 914.

225 In re Meyer, 181 Fed. 904, 25 Am. Bankr. Rep. 44; In re Graff, 250 Fed. 997, 163 C. C. A. 247, 41 Am. Bankr. Rep. 32.

226 In re Paine, 127 Fed. 246, 11 Am. Bankr. Rep. 351.

227 In re Paine, 127 Fed. 246, 11 Am. Bankr. Rep. 351.

228 In re Shaffer, 104 Fed. 982, 4 Am. Bankr. Rep. 728; In re Graff, 255 Fed. 241, 166 C. C. A. 421, 42 Am. Bankr. Rep. 741. The court has jurisdiction to grant an application by the bankrupt to reopen the proceedings as to property not passing through the bankruptcy court, in order to remove any question as to title. In re Graff (D. C.) 242 Fed. 577, 40 Am. Bankr. Rep. 205.

229 Traub v. Marshall Field & Co., 182 Fed. 622, 25 Am. Bankr. Rep. 410; In re Paine, 127 Fed. 246, 11 Am. Bankr. Rep. 351; Clark v. Pidcock, 129 Fed. 745, 64 C. C. A. 273, 12 Am. Bankr. Rep. 309; Duncan v. Watson, 198 Ala. 180, 73 South. 448.

230 In re Paine, 127 Fed. 246, 11 Am. Bankr. Rep. 351; In re Goldman, 129 Fed. 212, 63 C. C. A. 370, 11 Am. Bankr. Rep. 707; In re Graff, 250 Fed. 997, 163 C. C. A. 247, 41 Am. Bankr. Rep. 32.

231 In re Barton's Estate, 144 Fed. 540, 16 Am. Bankr. Rep. 569; In re Levy (D. C.) 259 Fed. 316, 43 Am. Bankr. Rep. 590. It is proper to reopen the estate on proof that a sale of the bankrupt's assets was effected for a grossly inadequate price because of the concealment of assets and the suppression of material facts. In re Leigh (C. C. A.) 272 Fed. 678, 47 Am. Bankr. Rep. 72.

232 In re O'Connell, 137 Fed. 838, 70

sale was not legally perfected.[233] And it has been held that the proceeding might be reopened to allow the bankrupt to amend his schedules so as to include a debt which, through misapprehension, was listed in the name of the wrong party.[234] As the reopening of a closed bankruptcy estate is, in general, only for the purposes of distribution, it in no way affects the bankrupt and notice to him of the application is not necessary, and if a restraining order is made in connection with the order for opening the estate, the bankrupt cannot have it vacated merely because it was made without notice to him.[235]

When the case is reopened, this does not have the effect of re-instating the trustee in his office, or of revoking his discharge. On the contrary, the first step to be taken is to call a meeting of the creditors, and they are then to elect a new trustee.[236] As this is a case of "vacancy" in the office of trustee, it is not proper for the referee to make an appointment to that office until after the creditors have had an opportunity to elect and have either neglected to do so or failed to reach an agreement. But if the referee proceeds at once to appoint a trustee, the title of the latter will not be considered invalid in any collateral proceeding.[237] Since the statute expressly limits the time for proving claims to one year after the adjudication, the question has been raised whether the reopening of the estate lifts the bar of the statute or not. In one instance, where no creditors took the trouble to prove their claims because the bankrupt scheduled no assets, and he was discharged and the estate closed, but afterwards property was discovered and the estate reopened, it was held that the court might permit the filing of claims for a year from the date of the order for reopening the case, although the year after the adjudication had expired.[238] It should also be observed

C. C. A. 336, 14 Am. Bankr. Rep. 237; In re Newton, 107 Fed. 429, 46 C. C. A. 399, 6 Am. Bankr. Rep. 52.

[233] In re Minners (D. C.) 253 Fed. 300, 41 Am. Bankr. Rep. 773.

[234] In re Adams (D. C.) 242 Fed. 335, 40 Am. Bankr. Rep. 22. But see In re Sayer (D. C.) 210 Fed. 397, 32 Am. Bankr. Rep. 90, holding that, where it does not appear that an estate in bankruptcy was not fully administered when closed, the court has no jurisdiction to open the same that the bankrupt may include certain omitted creditors in his schedules.

[235] In re Levy (D. C.) 259 Fed. 314, 44 Am. Bankr. Rep. 276.

[236] In re Newton, 107 Fed. 429, 46 C. C. A. 399, 6 Am. Bankr. Rep. 52; In re Paine (D. C.) 127 Fed. 246, 11 Am. Bankr. Rep. 351; In re Minners (D. C.) 253 Fed. 300, 41 Am. Bankr. Rep. 773; In re Rochester Sanitarium & Baths Co., 222 Fed. 22, 137 C. C. A. 560, 34 Am. Bankr. Rep. 355. After the estate is closed and there is no longer a trustee, the power of the court in respect to the discharged trustee is exhausted, and an order directing the former trustee to execute an instrument validating title of the bankrupt to property alleged to be newly discovered is invalid. In re Graff, 250 Fed. 997, 163 C. C. A. 247, 41 Am. Bankr. Rep. 32.

[237] Fowler v. Jenks, 90 Minn. 74, 95 N. W. 887, 96 N. W. 914.

[238] In re Pierson (D. C.) 174 Fed. 160, 23 Am. Bankr. Rep. 58. But see contra,

that the order reopening the estate does not of itself authorize the bringing of a suit to recover the assets claimed to have been newly discovered in the hands of a third person, but simply leaves the matter in the hands of the referee to cause the election of a trustee and to authorize such suit, or not, as he shall deem proper under the circumstances shown.[239]

[239] In re Meyer (D. C.) 181 Fed. 904, 25 Am. Bankr. Rep. 44.

[239] In re Ryburn (D. C.) 145 Fed. 662, 16 Am. Bankr. Rep. 514.

CHAPTER XIX

PROPERTY VESTING IN TRUSTEE

§ 316. Nature and Origin of Trustee's Title.—The bankruptcy act of 1867 provided for the transfer of the bankrupt's property and assets to his assignee in bankruptcy by means of an instrument in the nature of a deed or assignment, to be executed by the judge of the court, or, in some cases, by the register in bankruptcy.[1] But the present statute provides that the trustee shall be vested "by operation of law" with title to the bankrupt's property, and no assignment or conveyance to him is required, except as to property in foreign countries.[2] The result of an adjudication in bankruptcy, therefore, in divesting the title of the bankrupt and transferring it to the trustee, is not a sale,[3] although it is within the terms of a policy of insurance rendering the contract void in case of an "alienation" or "transfer" of the property covered, or a "change in the title or possession," without the consent of the insurer.[4] Hence the trustee in bankruptcy does not occupy the technical position of an innocent purchaser for value without notice.[5] On the contrary, it has always been the rule in bankruptcy, and still continues to be the rule, with an exception to be presently noted, that trustees in bankruptcy, except in the case of liens or transfers which are fraudulent or void under the statute, take only such rights and interests as the bankrupt himself had and could himself claim and assert at the time of his bankruptcy, and they take the property subject to and affected with all those claims, liens, and equities which were valid against it in the hands of the bankrupt, and which would affect and bind him if he were asserting those rights and interests.[6] Thus the law stood until 1910, when Congress added an amendment to the bankruptcy act providing that trustees in bankruptcy, "as to all property in the custody or coming into the

[1] Rev. Stat. U. S. § 5044.

[2] Bankruptcy Act 1898, §§ 7, 70. See In re F. W. Hall & Sons (D. C.) 208 Fed. 578, 31 Am. Bankr. Rep. 434; Goldsmith v. Winner Shingle Co., 96 Wash. 516, 165 Pac. 392; Gee v. Parks (Tex. Civ. App.) 193 S. W. 767. In Hough v. City of North Adams, 196 Mass. 290, 82 N. E. 46, it was held that, upon an adjudication in bankruptcy against the owner of land, the situation as to the title to the land is the same as it would have been under a deed from the bankrupt to his trustee.

[3] In re Bozeman, 1 Nat. Bankr. News, 479.

[4] Perry v. Lorillard Fire Ins. Co., 61 N. Y. 214, 19 Am. Rep. 272; Adams v. Rockingham Ins. Co., 29 Me. 292; Starkweather v. Cleveland Ins. Co., Fed. Cas. No. 13,309.

[5] In re Seward Dredging Co., 242 Fed. 225, 155 C. C. A. 65, 39 Am. Bankr. Rep. 372; Boise v. Talcott (C. C. A.) 264 Fed. 61, 45 Am. Bankr. Rep. 117; Woolridge v. Williams, 5 Alaska, 149; In re Scruggs, 205 Fed. 673, 31 Am. Bankr. Rep. 94; In re Charles Town Light & Power Co., 199 Fed. 846, 29 Am. Bankr. Rep. 721; In re Interstate Paving Co., 197 Fed. 371, 28 Am. Bankr. Rep. 573; First Nat. Bank v. Bacon, 113 App. Div. 612, 98 N. Y. Supp. 717; Ellison v. Ganiard, 167 Ind. 471, 79 N. E. 450; Goodyear Rubber Co. v. Schreiber, 29 Wash. 94, 69 Pac. 648; Chace v. Chapin, 130 Mass. 128; F. A. Ames Co. v. Slocomb Mercantile Co., 166 Ala. 99, 51 South. 994; Chicago Title & Trust Co. v. National Storage Co., 260 Ill. 485, 103 N. E. 227; Custard v. McNary, 85 W. Va. 516, 102 S. E. 216.

[6] Zartman v. First Nat. Bank, 216 U. S. 134, 30 Sup. Ct. 368, 54 L. Ed. 418,

custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly

23 Am. Bankr. Rep. 635; York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, 15 Am. Bankr. Rep. 633; Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 290, 48 L. Ed. 986; Bacon v. International Bank, 131 U. S. ccxvi, 26 L. Ed. 439; Yeatman v. New Orleans Sav. Inst., 95 U. S. 764, 24 L. Ed. 589; In re Interstate Paving Co., 197 Fed. 371, 28 Am. Bankr. Rep. 573; In re E. M. Newton & Co., 153 Fed. 841, 83 C. C. A. 23, 18 Am. Bankr. Rep. 567; In re Walsh Bros., 195 Fed. 576, 28 Am. Bankr. Rep. 243; In re Peacock, 178 Fed. 851, 24 Am. Bankr. Rep. 159; Walter A. Wood Co. v. Eubanks, 169 Fed. 929, 95 C. C. A. 273, 22 Am. Bankr. Rep. 307; In re Blake, 150 Fed. 279, 17 Am. Bankr. Rep. 668; In re Kellogg, 118 Fed. 1017, 56 C. C. A. 383; Duplan Silk Co. v. Spencer, 115 Fed. 689, 53 C. C. A. 321, 8 Am. Bankr. Rep. 367; Chattanooga Nat. Bank v. Rome Iron Co., 102 Fed. 755, 4 Am. Bankr. Rep. 441; Webber v. Clark, 136 Ill. 256, 26 N. E. 360, 32 N. E. 748; Union Brewing Co. v. Interstate Bank & Trust Co., 240 Ill. 454, 88 N. E. 997; Hardy v. Weyer, 42 Ind. App. 343, 85 N. E. 731; Wick v. Hickey (Iowa) 103 N. W. 469; Exchange & Deposit Bank v. Stone, 80 Ky. 109; Linthicum v. Fenley, 74 Ky. (11 Bush) 131; Chambers v. Northern Bank of Kentucky, 5 Ky. Law Rep. 123; Clarke v. Rosenda, 5 Rob. (La.) 27; Blank v. Blank, 124 La. 832, 50 South. 745; Kenney v. Ingalls, 126 Mass. 488; Upton v. National Bank of South Reading, 120 Mass. 153; Dugan v. Nichols, 125 Mass. 43; Chace v. Chapin, 130 Mass. 128; Lockwood v. Noble, 113 Mich. 418, 71 N. W. 856; Davis v. Lumpkin, 57 Miss. 506; Abbey v. Commercial Bank of New Orleans, 34 Miss. 571, 69 Am. Dec. 401; South End Imp. Co. v. Harden (N. J. Eq.) 52 Atl. 1127; Hunt v. Osborn, 180 N. Y. 508, 72 N. E. 1143; First Nat. Bank v. Zartman, 189 N. Y. 553, 82 N. E. 1126; Van Heusen v. Van Heusen Charles Co., 74 Misc. Rep. 292, 131 N. Y. Supp. 401; Crane Co. v. Smythe, 94 App. Div. 53, 87 N. Y. Supp. 917; White v. O'Brien, 31 Misc. Rep. 770, 64 N. Y. Supp. 387; Woodin v. Frazee, 38 N. Y. Super. Ct. 190; Godwin v. Murchison Nat. Bank, 145 N. C. 320, 59 S. E. 154, 17 L. R. A. (N. S.) 935; Walker v. Taylor (Tex. Civ. App.) 142 S. W. 31; Eason v. Garrison, 36 Tex. Civ. App. 574, 82 S. W. 800; Beall v. Walker, 26 W. Va. 741; Ferguson v. Bauernfeind, 140 Wis. 42, 121 N. W. 647; Claridge v. Evans, 137 Wis. 218, 118 N. W. 198, 803, 25 L. R. A. (N. S.) 144; In re Scruggs, 205 Fed. 673, 31 Am. Bankr. Rep. 94; In re Thompson, 205 Fed. 556, 30 Am. Bankr. Rep. 576; In re Tietje (D. C.) 263 Fed. 917; In re Hawley Down-Draft Furnace Co. (D. C.) 233 Fed. 451, 38 Am. Bankr. Rep. 62; Gage Lumber Co. v. McEldowney, 207 Fed. 255, 124 C. C. A. 641, 30 Am. Bankr. Rep. 251; In re Roseboom (D. C.) 253 Fed. 136, 42 Am. Bankr. Rep. 437; In re Moose River Lumber Co. (D. C.) 251 Fed. 409, 42 Am. Bankr. Rep. 242; In re East Stroudsburg Supply & Const. Co. (D. C.) 248 Fed. 356, 41 Am. Bankr. Rep. 57; Emerson-Brantingham Implement Co. v. Lawson (D. C.) 237 Fed. 877, 38 Am. Bankr. Rep. 344; In re Reading Hat Mfg. Co. (D. C.) 224 Fed. 786, 34 Am. Bankr. Rep. 884; In re Place (D. C.) 224 Fed. 778, 35 Am. Bankr. Rep. 426; Galbraith v. First Nat. Bank, 221 Fed. 386, 137 C. C. A. 194, 34 Am. Bankr. Rep. 213; Church E. Gates & Co. v. National Fair & Exposition Ass'n, 172 App. Div. 581, 158 N. Y. Supp. 1070; Coggan v. Ward, 215 Mass. 13, 102 N. E. 336; Walkof v. Fox, 90 Misc. Rep. 338, 153 N. Y. Supp. 27; Southern Trust Co. v. Wilkins, 101 S. C. 457, 86 S. E. 26; Davis v. Billings, 254 Pa. 574, 99 Atl. 163; O'Brien v. Doolittle, 91 Conn. 354, 99 Atl. 1055; Abele v. S. A. Meagher Co., 227 Mass. 427, 116 N. E. 805; Goodwin v. Barre Sav. Bank & Trust Co., 91 Vt. 228, 100 Atl. 34; American Bottle Co. v. Finney, 203 Ala. 92, 82 South. 106; Chicago Title & Trust Co. v. First Nat.

returned unsatisfied." [7] This provision gives the trustee a superior position with reference to some kinds of transactions (notably conditional sales) which would have been valid as against the bankrupt himself, though voidable as to lien creditors. And so far, it must be considered as modifying the general rule above stated, and as rendering inapplicable the decisions which supported it.[8] But otherwise, the rule remains in force. Thus, the trustee cannot hold real estate against a third person who claims under an earlier and unrecorded conveyance made to him by the bankrupt.[9] And where he brings his bill to set aside a sale of the bankrupt's realty, made under a deed of trust, and for leave to redeem, he has no greater rights than the bankrupt himself would have under the circumstances, and any defense that would be available against

Bank, 174 Ill. App. 339; Mankins v. Forward Movement Syndicate, 28 Cal. App. 285, 152 Pac. 313; Williams v. Noyes & Nutter Mfg. Co., 112 Me. 408, 92 Atl. 482, Ann. Cas. 1916D, 1224; Brown v. Brown, 172 Ky. 754, 189 S. W. 921; Lyttle v. National Surety Co., 43 App. D. C. 136.

[7] Act Cong. June 25, 1910, 36 Stat. 838, amending Bankruptcy Act 1898, § 47a. See In re Terrell, 246 Fed. 743, 159 C. C. A. 45, 40 Am. Bankr. Rep. 713; Brown v. Crawford (D. C.) 252 Fed. 248, 42 Am. Bankr. Rep. 263; In re Chotiner (D. C.) 216 Fed. 916; Furst-Kerber Cut Stone Co. v. Wells, 116 Va. 95, 81 S. E. 22. The rights given to the trustee in bankruptcy by this amendatory act, and which may, according to circumstances, be those of "a creditor holding a lien by legal or equitable proceedings," or those of "a judgment creditor holding an execution duly returned unsatisfied," are not defined by the act, as they are essentially matters of state law, and their scope and effect must therefore be determined by the law of the local jurisdiction. In re Floyd-Scott Co. (D. C.) 224 Fed. 987, 35 Am. Bankr. Rep. 463.

[8] In re Gehris-Herbine Co., 188 Fed. 502, 26 Am. Bankr. Rep. 470; In re Butterwick, 131 Fed. 371, 12 Am. Bankr. Rep. 536; Thomas v. Taggart, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845, 19 Am. Bankr. Rep. 710; Crawford v. Mandell, 173 Mich. 109, 138 N. W. 705. As to property in the custody of the court, the trustee is in the position of a creditor who has reduced his claim to judgment. In re Superior Drop Forge & Mfg. Co. (D. C.) 208 Fed. 813, 31 Am. Bankr. Rep. 455. As against the rights of a chattel mortgagee under an unfiled mortgage, the trustee in bankruptcy stands in the position of an attaching creditor. Lake View State Bank v. Jones, 242 Fed. 821, 155 C. C. A. 409, 40 Am. Bankr. Rep. 148. The trustee's right to property in the possession of the bankrupt is superior to that of a mortgagee holding under an unrecorded mortgage which would be good as between the bankrupt and the mortgagee. In re Social Circle Cotton Mills (D. C.) 213 Fed. 994, 32 Am. Bankr. Rep. 567. But this amendment was intended to preserve but not to enlarge the rights of creditors; and where under the state law a chattel mortgage, though unrecorded, is valid except as against subsequent creditors without notice and prior creditors who have secured liens by attachment or levy, a trustee cannot hold property as against the holder of an unrecorded mortgage for the benefit of prior simple contract creditors. In re Rutland-Perry Co. (D. C.) 205 Fed. 200, 30 Am. Bankr. Rep. 383. And see Martin v. Commercial Nat. Bank, 228 Fed. 651, 143 C. C. A. 173, 36 Am. Bankr. Rep. 25. In bankruptcy proceedings against a firm of cotton factors, the trustee represents unsecured creditors with the same effect as if they had, on the date of the filing of the petition in bankruptcy, levied executions upon the cotton stored by the firm in a warehouse. Interstate Banking & Trust Co. v. Brown, 235 Fed. 32, 148 C. C. A. 526, 37 Am. Bankr. Rep. 771.

[9] Goss v. Coffin, 66 Me. 432, 22 Am. Rep. 585.

the bankrupt may be urged against the trustee.[10] So where the bankrupt had borrowed money to pay for certain real estate, and it was orally agreed that, on payment of a note given for the loan, the title should be conveyed to him, he took merely an equitable title subject to a lien in favor of the holder of the note, and his trustee in bankruptcy occupies no more advantageous position.[11] So where a purchaser of personal property under a conditional sale sold the property to the bankrupt, the latter's trustee will acquire no better title than the bankrupt had.[12] Estoppels effective against the bankrupt may also bind his trustee, as, for example, with reference to ostensible membership in a firm, when the question concerns the rights of creditors who relied thereon,[13] or with reference to the merger of a lien in the legal title to the property.[14] So, where none of the creditors of a bankrupt extended credit to him in reliance on his ownership of property which, while standing in his name, was in fact held by him in trust for others, his trustee takes no greater interest or right therein than he himself had, and if the trust was enforceable in equity against him, it is equally so against his trustee.[15] And in fact, as a court of bankruptcy is a court of equity, trustees in bankruptcy will sometimes be ordered to do full justice even in cases where the circumstances give rise to no legal right, nor even, perhaps, to a right which could be enforced in a court of equity as against an ordinary litigant.[16] To take another illustration, where the business of the bankrupt is the retailing of a patented article under a license from the patentee, which license requires him to sell only at a fixed price and gives him the privilege of returning any of the articles not sold, the trustee in bankruptcy is also bound by the terms of the license, and, as to the stock on hand when he takes possession, he must either sell the articles at the fixed price or return them.[17]

As to the nature of the trustee's title, it is entirely peculiar and anomalous. It is sometimes said to resemble that of an executor.[18] But in

[10] Jenkins v. Pierce, 98 Ill. 646. Where title to land, subject only to a possible defeasance, was vested by deed in the purchaser at a tax sale, the trustee of the bankrupt owner of the property, not qualifying until the legal title was absolute in the purchaser, took no rights not possessed by the bankrupt. Beckham v. Lindsey, 22 Ga. App. 174, 95 S. E. 745.

[11] Beer v. Wisner, 74 Neb. 437, 104 N. W. 757.

[12] Crocker-Wheeler Co. v. Genesee Recreation Co., 140 App. Div. 726, 125 N. Y. Supp. 721.

[13] Kelly v. Scott, 49 N. Y. 595.

[14] In re Standard Laundry Co., 116 Fed. 476, 53 C. C. A. 644, 8 Am. Bankr. Rep. 538; Palmer v. Welch, 171 Mo. App. 580, 154 S. W. 433.

[15] In re Coffin, 152 Fed. 381, 81 C. C. A. 507, 18 Am. Bankr. Rep. 127.

[16] In re Chase, 124 Fed. 753, 59 C. C. A. 629, 10 Am. Bankr. Rep. 677.

[17] In re S. Spitzel & Co., 168 Fed. 156, 21 Am. Bankr. Rep. 729.

[18] Dillard v. Collins, 25 Gratt. (Va.) 343. In another case it is said that assignees in bankruptcy do not take the whole legal title in the bankrupt's property as heirs and executors do. Nothing vests in them, even at law, but such

truth it is not precisely similar to the title of an executor, an administrator, a guardian or conservator, a receiver, or an ordinary trustee. It is a title cast upon him by operation of law, at least co-extensive with the title of the bankrupt and in some respects wider or stronger, and not held for his own benefit or advantage, but in trust for those entitled to share in the distribution of the estate,[19] the only object of its creation being to enable the trustee to collect and distribute the assets among the creditors.[20] But the title of the trustee is exclusive, and he is the only person who can sue for the recovery of assets.[21] He may maintain replevin for the recovery of specific personal property, or trover for damages for its conversion.[22] But no creditor is permitted to pursue, and subject to the payment of his demands, assets of the bankrupt which existed at the time of the adjudication and so passed to the trustee, unless, indeed, the latter has distinctly abandoned them.[23] And it is also to be noticed that, since the trustee's title vests "by operation of law," he is not in the position of one holding under a power or authority from the bankrupt, which would be revocable by the latter's death. The statute itself provides that the death or insanity of the bankrupt shall not abate the proceedings,[24] and it follows also that the trustee could not be required in any circumstances to surrender the estate to an executor, administrator, committee, or guardian. Also his title is not in any way affected by the discharge of the bankrupt or by his failure to obtain a discharge.[25] But the trustee has no control over the interests of others in the property, except as expressly given by law to protect the bankrupt's interests for the benefit of the creditors.[26]

estate as the bankrupt had a beneficial as well as a legal interest in. Ontario Bank v. Mumford, 2 Barb. Ch. (N. Y.) 596. Proceedings in bankruptcy may be regarded as an equitable attachment, and the equitable interest vested in the trustee in bankruptcy for the benefit of all the creditors. In re Hinds, 3 N. B. R. 351, Fed. Cas. No. 6,516.

[19] Brown v. Frenken, 87 Ark. 160, 112 S. W. 207; Aiken v. Edrington, 15 N. B. R. 271, Fed. Cas. No. 111. The trustee is the agent of the court to liquidate the assets of the bankrupt, and is not the representative of the bankrupt but of the creditors, and holds the legal title to property as their representative. Barber v. Wiemer, 183 Iowa, 72, 165 N. W. 440.

[20] Bracklee Co. v. O'Connor, 67 Misc. Rep. 599, 122 N. Y. Supp. 710.

[21] Schnurman's Ex'x v. Biddle & Co., 109 Va. 702, 64 S. E. 977.

[22] Haughey v. Albin, 2 Bond, 244, 2 N. B. R. 399, Fed. Cas. No. 6,222; Foster v. Hackley, 2 N. B. R. 406, Fed. Cas. No. 4,971; McLeish v. Tylee, 4 Strobh. (C. C.) 287; Collier v. Hopper, 133 Ark. 599, 202 S. W. 687.

[23] Starr v. Whitcomb, 150 Mich. 491, 114 N. W. 345; Jenkins v. Pilcher, 160 Mich. 349, 125 N. W. 355, 28 L. R. A. (N. S.) 423. But where, before the bankruptcy proceedings, a novation has been effected, the creditor, and not the trustee, is entitled to demand and receive payment from the bankrupt's debtor. In re Haynes Son & Co. (D. C.) 224 Fed. 269.

[24] Bankruptcy Act 1898, § 8.

[25] In re Cheney, 5 Law Rep. 19, Fed. Cas. No. 2,636.

[26] Goddard v. Weaver, 1 Woods, 257, 6 N. B. R. 440, Fed. Cas. No. 5,495.

To a certain extent an adjudication in bankruptcy is notice to all parties in interest.[27] But provision has also been made by law both for official evidence of the trustee's title and for imparting notice by record. One section of the statute declares that "a certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and, if recorded, shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened."[28] And another section provides that "the trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution."[29] But the title of a trustee in bankruptcy to a patent is not of the kind that must be recorded; and the transfer of the patent to the trustee by the adjudication in bankruptcy, though not recorded in the patent office, will prevail over a recorded assignment of the patent from the administrator of the bankrupt made after the bankruptcy.[30] It should also be remarked that the title of the trustee cannot be divested except by the order of the court which has control of the administration of the estate, and until this has been done, all other courts must respect the trustee's title, at least until he has been discharged.[31]

§ 317. **Date of Accrual of Trustee's Title.**—Under the explicit provision of the statute, the title of the trustee in bankruptcy takes effect, by relation, from the date of the adjudication of bankruptcy.[32] The adjudication divests the title of the bankrupt, but there may be a considerable interval of time before the appointment and qualification of a trus-

[27] Where a trustee in bankruptcy has taken possession, the property is in the custody of the law, and cannot be removed therefrom by any private person or by any process out of any court, except one having a supervisory control or superior jurisdiction in the premises. Williams v. Noyes & Nutter Mfg. Co., 112 Me. 408, 92 Atl. 482, Ann. Cas. 1916D, 1224. And see Archenhold Co. v. Schaefer (Tex. Civ. App.) 205 S. W. 139. But the rule that the filing of a petition in bankruptcy is a caveat and an attachment does not apply to those having liens on, or title to, the property of the bankrupt. Tube City Min. & Mill. Co. v. Otterson, 16 Ariz. 305, 146 Pac. 203, L. R. A. 1916E, 303.

[28] Bankruptcy Act 1898, § 21e.

[29] Bankruptcy Act 1898, § 47c, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797.

[30] Prime v. Brandon Mfg. Co., 16 Blatchf. 453, Fed. Cas. No. 11,421.

[31] May v. New Orleans & C. R. Co., 44 La. Ann. 444, 10 South. 769.

[32] In re Butterwick, 131 Fed. 371, 12 Am. Bankr. Rep. 536; In re Fulton, 153 Fed. 664, 18 Am. Bankr. Rep. 591; Currie v. Look, 14 N. D. 482, 106 N. W. 131; Bennett v. Ætna Ins. Co., 201 Mass. 554, 88 N. E. 335, 131 Am. St. Rep. 414; Simpson v. Miller, 7 Cal. App. 248, 94 Pac. 252; In re Arctic Stores (D. C.) 258 Fed. 688, 43 Am. Bankr. Rep. 543; In re P. J. Sullivan Co. (D. C.) 247 Fed. 139, 41 Am. Bankr. Rep. 189; Williams v. Noyes & Nutter Mfg. Co., 112 Me. 408, 92 Atl. 482, Ann. Cas. 1916D, 1224; Barber v. Wiemer, 183 Iowa, 72, 165 N. W. 440.

tee. Hence, if it were not for this provision of the statute, the title would remain, during such interval, in nubibus. "The correct view of this matter is that the condition of a bankrupt's property, after the adjudication and before the appointment of a trustee, is analogous to the condition of the personal property of a decedent before the appointment of an executor or administrator. Bankruptcy, like death, divests the title of the owner. It becomes thereupon in custodia legis. Upon the appointment of a trustee, he takes title by relation back as of the date of the adjudication." [33] The provision requiring the trustee to file a certified copy of the adjudication in every county where the bankrupt holds real estate, does not affect this rule, nor is such filing necessary to complete the title of the trustee to given real estate.[34] Again, the trustee may maintain trover for property converted before his appointment, if the conversion occurred after the adjudication.[35]

But it has been made a question whether the title of the trustee does not relate back to the commencement of the proceeding, that is, the filing of the petition. Under the bankruptcy act of 1867, it was held that it does.[36] And there are numerous expressions in the cases decided under the present statute which apparently sanction the same view.[37] But it is disapproved by the Supreme Court, which has pointed out that the language of the act of 1898 is explicit and is essentially different from that

[33] In re Frazin & Oppenheim, 174 Fed. 713, 23 Am. Bankr. Rep. 289. And see In re Gutwillig, 90 Fed. 475, 1 Am. Bankr. Rep. 78. Under the act of 1867, the property of the bankrupt remained in him until an assignee had qualified and had received an assignment of the property from the judge or register. Leathem & Smith Lumber Co. v. Nalty, 109 La. 325, 33 South. 354. And see In re Banks, 207 Fed. 662, holding that, after the filing of the petition and prior to the adjudication, the bankrupt holds the title in trust for his creditors.

[34] Hull v. Burr, 61 Fla. 625, 55 South. 852.

[35] Mitchell v. McKibin, 8 N. B. R. 548, Fed. Cas. No. 9,666.

[36] Conner v. Long, 104 U. S. 228, 26 L. Ed. 723; Morris v. First Nat. Bank, 68 N. Y. 362; Southard v. Wilson, 29 Me. 56; Phillips v. Helmbold, 26 N. J. Eq. 202.

[37] In re Judson, 192 Fed. 834, 27 Am. Bankr. Rep. 704; Glidden v. Massachusetts Hospital Life Ins. Co., 187 Mass. 538, 73 N. E. 538; St. Louis County v. Watson, 3 Mo. App. 599; Cornelius v. Boling, 18 Okl. 469, 90 Pac. 874; Miller v. Barto, 247 Ill. 104, 93 N. E. 140; Sargeant v. Blake, 160 Fed. 57, 87 C. C. A. 213, 20 Am. Bankr. Rep. 115; Potter v. Martin, 122 Mich. 542, 81 N. W. 424; Toof v. City Nat. Bank, 206 Fed. 250, 124 C. C. A. 118; In re Continental Coal Corp. 238 Fed. 113, 151 C. C. A. 189, 38 Am. Bankr. Rep. 168; In re Diamond's Estate, 259 Fed. 70, 170 C. C. A. 138, 44 Am. Bankr. Rep. 268; Tripplehorn v. Cambron, 250 Fed. 605, 162 C. C. A. 621, 41 Am. Bankr. Rep. 334; In re Wellmade Gas Mantle Co. (D. C.) 230 Fed. 502, 36 Am. Bankr. Rep. 354. In re Federal Contracting Co., 212 Fed. 688, 129 C. C. A. 224, 32 Am. Bankr. Rep. 381; Kopplin v. Ludwig (Tex. Civ. App.) 170 S. W. 105; Petty v. Wilkins, 129 Ark. 364, 196 S. W. 453; Carter-Mullaly Transfer Co. v. Robertson (Tex. Civ. App.) 198 S. W. 791; Philoon v. Babbitt, 119 Me. 172, 109 Atl. 817. A trustee in bankruptcy was held entitled to recover from the payee of the bankrupt's check the amount he had collected on it, where, although the check was given in good faith and was deposited for collection before the filing of the petition in voluntary bankruptcy, it was not paid until afterwards. In re

of the earlier statute.[38] It is true, the evident intention of the statute is that all the property which the bankrupt owned at the time of the filing of the petition shall be drawn into the administration and pass to the trustee. But this intention is effected by other provisions of the act, not by that which relates to the title of the trustee. After the petition is filed, and before any adjudication has been made, the property may be taken and placed in the charge of a receiver, if there is danger of its being lost or dissipated. Again, it is said that the filing of the petition operates as notice to all the world and as a caveat, warning all persons not to interfere with the property, or an injunction having the same effect, or as an attachment sequestrating the property pending the further proceedings.[39] Moreover, an injunction may be obtained preventing the bankrupt from alienating any of his property in the interval, or forbidding third persons from removing or wasting it. But the title of the trustee takes effect only as of the date of the adjudication and embraces the estate as it then was. No difficulty need be experienced in reconciling this doctrine with the provision of the statute that the trustee shall be vested with title to property which, prior to the petition, the bankrupt could have transferred. For this refers merely to the class of property which passes to the trustee.[40] In other words, it means property which the bankrupt could have transferred if a petition in bankruptcy had not been filed against him. Hence, for example, the trustee cannot maintain trover to recover the value of mortgaged personal property of which the mortgagee had taken possession and appropriated the same to his own use before the adjudication in bankruptcy.[41] And so, where a chose in action has been assigned by a bankrupt before the adjudication, an action thereon must be brought in the name of the bankrupt, and not in that of his trustee.[42] On the other hand, this

Howe (D. C.) 235 Fed. 908, 37 Am. Bankr. Rep. 601.

[38] Hiscock v. Varick Bank of New York, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945, 18 Am. Bankr. Rep. 1; In re Rose (D. C.) 206 Fed. 991, 30 Am. Bankr. Rep. 791; Christopherson v. Harrington, 118 Minn. 42, 136 N. W. 289, 41 L. R. A. (N. S.) 276.

[39] State Bank of Chicago v. Cox, 143 Fed. 91, 74 C. C. A. 285, 16 Am. Bankr. Rep. 32; Loeffler v. Wright, 13 Cal. App. 224, 109 Pac. 269; Wright-Dalton-Bell-Anchor Store Co. v. Sanders, 142 Mo. App. 50, 125 S. W. 517; In re Flatland (C. C. A.) 196 Fed. 310, 28 Am. Bankr. Rep. 476. Where after the filing of the petition but before the adjudication, an attorney and the bankrupt diverted cash assets of the bankrupt, it was held that the trustee thereafter appointed might recover the money from the attorney, notwithstanding the declaration of the Bankruptcy Act that his title is of the date of adjudication. Arnold v. Horrigan, 238 Fed. 39, 151 C. C. A. 115, 38 Am. Bankr. Rep. 174.

[40] Gray v. Chase, 184 Mass. 444, 68 N. E. 676. While the title of a trustee in bankruptcy is only that which exists at the date of the adjudication, of necessity such title relates back to the time of the filing of the petition. Neuberger v. Felis, 203 Ala. 142, 82 South. 172.

[41] Jones v. Miller, 17 N. B. R. 316, Fed. Cas. No. 7,482.

[42] Hynson v. Burton, 5 Ark. 492.

provision of the statute serves to define clearly the dividing line between property which is assets of the estate in bankruptcy and after-acquired property of the bankrupt, which is his own and is not drawn into the administration. The trustee takes title to such property only as belonged to the bankrupt at the date of the adjudication and which the latter owned in such sense that he could have transferred title to it if bankruptcy had not intervened. Whatever vests in the bankrupt after that date is free from the claims of the trustee and the creditors.[43] But to have this character, the property must be a new acquisition, and not merely the fruits of something previously held. Thus, rents accruing after the adjudication, on mortgaged property of the bankrupt which comes into the possession of the trustee, and before the mortgagee has taken such action as to entitle him to the possession of the property, belong to the estate.[44] So where an item of the bankrupt's assets consists in a judgment in his favor, rendered before the adjudication in bankruptcy, but which was inadvertently entered for an amount less than the verdict, and it is amended by order of the court, after the adjudication, so as to cover the full amount, the trustee in bankruptcy may claim the full amount of the judgment as finally ascertained, not merely the sum for which it was entered originally.[45] Finally, the fact that the bankrupt obtains his discharge does not bar the right of the trustee to recover property subsequently discovered.[46]

But while the foregoing states the rule as to title to the bankrupt's property vesting in the trustee, it is otherwise as to the right or status of the latter as a creditor holding a lien or an unsatisfied judgment creditor, under the amendment of 1910. This status or lien, it is now held, relates back to the commencement of the proceedings, that is, the date of the filing of the petition in bankruptcy.[47]

[43] Wilkins v. Tourtellott, 42 Kan. 176, 22 Pac. 11. And see, supra, § 236.

[44] In re Dole, 110 Fed. 926, 7 Am. Bankr. Rep. 21.

[45] Zantzinger v. Ribble, 36 Md. 32, 4 N. B. R. 724.

[46] Maybin v. Raymond, 15 N. B. R. 353, Fed. Cas. No. 9,338. If the discharge be set aside and the bankrupt's assignment of life policies be voided, their status, as regards the trustee's interest, is of the date of adjudication, though the bankrupt has died. In re Levy (D. C.) 227 Fed. 1011, 36 Am. Bankr. Rep. 181.

[47] Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275, 35 Am. Bankr. Rep. 814; Fairbanks Steam Shovel Co. v. Wills, 240 U. S. 642, 36 Sup. Ct. 466, 60 L. Ed. 841, 36 Am. Bankr. Rep. 754; Bunch v. Maloney, 233 Fed. 967, 147 C. C. A. 641, 37 Am. Bankr. Rep. 369; Lake View State Bank v. Jones, 242 Fed. 821, 155 C. C. A. 409, 40 Am. Bankr. Rep. 148; In re Schilling (D. C.) 251 Fed. 966, 41 Am. Bankr. Rep. 705; In re Gay & Sturgis (D. C.) 251 Fed. 420, 41 Am. Bankr. Rep. 569; Big Four Implement Co. v. Wright, 207 Fed. 535, 125 C. C. A. 577, 47 L. R. A. (N. S.) 1223, 31 Am. Bankr. Rep. 125; Scales v. Holje, 41 Cal. App. 733, 183 Pac. 308; Kettenbach v. Walker, 32 Idaho, 544, 186 Pac. 912; First Nat. Bank of Union v. Wegener, 94 Or. 318, 181 Pac. 990, 186 Pac. 41. Compare In re Rose (D. C.) 206 Fed. 991, 30 Am. Bankr. Rep. 791.

§ 318. Assets in Bankruptcy in General.—By way of a general definition, it may be said that assets in bankruptcy are property of the bankrupt, or the proceeds thereof, coming into the hands of the trustee and applicable to the payment of the debts.[48] But the statute specifically describes the classes of property which shall constitute assets, as follows: (1) Documents relating to the property of the bankrupt; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit; (4) property transferred by him in fraud of his creditors; (5) property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him; (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.[49] But it is said that this section of the statute is not to be construed as exclusive of other assets not therein described, so that, if there be other kinds of property owned by the bankrupt and applicable to his debts, they will also vest in the trustee.[50] Further, though the bankrupt is required to file a schedule of his property, the extent of the trustee's title does not depend upon it; that is, the latter takes title to any propery which he may discover and which properly constitutes assets of the estate, though omitted from the schedule.[51] Several of the kinds of property enumerated in the statute, as above will be separately discussed in the succeeding sections of this chapter, but some require notice in this place.

First, as to "documents relating to his property." This term is elsewhere defined in the statute as including "any book, deed, or instrument in writing."[52] Consequently, the trustee is entitled to the possession of all the bankrupt's books of account, business, papers, contracts, securities, etc., relating to his business,[53] and, in the case of the bank-

[48] In re Wilson, 2 Hughes, 228, Fed. Cas. No. 17,782. As to insurance money taking the place of the property insured, for the purpose of the bankruptcy proceedings, see Tepel v. Coleman (D. C.) 229 Fed. 300.

[49] Bankruptcy Act 1898, § 70a. See Brown v. Crawford (D. C.) 252 Fed. 248, 42 Am. Bankr. Rep. 263.

[50] In re Baudouine, 96 Fed. 536, 3 Am. Bankr. Rep. 55. The decision was as to the surplus income of a bankrupt, above the amount necessary for his support, accruing under a will by which trustees were charged to pay him a fixed share of the trust estate during his life, and which the laws of the state made liable in equity to the claims of his creditors.

[51] Chachere v. Bloch, 46 La. Ann. 1386, 16 South. 176; Hallyburton v. Slagle, 130 N. C. 482, 41 S. E. 877; Ledoux v. Samuels, 116 App. Div. 726, 102 N. Y. Supp. 43; Leist v. Dierssen, 4 Cal. App. 634, 88 Pac. 812; Jude v. Nebham (Miss.) 60 South. 45; Gray v. Gudger, 260 Fed. 931, 171 C. C. A. 573, 44 Am. Bankr. Rep. 228; Neuberger v. Felis, 203 Ala. 142, 82 South. 172; Jones v. Barnes, 107 Miss. 800, 66 South. 212. See In re Levy (D. C.) 227 Fed. 1011, 36 Am. Bankr. Rep. 181.

[52] Bankruptcy Act 1898, § 1, clause 13.

[53] In re Hess, 134 Fed. 109, 14 Am. Bankr. Rep. 559.

ruptcy of a corporation, the corporate record and stock books.[54] But if the bankrupt's books of account have been transferred by him before the commencement of the proceedings in bankruptcy, in such a way as to give the holder an apparent legal title to them, the trustee must resort to plenary proceedings for their recovery.[55]

As to property conveyed in fraud of the bankrupt's creditors this subject will be more fully discussed in a later chapter. But it may here be remarked that, if existing creditors have not sued to set aside a voluntary or fraudulent conveyance of the bankrupt's property until within four months prior to his bankruptcy, they are not entitled to the proceeds of the property, sold on vacation of the conveyance, but such proceeds belong to the trustee for distribution according to the bankruptcy act.[56]

As to property which the bankrupt could have transferred, or which could have been levied upon and sold under judicial process against him, the word "transfer" is elsewhere defined in the act as including "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." [57] Transferability is in general the test of the title of the trustee in bankruptcy under this provision of the act.[58] And any interest of a bankrupt in property or a fund which he could by any means have transferred passes to his trustee, although it may not have been subject to seizure on execution against him.[59] On the other hand, without reference to the question of transferability, property passes to the trustee which could have been levied upon and sold under process against the bankrupt. And whether the particular property could have been levied on and sold under judicial process is to be determined according to the local law.[60] Generally, however, this clause will include all property to which the bankrupt had title as between himself and his creditors.[61] Thus, where personal property is held by a third person under a lease from the bankrupt, although the local law would not subject it to attachment or execution at the suit of the lessor's creditors, yet if it

[54] Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969, 23 Am. Bankr. Rep. 519.

[55] Rogers v. Winsor, 6 N. B. R. 246, Fed. Cas. No. 12,023.

[56] In re Martin, 193 Fed. 841, 27 Am. Bankr. Rep. 545. See Smith v. Retail Merchants' Fire Ins. Co., 37 S. D. 395, 158 N. W. 780.

[57] Bankruptcy Act 1898, § 1, clause 25.

[58] In re Packer's Estate, 246 Pa. 116, 92 Atl. 70.

[59] Pollack v. Meyer Bros. Drug Co., 233 Fed. 861, 147 C. C. A. 535, 36 Am. Bankr. Rep. 835.

[60] Rosenbluth v. De Forest & Hotchkiss Co., 85 Conn. 40, 81 Atl. 955; In re Berry (D. C.) 247 Fed. 700, 41 Am. Bankr. Rep. 357.

[61] Chesapeake Shoe Co. v. Seldner, 122 Fed. 593, 58 C. C. A. 261, 10 Am. Bankr. Rep. 466; Boone v. Hall, 7 Bush (Ky.) 66, 3 Am. Rep. 288; In re Millbourne Mills Co., 162 Fed. 988, 20 Am. Bankr.

could be reached by trustee process, subject to the rights of the lessee, it is assets of the estate in bankruptcy.[62]

As to the nature of the bankrupt's title or interest, it may be said that there must be some definitely fixed or ascertainable title or estate, in which the bankrupt has a beneficial as well as a legal interest.[63] But the fact that his interest is defeasible or contingent does not necessarily prevent it from being transferable or assignable and therefore assets in bankruptcy.[64] It has even been held that the trustee will be entitled to claim money which was placed in the bankrupt's hands and was converted by him under circumstances such as to make his act larcenous.[65] But the case is different in regard to property which is held by the bankrupt under no real title, but by virtue of a conveyance which was fraudulent and void as against the grantor's creditors. It is the latter, the grantor's creditors, who will be entitled to it, and not the trustee in bankruptcy of the grantee.[66] We have also to consider the case where the bankrupt is not the sole owner of property, but jointly interested in it with others. Here the trustee will take only the bankrupt's share or interest.[67] But on the bankruptcy of a person who was in fact the sole owner of a business, though it was conducted in the name of himself and another as partners, the property and assets of the business will pass to his trustee as his individual property, without regard to any liability of the ostensible partner to the creditors.[68] Without attempting to enumerate all the various kinds of property which may be claimed by the trustee as assets, it may be observed that he will become entitled in his capacity as trustee to wages or salary or other compensation for services, earned and payable at the date of the commencement of the proceedings in bankruptcy, but not then paid, though not to the bankrupt's earnings for services after that date;[69] as also to money in bank to the credit of the bankrupt,[70] to accruing rents from his property,[71]

Rep. 718; Patterson v. Boyd (Tenn.) 150 S. W. 424; In re T. C. Burnett & Co., 201 Fed. 162, 29 Am. Bankr. Rep. 872.

[62] Clark v. Williams, 190 Mass. 219, 76 N. E. 723.

[63] Ontario Bank v. Mumford, 2 Barb. Ch. (N. Y.) 596; In re Twaddell, 110 Fed. 145, 6 Am. Bankr. Rep. 539. See In re Hunter Arms Co., 233 Fed. 79, 147 C. C. A. 149.

[64] In re Wright (C. C. A.) 157 Fed. 544, 19 Am. Bankr. Rep. 454; In re Judson, 188 Fed. 702, 26 Am. Bankr. Rep. 775.

[65] Lord v. Seymour, 177 N. Y. 525, 69 N. E. 1126.

[66] Manning v. Drake, 1 Mich. 34; Gunther v. Greenfield, 8 Abb. Prac. N. S. (N. Y.) 191, 3 N. B. R. 730.

[67] Goddard v. Weaver, 1 Woods, 257, 6 N. B. R. 440, Fed. Cas. No. 5,495.

[68] In re Gibson, 191 Fed. 665, 27 Am. Bankr. Rep. 401.

[69] In re Evans, 253 Fed. 276. See In re Gillespie (D. C.) 209 Fed. 1003.

[70] Wagner v. Citizens' Bank & Trust Co., 122 Tenn. 164, 122 S. W. 245, 135 Am. St. Rep. 869, 19 Ann. Cas. 483.

[71] Keenan v. Shannon, 10 Phila. (Pa.) 219, 9 N. B. R. 441, Fed. Cas. No. 7,640; In re Dole, 110 Fed. 926, 7 Am. Bankr. Rep. 21.

removable trade fixtures,[72] shares of corporate stock standing in the name of the bankrupt,[73] and the interest of a bankrupt in a stock pool organized to advance the market in a certain stock and then sell to the public.[74] As to corporate stock, the trustee has a right to have the certificate transferred to him or to have a new one issued, if it is beyond his power to compel a transfer from the bankrupt,[75] and probably to vote the stock at stockholders' meetings, though if he allows the bankrupt to do this, the other stockholders have no right to object.[76] But while shares of corporate stock pass to the trustee, for whatever they may be currently worth, a stockholder's interest in the accumulated but undivided profits of the company is not "property," and therefore the trustee cannot recover dividends declared on the stock after the bankrupt's discharge.[77] And although the bankrupt may be employed by a given corporation, all the stock of which stands in the name of his wife, and its prosperity may be chiefly due to his efforts, it does not follow that any part of its property can be claimed as assets of his estate.[78] And it is to be noted that the individual liability of a stockholder in a corporation does not descend upon his trustee in bankruptcy, nor attach to the assets in his hands, at least where the trustee has not accepted the stock or consented to become a stockholder in the corporation.[79]

A private banker being subject to adjudication in bankruptcy, the property and assets employed in the business pass to the trustee in bankruptcy; but whether the creditors of the bankrupt in his capacity as a banker have a preference or priority over his general or personal creditors, must depend upon the laws of the particular state.[80] As to

[72] Montello Brick Co. v. Trexler (C. C. A.) 167 Fed. 482, 21 Am. Bankr. Rep. 896.

[73] Wilson v. Atlantic & St. L. R. Co., 2 Fed. 459.

[74] In re Lathrop, Haskins & Co., 184 Fed. 534, 24 Am. Bankr. Rep. 911.

[75] Wilson v. Atlantic & St. L. R. Co., 2 Fed. 459.

[76] State v. Ferris, 42 Conn. 560.

[77] Bryan v. Sturgis Nat. Bank, 40 Tex. Civ. App. 307, 90 S. W. 704, 40 Am. Bankr. Rep. 18. But see In re Brantman, 244 Fed. 101, 156 C. C. A. 529. In this case it is said that ordinarily a stockholder cannot maintain an action for a dividend not declared, but that if directors of a corporation unreasonably and wrongfully refuse or neglect to declare dividends, when there are surplus profits out of which a dividend might be declared, and there is no good reason for their failure, a stockholder may, by a bill in equity, compel the declaration of a dividend. And as the trustee of a bankrupt succeeds to the bankrupt's title to corporate stock and has the bankrupt's rights and remedies as respects dividends which have been declared or which ought to have been declared, so where corporate directors, to protect a bankrupt, failed to declare dividends, the trustee may maintain a suit to compel the declaration and payment of a dividend.

[78] Campbell v. Thompson, 18 Colo. App. 93, 70 Pac. 161.

[79] American File Co. v. Garrett, 110 U. S. 288, 4 Sup. Ct. 90, 28 L. Ed. 149; Garrett v. Sayles, 1 Fed. 371.

[80] See In re Sage (D. C.) 224 Fed. 525, 35 Am. Bankr. Rep. 436; Ledgerwood v.

property which has inherent value, or value in use or consumption, but which is contraband or cannot legally be sold, the case is doubtful. It was formerly thought that where the bankrupt was a licensed dealer in intoxicating liquors, his stock in trade would be assets in the hands of his trustee in bankruptcy, notwithstanding the doubt as to the legality of any sale of it by the latter.[81] But since the adoption of the Eighteenth Amendment to the federal Constitution it would appear that a stock of liquors in the hands of a bankrupt would not be assets of his estate, since it could neither be legally transferred by him nor levied upon and sold under judicial process.

§ 319. **Situation of Property.**—All property of the bankrupt situated anywhere within the United States passes to and vests in his trustee in bankruptcy, without regard to the territorial limits of the jurisdiction of the court which made the adjudication of bankruptcy. That is, it is entirely immaterial that parts of the property, whether real or personal, may be situated without the district or in another state; it all comes within the trustee's title and right of possession, and within the exclusive control of the bankruptcy court in which the proceedings are had.[82] But a decree in bankruptcy would not be sufficient in itself to invest the trustee with title to real property of the bankrupt situated in a foreign country,[83] the reason being that, as a bankruptcy law can have no exterritorial operation, it cannot affect land situated beyond the boundaries of the United States, which is governed only by the law of its situs. But this contingency has been provided for by the present statute, which enacts that it shall be the duty of the bankrupt to "execute to his trustee transfers of all his property in foreign countries." [84] While this language is broad enough to include assignments of personal property or choses in action, it is doubtful whether they would be necessary. It seems that intangible personal property of a bankrupt, such that its situs must be taken to be that of the owner's domicile, will vest in his trustee in bankruptcy, though the obligation which it secures, or the value which it represents, is performable or payable only in a foreign

Dashiell (Tex. Civ. App.) 177 S. W. 1010; In re Deutsche Bros. (D. C.) 220 Fed. 532, 33 Am. Bankr. Rep. 858

[81] See Strub v. Gamble, 221 Fed. 253, 137 C. C. A. 258, 34 Am. Bankr. Rep. 229.

[82] In re Granite City Bank, 137 Fed. 818, 70 C. C. A. 316, 14 Am. Bankr. Rep. 404; In re Wilka, 131 Fed. 1004, 12 Am. Bankr. Rep. 727; Ward v. Hargett, 151 N. C. 365, 66 S. E. 340; Cannon v. Wellford, 22 Grat. (Va.) 195; Knauth, Nachod & Kuhne v. Latham & Co., 219 Fed. 721, 135 C. C. A. 419, 33 Am. Bankr. Rep. 631; Koger v. Clark (Tex. Civ. App.) 216 S. W. 434.

[83] Oakey v. Bennett, 11 How. 33, 13 L. Ed. 593; Chaison v. McFaddin (Tex. Civ. App.) 132 S. W. 524; In re Delehanty's Estate, 11 Ariz. 366, 95 Pac. 109, 21 Ann. Cas. 1038.

[84] Bankruptcy Act 1898, § 7, clause 5.

jurisdiction. In an English case we find a decision that bonds of a foreign government vest in the executor of a decedent who held such bonds at the time of his death, the same being marketable securities in England,[85] and the rule should certainly extend by analogy to trustees in bankruptcy.

§ 320. Burdensome Interests.—Though title to all the bankrupt's property descends upon his trustee, the latter is not bound to accept or to administer any portion of it or any item of assets which he may decide to be worthless, or likely to cost more than it will yield, or to be more of a burden than a benefit to the estate. In the exercise of his judgment and discretion on this point, he may reject, abandon, or refuse to take charge and possession of, any such property, and so free himself from any duty or responsibility in regard to it.[86] Thus, for instance, if he finds property of the bankrupt so heavily burdened with mortgages or other liens that he considers it impossible to realize anything out of the equity of redemption for the benefit of the general creditors, he may refuse to administer it and abandon it to the secured creditor, and it is in fact his duty to do so whenever it is certain that the general estate would derive no benefit from a sale of the property.[87] So, he is not bound to accept any property which may involve him in litigation, when the probability is that the estate would be taxed with costs and expenses in excess of any sum eventually realized.[88] While the decision of such questions is for the trustee in the first instance, and he is bound to exercise sound judgment as well as good faith, his determination is not irrevocably binding on the creditors. That is to say, if they believe his decision to reject or abandon property was unwise, and that the prop-

[85] Attorney General v. Bouwens, 4 Mees. & W. 171. See Devisme v. Martin, Wythe (Va.) 298.

[86] Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915; American File Co. v. Garrett, 110 U. S. 288, 4 Sup. Ct. 90, 28 L. Ed. 149; Sessions v. Romadke, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; In re Wisconsin Engine Co., 234 Fed. 281, 148 C. C. A. 183, 37 Am. Bankr. Rep. 106; In re Scruggs (D. C.) 205 Fed. 673, 31 Am. Bankr. Rep. 94; In re Berry (D. C.) 247 Fed. 700, 41 Am. Bankr. Rep. 357; Taylor v. Irwin, 20 Fed. 615; Kimberling v. Hartly, 1 McCrary, 136, 1 Fed. 571; Amory v. Lawrence, 3 Cliff. 523, Fed. Cas. No. 336; Copeland v. Stephens, 1 Barn. & Ald. 603; Smith v. Gordon, 6 Law Rep. 313, Fed. Cas. No. 13,052; Glenn v. Howard, 65 Md. 40, 3 Atl. 895; Griswold v. Morse, 59 N. H. 211; Berry v. Gillis, 17 N. H. 9, 43 Am. Dec. 584; Briggs v. Avary, 47 Tex. Civ. App. 488, 106 S. W. 904; Fleming v. Courtenay, 98 Me. 401, 57 Atl. 592, 99 Am. St. Rep. 414; In re Zehner, 193 Fed. 787, 27 Am. Bankr. Rep. 536; McCarty v. Light, 155 App. Div. 36, 139 N. Y. Supp. 853; Dow v. Bradley, 110 Me. 249, 85 Atl. 896.

[87] In re Zehner, 193 Fed. 787, 27 Am. Bankr. Rep. 536; In re Jersey Island Packing Co., 138 Fed. 625, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560, 14 Am. Bankr. Rep. 689; In re Stewart, 193 Fed. 791, 27 Am. Bankr. Rep. 529; In re North Star Ice & Coal Co. (D. C.) 252 Fed. 301, 42 Am. Bankr. Rep. 76.

[88] Oldmixon v. Severance, 119 App. Div. 821, 104 N. Y. Supp. 1042.

erty might be administered for the benefit of the estate, the court of bankruptcy is open to them, and they may there obtain a reversal of his decision and an order requiring him to take charge of the property and administer it.[89] But if the trustee's decision to abandon the property is acquiesced in, or not overruled, the effect is to restore to the bankrupt the title and possession of the property and the right to deal with it as his own, and the trustee cannot thereafter interfere with it or claim any proceeds arising from the sale or other disposition of the property or any advantage accruing from it.[90] Thus, in a case where the bankrupt was carrying some policies of life insurance, the trustee decided that they were not of any value to the estate, and hence did not have them appraised or make any provision for paying the premiums, but abandoned them to the bankrupt, with the approval of the court. But the beneficiaries in the policies or the bankrupt himself kept up the premiums, and the bankrupt died before the estate was closed. It was held that the trustee was not entitled to recover the proceeds of the policies from the insurance companies or from the beneficiaries.[91] So, when the trustee declines to take a debt or claim due to the bankrupt, it becomes the latter's right to sue upon it himself, and in this case it is immaterial whether or not the trustee's right to sue would be barred, as that does not affect the bankrupt.[92]

§ 321. Same; Trustee's Election to Accept or Abandon Property.—The trustee cannot be put to his election whether to accept or to reject property of the bankrupt unless he is aware of its existence and of the circumstances which should influence his decision. In other words, no one else can deal with the property without first showing that the trustee abandoned it, and in order to establish this, it must be shown that the trustee had either actual knowledge of the property in question or sufficient means of obtaining full information.[93] And if the trustee assumes control over the property with reasonable promptness, after learning of its existence, no previous inaction on his part will count for anything

[89] Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915; People's Nat. Bank v. Maxson, 168 Iowa, 318, 150 N. W. 601.

[90] Fleming v. Courtenay, 98 Me. 401, 57 Atl. 592, 99 Am. St. Rep. 414; Burton v. Perry, 146 Ill. 71, 34 N. E. 60; Amory v. Lawrence, 3 Cliff. 523, Fed. Cas. No. 336; Kimberling v. Hartley, 1 McCrary, 136, 1 Fed. 571; Smith v. Gordon, 6 Law Rep. 313, Fed. Cas. No. 13,052; Haley v. Boston Belting Co., 140 Mass. 73, 2 N. E. 785; Shaffer v. Federal Cement Co. (D. C.) 225 Fed. 893; Mesirov v. Inn's Speiden & Co., 88 N. J. Law, 548, 97 Atl. 160; Smith v. Wahl, 88 N. J. Law, 623, 97 Atl. 261.

[91] Meyers v. Josephson, 124 Fed. 734, 59 C. C. A. 650, 10 Am. Bankr. Rep. 687.

[92] Buckingham v. Buckingham, 36 Ohio St. 68.

[93] Dushane v. Beall, 161 U. S. 513, 16 Sup. Ct. 637, 40 L. Ed. 791; Atwood v. Bailey, 184 Mass. 133, 68 N. E. 13; Buckingham v. Buckingham, 36 Ohio St. 68.

or prejudice his rights in any way.[94] The rule that a bankrupt can assert title to any property which the trustee declines to take "can have no application when the trustee is ignorant of the existence of the property and has had no opportunity to make an election. It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee has never taken any action in respect to it. If the claim was of value, it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property." [95]

Naturally the trustee is not required to come to an instant decision on learning of the property in question. He must be accorded a reasonable length of time in which to inform himself and arrive at a conclusion.[96] But on the other hand, he must make his decision within a reasonable length of time, and cannot delay indefinitely. If he pursues a policy of mere neglect and inaction, and this continues for an unreasonable length of time, it will give rise to a presumption that he has abandoned the property, and will estop him to assert any interest in it, at least as against rights or liens subsequently acquired by third persons, such as a purchaser from the bankrupt, or a creditor who has independently taken steps to subject the property to the payment of his debt.[97] In particular, the courts will not permit the trustee to wait indefinitely in order to see whether an item of property, now apparently valueless, may eventually become sufficiently valuable to justify him in taking possession of it for the benefit of the estate.[98]

[94] Hammond v. Whittredge, 204 U. S. 538, 27 Sup. Ct. 396, 51 L. Ed. 606; In re Wiseman & Wallace, 159 Fed. 236, 20 Am. Bankr. Rep. 293.

[95] First Nat. Bank v. Lasater, 196 U. S. 115, 25 Sup. Ct. 206, 49 L. Ed. 408, 13 Am. Bankr. Rep. 698.

[96] Briggs v. Avary, 47 Tex. Civ. App. 488, 106 S. W. 904; Whittredge v. Sweetser, 189 Mass. 45, 75 N. E. 222.

[97] Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; Taylor v. Irwin, 20 Fed. 615; Rugely v. Robinson, 19 Ala. 404; Smith v. Gordon, 6 Law Rep. 313, Fed. Cas. No. 13,052; Fleming v. Courtenay, 98 Me. 401, 57 Atl. 592, 99 Am. St. Rep. 414.

[98] Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915. In this case the bankrupt was a stockbroker and owned memberships in the New York and Philadelphia stock exchanges, but at the time of his bankruptcy they were of no value as property of his estate, because he was indebted to other members of the exchanges (whose debts were preferred under the rules of the exchanges) to an amount largely in excess of the value of the seats. The trustees in bankruptcy were aware of all the facts, but they did nothing towards taking charge of the property or administering it. They "contented themselves with the hope that masterly inactivity might enable them to assert a claim if, by the efforts of the bankrupt, the load of debt which weighed down the right to the seats was lifted, and in the progress of years the value of such seats happened to increase, instead of dimin-

The trustee's election not to take the property may be manifested formally, as where he gives a written waiver of his right, title, and interest in the property, containing also permission to the bankrupt to deal with it as owner.[99] Or he may obtain an order of court directing him to pursue this course, or approving nunc pro tunc an abandonment of the property already made.[100] But this is not at all necessary, as regards third persons. For the abandonment of the property by the trustee may be conclusively presumed, not only from unreasonable delay in claiming it, as above stated, but also from any conduct on his part which is plainly inconsistent with an election to retain it or to administer it.[101]

§ 322. **Property in Bankrupt's Possession.**—All property of a bankrupt in his actual possession at the time of the adjudication passes into the hands of the trustee immediately upon his appointment, except only such as is exempt by law.[102] And where a deficit is shown in the assets of the bankrupt's estate, he must account for it by a satisfactory explanation or pay the amount of the deficit to the trustee.[103] And if he attempts to conceal or withhold any property which is in his possession or under his own control or the control of those who are holding it merely as his agents or bailees, he may be compelled, by order of the court of bankruptcy, to surrender it to his trustee, and punished for his failure to obey.[104] Further, "whatever money or property is in the possession of the bankrupt at the time of filing his petition, which he is actually using and holding as his own, passes to his assignee [trustee] in bankruptcy, and he cannot set up in defense to the claim of the assignee a title in a third person merely for the purpose of holding on to it himself. If third persons have the possession, this court cannot, on summary petition, order it to be delivered to the assignee. But if the bankrupt has it, it passes to the assignee, subject to the liens or rights of third persons, whatever they may be. After the assignee gets the property, any

ish." The court said that "their conduct can be viewed in no other light than that of an election not to accept these rights as property of the estate." And as this conduct continued for ten years after the bankrupt's discharge, it constituted "laches and acquiescence of the most pronounced character."

[99] Briggs v. Avary, 47 Tex. Civ. App. 488, 106 S. W. 904.

[100] In re Josephson, 121 Fed. 142, 9 Am. Bankr. Rep. 345.

[101] Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; Fleming v. Courtenay, 98 Me. 401, 57 Atl. 592, 99 Am. St. Rep. 414; Laing v. Fish, 119 Ill. App. 645.

[102] In re Vogel, 7 Blatchf. 18, Fed. Cas. No. 16,982.

[103] In re Peltasohn, 4 Dill, 107, Fed. Cas. No. 10,912; In re Goodman, 196 Fed. 566, 27 Am. Bankr. Rep. 697.

[104] Supra, §§ 227–231. And see In re Kreuger, 197 Fed. 124, 28 Am. Bankr. Rep. 890; In re Karp, 196 Fed. 998, 28 Am. Bankr. Rep. 559; In re Weber Co., 200 Fed. 404, 118 C. C. A. 556, 29 Am. Bankr. Rep. 217; Lessaius v. Goodman, 165 Fed. 889, 91 C. C. A. 567, 21 Am. Bankr. Rep. 446; In re Jablin, 194 Fed. 228, 28 Am. Bankr. Rep. 54.

third person may, by petition or suit, assert his rights in it." [105] In a case where an individual, who was engaged in the manufacture of piano cases, organized two corporations, transferring to one of them the business and to the other the real property, and managed the two corporations, not as separate and distinct entities, but as a part of the manufacturing business, it was held that, on the bankruptcy of the manufacturing corporation, the trustee in bankruptcy was entitled to a summary order extending the trusteeship to the assets of the other corporation.[106]

§ 323. **Property in Custody of the Law.**—A trustee in bankruptcy is entitled to possession of all of the bankrupt's property and to administer the same, although it may be subject to liens or in the possession of a state court in proceedings to enforce a lien.[107] If the property has been committed to the custody of a receiver appointed by a state court, it is the right and duty of the trustee to reclaim it, although, in view of the comity which subsists between the state and federal courts, he cannot do this by any hostile proceedings, but must apply to the state court for an order directing the surrender of the property by its receiver, and if this is refused, the trustee must intervene in the pending suit.[108] If the property (or the money arising from its sale) is in the hands of a sheriff, the trustee may demand and claim it, provided the lien under which the sheriff seized the property was one dissolved by the adjudication in bankruptcy, otherwise, it must be treated as in the custody of the court and a proper application made for its surrender.[109] If property is in the possession of an assignee for the benefit of creditors, the assignment being dissolved by the adjudication in bankruptcy, or being the act of bankruptcy on which the adjudication was based, such assignee cannot hold the property, but must surrender it to the trustee in bankruptcy.[110] Where land has been sold under decree of partition and the proceeds impounded in the state court, it is proper for the trustee of a bankrupt to apply to the state court for an order directing that so much of the fund as constitutes the bankrupt's distributive share should be paid over to him for distribution in the bankruptcy proceedings, and the application should be granted.[111]

[105] In re Moses, 1 Fed. 845. And see In re Havens, 8 Ben. 309, Fed. Cas. No. 6,230.

[106] In re Looschen Plano Case Co. (D. C.) 261 Fed. 93, 44 Am. Bankr. Rep. 190.

[107] In re Kaplan, 144 Fed. 159, 16 Am. Bankr. Rep. 267.

[108] Supra, § 27. And see Kennedy v. American Tanning Co., 81 N. J. Eq. 109, 85 Atl. 812; A. H. Alden & Co. v. New York Commercial Co., 157 App. Div. 872, 142 N. Y. Supp. 772; Gealey v. South Side Trust Co., 249 Fed. 189, 161 C. C. A. 225, 41 Am. Bankr. Rep. 645; In re Williams (D. C.) 240 Fed. 788; Cudahy Packing Co. v. New Jersey Dairy Products Co., 90 N. J. Eq. 541, 107 Atl. 147.

[109] Supra, § 28. And see Bristol v. Mills, 14 Pa. Super. Ct. 107; In re Farrell, 201 Fed. 338; Cooper v. Dannenberg, 18 Ga. App. 615, 89 S. E. 1089.

[110] See infra, ch. 21.

[111] Moran & Wilkinson v. Martin, 21 Ga. App. 672, 94 S. E. 905.

§ 324. Interests in Real Estate.—The title to all real estate of the bankrupt passes to and vests in his trustee,[112] and the latter may if necessary maintain ejectment for its recovery.[113] Generally speaking, also, any interest which the bankrupt may have in landed property will constitute assets of his estate, provided it is a beneficial interest and one which he might have transferred by his own deed or which might have been subjected to the claims of his creditors outside of the bankruptcy proceedings.[114] Thus, although the title to realty may be in another, yet if the bankrupt has an interest in it, that interest will be available under the administration of the trustee.[115] Or, though the bankrupt, nominally the owner, has only an undivided interest, at least that interest will be assets of his estate.[116] So, where an estate is devised unconditionally to two persons, and after the death of the testator but before the probate of the will, one of the devisees is adjudged bankrupt, the estate so devised will pass to his trustee in bankruptcy.[117] Again, it is not necessary that the bankrupt's title should be one in fee. A life estate vested in him at the date of the adjudication is assets and may be sold by the trustee.[118] Again, a conveyance of land on condition of the payment of an annual sum to the grantor during his life gives the grantee a title which will pass to his trustee in bankruptcy.[119] And although the title to property which is exempt by law does not vest in the trustee, yet he may claim land which was once occupied as a homestead but has since been voluntarily abandoned by the bankrupt.[120] So where the bankrupt was the owner in fee of a public street in a city, subject only to the public easement of passage, the right of the owner therein will pass to his trustee in bankruptcy,[121] but a mere usufruct in property, not capable

[112] Pearce v. Foreman, 29 Ark. 563. For the rule as to fixtures, see In re West (D. C.) 253 Fed. 963, 42 Am. Bankr. Rep. 338, 341; In re Dr. Riegel Sanitarium Co. (D. C.) 206 Fed. 319, 31 Am. Bankr. Rep. 98.

[113] Beach v. Beach, 14 Vt. 28, 39 Am. Dec. 204; Essex Co. v. Durant, 14 Gray (Mass.) 447; Talcott v. Goodwin, 3 Day (Conn.) 264.

[114] Merrill v. Hussey, 101 Me. 439, 64 Atl. 819; Wright v. Green, 239 Mo. 449, 144 S. W. 437.

[115] In re Sanderson, 149 Fed. 273, 17 Am. Bankr. Rep. 871. The trustee is entitled to a decree adjudging a lien on the property of the bankrupt's wife to the amount of the money expended by the bankrupt in improvements on the property. McKay v. Weager, 134 N. Y. Supp. 66.

[116] In re Throckmorton, 149 Fed. 145, 79 C. C. A. 15, 17 Am. Bankr. Rep. 856.

[117] Ex parte Fuller, 2 Story, 327, Fed. Cas. No. 5,147.

[118] Adair v. Adair's Trustee, 99 S. W. 925, 30 Ky. Law Rep. 857; City Nat. Bank v. Slocum (C. C. A.) 272 Fed. 11, 47 Am. Bankr. Rep. 47. But otherwise as to a life estate which did not vest until after the adjudication of bankruptcy. Hackett's Ex'rs v. Hackett's Trustee (Ky.) 118 S. W. 377.

[119] Atwood v. Kittell, 9 Ben. 473, 17 N. B. R. 406, Fed. Cas. No. 641.

[120] Martin v. Smith, 104 S. W. 310, 31 Ky. Law Rep. 882.

[121] Kinzie v. Winston, 56 Ill. 56.

of being transferred by sale except with the owner's permission, is not assets in bankruptcy.[122]

A trustee in bankruptcy, when there are creditors of the bankrupt who are entitled to invoke an estoppel against the owner of realty, the apparent record title of which is in the bankrupt, and on the faith of which credit had been extended to him, may maintain an action to appropriate the property to the extent of the claims of such creditors, but to no greater extent than the bankrupt's creditors might have appropriated it if bankruptcy had not intervened.[123] Where the owner of real estate died intestate, and the next of kin conveyed it to the bankrupt, who held it at the time of the bankruptcy, and no proceedings for its sale to pay the debts of the decedent had been taken up to that time, the receiver in bankruptcy is entitled to collect the rents.[124]

§ 325. Same; Equity of Redemption.—When real property of the bankrupt is incumbered by a mortgage, valid as to creditors and not voidable under the bankruptcy act, the trustee takes title to the bankrupt's equity of redemption in the premises.[125] And this applies not only to a common-law mortgage in the ordinary form, but to equitable mortgages and various other anomalous forms, such as a conveyance of land which, though absolute in form, is intended as security for a debt and is accompanied by an unrecorded agreement of defeasance,[126] an instrument in the form of a deed of trust, but meant to secure a debt,[127] a mortgage of personal property which authorizes the debtor to sell the items covered,[128] and an assignment of a judgment, absolute in form, but intended as security for the price of goods sold or to be sold to the assignor.[129] So also, where the local law allows a certain period of time for redemption from a sale of real estate under execution, this right may be exercised by the debtor's trustee in bankruptcy, provided the appointed time has not expired when he is appointed, though it will not be enlarged by the intervening bankruptcy.[130] A trustee in bankruptcy will also be entitled to collect and receive the rents of mortgaged

122 In re O'Dowd, 8 N. B. R. 451, Fed. Cas. No. 10,439.

123 Bergin v. Blackwood, 141 Minn. 325, 170 N. W. 508.

124 In re Tietje (D. C.) 253 Fed. 283, 41 Am. Bankr. Rep. 816.

125 In re Kellogg, 113 Fed. 120, 7 Am. Bankr. Rep. 623; Bryar's Appeal, 111 Pa. St. 81, 2 Atl. 344; Robinson v. Denny, 57 Ala. 492; Winslow v. Clark, 47 N. Y. 261; In re Stewart, 193 Fed. 791, 27 Am. Bankr. Rep. 529.

126 Moors v. Albro, 129 Mass. 9.

127 In re Jersey Island Packing Co., 138 Fed. 625, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560, 14 Am. Bankr. Rep. 689.

128 In re Hull, 115 Fed. 858, 8 Am. Bankr. Rep. 302.

129 English v. Ross, 140 Fed. 630, 15 Am. Bankr. Rep. 370.

130 In re Goldman, 102 Fed. 122, 4 Am. Bankr. Rep. 100.

property of the bankrupt, at least until the mortgagee shall have taken proper steps to secure their application on his debt.[131] But if a mortgage on land of the bankrupt has actually been paid, the property will pass to the trustee in bankruptcy free from the incumbrance, although the mortgage has been assigned to a third person instead of being canceled.[132]

§ 326. **Same; Leased Property.**—If the bankrupt is a tenant of leased premises, his interest in the unexpired term of the lease will constitute assets of his estate in bankruptcy and pass to the trustee.[133] The latter has the privilege of declining to accept the lease and of surrendering possession if he thinks that course will be advantageous for the estate, but if he finds that the leasehold interest has a market value and can be sold, it is his duty to claim it and administer it for the benefit of the creditors.[134] But in this case the rights of the landlord must be carefully guarded. It is said to be the duty of the trustee either to fix an upset price for the sale of the leasehold sufficient to pay the lessor the entire rental for the remaining term of the lease and pay over such amount to the lessor, or else to require a bond with ample security, obliging the purchaser to conform strictly to all the terms of the lease, and if bids cannot be obtained subject to these conditions, the trustee should surrender the lease to the landlord.[135] If notice to quit has been served on the tenant before his bankruptcy, it will serve as notice to the trustee, who takes only such rights as the bankrupt had at the time of the adjudication, and a new notice is not necessary.[136] And if a suit to cancel the lease is pending, which finally results in favor of the landlord, but meanwhile the lessee's trustee in bankruptcy has remained in the use and occupation of the premises, his possession pendente lite will be that of a trespasser under a claim of

[131] Alter v. Clark, 193 Fed 153; Hunter v. Hays, 7 Biss. 362, Fed. Cas. No. 6,906.

[132] McMaster v. Campbell, 41 Mich. 513, 2 N. W. 836.

[133] Crowe v. Baumann, 190 Fed. 399, 27 Am. Bankr. Rep. 100; In re Frazin & Oppenheim, 174 Fed. 713, 23 Am. Bankr. Rep. 289; Olden v. Sassman, 68 N. J. Eq. 799. 64 Atl. 1134; Wildman v. Taylor, 4 Ben. 42, Fed. Cas. No. 17,654. And see Lyon v. Moore. 259 Ill. 23, 102 N. E. 179; In re J. L. Kesner Co., 219 Fed. 512, 135 C. C. A. 262.

[134] Supra, § 307.

[135] In re Gutman, 197 Fed. 472, 28 Am. Bankr. Rep. 643. The trustee in bankruptcy of the owner of a mining lease takes the lease subject to the same burdens as rested on the lessee, and may take it only by complying with its terms and conditions. In re Barnhardt Coal & Limestone Co. (D. C.) 265 Fed. 385, 44 Am Bankr. Rep. 170.

[136] Lindeke v. Associates Realty Co., 146 Fed. 630, 77 C. C. A. 56, 17 Am. Bankr. Rep. 215. And see In re Van Da Grift Motor Car Co., 192 Fed. 1015, 27 Am. Bankr. Rep. 474.

title.[137] Where a court of bankruptcy has acquired jurisdiction to determine the right of a lessor to a forfeiture under the terms of the lease, it will proceed on equitable principles, and will refuse to enforce a forfeiture if inequitable, even though as strict matter of law the lessor may be entitled to it.[138] Where a mining lease held by the bankrupt became subject to forfeiture under its terms pending the proceedings, the trustee will be permitted to avoid the forfeiture and retain the lease by paying the royalty in arrears.[139]

§ 327. **Same; Remainders and Expectant Estates.**—A vested estate in remainder in real property is an asset which will vest in the trustee in bankruptcy, as in the ordinary case of an estate limited to one for life, with remainder to his surviving child or children and their heirs. Here, if the life-tenant is still living and the bankrupt is his child, the latter has a vested estate which will pass to his trustee in bankruptcy.[140] But as to contingent remainders and expectant interests the law is not so clear. Several cases hold that a vested interest in a contingent remainder will pass to the trustee in bankruptcy,[141] particularly where the contingency relates to the event and not to the person. In this case, it is said the remainder-man possesses a right of title which may indifferently be called a vested right in or to a contingent interest or estate or a contingent right to a future interest or estate, and such a right is alienable and transmissible to heirs, and therefore will pass to the trustee in bankruptcy of the remainder-man.[142] And in another case the broad view is expressed that, while a contingent remainder is not technically an estate, but a mere possibility of an estate in the future, yet it is "property" within the meaning of the bankruptcy act, that term, as used in the statute, being of the broadest possible signification, and embracing everything that has exchangeable value, or goes to make up a man's wealth, and every interest or estate

[137] In re St. Louis & Kansas Oil & Gas Co., 168 Fed. 934, 22 Am. Bankr. Rep. 56.

[138] In re Larkey (D. C.) 214 Fed. 867, 32 Am. Bankr. Rep. 287.

[139] In re Barnhardt Coal & Limestone Co. (D. C.) 265 Fed. 385, 44 Am. Bankr. Rep. 170.

[140] In re McHarry, 111 Fed. 498, 49 C. C. A. 429, 7 Am. Bankr. Rep. 83; In re Haslett, 116 Fed. 680; In re Twaddell, 110 Fed. 145, 6 Am. Bankr. Rep. 539; In re St. John, 105 Fed. 234, 5 Am. Bankr. Rep. 190; In re Wood, 98 Fed. 972, 3 Am. Bankr. Rep. 572; Loomer v. Loomer, 76 Conn. 522, 57 Atl. 167; Simpson v. Miller, 7 Cal. App. 248, 94 Pac. 252; Markham v. Waterman, 181 Kan. 93, 181 Pac. 621.

[141] Putnam v. Story, 132 Mass. 205; Belcher v. Burnett, 126 Mass. 230; In re Churchman, 4 Pa. Co. Ct. R. 237; Bodenhamer v. Welch, 89 N. C. 78; Clark v. Grosh, 81 Misc. Rep. 407, 142 N. Y. Supp. 966; Clowe v. Seavey, 208 N. Y. 496, 102 N. E. 521.

[142] In re Twaddell, 110 Fed. 145, 6 Am. Bankr. Rep. 539; Clowe v. Seavey, 208 N. Y. 496, 102 N. E. 521; Clark v.

which the law regards as of sufficient value for judicial recognition.[143] But on the other hand, there are respectable authorities to the effect that an expectation of succeeding to an estate, fixed as to the person but contingent on his surviving one or more previous takers or life-tenants, is nothing more than a mere possibility, and not of such a nature that it could be reached by a creditors' bill, and therefore not vesting in the trustee in bankruptcy.[144] And so, if the expectancy of the remainder-man depends upon the omission of the life-tenant to exercise a power of appointment which he holds, it appears that there is nothing which could be made available for his creditors in bankruptcy. Thus, under a devise to the use of one for life, with power of appointment by will, and, in case of failure to exercise the power, the property to go to the surviving next of kin of the testator, one who is next of kin does not take such an interest in the estate in remainder as will pass to his trustee in bankruptcy.[145] On much the same principle rested the decision in a case in which it appeared that an aged woman made her will devising practically her entire estate to her son, and died three weeks later. But in the mean time, the son filed his voluntary petition in bankruptcy. Creditors sought to make the property available for their claims in the bankruptcy proceedings, on the ground that, when the petition in bankruptcy was filed, the son had a contingent interest under the will which should constitute an asset of his estate, and represented that it would be a fraud upon them to allow the bankrupt to retain the property for himself, since his petition in bankruptcy was evidently filed in the expectation of his mother's early death and in anticipation of that event. But the court held that, since the mother might at any time have changed her will, the bankrupt had no property rights under it during her life, and what he eventually received under it was not assets of his estate in bankruptcy but after-acquired property and his own.[146] Again, where the father of a bankrupt orally

Grosh, 81 Misc. Rep. 407, 142 N. Y. Supp. 966.

[143] Martin v. Maxwell, 86 S. C. 1, 67 S. E. 962, 138 Am. St. Rep. 1012.

[144] Van Heusen v. Van Heusen Charles Co., 74 Misc. Rep. 292, 131 N. Y. Supp. 401; Clarke v. Fay, 205 Mass. 228, 91 N. E. 328, 27 L. R. A. (N. S.) 454; Smith v. Kearney, 2 Barb. Ch. (N. Y.) 533; Luttgen v. Tiffany, 37 R. I. 416, 93 Atl. 182; In re Russell (D. C.) 273 Fed. 724. Only vested interests are considered property within the meaning of the Bankruptcy Act. Bank of Elberton v. Swift (C. C. A.) 268 Fed. 305, 46 Am. Bankr. Rep. 75. And therefore property which the alleged bankrupt expects or hopes to acquire thereafter by will or descent is not assets of his estate. Idem.

[145] In re Wetmore, 102 Fed. 290, 4 Am. Bankr. Rep. 335, affirmed 108 Fed. 520, 47 C. C. A. 477, 6 Am. Bankr. Rep. 210. But see In re Dorgan's Estate (D. C.) 237 Fed. 507, 38 Am. Bankr. Rep. 157.

[146] In re Seal (D. C.) 261 Fed. 112, 44 Am. Bankr. Rep. 556.

agreed to give land to him at the time when the father should decide to make a decision, it was considered that the contract was wholly executory, and the land itself, title to which was still in the grantor, could not be subjected in bankruptcy by the creditors before the grantor divided it.[147]

§ 328. **Same; Estates by Curtesy and Community Property.**—An estate by the curtesy, consummate by the death of the wife, will pass to the trustee in bankruptcy of the husband.[148] And the same has been held in regard to an estate by the curtesy initiate by the birth of issue.[149] But this must depend upon the local law. And in some states (Massachusetts, for instance), under the statutory law, a husband's interest in the real estate of his wife, during her lifetime and after issue born, is not property which he could convey or assign, nor is it a "power" which he might exercise for his own benefit, and consequently it will not pass to his trustee in bankruptcy as assets of his estate.[150] Where an estate is devised to a man and his wife absolutely and forever as tenants by entireties, the trustee in bankruptcy of the husband is not entitled, during the life of the wife, to any part of the property, or, in case of personalty, to any part of the principal or income.[151] As to community property, it has been held that, where funds belonging to the community estate of husband and wife were used by the husband in the erection of improvements on the wife's separate real estate, and the fund remained to that extent community property, the husband's trustee in bankruptcy was entitled to recover the amount of the community funds so expended, to be paid out of the proceeds of the sale of the improvements.[152]

§ 329. **Same; Estates of Vendor and Vendee Under Executory Contract.**—Where a purchaser of lands under an uncompleted contract becomes bankrupt, whatever interest he has in the lands will pass to his trustee, who is thereafter the proper party to maintain a bill in equity for the specific performance of the contract, and, on the other hand, is the proper defendant in a suit to enforce the vendor's lien.[153]

147 White v. Graybill, 184 Iowa, 897, 169 N. W. 135.

148 Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314; Conoly v. Gayle, 54 Ala. 269; Beamish v. Hoyt, 2 Rob. (N. Y.) 307. But see Cox v. Wallace, 219 Fed. 126, 134 C. C. A. 562, 33 Am. Bankr. Rep. 186.

149 In re McKenna, 9 Fed. 27.

150 Hesseltine v. Prince, 95 Fed. 802, 2 Am. Bankr. Rep. 600; Parks v. Tirrell, 3 Allen (Mass.) 15.

151 In re Meyer's Estate, 232 Pa. St. 89, 81 Atl. 145, 36 L. R. A. (N. S.) 205, Ann. Cas. 1912C, 1240.

152 Collins v. Bryan, 40 Tex. Civ. App. 88, 88 S. W. 432. See Gibbons v. Goldsmith, 222 Fed. 826, 138 C. C. A. 252, 35 Am. Bankr. Rep. 40.

153 Rea v. Richards, 56 Ala. 396; Mc-

And though a parol contract for the sale of land is void under the local law, yet if the purchaser under such a contract goes into possession and improves the property with the consent of the vendor, he has an equity in the land which can be subjected to the claims of creditors in bankruptcy proceedings.[154] Conversely, whatever interest may remain in the vendor of land under an executory contract will vest in his trustee in bankruptcy, and the latter may maintain ejectment on failure of the vendee to pay the price.[155] But since the bankruptcy act does not give the trustee any greater right or estate than the bankrupt had, a purchaser under an oral contract of purchase, and who was entitled prior to the bankruptcy of the vendor to compel a conveyance by the vendor, may compel the trustee to convey.[156]

§ 330. Same; Settlers' Rights and Improvements on Public Lands. —A settler upon the public lands, under the pre-emption laws or other acts of Congress, has no title which he can sell or mortgage, or which could be levied upon and sold under executions against him, until he has fully complied with all the requirements prescribed by law as essential to his right to receive a patent.[157] Until that is done, he has only an inchoate and personal interest in the lands. But when he has performed everything that is required of him by the statutes, either in respect to residence on the land, improvements, payment of purchase money and fees, or making final proof, so that, as far as concerns him, the law has been fully satisfied and his right to a patent is complete, then he is considered as holding an equitable title to the lands, and the United States holds the legal title merely in trust for him and is under

Donald v. McMahon, 66 Ala. 115; Smith v. Hornesby, 58 Ga. 529; Duffield v. Dosh, 124 Iowa, 286, 99 N. W. 1074. And see Christopherson v. Harrington, 118 Minn. 42, 136 N. W. 289, 41 L. R. A. (N. S.) 276. But compare In re Phœnix Planing Mill (D. C.) 250 Fed. 899, 42 Am. Bankr. Rep. 145. And see In re Berry (D. C.) 247 Fed. 700, 41 Am. Bankr. Rep. 357, holding that the interest of a Michigan bankrupt in land which he and his wife had contracted to purchase does not pass to the trustee, since the rights of the parties are those of tenants by the entireties.

154 Overcast v. Lawrence, 141 Ky. 25, 131 S. W. 1029.

155 Clements v. Taylor, 65 Ala. 363. And see In re Sayed, 185 Fed. 962, 26 Am. Bankr. Rep. 444.

156 In re Snelling, 202 Fed. 259, 29 Am. Bankr. Rep. 818.

157 But an entry under the desert land laws, on which final proof has not been made, is property subject to the payment of the entryman's debts, and on his bankruptcy may be subjected to the payment of such debts, whether the bankruptcy be voluntary or involuntary, for under the acts of Congress the entry may be assigned before it is perfected, and assignments may be voluntary or involuntary, while the purpose of the desert land laws is not, as in the case of homesteads, to encourage settlers to establish themselves, but requires the payment of substantial consideration. In re Evans (D. C.) 235 Fed. 956, 38 Am. Bankr. Rep. 361.

obligation to transfer the legal title to him by the issuance of a patent. When his title is in this condition, therefore, notwithstanding the fact that the patent, the formal evidence of legal title, has not yet been issued to him, he has an estate which can be incumbered, alienated, or made liable for the payment of his debts. And consequently, if his claim to the lands has advanced this far on the way to a complete legal title, at the time he is adjudicated a bankrupt, it is such property as will pass to and vest in his trustee.[158] And generally speaking the settler's improvements on the public lands are also property available to his creditors in bankruptcy,[159] unless they have been forfeited by the cancellation of the sale to him by the general government or the state, as the case may be.[160]

§ 331. Same; Resulting Trusts.—Though the legal title to real property may stand in the name of a third person, yet if the bankrupt has an equitable interest in it by virtue of a resulting trust in his favor, that interest will vest in his trustee as assets of the estate in bankruptcy,[161] as, where the bankrupt paid the entire consideration for the property, but the deed was taken in the name of another.[162] And the trustee will take title notwithstanding a previous levy of execution on the bankrupt's equitable interest and a sale thereunder, where, by the law of the state, a resulting trust is not such property as can be sold on execution.[163] On similar principles, although the bankrupt swore on his schedules that he owned no real estate at the time of filing the petition, neither he nor his heirs will be estopped by that oath from asserting their claim to property fraudulently procured from him by his vendee, and after the death of the bankrupt, the heirs at law may file a bill to recover such property, and their recovery will inure to the trustee in bankruptcy.[164]

§ 332. Same; Powers.—The present bankruptcy statute explicitly enumerates, as among the classes or kinds of property of a bankrupt which shall vest in his trustee, "powers which he might have exercised

158 See Colorado Co. v. Commissioners, 95 U. S. 259, 24 L. Ed. 495; Myers v. Croft, 13 Wall. 291, 20 L. Ed. 562; Hutchings v. Low, 15 Wall. 77, 21 L. Ed. 82; Carroll v. Safford, 3 How. 441, 11 L. Ed. 671; Webster v. Bowman, 25 Fed. 889; United States v. Freyberg, 32 Fed. 195; Boggan v. Reid, 1 Wash. 514, 20 Pac. 425.

159 French v. Carr, 7 Ill. (2 Gilman) 664.

160 Snodgrass v. Posey, 30 Tex. Civ. App. 584, 70 S. W. 984.

161 In re Dunavant, 96 Fed. 542, 3 Am. Bankr. Rep. 41. And see Cullen v. Armstrong (D. C.) 209 Fed. 704, 33 Am. Bankr. Rep. 735.

162 Carr v. Hilton, 1 Curt. 230, Fed. Cas. No. 2,436; Gove v. Lawrence, 26 N. H. 484.

163 In re Dunavant, 96 Fed. 542, 3 Am. Bankr. Rep. 41.

164 Ferguson v. Dent, 24 Fed. 412.

for his own benefit, but not those which he might have exercised for some other person." [165] This particular mention was necessary to bring this kind of interest or title within the scope of the statute, since the Supreme Court had expressly held, under the act of 1867, that a power of appointment would not pass to the assignee in bankruptcy of the person in whom the power resided.[166]

§ 333. **Growing Crops.**—When the bankrupt is the owner of agricultural land, crops sown and growing thereon at the time of the filing of the petition will pass to the trustee along with the land and as a part of it, and the trustee may sell the crops with the land, or claim them as assets of the estate when grown and severed.[167] So where the bankrupt was tenant of a farm under a contract reserving to the landlord, as rent, one-fourth of the crops raised on the land, the bankrupt's interest in the growing crops, though they are immature and unsevered at the commencement of the proceeding in bankruptcy, is property which he might have transferred at that date, within the meaning of the statute, and therefore vests in his trustee as assets of the estate; and after the crops have been severed, the bankrupt must surrender them to the trustee or else account for the proceeds.[168] But crops not sown at the time of the adjudication do not become a part of the bankrupt's estate and the trustee has no interest in them.[169]

§ 334. **Patents and Copyrights.**—The statute provides that the trustee in bankruptcy shall be vested by operation of law with the bankrupt's title, as of the date he was adjudged a bankrupt, to "interests in patents and patent rights." This clearly includes interests then owned by the bankrupt in patents already issued and in force, whether as patentee, assignee of the patent, or holder of rights acquired under a patent to a third person, such as licenses or manufacturing rights.[170] But on the question whether it also includes the interest of the bankrupt in a patentable invention or in a pending application for a patent, the authorities are divided and irreconcilable. In one of the cases it is held that the trustee takes no title to a patent for an invention granted

[165] Bankruptcy Act 1898, § 70a, cl. 3. See Montague v. Silsbee, 218 Mass. 107, 105 N. E. 611.

[166] Brandies v. Cochrane, 112 U. S. 344, 5 Sup. Ct. 194, 28 L. Ed. 760; Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908.

[167] Hebert v. Crawford, 228 U. S. 204, 33 Sup. Ct. 484, 57 L. Ed. 800, 30 Am. Bankr. Rep. 24; In re T. C. Burnett & Co., 201 Fed. 162, 29 Am. Bankr. Rep. 872; In re Eastman, 2 Nat. Bankr. News, 86; Carney v. Averill, 110 Me. 172, 85 Atl. 494.

[168] In re Barrow, 98 Fed. 582, 3 Am. Bankr. Rep. 414.

[169] Bank of Nez Perce v. Pindel (C. C. A.) 193 Fed. 917, 28 Am. Bankr. Rep. 69.

[170] In re McDonnell, 101 Fed. 239, 4 Am. Bankr. Rep. 92.

to the bankrupt after the date of the adjudication, although the application for the patent was made before the bankruptcy and was pending at the time of the adjudication.[171] In another decision, where the same rule was adhered to, it was pointed out that there can be no such thing as a "patent right" until a patent has been issued, and that the statute, in referring to the bankrupt's interests in "patent rights," must be construed as intending rights acquired under patents issued to third parties, but cannot with any propriety be made to include the incorporeal interest in an alleged invention pending an application for a patent thereon. Pressed with the argument that, if such an interest was not a "patent or patent right," at least it was "property" which the bankrupt could have transferred to another before his adjudication, especially in view of the fact that the patent laws permit an inventor to transfer his application and authorize the issue of a patent to the transferee, the court replied that Congress evidently intended to dispose of the whole subject of patents, and rights and interests therein, in the one clause of the statute in which they are specifically mentioned, and that the subsequent general clause relating to "property" of the bankrupt could not be understood as enlarging the previous specific clause, but was meant only to include other classes or kinds of property than those itemized in the preceding clauses.[172] But this precise point has been otherwise decided in a later case, where the court took a very broad view of the word "property," and held that it was intended to include everything which is the proper subject of a legal transfer, and therefore should include a pending application for a patent.[173] The same view has been expressed by one of the circuit courts of appeals, but only in the way of an obiter dictum, since the disputed item of property before the court had nothing to do with a patent, but was a license for the sale of liquor.[174]

As to copyrights, no such question has yet arisen. It might be interesting to inquire whether the bankrupt author of a literary composition, finished in manuscript form but not copyrighted, could be required to surrender it to his trustee, in order that the latter might take out copyright upon it and arrange for its publication. Probably such an unpublished work should be regarded as "property" of the bankrupt, within the broad meaning of the statute, and if so, the trustee in bank-

171 In re McDonnell, 101 Fed. 239, 4 Am. Bankr. Rep. 92.

172 In re Dann, 129 Fed. 495, 12 Am. Bankr. Rep. 27. See Ingle v. Landis Tool Co. (D. C.) 262 Fed. 150, 45 Am. Bankr. Rep. 89.

173 In re Cantelo Mfg. Co., 185 Fed. 276, 26 Am. Bankr. Rep. 57.

174 Fisher v. Cushman, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, 4 Am. Bankr. Rep. 646.

ruptcy should have his election whether to take possession of it and attempt to convert it into money for the benefit of the creditors or to reject it as likely to be unprofitable. But the courts have not yet been confronted with this problem. It is held, however, that where an existing copyright has been assigned by the author to a third person, absolutely and unconditionally, it constitutes property of the assignee which will pass to his trustee in bankruptcy.[175] But a contract between an author and a publisher for the publication and sale of a work having only a limited circulation among a special class of readers, who constitute the special clientele of the publisher, which contract contemplates the taking out of copyright in the name of the publisher and the payment of a royalty to the author, is in the nature of a personal engagement. And where the contract expressly provides that it shall not be transferred without the author's consent, and that, on failure to carry out its provisions, the copyright shall revert to the author, such copyright cannot be sold by a trustee in bankruptcy as an asset of the publisher's estate, against the objection of the author, but the latter is entitled, on petition therefor, to have the copyright assigned to him by the trustee in accordance with the contract.[176]

§ 335. **Trade Marks and Trade Names.**—A trade mark or trade name, consisting of a man's individual name prefixed to the title of the article he manufactures, is not property which will vest in his trustee in bankruptcy,[177] because in the case of personal trade marks of this kind, the use of them by any other person than the one with whom they are connected would be a fraud upon the public. But the right to use trade marks, in connection with a manufacturing or mercantile business, which are not personal in their character, but are descriptive titles or fanciful appellations, or which merely designate the place or establishment at which the goods are made, or the process employed, will pass to and vest in an assignee in insolvency of the owner,[178] and therefore, by analogy, in a trustee in bankruptcy, especially since the statute itself speaks of trade marks as among the kinds of property so vesting.

§ 336. **Franchises and Licenses.**—A franchise, whether held by an individual or a corporation, may constitute property in such sense as to vest in the trustee in bankruptcy, and be salable by him for the benefit of the estate, provided it does not involve a personal trust or duty, but

[175] In re Howley-Dresser Co., 132 Fed. 1002, 13 Am. Bankr. Rep. 94.

[176] In re D. H. McBride & Co., 132 Fed. 285, 12 Am. Bankr. Rep. 81.

[177] Helmbold v. Helmbold Mfg. Co., 53 How. Prac. (N. Y.) 453; Mattingly v. Stone (Ky.) 14 S. W. 47.

[178] Warren v. Warren Thread Co., 134 Mass. 247; Bradley v. Norton, 33 Conn. 157, 87 Am. Dec. 200.

the service to be rendered in exchange for the franchise can presumably be as well performed by any purchaser of it as by the original holder.[179] The rule is substantially the same as to licenses. Thus a license for the sale of intoxicating liquors issued by the authorities of a state or municipality or by a court, and which may be transferred on written application of the holder and subject to the approval of such authorities, which approval is ordinarily granted, and which for the purpose of sale and transfer has a recognized and actual money value, conditioned upon the acceptance of the transferee by the authorities, is property of the licensee, which is available as assets of his estate in bankruptcy, and he may be required by the court of bankruptcy to sign the necessary application for a transfer or to execute whatever other instrument in the nature of a transfer may be necessary to enable his trustee to convert it into money.[180] Such is also the rule in regard to a license to occupy a particular stall in a city market. Though it may be revocable at the pleasure of the city authorities, and cannot be assigned to another person without their written permission, yet if it has an ascertainable market value as an article of sale and can be transferred without any practical difficulty, it is an asset in the hands of the holder's trustee in bankruptcy, and such holder may be required to take such steps as are necessary and usual to effect a transfer.[181]

§ 337. **Membership in Stock Exchange.**—It is now well settled that a membership in a stock exchange or other similar body is an asset of the member which will pass to and vest in his trustee in bankruptcy, provided that it has an actual and substantial money value for purposes of sale and can be transferred to a purchaser without practical difficulty; and this, notwithstanding the fact that the transfer of a membership may be restricted by the rules of the exchange,—as where the membership is limited and the purchaser of a seat must pass the scru-

[179] See, supra, § 147, particularly as to corporate franchises. And see People v. Duncan, 41 Cal. 507; Stewart v. Hargrove, 23 Ala. 429.

[180] Fisher v. Cushman, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, 4 Am. Bankr. Rep. 646; In re Wiesel, 173 Fed. 718, 23 Am. Bankr. Rep. 59; In re Brodbine, 93 Fed. 643, 2 Am. Bankr. Rep. 53; In re Becker, 98 Fed. 407, 3 Am. Bankr. Rep. 412; In re Fisher, 98 Fed. 89, 3 Am. Bankr. Rep. 406. Compare E. S. Bonnie & Co. v. Perry's Trustee, 117 Ky. 459, 78 S. W. 208; In re John F. Doyle & Son, 209 Fed. 1, 126 C. C. A. 143, 31 Am. Bankr. Rep. 571; In re Beahn (D. C.) 212 Fed. 762, 32 Am. Bankr. Rep. 375; In re Benz, 218 Fed. 50, 134 C. C. A. 26, 33 Am. Bankr. Rep. 363.

[181] In re Gallagher, 16 Blatchf. 410, Fed. Cas. No. 5,192; In re Emrich, 101 Fed. 231, 4 Am. Bankr. Rep. 89. But see Day v. Luna Park Co., 174 Ill. App. 477, holding that where a contract by an amusement park company granting a license to a concessionaire to conduct a bar provides that it must not be assigned or transferred without the consent of the company, on the concessionaire becoming bankrupt, the license does not pass to his trustee in bankruptcy.

tiny of a committee and be elected by ballot,—and notwithstanding the rules provide that the proceeds of a member's seat shall first be applied in liquidation of any indebtedness of his to the exchange itself or to other members of it; and if the rules or customs of the exchange require the execution of an assignment or other transfer by the bankrupt member, in order to make an effectual transfer of the seat to a purchaser from the trustee, he may be compelled by the court of bankruptcy to execute such assignment.[182] At least, such an order may be made by the court of bankruptcy at any time before the bankrupt has obtained his discharge. After that, he is no longer subject to the summary jurisdiction of the court, though perhaps the trustee could gain control of the seat, for the purpose of selling it, by means of a bill in equity.[183] But the trustee must move with reasonable promptness after acquiring knowledge of the bankrupt's membership in the exchange, and cannot indefinitely postpone action while waiting for the seat to increase in value or for the bankrupt to clear it from preferred debts. If he takes this course, it will be held an abandonment of the seat to the bankrupt or an election not to assume it and administer it.[184] It should be observed that it is perfectly competent for a stock exchange to provide by rule that, upon the insolvency of a member, the proceeds of a sale of his seat shall first be applied to his indebtedness to the exchange and then to debts due from him to fellow members, to the exclusion of outside creditors. And such a rule will be recognized as valid in the bankruptcy proceedings. So that, when the trustee in bankruptcy sells the seat, he will be entitled, as the representative of the general credi-

[182] Page v. Edmunds, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318, 9 Am. Bankr. Rep. 277; Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. 104, 34 L. Ed. 915; Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 265; O'Dell v. Boyden, 150 Fed. 731, 80 C. C. A. 397, 17 Am. Bankr. Rep. 751; Board of Trade of City of Chicago v. Weston, 243 Fed. 332, 156 C. C. A. 112, 40 Am. Bankr. Rep. 263; In re Stringer, 253 Fed. 352, 165 C. C. A. 134, 41 Am. Bankr. Rep. 510; In re Hurlbutt, Hatch & Co., 135 Fed. 504, 68 C. C. A. 216, 13 Am. Bankr. Rep. 50; In re Page, 107 Fed. 89, 46 C. C. A. 160, 59 L. R. A. 94, 5 Am. Bankr. Rep. 707; In re Gaylord, 111 Fed. 717, 7 Am. Bankr. Rep. 195; In re Page, 102 Fed. 746, 4 Am. Bankr. Rep. 467; In re Werder, 15 Fed. 789; In re Ketchum, 1 Fed. 840; Wrede v. Clark, 132 App. Div. 293, 117 N. Y. Supp. 5; Platt v. Jones, 96 N. Y. 24; Powell v. Waldron, 89 N. Y. 328, 42 Am. Rep. 301; Ritterband v. Baggett, 4 Abb. New Cas. (N. Y.) 67; McCabe v. Emmons, 51 N. Y. Super. Ct. 219; Londheim v. White, 67 How. Prac. (N. Y.) 467; Grocers' Bank v. Murphy, 60 How. Prac. (N. Y.) 426; Eliot v. Merchants' Exchange, 14 Mo. App. 234; Habenicht v. Lissak, 78 Cal. 351, 20 Pac. 874, 5 L. R. A. 713, 12 Am. St. Rep. 63; Clute v. Loveland, 68 Cal. 254, 9 Pac. 133. Contra, In re Sutherland, 6 Biss. 526, Fed. Cas. No. 13,637; Barclay v. Smith, 107 Ill. 349, 47 Am. Rep. 437; Weaver v. Fisher, 110 Ill. 146; Thompson v. Adams, 93 Pa. St. 55; Pancoast v. Gowen, 93 Pa. St. 66.

[183] In re Nichols, 1 Fed. 842; Platt v. Jones, 96 N. Y. 24; Powell v. Waldron, 89 N. Y. 328, 42 Am. Rep. 301.

[184] Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. 104, 34 L. Ed. 915.

tors, only to such surplus of the purchase price as may remain after satisfying the preferred debts mentioned.[185]

§ 338. Executory Contracts.—As a general rule, the interests and rights of the bankrupt under contracts are transferred to the trustee; and whatever these rights may be, the trustee can claim and enforce them. It is not the purpose of the bankruptcy law to interfere with or avoid contracts made by the bankrupt with other parties or prevent their execution.[186] If the trustee so elects, he can require the performance of an executory contract made with the bankrupt by another party, under which benefit will accrue to the estate in bankruptcy, or recover damages for the breach of it, and his action cannot be defeated on the theory that the adjudication in bankruptcy (even though founded on a voluntary petition) was an anticipatory breach on the part of the bankrupt; for while voluntary bankruptcy is an anticipatory breach of a contract so far as concerns the establishment of a provable claim against the bankrupt, it is not such a breach, when it concerns the trustee's right to enforce the contract.[187] But when the trustee in bankruptcy, by order of the referee or the court, elects to ratify, confirm, and adopt an executory contract of the bankrupt, he thereby assumes the liabilities of the bankrupt, and takes the contract in same plight in which the bankrupt held it.[188]

It is not, however, invariably true that the bankrupt's unfinished contracts vest as property in his trustee. For contracts which cannot be made available for the payment of the debts do not pass to the trustee,[189] nor those which would be onerous or unprofitable, or more of a burden than a benefit to the estate,[190] nor those which depend upon the future personal services of the bankrupt, where his special knowledge or skill or adaptability to the employment, or special trust and confidence reposed in him, constitute an essential part of the contract, so that it

185 Page v. Edmunds, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318, 9 Am. Bankr. Rep. 277; Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 266; In re Currie, 185 Fed. 263, 107 C. C. A. 369, 26 Am. Bankr. Rep. 345; In re Gregory, 174 Fed. 629, 98 C. C. A. 383, 23 Am. Bankr. Rep. 270; Cohen v. Budd, 52 Misc. Rep. 217, 103 N. Y. Supp. 45; Solinsky v. New York Stock Exchange (D. C.) 260 Fed. 266, 44 Am. Bankr. Rep. 56.

186 Foster v. Hackley, 2 N. B. R. 406, Fed. Cas. No. 4,971.

187 Planters' Oil Co. v. Gresham (Tex. Civ. App.) 202 S. W. 145.

188 Greif Bros. Cooperage Co. v. Mullinix (C. C. A.) 264 Fed. 391, 45 Am. Bankr. Rep. 265. Concerning the ownership of property or material furnished or prepared for use in connection with the execution of a building or construction contract, the contract being interrupted before completion by the bankruptcy of the contractor, see Wilds v. Board of Education of City of New York, 227 N. Y. 211, 125 N. E. 89; In re Schilling (D. C.) 258 Fed. 489, 46 Am. Bankr. Rep. 49.

189 Streeter v. Sumner, 31 N. H. 542.

190 Supra, § 320. And see Streeter v. Sumner, 31 N. H. 542.

could not be performed by a third person to the equal satisfaction of the employer.[191] But the fact that a contract of the latter kind is not assignable as a whole, does not necessarily prevent the assignability of rights arising out of it, as, for compensation already earned,[192] provided that compensation is apportionable, and not dependent upon the future completion of the entire contract.[193] Thus the complainant in a creditor's bill (and the same would be true of a trustee in bankruptcy) cannot reach the salary or compensation which is to become due to the defendant, as a public officer, at a future time, for the performance of services which had been partially rendered but not completed at the time of the filing of the bill, where the defendant himself would have no legal or equitable right to demand payment for the services already performed (that is, any compensation at all) in case he should thereafter neglect to complete the services which had not been rendered at the time the bill was filed.[194] But aside from such cases as these, it does not stand in the way of the trustee's recovery that the bankrupt's compensation for services rendered was to be contingent, provided the event on which it depended happens during the administration of the estate, as, for instance, where the bankrupt had rendered certain services for a third person, for which that person was to pay him a fixed sum in case he succeeded in a pending suit in chancery.[195] And where the bankrupt's interest in a contract is a right to share in the profits resulting from it, his interest will pass to and vest in his trustee in bankruptcy,[196] in so far as profits have already accrued, or the bankrupt's right to share in future profits has become fixed, at the time of the bankruptcy. But not so as to a mere expectation of future profits growing out of the bankrupt's right to a continuous performance of the contract. Thus, an interest in the business of another, which the bankrupt conducts in his own name, receiving half the profits as compensation, is not property which will pass to his trustee. "The right to his share of the net profits was not property, any more than the right of a clerk, who has a stated salary, to continue to receive such salary is property."[197]

§ 339. **Good-Will of a Business.**—It is well settled that the good-will of a business may have a property value and form the subject-

191 Streeter v. Sumner, 31 N. H. 542.

192 In re Wright (C. C. A.) 157 Fed. 544, 19 Am. Bankr. Rep. 454; Buckingham v. Buckingham, 36 Ohio St. 68.

193 In re Jones, 4 N. B. R. 347, Fed. Cas. No. 7,448.

194 Browning v. Bettis, 8 Paige (N. Y.) 568; Grow v. His Creditors, 31 Cal. 329.

195 Burton v. Lockert, 9 Ark. 411.

196 Sherman v. International Bank, 8 Biss. 371, Fed. Cas. No. 12,765; Fraser v. Gates, 118 Ill. 99, 1 N. E. 817.

197 In re Beardsley, 1 N. B. R. 457, Fed. Cas. No. 1,184. And see Rhoades v. Blackiston, 106 Mass. 334, 8 Am. Rep. 332.

matter of a contract and sale,[198] and an administrator may be surcharged with the value of the good-will of his decedent's business, where it had a market value which he failed to realize,[199] and the good-will of a partnership business is assets of the firm, if it has any selling value, and cannot be appropriated by one partner on the dissolution of the firm, but must be sold for the benefit of the firm.[200] From these considerations we should conclude that, if the bankrupt was carrying on a business of such a nature that it might have a good-will attached to it, the trustee will be entitled to claim whatever benefit may accrue therefrom, and that it is the duty of the trustee to ascertain if the good-will has any market value, and, if so, to realize it for the benefit of the estate. It is expressly so held by the decisions rendered in England under the bankruptcy law of that country,[201] and was so ruled under the act of Congress of 1867 relating to bankruptcy.[202] Also it appears that the value of the good-will should be taken into account, as an asset of an alleged bankrupt, in determining the question of his solvency or insolvency.[203] But a good-will which rests only on the voluntary and unconstrained forbearance of those who are engaged in a particular trade, whereby they refrain from inaugurating an enterprise which would rival that already set on foot by another, though they are under no legal obligation so to refrain, is not property in any sense known to the law.[204] Hence it becomes important to inquire whether the sale of the good-will of the bankrupt's business by the trustee would in any way estop or prevent the bankrupt from subsequently re-engaging in the same business and soliciting the custom of those who had formerly been in the habit of resorting to his establishment. So far as the authorities go, they seem to answer this question in the negative. It is true that the bankrupt might bind himself by a covenant not to set up competition against the purchaser, but the court could not require him to enter into such a covenant. However, if he is guilty of fraudulent conduct in representing his new business to be a continuation of his old trade, or if he has so acted as to induce the purchaser to believe that he

198 Hathaway v. Bennett, 10 N. Y. 108, 61 Am. Dec. 739; Morse v. Hutchins, 102 Mass. 439; Fay's Adm'r v. Fay (N. J. Eq.) 6 Atl. 12; Cruess v. Fessler, 39 Cal. 336; Herfort v. Cramer, 7 Colo. 483, 4 Pac. 896; Carey v. Gunnison, 65 Iowa, 702, 17 N. W. 934.

199 Wiley's Appeal, 8 Watts & S. (Pa.) 244.

200 Bradbury v. Dickens, 27 Beav. 53; Wedderburn v. Wedderburn, 22 Beav. 84; Wallingford v. Burr, 17 Neb. 137, 22 N. W. 350; Sheppard v. Boggs, 9 Neb. 257, 2 N. W. 370.

201 Hudson v. Osborne, 39 Law Jour. Ch. (N. S.) 79; English Bankruptcy Act, 1883, § 56.

202 In re Long, 7 Phila. (Pa.) 578, Fed. Cas. No. 8,477.

203 Bell v. Ellis, 33 Cal. 620. But compare In re Glickman, 1 Nat. Bankr. News, 58.

204 Sheldon v. Houghton, 5 Blatchf. 285, Fed. Cas. No. 12,748.

would not trade again, the purchaser may have a remedy, but outside of the bankruptcy proceedings.[205]

§ 340. Debts Due to Bankrupt.—Upon an adjudication in bankruptcy, all debts and claims due to the bankrupt pass to his trustee, and the latter thereafter is alone entitled to collect and receive payment of the same,[206] and payment of a debt directly to the bankrupt, made after the institution of the bankruptcy proceedings, though made in good faith, and even in the usual course of business, and without any other notice than such constructive notice as the filing of a bankruptcy petition is supposed to impart to all concerned, is not effectual to discharge the debt, and is no protection against a suit for its recovery subsequently brought by the trustee in bankruptcy.[207] And for stronger reasons, a payment made in bad faith, or with knowledge of the pending proceeding, and with the purpose of evading or defeating the operation of the bankruptcy act in any way, is void as against the trustee.[208] If the trustee dies or becomes bankrupt, however, the right to receive payment of outstanding debts due to the estate in his charge does not vest in his personal representatives or trustee, but passes to a new trustee to be appointed in the original bankruptcy.[209]

These general rules apply to all manner of claims and demands in favor of the bankrupt, as, for example, to money due for the price of goods manufactured and sold by the bankrupt,[210] to money borrowed from him after the filing of the petition and before the adjudication,[211] a judgment rendered in the bankrupt's favor before the adjudication,[212]

[205] Robson, Bankruptcy (6th edn.) 620, citing Walker v. Mottram, 19 Ch. Div. 355. And see James Van Dyk Co. v. F. V. Reilly Co., 73 Misc. Rep. 87, 130 N. Y. Supp. 755.

[206] Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818; Stow v. Yarwood, 20 Ill. 497; Rogers v. Union Stone Co., 134 Mass. 31; Ex parte Goodwin, 1 Atk. Ch. 100. See In re Smyth, 167 Fed. 871, 21 Am. Bankr. Rep. 853; First Nat. Bank v. Guarantee Title & Trust Co., 178 Fed. 187, 101 C. C. A. 507, 24 Am. Bankr. Rep. 330; In re Tanory (D. C.) 270 Fed. 872, 46 Am. Bankr. Rep. 520.

[207] Mays v. Manufacturers' Nat. Bank 64 Pa. St. 74, 4 N. B. R. 660, 3 Am. Rep. 573; Stevens v. Mechanics' Sav. Bank, 101 Mass. 109, 3 Am. Rep. 325; Howard v. Crompton, 14 Blatchy. 328, Fed. Cas. No. 6,758; In re Hayden, 7 N. B. R. 192, Fed. Cas. No. 6,257; Ex parte Goodwin, 1 Atk. Ch. 100. But see In re Zotti, 186 Fed. 84, 108 C. C. A. 196, 26 Am. Bankr. Rep. 234; Galvin v. Boyd, Fed. Cas. No. 5,208; Mersfelder v. Peters Cartridge Co., 32 Ohio Cir. Ct. R. 187.

[208] Babbitt v. Burgess, 2 Dill. 169, 7 N. B. R. 561, Fed. Cas. No. 693. Where a creditor, without authority, obtains possession of funds belonging to the debtor, such unauthorized possession does not, on the subsequent bankruptcy of the debtor, entitle the creditor to apply the money to the payment of his own claim to the prejudice of other creditors. Emerson v. Fisher, 246 Fed. 642, 158 C. C. A. 598, 41 Am. Bankr. Rep. 112.

[209] In re Merrick, 5 Watts & S. (Pa.) 9.

[210] Sweet v. Oregon-Washington Lumber & Mfg. Co., 98 Wash. 91, 167 Pac. 82.

[211] Crompton v. Conkling, 9 Ben. 225, Fed. Cas. No. 3,407.

[212] First Nat. Bank v. Cook, 154 U. S. 628, 14 Sup. Ct. 481, 24 L. Ed. 916; Brown v. Wygant, 21 D. C. 16; Hale v.

or a claim against a sheriff for failing to make the money on an execution issued on such a judgment,[213] also to rent due and accrued for premises owned by the bankrupt,[214] and the amount due to him from another estate in bankruptcy,[215] or from the estate of a decedent in process of administration in a probate court,[216] a claim under a policy of fire insurance for the loss by fire of property of the bankrupt covered by such policy,[217] a claim against a city for damages to the bankrupt's real property occasioned by a change in the grade of a street, where the property was injured but not taken,[218] or money received by the administrator of a bankrupt who dies after the adjudication and pending the proceedings.[219] In one case, it appeared that the bankrupt was managing agent for a life insurance company, under a contract having several years to run, which entitled him to an interest in renewal premiums on policies previously written, when collected, so long as the contract was in force, but subject to the right of the company to terminate such interest if dissatisfied or if the bankrupt failed to comply with the contract. In case of his death, his widow or estate was entitled to receive such interest for five years, subject to a fee for collection. It was held that this interest was property which the bankrupt could have transferred, and which therefore vested in his trustee in bankruptcy.[220] But an agreement between a debtor and his surety that property held in trust by the surety as indemnity shall be applied to the payment of the debt, does not constitute a demand against the surety which will pass to the trustee in bankruptcy of the debtor, as it is not a money demand,

Christy, 24 Neb. 746, 40 N. W. 295; Simmons v. Heman, 17 Mo. App. 444; Moore v. Jones, 23 Vt. 739, Fed. Cas. No. 9,768. But see (as to effect of pending appeal and right of trustee to intervene) Althause v. Giroux Consol. Mines Co., 150 App. Div. 580, 135 N. Y. Supp. 500. Where a divorced wife is adjudged bankrupt, arrears of alimony due her at the time of the adjudication pass to her trustee, but not so as to alimony accruing after the beginning of the bankruptcy proceedings. Bolton v. Bolton, 86 N. J. Law, 69, 89 Atl. 1014.

[213] Gary v. Bates, 12 Ala. 544.

[214] Flanders v. Coleman (D. C.) 249 Fed. 757, 41 Am. Bankr. Rep. 727. Brock v. Weiss, 44 N. J. Law, 241. So a covenant by a landlord to return the deposit made by the tenant as security to carry out the lease is collateral and personal and does not pass to the tenant's assignee as against his trustee in bankruptcy. Sanford v. Zimmern, 76 Misc. Rep. 434, 134 N. Y. Supp. 1116. And see Alvord v. Banfield, 85 Or. 49, 166 Pac. 549.

[215] In re Ellis, 5 Ben. 421, Fed. Cas. No. 4,399.

[216] Collier v. Hunter, 27 Ark. 74.

[217] Walton Land & Timber Co. v. Runyan (C. C. A.) 269 Fed. 130, 46 Am. Bankr. Rep. 248; Home Ins. Co. v. Hollis, 53 Ga. 659, 14 N. B. R. 337. In re Luber (D. C.) 261 Fed. 221, 44 Am. Bankr. Rep. 292. But a trustee whose bankrupt had mortgaged chattels is not entitled to the proceeds of a fire policy on such chattels taken out by the mortgagee, on the theory that, the mortgage being invalid, the mortgagee had no insurable interest. In re Stucky Trucking & Rigging Co. (D. C.) 240 Fed. 427.

[218] In re Torchia, 185 Fed. 576, 26 Am. Bankr. Rep. 188.

[219] In re Matschke, 193 Fed. 284, 27 Am. Bankr. Rep. 770.

[220] In re Wright (C. C. A.) 157 Fed. 544, 19 Am. Bankr. Rep. 454.

but merely a right to require performance of an obligation or duty.[221] So, where the payee of a note or duebill sells it before his bankruptcy, the purchaser takes title as against the seller's trustee, though the indorsement is made after the bankruptcy.[222] In this connection it should be noted that it is not permissible for the bankrupt so to deal with any debt or claim due to him as to make it available only for his personal benefit and take it out of the reach of his creditors. Thus, if he holds a promissory note, an agreement on his part to accept payment of it in labor or care of himself or in his own support, made without any new consideration, will not be valid as against his general creditors where the contract was not fulfilled before the institution of bankruptcy proceedings.[223]

§ 341. **Same; Claims Against Government.**—A claim for damages against the United States government will pass to and vest in the trustee in bankruptcy of the claimant,[224] even before Congress has made any provision for the payment of such claims, and even though the claim is only a right to share in the distribution of a fund received by the United States from a foreign government to be apportioned as compensation among its own injured citizens (as was the case with the Geneva award under the Alabama Claims Commission), though both the accrual of the claim and the bankruptcy of the claimant preceded the making of the treaty under which such fund eventually became available.[225] But this is not the case where the claim is not of such a nature that it would be legally enforceable against a private individual, and where its recognition and payment are wholly optional with Congress and depend rather upon the clemency or generosity of that body than upon any moral obligation.[226] And so, a mere expectation of receiving a reward from the Treasury department for furnishing information concerning smugglers, which has been applied for by the informer but not yet passed upon by the Secretary of the Treasury, whose action in the matter is discretionary, is not property of such a nature as to vest in the trustee in bankruptcy of the claimant.[227] An act of Congress (Rev. Stat. § 3477, U. S. Comp.

221 White v. Crew, 16 Ga. 416.

222 Smoot v. Morehouse, 8 Ala. 370, 42 Am. Dec. 644; Hersey v. Elliot, 67 Me. 526, 24 Am. Rep. 50.

223 In re Powers, 1 Nat. Bankr. News, 135.

224 Erwin v. United States, 97 U. S. 392, 24 L. Ed. 1065; Phelps v. McDonald, 99 U. S. 298, 25 L. Ed. 478; Phelps v. McDonald, 2 MacArthur (D. C.) 375, 16 N. B. R. 217; Comegys v. Vasse, 1 Pet. 193, 7 L. Ed. 108.

225 Williams v. Heard, 140 U. S. 529, 11 Sup. Ct. 885, 35 L. Ed. 550; Phelps v. McDonald, 99 U. S. 298, 25 L. Ed. 478; Erwin v. United States, 13 Ct. Cl. 49; Leonard v. Nye, 125 Mass. 455; Williamson v. Colcord, 1 Hask, 620, 13 N. B. R. 319, Fed. Cas. No. 17,752.

226 Dockery v. United States, 26 Ct. Cl. 148.

227 In re Ghazal, 174 Fed. 809, 98 C. C. A. 517, 23 Am. Bankr. Rep. 178; s. c., 163 Fed. 602, 20 Am. Bankr. Rep. 807.

Stat. 1901, p. 2320) expressly forbids the assignment of a claim against the United States for money due under a contract, unless executed with the formalities therein prescribed, and unless the claim has been previously allowed and a warrant issued for its payment. And consequently an assignment of such a claim, not yet allowed, can have no force or validity as against the trustee in bankruptcy of the claimant, and he takes it as assets of the estate, free from any rights or interests on the part of the assignee.[228]

§ 342. **Rights of Action.**—The bankruptcy statute expressly vests in the trustee of a bankrupt "rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property," [229] and it is probable that various choses in action, not precisely within this limited description, will pass to the trustee under the broader clause (in the same section of the act) which invests him with title to property which the bankrupt "could by any means have transferred." Thus the trustee becomes entitled to claim, and to enforce for the benefit of the estate in his charge, a promissory note of a third person belonging to the bankrupt at the time of the filing of the petition,[230] a claim of the bankrupt against a third person for goods sold to the latter, to the extent of their value, where no price was fixed at the time of the sale,[231] a claim against an insolvent estate pending in the probate court,[232] or the right to contest the account of the administrator of the bankrupt's ancestor.[233] Also the trustee takes a right of action for land in dispute

[228] National Bank of Commerce v. Downie, 218 U. S. 345, 31 Sup. Ct. 89, 54 L. Ed. 1065, 25 Am. Bankr. Rep. 199, affirming 161 Fed. 839, 88 C. C. A. 657, 20 Am. Bankr. Rep. 531; Guarantee Title & Trust Co. v. First Nat. Bank. 185 Fed. 373, 107 C. C. A. 429, 26 Am. Bankr. Rep. 85.

[229] Bankruptcy Act 1898, § 70a. All rights of action arising out of contracts, belonging to the bankrupt, vest in his trustee. Tucker v. Western Union Tel. Co., 94 Misc. Rep. 364, 157 N. Y. Supp. 873. Where a buyer of goods has a claim for damages against the seller for the latter's failure to deliver, such claim passes to the buyer's trustee in bankruptcy. Tennison v. Hanson, 136 Ark. 266, 206 S. W. 438; Hibernian Banking Ass'n v. Bell & Zoller Coal Co., 181 Ill. App. 581. This is also true of a claim arising out of the embezzlement or misappropriation of the bankrupt's money. Millard v. Green, 94 Conn. 597, 110 Atl. 177, 9 A. L. R. 1610. And a claim transferred by a bankrupt as a credit on a pre-existing indebtedness, on the day on which he filed his petition in bankruptcy, may be sold by the trustee, although the transfer was only voidable and not void. Keller v. Faickney, 42 Tex. Civ. App. 483, 94 S. W. 103. See In re Thomas (D. C.) 199 Fed. 214, 29 Am. Bankr. Rep. 945. But a wife's trustee in bankruptcy is not entitled to recover from the husband the amount expended by the wife for the support of herself and her children during the husband's abandonment of his family, when not representing creditors supplying necessities on the husband's credit. McCabe v. Guido, 116 Miss. 858, 77 South. 801.

[230] In re Duncan (D. C.) 148 Fed. 464, 17 Am. Bankr. Rep. 283.

[231] Leist v. Dierssen, 4 Cal. App. 634, 88 Pac. 812.

[232] Miller v. Parker, 47 Ala. 312.

[233] In re Clute, 1 Nat. Bankr. News, 386.

and held in adverse possession by a third person,[234] and may maintain an action to set aside the cancellation of a real-estate mortgage which was fraudulently procured from the bankrupt.[235] He is likewise vested with the right of action on a policy of fire insurance, for the destruction of insured property of the bankrupt by fire, occurring after the adjudication but before the appointment of the trustee,[236] and with the right of action against a sheriff for failing to make the money on an execution, or for selling the property on credit and failing to collect the amount of the bid.[237] So also, the bankrupt's right to file a notice of and to enforce a mechanic's lien passes to his trustee.[238] And the trustee of a bankrupt corporation is entitled to sue for and collect unpaid subscriptions to the stock,[239] though a statutory liability imposed upon persons who organize and transact business in the name of a corporation before its minimum capital stock has been subscribed is not an asset of the corporation, and hence the right to enforce such liability does not pass to its trustee in bankruptcy.[240] A personal claim which there is no legal power to enforce, but on which an award is made by arbitrators, does not pass to a trustee in bankruptcy;[241] and a claim of a wife for alimony is not a property right, and property awarded to her as alimony after her adjudication in bankruptcy does not become a part of her estate.[242] It should also be observed that a trustee in bankruptcy succeeds to the bankrupt's title to choses in action, subject to any defense or counterclaim to which they would have been liable in the hands of the bankrupt.[243] Hence, for example, where property of the bankrupt covered by insurance has been destroyed by fire, but he has lost his right to sue on the policy by failing to render a statement forthwith, as required by the policy, his trustee in bankruptcy cannot sue on it.[244] So a trustee in bankruptcy has no greater rights on a note payable to the bankrupt, the signer of which added to his signature words indicating that he signed it as the treasurer of a corporation, than the bankrupt

234 Pope v. Davenport, 52 Tex. 206.

235 Alexander v. Berney, 28 N. J. Eq. 90.

236 Fuller v. New York Fire Ins. Co., 184 Mass. 12, 67 N. E. 879.

237 Sullivan v. Bridge, 1 Mass. 511; In re Geiser, 129 Fed. 237, 12 Am. Bankr. Rep. 208.

238 Held v. Burke, 83 App. Div. 509, 82 N. Y. Supp. 426.

239 Foote v Greilick, 166 Mich. 636, 132 N W. 473; Lane v. Nickerson, 99 Ill. 284, Benner v. Billings, 107 Wash. 1, 181 Pac. 19. See McKay v. Garman, 89 Wash. 23, 153 Pac. 1082. On the general subject, see, supra, § 148.

240 John V. Farwell Co. v. Jackson Stores, 137 Ga. 174, 73 S. E. 13. And see, supra, § 149. See also Breck v. Brewster, 153 App. Div. 800, 138 N. Y. Supp. 821.

241 Tallman v. Tallman, 5 Cush. (Mass.) 325.

242 In re Le Claire, 124 Fed. 654, 10 Am. Bankr. Rep. 733.

243 Nebraska Moline Plow Co. v. Blackburn, 74 Neb. 246, 104 N. W. 178.

244 Bennett v. Ætna Ins. Co., 201 Mass. 554, 88 N. E. 335, 131 Am. St. Rep. 414.

himself had.[245] And the trustee in bankruptcy of a corporation stands in no better position to attack an arrangement between the corporation's selling agent and a purchaser, whereby the agent was to pay his debt to the purchaser by paying part of the purchase price, which was ratified by the corporation, than would the bankrupt company.[246] In the bankruptcy of corporations, the same rules generally prevail. Thus, the trustee in bankruptcy of a trading corporation succeeds to any right which it might have to sue the directors for loss resulting from a breach of their duty.[247]

§ 343. Same; For Personal Injuries and Other Torts.—In respect to rights of action on torts, it is necessary to distinguish carefully between those which occasion injury to the person and those which occasion injury to property. Those of the latter class vest in the trustee in bankruptcy; those of the former class do not. Thus, if the bankrupt has an unliquidated claim for damages against a common carrier or other person, for negligence or wrongful act which caused injury to his person, it does not vest in his trustee in bankruptcy and the latter has no interest in it.[248] But a similar claim for the value of property of the bankrupt, lost or damaged in consequence of the negligence or wrongful act of a carrier or other person, is an asset of his estate and passes to the trustee.[249] On the same principle, the trustee cannot lay claim to a right of action for damages growing out of an assault and battery upon the bankrupt,[250] or for slander or libel against him,[251] or for malicious prosecution and false imprisonment.[252] But if the bankrupt's claim for damages for any purely personal tort has already been reduced to judgment before his bankruptcy, it would seem clear that the judgment will vest in the trustee, for the tort is merged in the judgment, and the latter is property which the bankrupt "could have transferred," within the meaning of the statute.

245 Jump v. Sparling, 218 Mass. 324, 105 N. E. 878.

246 Grollman v. Montgomery Ward & Co., 181 Ill. App. 598.

247 McEwen v. Kelly, 140 Ga. 720, 79 S. E. 777. See Emerson v. Fisher, 246 Fed. 642, 158 C. C. A. 598, 41 Am. Bankr. Rep. 112.

248 Sibley v. Nason, 196 Mass. 125, 81 N. E. 887, 12 L. R. A. (N. S.) 1173, 124 Am. St. Rep. 520. 12 Ann. Cas. 938; Hanson v. First Nat. Bank (Tex. Civ. App.) 128 S. W. 1147; Rand v. Fleishman, 6 Wkly. Notes Cas. (Pa.) 497; Dillard v. Collins, 25 Gratt. (Va.) 343; Stone v. Boston & M. R. Co., 7 Gray (Mass.) 539; Beechwood v. Joplin-Pittsburg Ry. Co. 173 Mo. App. 371, 158 S. W. 868.

249 Borden v. Bradshaw, 68 Ala. 362. The right to recover for injuries to the estate of a bankrupt, resulting from the wrongful appointment of a receiver, vests in the trustee when he is appointed. In re Veler, 249 Fed. 633, 161 C. C. A. 543, 41 Am. Bankr. Rep. 736.

250 Hudson v. Plets, 11 Paige (N. Y.) 180.

251 Dillard v. Collins, 25 Gratt. (Va.) 343; Irion v. Knapp, 132 La. 60, 60 South. 719, 43 L. R. A. (N. S.) 940.

252 In re Haensell, 91 Fed. 355, 1 Am.

On the other hand, malicious attachment is an injury to property, and not to the person, and therefore the right of action will vest in the trustee in bankruptcy.[253] And so, a cause of action against an attorney at law, who had been employed to examine and pass upon the title to realty which the plaintiff intended to purchase, for certifying to him as good a title which was really defective, is nominally a cause of action for breach of contract, but in substance an action of tort; yet as the tort involved is an injury to the property of the plaintiff, rather than his person, it will pass to his trustee in bankruptcy.[254] So also, the modern decisions hold that a right of action for deceit, based on false and fraudulent representations, whereby the plaintiff was induced to sign a contract, enter into a partnership, buy property at an excessive price, or extend credit to a third person, to his pecuniary loss, is a "right of action arising from an injury to his property," within the meaning of the statute, and therefore passes to the trustee.[255] And for a similar reason, a right of action for damages, given by a state statute to any person injured by the operation of any "trust," (as, for instance, for a conspiracy whereby the plaintiff was driven out of business), is held to be for an injury to business, employment, or property, and therefore such as will vest in the trustee in bankruptcy.[256] So also of a right to sue for money lost in gambling, given by statute to the loser.[257] And under the statutes giving a right of action for the wrongful killing of a human being, the recovery to be for the benefit of the next of kin, it has been held that where a father is entitled to the entire amount to be recovered for the wrongful killing of his son, his right thereto constitutes an asset of his estate in bankruptcy.[258] So again, where profits of the business of a corporation are wrongfully appropriated to his own use by an officer of the company, under the guise of a salary, the trustee in bankruptcy of the corporation may recover the same.[259]

Bankr. Rep. 286; Noonan v. Orton, 34 Wis. 259, 17 Am. Rep. 441, 12 N. B. R. 405; Stanly v. Duhurst, 2 Root (Conn.) 52.

[253] Hansen Mercantile Co. v. Wyman, Partridge & Co., 105 Minn. 491, 117 N. W. 926, 21 L. R. A. (N. S.) 727.

[254] Knights v. Quarles, 4 Moore, 532.

[255] In re Gay, 182 Fed. 260, 25 Am. Bankr. Rep. 111; In re Harper, 175 Fed. 412, 23 Am. Bankr. Rep. 918; Hyde v. Tuffts, 45 N. Y. Super. Ct. 56. Earlier decisions, under the act of 1867, were to the contrary. See Tufts v. Mathews, 10 Fed. 609; In re Crockett, 2 Ben. 514, 2 N. B. R. 208. Fed. Cas. No. 3,402; Leggate v. Moulton, 115 Mass. 552.

[256] Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A. (N. S.) 136; Id., 75 Neb. 273, 105 N. W. 1092, 5 L. R. A. (N. S.) 136. But compare Bonvillain v. American Sugar Refining Co. (D. C.) 250 Fed. 641, 41 Am. Bankr. Rep. 267.

[257] Brandon v. Sands, 2 Ves. Jr. 514.

[258] In re Burnstine, 131 Fed. 828, 12 Am. Bankr. Rep. 596.

[259] Fillebrown v. Haywood, 190 Mass. 472, 77 N. E. 45. But salaries, not unreasonable in amount, voted and paid by the directors of a corporation, who

§ 344. **Same; For Usury.**—A right of action under a state statute to recover back usurious interest paid (or double the amount of it, or a penalty for exacting it, as the case may be) will vest in the trustee in bankruptcy of the borrower, since the injury done by the usurer is an injury to the property or estate of the borrower and not a personal tort.[260] The rule is the same under the national banking law. The right of action against a national bank, to recover twice the amount of usurious interest paid to it, under the act of Congress in that behalf (Rev. Stat. U. S. § 5198), will pass to and vest in the trustee in bankruptcy of the borrower, who is the "legal representative" of the borrower, within the meaning of that statute, for although the action thereon is one to recover a penalty, yet it is distinguishable from causes of action for damages growing out of mere personal torts.[261]

§ 345. **Legacies and Inheritances.**—Property coming to a bankrupt as his distributive share of the estate of one dying intestate, or as a legacy or devise, will pass to and vest in his trustee in bankruptcy,[262] though it may be as yet undetermined in respect to its extent,[263] or though it may consist of an undivided interest,[264] provided only that the bankrupt's right thereto became a fixed and vested interest by the death of the decedent prior to the filing of the petition in bankruptcy. And where the death and the filing of the petition occurred on the same day, the fractions of that day will be inquired into for the purpose of fixing the status of the property, and if the filing of the petition was the later event, the trustee in bankruptcy may claim the inheritance.[265] Where the bankrupt's interest in a legacy is contingent, and becomes vested by the happening of the event or contingency after his adjudication in bankruptcy, it will then become available as an asset of his

also owned a large majority of its stock, to certain officers of the corporation for past services, without objection by any stockholder or creditor, are not recoverable by the trustee on behalf of subsequent creditors, on the bankruptcy of the corporation more than ten years later. In re Franklin Brewing Co. (C. C. A.) 263 Fed. 512, 45 Am. Bankr. Rep. 7.

[260] Reed v. American-German Nat. Bank, 155 Fed. 233, 19 Am. Bankr. Rep. 140; Lasater v. First Nat. Bank, 96 Tex. 345, 72 S. W. 1057; Whèelock v. Lee, 15 Abb. Prac. N. S. (N. Y.) 24, 10 N. B. R. 363; Moore v. Jones, 23 Vt. 739, Fed. Cas. No. 9,768. Contra, Lafountain v. Burlington Sav. Bank, 56 Vt. 332.

[261] Wright v. First Nat. Bank, 8 Biss. 243, 18 N. B. R. 87, Fed. Cas. No. 18,078; Markson v. First Nat. Bank, Fed. Cas. No. 9,907; Crocker v. First Nat. Bank, 4 Dill. 358, Fed. Cas. No. 3,397; Monongahela Bank v. Overholt, 96 Pa. St. 327. Contra, Barnett v. Muncie Nat. Bank, Fed. Cas. No. 1,026; Bromley v. Smith, 2 Biss. 511, 5 N. B. R. 152, Fed. Cas. No. 1,922.

[262] Watkins v. Bigelow, 93 Minn. 361, 101 N. W. 497; Ex parte Newhall, 2 Story, 360, Fed. Cas. No. 10,159; Dohner v. Dohner (Pa.) 1 Am. Law J. N. S. 78.

[263] In re Mosier, 112 Fed. 138, 7 Am. Bankr. Rep. 268.

[264] In re Kane, 161 Fed. 633, 20 Am. Bankr. Rep. 616.

[265] In re Stoner, 105 Fed. 752, 5 Am. Bankr. Rep. 402; In re McKenna, 137 Fed. 611, 15 Am. Bankr. Rep. 4.

estate,[266] Where the estate devised includes both real and personal property, the administrator of the decedent will have no right or interest in the real property as against the trustee in bankruptcy, though it may be that he would be entitled to possession of the personal property pending its administration.[267] But it is said that, if there are no local creditors to be protected, the probate court will be justified in turning over to a foreign trustee in bankruptcy of the heir or next of kin the bankrupt's share in the personal estate.[268]

§ 346. Property Held in Trust for Bankrupt.—When property is held in trust for the bankrupt under a mere passive trust, with no direction as to accumulation and no discretion in the trustee to devote the fund or the income to any person other than the bankrupt, it constitutes assets of the latter's estate and may be recovered by the trustee, who need not give notice to the holder of the trust in order to complete his title.[269] And this is true not only of express trusts but of such as are implied by law from the situation and dealings of the parties. Thus, a trustee in bankruptcy may enforce a resulting trust in land in favor of the bankrupt,[270] or a trust in the avails of personal property or choses in action.[271] And of course property which is in the possession of a third person, who holds it merely as the agent or bailee of the bankrupt, must be surrendered to the trustee in bankruptcy.[272] But it is otherwise when a trust created by will or deed confers upon the trustee an authority to choose or change the beneficiary or to decide upon the extent to which he shall benefit by the trust. "No case is cited, none is known to us, which goes so far as to hold that an absolute discretion in the trustee (under a will),—a discretion which by the express language of the will he is under no obligation to exercise in favor of the bankrupt,—confers such an interest on the latter that he or his

266 Churchman's Appeal (Pa.) 12 Atl. 600.

267 In re Kane, 161 Fed. 633, 20 Am. Bankr. Rep. 616.

268 In re Delehanty's Estate, 11 Ariz. 366, 95 Pac. 109, 21 Ann. Cas. 1038.

269 Whittredge v. Sweetser, 189 Mass. 45, 75 N. E. 222, affirmed in Hammond v. Whittredge, 204 U. S. 538, 27 Sup. Ct. 396, 51 L. Ed. 606; Wallace v. Everett (Ky.) 125 S. W. 745; Pollack v. Meyer Bros. Drug Co., 233 Fed. 861, 147 C. C. A. 535, 36 Am. Bankr. Rep. 835.

270 In re Dunavant, 96 Fed. 542, 3 Am. Bankr. Rep. 41; Currie v. Look, 14 N. D. 482, 106 N. W. 131. The trustee of a bankrupt corporation is entitled to recover real estate held in the name of a person who, with his family owned all the stock of the corporation, on the ground that it was held in trust for the company, but he is not entitled to such person's homestead or other property in which the corporation's funds were not invested. Scott v. Cline, 257 Fed. 706, 168 C. C. A. 656, 44 Am. Bankr. Rep. 8.

271 In re Perley, Fed. Cas. No. 10,992. Compare Butler v. Merchants' Ins. Co., 14 Ala. 777. Any property in which there is a secret trust for the bankrupt's benefit, no matter how much covered up, passes to the trustee. Ury v. Van Every, 181 Cal. 604, 188 Pac. 985.

272 In re Cole, 144 Fed. 392, 75 C. C. A. 330, 16 Am. Bankr. Rep. 302; Lineker v. Ayeshford, 1 Cal. 75.

assignee in bankruptcy can successfully assert it in a court of equity or any other court." [273] But the fact that a fund in which the bankrupt had an interest was held in trust during the life of another by a trustee appointed by a state court will not deprive the court of bankruptcy of jurisdiction to administer such interest.[274]

§ 347. Same; Testamentary Trusts and Annuities.—Whether or not the provisions of a will create such a trust as will prevent a fund bequeathed from passing to the trustee in bankruptcy of the beneficiary or legatee, is to be determined by the law of the particular state.[275] But it may be stated as a general rule of law that, where property is devised to trustees, with directions to pay the income therefrom into the hands of a named beneficiary during his life, the latter has no such interest or estate either in the corpus of the property or in the income as will pass to and vest in his trustee in bankruptcy, as his rights or interests are not alienable by any sale or assignment on his part.[276] This is the ordinary case of a will making provision for a son, daughter, or other relative, by securing an income for life to the beneficiary, but at the same time placing the principal beyond his control, so that he may not squander it or make debts which would absorb it. This is unquestionably within the power of a testator, and as creditors of the beneficiary cannot defeat and annul the provisions of the will by the most searching process known to equity,—a creditors' bill,—neither can they do so through the instrumentality of the court of bankruptcy. So, where the income of a trust fund is directed to be applied to the support of a designated beneficiary and his wife and children, the trustee in bankruptcy of the beneficiary cannot claim such income, and the court cannot apportion the income, as between the bankrupt himself and his family, so as to give the trustee an aliquot share.[277] It is also entirely competent for a testator to direct that the income of the trust fund shall cease to be paid to the named beneficiary if he shall become bankrupt, and that it shall in that event be paid to his wife or children or to other specified

[273] Nichols v. Eaton, 91 U. S. 716, 23 L. Ed. 254. And see Kip v. Bank of New York, 10 Johns. (N. Y.) 63; Frazier v. Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666.

[274] Pollack v. Meyer Bros. Drug Co., 233 Fed. 861, 147 C. C. A. 535, 36 Am. Bankr. Rep. 835.

[275] In re McKay, 143 Fed. 671, 16 Am. Bankr. Rep. 238.

[276] Eaton v. Boston Safe Deposit & Trust Co., 240 U. S. 427, 36 Sup. Ct. 391, 60 L. Ed. 723, Ann. Cas. 1918D, 90, 36 Am. Bankr. Rep. 701; In re McKay, 143 Fed. 671, 16 Am. Bankr. Rep. 238; Spindle v. Shreve, 9 Biss. 199, 4 Fed. 136; In re Hoadley, 101 Fed. 233, 3 Am. Bankr. Rep. 780; Degraw v. Clason, 11 Paige (N. Y.) 136; Munroe v. Dewey (Mass.) 2 Nat. Bankr. News, 840; Brown v. Lumbert, 221 Mass. 419, 108 N. E. 1079; Boston Safe Deposit & Trust Co. v. Luke, 220 Mass. 484, 108 N. E. 64, L. R. A. 1917A, 988.

[277] Durant v. Hospital Life Ins. Co., 2 Low. 575, 16 N. B. R. 324, Fed. Cas. No. 4,188. Compare Rugely v. Robinson, 10 Ala. 702.

beneficiaries. Such a provision is not contrary either to the general policy of the law or to that of the bankruptcy act in particular, and it leaves nothing for the trustee in bankruptcy to claim for the estate.[278] And for even stronger reasons, he has no claim upon a trust fund which the trustees were at liberty to apply to the benefit of the bankrupt, or not, in their discretion.[279]

But in some states (particularly New York) the law provides that where a trust is created by which the trustee is to receive and collect the income from property and apply it to the use and benefit of a named beneficiary during his life, the latter shall not take any legal estate or interest in the property, and can only enforce the trust in equity, and cannot transfer his rights, but that, if no valid direction for accumulation is given, the surplus of such income, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property which cannot be reached by execution. Under such statutory provisions, the federal courts have held that the surplus of an income so settled may be claimed by the trustee in bankruptcy of the beneficiary as assets of his estate.[280] But the highest court of New York has ruled otherwise, holding that such surplus can be reached only in the manner pointed out in the state statute, and that, since it could neither be "transferred" by the bankrupt nor "levied upon and sold under judicial process against him" (Bankruptcy Act, § 70a), it is not within the terms or meaning of the act.[281]

A somewhat different question is presented where a testator gives property to trustees for the benefit of a designated beneficiary, but with the direction that they shall hold it and the accumulations until the beneficiary reaches a certain age, later than the ordinary age of majority. Where this is the case, and the beneficiary is adjudged bankrupt before attaining the age mentioned in the will, it is held that his trustee in

[278] Nichols v. Eaton, 91 U. S. 716, 23 L. Ed. 254, affirming 3 Cliff. 595, Fed. Cas. No. 10,241.

[279] Nichols v. Eaton, 91 U. S. 716, 23 L. Ed. 254.

[280] In re Tiffany, 133 Fed. 799, 13 Am. Bankr. Rep. 310; In re Reynolds (D. C.) 243 Fed. 268, 40 Am. Bankr. Rep. 141; Forbes v. Snow (Mass.) 131 N. E. 299; In re Baudouine, 96 Fed. 536, 3 Am. Bankr. Rep. 55. See the latter case on appeal, 101 Fed. 574, 41 C. C. A. 318, 3 Am. Bankr. Rep. 651, where, however, the decision was not on the merits, but on the question whether the trustee in bankruptcy must bring a plenary suit. See, also, Graff v. Bonnett, 31 N. Y. 9, 88 Am. Dec. 236; Brown v. Barker, 68 App. Div. 592, 74 N. Y. Supp. 43.

[281] Butler v. Baudouine, 177 N. Y. 530, 69 N. E. 1121. And see McNaboe v. Marks, 51 Misc. Rep. 207, 99 N. Y. Supp. 960; Cuthbert v. Chauvet, 136 N. Y. 326, 32 N. E. 1088, 18 L. R. A. 745; Wetmore v. Wetmore, 149 N. Y. 520, 44 N. E. 169, 33 L. R. A. 708, 52 Am. St. Rep. 752; Mills v. Husson, 140 N. Y. 99, 35 N. E. 422. Compare Jenks v. Title Guarantee & Trust Co., 170 App. Div. 830, 156 N. Y. Supp. 478.

bankruptcy is entitled to claim the fund from the testamentary trustees.[282] But a trust fund which is directed to be paid over to the testator's son only when he shall become financially solvent and able to pay all his just debts and liabilities from resources other than such fund does not pass to his trustee in bankruptcy, although after his discharge in bankruptcy it was paid over to the son.[283]

As to a testamentary annuity, created by a will which directs trustees to pay a fixed annual sum to a named beneficiary during his life, it is held that the right of the beneficiary is property which he could assign and which could be followed by his creditors, and therefore will vest in his trustee in bankruptcy, to be sold by the latter for its present value,[284] although it may not pass any estate or interest in the particular lands which are expected to furnish the income out of which the annuity shall be paid.[285] It is also ruled that where property is devised in trust, the income to be paid to a named person for life, and the principal, after his death, to his executor in trust for the use of such person as he may appoint by will, and the first taker executes the power, the property appropriated is deemed in equity part of his assets and subject to the demand of his creditors, in preference to the claims of his voluntary appointees or legatees, and hence it should be available as assets of his estate in bankruptcy.[286]

§ 348. **Policies of Life Insurance.**—The provision of the statute on this subject is that, if the bankrupt "shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."[287] Aside from the question of exemption, therefore, insurance policies having a surrender or disposable value are assets passing to the bankrupt's trustee.[288] This part of the statute is now

[282] Sanford v. Lackland, 2 Dill. 6, Fed. Cas. No. 12,312. And see Loomer v. Loomer, 76 Conn. 522, 57 Atl. 167.

[283] Hull v. Farmers' Loan & Trust Co., 245 U. S. 312, 38 Sup. Ct. 103, 62 L. Ed. 312, 40 Am. Bankr. Rep. 594.

[284] In re Burtis, 188 Fed. 527, 26 Am. Bankr. Rep. 680; Degraw v. Clason, 11 Paige (N. Y.) 136; Graves v. Dolphin, 1 Simons, 66; Brandon v. Robinson, 18 Ves. 429.

[285] De Haven v. Sherman, 131 Ill. 115, 22 N. E. 711, 6 L. R. A. 745.

[286] Clapp v. Ingraham, 126 Mass. 200.

[287] Bankruptcy Act 1898, § 70a, proviso.

[288] In re Phillips & Goldman, 192 Fed. 1020; In re Churchill, 198 Fed. 711, 29 Am. Bankr. Rep. 153; In re Whelpley, 169 Fed. 1019, 22 Am. Bankr. Rep. 433; Travelers' Ins. Co. v. Middlekamp, 67 Colo. 162, 185 Pac. 335. As to the rule

read as excluding from the estate in bankruptcy all policies except such as may have a surrender value,[289] though it was formerly held that the language above quoted was not intended to define the class of insurance policies which should pass to the trustee in bankruptcy, and limit the same to such policies as had a cash surrender value, but merely to give to the bankrupt a privilege with respect to the redemption of such policies,[290] and that therefore, though the policy in question may have no surrender value in cash, yet if it has any actual value (such as an inchoate value, or a value for the purpose of being pledged as collateral, or a paid-up insurance value), the trustee may claim it as an asset of the estate, since it is property which the bankrupt himself could have transferred and is therefore within the broader clause of the statute.[291] But a policy which has no surrender value, and no cash value to the estate, and in fact no value for any purpose except the contingency of its becoming valuable at the death of the bankrupt in case the premiums are kept paid, does not constitute an asset of the estate in bankruptcy.[292]

The surrender value of a life insurance policy is the sum which the company will pay upon the surrender of the policy and its cancellation,

in Mississippi, see In re Brinson (D. C.) 262 Fed. 707, 45 Am. Bankr. Rep. 99. As to the exemption of life insurance policies, see, supra, § 243.

[289] Burlingham v. Crouse, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 30 Am. Bankr. Rep. 6, affirming 181 Fed. 479, 104 C. C. A. 227, 24 Am. Bankr. Rep. 632; In re Josephson, 121 Fed. 142, 9 Am. Bankr. Rep. 345, affirmed in Meyers v. Josephson, 124 Fed. 734, 59 C. C. A. 650, 10 Am. Bankr. Rep. 687; King v. Miles, 108 Miss. 732, 67 South. 182.

[290] In re Slingluff, 106 Fed. 154, 5 Am. Bankr. Rep. 76; In re Coleman, 136 Fed. 818, 69 C. C. A. 496, 14 Am. Bankr. Rep. 461.

[291] Partridge v. Andrews (C. C. A.) 191 Fed. 325, 27 Am. Bankr. Rep. 388; In re Orear, 178 Fed. 632, 102 C. C. A. 78, 24 Am. Bankr. Rep. 343; In re Coleman, 136 Fed. 818, 69 C. C. A. 496, 14 Am. Bankr. Rep. 461; In re Welling, 113 Fed. 189, 51 C. C. A. 151, 7 Am. Bankr. Rep. 340; In re Dolan, 182 Fed. 949, 25 Am. Bankr. Rep. 145; In re Hettling, 175 Fed. 65, 23 Am. Bankr. Rep. 161; Clark v. Equitable Life Assur. Soc., 143 Fed. 175, 16 Am. Bankr. Rep. 137; Van Kirk v. Vermont Slate Co., 140 Fed. 38, 15 Am. Bankr. Rep. 239; Gould v. New York Life Ins. Co., 132 Fed. 927, 13 Am. Bankr. Rep. 233.

[292] In re Buelow (D. C.) 98 Fed. 86, 3 Am. Bankr. Rep. 389; Gould v. New York Life Ins. Co. (D. C.) 132 Fed. 927, 13 Am. Bankr. Rep. 233; Sanders v. Ætna Life Ins. Co., 95 S. C. 36, 78 S. E. 532, Ann. Cas. 1915B, 1284. Where a twenty-year endowment policy has no cash surrender value before the end of the period, the insured's trustee in bankruptcy does not take an interest therein merely because it provides certain valuable benefits to which the bankrupt will be entitled in case he survives the period. In re Churchill, 209 Fed. 766, 126 C. C. A. 490, 31 Am. Bankr. Rep. 1. An industrial policy, not payable with certainty to any beneficiary, and which it does not appear the insurer will certainly buy, has no cash surrender value and therefore does not pass to the trustee. In re Gannon, 247 Fed. 932, 160 C. C. A. 122, 40 Am. Bankr. Rep. 518. Insurance policies on the life of the bankrupt, which have been fully paid and are yielding annual dividends, do not pass to the trustee where they have all been borrowed upon to their full loan value, and the interest on the loans exceeds the dividends. In re Williams (D. C.) 250 Fed. 288, 41 Am. Bankr. Rep. 611.

in consideration of being relieved from carrying the risk further.[293] This surrender value is often expressly stipulated for in the policy itself, which may further contain the data, or fixed basis of calculation, on which the surrender value in any given year of the life of the policy will be computed. But in order that a policy may have a "cash surrender value," within the meaning of the bankruptcy law, it is not necessary that the policy should contain an express agreement or stipulation to that effect; it is sufficient if it possesses an actual value, either in cash or for the purchase of a paid-up policy, which would be recognized and paid by the insurer on the surrender of the policy, as a matter of settled and usual practice, or even as a concession in the particular case.[294]

An endowment policy on the life of the bankrupt, payable to him with accumulated dividends if he survives the term, or to his wife in case of his death before its maturity, if it has a cash surrender value, will vest in the trustee in bankruptcy unless redeemed by the bankrupt.[295] And even if it has no surrender value, yet if it has an actual

[293] In re Boardman, 2 Nat. Bankr. News, 821; In re McKinney, 15 Fed. 535. In the case last cited, it was pointed out that the foundation of the surrender value of a policy is the excess of the fixed annual premiums in the earlier years of the policy over the annual risk during the later years of the policy. "This excess in the premium paid over the annual cost of insurance, with accumulations of interest, constitutes the surrender value. Though this excess of premiums paid is legally the sole property of the company, still, in practical effect, though not in law, it is money of the assured, deposited with the company in advance, to make up the deficiency in later premiums to cover the annual cost of insurance instead of being retained by the assured and paid by him to the company in the shape of greatly increased premiums when the risk is greatest. It is the 'net reserve' required by law to be kept by the company for the benefit of the assured and to be maintained to the credit of the policy. So long as the policy remains in force, the company has not practically any beneficial interest in it, except as its custodian, with the obligation to maintain it unimpaired and suitably invested for the benefit of the assured. This is the practical, though not the legal, relation of the company to this fund. Upon the surrender of the policy before the death of the assured, the company, to be relieved from all responsibility for the increased risk, which is represented by this accumulating reserve, could well afford to surrender a considerable part of it to the assured or his representative. A return of a part, in some form or other, is now usually made."

[294] Holden v. Stratton, 198 U. S. 214, 25 Sup. Ct. 660, 49 L. Ed. 1022, 14 Am. Bankr. Rep. 94; Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, 17 Am. Bankr. Rep. 483; Equitable Life Assur. Soc. v. Miller, 185 Fed. 98, 25 Am. Bankr. Rep. 560; In re Herr, 182 Fed. 716, 25 Am. Bankr. Rep. 142; In re Coleman, 136 Fed. 818, 69 C. C. A. 496, 14 Am. Bankr. Rep. 461; In re Boardman, 103 Fed. 783, 4 Am. Bankr. Rep. 620. But compare Pulsifer v. Hussey, 97 Me. 434, 54 Atl. 1076. Though the insurance company does not recognize the policy as having a surrender value, yet if it has a recognized loan value, which is substantially the same, this value may be made available to the trustee in bankruptcy. Richter v. Rockhold, 253 Fed. 941, 165 C. C. A. 383, 42 Am. Bankr. Rep. 384.

[295] Remley v. Travelers' Ins. Co., 108 Minn. 31, 121 N. W. 230; In re Schofield, 147 Fed. 862, 15 Am. Bankr. Rep. 824; In re Young, 208 Fed. 373, 31 Am. Bankr. Rep. 29; In re Simmous (D. C.) 253 Fed. 466, 42 Am. Bankr. Rep. 209;

cash value which, by any practicable means, can be realized and made available for the payment of debts, the creditors are entitled to the benefit of it. Where the amount of such a policy is considerable, and it will mature before the estate can be closed, the trustee may, with the sanction of the court and the assent of the creditors, retain it, and pay the remaining premiums as they mature, and in case the amount is realized, the creditors will be entitled to at least the proportion equitably to the credit of the policy at the date of the adjudication, with the outlay for premiums.[296] And the same rule has been applied to the so-called "tontine" and "semi-tontine" forms of policies.[297] And a paid-up policy insuring the bankrupt's life, under an agreement to pay him an annuity for life after twenty years, which term has not expired, and to pay his widow a fixed sum on his death, vests in his trustee in bankruptcy, but only as to the bankrupt's interest in the annuity, and not as to the entire present value of the policy.[298]

The trustee can claim only such policies as are payable to the bankrupt himself or to his estate or personal representatives. A special industrial life policy, payable primarily to the executors or administrators, but with provision for payment to any person who may be equitably entitled, at the company's option, does not vest in the trustee.[299] And it was formerly held that a policy on the life of the bankrupt, but expressed to be payable to his wife, was her property and not an asset of his estate in bankruptcy,[300] and that it was immaterial that the bankrupt might have the right, with the consent of the company, to change the beneficiary, if he had not done so at the time of the bankruptcy.[301]

In re Dreuil & Co. (D. C.) 221 Fed. 796, 34 Am. Bankr. Rep. 373.

[296] In re Slingluff, 106 Fed. 154, 5 Am. Bankr. Rep. 76; In re Mertens, 131 Fed. 972, 12 Am. Bankr. Rep. 712.

[297] Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, 17 Am. Bankr. Rep. 483; In re Welling, 113 Fed. 189, 51 C. C. A. 151, 7 Am. Bankr. Rep. 340; In re Mertens, 131 Fed. 972, 12 Am. Bankr. Rep. 712.

[298] In re Schaefer, 189 Fed. 187, 26 Am. Bankr. Rep. 340.

[299] In re Gannon (D. C.) 241 Fed. 733, 39 Am. Bankr. Rep. 783.

[300] In re Flanigan (D. C.) 228 Fed. 339, 35 Am. Bankr. Rep. 807; In re Steele, 98 Fed. 78, 3 Am. Bankr. Rep. 549; In re Pfaffinger, 164 Fed. 526, 21 Am. Bankr. Rep. 255; In re Bear, 11 N. B. R. 46, Fed. Cas. No. 1,178; Pace v. Pace, 19 Fla. 438; Haskell v. Equitable Life Assur. Soc., 181 Mass. 341, 63 N. E. 899; Pulsifer v. Hussey, 97 Me. 434, 54 Atl. 1076. But see In re White, 174 Fed. 333, 98 C. C. A. 205, 23 Am. Bankr. Rep. 90; In re Holden, 114 Fed. 650, 52 C. C. 346. Compare In re Young, 208 Fed. 373, 31 Am. Bankr. Rep. 29; In re Loveland, 200 Fed. 136, 118 C. C. A. 310, 29 Am. Bankr. Rep. 560.

[301] In re Cohen (D. C.) 230 Fed. 733, 37 Am. Bankr. Rep. 189; In re Arkin, 231 Fed. 947, 146 C. C. A. 143, 36 Am. Bankr. Rep. 694; In re Pfaffinger (D. C.) 164 Fed. 526, 21 Am. Bankr. Rep. 255. See In re L. Hammel & Co., 221 Fed. 56, 137 C. C. A. 80, 34 Am. Bankr. Rep. 46, holding that the bankrupt cannot be compelled to substitute himself as beneficiary in a life insurance policy payable to his wife and borrow the loan value thereof for the benefit of his creditors.

But in 1917 the Supreme Court laid down the rule that although a policy on the life of the bankrupt may be explicitly made payable to some other person, yet if the bankrupt has the absolute right to change the beneficiary at will, so that the designated person has no vested right in the policy, its cash surrender value is property which the bankrupt could have transferred prior to the bankruptcy, within the meaning of the Bankruptcy Act, and the power to change the beneficiary is a power which he might have exercised for his own benefit, and therefore the surrender value of the policy is an asset of his estate vesting in the trustee.[302] It is important to be noticed that in some of the states a policy expressed to be payable to the wife of the insured is exempt by statute, and where this is the case, his trustee in bankruptcy takes no interest in it.[303] But otherwise, the rule must now be accepted that if the bankrupt has the right at any time and without the consent of the wife to substitute another beneficiary in her place, the policy cannot be regarded as her property, but its surrender value will pass to the husband's trustee in bankruptcy.[304] But this rule does not apply to a policy made payable to the bankrupt's wife, where its terms are such that he has no right to change the beneficiary except after the death of the wife,[305] and the trustee of a bankrupt cannot recover, after the bankrupt's death, the amount of a policy payable to his wife, with a right to change the beneficiary, which the company had paid to the wife without notice of any adverse claim thereto.[306] Nor can the trustee claim a policy which was originally payable to the personal representatives of the bankrupt, but which was assigned to his wife more than four months before the bankruptcy, where nothing appears to impugn the good faith of the transaction,[307] or where, at the time of the

[302] Cohen v. Samuels, 245 U. S. 50, 38 Sup. Ct. 36, 62 L. Ed. 143, 40 Am. Bankr. Rep. 384; Cohn v. Malone, 248 U. S. 450, 39 Sup. Ct. 141, 63 L. Ed. 352, 43 Am. Bankr. Rep. 1; In re Samuels, 254 Fed. 775, 166 C. C. A. 221, 42 Am. Bankr. Rep. 434; In re Shoemaker (D. C.) 225 Fed. 329, 35 Am. Bankr. Rep. 22; Rawls v. Penn Mut. Life Ins. Co., 253 Fed. 725, 165 C. C. A. 319, 42 Am. Bankr. Rep. 612; Malone v. Cohn, 236 Fed. 882, 150 C. C. A. 144, 38 Am. Bankr. Rep. 87; In re Bonvillain (D. C.) 232 Fed. 370, 36 Am. Bankr. Rep. 761; In re Jamison Bros. & Co. (D. C.) 222 Fed. 92, 34 Am. Bankr. Rep. 231; Frederick v. Fidelity Mut. Life Ins. Co., 255 U. S. —, 41 Sup. Ct. 503, 65 L. Ed. —, 46 Am. Bankr. Rep. 586; In re Greenberg (C. C. A.) 271 Fed. 258, 46 Am. Bankr. Rep. 400; In re Jens (D. C.) 273 Fed. 606. Compare In re Young (D. C.) 208 Fed. 373, 31 Am. Bankr. Rep. 29.

[303] Supra, § 243.

[304] In re Jones (D. C.) 249 Fed. 487, 41 Am. Bankr. Rep. 299, 467.

[305] In re Majors (D. C.) 241 Fed. 538, 39 Am. Bankr. Rep. 642; In re Fetterman (D. C.) 243 Fed. 975, 39 Am. Bankr. Rep. 834.

[306] Frederick v. Metropolitan Life Ins. Co., 239 Fed. 125, 152 C. C. A. 167, 39 Am. Bankr. Rep. 204; Frederick v. Fidelity Mut. Life Ins. Co., 255 U. S. — 41 Sup. Ct. 503, 65 L. Ed. —, 46 Am. Bankr. Rep. 586.

[307] In re Steele (D. C.) 98 Fed. 78, 3 Am. Bankr. Rep. 549; Grems v. Traver,

assignment, it had no surrender value in cash.[308] But where the policy provides that the principal sum shall be paid to the assured himself at the end of a stipulated term of years if he is then living, or to his wife if he dies before the expiration of the term, its surrender value is payable to the assured, and it becomes a part of his estate in bankruptcy.[309] But the mere expectancy of one who is named as the beneficiary in a policy of insurance on the life of another is not an asset in his estate in bankruptcy, where the policy also gives the assured the unqualified right to change the beneficiary at will, as this is not property which he could have transferred or which could have been levied on and sold.[310] But where the assured in such a case dies shortly after the adjudication in bankruptcy, leaving the bankrupt as the last designated beneficiary, the interest of the latter in the policy becomes fixed and unalterable, and passes to his trustee.[311] And so, where a wife holds a policy of insurance on the life of her husband, by the terms of which she is bound to pay the premiums and is entitled to receive the proceeds of the policy, such policy will become a part of the assets of her estate in bankruptcy, unless she secures or pays to her trustee its surrender value.[312]

The only interest which the trustee can claim is the surrender value of the policy at the time of the bankruptcy, and if that is paid or secured to him, the bankrupt remains the owner of the policy and of whatever interest or value may thereafter accrue under it.[313] Indeed the policy, so far as respects any future insurance under it, would be a burden to the estate rather than a benefit, which the trustee would not be authorized to continue.[314] But if the bankrupt does not redeem the policy, as authorized by the statute, it is for the court of bankruptcy to determine in what way the trustee shall treat the bankrupt's interest in it, whether by sale or by postponement of any action until the policy

87 Misc. Rep. 644, 148 N. Y. Supp. 200. Compare South Side Trust Co. v. Wilmarth, 199 Fed. 418, 117 C. C. A. 650, 29 Am. Bankr. Rep. 29. The fact that the husband paid the premiums on his life insurance policy, assigned to his wife, does not affect her title to the policy as against the husband's trustee in bankruptcy. Longbottom v. Emery, 261 Pa. 163, 104 Atl. 561.

[308] Morris v. Dodd, 110 Ga. 606, 36 S. E. 83, 50 L. R. A. 33, 78 Am. St. Rep. 129.

[309] In re Steele, 98 Fed. 78, 3 Am. Bankr. Rep. 549; In re Grahs, 1 Nat. Bankr. News, 164; Brigham v. Home Ins. Co., 131 Mass. 319; In re Draper (D. C.) 211 Fed. 230, 32 Am. Bankr. Rep. 203.

[310] In re Hogan, 194 Fed. 846, 28 Am. Bankr. Rep. 166; In re McDonnell, 101 Fed. 239, 4 Am. Bankr. Rep. 92.

[311] In re Hogan, 186 Fed. 537.

[312] In re Steele, 98 Fed. 78, 3 Am. Bankr. Rep. 549.

[313] Pulsifer v. Hussey, 97 Me. 434, 54 Atl. 1076; In re Simmons & Griffin, 255 Fed. 521, 166 C. C. A. 589, 43 Am. Bankr. Rep. 3. If an assignment by the bankrupt and his wife of policies on his life was void, the wife may, on their return after his death, and within 30 days after the determination of their surrender value at the date of the adjudication, redeem them. In re Levy (D. C.) 227 Fed. 1011, 36 Am. Bankr. Rep. 181.

[314] In re McKinney, 15 Fed. 535.

shall fall due.[315] And in any case, the trustee takes the surrender value of the policy subject to any valid existing liens upon it, as, for example, an equitable lien in favor of the bankrupt's wife for the amount of premiums which she has paid out of her own money in past years in order to keep the policy alive,[316] or the lien of one to whom the policy had previously been pledged as collateral security for a loan.[317] And if the insurance company itself has loaned the bankrupt a sum equal to the full surrender value of the policy, holding the policy as security, there is nothing for the trustee in bankruptcy to take.[318]

The death of the bankrupt will of course extinguish the surrender value of any policy, but at the same time mature the policy. And it was formerly held that, if this occurred after the filing of the petition but before the adjudication, the trustee would take the policy in its condition at the date of the adjudication as a matured contract, and if it was payable to the estate or the personal representatives of the assured, the trustee might claim the entire proceeds; whereas, if the bankrupt survived the adjudication, the trustee would take only such surrender value as the policy might have had at that date, and on the subsequent death of the bankrupt his heirs or representatives would have the right to pay to the trustee such surrender value and retain the rest of the proceeds of the policy.[319] But the Supreme Court of the United States has recently decided that the time when the petition in bankruptcy is filed (not the date of adjudication) fixes the cash surrender value of the policy, so that the death of the bankrupt between the filing of the petition and the adjudication does not make the proceeds of the policy above the cash surrender value assets in the hands of the trustee, but the right to redeem on paying the surrender value may be exercised by the bankrupt's executors.[320] Where the bankrupt's death occurs by suicide, and the policy thereupon becomes void, but the insurance company returns pre-

315 Waldron v. Becker, 33 Misc. Rep. 182, 68 N. Y. Supp. 402.

316 In re Diack, 100 Fed. 770, 3 Am. Bankr. Rep. 723; Waldron v. Becker, 33 Misc. Rep. 182, 68 N. Y. Supp. 402. And see In re Bear, 11 N. B. R. 46, Fed. Cas. No. 1,178; American Sav. Bank & Trust Co. v. Munson, 93 Wash. 78, 159 Pac. 1195.

317 In re Wolff, 165 Fed. 984, 21 Am. Bankr. Rep. 452; Mutual Benefit Life Ins. Co. v. Swett, 222 Fed. 200, 137 C. C. A. 640, Ann. Cas. 1917B, 298; Connecticut Mut. Life Ins. Co. v. Allen, 235 Mass. 187, 126 N. E. 367.

318 Burlingham v. Crouse (C. C. A.) 181 Fed. 479, 24 Am. Bankr. Rep. 632.

319 Partridge v. Andrews (C. C. A.) 191 Fed. 325, 27 Am. Bankr. Rep. 388; Van Kirk v. Vermont Slate Co., 140 Fed. 38, 15 Am. Bankr. Rep. 239; In re McKinney, 15 Fed. 535; Sanders v. Ætna Life Ins. Co., 95 S. C. 36, 78 S. E. 532.

320 Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 30 Am. Bankr. Rep. 1, affirming 192 Fed. 834, 113 C. C. A. 158, 27 Am. Bankr. Rep. 704; Andrews v. Partridge, 228 U. S. 479, 33 Sup. Ct. 570, 57 L. Ed. 929, 30 Am. Bankr. Rep. 4, reversing 191 Fed. 325, 112 C. C. A. 69, 41 L. R. A. (N. S.) 123, 27 Am. Bankr. Rep. 388; King v. Miles, 108 Miss. 732, 67 South. 182.

miums paid under the policy, the money belongs to the trustee, as being a refund of the bankrupt's own money.[321]

Practically the same principles apply to contracts of indemnity insurance. Thus, where an employer of labor holds a policy undertaking to indemnify him against loss sustained by accident to an employé, and pays a judgment recovered by an employé against him, and becomes bankrupt, his claim against the insurance company under the policy for reimbursement will pass to his trustee in bankruptcy as an asset of his estate.[322] The trustee in bankruptcy is also entitled, as against the bankrupt's widow, to the proceeds of a policy of insurance against permanent disability.[323]

§ 349. Wife's Personalty and Choses in Action.—Where the rule of the common law has not been changed or abrogated by statute, the personal property of the wife of a bankrupt, owned by her at the time of the marriage, and not excluded from the control of the husband by any trust, and also her choses in action reduced to his possession, are assets of his estate in bankruptcy.[324] But courts of equity have always recognized the wife's right to a settlement,—that is, to an adequate provision for her support to be made out of her own property,—and have enforced it whenever it became necessary for the husband to resort to chancery in order to reach her property or rights of action, and courts of bankruptcy will take the same course.[325] Subject to this equity, however, and wherever the common law still prevails, the husband's trustee in bankruptcy succeeds to his rights, and where the husband and wife were jointly prosecuting a suit in respect to a chose in action of the wife, and during its pendency the husband is adjudged bankrupt, his trustee should join with the wife in the further conduct of the suit, and his recovery therein will inure to the benefit of the husband's creditors.[326] But the trustee is not entitled to a chose in action of the bankrupt's wife, where there is nothing to show that the bankrupt ever asserted his marital right thereto or made any attempt to reduce it to his possession,[327] and

321 In re Judson, 188 Fed. 702, 26 Am. Bankr. Rep. 775, affirmed 192 Fed. 834, 113 C. C. A. 158, 27 Am. Bankr. Rep. 704.

322 Travelers' Ins. Co. v. Moses, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663.

323 In re Matschke, 193 Fed. 284, 27 Am. Bankr. Rep. 770.

324 In re Boyd, 2 Hughes, 349, 5 N. B. R. 199, Fed. Cas. No. 1,745; In re Grant, 2 Story, 312, Fed. Cas. No. 5,693; Butler v. Merchants' Ins. Co., 8 Ala. 146; Gayle v. Randall, 71 Ala. 469; Smith v. Chandler, 3 Gray (Mass.) 392; In re Hammond, 98 Fed. 845.

325 Clark v. Hezekiah, 24 Fed. 663; In re Brandt, 5 Biss. 217, Fed. Cas. No. 1,811; In re Campbell, 3 Hughes, 276, 17 N. B. R. 4, Fed. Cas. No. 2,348; Shaw v. Mitchell, 2 Ware, 220, Fed. Cas. No. 12,722; Bell v. Bell, 1 Ga. 637.

326 In re Boyd, 2 Hughes, 349, 5 N. B. R. 199, Fed. Cas. No. 1,745.

327 Wickham v. Valle, 11 N. B. R. 83, Fed. Cas. No. 17,613; In re Snow, Fed.

merely including it in his schedule of assets filed in the bankruptcy proceedings is not such a reduction to possession as to give his trustee or creditors a claim upon it.[328] Nor does the general rule apply to anything but property in which the wife has a fixed and definite interest. Thus, a legacy to the bankrupt's wife, dependent on her surviving another person, is a mere possibility and does not pass to the husband's trustee.[329]

On the other hand, where the wife's separate property is secured to her by statute, the husband's trustee in bankruptcy has no claim to any personal property or chose in action acquired and owned by her before the marriage, such, for instance, as stock in a corporation.[330] And the fact that the wife allows her husband to have and use her money in his own business indefinitely does not prevent her from reclaiming it, as against other creditors, in his subsequent bankruptcy,[331] unless the statutory law of the state expressly precludes her from asserting ownership as against creditors in general,[332] or raises a presumption that a gift of the money was intended.[333] And however this may be, the property or profits which the husband may have accumulated in business transactions, using his wife's money as capital, but adding his own skill and energy, constitute his own assets and not hers, and vest in his trustee.[334]

Either money or other property given by a man to his wife, at a time when he is solvent and entertains no fraudulent purpose, passes out of his ownership into hers, and cannot be reclaimed for the benefit of his creditors when he afterwards becomes insolvent and bankrupt.[335] And although it is a general rule that money saved by a wife out of an allowance made by her husband for the expenses of the household belongs to him and not to her, yet where the wife, during the twelve years of her marriage, managed, by doing her own work, to save from the allowance a considerable sum, which she deposited in bank in her own name, besides on different occasions expending considerable sums, which fact was probably known to her husband, the presumption is that he intended such savings as a gift to her; and where he was solvent at all times until his death, the trustee in bankruptcy of the surviving partner of a

Cas. No. 13,142; Shay v. Sessaman, 10 Pa. St. 432.

328 Poor v. Hazleton, 15 N. H. 564.

329 Krumbaar v. Burt, 2 Wash. C. C. 406, Fed. Cas. No. 7,944.

330 Bryan v. Sturgis Nat. Bank, 40 Tex. Civ. App. 307, 90 S. W. 704.

331 Van Kleeck v. Miller, 19 N. B. R. 484, Fed. Cas. No. 16,860; In re Westervelt, Fed. Cas. No. 17,445a; Shippen's Appeal, 80 Pa. St. 391, 15 N. B. R. 553. But see Keating v. Keefer, 5 N. B. R. 133, Fed. Cas. No. 7,635.

332 In re Hemstreet, 139 Fed. 958, 14 Am. Bankr. Rep. 823.

333 Teter v. Viquesney, 179 Fed. 655, 103 C. C. A. 213, 24 Am. Bankr. Rep. 242.

334 Muirhead v. Aldridge, 14 N. B. R. 249, Fed. Cas. No. 9,904.

335 In re Brandt, 5 Biss. 217, Fed. Cas. No. 1,811; In re Ludlow, Fed. Cas. No. 8,599.

firm of which he had been a member, on its bankruptcy, after his death, cannot claim such money.[336]

§ 350. Acquisitions of Minor Children.—Theoretically the services and earnings of a minor belong to his father and constitute assets of the latter's estate in bankruptcy. But the law is not overzealous to strip infants of their earnings, even in favor of their parent's creditors. And it has been held that the property of minor children, accumulated by their sole exertions with their father's consent, and which he has not reduced to his own possession but which has always stood in their names, does not pass to his trustee in bankruptcy.[337] Moreover, where a father, although himself insolvent, has expressly emancipated his minor son, the earnings of the latter, thenceforward and during the remainder of his minority, or property purchased with the same, do not belong to the father and cannot be claimed by his creditors as assets of his estate in bankruptcy.[338]

§ 351. Dower Rights.—A woman's inchoate right of dower in the lands of her husband is not such property as will pass to and vest in her trustee in bankruptcy.[339] But when a wife's contingent interest in her husband's lands has been transformed into a vested right by the event of his death, she cannot then divest it by parol without consideration, as against her creditors, and consequently, if she has not parted with it prior to her bankruptcy, it will constitute an asset of her estate.[340]

As to the dower rights of the wife in the case of the bankruptcy of the husband, it is the rule in Pennsylvania that the land of a bankrupt can be sold free from the dower rights of his wife, such rights under the state laws being subject to the claims of creditors.[341] But in Ohio, a wife's dower interest in lands, although they are mortgaged, does not pass to the husband's trustee in bankruptcy.[342] Under the law in North Carolina, where the wife of a bankrupt has an inchoate dower right in his equitable estates, and has joined with him in mortgages under which his realty is sold subsequent to the bankruptcy, she has a dower right only in the surplus proceeds, and is not, as against the trustee, representing the unsecured creditors, entitled to the present value of one-third of the entire proceeds of the sale.[343]

336 In re Simon, 197 Fed. 102, 28 Am. Bankr. Rep. 616.

337 Ex parte Tebbets, 5 Law Rep. 503, Fed. Cas. No. 13,816.

338 In re Dunavant, 96 Fed. 542, 3 Am. Bankr. Rep. 41.

339 Lucas v. Bennett, 42 Iowa, 703.

340 Watterson's Appeal, 95 Pa. 312.

341 In re Kligerman (D. C.) 253 Fed. 778, 42 Am. Bankr. Rep. 670.

342 Marine Nat. Bank v. Swigart (C. C. A.) 262 Fed. 854, 45 Am. Bankr. Rep. 162.

343 In re Munford (D. C.) 255 Fed. 108, 43 Am. Bankr. Rep. 218.

§ 352. Property of Third Persons in Bankrupt's Possession.—If the aggregate of property surrendered and turned over to a trustee in bankruptcy includes any article or item which does not belong to the bankrupt, but to a third person, it is not a part of the estate in bankruptcy. The trustee must take charge of it until it is reclaimed by the rightful owner, and cannot surrender it to any other person. But it is not an asset in his hands for administration in bankruptcy.[344] This is also true of personal property which is in the possession of the bankrupt under a contract of lease, although he may have an option to buy it at a stated price, which he has never exercised.[345] But to withdraw specific property from the estate to be administered, the assertion of title to it must come from the rightful owner, not from the bankrupt. Whatever is in the possession of the latter at the time of the bankruptcy must be delivered to the trustee. A third person may thereafter reclaim any property of his own. But the bankrupt cannot withhold any property actually in his possession, and set up in defense to the trustee's demand for it that the title is in a third person.[346] If, however, money has been paid to the bankrupt by mistake, and he has turned it over to the person entitled to receive it, the trustee in bankruptcy cannot maintain a suit to recover it back, as it is not a part of the bankrupt's assets.[347]

Questions often arise as to the ownership of property in the bankrupt's possession under a contract for its sale to him or a contract under which it was to become his property on the performance of certain conditions, the trustee claiming the goods as the bankrupt's and seeking to put the seller in the position of a creditor for the unpaid price,

[344] In re John H. Parker Co. (D. C.) 268 Fed. 868, 45 Am. Bankr. Rep. 34; In re Toole (C. C. A.) 270 Fed. 195, 46 Am. Bankr. Rep. 243; In re Condon, 198 Fed. 480, 117 C. C. A. 212, 28 Am. Bankr. Rep. 851; In re Cox, 199 Fed. 952, 29 Am. Bankr. Rep. 456; In re Thompson, 205 Fed. 556, 30 Am. Bankr. Rep. 64; In re Walsh Bros., 195 Fed. 576, 28 Am. Bankr. Rep. 243; Cooper v. White, 19 Ga. 554. And see In re Potee Brick Co., 179 Fed. 525 (case of fixtures); Ludvigh v. Umstadter, 148 Fed. 319, 17 Am. Bankr. Rep. 774 (property partitioned before bankruptcy); In re Woodman, 186 Fed. 533 (money held as deposit to secure the return of cans in which the goods were shipped); In re Shelly (D. C.) 235 Fed. 311, 37 Am. Bankr. Rep. 514; Southern Cotton Oil Co. v. Elliotte, 218 Fed. 567, 134 C. C. A. 295, 33 Am. Bankr. Rep. 375. In the bankruptcy of a corporation, where one of its officers made a prima facie showing of his individual ownership of certain certificates of deposit, as against the trustee's claim that they belonged to the bankrupt, it was held that they should not be impounded for the purpose of being made available to satisfy a judgment which might be obtained by the trustee against the officer. In re McGinley, 219 Fed. 159, 135 C. C. A. 57, 33 Am. Bankr. Rep. 612.

[345] McEwen v. Totten, 164 Fed. 837, 90 C. C. A. 599, 21 Am. Bankr. Rep. 336; In re Kay-Tee Film Exchange (D. C.) 193 Fed. 140.

[346] In re Moses (D. C.) 1 Fed. 845. And see supra, § 322.

[347] Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955, affirmed Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 27 Sup. Ct. 391, 51 L. Ed. 596, 17 Am. Bankr. Rep. 675.

while the latter claims that title has not passed and that he is therefore entitled to a return of the goods.[348] These questions must ordinarily be determined according to the general law of sales of personal property.[349] But it may be said, in general, that while payment of the price is not always necessary to complete a sale, yet the vendor may reclaim the property when there has been no delivery of it of such a character as to pass title,[350] as, where the bankrupt, on receipt of the property, objected both to its quantity and quality and stored it separately, and refused to pay for it except at a reduced price, which had not been agreed to when bankruptcy intervened.[351] So also the seller may reclaim the goods where the contract was for an absolute sale (not conditional) and the payment of the price in cash was a condition precedent to the passing of title, and payment has not been made,[352] or where payment has been tendered in a medium which the seller refused to accept, such as an uncertified check which is afterwards dishonored.[353] Again, if property is in the bankrupt's possession which was not sold to him, but consigned to him for sale on the owner's account, it is not assets of his estate, but may be reclaimed by the true owner.[354] But the fact that a merchant ships goods to a customer, but consigned to himself, is not conclusive proof of his assertion that he reserved title in himself for the purpose of a future scrutiny of the customer's financial condition, if there are other facts tending to show an actual sale and a resort to this equivocal method for the purpose of denying a sale in case of the cus-

348 The title to building material which has passed with delivery to the purchaser is not restored to the seller by the fact that there was a representation in the contract that it would be used in a certain building, which was breached by the buyer's subsequent bankruptcy. Citizens' Coal & Supply Co. v. Custard, 244 Fed. 425, 157 C. C. A. 51, 40 Am. Bankr. Rep. 369; And see In re Shelly, 242 Fed. 251, 155 C. C. A. 91, 39 Am. Bankr. Rep. 519.

349 In proceedings to reclaim property from a trustee in bankruptcy, the question whether the contract under which the bankrupt held the property was a bailment for hire, or a sale, conditional or absolute, must be determined by the law of the state in which it was made. In re Eagle Ice & Coal Co. (D. C.) 241 Fed. 393, 39 Am. Bankr. Rep. 184. Where goods were sold to the bankrupt on open account, the title vested at once and the relation of debtor and creditor was created, so that on bankruptcy intervening the seller was not entitled to rescind and reclaim. In re Caldwell Machinery Co. (D. C.) 215 Fed. 428.

350 In re Kingston Realty Co. (D. C.) 157 Fed. 303, 19 Am. Bankr. Rep. 703. See Kellogg-Mackey-Cameron Co. v. Curtice, 162 Mo. App. 124, 144 S. W. 152. A receiver in bankruptcy has the right to take property sold to the bankrupt, and shipped by carrier, from the carrier on its arrival at destination, and such taking ends the right of stoppage in transitu. In re Arctic Stores (D. C.) 258 Fed. 688, 43 Am. Bankr. Rep. 543.

351 In re Planett Mfg. Co., 157 Fed. 916, 19 Am. Bankr. Rep. 729.

352 Southern Pine Co. v. Savannah Trust Co., 141 Fed. 802, 73 C. C. A. 60, 15 Am. Bankr. Rep. 618; In re Smith, 119 Fed. 1004, 9 Am. Bankr. Rep. 590; In re Burkle, 116 Fed. 766, 8 Am. Bankr. Rep. 542.

353 In re Tracy, 185 Fed. 844; In re Selman Heating & Plumbing Co., 203 Fed. 777.

354 See, infra, § 356.

tomer's bankruptcy; there must be good faith, and no sinister design, in the transaction.[355]

There are also some cases in which a third person may reclaim goods on the ground that the bankrupt was estopped to assert title in himself. And if this is true, the estoppel is equally binding on the trustee in bankruptcy, who stands in no better position than the bankrupt himself in respect to the assets, except as to fraudulent conveyances, preferences, and the like. In an interesting case under the former bankruptcy statute, it appeared that the bankrupts had agreed to build a locomotive engine for a railroad company. They notified the company that the engine was finished and dispatched, whereupon the price was paid. No such engine then existed, but two engines, either of which would answer the contract, were afterwards finished, and one of them was delivered to a third person before the bankruptcy. At the date of the bankruptcy, the other remained in the bankrupts' shop. It was held that the railroad company had a title to the engine as against the bankrupts and their trustee by estoppel.[356]

§ 353. Same; Remedies of Owner.—When property in the possession of a bankrupt, but which belongs to a stranger, passes into the hands of the trustee in bankruptcy, the proper remedy of the owner, desiring to reclaim it, is to file his petition in the court of bankruptcy setting forth the facts and his claim, and the referee has authority summarily to call the parties in interest before him and to hear and determine the claim, and if it is admitted or established by proof, to make an order for the restoration of the property to the claimant.[357] This remedy is exclusive. When property has come into the hands of a trustee in bankruptcy, it is in the custody of the court of bankruptcy,

[355] In re Leeds Woolen Mills, 129 Fed. 922, 12 Am. Bankr. Rep. 136; In re Levin, 127 Fed. 886, 11 Am. Bankr. Rep. 446. See Grange Co. v. Farmers' Union & Milling Co., 3 Cal. App. 519, 86 Pac. 615.

[356] Ex parte Rockford, R. I. & St. L. R. Co., 1 Low. 345, 3 N. B. R. 50, Fed. Cas. No. 11,978. And see In re Cantelo Mfg. Co., 185 Fed. 276, 26 Am. Bankr. Rep. 57; Lovell v. Isidore Newman & Son, 188 Fed. 534, 26 Am. Bankr. Rep. 660.

[357] In re Kaplan & Myers, 241 Fed. 459, 154 C. C. A. 291, 39 Am. Bankr. Rep. 367; In re Midland Motor Co., 224 Fed. 368, 140 C. C. A. 54, 37 Am. Bankr. Rep. 365; In re Aronson (D. C.) 245 Fed. 207, 40 Am. Bankr. Rep. 177; In re Liebig, 255 Fed. 458, 168 C. C. A. 534, 42 Am. Bankr. Rep. 535; In re Clayton (D. C.) 259 Fed. 911, 43 Am. Bankr. Rep. 687; Darrough v. First Nat. Bank, 56 Okl. 647, 156 Pac. 191; Mound Mines Co. v. Hawthorne, 173 Fed. 882, 97 C. C. A. 394, 23 Am. Bankr. Rep. 242; In re Squier, 165 Fed. 515, 21 Am. Bankr. Rep. 346; In re Pierce, 157 Fed. 757, 19 Am. Bankr. Rep. 664; In re Schloerb, 97 Fed. 326, 3 Am. Bankr. Rep. 224; Keegan v. King, 96 Fed. 758, 3 Am. Bankr. Rep. 79; In re Anderson, 23 Fed. 482; In re Clark, 9 Blatchf. 379, 6 N. B. R. 410, Fed. Cas. No. 2,802; In re Havens, 8 Ben. 309, Fed. Cas. No. 6,230.

which alone has jurisdiction over it. Hence the claimant cannot regain it by means of a writ of replevin,[358] nor by a suit in a state court against the trustee in bankruptcy to establish his title and restrain that officer from selling the property,[359] nor by an attempted exercise of the right of stoppage in transitu.[360] Neither is property so in the possession of the trustee liable to be levied on and taken in execution by a sheriff at the suit of a creditor of the person who claims title thereto as against the bankrupt.[361] Further, it behooves the claimant to act with reasonable promptness in asserting his claims. If he has notice of the proceedings in bankruptcy, but stands silently by while the trustee turns all the property in his hands into cash and pays it out in the form of a dividend to creditors, the claimant will be considered guilty of laches and cannot afterwards present his claim.[362]

§ 354. Property Held by Bankrupt as Trustee.—Property held by a bankrupt by a mere naked legal title, and purely in trust for another, is no part of his estate in bankruptcy and does not pass to his trustee,[363] unless in cases where the trust has been virtually terminated by such acts or conduct on the part of the cestui que trust as would estop him to claim any benefit from it, in which event the estoppel is equally available to the trustee in bankruptcy as it would have been to the bankrupt himself.[364] But while the rule is as above stated, still the trustee in bankruptcy will have the right to claim for the benefit of creditors

[358] In re Schloerb, 97 Fed. 326, 3 Am. Bankr. Rep. 224; In re Clark, 9 Blatchf. 379, 6 N. B. R. 410, Fed. Cas. No. 2,802; Erb v. Perkins, 32 Ark. 428. Compare Leighton v. Harwood, 111 Mass. 67, 15 Am. Rep. 4, 12 N. B. R. 360. And see Kennedy v. Strong, 10 Johns. (N. Y.) 289; In re Wellmade Gas Mantel Co. (D. C.) 230 Fed. 502. 36 Am. Bankr. Rep. 354.

[359] Keegan v. King, 96 Fed. 758, 3 Am. Bankr. Rep. 79. See In re Litchfield, 13 Fed. 863.

[360] In re Allen, 178 Fed. 879, 24 Am. Bankr. Rep. 574. See In re Arctic Stores (D. C.) 258 Fed. 688, 43 Am. Bankr. Rep. 543.

[361] In re Clark, 9 Blatchf. 379, 6 N. B. R. 410, Fed. Cas. No. 2,802. See Hill v. Fleming, 39 Ga. 662.

[362] Claflin Co. v. Eason, 1 Nat. Bankr. News, 360; In re Ennis, 198 Fed. 381, 117 C. C. A. 257.

[363] Lowell v. International Trust Co., 158 Fed. 781, 86 C. C. A. 137, 19 Am. Bankr. Rep. 853; In re Coffin, 152 Fed. 381, 81 C. C. A. 507, 18 Am. Bankr. Rep. 127; Clark v. Wilson, 53 Miss. 119, 16 N. B. R. 356; Welch v. Polley, 177 N. Y. 117, 69 N. E. 279; Butler v. Merchants' Ins. Co., 14 Ala. 777; Starr v. Keefer, 1 MacArthur (D. C.) 166; Pickerell v. Zell, 2 MacArthur (D. C.) 65; Pugh v. Holliday, 3 Ohio St. 284; Bailey v. Wood, 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913A, 950; Blin v. Pierce, 20 Vt. 25; Shryock v. Waggoner, 28 Pa. St. 430; Ludwig v. Highley, 5 Pa. St. 132. Compare Carr v. Gale, 3 Woodb. & M. 38, Fed. Cas. No. 2,435. See Hatch v. Curtin, 154 Fed. 791, 83 C. C. A. 495, 19 Am. Bankr. Rep. 82; Clark v. Snelling, 205 Fed. 240, 123 C. C. A. 430, 30 Am. Bankr. Rep. 50; In re Benz, 218 Fed. 50, 134 C. C. A. 26, 33 Am. Bankr. Rep. 363; City Nat. Bank v. Slocum (C. C. A.) 272 Fed. 11, 47 Am. Bankr. Rep. 47.

[364] In re Coffin, 146 Fed. 181, 16 Am. Bankr. Rep. 682.

any interest which the bankrupt himself had in the subject of the trust, whether by way of compensation for his services or as a part owner or distributee.[365] Where merchandise is by mistake delivered to a factor to whom it was not consigned, and is sold by a warehouseman and the proceeds deposited in bank to the credit of the factor, the money is held in trust for the owner and does not pass to the factor's trustee in bankruptcy.[366] So, where a husband has, by fraud or mistake, been invested with the title to land inherited by his wife, equity will treat him as trustee of the wife, and a court of bankruptcy will not subject the land to the claims of the husband's creditors.[367] So land which the bankrupt holds upon an implied trust for another is not an asset of his estate, although no declaration of trust has been made or recorded.[368] But although one who has given a bond to convey becomes in equity a trustee for the purchaser, yet if he has not received the whole of the purchase money, he is not a mere naked trustee, and his interest in the property will pass to his trustee in bankruptcy.[369]

It is a general rule that persons seeking to recover trust funds which they claim to have traced into the possession of the trustee in bankruptcy of their trustee are under the burden of proving their title, and if the evidence leaves the identification in doubt, that doubt must be resolved in favor of the trustee in bankruptcy.[370] Hence where the subject of the trust is money, the cestui que trust cannot claim reimbursement in full, but must occupy the position of a general creditor, unless he can in some way identify his fund, and he has the burden of clearly tracing his money into some specific fund or property in the possession of the trustee in bankruptcy.[371] And the older cases generally main-

[365] Appling v. Bailey, 44 Ala. 333; Rankin v. Bancroft, 114 Ill. 441, 3 N. E. 97. See Clark v. Snelling, 205 Fed. 240, 30 Am. Bankr. Rep. 50. Where an administratrix, without authority from the probate court, continued the mercantile business of the decedent, purchasing new goods and contracting new debts, all merchandise on hand acquired by her and all accounts accruing to her after her appointment are property of her estate in bankruptcy, as well as the proceeds of accounts made while the business was conducted by her receiver. In re Tietje (D. C.) 253 Fed. 283, 41 Am. Bankr. Rep. 816. And see In re Mitchell (D. C.) 250 Fed. 1003, 41 Am. Bankr. Rep. 528.

[366] In re Woods & Malone, 121 Fed. 599, 9 Am. Bankr. Rep. 615.

[367] In re Anderson, 2 Hughes, 378, 9 N. B. R. 360, Fed. Cas. No. 351. See Arbury v. De Niord (Sup.) 152 N. Y. Supp. 763.

[368] Low v. Welch, 139 Mass. 33, 29 N. E. 216. But compare Putnam v. Southworth, 197 Mass. 270, 83 N. E. 887.

[369] Swepson v. Rouse, 65 N. C. 34, 6 Am. Rep. 735.

[370] Schuyler v. Littlefield, 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. 806, 35 Am. Bankr. Rep. 209.

[371] In re A. D. Matthews' Sons, 238 Fed. 785, 151 C. C. A. 635, 38 Am. Bankr. Rep. 438.

tained the rule that the right to follow a trust fund ceases when the means of identification fail and that this result follows from the mere act of the bankrupt in mingling the trust funds with his own money, as where the whole is deposited to his personal credit in a bank. On this subject it was said: "Money delivered to the bankrupt in trust, if ear-marked or separately kept and retained as trust property, to be delivered or paid over in the same bills or coin in which it was received by the bankrupt, would not pass under such assignment [in bankruptcy], but would be considered as trust property; but an amount of money due from the bankrupt as trustee, and which could not be distinguished from any moneys in his possession or under his control, or which was only due from him because he had used trust funds for his own purposes, or otherwise misapplied them, could not be considered as property held by the bankrupt in trust." [372] But the rule generally applied by the later decisions is that if trust funds have been intermingled with the general funds of the trustee so as to render their identification impossible, still a court of bankruptcy will follow them and decree restitution to the cestui que trust, if the unlawful appropriation of them resulted in increasing the assets of the bankrupt as they come into his trustee's possession, as where the trust money is mingled with the bankrupt's own by being deposited in his name in bank, but the amount of the deposit at all times equals or exceeds the amount of the trust fund.[373] But if, before the date of the bankruptcy, so much of the money on deposit is withdrawn as to leave less in bank than the amount of the trust fund, the cestui que trust cannot establish a lien on the whole or any part of the balance.[374] And if the whole of the money is withdrawn from the bank, his right to claim his specific funds will not be restored by the subsequent deposit of other money obtained from other sources to the credit of the account.[375] And so where the

[372] Hosmer v. Jewett, 6 Ben. 208, Fed. Cas. No. 6,713; Illinois Trust & Sav. Bank v. First Nat. Bank, 21 Blatchf. 275, 15 Fed. 858; In re Vetterlein, 26 Fed. 145; In re Richard, 104 Fed. 792; In re Janeway, 4 N. B. R. 100, Fed. Cas. No. 7,208. See Hotchkiss v. National City Bank, 200 Fed. 287; In re Leigh (D. C.) 208 Fed. 486, 31 Am. Bankr. Rep. 379; Knauth, Nachod & Kuhne v. Lovell (D. C.) 212 Fed. 337, 32 Am. Bankr. Rep. 340.

[373] In re M. E. Dunn & Co., 193 Fed. 212, 28 Am. Bankr. Rep. 127; In re Royea's Estate, 143 Fed. 182, 16 Am. Bankr. Rep. 141; In re Woods & Malone, 121 Fed. 599, 9 Am. Bankr. Rep. 615; In re A. O. Brown & Co., 189 Fed. 432; In re City Bank of Dowagiac, 186 Fed. 250, 25 Am. Bankr. Rep. 236; Ex parte Hobbs, 2 Low. 491, 14 N. B. R. 495, Fed. Cas. No. 6,549; Wuerpel v. Commercial Germania Trust & Sav. Bank, 238 Fed. 269, 151 C. C. A. 285, 38 Am. Bankr. Rep. 223.

[374] In re Mulligan, 116 Fed. 715, 9 Am. Bankr. Rep. 8.

[375] In re M. E. Dunn & Co., 193 Fed. 212, 28 Am. Bankr. Rep. 127; Schuyler v. Littlefield, 232 U. S. 707, 34 Sup. Ct.

bankrupt took the trust funds and added some of his own money and placed the sum in the hands of a broker for investment in stocks, and most of it was lost, the cestui que trust cannot claim a lien on any of the stocks remaining in the hands of the broker and recovered by the trustee in bankruptcy, unless he can prove that they were bought with his money and not with that of the bankrupt.[376]

In a case in which the bankrupt had been engaged in business as a private banker, the following principles were laid down: First, claimants who had deposited funds with him for investment in a particular manner were entitled to subject to their claims a deposit account in the name of the bankrupt, provided they could trace their funds into such deposit, as it appeared that the bankrupt had assumed a fiduciary relation to them and had not carried out his undertaking. Second, claimants who bought from the bankrupt drafts which they used to send funds abroad could not assert a claim against a deposit to the account of the bankrupt merely because the drafts were not paid, where it appeared they obtained the drafts they bargained for and no circumstances of active fraud or deception were shown. Third, where several laid claim to a fluctuating deposit to the account of the bankrupt, on the theory that their funds, which had been impressed with a trust because of his breach of fiduciary relations, were commingled therewith, the several claimants were equitably entitled to an allowable preference in the inverse order of the times of their respective payments into the funds. Fourth, where a number of claimants delivered moneys to the bankrupt for particular investment, and he failed to make the investment, thus violating the fiduciary relation, and deposited the funds to his own account, the claimants were entitled to assert the trust against the deposit only to the extent of the smallest amount such deposit contained subsequent to the commingling.[377]

Where a consolidated corporation periodically declared dividends on its preferred stock, each time depositing in bank in a special fund sufficient money to pay the dividend, such deposit became a trust fund held by it for the stockholders, which did not pass to its trustee in bankruptcy, and in which the stockholders of the consolidating corporations, who had not yet exchanged their stock for that of the new

466, 58 L. Ed. 806, 35 Am. Bankr. Rep. 209; In re A. D. Matthews' Sons, 238 Fed. 785, 151 C. C. A. 635, 38 Am. Bankr. Rep. 438.

[376] In re Mulligan, 116 Fed. 715, 9 Am. Bankr. Rep. 8.

[377] In re A. Bolognesi & Co., 254 Fed. 770, 166 C. C. A. 216, 42 Am. Bankr. Rep. 548.

corporation, but had the right to do so, were entitled to share to the extent of their dividends on making such exchange.[378]

Where a bank (or an individual) advances money to a merchant to enable him to buy or import a stock of goods, and the merchant executes a trust receipt, by which he agrees to hold the goods in trust for the one so advancing the funds and as the latter's property, but with liberty to sell the same in the course of trade, and binding him to pay over the proceeds of such sales as fast as received until the advances are repaid, the title to the goods, before such repayment, does not vest in the merchant in such sense that they will be assets of his estate in bankruptcy, but the cestui que trust will be entitled to reclaim the goods from the trustee in bankruptcy, or their proceeds if sold.[379] And the same rule is applied where, instead of an advance of cash, the goods are directly supplied to the merchant by a manufacture or wholesaler, under the same form of trust receipt.[380]

§ 355. Same; Deposits in Bank.—The doctrine prevails in the federal courts that the relation between a bank and a depositor is simply that of debtor and creditor, and that, in the absence of any agreement to the contrary, deposits are not special but become the property of the bank, which does not occupy the position of a trustee, so that upon its bankruptcy, an ordinary depositor cannot claim to be repaid the amount of his balance but must take his place with all other creditors.[381] There may of course be a form of special deposit, contemplating the return of the identical bills or coin, made for safe-keeping only, under which the deposit would not become the property of the bank,[382] but the mere fact

[378] In re Interborough Consol. Corp. (D. C.) 267 Fed. 914, 46 Am. Bankr. Rep. 203.

[379] In re Cattus, 183 Fed. 733, 106 C. C. A. 171, 26 Am. Bankr. Rep. 348; Charavay & Bodvin v. York Silk Mfg. Co., 170 Fed. 819; In re E. Reboulin Fils & Co., 165 Fed. 245, 21 Am. Bankr. Rep. 296; In re Emerson, Marlow & Co., 199 Fed. 99, 117 C. C. A. 639, 29 Am. Bankr. Rep. 179; In re Boessneck, 232 Fed. 596, 146 C. C. A. 554; In re Bettman-Johnson Co., 250 Fed. 657, 163 C. C. A. 3, 42 Am. Bankr. Rep. 128.

[380] Walter A. Wood Co. v. Eubanks, 169 Fed. 929, 95 C. C. A. 273, 22 Am. Bankr. Rep. 307; Corbitt Buggy Co. v. Ricaud, 169 Fed. 935, 95 C. C. A. 279, 22 Am. Bankr. Rep. 316; In re J. V. Lindsley & Co., 185 Fed. 684, 25 Am. Bankr. Rep. 239; Webster v. Stearns, 75 N. H. 451, 75 Atl. 983. But see Ungewitter v. Von Sachs, 4 Ben. 167, 3 N. B. R. 723, Fed. Cas. No. 14,343.

[381] In re Smith, 15 N. B. R. 459. Fed. Cas. No. 12,990; Bank of Republic v. Millard, 10 Wall. 152, 19 L. Ed. 897; Claflin Co. v. Eason, 1 Nat. Bankr. News, 360.

[382] See In re King, 9 N. B. R. 140. In this case, the creditor claimed to have deposited 72 twenty-dollar gold pieces, as a special deposit, with the bankrupt, who was a banker. It was alleged that this money was sewed up in a belt, with the owner's name attached, and the bankrupt was directed to keep it, deliverable only to the owner or to some person specially authorized by him to receive it. The creditor petitioned to have his debt paid in full out of the general assets. The trustee refused to

that money is deposited for a specific purpose, as, to pay a mortgage note when presented, does not stamp it as a trust fund, or make the banker a fiduciary.[383] And those who deposit money in a bank after it has suspended payment and then resumed business, on the strength of an advertisement by the bank that it will keep the old and new accounts separate, are not entitled to a preference on its subsequent bankruptcy.[384] The rule is substantially the same as to collections made by a bank. A creditor of a bank which collects money for him and fails to pay it over has no priority over other creditors in the bankruptcy of the bank.[385] It may be that a check or note deposited with a bank for collection, and against which the depositor is not allowed to draw until payment, does not become the property of the bank, and may be reclaimed from its trustee in bankruptcy, and it has been so held,[386] but it is otherwise where the note or check is at once passed to the credit of the depositor's general account, especially if the account was then overdrawn.[387] On the same principle, where one bank agrees to become the agent of another, for clearing-house purposes, and in that capacity agrees to pay all the checks of the latter which come to it through the clearing-house, and in pursuance of this arrangement the latter bank sends funds to the former from time to time, which are passed to its credit but not kept separate, the relation of the two banks is simply that of debtor and creditor, and the funds cannot be considered as clothed with a trust, but will, on failure of the bank receiving them, pass to its trustee.[388]

§ 356. Property Held by Bankrupt as Agent or Bailee.—Property in the possession of a bankrupt, which he holds only as agent or bailee for another, does not pass to his trustee.[389] For instance, money received by

pay, stating that no such belt was found, and that he was not able to say whether these particular gold coins were among the gold received as part of the bankrupt's assets. It was held that the creditor could only share pro rata with the other creditors and was not entitled to payment in full.

[383] In re Hosie, 7 N. B. R. 601, Fed. Cas. No. 6,711. But see In re Jarmulowsky, 258 Fed. 231, 169 C. C. A. 297, 43 Am. Bankr. Rep. 536, holding that the trustee in bankruptcy of a private banker cannot retain money given to the bankrupt for transmittal.

[384] In re Mutual Building Fund Society & Dollar Sav. Bank, 2 Hughes, 374, 15 N. B. R. 44, Fed. Cas. No. 9,976.

[385] Bank of Commerce v. Russell, 2 Dill. 215, Fed. Cas. No. 884.

[386] In re Havens, 8 Ben. 309, Fed. Cas. No. 6,230.

[387] In re Bank of Madison, 5 Biss. 515, 9 N. B. R. 184, Fed. Cas. No. 890. See In re Jarmulowsky (C. C. A.) 261 Fed. 779, 44 Am. Bankr. Rep. 432.

[388] Phelan v. Iron Mountain Bank, 4 Dill. 88, 16 N. B. R. 308, Fed. Cas. No. 11,069.

[389] In re Hawley Down-Draft Furnace Co., 238 Fed. 122, 151 C. C. A. 198, 38 Am. Bankr. Rep. 219; In re Wright-Dana Hardware Co., 211 Fed. 908, 128 C. C. A. 286, 31 Am. Bankr. Rep. 764; In re Devon Manor Corporation (D. C.) 257 Fed. 766, 44 Am. Bankr. Rep. 79; L. C. Smith & Bro. Typewriter Co. v. Alleman,

an attorney for his client, and which he kept distinct and separate from his own funds, is no part of his estate in bankruptcy.[390] And so of bonds or certificates of stock or other securities in the hands of a broker for sale for the account of his customer, or the proceeds of such sales if capable of identification,[391] and so also of raw material or unfinished products placed in the hands of the bankrupt for manufacture or completion or for repairs,[392] and of grain stored with a warehouseman, provided it is kept separate or in such a manner as to be capable of identification or separation.[393] So again, a right of action upon a contract made by the bankrupt in his own name, but as agent for an undisclosed principal, in which the bankrupt has no beneficial interest, does not vest in his trustee.[394] But where an agent agrees to be liable to his principal for any damage by fire to the latter's property in his hands, the money due from an insurance company to the agent on account of loss under its policy, is not a trust fund for the benefit of the principal, but a debt due to the agent, which becomes a part of his general estate in bankruptcy.[395]

But the form of contract which the courts of bankruptcy are most frequently called upon to construe, in this connection, is that by which goods are consigned to a factor or agent for their sale, to be sold for the account of the consignor and to remain his property until sold, and the agent to account for the proceeds of sale. This is a perfectly valid form of contract, and it constitutes a bailment and not a conditional sale, and on the bankruptcy of the factor or agent, the principal is entitled to re-

199 Fed. 1, 117 C. C. A. 577, 28 Am. Bankr. Rep. 699; In re Marx Tailoring Co. (D. C.) 196 Fed. 243, 28 Am. Bankr. Rep. 147; Gallaspy v. International Harvester Co., 109 Miss. 904, 67 South. 904. As a condition to the recovery of specific property held by the bankrupt as a bailee, the bailor must pay to the trustee in bankruptcy any sum already paid by the bailee on a contemplated purchase of the property. Goldman v. Shreve (C. C. A.) 263 Fed. 74, 45 Am. Bankr. Rep. 285.

390 Schoolfield's Adm'r v. Rudd, 9 B. Mon. (Ky.) 291.

391 Hamilton v. National Loan Bank, 3 Dill. 230, 18 N. B. R. 97, Fed. Cas. No. 5,987; Voight v. Lewis, 11 Phila. (Pa.) 511, 14 N. B. R. 543, Fed. Cas. No. 16,989. And see, infra, § 357.

392 In re Susquehanna Roofing Co., 173 Fed. 150, 23 Am. Bankr. Rep. 5; Safford v. Burgess, 16 N. B. R. 402, Fed. Cas. No. 12,213; In re Oberhoffer, 9 Ben. 485, 17 N. B. R. 546, Fed. Cas. No. 10,396; Stow v. Yarwood, 20 Ill. 497. But see In re Sassman, 167 Fed. 419, 21 Am. Bankr. Rep. 893; Chisholm v. Eagle Ore Sampling Co., 144 Fed. 670, 75 C. C. A. 472, 16 Am. Bankr. Rep. 423. Compare In re MacDonald, 138 Fed. 463, 14 Am. Bankr. Rep. 797. Where furniture owned by a creditor was at the time of the bankruptcy in the possession of the bankrupt for repairs, which had been partially completed, the creditor may reclaim the furniture on payment of the amount then due for work done thereon. In re Pottier & Stymus Co. (C. C. A.) 262 Fed. 955, 44 Am. Bankr. Rep. 469.

393 Adams v. Meyers, 1 Sawy. 306, 8 N. B. R. 214, Fed. Cas. No. 62. In re Chalmers (D. C.) 206 Fed. 143, 30 Am. Bankr. Rep. 521.

394 Rhoades v. Blackiston, 106 Mass. 334, 8 Am. Rep. 332.

395 David Bradley & Co. v. Brown, 78 Neb. 836, 112 N. W. 331, 13 L. R. A. (N. S.) 152, 126 Am. St. Rep. 647.

claim from the trustee in bankruptcy all of the goods remaining unsold and the proceeds of any sold by the trustee,[396] unless this kind of arrangement is made fraudulent and void as to creditors by some provision of the local statute,[397] or unless the arrangement is not made in good faith but with a fraudulent purpose to cheat other creditors.[398] But irregularities in conducting the business under a contract of factorage do not avoid the contract in bankruptcy so long as no creditor of the bankrupt was misled to his injury.[399] And where coal was delivered to an agent under a contract between the principal and the seller, the fact that a subsequent contract between the principal and the agent, defining the terms of the agency, contained illegal provisions for the control of the agent, does not preclude recovery by the principal of the coal and the proceeds of sale thereof from the agent's trustee in bankruptcy.[400] And although the bankrupt did not advertise himself as an agent, or in any way indicate that he was selling goods on consignment, that fact

[396] Ludvigh v. American Woolen Co., 231 U. S. 522, 34 Sup. Ct. 161, 58 L. Ed. 345, 31 Am. Bankr. Rep. 481; In re Marx Tailoring Co., 196 Fed. 243, 28 Am. Bankr. Rep. 147; In re Smith, 192 Fed. 574, 27 Am. Bankr. Rep. 647; In re Monongahela Distillery Co., 186 Fed. 220; In re Fabian, 151 Fed. 949, 18 Am. Bankr. Rep. 488; In re Smith & Nixon Piano Co., 149 Fed. 111, 79 C. C. A. 53, 17 Am. Bankr. Rep. 636; Franklin v. Stoughton Wagon Co., 168 Fed. 857, 94 C. C. A. 269, 22 Am. Bankr. Rep. 63; Walter A. Wood Mowing & Reaping Mach. Co. v. Vanstory, 171 Fed. 375, 96 C. C. A. 331, 22 Am. Bankr. Rep. 740; In re Galt, 120 Fed. 64, 56 C. C. A. 470, 13 Am. Bankr. Rep. 575; In re Pierce, 157 Fed. 757, 19 Am. Bankr. Rep. 664; In re Bailey, 176 Fed. 628, 23 Am. Bankr. Rep. 876; Price v. Ralston, 2 Dall. (Pa.) 60, 1 L. Ed. 289, 1 Am. Dec. 260; McKey v. Clark, 233 Fed. 928, 147 C. C. A. 602, 37 Am. Bankr. Rep. 699; Healey v. Boston Batavia Rubber Co. (D. C.) 268 Fed. 75, 45 Am. Bankr. Rep. 727; In re King (C. C. A.) 262 Fed. 318, 45 Am. Bankr. Rep. 95; In re National Home & Hotel Supply Co. (D. C.) 226 Fed. 840; In re Reeves (D. C.) 227 Fed. 711, 36 Am. Bankr. Rep. 130; In re Bondurant Hardware Co. (D. C.) 231 Fed. 247, 37 Am. Bankr. Rep. 308; In re Wright & Barron Drug Co. (D. C.) 237 Fed. 411, 38 Am. Bankr. Rep. 486; General Electric Co. v. Brower, 221 Fed. 597, 137 C. C. A. 321, 34 Am. Bankr. Rep. 642; In re Caldwell Machinery Co. (D. C.) 215 Fed. 428; Thomas v. Field-Brundage Co., 215 Fed. 891, 132 C. C. A. 231; Gray v. A. W. Martin & Co., 18 Ga. App. 460, 89 S. E. 540.

[397] Chesapeake Shoe Co. v. Seldner, 122 Fed. 593, 58 C. C. A. 261, 10 Am. Bankr. Rep. 466. Under Code Va., 1904, § 2877, providing that all property or stock acquired or used in the business of a trader, doing business in his own name and not displaying by a sign the name of any partner or principal, shall be liable for his debts, the trustee in bankruptcy of such a trader takes title to his stock, including goods held on consignment. Virginia Book Co. v. Sites, 254 Fed. 46, 165 C. C. A. 456, 41 Am. Bankr. Rep. 450. But under the law of Georgia, which does not require the recording of consignment contracts, the fact that a bankrupt had in his possession goods held on consignment under an unrecorded contract does not vest the trustee with their ownership. In re Thomas (D. C.) 231 Fed. 513, 36 Am. Bankr. Rep. 600.

[398] In re Cozatsky (D. C.) 216 Fed. 920, 33 Am. Bankr. Rep. 323.

[399] McElwain-Barton Shoe Co. v. Bassett, 231 Fed. 889, 146 C. C. A. 85, 36 Am. Bankr. Rep. 536.

[400] In re H. L. Herbert & Co. (C. C. A.) 263 Fed. 351, 45 Am. Bankr. Rep. 20.

does not affect the rights of the owner who had consigned goods to him for sale.[401]

As to the proceeds of sales made before the bankruptcy, it is held that the consignor is entitled to the possession and benefit of any notes, checks, or specific uncollected debts for goods so sold,[402] and to the cash proceeds of any sale which can be traced and specifically distinguished from the general mass of the agent's property.[403] Under the older rule, however, the principal was not entitled to recover money arising from such sales if it had been inextricably mingled with the general funds of the bankrupt, bearing no ear-mark and not being capable of identification.[404] But the modern rule, applicable to all kinds of trust funds, is now applied to this case, so that, if the proceeds of such sales of the principal's goods have swelled the funds coming to the trustee in bankruptcy, and such funds have at all times equalled or exceeded the amount due to the principal, equity will follow the goods into their proceeds and decree his reimbursement.[405]

But in many cases there is strong ground for suspecting that this kind of arrangement has been resorted to for the precise purpose of protecting the seller or consignor in case of the bankruptcy of the alleged agent or factor. This will not be countenanced. And where the transaction is essentially a sale on credit, though masked as a consignment for sale, the seller will not be entitled to reclaim goods unsold or the proceeds of any sales.[406] Thus it has been said that, to make out a case of agency contract for sale, it must appear that the goods were at all times subject to the owner's control, both as to the selling price and the manner in which the goods should be sold, that there was a strict accounting between the bankrupt and the owner at the periods called for in the contract, giving the names of purchasers and all other details of sales, and, if sales were made otherwise than for cash, that the notes and accounts had either been forwarded to the owner or accounted for by the bankrupt, and held subject to the owner's orders, to be forwarded

401 Taylor v. Fram, 252 Fed. 465, 164 C. C. A. 389, 41 Am. Bankr. Rep. 831.

402 In re McGehee, 166 Fed. 928, 21 Am. Bankr. Rep. 656; Hutchinson v. Reed, 1 Hoff. Ch. (N. Y.) 316; In re Taft, 133 Fed. 511, 66 C. C. A. 385, 13 Am. Bankr. Rep. 417; International Agricultural Corp. v. Sparks (D. C.) 250 Fed. 318, 40 Am. Bankr. Rep. 80.

403 In re Bank of Madison, 5 Biss. 515, 9 N. B. R. 184, Fed. Cas. No. 890; Nutter v. Wheeler, 2 Low. 346, Fed. Cas. No. 10,384.

404 Trecothick v. Austin, 4 Mason, 16, Fed. Cas. No. 14,164; In re Coan & Ten Broeke Mfg. Co., 6 Biss. 315, 12 N. B. R. 203, Fed. Cas. No. 2,915.

405 In re Northrup, 152 Fed. 763, 18 Am. Bankr. Rep. 335; In re Kurtz, 125 Fed. 992, 11 Am. Bankr. Rep. 129. And see, supra, § 354.

406 In re Carpenter, 125 Fed. 831, 11 Am. Bankr. Rep. 147; In re Rabenau, 118 Fed. 471, 9 Am. Bankr. Rep. 180; In re Landsberger, 177 Fed. 443, 24 Am. Bankr. Rep. 107; In re Linforth, 4 Sawy. 370, 16 N. B. R. 435, Fed. Cas. No 8,369; In re A. Gaglione & Son, 200 Fed. 81, 28 Am. Bankr. Rep. 694.

on demand.[407] So where the consignee is at liberty to sell the goods at any price and on any terms he pleases, accounting at a fixed price to the consignor, and is to pay taxes and insurance and is responsible for the loss of the goods, and is to pay for such as remain unsold at a fixed time, he is not an agent or factor, but the contract is one of conditional sale.[408] So if the contract contains no provision for commissions on sales, nor for the return of goods under any circumstances, and they are billed as sold.[409] The determining factor is often the liability of the consignee to buy and pay for all of the goods which may remain unsold at a given time. If this liability is a part of the contract, it is held a sale.[410] But if he has the privilege of returning goods then unsold, it is a contract of factorage.[411] Finally, where a merchant is charged a fixed price for the goods sent to him, including the cases and bottles in which they are contained, but allowed a "rebate" for empty cases and bottles returned, the contract is not one of bailment as to the cases and bottles, but of sale and return, and such as remain in his hands at the time of his bankruptcy are assets of his estate.[412]

§ 357. Money or Collateral in Hands of Bankrupt as Stock-Broker. —Where a stock-broker has in his possession, at the time of his bankruptcy, certificates of stock placed in his hands by a customer but not yet sold, or stock bought for a customer but not yet delivered to him, he holds the same as an agent or bailee, and the stock may be reclaimed by the owner from his trustee in bankruptcy.[413] And if the bankrupt had a larger quantity of that particular stock on hand at the time of his failure, it will be presumed that part of it was the stock belonging to such customer.[414] If the broker had bought various lots of stock in the same corporation for various customers, but had not delivered any of it, and it is found that, at the time of his bankruptcy, he had not enough of that particular stock in his possession to cover all of his customers who were "long" of it at that time, such customers are

407 In re Agnew, 178 Fed. 478, 23 Am. Bankr. Rep. 360; Taylor v. Fram (D. C.) 243 Fed. 733, 40 Am. Bankr. Rep. 377.

408 In re Rabenau, 118 Fed. 471, 9 Am. Bankr. Rep. 180; In re Wells, 140 Fed. 752, 15 Am. Bankr. Rep. 419; Miller Rubber Co. v. Citizens' Trust & Sav. Bank, 233 Fed. 488, 147 C. C. A. 374, 37 Am. Bankr. Rep. 542.

409 In re Martin-Vernon Music Co., 132 Fed. 983, 13 Am. Bankr. Rep. 276.

410 Parlett v. Blake, 188 Fed. 200, 110 C. C. A. 72, 26 Am. Bankr. Rep. 25. See Bransford v. Regal Shoe Co., 237 Fed. 67, 150 C. C. A. 269, 38 Am. Bankr. Rep. 450.

411 Ludvigh v. American Woolen Co., 188 Fed. 30, 110 C. C. A. 180; In re Larkin & Metcalf, 202 Fed. 572.

412 In re Allen, 183 Fed. 172, 25 Am. Bankr. Rep. 722.

413 In re James Carothers & Co., 182 Fed. 501.

414 In re Graff, 117 Fed. 343, 8 Am. Bankr. Rep. 744; Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047, 30 Am. Bankr. Rep. 266. And see Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981, 19 Am. Bankr. Rep. 717; Sexton v. Kessler & Co., 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995, 28 Am. Bankr. Rep. 85.

entitled to have his holdings of that stock divided among them pro rata.[415] If the broker had bought stock for a customer, but instead of delivering it he converted it to his own use and sold it, still, if he has in his possession at the time of his bankruptcy an equal or greater amount of the same stock, not specifically identified as belonging to any one else, the customer may claim and receive the number of shares originally bought for him, to the exclusion of general creditors. "It is unnecessary for a customer, where shares of stock of the same kind are in the hands of a broker, being held to satisfy his claims, to be able to put his finger upon the identical certificates of stock purchased for him. It is enough that the broker has shares of the same kind which are legally subject to the demand of the customer. And in this respect the trustee in bankruptcy is in the same position as the broker."[416] The same principle applies where there are several customers claiming stock of the same kind. But if the broker had converted a part of the stock held for various customers, leaving unconverted a certain amount of similar stock, there is no presumption that he selected the stock of margin customers for conversion, leaving untouched the stock of cash customers.[417]

A deposit of securities with a broker by a customer as margin, and as security against losses in stock transactions, under an agreement which does not contemplate a sale or disposition of such securities by the broker except in the event of losses, constitutes a pledge and does not create the relation of debtor and creditor, and where the securities have not been sold by the broker to meet marginal requirements prior to his bankuptcy, they may be recovered by the pledgor from the bankrupt's trustee.[418] And the court should not require him to make good losses for which he would have been liable, if the stocks pretended to have been bought for him had really been bought and carried, as a condition to his

[415] Duel v. Hollins, 241 U. S. 523, 36 Sup. Ct. 615, 60 L. Ed. 1143, 37 Am. Bankr. Rep. 1; Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047, 30 Am. Bankr. Rep. 266; In re Pierson, 238 Fed. 142, 151 C. C. A. 218, 38 Am. Bankr. Rep. 214; In re H. B. Hollins & Co. (D. C.) 212 Fed. 317. See In re J. C. Wilson & Co. (D. C.) 252 Fed. 631, 42 Am. Bankr. Rep. 350, holding that, though shares of certain stock held by a bankrupt broker are insufficient to satisfy long customers for whom he held such stock, a customer who can identify his stock by certificate number is entitled to reclaim that stock or its proceeds.

[416] Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047, 30 Am. Bankr. Rep. 266, reversing In re Brown, 184 Fed. 454, 106 C. C. A. 536. And see Duel v. Hollins, 241 U. S. 523, 36 Sup. Ct. 615, 60 L. Ed. 1143, 37 Am. Bankr. Rep. 1; In re B. Solomon & Co. (C. C. A.) 268 Fed. 108, 45 Am. Bankr. Rep. 733.

[417] In re J. C. Wilson & Co. (D. C.) 252 Fed. 631, 42 Am. Bankr. Rep. 350.

[418] In re Jacob Berry & Co., 149 Fed. 176, 79 C. C. A. 124, 17 Am. Bankr. Rep. 467, affirmed, Thomas v. Taggart, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845, 19 Am. Bankr. Rep. 710; United Nat. Bank v. Tappan, 33 R. I. 1, 79 Atl. 946; In re T. A. McIntyre & Co. (C. C. A.) 181 Fed. 955, 24 Am. Bankr. Rep. 626; Boston Safe Deposit & Trust Co. v. Adams, 224 Mass. 442, 113 N. E. 277, L. R. A. 1916F, 488.

recovery of the securities deposited as collateral.[419] But a claimant who remitted money to brokers to purchase stocks, which were bought and paid for by the brokers but afterwards converted to their own use, cannot rescind the whole transaction and recover the money so remitted, from the trustee in bankruptcy of the brokers, as a trust fund, although he may follow the proceeds of the stocks, if sold by the brokers, and if such proceeds can be traced into the hands of the trustee.[420] So likewise, where the customer does not remit to the broker the entire price of the stock to be bought for him, but a margin, and the broker buys and carries the stock, the latter holds it as a pledgee, and on his bankruptcy the customer is entitled to the stock on payment of the amount due thereon, or to the surplus realized from its sale by the trustee, to the exclusion of the general creditors.[421] Another problem arises where a broker, having in his possession stock bought for a customer and paid for, or stock placed in his hands as security for a customer's account, but without authority to use or hypothecate the same, pledges it as collateral security for his own debt to a third person. Here the pledgee probably has a lien on the stock for repayment of his advances, but if his debt is satisfied from other sources and the stock surrendered to the broker's trustee in bankruptcy, the customer may then reclaim it, or if the stock remains in the hands of the pledgee, the customer may be subrogated to the rights of the bankrupt and so recover it.[422] But in order to do this, the claimant must be able to identify the stock as his own. It is not sufficient for him merely to show that the trustee in bankruptcy has in his hands an equal or greater number of shares of the same kind of stock, recovered by him from third persons to whom they had been pledged by the bankrupt. In addition, he must be able to trace his own stock, or to show, at least with a reasonable degree of certainty, that some portion of the stock in the trustee's hands is the identical stock which belonged to him and which the bankrupt wrongfully hypothecat-

[419] In re Ennis, 187 Fed. 726, 109 C. C. A. 474.

[420] In re Brown, 175 Fed. 769, 99 C. C. A. 345, 23 Am. Bankr. Rep. 423; In re A. O. Brown & Co., 185 Fed. 972. The trustee in bankruptcy of a broker acquires no right to money delivered to the broker to be applied on payment for stock which the broker never secured, but merely ordered from another broker and the next day sold. In re Wettengel, 238 Fed. 798, 151 C. C. A. 648, 38 Am. Bankr. Rep. 444.

[421] Kean v. Dickinson, 152 Fed. 1022, 82 C. C. A. 667; In re Bolling, 147 Fed. 786, 17 Am. Bankr. Rep. 399.

[422] In re T. A. McIntyre & Co., 189 Fed. 46, 110 C. C. A. 610, 26 Am. Bankr. Rep. 771; In re Ennis, 187 Fed. 720, 109 C. C. A. 468; In re A. O. Brown & Co., 183 Fed. 861, 25 Am. Bankr. Rep. 800; In re Meadows, Williams & Co., 173 Fed. 694, 23 Am. Bankr. Rep. 124; In re Amy (C. C. A.) 263 Fed. 8, 45 Am. Bankr. Rep. 15. Owners of securities in the hands of bankrupts, who were brokers, which had been wrongfully pledged as collateral for a bank loan, and were sold by the bank, were held subrogated to the bank's right of set-off with respect to a general balance to the credit of the bankrupts in their deposit account. In

ed, or represents its proceeds.[423] Where a bankrupt has pledged his own securities and the securities of various of his customers, his own securities are to be applied first to the payment of the sum for which they were pledged, then those of his customers rightfully pledged, and lastly those of his customers wrongfully pledged.[424] And where a broker converts a portion of the long stock of a customer trading on margin, and the latter, with notice of the conversion, allows the broker to remain in possession of his unconverted stock, which is hypothecated and upon the broker's bankruptcy sold by the pledgee, the customer's claim, no matter how much the value of the unconverted shares exceeded his debit balance, is inferior to those of customers whose stock was hypothecated without authority and who can trace such stock or its proceeds.[425] Where stockbrokers made an unauthorized pledge of stock belonging to their customers, part of which the pledgee, upon the bankruptcy of the brokers, sold to satisfy the brokers' indebtedness, a customer whose stock was not sold by the pledgee is no better situated than customers whose stock was sold and can be successfully traced, the former being merely entitled to prorate with the latter.[426]

Where the broker has sold his customer's securities, or they have been sold by a third person to whom he pledged them, the customer may still claim full reimbursement out of the proceeds if he can trace his money into a particular fund, and this can be done—on the doctrine of the commingling of funds—if he can show that the bankrupt broker's balance in bank, or the amount due to him from the party to whom the customer's stock was sold or pledged, has been, at all times since the conversion, equal to or greater than the amount realized on the sale of the customer's securities.[427] In another case, a customer directed the broker to sell certain stock on his account, and, on being advised that the sale had been made, delivered to the broker his certificate for the stock and received in exchange a check which proved to be worthless, and the broker's bankruptcy followed. It was shown that the broker had made a sale of so many shares of the stock as directed by his customer, but

re Leavitt & Grant, 215 Fed. 901, 132 C. C. A. 139, 33 Am. Bankr. Rep. 63.

[423] In re Ennis, 187 Fed. 728, 109 C. C. A. 476; In re T. A. McIntyre & Co. (C. C. A.) 181 Fed. 960, 25 Am. Bankr. Rep. 93.

[424] In re H. B. Hollins & Co., 232 Fed. 124, 146 C. C. A. 316, 36 Am. Bankr. Rep. 698.

[425] In re J. C. Wilson & Co. (D. C.) 252 Fed. 631, 42 Am. Bankr. Rep. 350.

[426] In re J. C. Wilson & Co. (D. C.) 252 Fed. 631, 42 Am. Bankr. Rep. 350. See In re Toole (C. C. A.) 274 Fed. 337, 46 Am. Bankr. Rep. 651.

[427] In re Swift (D. C.) 108 Fed. 212; In re Graff (D. C.) 117 Fed. 343, 8 Am. Bankr. Rep. 744; In re A. O. Brown & Co. (D. C.) 189 Fed. 432; In re Brown, 185 Fed. 766, 107 C. C. A. 656; In re James Carothers & Co. (D. C.) 182 Fed. 501; In re J. C. Wilson & Co. (D. C.) 252 Fed. 631, 42 Am. Bankr. Rep. 350.

had delivered stock of his own and received payment. It was held that the customer had the right to recover the proceeds of his stock from the bankrupt's trustee, if they had not been dissipated, and if they had been, to rescind the delivery and reclaim his stock.[428]

The fact that one who loaned securities to a broker who became bankrupt proved his claim for the value of such securities in the bankruptcy proceedings does not prevent him from reclaiming the actual securities themselves, provided he reserved the right to do so.[429]

§ 358. Property Held Under Contract of Conditional Sale.—Except in so far as the matter may be regulated by a local statute, the rule is that property in the possession of a bankrupt under a contract of conditional sale, the condition not having been performed (as, where he bought under a written contract stipulating that the title should remain in the vendor until the goods were fully paid for), does not vest in the trustee in bankruptcy, and he is not entitled to hold it as against the unpaid vendor.[430] If no payment has been made on the price of the property, the vendor may reclaim it. If it has been paid for in

[428] In re A. O. Brown & Co. (D. C.) 189 Fed. 432.

[429] Robinson v. Roe, 233 Fed. 936, 147 C. C. A. 610, 38 Am. Bankr. Rep. 26.

[430] Smith Wallace Shoe Co. v. Ternes, 235 Fed. 282, 148 C. C. A. 642, 37 Am. Bankr. Rep. 845; In re K. Marks & Co., 222 Fed. 52, 137 C. C. A. 590; In re Seward Dredging Co., 242 Fed. 225, 155 C. C. A. 65, 39 Am. Bankr. Rep. 372; Shook v. Levi, 240 Fed. 121, 153 C. C. A. 157, 39 Am. Bankr. Rep. 549; In re Traunstein (D. C.) 225 Fed. 317, 34 Am. Bankr. Rep. 482; In re American Steel Supply Syndicate (D. C.) 256 Fed. 876, 43 Am. Bankr. Rep. 271; In re Wegman Piano Co. (D. C.) 221 Fed. 128, 34 Am. Bankr. Rep. 490; In re Place (D. C.) 224 Fed. 778, 35 Am. Bankr. Rep. 426; In re I. S. Remsen Mfg. Co. (D. C.) 227 Fed. 207, 35 Am. Bankr. Rep. 195; In re Hamil (D. C.) 236 Fed. 292, 38 Am. Bankr. Rep. 205; In re White's Express Co., 215 Fed. 894, 132 C. C. A. 234, 33 Am. Bankr. Rep. 74; In re Robinson Mach. Co. (D. C.) 268 Fed. 165, 46 Am. Bankr. Rep. 293; Davis v. Crompton, 158 Fed. 735, 85 C. C. A. 633, 20 Am. Bankr. Rep. 53; In re Regealed Ice Co., 191 Fed. 931; In re Gartman, 186 Fed. 349; In re Forse, 182 Fed. 212, 25 Am. Bankr. Rep. 134; In re C. K. Hutchins Co., 179 Fed. 864, 24 Am. Bankr. Rep. 647; In re Pittsburgh Industrial Iron Works, 179 Fed. 151, 25 Am. Bankr. Rep. 221; In re Atlanta News Pub. Co., 160 Fed. 519, 20 Am. Bankr. Rep. 193; Sprague Canning Mach. Co. v. Fuller, 158 Fed. 588, 86 C. C. A. 46, 20 Am. Bankr. Rep. 157; Dunlop v. Mercer, 156 Fed. 545, 19 Am. Bankr. Rep. 361; Rogers v. Whitehouse, 71 Me. 222; Andre v. Murray (Ind.) 101 N. E. 81; Park v. South Bend Chilled Plow Co. (Tex. Civ. App.) 199 S. W. 843; Creamery Package Mfg. Co. v. Horton, 178 App. Div. 467, 165 N. Y. Supp. 257; Toledo Computing Scale Co. v. Johnson, 194 Ill. App. 159; Jennings v. Schwartz, 86 Wash. 202, 149 Pac. 947. Modification of the terms of payment for a machine sold under a conditional sale contract, may not be a waiver of the reservation of title, so as to prevent the seller, on the buyer's bankruptcy, from enforcing the condition. Colonial Trust Co. v. Thorpe, 194 Fed. 390, 114 C. C. A. 308, 27 Am. Bankr. Rep. 451. A seller of property to a bankrupt by a contract of conditional sale, which provided that it should be insured for his benefit, will be entitled to the proceeds of the insurance where the property was burned within four months prior to the bankruptcy, although the bankrupt insured in his own name. In re Zitron, 203 Fed. 79, 30 Am. Bankr. Rep. 172.

part, he has a good and valid lien upon it for the unpaid balance of the purchase money, which the trustee in bankruptcy must recognize.[431] And if it is likely to result in benefit to the estate, the trustee may pay such balance, and thereby become invested with full title to the property.[432] Or the trustee may be ordered to sell the property at public auction, and out of the proceeds pay to the vendor the balance due him on the contract.[433] If the property in question is valuable in the use (such as machinery) and was to have been paid for in monthly instalments called "rent," the vendor cannot recover such contract rentals for the time the property remained in the possession of the trustee pending the determination of his rights, but if the trustee used the property without his consent, he may recover the reasonable value of such use.[434]

The preliminary question whether the contract between the vendor and the bankrupt was one of conditional sale, absolute sale, sale and return, or lease or bailment, is a question of local law, and is to be determined in accordance with the decisions of the highest court of the state,[435] as is also the question of the validity of the contract, assuming it to be one of conditional sale.[436] And where a contract of

[431] In re Bentz (D. C.) 267 Fed. 606, 46 Am. Bankr. Rep. 164; In re New Orleans Milling Co. (D. C.) 263 Fed. 254, 45 Am. Bankr. Rep. 364; Southern Hardware & Supply Co. v. Clark, 201 Fed. 1, 119 C. C. A. 339.

[432] In re Lyon, 7 N. B. R. 182, Fed. Cas. No. 8,644; In re Wegman Piano Co. (D. C.) 221 Fed. 128, 34 Am. Bankr. Rep. 490. See Waterbury Trust Co. v. Weisman, 94 Conn. 210, 108 Atl. 550.

[433] In re Azule Natural Seltzer Water Co., 2 Nat. Bankr. News, 639; Allen v. Whittemore, 8 Ben. 485, 14 N. B. R. 189, Fed. Cas. No. 241.

[434] In re Daterson Pub. Co., 188 Fed. 64, 110 C. C. A. 134, 26 Am. Bankr. Rep. 582. See Haskell v. Merrill, 179 Mass. 120, 60 N. E. 485.

[435] Mishawaka Woolen Mfg. Co. v. Westveer, 191 Fed. 465, 112 C. C. A. 109, 27 Am. Bankr. Rep. 345, citing Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, 13 Am. Bankr. Rep. 437; York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, 15 Am. Bankr. Rep. 633; Bryant v. Swofford, 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997, 22 Am. Bankr. Rep. 111; Dodge v. Norlin, 133 Fed. 363, 66 C. C. A. 425, 13 Am. Bankr. Rep. 176; In re E. M. Newton & Co., 153 Fed. 841, 83 C. C. A. 23, 18 Am. Bankr. Rep. 567; Bradley, Alderson & Co. v. McAfee, 149 Fed. 254, 17 Am. Bankr. Rep. 495; In re Butterwick, 131 Fed. 371, 12 Am. Bankr. Rep. 536; Flanders Motor Co. v. Reed, 220 Fed. 642, 136 C. C. A. 250, 33 Am. Bankr. Rep. 842.

[436] First Nat. Bank v. Guarantee Title & Trust Co., 178 Fed. 187, 101 C. C. A. 507, 24 Am. Bankr. Rep. 330; Davis v. Crompton, 158 Fed. 735, 85 C. C. A. 633, 20 Am. Bankr. Rep. 53; In re Great Western Mfg. Co., 152 Fed. 123, 81 C. C. A. 341, 18 Am. Bankr. Rep. 259; In re Lutz, 197 Fed. 492, 28 Am. Bankr. Rep. 649; In re Osborn, 196 Fed. 257; In re Nelson, 191 Fed. 233, 27 Am. Bankr. Rep. 272; In re Dunn Hardware & Furniture Co., 132 Fed. 719, 13 Am. Bankr. Rep. 147. Where a conditional sale contract provided for the delivery of goods in the Indian Territory, there being no local law therein inhibiting such contracts, the question whether the fact that they were furnished to the buyer for resale in the usual course of business invalidated the contract must be tested in bankruptcy proceedings against the buyer in accordance with the general law. In re Gray, 170 Fed. 638, 21 Am. Bankr. Rep. 375.

conditional sale of personal property is made in one state, but provides for the delivery of the chattels in another state and their use there by the purchaser, it is to be governed, in a contest between the vendor and the trustee in bankruptcy of the vendee, by the law of the latter state, not the former.[437] Next, it is to be observed that the rights of the parties become fixed, so far as regards creditors of the vendee and his trustee in bankruptcy, at the time of the original transaction, and cannot be afterwards changed by their agreement so as to put the vendor in a more favorable position. If the contract was originally one of conditional sale, but the local law would make the reservation of title in the vendor ineffective as against creditors, it cannot be turned into a contract of bailment, or of lease, or of factorage, after the buyer has become insolvent, or especially after he has been adjudged bankrupt.[438] On the other hand, if the seller under a contract of conditional sale sues for the price, obtains judgment, and levies an execution, within four months prior to the purchaser's bankruptcy, he will be held to have waived his reserved title, and he will have no greater rights in the property than any other execution creditor.[439] It should also be observed in this connection that one claiming property which has passed into the possession of a trustee in bankruptcy, on the ground that the sale to the bankrupt was conditional, has the burden of proof.[440] If the trustee has taken possession of the property, it is in the custody of the law, and the bankruptcy court has jurisdiction to determine all questions respecting title, possession, or control. The conditional vendor, in such a case, is an "adverse claimant," and is entitled to a plenary hearing in the bankruptcy court, but only the kind of plenary hearing that will end the situation.[441]

But in many states the laws now provide that a contract of conditional sale, though good between the immediate parties, shall not be valid as against creditors of the purchaser unless reduced to writing and cast in the form of a chattel mortgage, or unless filed or recorded in the proper office, so as to impart notice. Of course if the vendor fully complies with a statutory provision of this kind, it will be effective to preserve his rights as against the purchaser's trustee in bankruptcy.[442]

[437] In re Legg, 96 Fed. 326; In re Gehris-Herbine Co., 188 Fed. 502, 26 Am. Bankr. Rep. 470.

[438] In re Poore, 140 Fed. 786, 15 Am. Bankr. Rep. 407; In re Martin-Vernon Music Co., 132 Fed. 983, 13 Am. Bankr. Rep. 276; In re Rinker, 174 Fed. 490, 23 Am. Bankr. Rep. 62; In re Tweed, 131 Fed. 355, 12 Am. Bankr. Rep. 648.

[439] In re Fitzhugh Hall Amusement Co., 230 Fed. 811, 145 C. C. A. 121, 36 Am. Bankr. Rep. 493.

[440] In re Farmers' Dairy Ass'n (D. C.) 234 Fed. 118, 37 Am. Bankr. Rep. 672.

[441] Story & Clark Piano Co. v. Holmes, 251 Fed. 565, 163 C. C. A. 559, 41 Am. Bankr. Rep. 668.

[442] In re Farmers' Co-operative Co. of Barlow, N. D. (D. C.) 202 Fed. 1005,

But if not, there has been (until recently) much doubt and uncertainty as to his right to reclaim the property from the trustee in bankruptcy. In one line of cases it has been argued that such a contract, not protected by compliance with the statute, is fraudulent and void as against the creditors of the bankrupt, and therefore should be equally void as against their representative, the trustee in bankruptcy; that as it is good between the parties, the bankrupt has an interest or right under it which could have been transferred or levied on; and that it should be held within the terms of the bankruptcy act, providing that "claims which for want of record would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate." For some or all of these reasons the cases referred to held that the reservation of title in the vendor was void as against the trustee in bankruptcy, the state statute not having been complied with, and gave him no right to reclaim the property.[443] But these views have not prevailed. Other courts, following the lead of the Supreme Court of the United States, have held that if the contract was free from actual fraud and good as between the parties, it would be equally good and binding upon the purchaser's trustee in bankruptcy, although not acknowledged or recorded as required by the state law, and whatever might have been the rights of creditors outside of the bankruptcy proceedings, for the reason that a trustee in bankruptcy has no higher or stronger rights in property in the bankrupt's possession than the bankrupt himself.[444] And further, where the state

30 Am. Bankr. Rep. 187; Woods v. Brunswick-Balke-Collender Co., 190 Fed. 935, 111 C. C. A. 569, 27 Am. Bankr. Rep. 172. In re Canuet Lumber Co. (D. C.) 178 Fed. 340.

[443] Liquid Carbonic Co. v. Quick, 182 Fed. 603, 105 C. C. A. 141, 25 Am. Bankr. Rep. 394; In re Faulkner, 181 Fed. 981, 25 Am. Bankr. Rep. 416; In re G. & K. Trunk Co., 176 Fed. 1007, 23 Am. Bankr. Rep. 914; In re Penny & Anderson, 176 Fed. 141, 23 Am. Bankr. Rep. 115; In re Rinker, 174 Fed. 490, 23 Am. Bankr. Rep. 62; Chilberg v. Smith, 174 Fed. 805, 98 C. C. A. 513; McElvain v. Hardesty, 169 Fed. 31, 94 C. C. A. 399, 22 Am. Bankr. Rep. 320; In re Burke, 168 Fed. 994, 22 Am. Bankr. Rep. 69; In re Fish Bros. Wagon Co. (C. C. A.) 164 Fed. 553, 21 Am. Bankr. Rep. 149; In re Burt, 155 Fed. 267, 19 Am. Bankr. Rep. 123; In re Perkins, 155 Fed. 237, 19 Am. Bankr. Rep. 134; In re George O. Hassam & Son, 153 Fed. 932, 18 Am. Bankr. Rep. 745; In re Franklin Lumber Co., 147 Fed. 852, 17 Am. Bankr. Rep. 443; In re Tice, 139 Fed. 52, 15 Am. Bankr. Rep. 97; In re Poore, 139 Fed. 862, 15 Am. Bankr. Rep. 174; In re Ducker, 134 Fed. 43, 67 C. C. A. 117, 13 Am. Bankr. Rep. 760; In re Smith & Shuck, 132 Fed. 301, 13 Am. Bankr. Rep. 103; In re Tweed, 131 Fed. 355, 12 Am. Bankr. Rep. 648; In re Carpenter, 125 Fed. 831, 11 Am. Bankr. Rep. 147; In re Pekin Plow Co., 112 Fed. 308, 50 C. C. A. 257, 7 Am. Bankr. Rep. 369; In re Howland. 109 Fed. 869, 6 Am. Bankr. Rep. 495. In re Legg, 96 Fed. 326, 2 Am. Bankr. Rep. 805; Press Post Printing Co. v. Landon Printing & Pub. Co., 2 Nat. Bankr. News, 774; Logan v. Nebraska Moline Plow Co., 3 Neb. (Unof.) 516, 92 N. W. 129; McFarlan Carriage Co. v. Wells, 99 Mo. App. 641, 74 S. W. 878.

[444] Bryant v. Swofford Bros. Dry Goods Co., 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997, 22 Am. Bankr. Rep. 111;

law provides for the filing of contracts of conditional sale, but makes an unfiled contract of that kind void only as to those creditors who have fastened upon the property by some specific lien, an adjudication in bankruptcy is not the equivalent of a judgment or attachment, so as to operate as a lien in favor of the trustee as against the conditional vendor of property sold to the bankrupt, because of failure to comply with the state law.[445] But this does not apply where actual fraud entered into the arrangement between the parties or where the transaction was merely colorable.[446]

Thus the law stood until 1910, when Congress passed an amendment to the bankruptcy act covering the case in point and probably enacted as a direct consequence of the conflicting decisions above mentioned. It provides that trustees in bankruptcy, "as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon."[447] This amendment was intended to protect the general creditors of a bankrupt against holders of unrecorded mortgages and conditional sales, and since its passage the right of the trustee in bankruptcy to hold and administer the property held by the bankrupt under an unrecorded contract of conditional sale is superior to the right of the seller.[448] But the amendment

Nauman Co. v. Bradshaw, 193 Fed. 350, 113 C. C. A. 274, 27 Am. Bankr. Rep. 565; In re Anson Mercantile Co., 203 Fed. 871; In re Ferguson Contracting Co., 183 Fed. 880; Crucible Steel Co. of America v. Holt, 174 Fed. 127, 98 C. C. A. 101, 23 Am. Bankr. Rep. 302; York Mfg. Co. v. Brewster, 174 Fed. 566, 98 C. C. A. 348, 23 Am. Bankr. Rep. 474; John Deere Plow Co. v. Anderson, 174 Fed. 815, 98 C. C. A. 523, 23 Am. Bankr. Rep. 480; In re Hager, 166 Fed. 972; In re Pickens Mfg. Co., 166 Fed. 585; In re Cavagnaro, 143 Fed. 668, 16 Am. Bankr. Rep. 320; Mishawaka Wooleu Mfg. Co. v. Smith, 158 Fed. 885, 20 Am. Bankr. Rep. 317; In re Pierce, 157 Fed. 755, 19 Am. Bankr. Rep. 662; In re Kellogg, 118 Fed. 1017, 56 C. C. A. 383; In re Hinsdale, 111 Fed. 502, 7 Am. Bankr. Rep. 85; In re Sewell, 111 Fed. 791, 7 Am. Bankr. Rep. 133; Buckwalter Stove Co. v. Stratton, 118 App. Div. 915, 103 N. Y. Supp. 118; Studebaker Bros. Mfg. Co. v. Elsey-Hemphill Carriage Co., 152 Mo. App. 401, 133 S. W. 412; John Deere Plow Co. v. Edgar Farmer Store Co. (Wis.) 143 N. W. 194. In re Superior Drop Forge & Mfg. Co. (D. C.) 208 Fed. 813, 31 Am. Bankr. Rep. 455; In re Terrell, 246 Fed. 743, 159 C. C. A. 45, 40 Am. Bankr. Rep. 713; Mergenthaler Linotype Co. v. Hull, 239 Fed. 26, 152 C. C. A. 76, 39 Am. Bankr. Rep. 187.

[445] York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, 15 Am. Bankr. Rep. 633; Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, 11 Am. Bankr. Rep. 709; In re Brown Wagon Co. (D. C.) 224 Fed. 266, 35 Am. Bankr. Rep. 383; John Deere Plow Co. v. Edgar Farmer Store Co., 154 Wis. 490, 143 N. W. 194. Compare In re Press-Post Printing Co., 134 Fed. 998, 13 Am. Bankr. Rep. 797; Chesapeake Shoe Co. v. Seldner, 122 Fed. 593, 58 C. C. A. 261, 10 Am. Bankr. Rep. 466; In re Fraizer, 117 Fed. 746, 9 Am. Bankr. Rep. 21.

[446] In re Fitzgerald, 188 Fed. 763, 26 Am. Bankr. Rep. 104.

[447] Act Cong. June 25, 1910, 36 Stat. 838, amending Bankruptcy Act 1898, § 47a, cl. 2, by adding the words quoted.

[448] In re Mina (D. C.) 270 Fed. 969, 46 Am. Bankr. Rep. 523; Augusta Grocery Co. v. Southern Moline Plow Co., 213 Fed. 786, 130 C. C. A. 444, 31 Am.

is not retroactive, and does not enable the trustee to invalidate a contract of conditional sale made prior to its passage and otherwise valid.[449] It is also held that the liens of execution creditors on property held by the insolvent judgment debtor under a contract of conditional sale, as they existed when the petition in bankruptcy was filed, cannot be subsequently destroyed so as to prevent the court of bankruptcy from preserving them for the benefit of the estate, by the act of the conditional vendor in retaking the property.[450]

§ 359. Property Held Under Executory and Option Contracts of Sale.—Property delivered to the bankrupt under a contract of sale with reservation of title in the vendor until payments are completed, or under a contract of lease with an option to purchase it on making certain specified payments, the title meanwhile to remain in the lessor or vendor, but which has not been paid for at the time of bankruptcy, does not vest in the trustee, but may be claimed from him by the vendor, or its

Bankr. Rep. 677; Potter Mfg. Co. v. Arthur, 220 Fed. 843, 136 C. C. A. 589, Ann. Cas. 1916A, 1268, 34 Am. Bankr. Rep. 75; Groner v. Babcock Printing Press Mfg. Co. (C. C A.) 267 Fed. 822, 45 Am. Bankr. Rep. 563; In re M. L. B. Sturkey Co. (D. C.) 224 Fed. 251, 35 Am. Bankr. Rep. 371; In re Frankel (D. C.) 225 Fed. 129; In re Kreuger, 199 Fed. 367, 27 Am. Bankr. Rep. 623; In re Dancy Hardware & Furniture Co., 198 Fed. 336, 28 Am. Bankr. Rep. 444; In re Farmers' Supply Co., 196 Fed. 990, 28 Am. Bankr. Rep. 535; In re Nelson, 191 Fed. 233, 27 Am. Bankr. Rep. 272; In re J. S. Appel Suit & Cloak Co., 198 Fed. 322, 28 Am. Bankr. Rep. 818; In re Hartdagen, 189 Fed. 546, 26 Am. Bankr. Rep. 532; In re Calhoun Supply Co., 189 Fed. 537, 26 Am. Bankr. Rep. 528; In re Gehris-Herbine Co., 188 Fed. 502, 26 Am. Bankr. Rep. 470; In re Franklin Lumber Co., 187 Fed. 281, 26 Am. Bankr. Rep. 37; In re Williamsburg Knitting Mill, 190 Fed. 871, 27 Am. Bankr. Rep. 178. See In re Rutland-Perry Co., 205 Fed. 200, 30 Am. Bankr. Rep. 383. The amendatory act confers on the trustee an absolute right to attack the unrecorded lien of a conditional seller, without reference to whether the trustee represents creditors who have in fact acquired liens by legal or equitable proceedings against the bankrupt. In re Bazemore, 189 Fed. 236, 26 Am. Bankr. Rep. 494. But property delivered to a bankrupt under an unrecorded contract of conditional sale, but retaken by the seller prior to the bankruptcy, though within four months, is not recoverable by the trustee, since it never became the bankrupt's property. Hart v. Emmerson-Brantingham Co., 203 Fed. 60, 30 Am. Bankr. Rep. 218. A party seeking to reclaim from a trustee in bankruptcy property conditionally sold to the bankrupt has the burden of showing that there were prior creditors, as to whom the contract was not invalid, and that the claims of subsequent creditors will not exhaust the property. Potter Mfg. Co. v. Arthur, 220 Fed. 843, 136 C. C. A. 589, Ann. Cas. 1916A, 1268, 34 Am. Bankr. Rep. 75. Where a conditional sale contract did not identify the property, and there was no identification of invoices of goods sold as the goods intended to be covered, the contract was void as against the buyer's trustee in bankruptcy exercising the rights of a lien creditor. Meier & Frank Co. v. Sabin, 214 Fed. 231, 130 C. C. A. 605, 32 Am. Bankr. Rep. 595.

[449] Arctic Ice Mach. Co. v. Armstrong County Trust Co., 192 Fed. 114, 112 C. C. A. 458, 27 Am. Bankr. Rep. 562; In re Schneider, 203 Fed. 589, 29 Am. Bankr. Rep. 469.

[450] Rock Island Plow Co. v. Reardon, 222 U. S. 354, 32 Sup. Ct. 164, 56 L. Ed. 231; 27 Am. Bankr. Rep. 492.

proceeds if sold.[451] Or if some of the payments have been made, while others are in default, and the lessor has not attempted to forfeit the contract or retake the property, the trustee in bankruptcy may tender the amount remaining due under the contract and so acquire title to the property.[452] In regard to contracts of sale and return, an essential difference is to be noted between a delivery with an option to purchase and a sale with the privilege of rescinding and returning. "An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case, the title will not pass until the option is determined; in the other, the property passes at once, subject to the right to rescind and return."[453] Hence where goods were delivered to a bankrupt on memorandum, the understanding being that, if he signified his desire to keep them within thirty days after delivery, they should be charged to him, otherwise they should be returned, the contract was one of the first class above mentioned, and the title remained in the seller until the expiration of the buyer's option, so that, on his becoming bankrupt, the seller was entitled to a return of all such goods as had been delivered to the bankrupt within thirty days before the filing of the petition in bankruptcy.[454] On the other hand, where property is delivered to the bankrupt on the agreement that he is to put it into use and test and try it for a limited time, and that he shall have the privilege of returning it if it proves unsatisfactory, we have a contract of the second kind, under which the title passes to the bankrupt on delivery, though subject to be divested if he should elect to return the goods, and therefore the seller cannot reclaim the goods from the trustee but simply becomes a creditor for the price.[455] Again, where a wholesaler sends to a merchant a large assort-

[451] Hauck v. Frey (D. C.) 228 Fed. 779, 37 Am. Bankr. Rep. 350; In re Atlantic Beach Corp. (D. C.) 244 Fed. 828, 40 Am. Bankr. Rep. 514; Colonial Trust Co. v. Thorpe, 194 Fed. 390, 114 C. C. A. 308, 27 Am. Bankr. Rep. 451; In re Kay-Tee Film Exchange (D. C.) 193 Fed. 140; Nylin v. American Trust & Sav. Bank., 166 Fed. 276, 92 C. C. A. 194, 21 Am. Bankr. Rep. 533; Hardcastle v. National Clothing Co., 137 Tenn. 64, 191 S. W. 524.

[452] In re Palatable Distilled Water Co., 154 Fed. 531, 18 Am. Bankr. Rep. 833; Breakstone v. Buffalo Foundry & Machine Co., 167 App. Div. 62, 152 N. Y. Supp. 394. Where a seller had the right to reclaim goods sold, for nonpayment of the price, at a time prior to the four months before the buyer's bankruptcy, but did not exercise it, he has no rights as against the trustee in bankruptcy. McCabe v. Northampton Trust Co., 60 Pa. Super. Ct. 18.

[453] Hunt v. Wyman, 100 Mass. 198, quoted with approbation in Sturm v. Baker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093, and in Guss v. Nelson, 200 U. S. 302, 26 Sup. Ct. 260, 50 L. Ed. 489.

[454] In re Schindler, 158 Fed. 458, 19 Am. Bankr. Rep. 800. But see In re Miller & Brown, 135 Fed. 868, 14 Am. Bankr. Rep. 439.

[455] In re Landis, 151 Fed. 896, 18 Am. Bankr. Rep. 483. But compare In re Froelich Rubber Refining Co., 139 Fed. 201, 15 Am. Bankr. Rep. 72.

ment of goods of a certain line, and the merchant selects those which he wishes to keep and places them in his stock, but keeps the rest separate, in their original packages, and marks them to be returned, the transaction, so far as regards the goods to be returned, is not a "sale and return," but a bailment, and those goods may be reclaimed by the seller from the merchant's trustee in bankruptcy.[456] So also the vendor is entitled to reclaim property which was to be paid for when installed, but which had not been installed nor even unpacked when bankruptcy intervened, as the title had not passed from him.[457] And again, if the bankrupt wrongfully gets possession of property, which was not to be delivered to him until paid for, and mingles it with his own goods of like kind, the seller will be entitled to recover from the trustee in bankruptcy the value of so much of his property as came into the trustee's hands.[458] But not so, where the goods are delivered to the purchaser to be sold by him in the usual course of his business, and the seller attempts to reserve title until payment with the right to take possession at any time, such a contract being fraudulent and void as against purchasers or creditors.[459] On a similar principle, the trustee acquires no title to land, the contract for which the bankrupt has forfeited before the bankruptcy, for failure of performance on his part.[460]

It should be remarked that the application to particular cases of these general rules may depend upon local statutes. For it is the state law which governs in determining the question whether the title to chattels passed to the bankrupt or remained in the seller; and where, for instance, under the state law, a seller's reservation of title was good as against the bankrupt and his creditors, it will be good against the trustee in bankruptcy.[461] But where a seller in one state delivers goods to a buyer in another state, the title thereto, as between the seller and the trustee in bankruptcy of the buyer, is governed by the laws of the state of the buyer.[462]

[456] In re Miller & Brown, 135 Fed. 871, 14 Am. Bankr. Rep. 443; In re Handy (D. C.) 218 Fed. 956, 33 Am. Bankr. Rep. 666.

[457] Pridmore v. Puffer Mfg. Co., 163 Fed. 496, 20 Am. Bankr. Rep. 851. Where a bankrupt, who had purchased fixtures under a retained title contract, joined to them other fixtures title to which was in him, his act in so doing having been unauthorized, the trustee in bankruptcy cannot sever the fixtures without paying to the seller, who had retained title, such sum as would actually restore his fixtures to their original condition. In re Dana Bros. (D. C.) 250 Fed. 268, 42 Am. Bankr. Rep. 95.

[458] Erie R. Co. v. Dial, 140 Fed. 689, 72 C. C. A. 183, 15 Am. Bankr. Rep. 559.

[459] In re Rasmussen's Estate, 136 Fed. 704, 13 Am. Bankr. Rep. 462; In re Aronson (D. C.) 245 Fed. 207, 40 Am. Bankr. Rep. 177.

[460] Norton v. Hood, 124 U. S. 20, 8 Sup. Ct. 357, 31 L. Ed. 364.

[461] In re Farmers' Dairy Ass'n (D. C.) 234 Fed. 118, 37 Am. Bankr. Rep. 672.

[462] In re O'Callaghan (D. C.) 225 Fed. 133.

§ 360. Property Procured by Bankrupt by Fraud.—If one obtains goods from another on credit, with no intention of paying for them, or at least with no reasonable expectation of being able to pay for them, and the sale was induced by his false and fraudulent representations as to his financial condition, on which the seller relied, or would not have been made but for his fraudulent concealment of his insolvency, then the seller has the right to rescind the sale and recover his property, and this right is not lost by the bankruptcy of the purchaser. Though the latter has a title to the goods, and though this title passes to his trustee in bankruptcy, it is no more than a defeasible title, and if the goods have not lost their identity nor ceased to be distinguishable from others, the seller may follow them into the hands of the trustee in bankruptcy and reclaim and recover them,[463] or their proceeds, if they have been sold by the trustee, provided the money arising from the sale of those particular goods can be distinguished from other funds in his hands.[464] And although the amendment to the bankruptcy act of 1910, which arms the trustee with the rights and powers of a lien creditor, gives him in some ways a stronger title than the bankrupt had, it does not affect this right of reclamation on the part of a defrauded vendor.[465] And although an attachment levied within four months be-

[463] Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993; Montgomery v. Bucyrus Machine Works, 92 U. S. 257, 23 L. Ed. 656; In re Arkin Dress Co., 253 Fed. 926, 166 C. C. A. 26; In re New York Commercial Co., 228 Fed. 120, 142 C. C. A. 526, 35 Am. Bankr. Rep. 779; Petition of Friedlaender, 233 Fed. 250, 147 C. C. A. 256, 37 Am. Bankr. Rep. 7; In re Interocean Transp. Co., 234 Fed. 863, 148 C. C. A. 461, 37 Am. Bankr. Rep. 765; Jones v. H. M. Hobbie Grocery Co., 246 Fed. 431, 158 C. C. A. 495, 40 Am. Bankr. Rep. 415; In re J. F. Growe Const. Co. (D. C.) 256 Fed. 907; In re Underwood & Daniel (D. C.) 215 Fed. 279; Halsey v. Diamond Distilleries Co., 191 Fed. 498, 112 C. C. A. 142, 27 Am. Bankr. Rep. 333; Bloomingdale v. Empire Rubber Mfg. Co., 114 Fed. 1016, 8 Am. Bankr. Rep. 74; In re J. S. Patterson & Co., 125 Fed. 562, 10 Am. Bankr. Rep. 748; In re Salmon, 145 Fed. 649, 16 Am. Bankr. Rep. 623; William Openhym & Sons v. Blake (C. C. A.) 157 Fed. 536, 19 Am. Bankr. Rep. 639; Haywood Co. v. Pittsburgh Industrial Iron Works, 163 Fed. 799, 19 Am. Bankr. Rep. 780; In re McPeck, 2 Nat. Bankr. News, 172; Davis v. Stewart, 8 Fed. 803; Donaldson v. Farwell, 5 Biss. 451, Fed. Cas. No. 3,983; Purviance v. Union Nat. Bank, 8 N. B. R. 447, Fed. Cas. No. 11,475; Goodyear Rubber Co. v. Schreiber, 29 Wash. 94, 69 Pac. 648; Richardson v. Vick, 125 Tenn. 532, 145 S. W. 174.

[464] In re Liebig, 255 Fed. 458, 166 C. C. A. 534, 42 Am. Bankr. Rep. 535; In re Watmough (D. C.) 210 Fed. 539, 32 Am. Bankr. Rep. 59; In re Arkin Dress Co., 253 Fed. 926, 166 C. C. A. 26, 41 Am. Bankr. Rep. 827; Gillespie v. J. C. Piles & Co., 178 Fed. 886, 102 C. C. A. 120, 44 L. R. A. (N. S.) 1, 24 Am. Bankr. Rep. 502; In re Weil (D. C.) 111 Fed. 897, 7 Am. Bankr. Rep. 90. If the proceeds of the sale of the goods cannot be definitely traced into the trustee's hands, the seller must take the status of a general creditor on a quasi contractual obligation. In re Midland Motor Co., 224 Fed. 368, 140 C. C. A. 54, 37 Am. Bankr. Rep. 365.

[465] In re Collins (D. C.) 242 Fed. 975, 39 Am. Bankr. Rep. 510; In re Gold, 210 Fed. 410, 127 C. C. A. 142, 31 Am. Bankr. Rep. 18; In re J. S. Appel Suit & Cloak Co. (D. C.) 198 Fed. 322, 28 Am. Bankr. Rep. 818. But compare In re Whatley

fore bankruptcy is avoided by the adjudication, yet if a creditor takes this method of recovering the goods from his fraudulent vendee, and pursues his process through a long and costly litigation for several years, without interference on the part of the trustee, it will be too late for the latter to have the attachment vacated.[466]

But while the general principle is well settled, as above set forth, the authorities are by no means clear as to the exact elements which must enter into the fraud in order to give the seller the right to rescind. In the first place, some of the decisions hold it necessary to show that the purchaser was insolvent at the time of the purchase,[467] while others maintain that this is not essential where specific false statements as to assets and concealment of debts are brought home to him and are shown to have induced the sale.[468] In the next place, some cases apply the strict rule that the purchaser must have had an actual intention not to pay for the goods when he acquired them,[469] while others hold that no such actual intention is necessary, if he knew at the time that he could not then pay for them and had no reasonable expectation of ever being able to do so.[470] In the next place, there is a general agreement that there must have been either false representations or a fraudulent concealment of material facts.[471] But whereas some of the decisions hold it to be a sufficient fraud if the purchaser merely conceals his insolvency or precarious financial condition, though well aware of it himself,[472] there are also rulings to the contrary.[473]

Bros. (D. C.) 199 Fed. 326, 29 Am. Bankr. Rep. 64.

[466] Jacobson's Assignees v. Sims, 60 Ala. 185.

[467] In re Sol. Aarons & Co., 193 Fed. 646, 113 C. C. A. 514, 28 Am. Bankr. Rep. 399; In re Henry Siegel Co. (D. C.) 223 Fed. 369, 35 Am. Bankr. Rep. 130.

[468] In re Bendall (D. C.) 183 Fed. 816, 25 Am. Bankr. Rep. 698.

[469] In re Sol. Aarons & Co., 193 Fed. 646, 113 C. C. A. 514, 28 Am. Bankr. Rep. 399; In re Levi & Pickard (D. C.) 148 Fed. 654, 16 Am. Bankr. Rep. 756.

[470] In re Hamilton Furniture & Carpet Co. (D. C.) 117 Fed. 774, 9 Am. Bankr. Rep. 65; In re Berg (D. C.) 183 Fed. 885, 25 Am. Bankr. Rep. 170. Where the seller refused to deliver the goods unless the buyer would make a payment upon a previous indebtedness, and the buyer, to obtain the goods, gave a check without having funds in bank to meet it, and then became bankrupt, it was held that the seller was entitled to reclaim the goods, as they had remained in the original boxes unopened, and he had made an immediate demand. Mulroney Mfg. Co. v. Weeks, 185 Iowa, 714, 171 N. W. 36.

[471] Where the evidence shows that the sale of the goods was induced by the satisfactory existing business relations between the seller and buyer, and not by any false statements or concealments by the buyer, the seller cannot reclaim. In re Wilson-Nobles-Barr Co. (D. C.) 256 Fed. 966, 42 Am. Bankr. Rep. 252. Where the bankrupt owned a business

[472] In re Spann, 183 Fed. 819, 25 Am. Bankr. Rep. 551, citing Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993, where however, there was both a concealment of insolvency and an intention not to pay for the goods, the latter being clearly established by the evidence.

[473] In re Davis, 112 Fed. 294, 7 Am. Bankr. Rep. 276; Schroth v. Monarch Fence Co., 229 Fed. 549, 144 C. C. A. 9, 36 Am. Bankr. Rep. 258.

But where the creditor sold goods to the bankrupt in an assumed name, extending credit to the man rather than to the name, it cannot be said that the bankrupt obtained the goods by fraud merely because he did not disclose his true name.[474] And the false representations or statements must have been made to the particular vendor, and it is not enough for him to show a general scheme to defraud creditors.[475] It is, however, agreed on all hands that the seller must have been ignorant of the buyer's insolvency, and also that the concealment or false representations induced him to make the sale on credit. He will have no right to rescind the sale and reclaim the goods if he delivered them with knowledge that the buyer was in failing circumstances,[476] or if he fairly understood the bankrupt's financial condition,[477] or admits that he might have sold the goods if the representations claimed had not been made.[478] Further, the law expects him to keep a reasonably close watch of the credit and financial standing of his customer, although his continuing to rely for a period of three months on financial statements satisfactory when made is not necessarily such negligence as to debar him from rescinding the sale.[479]

In any contest over a matter of this kind between the seller of goods and the trustee in bankruptcy of the buyer, the seller must act with reasonable promptness,[480] and he must sustain the burden of proving by clear and satisfactory evidence all the essential elements of his case, particularly the alleged false representation or concealment, its influence in inducing him to make the sale, and the buyer's knowledge of his own financial condition and the seller's ignorance of it.[481] In a

which was carried on under a trade name and managed by her husband, false statements made by the husband to one from whom he bought goods, that he was the owner and was doing a big business, were held not binding on the bankrupt, and not material, and not such as to entitle the seller to reclaim. In re Bernstein (D. C.) 261 Fed. 719, 44 Am. Bankr. Rep. 359.

[474] In re McUlta, 189 Fed. 250, 26 Am. Bankr. Rep. 480.

[475] In re O'Connor, 112 Fed. 666, 7 Am. Bankr. Rep. 428. But see In re Johnson, 208 Fed. 164, holding that, where goods were sold to a bankrupt on credit, the seller relying entirely on a commercial rating which was based on information given by the bankrupt orally to the commercial agency's representative, which was false, the seller was entitled to reclaim the goods.

[476] In re Sweeney, 168 Fed. 612, 94 C. C. A. 90, 21 Am. Bankr. Rep. 866.

[477] In re Hess, 138 Fed. 954, 14 Am. Bankr. Rep. 635.

[478] In re Davis, 112 Fed. 294, 7 Am. Bankr. Rep. 276.

[479] In re J. S. Patterson & Co., 125 Fed. 562, 10 Am. Bankr. Rep. 748.

[480] In re Mertens, 131 Fed. 507, 12 Am. Bankr. Rep. 698. After the bankruptcy of the buyer who had wrongfully rejected the goods, the seller cannot reconsider his previous refusal of a rescission, and thereby revest the title in himself. Murphy v. John Hofman Co., 157 App. Div. 88, 141 N. Y. Supp. 900.

[481] In re Davis, 112 Fed. 294, 7 Am. Bankr. Rep. 276; In re O'Connor, 112 Fed. 666, 7 Am. Bankr. Rep. 428; In re Stewart, 178 Fed. 463, 24 Am. Bankr.

case where the bankrupts each day overdrew their bank account, which was secured by collateral, and each night made deposits to cover, the fact that money fraudulently obtained from the complainants was from time to time included in such deposits, was held not to impress the surplus fund arising from the sale of the bank collateral after bankruptcy with a trust in favor of the complainants.[482]

Similar principles apply in the opposite case to that which we have been considering, that is, in the case where it is the seller of goods, and not the buyer, who becomes bankrupt. In one such case, the buyer placed an order for goods in reliance upon the statements of the seller as to its ability to fill the order, and gave a check on account. The seller was in fact insolvent at the time, and concealed that fact as well as the truth concerning its supply of goods on hand, and its representations of ability to fill the order were false. It was held that the buyer was entitled to reclaim so much of his money as yet remained in the possession of the seller and could be identified.[483]

The foregoing relates to sales of personal property. As to real estate, it is held that if the bankrupt has been the recipient of a conveyance made in fraud of the creditors of the grantor, although such a conveyance is voidable at the instance of those creditors, yet, as between the grantor and grantee (the bankrupt) it operates to pass title to the latter, and hence it gives him an estate which he must include in his schedule and which will vest in his trustee.[484] Exaggerated statements on behalf of the vendor as to the value of the land sold and the minerals thereon, but not intentionally false, do not defeat a claim against the purchaser's trustee in bankruptcy on the bonds given for the purchase price.[485]

§ 361. Property Sold or Pledged by Bankrupt.—Property actually sold or assigned by the bankrupt, without fraud, before the adjudication, and the title to which has passed, cannot be claimed or recovered by the trustee nor retained by him, as against the purchaser, if it comes into his possession.[486] If the transfer constituted a voidable preference,

Rep. 474; In re Rose, 135 Fed. 888, 14 Am. Bankr. Rep. 345; In re American Knit Goods Mfg. Co., 155 Fed. 906, 19 Am. Bankr. Rep. 212; In re K. Marks & Co., 218 Fed. 453, 134 C. C. A. 253, 33 Am. Bankr. Rep. 275; Schroth v. Monarch Fence Co., 229 Fed. 549, 144 C. C. A. 9, 36 Am. Bankr. Rep. 258.

[482] Knauth v. Knight, 255 Fed. 677, 167 C. C. A. 53, 42 Am. Bankr. Rep. 743.

[483] In re Syracuse Gardens Co. (D. C.) 231 Fed. 284, 37 Am. Bankr. Rep. 354.

[484] In re O'Bannon, 2 N. B. R. 15, Fed. Cas. No. 10,394; Aiken v. Edrington, 15 N. B. R. 271, Fed. Cas. No. 111.

[485] In re Georgia Steel Co. (D. C.) 240 Fed. 473, 39 Am. Bankr. Rep. 426.

[486] Rode & Horn v. Phipps, 195 Fed. 414, 115 C. C. A. 316, 27 Am. Bankr. Rep. 827; Pyle v. Texas Transport &

the remedy of the trustee is by action, but meanwhile the purchaser is entitled to the possession of the property.[487] So also, an adjudication in bankruptcy operates to dissolve the lien of an execution levied within four months prior thereto, but if a sale has been held under an execution and the property delivered to the purchaser at such sale, his title is not affected by the subsequent adjudication of the debtor, and the latter's trustee cannot take the property from him.[488] And the same rule holds good in the case of a sale under a chattel mortgage.[489] But usually the question between a trustee in bankruptcy and one claiming the goods as a purchaser is whether the title had passed at the date of the bankruptcy. This depends on the intention of the parties, to be gathered from the contract, and if not expressly stated, then by inference or presumption from its terms.[490] Very often the determining element will be the fact of delivery or nondelivery.[491] In the case of land, the

Terminal Co., 192 Fed. 725, 27 Am. Bankr. Rep. 225; Lovell v. Isidore Newman & Son, 192 Fed. 753, 27 Am. Bankr. Rep. 746; Scammon v. Bowers, 1 Hask. 496, Fed. Cas. No. 12,431; Green v. Holmes, 125 Mass. 46, note; Gill v. Bell's Knitting Mills, 128 App. Div. 691, 113 N. Y. Supp. 90; Carr v. Phillips, 39 Mich. 319; Hall v. Keating Implement & Machine Co., 33 Tex. Civ. App. 526, 77 S. W. 1054; Eason v. Garrison & Kelly, 36 Tex. Civ. App. 574, 82 S. W. 800. But those acquiring rights to the bankrupt's property subsequent to the adjudication are not bona fide purchasers, at least where they had knowledge of sufficient facts to put them on inquiry. Hull v. Burr, 61 Fla. 625, 55 South. 852. Property of a partnership, contributed by its members to the capital of another partnership, of which they became members, was held to have passed to the new partnership and to be subject to its debts in bankruptcy as against the trustee of the former owner and in members, in Warner v. Grafton Woodworking Co., 210 Fed. 12, 126 C. C. A. 592.

[487] In re Blake, 171 Fed. 298, 22 Am. Bankr. Rep. 612.

[488] In re Weitzel, 191 Fed. 463, 27 Am. Bankr. Rep. 370; Nelson v. Svea Pub. Co., 178 Fed. 136. See Bankruptcy Act 1898, § 67f.

[489] Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816. See Benedict v. Zutes, 88 Misc. Rep. 214, 150 N. Y. Supp. 147; Simpson v. Combes, 107 Wash. 575, 182 Pac. 566.

[490] In re Clairfield Lumber Co., 194 Fed. 181; Gage Lumber Co. v. McEldowney, 207 Fed. 255, 124 C. C. A. 641, 30 Am. Bankr. Rep. 251.

[491] In re National Boat & Engine Co., 198 Fed. 407; Lovell v. H. Hentz & Co., 181 Fed. 555; Allen v. Hollander, 128 Fed. 159, 11 Am. Bankr. Rep. 753; Weeks v. Fowler, 71 N. H. 518, 53 Atl. 543. Whether delivery of property sold by a bankrupt was sufficient to pass the title is to be determined by the law of the state. In re Waite-Robbins Motor Co., 192 Fed. 47, 27 Am. Bankr. Rep. 541. Where a buyer of a crop of hops at a specified price per pound, to be delivered by the seller at a railroad station, inspected, weighed, and accepted a part of the crop at the seller's ranch, before the latter's bankruptcy, it was held that the title had passed as to such part of the crop, as against the seller's trustee in bankruptcy, the provision as to delivery at the railroad station being one which the buyer could waive and had waived. Williamson v. Richardson 205 Fed. 245, 123 C. C. A. 427, 30 Am. Bankr. Rep. 559. Where bankrupts had set aside cotton, and weighed, marked, and shipped it to a steamship for a purchaser's account before their bankruptcy, it was held that there was a delivery whereby it passed beyond the control of the bankrupts. Hiller v. Cornille & De Blonde, 228 Fed. 670, 143 C. C. A. 192, 36 Am. Bankr. Rep. 377. Where purchasers of lumber accepted the same, receipted for the bill of lad-

title may be considered as passing upon the delivery of a deed to the purchaser.[492] In the case of personalty, a symbolical delivery may be sufficient, as, by the delivery of the key to a room where the goods are stored,[493] or the delivery of warehouse receipts.[494] But a conveyance of real property which is intended as security only, although it is in form an absolute deed, is no more than a mortgage, and though it creates an enforceable lien, yet the property itself is assets of the mortgagor's estate in bankruptcy,[495] and even in the case of a mortgage regular in form, the mortgagee is not generally entitled to uncollected rents, but the same must go to the trustee in bankruptcy.[496]

Goods pledged by the bankrupt to secure a debt or claim, supposing that there is nothing fraudulent or preferential in the contract, are equally beyond the reach of the trustee, who can recover them and make them available as assets only on condition of redeeming from the pledge.[497] But the bailment, to have this effect, must be in all respects valid and binding under the laws of the state, and if an actual change of

ing, and directed transfer of the shipment to a third party, to whom they transferred the lumber, it was held that, as title passed to the purchasers, the ultimate buyer became indebted to such purchasers and on bankruptcy the purchasers' trustee was entitled to the proceeds of the sale. Turnbull v. Potlatch Lumber Co. (Sup.) 181 N. Y. Supp. 56.

[492] Mason v. Perkins, 180 Mo. 702, 79 S. W. 683, 103 Am. St. Rep. 591; Congleton v. Schreihofer (N. J. Eq.) 54 Atl. 144. See In re Dr. Riegel Sanitarium Co., 206 Fed. 319, 31 Am. Bankr. Rep. 98. Where the bankrupt delivered a bond and mortgage under an agreement to pass title, creditors have no greater rights than the bankrupt, and the trustee in bankruptcy would have no better position than that of a subsequent lienor to the rights of the bank holding the bond and mortgage. In re Friedman (D. C.) 241 Fed. 603, 39 Am. Bankr. Rep. 777.

[493] In re Cole, 171 Fed. 297, 22 Am. Bankr. Rep. 611.

[494] Taney v. Penn Nat. Bank, 187 Fed. 689, 109 C. C. A. 437, affirming In re Miller Pure Rye Distilling Co., 176 Fed. 606, 23 Am. Bankr. Rep. 890. Jurisdiction in bankruptcy over property in a warehouse, the receipts for which were pledged as security for a loan, depends on whether possession thereof was with the bankrupt or with persons claiming adversely at the time the petition was filed. Chicago Title & Trust Co. v. First Nat. Bank, 174 Ill. App. 339, affirmed, Chicago Title & Trust Co. v. National Storage Co., 260 Ill. 485, 103 N. E. 227.

[495] In re Moore, 146 Fed. 187, 17 Am. Bankr. Rep. 164.

[496] In re Dole, 110 Fed. 926, 7 Am. Bankr. Rep. 21; Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314.

[497] Commercial Nat. Bank v. Hiller, 211 Fed. 337, 128 C. C. A. 16, 32 Am. Bankr. Rep. 236. In re Miller Pure Rye Distilling Co., 214 Fed. 189, 130 C. C. A. 537; Roth v. Smith, 215 Fed. 82, 131 C. C. A. 390; In re Dreuil & Co., 205 Fed. 573, 31 Am. Bankr. Rep. 69; Bank of Brodhead v. Smith, 199 Fed. 703, 118 C. C. A. 141; Lovell v. Isidore Newman & Son, 192 Fed. 753, 113 C. C. A. 39, 27 Am. Bankr. Rep. 746; In re Macauley, 158 Fed. 322, 18 Am. Bankr. Rep. 459; Van Kirk v. Vermont Slate Co., 140 Fed. 38, 15 Am. Bankr. Rep. 239; Bush v. Export Storage Co., 136 Fed. 918, 14 Am. Bankr. Rep. 138; Lamb v. Hall, 147 Cal. 44, 81 Pac. 288; King v. Cram, 185 Mass. 103, 69 N. E. 1049. See Bank of North America v. Penn Motor Car Co., 235 Pa. St. 194, 83 Atl. 622; Martin v. Bankers' Trust Co., 18 Ariz. 55, 156 Pac. 87, Ann. Cas. 1918E, 1240; Bennett v. North Philadelphia Trust Co., 66 Pa. Super. Ct. 261; Griffin v. Smith, 177 Cal. 481, 171 Pac. 92.

possession is necessary to constitute a valid pledge, the claimant must be able to show that this has taken place, or else he cannot hold the goods as against the trustee in bankruptcy of the pledgor.[498] A contract by which a bankrupt agreed that in the event that certain goods which he had sold, and the accounts for which had been assigned to a bank, should be returned, the bankrupt would hold the goods or the proceeds in trust for the bank, and deliver the same on demand, was not, in the absence of such delivery, a valid pledge.[499] But the trustee of a bankrupt corporation, acting for the benefit of its creditors, can have an order for the cancellation of bonds of the corporation and a trust deed securing them, when they are held by one to whom they had been pledged for a debt, that debt having been paid, and the holder claiming to retain them as security for the debt of another corporation, for which they could not legally be held, although no fraud is alleged and the holder is making his claim in good faith.[500]

§ 362. Equitable Rights of Third Persons.—Aside from cases of preference and of fraudulent conveyance, a trustee in bankruptcy takes the property of the bankrupt subject not only to specific liens, but also to equities in favor of third persons, whether arising out of the act of the bankrupt or by operation of law, which are not invalid as to creditors.[501] Thus, for example, one having a claim against a fund by an

498 In re Gebbie & Co., 167 Fed. 609, 21 Am. Bankr. Rep. 694; Fourth Street Nat. Bank v. Millbourne Mills Co.'s Trustee, 172 Fed. 177, 96 C. C. A. 629, 22 Am. Bankr. Rep. 442; In re A. P. Wilson & Co., 176 Fed. 652, 23 Am. Bankr. Rep. 907; Godwin v. Murchison Nat. Bank, 145 N. C. 320, 59 S. E. 154, 17 L. R. A. (N. S.) 935; French v. White, 78 Vt. 89, 62 Atl. 35, 2 L. R. A. (N. S.) 804, 6 Ann. Cas. 479; Goodrich v. Dore, 194 Mass. 493, 80 N. E. 480. See In re Zinner, 202 Fed. 197, 29 Am. Bankr. Rep. 860; In re Shulman, 206 Fed. 129, 30 Am. Bankr. Rep. 238.

499 In re Shulman (D. C.) 206 Fed. 129, 30 Am. Bankr. Rep. 238.

500 First Nat. Bank v. Towner, 239 Fed. 433, 152 C. C. A. 311, 38 Am. Bankr. Rep. 576.

501 Greif Bros. Cooperage Co. v. Mullinix (C. C. A.) 264 Fed. 391, 45 Am. Bankr. Rep. 265; Cohen v. Bacharach, 229 Fed. 385, 143 C. C. A. 505, 36 Am. Bankr. Rep. 166; In re Einstein (D. C.) 245 Fed. 189, 40 Am. Bankr. Rep. 507; In re Cotton (D. C.) 209 Fed. 124, 31 Am. Bankr. Rep. 568; In re Sherwoods, 210 Fed. 754, 127 C. C. A. 304, Ann. Cas. 1916A, 940, 31 Am. Bankr. Rep. 769; Gage Lumber Co. v. McEldowney, 207 Fed. 255, 124 C. C. A. 641, 30 Am. Bankr. Rep. 251; In re M. E. Dunn & Co. (D. C.) 193 Fed. 212, 28 Am. Bankr. Rep. 127; In re McConnell (D. C.) 197 Fed. 438, 28 Am. Bankr. Rep. 659; Goodnough Mercantile & Stock Co. v. Galloway (D. C.) 171 Fed. 940, 22 Am. Bankr. Rep. 803; In re Chantler Cloak & Suit Co. (D. C.) 151 Fed. 952, 18 Am. Bankr. Rep. 498; Crosby v. Ridout, 27 App. D. C. 481; Blake v. Meadows, 225 Mo. 1, 123 S. W. 868, 30 L. R. A. (N. S.) 1; Kimball v. Baker Land & Title Co., 152 Wis. 441, 140 N. W. 47. See Hotchkiss v. National City Bank (D. C.) 200 Fed. 287. The trustee in bankruptcy of one who had contracted with the state to install certain plumbing will be postponed to the rights of a surety for the contractor, which performed the contract on the contractor's default. Derby v. United States Fidelity & Guaranty Co., 87 Or. 34, 169 Pac. 500.

equitable assignment from the bankrupt may assert it against the trustee in bankruptcy.[502] A check on a bank, where the drawer has sufficient funds to meet it, operates as an equitable assignment pro tanto of the money as between the holder of the check and the trustee in bankruptcy of the drawer,[503] unless the statute law of the particular state has established a different rule.[504] A draft does not ordinarily operate as an equitable assignment until it has been accepted, but if the drawer, having no funds to meet it at the time it is presented, afterwards makes a remittance for the specific purpose of taking up the draft, the holder has an equitable claim upon the fund thus set apart.[505] The same is true of an order given by the bankrupt on his attorney, directing the latter to pay the holder out of the proceeds of notes collected by him for the bankrupt,[506] and of an order on the bankrupt's agent to pay the holder out of rents collected by the agent for the bankrupt.[507] But a mere promise to pay out of a particular fund when received, the promisor retaining control of the fund, and no notice being given to the person who is to pay, does not create any lien or charge upon the fund or any equity in it,[508] nor does an order directing an insurance agent to pay the holder part of the proceeds of an insurance loss due to the bankrupt, where no notice is given to the insurance company and the agent has no authority from the company to comply with such an order.[509] And one who holds funds of the bankrupt in the character of a trustee or as security for his own debt, has no power to bind the trustee in bankruptcy by a promise given to a creditor to pay him out of the fund.[510] But where plaintiff, being a member of a stock exchange, is in the habit of executing orders for a brokerage firm not a member, and the firm accepts orders of customers, which it directs plaintiff to execute, such customers, though unknown to plaintiff, sustain the relation to him of debtor and creditor, and he will be required to pay them the funds he may have from their business done on the

[502] In re Hanna (D. C.) 105 Fed. 587, 5 Am. Bankr. Rep. 127; Andrews Electric, Inc. v. St. Alphonse Catholic Total Abstinence Soc., 233 Mass. 20, 123 N. E. 103. See In re Stiger (D. C.) 202 Fed. 791.

[503] First Nat. Bank v. Coates (C. C.) 8 Fed. 540, 3 McCrary, 9; Fourth Nat. Bank v. City Nat. Bank, 68 Ill. 398, 10 N. B. R. 44.

[504] In re Grive, 151 Fed. 711, 18 Am. Bankr. Rep. 202.

[505] Dickey v. Harmon, 1 Cranch, C. C. 201, Fed. Cas. No. 3,894; Seligman v. Wells, 17 Blatchf. 410, 1 Fed. 302.

[506] In re Smith, 16 N. B. R. 399, Fed. Cas. No. 12,992.

[507] In re Oliver, 132 Fed. 588, 12 Am. Bankr. Rep. 694.

[508] Ex parte Tremont Nail Co., 16 N. B. R. 448, Fed. Cas. No. 14,168.

[509] In re The Leader, 190 Fed. 624, 26 Bankr. Rep. 668.

[510] In re Ballantine, 186 Fed. 91, 109 C. C. A. 203, 26 Am. Bankr. Rep. 275. See In re Kessler & Co., 165 Fed. 508, 21 Am. Bankr. Rep. 583.

firm's orders, before he pays anything to the firm's trustee in bankruptcy.[511]

An equitable right or claim in favor of a third person may also grow out of circumstances which would raise an estoppel against the bankrupt to claim particular property as his own. Generally, such an estoppel will be equally effective against the trustee in bankruptcy.[512] And conversely, the trustee may claim an estoppel against one who fails to assert his claims at the proper season, provided that positive and clear loss has resulted.[513] But the advantage derived from a mistake made by a bankrupt when reducing to writing a contract made by him, is not an asset in the hands of his trustee, for the latter is not a bona fide purchaser for value in such sense as to bar the reformation of the contract in equity.[514] But on the other hand, circumstances under which a court of equity might permit a rescission of a contract of sale, on the ground of mistake, where the parties could be restored to their original position, may not warrant such relief after the purchaser has become bankrupt and the rights of creditors have intervened, and especially where the specific property cannot be restored.[515]

Real property of a bankrupt, which was intended to be covered by a mortgage, but which was not sufficiently described therein to give the trustee notice of the fact, passes to the trustee, especially since the amendment of 1910 to the Bankruptcy Act, which gives him the rights, remedies, and powers, of a creditor holding a lien.[516] But a receiver in bankruptcy acquires no specific lien on property of the bankrupt consisting in deposits in a bank which will prevent the bank from setting off against the deposits, after the adjudication, notes due to it which had not matured when the receiver was appointed.[517]

[511] Doucette v. Baldwin, 194 Mass. 131, 80 N. E. 444.

[512] Aldine Trust Co. v. Smith, 182 Fed. 449, 104 C. C. A. 556, 25 Am. Bankr. Rep. 608. Where officers and stockholders of a corporation in effect ratify irregular payments by a corporate officer of his individual indebtedness with checks drawn directly upon the corporation, by remaining silent and thus preventing the creditor from proceeding against the corporate officer, the trustee in bankruptcy of the corporation cannot contend that the officer was not authorized to draw such checks. Atherton v. Beaman (D. C.) 256 Fed. 871, 42 Am. Bankr. Rep. 631. Where two persons purchase property, each paying part of the purchase money, and title is taken in the name of one, the trustee in bankruptcy of the legal owner cannot claim a greater interest than the bankrupt actually had. Jones v. Dugan, 124 Md. 346, 92 Atl. 775.

[513] In re Loll, 162 Fed. 79, 20 Am. Bankr. Rep. 548.

[514] Zartman v. First Nat. Bank, 216 U. S. 134, 30 Sup. Ct. 368, 54 L. Ed. 418, 23 Am. Bankr. Rep. 635.

[515] In re American Knit Goods Mfg. Co., 155 Fed. 906, 19 Am. Bankr. Rep. 212.

[516] In re Scruggs Bros. (D. C.) 252 Fed. 322, 40 Am. Bankr. Rep. 543.

[517] De Long v. Mechanics & Metals Nat. Bank, 168 App. Div. 525, 153 N. Y. Supp. 1010.

CHAPTER XX

EFFECT OF BANKRUPTCY ON EXISTING LIENS

§ 363. **Statutory Provisions.**—The sixty-seventh section of the bankruptcy act provides, in clause "c," that "a lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person, the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the es-

tate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened." Later in the same section it is provided (clause "f") that "all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien, shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate; and thereupon the same shall pass to and may be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as may be necessary to carry the purposes of this section into effect; Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Although the latter of these two provisions is in terms confined to a person "against" whom a petition in bankruptcy is filed, yet in view of the provision of the first section of the statute that "a person against whom a petition has been filed shall include a person who has filed a voluntary petition," it is held that the provision as to liens applies to cases of voluntary bankruptcy as well as to involuntary cases.[1] And although it may apply to proceedings on debts contracted before the pas-

[1] In re Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145; In re Dobson, 98 Fed. 86, 3 Am. Bankr. Rep. 420; In re Beals, 116 Fed. 530, 8 Am. Bankr. Rep. 639; In re Vaughan, 97 Fed. 560, 3 Am. Bankr. Rep. 362; In re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815; In re Rhoads, 98 Fed. 399, 3 Am. Bankr. Rep. 380; In re McCartney, 109 Fed. 621, 6 Am. Bankr. Rep. 367; Gabriel v. Tonner, 138 Cal. 63, 70 Pac. 1021; McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433; Jones v. Stevens, 94 Me. 582, 48 Atl. 170; Stickney & Babcock Coal Co. v. Goodwin, 95 Me. 246, 49 Atl. 1039, 85 Am. St. Rep. 408; Brown v. Case, 180 Mass. 45, 61 N. E. 279; Cavanaugh v. Fenley, 94 Minn. 505, 103 N. W. 711, 110 Am. St. Rep. 382; National Bank & Loan Co. v. Spencer, 53 App. Div. 547, 65 N. Y. Supp. 1001; Ford v. Henderson, 91 Or. 701, 178 Pac. 381, 179 Pac. 558; Wallace v. Camp, 200 Pa. St. 220, 49 Atl. 942; Mencke v. Rosenberg, 202 Pa. St. 131, 51 Atl. 767, 90 Am. St. Rep. 618; Rothermel v. Moyer, 24 Pa. Super. Ct. 325; Gardiner v. Ross, 19 S. Dak. 497, 104 N. W. 220; Farrell v. W. B. Lockett & Co., 115 Tenn. 494, 91 S. W. 209. Contra, In re De Lue, 91 Fed. 510, 1 Am. Bankr. Rep. 387; In re O'Connor, 95 Fed. 943; In re Easley, 93 Fed. 419, 1 Am. Bankr. Rep. 715. And see In re Kemp, 101 Fed. 689, 4 Am. Bankr. Rep. 242.

sage of the law, yet it is not for that reason objectionable as impairing the obligation of contracts, since it affects only the remedy on the contract, and not the contract itself.[2] This provision is not intended solely for effect in the courts of bankruptcy, but it is equally binding upon the courts of the states,[3] and it overrides and is superior to all state laws on the same subject.[4]

No one can fail to notice that the two clauses of the act which we have quoted above, clauses "c" and "f" of the sixty-seventh section, are to a certain extent duplicates of each other, and yet sufficiently unlike to introduce the greatest confusion into the law if both are to have equal authority. This state of affairs is accounted for by the fact that the one clause was contained in the bill as originally passed by the House of Representatives, and the other in the bill as originally passed by the Senate, and both were retained by the conference committee which settled the terms of the statute in its present form, and consequently passed by both houses without adverting to the conflict between them. It has sometimes been thought that the particular or special provisions in clause "c" are to be taken as exceptions to the general provisions of clause "f." [5] But the courts are now agreed that the two clauses are absolutely repugnant and irreconcilable, and that therefore in any case of conflict between them, clause "c" must give way, and clause "f" must prevail, as being the latest expression of the legislative will.[6] Yet the two clauses must be read together, for the light they may throw on each other, in construing the act as a whole.[7]

Both of these provisions relate to liens obtained through legal proceedings. As to liens created by the act of the parties, or raised by the law without suit, the provisions are that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate," and that "liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act." [8]

[2] In re Rhoads, 98 Fed. 399, 3 Am. Bankr. Rep. 380.

[3] Thompson v. Ragan, 117 Ky. 577, 78 S. W. 485.

[4] Atkinson v. Purdy, Crabbe, 551, Fed. Cas. No. 616.

[5] Ex parte Chase, 62 S. C. 353, 38 S. E. 718.

[6] Cook v. Robinson (C. C. A.) 194 Fed. 785, 28 Am. Bankr. Rep. 182; In re Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145; In re Rhoads, 98 Fed. 399, 3 Am. Bankr. Rep. 380.

[7] Folger v. Putnam (C. C. A.) 194 Fed. 793, 28 Am. Bankr. Rep. 173.

[8] Bankruptcy Act 1898, § 67, clauses "a" and "d."

§ 364. Validity of Liens as Against Trustee.—Except as to the classes of liens expressly declared by the bankruptcy act to be dissolved by an adjudication within four months after they attached, and except also in cases of fraud or attempted preference, the rule is that proceedings in bankruptcy do not interfere with existing valid liens, but the trustee takes the property of the bankrupt subject to all such liens as would have been enforceable against it in the hands of the bankrupt himself.[9] And as the trustee does not occupy the technical position of a "purchaser for value," it is immaterial whether or not he had notice of a given lien, or rather, he is supposed to take with notice.[10] Further, as to liens which are thus protected and preserved, the bankruptcy law makes no distinction between them, as to the manner in which they originated, or whether they are enforceable at law or in equity,[11] but will preserve them all and direct their payment in their relative order of rank and priority,[12] and if the trustee in bankruptcy does not undertake the administration of the property affected, and the lien creditor does not prove his debt in the bankruptcy proceeding, the lien will survive that proceeding.[13]

But a lien claimed by a creditor must be valid under the law of the particular state,[14] and free from all fraudulent design as against other

[9] Rode & Horn v. Phipps, 195 Fed. 414, 115 C. C. A. 316, 27 Am. Bankr. Rep. 827; Atchison, T. & S. F. Ry. Co. v. Hurley, 153 Fed. 503, 82 C. C. A. 453, 18 Am. Bankr. Rep. 396; Tucker v. Curtin, 148 Fed. 929, 78 C. C. A. 557, 17 Am. Bankr. Rep. 354; In re Boschelli, 183 Fed. 864, 25 Am. Bankr. Rep. 528; In re Columbia Fireproof Door & Trim Co., 168 Fed. 159, 21 Am. Bankr. Rep. 714; In re Platteville Foundry & Machine Co., 147 Fed. 828, 17 Am. Bankr. Rep. 291; In re Clifford, 136 Fed. 475, 14 Am. Bankr. Rep. 281; Schoenthaler v. Rosskam, 107 Ill. App. 427; Mattocks v. Baker, 2 Fed. 455; Robinson v. Tuttle, 2 Hask. 76, Fed. Cas. No. 11,968; Presbyterian Board, etc., v. Gilbee, 212 Pa. St. 310, 61 Atl. 925. The rule that the filing of a petition in bankruptcy is in effect an attachment and injunction has no application to those holding substantial claims, antedating the filing, to liens upon property of the bankrupt. In re Rathman, 183 Fed. 913, 106 C. C. A. 253, 25 Am. Bankr. Rep. 246. Equitable liens of creditors of a decedent upon land devised by him are not lost by the passing of the legal title of the land to the trustee in bankruptcy of his devisee, for such property passes subject to all equities impressed upon it in the hands of the bankrupt. In re McAusland (D. C.) 235 Fed. 173, 37 Am. Bankr. Rep. 519.

[10] Clason v. Morris, 10 Johns. (N. Y.) 524; State v. Superior Court of King County, 63 Wash. 312, 115 Pac. 307, Ann. Cas. 1913D, 1119.

[11] Reed v. Bullington, 49 Miss. 223, 11 N. B. R. 408.

[12] McLean v. Lafayette Bank, 3 McLean, 587, Fed. Cas. No. 8,888; In re Longfellow, 2 Hask. 221, 17 N. B. R. 27, Fed. Cas. No. 8486. A court of bankruptcy will release from its administration only that property of a bankrupt in which, by reason of conceded and absorbing superior liens and privileges, the trustee has no equity. Roger v. J. B. Levert Co., 237 Fed. 737, 150 C. C. A. 491, 38 Am. Bankr. Rep. 240.

[13] Clanton v. Estes, 77 Ga. 352, 1 S. E. 163.

[14] Hoyt v. Zibell, 259 Fed. 186, 170 C. C. A. 254, 43 Am. Bankr. Rep. 538; In re McAusland (D. C.) 235 Fed. 173, 37 Am. Bankr. Rep. 519; In re United States Lumber Co., 206 Fed. 236, 30 Am. Bankr. Rep. 682; In re Hersey, 171 Fed. 1004, 22 Am. Bankr. Rep. 863; Platt v. Preston, Fed. Cas. No. 11,219. Though

creditors.[15] But where the question is purely between the trustee in bankruptcy and the lien-creditor, the rights of the former are measured by those of the bankrupt. If the contract or arrangement by which the lien was created was binding on the bankrupt, it will be binding on his trustee.[16] But if it was not binding as between the immediate parties,—as, for instance, in the case of an agreement for a lien on personal property, but without change of possession,—it will not affect the property in the hands of the trustee.[17] But if the circumstances were such that the bankrupt would be estopped to take advantage of a defect or irregularity, the estoppel may also be set up against his trustee.[18] Thus, where a corporation, before becoming bankrupt, had given a mortgage on its property, but without complying with the state law requiring such a mortgage to be authorized by a vote of the stockholders in meeting, it was held that its trustee in bankruptcy could not take advantage of the defect, in view of the fact that the courts of the state had construed that provision of the statute as being for the exclusive benefit of the stockholders.[19] But the trustee is not so far in privity with the bankrupt as to be prohibited from attacking judgments against him collaterally, as, in the case of a judgment obtained on a debt not due.[20]

Further, it is necessary that the lien should be in full force and vitality at the date of the adjudication. If it has been in any way released or

the rights of a trustee in bankruptcy and those of an assignee in insolvency under a state statute are defined in similar language, yet a state statute making a certain transfer void as against an assignee eo nomine does not make it void as against a trustee in bankruptcy. In re Loveland, 155 Fed. 838, 84 C. C. A. 72, 19 Am. Bankr. Rep. 18.

[15] Ommen v. Talcott, 188 Fed. 401, 112 C. C. A. 239, 26 Am. Bankr. Rep. 689. Where an assignment of accounts by the bankrupt was subject to attack as preferential and fraudulent, a defendant, who had consented to the bankrupt's use in his business of sums of money collected, was held not entitled to an equitable lien for those amounts. Chapman v. Hunt (D. C.) 248 Fed. 160, 41 Am. Bankr. Rep. 482. Where a wife paid seven-eighths of the purchase price of land taken in the name of the husband, who bought goods, giving a note and mortgage to the seller, which borrowed money from a bank, depositing accounts and the note as collateral, and the seller was thereafter declared bankrupt, and the trustee recovered the collateral from the bank, it was held that the trustee's rights were superior to the secret equity of the wife. Gee v. Parks (Tex. Civ. App.) 193 S. W. 767.

[16] In re Greek Mfg. & Enterprising Co. (D. C.) 167 Fed. 424, 21 Am. Bankr. Rep. 717. But see Scandinavian-American Bank v. Sabin, 227 Fed. 579, 142 C. C. A. 211, 36 Am. Bankr. Rep. 151, holding that an agreement under which a creditor claims a lien on property, while good as between the parties, may not be good as against the trustee in bankruptcy, under the 1910 amendment to the Bankruptcy Act, giving the trustee the position of a lien creditor.

[17] In re Faulhaber Stable Co., 170 Fed. 68, 95 C. C. A. 344, 22 Am. Bankr. Rep. 381; Bank of Leavenworth v. Hunt, 11 Wall. 391, 20 L. Ed. 190.

[18] Allen v. Whittemore, 8 Ben. 485, 14 N. B. R. 189, Fed. Cas. No. 241. See In re Jackson Light & Traction Co. (C. C. A.) 269 Fed. 223, 46 Am. Bankr. Rep. 258.

[19] In re V. & M. Lumber Co., 182 Fed. 231; Stuart v. Holt, 198 Ala. 73, 73 South. 390.

[20] Partridge v. Dearborn, 2 Low. 286, 9 N. B. R. 474, Fed. Cas. No. 10,785.

relinquished before that time, it cannot be revived as against the trustee.[21] And after the adjudication it is too late to fasten any lien upon the property of the bankrupt however far the debt or claim may antedate it.[22]

Subject to these conditions, all classes of liens may follow the specific property affected into the hands of a trustee in bankruptcy, such, for instance, as the lien of a state for taxes,[23] the lien of a factor for advances to his principal and for his commissions,[24] the lien of a municipal corporation on a stock of goods belonging to one of its public officers which was purchased wholly or in part with public moneys misappropriated by him,[25] or the lien of the surety on the bond of a bankrupt contractor, against funds remaining due under the contract,[26] or the lien of a private corporation, created by its by-laws, on the stock of each stockholder to cover his indebtedness to the corporation,[27] or the lien created by the filing of a judgment creditor's bill to set aside a fraudulent conveyance and subject the property conveyed to the satisfaction of the judgment, after the service of process thereon,[28] or at any rate after the service of an injunction or the appointment of a receiver.[29] And although a mere personal claim against a bankrupt's estate does not constitute a lien,[30] yet the bankruptcy act will save and protect equitable liens as well as those given by statute or raised by the explicit agreement of the parties, and the court of bankruptcy will recognize a lien of this character wherever a court of equity would do so.[31] Such an equitable lien may arise out of the assignment, as security for a loan, of money to accrue under a con-

[21] Sage v. Wynkoop, 16 N. B. R. 363, Fed. Cas. No. 12,215, affirmed, 104 U. S. 319, 26 L. Ed. 740. But see Crane v. Penny, 2 Fed. 187, as to the right of a trustee in bankruptcy to plead that an execution was dormant at the time of the adjudication.

[22] In re York Silk Mfg. Co., 188 Fed. 735, 26 Am. Bankr. Rep. 650; In re Badenheim, 15 N. B. R. 370, Fed. Cas. No. 716.

[23] In re Brand, 2 Hughes, 334, 3 N. B. R. 324, Fed. Cas. No. 1,809.

[24] Ommen v. Talcott, 188 Fed. 401, 112 C. C. A. 239, 26 Am. Bankr. Rep. 689; In re Roseberry, 8 Biss. 112, 16 N. B. R. 340, Fed. Cas. No. 12,052; Nisbet v. Sigel-Campion Live Stock Commission Co., 21 Colo. App. 494, 123 Pac. 110; Boise v. Talcott (D. C.) 212 Fed. 268, 36 Am. Bankr. Rep. 838.

[25] Smith v. Township of Au Gres, 150 Fed. 257, 17 Am. Bankr. Rep. 745.

[26] Lyttle v. National Surety Co., 43 App. D. C. 136.

[27] In re Dunkerson, 4 Biss. 227, Fed. Cas. No. 4,156; In re Bigelow, 2 Ben. 469, 1 N. B. R. 667, Fed. Cas. No. 1,395.

[28] Bradley v. United Wireless Telegraph Co., 79 N. J. Eq. 458, 81 Atl. 1107; In re Beadle, 5 Sawy. 351, Fed. Cas. No. 1,155. Compare In re Pitts, 9 Fed. 542. And see Blick v. Nimmo, 121 Md. 139, 88 Atl. 116.

[29] In re Smith, Fed. Cas. No. 12,997; Johnson v. Rogers, 15 N. B. R. 1, Fed. Cas. No. 7,408; In re Pemberton (D. C.) 260 Fed. 521, 43 Am. Bankr. Rep. 149; Bradley v. United Wireless Telegraph Co., 83 N. J. Eq. 688, 93 Atl. 1084.

[30] Eason v. Garrison, 36 Tex. Civ. App. 574, 82 S. W. 800; Hotchkiss v. National City Bank, 200 Fed. 287.

[31] In re Plantations Co. (D. C.) 270 Fed. 273, 46 Am. Bankr. Rep. 318; Walton Land & Timber Co. v. Runyan (C. C. A.) 269 Fed. 128, 46 Am. Bankr. Rep. 251; Gage Lumber Co. v. McEldowney (C. C. A.) 207 Fed. 255, 30 Am. Bankr. Rep. 251; In re Hoffman, 199 Fed. 448, 28 Am. Bankr. Rep. 680; Parker v. Bates,

tract,[32] or out of the agreement of the bankrupt to assign specific accounts or funds as security for advances of money made to him.[33] So a purchaser of drafts drawn by the bankrupt on a London bank, which were refused payment because of the intervening bankruptcy, was held entitled to an equitable lien on securities deposited by the bankrupt in New York to protect such drafts, pursuant to an agreement with the drawee.[34] Again, a purchaser of lumber to be manufactured by the bankrupt, having made large advances thereon, was held to have an equitable lien on lumber sawed and piled in the bankrupt's yards at the time the bankruptcy occurred, and which was intended to be applied on the contract, the lien being enforceable against the bankrupt's trustee.[35] And so, as against the trustee in bankruptcy, one who had made loans to the bankrupt, secured by instruments representing the grain handled by it, which instruments, more than four months before the adjudication, were taken up and replaced by a single receipt covering grain in various elevators in several states, but which receipt did not comply with the state laws governing warehouse receipts, was held entitled to an equitable lien.[36] On the same principle, where a mortgagor, after having paid a part of the mortgage debt, borrowed further sums from the mortgagee, and indorsements were made on the mortgage note to the effect that such sums should be added to the amount previously remaining due thereon, it was held that the mortgage was a valid lien in equity for the full amount as so increased, as against the mortgagor's trustee in bankruptcy.[37] So, an equitable lien on personal property may be created by a verbal agreement, provided the intention is clear to charge some particu-

203 Fed. 294, 30 Am. Bankr. Rep. 198; Atchison, T. & S. F. Ry. Co. v. Hurley, 153 Fed. 503, 82 C. C. A. 453, 18 Am. Bankr. Rep. 396; Smith v. Township of Au Gres (C. C. A.) 150 Fed. 257, 17 Am. Bankr. Rep. 745; Hanson v. W. L. Blake & Co., 155 Fed. 342, 19 Am. Bankr. Rep. 325; In re J. F. Grandy & Son, 146 Fed. 318, 17 Am. Bankr. Rep. 206; In re MacDougall, 175 Fed. 400, 23 Am. Bankr. Rep. 762; Loving v. Moore, 37 App. D. C. 214; Crosby v. Ridout, 27 App. D. C. 481; Kelly-Buckley Co. v. Cohen, 195 Mass. 585, 81 N. E. 297; Smith v. Godwin, 145 N. C. 242, 58 S. E. 1089; Gardner v. Planters' Nat. Bank, 54 Tex. Civ. App. 572, 118 S. W. 1146; Newlin v. McAfee, 64 Ala. 357; Fletcher v. Morey, 2 Story, 555, Fed. Cas. No. 4,864; Ex parte General Assignee, 5 Law Rep. 362, Fed. Cas. No. 5,305. See also the following cases, where the circumstances were held not sufficient to create an equitable lien: Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314; Ross v. Saunders, 123 Fed. 737; Moore v. Green, 145 Fed. 472, 76 C. C. A. 242, 16 Am. Bankr. Rep. 648; In re Teter, 173 Fed. 798, 23 Am. Bankr. Rep. 223; Ernst v. Mechanics' & Metals Nat. Bank (C. C. A.) 201 Fed. 664, 29 Am. Bankr. Rep. 289.

[32] Jennings v. Whitney, 224 Mass. 138, 112 N. E. 655. See Maltbie v. Olds, 88 Conn. 633, 92 Atl. 403.

[33] In re Imperial Textile Co. (D. C.) 239 Fed. 775, 39 Am. Bankr. Rep. 534.

[34] In re Hollins, 215 Fed. 41, 131 C. C. A. 349, L. R. A. 1915B, 438.

[35] Gage Lumber Co. v. McEldowney, 207 Fed. 255, 124 C. C. A. 641, 30 Am. Bankr. Rep. 251.

[36] Britton v. Union Inv. Co. (C. C. A.) 262 Fed. 111, 44 Am. Bankr. Rep. 531.

[37] In re Loveland, 155 Fed. 838, 84 C. C. A. 72.

lar property.[38] Thus, an oral agreement by a mortgagor to insure the property for the benefit of the mortgagee, whose money was used in its purchase, will give the mortgagee an equitable lien on the proceeds of the insurance after the property has been destroyed by fire, as against the mortgagor or his trustee in bankruptcy.[39] It is also a part of this general doctrine that one whose money or property was held by the bankrupt in the capacity of a trustee, and was converted or misappropriated by the latter, the proceeds going to swell his general estate, may claim a lien on the assets of the bankrupt to the extent of his loss, provided he is able to trace his property, either in its original shape or in a substituted form, into the hands of the trustee in bankruptcy.[40] But the equitable rights of claimants as creditors of another corporation, whose property the bankrupt acquired, on the theory that it was transferred subject to a trust ex maleficio, cannot be treated as a valid lien superior to the rights of general creditors of the bankrupt, until, by some legal proceeding, it has become attached to the property of the bankrupt.[41] So, a customer of bankrupt brokers, whose stocks had been loaned by them and sold by the borrowers on their insolvency, is not entitled to subrogation to a lien on the proceeds of the sale of their seat on the stock exchange.[42]

§ 365. Liens Invalid as Against Creditors.—Since a trustee in bankruptcy is the representative of the creditors, no one can successfully assert against him a lien on property of the bankrupt which, though it might have been good as against the bankrupt himself, would be invalid as against his creditors,[43] whether for failure to record the instru-

[38] Goodnough Mercantile & Stock Co. v. Galloway, 156 Fed. 504, 19 Am. Bankr. Rep. 244.

[39] Hanson v. W. L. Blake & Co., 155 Fed. 342, 19 Am. Bankr. Rep. 325; Reilley v. Buffalo German Ins. Co., 86 Misc. Rep. 69, 147 N. Y. Supp. 1086.

[40] In re Brown, 193 Fed. 24, 113 C. C. A. 348; In re A. O. Brown & Co., 193 Fed. 30, 113 C. C. A. 354; Brown Bros. Co. v. Smith Bros. Co. (D. C.) 231 Fed. 475, 37 Am. Bankr. Rep. 30. And see, supra, §§ 354, 357, 362.

[41] In re American Candy Mfg. Co. (D. C.) 248 Fed. 145, 41 Am. Bankr. Rep. 461. But see Brown Bros. Co. v. Smith Bros. Co. (D. C.) 231 Fed. 475, 37 Am. Bankr. Rep. 30, holding that the fact that the particular funds converted by a bankrupt did not reach the trustee does not defeat the lien of the owner of the funds upon the other assets of the bankrupt.

[42] In re Van Schaick & Co., 228 Fed. 465, 143 C. C. A. 47, 37 Am. Bankr. Rep. 59.

[43] First Nat. Bank v. Staake, 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967, 15 Am. Bankr. Rep. 639; McHarg v. Staake, 202 U. S. 150, 26 Sup. Ct. 584, 50 L. Ed. 971, 15 Am. Bankr. Rep. 646; Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779; Burnett v. Frederick (C. C. A.) 263 Fed. 681, 45 Am. Bankr. Rep. 442; Receivers of Virginia Iron, Coal & Coke Co. v. Staake, 133 Fed. 720, 66 C. C. A. 550; In re Thomas, 199 Fed. 214, 232, 29 Am. Bankr. Rep. 945; In re Cramond, 145 Fed. 966, 17 Am. Bankr. Rep. 22; Hanson v. W. L. Blake & Co., 155 Fed. 342, 19 Am. Bankr. Rep. 325; In re I. S. Vickerman & Co., 199 Fed. 589, 29 Am. Bankr. Rep. 298; In re Booth, 98 Fed. 975; Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885;

ment creating the alleged lien[44] or for any other reason,[45] provided it can be shown that general creditors were misled to their injury, or induced to give credit to the bankrupt, by reason of the concealment or other irregularity which they allege as a ground for rejecting the alleged lien.[46] But under the laws of some of the states, as interpreted by their courts, it is not open to any creditor at large to impeach an alleged lien on property of his debtor, on the ground of fraud, concealment, or other ground of invalidity, but only to a creditor who has fastened a specific lien on the particular property or who is armed with some legal process which puts him in a position to enforce his claim directly against the property. A few decisions, particularly under the former bankruptcy act, have held that a trustee in bankruptcy, for this purpose, is in the same position and has the same rights as a creditor holding an execution or attachment.[47] But the decided preponderance of authority was to the effect that the trustee in bankruptcy represents only the general creditors, and hence, if none of them is in position at the time of the adjudication in bankruptcy to attack the validity of an alleged lien, in virtue of having fastened a lien on the property involved or of holding an execution or attachment or other similar process, neither can the trustee in bankruptcy attack it, notwithstanding fraud, concealment, or other cause of impeachment.[48] And if the lien was invalid as to one creditor, but valid as against others, or if only one

Moore v. Young, 4 Biss. 128, Fed. Cas. No. 9,782; In re Wynne, Chase, 227, 4 N. B. R. 23, Fed. Cas. No. 18,117; Odell v. Flood, 8 Ben. 543, Fed. Cas. No. 10,428; Todd v. Townsend, Fed. Cas. No. 14,075; Johnson v. Rogers, 15 N. B. R. 1, Fed. Cas. No. 7,408; Edmondson v. Hyde, 2 Sawy. 205, 7 N. B. R. 1, Fed. Cas. No. 4,285; In re Morrill, 2 Sawy. 357, 8 N. B. R. 117, Fed. Cas. No. 9,821; In re Dunn, 2 Hughes, 169, 11 N. B. R. 270, Fed. Cas. No. 4,172; Benner v. Scandinavian American Bank, 73 Wash. 488, 131 Pac. 1149.

[44] But Bankruptcy Act § 67a applies only to claims which are required by the state law to be recorded. In re Lane Lumber Co., 217 Fed. 550, 133 C. C. A. 402, 33 Am. Bankr. Rep. 491.

[45] Security Warehousing Co. v. Hand, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, 19 Am. Bankr. Rep. 291, affirming 143 Fed. 32, 74 C. C. A. 186, 16 Am. Bankr. Rep. 49. See In re Thackara Mfg. Co., 140 Fed. 126, 15 Am. Bankr. Rep. 258, holding the lien of an outstanding execution invalid because it had been allowed to lie dormant in the hands of the sheriff for several months. So, a creditor who sold machinery to the bankrupt with the understanding that it was to be used in a vessel being built under contract for the United States was held to have no lien upon the machinery, nor upon the contract or its proceeds, because an act of Congress makes void the assignment of any interest in government contracts. In re Waters-Colver Co., 206 Fed. 845, 30 Am. Bankr. Rep. 763.

[46] In re MacDougall, 175 Fed. 400, 23 Am. Bankr. Rep. 762; In re Gerstman, 157 Fed. 549, 19 Am. Bankr. Rep. 145.

[47] Niagara Falls Hydraulic Power & Mfg. Co. v. Schermerhorn, 60 Misc. Rep. 209, 111 N. Y. Supp. 576; In re Werner, 5 Dill. 119, Fed. Cas. No. 17,416; Beers v. Place, 4 N. B. R. 459, Fed. Cas. No. 1,233.

[48] In re New York Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133, 6 Am. Bankr. Rep. 615; In re Burnham, 140 Fed. 926, 15 Am. Bankr. Rep. 548;

creditor was in position to enforce his rights against it, then it was held that the trustee could avoid it only to the extent of the claim of that creditor.[49] But in 1910, in order to obviate the difficulties of this position and strengthen the enforcement of the bankruptcy act, Congress amended the statute by adding a provision that trustees in bankruptcy, "as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." [50] Since this amendment, therefore, the trustee is no longer in the situation of a general creditor, but occupies the more favorable position of a judgment or execution creditor, and can resist the enforcement of any lien which would be invalid as against a creditor of that class.[51]

§ 366. **Mortgages of Real Property.**—A mortgage of real property given by one subsequently adjudged bankrupt will be a valid and enforceable security as against his trustee in bankruptcy provided it was given and accepted in good faith, and not in contemplation of bankruptcy nor in fraud of the bankruptcy act, and for a present consideration, and if it was recorded according to law.[52] If made within four months prior to the filing of the petition in bankruptcy it may be voidable as a preference, but if not, it is not invalid as a lien, unless made with intent to hinder, delay, or defraud creditors, or unless, the debtor being at the time insolvent, the conveyance would be held null and void as to creditors under the laws of the state where the property is situated.[53] When none of these invalidating elements is present, the trustee in bankruptcy takes the property charged with the mortgage, and has no greater interest or higher rights than the bankrupt himself,[54] being entitled only to the equity of redemption or the surplus proceeds of the property,[55] and being bound by the mortgagor's

In re Lausman, 183 Fed. 647, 25 Am. Bankr. Rep. 186; Skilton v. Codington, 86 App. Div. 166, 83 N. Y. Supp. 351.

[49] In re New York Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133, 6 Am. Bankr. Rep. 615.

[50] Act Cong. June 25, 1910, c. 412, § 8, 36 Stat. 840, amending Bankruptcy Act 1898, § 47a.

[51] In re Hammond, 188 Fed. 1020, 26 Am. Bankr. Rep. 336; Sturdivant Bank v. Schade, 195 Fed. 188, 27 Am. Bankr. Rep. 673; In re Empress Pharmacy (D. C.) 237 Fed. 676, 38 Am. Bankr. Rep. 145.

[52] Bankruptcy Act 1898, § 67d.

[53] Bankruptcy Act 1898, § 67e.

[54] In re Stewart, 193 Fed. 791, 27 Am. Bankr. Rep. 529; In re Dunavant, 96 Fed. 542, 3 Am. Bankr. Rep. 41.

[55] Lyall v. Miller, 6 McLean, 482, Fed.

covenant to keep the premises insured for the benefit of the mortgagee.[56] And where a bill is filed by a junior mortgagee for the foreclosure and sale of the equity of redemption, the trustee in bankruptcy of the mortgagor has no standing to object to the order in which the priority of valid and subsisting liens on the mortgaged property is fixed by the decree of foreclosure, as he can get nothing in any event until all valid liens have been satisfied.[57]

Of course, however, the trustee also represents the general creditors, and may and should assert whatever rights they may have as against the holder of the security. Thus, for instance, a bankrupt had executed a trust deed (in the nature of a mortgage) securing certain notes which he made and signed. He delivered the notes to the payee named therein, but after recording the trust deed, he kept possession of it. He then made other notes exactly similar to those first executed, and succeeded in borrowing money from a bank upon the false representation that the second set of notes (which he put up as collateral) were the first set. It was held that the lien of the first payee on the mortgaged property was superior, and that the bank could not assert even an equitable lien on the property as against the trustee, representing the unsecured creditors of the bankrupt, especially in view of the fact that the local law made parol liens void as against creditors.[58] So, a stipulation by a mortgagor (who afterwards became bankrupt) indorsed on a bond at the time of an assignment of the bond and mortgage, as to the amount then due, which, through an error in computation, stated a larger amount than was actually due, does not increase the lien of the mortgage as against the trustee in bankruptcy and the general creditors.[59] Again, the holder of a real estate mortgage as collateral security for a bankrupt's debt is not entitled to collect the rents and profits as against the bankrupt's trustee.[60]

These rules of course do not apply if the security is fraudulent or void. But a security otherwise valid is not avoided merely because taken in the form of an absolute deed instead of a mortgage,[61] nor because it covers all of the bankrupt's property, if given to secure bona

Cas. No. 8,613; In re Erie Lumber Co., 150 Fed. 817, 17 Am. Bankr. Rep. 689.

[56] In re Sands Ale Brewing Co., 3 Biss. 175, 6 N. B. R. 101, Fed. Cas. No. 12,307.

[57] Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136. And see In re Times Pub. Co., 183 Fed. 603.

[58] Page v. Old Dominion Trust Co., 257 Fed. 402, 168 C. C. A. 442, 43 Am. Bankr. Rep. 26.

[59] In re Howard (D. C.) 207 Fed. 402, 31 Am. Bankr. Rep. 251.

[60] In re Sweeney, 212 Fed. 1, 128 C. C. A. 483, 32 Am. Bankr. Rep. 302.

[61] Gaffney v. Signaigo, 1 Dill. 158, Fed. Cas. No. 5,169; Alter v. Clark (D. C.) 193 Fed. 153.

fide debts and liabilities,[62] nor because, being a partnership obligation, it in terms adopts a debt incurred by one of the partners in behalf of the firm and includes it in the mortgage.[63] A mortgage of a corporation's real property which has been properly recorded may create a valid lien on such property as against the corporation's trustee in bankruptcy, though it was defectively acknowledged.[64] But a mortgage executed in the name of a bankrupt corporation by its officers, without any authority or ratification by the directors, does not create a valid lien as against its unsecured creditors.[65]

As to recording, the rule appears to be well established that a mortgage which was valid when executed and entirely free from fraud is not invalidated in the bankruptcy proceedings simply because it was not placed on the record until after the debtor had become insolvent or until shortly before the filing of the petition in bankruptcy, provided it is not shown that there was any fraudulent purpose in so withholding it from the record, and if the law of the state is such that recording is not necessary to its validity as between the parties.[66] Also the trustee cannot recover the value of the mortgaged property if the mortgagee took possession before the commencement of the proceedings in bankruptcy, although the mortgage was not properly recorded.[67] In the case of an indemnity mortgage given to a surety, the holder can enforce it to the extent of the indemnity contracted for, but not to any greater extent, although he may have paid debts or incurred liabilities to a larger amount. Whatever might be his equities as against the mortgagor himself in this case, he can claim no more than the face of the mortgage as against the trustee in bankruptcy.[68] If the surety in such a case has not paid the creditors to whom he became bound as surety, the mortgage may be held by the court of bankruptcy to inure to

[62] Sidener v. Klier, 4 Biss. 391, Fed. Cas. No. 12,843.

[63] Wait v. Bull's Head Bank, 19 N. B. R. 500, Fed. Cas. No. 17,043.

[64] Pacific State Bank v. Coates, 205 Fed. 618, 123 C. C. A. 634, Ann. Cas. 1913E, 846, 30 Am. Bankr. Rep. 655.

[65] Bernard v. Lea, 210 Fed. 583, 127 C. C. A. 219, 31 Am. Bankr. Rep. 436.

[66] Sturdivant Bank v. Schade, 195 Fed. 188, 115 C. C. A. 140, 27 Am. Bankr. Rep. 673; In re Doran, 154 Fed. 467, 83 C. C. A. 265, 18 Am. Bankr. Rep. 760; In re Adams, 97 Fed. 188, 2 Am. Bankr. Rep. 415; In re Wright, 96 Fed. 187, 2 Am. Bankr. Rep. 364; Stewart v. Hopkins, 30 Ohio St. 502; Clark v. Hezekiah, 24 Fed. 663; Curry v. McCauley, 20 Fed. 583; Seaver v. Spink, 8 N. B. R. 218, 65 Ill. 441; Folsom v. Clemence, 111 Mass. 273. But see Bostwick v. Foster, 14 Blatchf. 436, 18 N. B. R. 123, Fed. Cas. No. 1,682; In re Lukens, 138 Fed. 188, 14 Am. Bankr. Rep. 683; In re Randolph, 187 Fed. 186, 26 Am. Bankr. Rep. 623.

[67] Miller v. Jones, 15 N. B. R. 150, Fed. Cas. No. 9,576.

[68] Courier-Journal Job Printing Co. v. Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614, 4 Am. Bankr. Rep. 183. And see In re Stoddard Bros. Lumber Co., 169 Fed. 190, 22 Am. Bankr. Rep. 435.

their benefit.[69] It remains to be added that, in the case of a valid mortgage, the discharge of the debtor in bankruptcy does not extinguish the mortgage debt so far as the same is necessary to uphold the mortgage.[70]

§ 367. **Chattel Mortgages.**—A chattel mortgage is a valid form of security and gives a lien which may be enforced as against the trustee in bankruptcy of the mortgagor, if free from fraud, based on an actual consideration, and recorded or filed as required by local law.[71] But it is always open to the trustee to question the validity of the mortgage,[72] or to show that its lien has been lost, as, by delay on the part of the mortgagee in taking possession after default,[73] or allowing the mortgaged goods to be inextricably commingled with other property not covered by it,[74] and if, for any reason, such a mortgage is null and void as against the other creditors of the mortgagor, it is not valid as against his trustee in bankruptcy.[75] In particular, the security must be

[69] In re Pierce, 2 Low. 343, Fed. Cas. No. 11,140.

[70] Chamberlain v. Meeder, 16 N. H. 381; Sosnowski v. Rape, 69 Ga. 548; Thaxton v. Roberts, 66 Ga. 704; Carlisle v. Wilkins, 51 Ala. 371.

[71] Title Guaranty & Surety Co. v. Witmire, 195 Fed. 41, 115 C. C. A. 43, 28 Am. Bankr. Rep. 235; Davis v. Turner, 120 Fed. 605, 56 C. C. A. 669, 9 Am. Bankr. Rep. 704; In re Durham, 114 Fed. 750, 8 Am. Bankr. Rep. 115; Simmons v. Greer, 174 Fed. 654, 98 C. C. A. 408, 23 Am. Bankr. Rep. 443; Long v. Gump, 144 Fed. 824, 75 C. C. A. 554, 16 Am. Bankr. Rep. 501; In re Collins, 8 Ben. 59, Fed. Cas. No. 3,004; Ex parte Ames, 1 Low. 561, 7 N. B. R. 230, Fed. Cas. No. 323; In re Gregg, 1 Hask. 173, 3 N. B. R. 529, Fed. Cas. No. 5,796; In re Mitchell Motor & Service Co. (D. C.) 274 Fed. 492, 46 Am. Bankr. Rep. 716; In re Baar, 213 Fed. 628, 130 C. C. A. 292; Park v. South Bend Chilled Plow Co. (Tex. Civ. App.) 199 S. W. 843; Hasbrouck v. La Febre, 23 Wyo. 367, 152 Pac. 168. Machinery placed in its plant by the bankrupt corporation, under a bailment or a lease with an option to purchase, with title reserved in the bailor, will pass under a mortgage of the plant and the machinery therein, as against the trustee and the creditors, because they are not concerned with the rights of the bailor. In re Erie Lithograph Co. (D. C.) 260 Fed. 490, 43 Am. Bankr. Rep. 397.

[72] Carlsbad Water Co. v. New, 33 Colo. 389, 81 Pac. 34; In re Hartman, 185 Fed. 196. The trustee in bankruptcy may maintain an action to set aside a chattel mortgage, although more than four months have elapsed between the filing of the mortgage and the petition in bankruptcy. Parker v. Wagoner (Sup.) 166 N. Y. Supp. 625. But a chattel mortgage describing logs as being in the mortgagor's boom, which did not reach the boom for 12 days thereafter, will be valid as against the trustee in bankruptcy subsequently appointed. Otto v. England, 99 Wash. 529, 169 Pac. 964.

[73] Knapp v. Milwaukee Trust Co., 216 U. S. 545, 30 Sup. Ct. 412, 56 L. Ed. 610; Hanson v. W. L. Blake & Co., 155 Fed. 342, 19 Am. Bankr. Rep. 325; In re Forbes, 5 Biss. 510, Fed. Cas. No. 4,922; Stewart v. Hoffman, 31 Mont. 184, 77 Pac. 689, 81 Pac. 3; Schaupp v. Miller, 206 Fed. 575, 30 Am. Bankr. Rep. 699. A mortgagee who is in possession of the mortgaged property at the time of the adjudication in bankruptcy against the mortgagor is entitled to retain such possession as against the trustee in bankruptcy and the general creditors. In re Howard, 207 Fed. 402; Coggan v. Ward (Mass.) 102 N. E. 336. But compare Cornelius v. Boling, 18 Okl. 469, 90 Pac. 874.

[74] In re Holmes Lumber Co., 189 Fed. 178, 26 Am. Bankr. Rep. 119.

[75] Harvey v. Crane, 2 Biss. 496, 5 N. B. R. 218, Fed. Cas. No. 6,178; Kane v. Rice, 10 N. B. R. 469, Fed. Cas. No.

based upon a real, present, and sufficient consideration, and failing this, it creates no lien which will be preserved in the bankruptcy proceedings,[76] and if the circumstances suggest a fraudulent transaction or an attempt to give a preference, the burden may be on the mortgagee to show both his good faith in the matter and the existence of a good consideration.[77] In cases where the debt purporting to be secured by the mortgage is greater than the actual consideration passing between the parties, it may be good in bankruptcy to the extent of the real consideration, provided it was given in good faith and with no fraudulent purpose and has been recorded.[78] But if the alleged debt is purposely exaggerated for the sake of deceiving a creditor and hiding the property from execution, and the mortgagee knows the fact and records the mortgage with an affidavit that the entire amount is justly due, the whole transaction is so vitiated with fraud that the mortgage cannot be enforced in bankruptcy even to the extent of the sum really due.[79] But a renewal chattel mortgage given to a bankrupt's creditor may be good so far as the renewal debts were previously validly secured, although the renewal mortgage be otherwise invalid.[80]

In regard to the requirement that the mortgage shall be filed or recorded according to the local law, it was held under the former bankruptcy statute that the trustee in bankruptcy of the mortgagor could not take advantage of a failure to file or record it, for it would still be good and valid as between the original parties and the trustee

7,609. Under a state statute providing that "any chattel mortgage securing notes which do not state upon their face the fact of such security shall be absolutely void," the holder of such a note and mortgage has no lien, as against the trustee in bankruptcy, even though he has taken possession. In re Birck & Co., 142 Fed. 438, 73 C. C. A. 554, 15 Am. Bankr. Rep. 694. But where the state law provides that mortgages may be made only on certain enumerated kinds of personal property, yet provides that mortgages of other kinds of chattels shall be valid between the parties, and their heirs, legatees, personal representatives, and persons who, before parting with value, have actual notice thereof, a chattel mortgage of property other than that specified, if executed in good faith and for a good consideration, is valid against the mortgagor's trustee in bankruptcy and the general creditors. In re Grainger, 160 Fed. 69, 87 C. C. A. 225, 20 Am. Bankr. Rep. 166.

[76] In re Builders' Lumber Co., 148 Fed. 244, 17 Am. Bankr. Rep. 449; In re Levine, 196 Fed. 589, 28 Am. Bankr. Rep. 481. See Stedman v. Bank of Monroe, 117 Fed. 237, 54 C. C. A. 269, 9 Am. Bankr. Rep. 4.

[77] In re Sims, 19 N. B. R. 57, Fed. Cas. No. 12,889; In re Ewald v. Brainard, 135 Fed. 168, 14 Am. Bankr. Rep. 267.

[78] Act Cong. June 25, 1910, § 12, 36 Stat. 838, amending Bankruptcy Act 1898, § 67d. And see In re Mahland, 184 Fed. 743, 26 Am. Bankr. Rep. 81.

[79] In re Hugill, 100 Fed. 616, 3 Am. Bankr. Rep. 686.

[80] In re Endlar, 192 Fed. 762, 113 C. C. A. 48. As to the validity of a curative chattel mortgage, given in place of one technically defective, and for that reason not recorded, see In re International Mahogany Co., 147 Fed. 147, 78 C. C. A. 58, 15 Am. Bankr. Rep. 797.

had no better right to avoid it than the bankrupt.[81] But the present statute reverses this rule, and if the law of the state makes an unfiled chattel mortgage invalid as against the creditors of the mortgagor, it is also invalid as against his trustee.[82] Where the mortgage is recorded or filed, but not until a considerable time after its execution, or just before the commencement of the bankruptcy proceedings, this does not necessarily invalidate it,[83] except as to creditors of the bankrupt who became such between the time of the execution and the filing of the mortgage.[84] But this supposes that the delay does not result from

[81] Detroit Trust Co. v. Pontiac Sav. Bank, 237 U. S. 186, 35 Sup. Ct. 509, 59 L. Ed. 907, 34 Am. Bankr. Rep. 759; Platt v. Preston, 3 Fed. 394; Ex parte Dalby, 1 Low. 431, 3 N. B. R. 731, Fed. Cas. No. 3,540; Coggeshall v. Potter, Holmes, 75, 4 N. B. R. 73, Fed. Cas. No. 2,955; Field v. Baker, 12 Blatchf. 438, 11 N. B. R. 415, Fed. Cas. No. 4,762.

[82] Bankruptcy Act 1898, § 67a. And see Mattley v. Giesler, 187 Fed. 970, 110 C. C. A. 90, 26 Am. Bankr. Rep. 116; In re Beckhaus, 177 Fed. 141, 100 C. C. A. 561, 24 Am. Bankr. Rep. 380; In re Southern Textile Co., 174 Fed. 523, 98 C. C. A. 305, 23 Am. Bankr. Rep. 172; Simmons v. Greer, 174 Fed. 654, 98 C. C. A. 408, 23 Am. Bankr. Rep. 443; In re McDonald, 173 Fed. 99, 23 Am. Bankr. Rep. 51; In re Shiebler, 165 Fed. 363, 21 Am. Bankr. Rep. 309; In re Burlage Bros., 169 Fed. 1006, 22 Am. Bankr. Rep. 410; In re Shaw, 146 Fed. 273, 17 Am. Bankr. Rep. 196; In re H. G. Andræ Co., 117 Fed. 561, 9 Am. Bankr. Rep. 135; In re Jones, 116 Fed. 431, 8 Am. Bankr. Rep. 626; In re Tatem, 110 Fed. 519, 6 Am. Bankr. Rep. 426; In re Wright, 107 Fed. 428; In re Booth's Estate, 98 Fed. 975; In re Leigh, 96 Fed. 806; Goodrich v. Dore, 194 Mass. 493, 80 N. E. 480; Clark v. Williams, 190 Mass. 219, 76 N. E. 723. But where, as under the law in Wisconsin, the failure of a chattel mortgagee to file his mortgage or take possession of the property, without fraud or collusion, renders the mortgage voidable only as to subsequent creditors or those who acquire a lien, the taking possession by the holder of an unrecorded chattel mortgage, after the filing of a petition in bankruptcy against the mortgagor, validates the mortgage as against the general creditors, so that it cannot be attacked in their behalf by the trustee. In re Antigo Screen Door Co., 123 Fed. 249, 59 C. C. A. 248, 10 Am. Bankr. Rep. 359. And see In re Chadwick, 140 Fed. 674, 15 Am. Bankr. Rep. 528. It is stated to be the settled law in Georgia (which will be recognized by the courts of bankruptcy sitting within that state) that recording is not essential to the validity of a chattel mortgage, and under this rule, a chattel mortgage given to a bank to secure a present loan, made by the bank in good faith and without knowledge of the borrower's insolvency, although unrecorded, will create a valid lien as against the trustee in bankruptcy, provided that the withholding of the mortgage from record was not for any fraudulent purpose nor pursuant to any agreement between the parties. In re Josephson, 116 Fed. 404, 8 Am. Bankr. Rep. 423.

[83] In re Perrin, 7 N. B. R. 283, Fed. Cas. No. 10,995; In re Barman, 14 N. B. R. 125, Fed. Cas. No. 999.

[84] In re Jacobson & Perrill, 200 Fed. 812, 29 Am. Bankr. Rep. 603; In re Harnden, 200 Fed. 175, 29 Am. Bankr. Rep. 507; Detroit Trust Co. v. Pontiac Sav. Bank, 196 Fed. 29, 115 C. C. A. 663, 27 Am. Bankr. Rep. 821; Post v. Berry, 175 Fed. 564, 99 C. C. A. 186, 23 Am. Bankr. Rep. 699; In re Wade, 185 Fed. 664, 26 Am. Bankr. Rep. 169; Mattley v. Wolfe, 175 Fed. 619, 23 Am. Bankr. Rep. 673; In re J. C. H. Claussen & Co., 164 Fed. 300, 21 Am. Bankr. Rep. 34; In re Doran, 148 Fed. 327, 17 Am. Bankr. Rep. 799; In re Beede, 138 Fed. 441, 14 Am. Bankr. Rep. 697; In re Adams, 97 Fed. 188, 2 Am. Bankr. Rep. 415; In re Kauffman, 2 Nat. Bankr. News, 778. Where an unfiled chattel mortgage, void as to subsequent creditors under the state law, is set aside in bankruptcy proceedings against the mortgagor, the mortgagee will be en-

any fraudulent or sinister design.[85] And where, by a secret agreement between a bankrupt and one of his creditors, who held a chattel mortgage on the bankrupt's stock, the mortgage was withheld from record in order that the bankrupt might obtain credit to which he was not entitled, it was held that the mortgage was fraudulent and void, not only as to subsequent creditors, but as to all those interested in the bankrupt's estate.[86] Further it is to be noted that, in order to avoid the lien claimed, it must be quite clear that the instrument in question is of such a nature as to come within the recording laws of the state. Thus, a lease of land containing a provision that, if it shall be terminated for any cause before a specified date, the improvements placed on the land by the lessee shall belong to the lessor, is not a chattel mortgage and therefore is enforceable against the lessee's trustee in bankruptcy though not filed for record.[87] But a bill of sale of the bankrupt's stock in trade, or a contract for the sale of merchandise, may be in substance and actual effect a chattel mortgage, and, if so, will be governed in bankruptcy by the rules applicable to such instruments.[88] A contractor's application to a surety company for a performance bond, assigning to the surety company, in the event of nonperformance, all the contractor's interest in tools, plant, materials, etc., has no greater force than a chattel mortgage, and as between the surety company and the contractor's trustee in bankruptcy, it is to be regarded as if it were on its face a chattel mortgage.[89] So, where an insolvent conveyed personal property of which he was the absolute owner to a creditor for the expressed consideration of $1, and then took back a lease of the same, also, giving a nominal consideration, with the right in the lessee to repurchase if he had paid his indebtedness to the lessor, it was held that the

titled to share in the proceeds of the mortgaged property with the mortgagor's subsequent creditors. In re Huxoll, 193 Fed. 851, 113 C. C. A. 637, 27 Am. Bankr. Rep. 579. But see In re Cannon, 121 Fed. 582, 10 Am. Bankr. Rep. 64, holding that both the mortgagee and the antecedent creditors must be excluded from the distribution.

[85] A creditor who withheld a chattel mortgage from record until he discovered that the debtor was in failing circumstances, cannot assert an equitable lien on the property, where he acted deliberately, and where the statute requires the recording of such mortgages as a condition to their validity. National Bank of Bakersfield v. Moore, 247 Fed. 913, 160 C. C. A. 103, 41 Am. Bankr. Rep. 409.

[88] In re Duggan, 182 Fed. 252, 25 Am. Bankr. Rep. 105; In re Hickerson, 162 Fed. 345, 20 Am. Bankr. Rep. 682; In re Noel, 137 Fed. 694, 14 Am. Bankr. Rep. 715; Texas Brewing Co. v. Mallette, 28 Tex. Civ. App. 461, 67 S. W. 441; Deland v. Miller & Chaney Bank, 119 Iowa, 368, 93 N. W. 304.

[87] Niagara Falls Hydraulic Power & Mfg. Co. v. Schermerhorn, 60 Misc. Rep. 209, 111 N. Y. Supp. 576.

[88] In re Marengo County Mercantile Co. (D. C.) 199 Fed. 474, 29 Am. Bankr. Rep. 46; Gill v. Ely-Norris Safe Co., 170 Mo. App. 478, 156 S. W. 811. But compare Herritt v. Clark, 247 Fed. 100, 159 C. C. A. 318, 41 Am. Bankr. Rep. 232.

[89] In re Schilling (D. C.) 251 Fed. 966, 41 Am. Bankr. Rep. 705.

attempted transaction was in effect a mortgage, invalid under the law of Pennsylvania for want of delivery, and that on the bankruptcy of the debtor the property passed to his trustee.[90] So also, a mortgage which covers both real and personal property, and which is properly recorded as a real-estate mortgage, is nevertheless void as to the personalty unless it is also recorded as a chattel mortgage.[91]

Here also, as in regard to other forms of liens,[92] we encounter the question whether a chattel mortgage, void as to "creditors" of the mortgagor, may be impeached by the trustee in bankruptcy as the representative of creditors at large, or only by a creditor armed with legal process or who has fastened a lien upon the particular property. In the absence of a more specific direction in the bankruptcy act, it was held that this question must be determined in accordance with the recording law of the particular state as interpreted by its courts.[93] Thus, in New York, a chattel mortgage which is not filed as required by the statute (or where there is a failure to file a renewal statement at the end of a year) is invalid as against general creditors who became such prior to actual filing, and therefore it is also invalid as against the trustee in bankruptcy of the mortgagor, who may seize the property in the hands of either the mortgagor or mortgagee, or recover the proceeds of it from the latter.[94] But in some other states, such a mortgage is not impeachable by creditors at large, but only by one who has secured a lien on the property by execution or otherwise or has a judgment entitling him to a lien.[95] Some cases have held that a trustee in bankruptcy oc-

[90] In re Beihl (D. C.) 176 Fed. 583, 23 Am. Bankr. Rep. 905.

[91] Pacific State Bank v. Coats, 205 Fed. 618, 123 C. C. A. 634, Ann. Cas. 1913E, 846, 30 Am. Bankr. Rep. 655.

[92] See, supra, § 365.

[93] Holt v. Crucible Steel Co., 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756, 27 Am. Bankr. Rep. 856; In re Petersen (D. C.) 252 Fed. 849, 40 Am. Bankr. Rep. 653; In re Oliver, 19 N. B. R. 291, Fed. Cas. No. 10,492.

[94] In re Thomas, 199 Fed. 214, 29 Am. Bankr. Rep. 945; In re Gerstman, 157 Fed. 549, 19 Am. Bankr. Rep. 145; Skilton v. Coddington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885; Stephens v. Perrine, 143 N. Y. 476, 39 N. E. 11; Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073; Gove v. Morton Trust Co., 96 App. Div. 177, 89 N. Y. Supp. 247. And see Stich v. Pirkl, 100 Misc. Rep. 594, 166 N. Y. Supp. 440; In re Michigan Furniture Co. (D. C.) 249 Fed. 978, 41 Am. Bankr. Rep. 784.

[95] Holt v. Crucible Steel Co., 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756, 27 Am. Bankr. Rep. 856; Rode & Horn v. Phipps (C. C. A.) 195 Fed. 414, 27 Am. Bankr. Rep. 827; Title Guaranty & Surety Co. v. Witmire, 195 Fed. 41, 28 Am. Bankr. Rep. 235; Foerstner v. Citizens' Savings & Trust Co., 186 Fed. 1, 108 C. C. A. 267, 26 Am. Bankr. Rep. 377; E. Eppstein & Co. v. Wilson, 149 Fed. 197, 79 C. C. A. 155, 17 Am. Bankr. Rep. 591; In re Beard, 204 Fed. 129, 30 Am. Bankr. Rep. 301; In re Watson, 201 Fed. 962; Mattley v. Wolfe, 175 Fed. 619, 23 Am. Bankr. Rep. 673; In re Flatland, 196 Fed. 310, 28 Am. Bankr. Rep. 476; In re Beede, 138 Fed. 441, 14 Am. Bankr. Rep. 697; In re Wright, 96 Fed. 187, 2 Am. Bankr. Rep. 364; Simon v. Openheimer, 20 Fed. 553; Cragin v. Carmichael, 2 Dill. 519, 11 N. B. R. 511, Fed. Cas. No. 3,319; In re Collins, 12 Blatchf. 548, 12 N. B. R. 379, Fed. Cas. No. 3,007; Hall v. Keating Implement & Machine Co., 33 Tex. Civ. App. 526, 77

cupies this more favored position.[96] Whether this view is correct or not the question is now settled by the act of Congress of 1910 amending the bankruptcy law, which gives to the trustee the rights and remedies of a "creditor holding a lien by legal or equitable proceedings" or of "a judgment creditor holding an execution duly returned unsatisfied."[97]

In some states a chattel mortgage upon a stock of goods, which allows the mortgagor to remain in possession and sell the goods and buy others in their place, is fraudulent and void as against his creditors, at least in the absence of a provision for an accounting, and therefore may also be avoided by his trustee in bankruptcy.[98] As to mortgages covering after-acquired property, they are in some jurisdictions invalid so far as concerns such property, except as between the immediate parties, and where this is the case, such a mortgage will give the mortgagee no right to claim or hold the property against the mortgagor's trustee in bankruptcy.[99] But we must distinguish the case where one advances to a merchant the money with which to purchase a stock of goods and takes a chattel mortgage covering the property so to be bought, and which in fact is afterwards bought with his money. Here there is a present consideration, and an equity in favor of the lend-

S. W. 1054; Murphy v. W. T. Murphy & Co., 126 Iowa, 57, 101 N. W. 486.

[96] Zartman v. First Nat. Bank, 109 App. Div. 406, 96 N. Y. Supp. 633; Miller v. Jones, 15 N. B. R. 150, Fed. Cas. No. 9,576; In re Thorp, 130 Fed. 371, 12 Am. Bankr. Rep. 195; In re Schmidt, 181 Fed. 73, 24 Am. Bankr. Rep. 687.

[97] Act Cong. June 25, 1910, 36 Stat. 838, amending Bankruptcy Act 1898, § 47a. See In re Smith, 198 Fed. 876, 29 Am. Bankr. Rep. 527; Millikin v. Second Nat. Bank (C. C. A.) 206 Fed. 14, 30 Am. Bankr. Rep. 477; In re East End Mantel & Tile Co., 202 Fed. 275, 29 Am. Bankr. Rep. 793; In re Nuckols, 201 Fed. 437, 29 Am. Bankr. Rep. 867; In re Jacobson & Perrill, 200 Fed. 812, 29 Am. Bankr. Rep. 603.

[98] In re Noethen (C. C. A.) 201 Fed. 97, 29 Am. Bankr. Rep. 234; In re Marine Construction & Dry Dock Co., 144 Fed. 649, 75 C. C. A. 451, 16 Am. Bankr. Rep. 325; In re First Nat. Bank, 135 Fed. 62, 67 C. C. A. 536, 14 Am. Bankr. Rep. 180; In re Antigo Screen Door Co., 123 Fed. 249, 59 C. C. A. 248, 10 Am. Bankr. Rep. 359; Stroud v. McDaniel, 106 Fed. 493, 45 C. C. A. 453, 5 Am. Bankr. Rep. 695; In re Hawks, 204 Fed. 309, 30 Am. Bankr. Rep. 365; In re Tucker, 161 Fed. 584, 20 Am. Bankr. Rep. 404; Mitchell v. Mitchell, 147 Fed. 280, 17 Am. Bankr. Rep. 382; In re Standard Telephone & Electric Co., 157 Fed. 106, 19 Am. Bankr. Rep. 491; Marden v. Phillips, 103 Fed. 196, 4 Am. Bankr. Rep. 566; In re Leigh, 96 Fed. 806; In re Forbes, 5 Biss. 510, Fed. Cas. No. 4,922; Smith v. Ely, 10 N. B. R. 553, Fed. Cas. No. 13,044; In re Manly, 2 Bond, 261, 3 N. B. R. 291, Fed. Cas. No. 9,031; Benner v. Scandinavian American Bank, 73 Wash. 488, 131 Pac. 1149. In an action of trover by the trustee in bankruptcy against the bankrupt's mortgagee under a mortgage providing that the mortgagor might sell and replace goods, it was held that the mortgagee had the burden of showing title to goods, if any, and that, on the facts, the inference necessarily arose that no part of the original stock was left at the time of bankruptcy. Williams v. Noyes & Nutter Mfg. Co., 112 Me. 408, 92 Atl. 482, Ann. Cas. 1916D, 1224.

[99] In re Niagara Lead & Battery Co., 202 Fed. 298, 29 Am. Bankr. Rep. 788; In re Hurley, 185 Fed. 851, 26 Am. Bankr. Rep. 434; In re Eldridge, 2 Biss. 362, 4 N. B. R. 498, Fed. Cas. No. 4,330. See In re Clough, 197 Fed. 185, 28 Am. Bankr. Rep. 828; In re Hager, 166 Fed. 972; Mower v. McCarthy, 79 Vt. 142, 64

er as strong as a legal lien, and it will be recognized and protected in the bankruptcy proceedings.[100]

§ 368. Pledges and Assignments of Collateral.—The rights of a pledgee in respect to his lien, in cases free from fraud, are not affected by the adjudication in bankruptcy of the pledgor or the appointment of his trustee.[101] And this rule applies not only to pledges of tangible personal property, but also to assignments as collateral security of notes, accounts, or bills receivable;[102] of insurance policies;[103] of leases;[104] and of contracts, or sums of money due or to become due under contracts,[105] although it is to be remembered that, under federal laws, it is not permissible to assign or transfer any unallowed claim against the United States, so that an attempt to pledge such an account or contract is void as against the assignor's trustee in bankruptcy.[106]

But it is the rule at common law that there can be no valid pledge of personalty without a transfer of possession, actual or constructive, to the pledgee.[107] And, applying this rule to bankruptcy cases, it was held that no such change of possession as would validate a pledge of goods resulted from the pledge and delivery of so-called "warehouse receipts" acknowledging the receipt of goods on premises really occupied by the owner of the property, though nominally leased by him to a warehousing

Atl. 578, 7 L. R. A. (N. S.) 418, 118 Am. St. Rep. 942; Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673.

[100] In re Flatland, 196 Fed. 310, 116 C. C. A. 130, 28 Am. Bankr. Rep. 476; In re Chantler Cloak & Suit Co. (D. C.) 151 Fed. 952, 18 Am. Bankr. Rep. 498.

[101] In re Peacock (C. C.) 178 Fed. 851, 24 Am. Bankr. Rep. 159; In re Twining (D. C.) 185 Fed. 555, 26 Am. Bankr. Rep. 200; Woodard v. Snow, 233 Mass. 267, 124 N. E. 35, 5 A. L. R. 1381; Andrews Electric Co. v. St. Alphonse Catholic Total Abstinence Soc., 233 Mass. 20, 123 N. E. 103; First Nat. Bank v. Exchange Nat. Bank, 179 App. Div. 22, 153 N. Y. Supp. 818, 164 N. Y. Supp. 1092; Griffin v. Smith, 177 Cal. 481, 171 Pac. 92. And see Wood v. Simpson, 149 App. Div. 471, 133 N. Y. Supp. 1069.

[102] Union Trust Co. v. Bulkeley, 150 Fed. 510, 80 C. C. A. 328, 18 Am. Bankr. Rep. 35; Young v. Upson (C. C.) 115 Fed. 192, 8 Am. Bankr. Rep. 377; Montgomery v. City of Philadelphia (D. C.) 253 Fed. 473, 42 Am. Bankr. Rep. 498; Riverside Contracting Co. v. City of New York (Sup.) 148 N. Y. Supp. 281. See In re Cross (D. C.) 265 Fed. 769, 45 Am. Bankr. Rep. 695.

[103] J. M. Radford Grocery Co. v. Powell, 228 Fed. 1, 142 C. C. A. 457, 35 Am. Bankr. Rep. 790.

[104] Meador v. Everett, 3 Dill. 214, 10 N. B. R. 421, Fed. Cas. No. 9,376. See Lamb v. Hall, 147 Cal. 44, 81 Pac. 288.

[105] In re Merrill & Baker (D. C.) 162 Fed. 590, 19 Am. Bankr. Rep. 210. But where a pledge of installment contracts, under which the pledgor continued to collect installments, was made to secure a loan, which was ultra vires, it was held that the pledgee, though entitled upon the pledgor's bankruptcy to retain the contracts until payment of the debt, was not entitled to an interest in, or a lien upon, collections in the hands of the seller's trustee. Barker Piano Co. v. Commercial Security Co., 93 Conn. 129, 105 Atl. 328.

[106] In re Hudford Co. of New York, 257 Fed. 722, 169 C. C. A. 10.

[107] Adams v. Merchants' Nat. Bank, 9 Biss. 396, 2 Fed. 174; Spencer v. Duplan Silk Co. (C. C.) 112 Fed. 638, 7 Am. Bankr. Rep. 563. See First Nat. Bank

company, where the actual possession of the goods was exercised by and existed with the owner substantially the same after the issuance of the receipts as before, and that, where a pledge was thus invalid for want of a change of possession, the pledgee could not claim an equitable lien which would take precedence of the title of the trustee in bankruptcy of the pledgor.[108] But more recent decisions have considerably liberalized these doctrines. It is held, for instance, that an agrement to give and deliver a pledge, made in good faith and to secure a present loan or a consideration protected by the state law, is valid under the Bankruptcy Act, and that if the article or instrument to be pledged is afterwards delivered, the delivery will relate back to the date of the agreement.[109] So also, a paper assignment of a chose in action, without any other delivery than delivery of such paper, and without notice to the one in possession of what is transferred, is held to pass a good title as against the trustee in bankruptcy of the pledgor.[110] In a recent case in the Supreme Court of the United States, it appeared that a distiller, by way of giving security for money loaned, had entered into a transaction in the nature of a pledge of a specific number of barrels of whisky stored in his own bonded distillery warehouse, without any actual change of possession, but accompanied by the issuance and transfer conformably to trade usage, of the distiller's warehouse receipts representing such whisky. There being nothing in the law of the state (Ohio) to invalidate this transaction, it was held that it constituted a good and valid pledge, as against the distiller's trustee in bankruptcy.[111] In line with these decisions, there is also a ruling that a written agreement whereby specific property or a fund is made security for a debt, will create at least an equitable lien which must be recognized in bankruptcy.[112] Again, where a corporation, borrowing money, agreed to pledge 50 carloads of lumber stored with a storage company, the agreement providing for substitution of carloads, and it appeared that a "carload" meant either the load of a particular car or lumber to the value of $200, it was held that this was valid, as against the objection of indefiniteness of designation of the property at-

v. Pennsylvania Trust Co., 124 Fed. 968, 60 C. C. A. 100, 10 Am. Bankr. Rep. 782.

[108] Security Warehousing Co. v. Hand, 206 U. S. 415, 27 Sup. Ct. 720, 41 L. Ed. 1117, 11 Ann. Cas. 789, 19 Am. Bankr. Rep. 291. And see Adams v. Merchants' Nat. Bank (C. C.) 9 Biss. 396, 2 Fed. 174; Guarantee Title & Trust Co. v. First Nat. Bank, 185 Fed. 373, 107 C. C. A. 429, 26 Am. Bankr. Rep. 85; Fourth Street Nat. Bank v. Millbourne Mills Co.'s Trustee, 172 Fed. 177, 96 C. C. A. 629, 30 L. R. A. (N. S.) 552, 22 Am. Bankr. Rep. 442.

[109] In re Harvey (D. C.) 212 Fed. 340, 32 Am. Bankr. Rep. 337.

[110] In re Germantown Almegum Mfg. Co. (D. C.) 251 Fed. 755, 41 Am. Bankr. Rep. 598.

[111] Dale v. Pattison, 234 U. S. 399, 34 Sup. Ct. 785, 58 L. Ed. 1370, 52 L. R. A. (N. S.) 754.

[112] Root Mfg. Co. v. Johnson, 219 Fed. 397, 135 C. C. A. 139, 34 Am. Bankr. Rep. 247.

fected by the pledge, and entitled the pledgee to the equivalent of 50 carloads of lumber in the possession of the storage company, as against the corporation's trustee in bankruptcy, although a great part of the lumber had not been received by the storage company in cars, but had been shipped by water, and such part had never been appropriated from the larger mass by the storage company.[113] And so, in a case where a coal company had contracted with a railway company to supply it with coal, and was unable to go on with its deliveries for lack of funds, and the railway company advanced money for this purpose, it was held that the transaction amounted to a pledge, in favor of the railway company, of such a quantity of coal thereafter to be mined, and as fast as mined, as the moneys so advanced would pay for, and that this pledge was enforceable as a preferential claim against the assets of the bankrupt estate of the coal company in the hands of its trustees, who assumed and continued the performance of the contract.[114] This decision was rested on the strong and manifest equity in favor of the railway company, and may perhaps be considered as applying a rule analogous to the well-known rule that, in equity, an agreement to give a mortgage is equivalent to a mortgage. Also it has been held that persons paying drafts drawn for the price of goods shipped to the drawer, under an agreement that the goods should be pledged as security therefor, have a lien as against the trustee in bankruptcy of the purchaser.[115] A pledgee, who wrongfully sells the pledged property, will be estopped to claim a lien for any greater amount than he actually received, on an accounting to the trustee in bankruptcy of the pledgor for the value of the property.[116]

§ 369. **Maritime Liens.**—Maritime liens are among the classes of securities preserved and protected by the bankruptcy law, if valid and free from fraud and preferential features.[117] And such a lien which, by the law of the admiralty, would take precedence over charges of an earlier date, may be accorded a similar preference in a court of bankruptcy.[118] Also it has been held that a maritime lien, existing at the time when the petition in bankruptcy was filed, may be enforced by process in admiralty against the vessel after the filing of the petition, and while the trustee in

[113] Atherton v. Beaman (D. C.) 256 Fed. 871, 42 Am. Bankr. Rep. 631. Affirmed (C. C. A.) 264 Fed. 878, 45 Am. Bankr. Rep. 212.

[114] Hurley v. Atchison, T. & S. F. Ry. Co., 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729, 22 Am. Bankr. Rep. 17, affirming Atchison, T. & S. F. Ry. Co. v. Hurley, 153 Fed. 503, 82 C. C. A. 453, 18 Am. Bankr. Rep. 396.

[115] Fletcher v. Morey, 2 Story, 555, Fed. Cas. No. 4,864. But see In re Richheimer, 221 Fed. 16, 136 C. C. A. 542.

[116] Howard v. Mechanics' Bank (D. C.) 262 Fed. 699, 45 Am. Bankr. Rep. 112.

[117] The Home, 18 N. B. R. 557, Fed. Cas. No. 6,657; The Loulie Dole, 11 Biss. 479, 14 Fed. 862; The Ironsides, 4 Biss. 518, Fed. Cas. No. 7,069.

[118] In re Scott, 3 N. B. R. 742, Fed. Cas. No. 12,517.

bankruptcy, in such a case, has the right to appear and be heard, the court of bankruptcy will accept the determination of the admiralty court as to the validity and amount of the lien.[119] And a court of admiralty, which has obtained full jurisdiction over a vessel in a suit to enforce maritime liens thereon, before the institution of bankruptcy porceedings against the owner, is not deprived of such jurisdiction by the adjudication in bankruptcy, but will retain jurisdiction and determine all questions with respect to such liens.[120]

§ 370. **Attorneys' Liens for Services.**—The institution of proceedings in bankruptcy will not displace or invalidate an attorney's lien on securities belonging to the bankrupt in the possession of the attorney, or on funds collected for the bankrupt or a judgment recovered for him, or (as the law is in some states) upon his cause of action.[121] And the fact that an attorney, in drawing up the bankrupt's schedule of assets, includes certain notes or securities in his possession does not estop him from claiming a lien thereon for his professional services.[122] So when a suit in which the bankrupt is the plaintiff, and which is pending and undetermined at the time of the bankruptcy, is taken up and prosecuted by the trustee, an attorney's lien for compensation for services rendered in the suit prior to the adjudication in bankruptcy is preserved and is binding upon the trustee.[123] But attorneys for a bankrupt are not entitled to a lien for fees for services rendered to the bankrupt subsequent to the institution of the proceedings in an ancillary suit by the receiver to recover money belonging to the estate.[124]

§ 371. **Vendors' Liens.**—A vendor's lien on real property is not divested by the bankruptcy of the purchaser.[125] And this may also

[119] In re Interocean Transp. Co. (D. C.) 232 Fed. 408, 36 Am. Bankr. Rep. 651; The Ironsides, 4 Biss. 518, Fed. Cas. No. 7,069. But compare In re People's Mail S. S. Co., 3 Ben. 226, 2 N. B. R. 552, Fed. Cas. No. 10,970. And see, per contra. The Casco (D. C.) 230 Fed. 929, 37 Am. Bankr. Rep. 215; In re New England Transp. Co. (D. C.) 220 Fed. 203, 34 Am. Bankr. Rep. 323.

[120] The Philomena, 200 Fed. 859; The Bethulia, 200 Fed. 862.

[121] In re Eurich's Ft. Hamilton Brewery, 158 Fed. 644, 19 Am. Bankr. Rep. 798; In re Baxter & Co., 154 Fed. 22, 83 C. C. A. 106, 18 Am. Bankr. Rep. 450; Kneeland v. Pennell, 54 Misc. Rep. 43, 104 N. Y. Supp. 498; Clarke v. Clarke, 2 Hayw. & H. 114, Fed. Cas. No. 18,279; In re Luber (D. C.) 261 Fed. 221, 44 Am. Bankr. Rep. 292; Schoenherr v. Van Meter, 215 N. Y. 548, 109 N. E. 625. The lien of attorneys on money of their client is not affected by bankruptcy proceedings against him in another jurisdiction, no steps having been taken by the trustee to reach or claim the fund. Hartman v. Swiger (D. C.) 215 Fed. 986, 33 Am. Bankr. Rep. 369.

[122] In re Brown, Fed. Cas. No. 1,984.

[123] In re Wilson, 12 Fed. 235.

[124] Musica v. Prentice, 211 Fed. 326, 127 C. C. A. 575, 31 Am. Bankr. Rep. 687.

[125] In re Lane Lumber Co., 217 Fed. 550, 133 C. C. A. 402, 33 Am. Bankr. Rep. 491, affirming In re Lane Lumber Co. (D. C.) 210 Fed. 82; Sheridan State Bank v. Rowell (D. C.) 212 Fed. 529; In re French (D. C.) 231 Fed. 255, 37 Am.

be true of personal property, where such a lien is given by statute or reserved by the valid agreement of the parties. None exists at common law after delivery of the goods. But in a case where a claimant had sold goods to the bankrupt, taking his notes as conditional payment, but retained possession of the property until after the adjudication in bankruptcy and after the notes fell due and remained unpaid, it was held that he had a lien for the unpaid portion of the price, which the trustee in bankruptcy must recognize.[126] As to the creation of such a lien by statute, it is held that a statute providing that property shall not be exempt from claims for its purchase money and for the seizure and sequestration of the property in a suit for the purchase money, does not give the seller of personalty a lien arising at the time of the sale, and such as to be protected by the bankruptcy act, but only a right to gain a lien by attachment, and a lien so acquired will be divested by the adjudication in bankruptcy of the purchaser within four months thereafter.[127] A vendor's lien may also be reserved by the contract of the parties, and will be preserved in bankruptcy on the same terms and under the same conditions as other liens.[128] But the device now usually employed is a contract of conditional sale, in which the seller attempts to reserve for himself a lien, to secure payment of the price, on so much of the property as may remain in the buyer's hands and on the proceeds of what he has sold. This is generally held invalid in bankruptcy,[129] unless the contract is filed or recorded like a chattel mortgage.[130] But failure to file or record such a contract will not defeat the lien in bankruptcy, where all the creditors of the bankrupt had actual notice of the sale and its conditions, because in that case the trustee would represent no class as to which the condition would be void,

Bankr. Rep. 289; Rader v. Star Mill & Elevator Co., 258 Fed. 599, 169 C. C. A. 541, 43 Am. Bankr. Rep. 754; Farrell v. Wysong, 246 Fed. 281, 159 C. C. A. 11, 40 Am. Bankr. Rep. 740; Ex parte Drewry, 2 Hughes, 435, Fed. Cas. No. 4,081; Whalen v. Wolford, 96 Kan. 211, 150 Pac. 608; Deaton v. Southern Irr. Co. (Tex. Civ. App.) 144 S. W. 294; Stewart v. Comanche Mercantile Co. (Tex. Civ. App.) 147 S. W. 1166. Compare (as to the law in North Carolina) Bernard v. Lea, 210 Fed. 583, 127 C. C. A. 219, 31 Am. Bankr. Rep. 436.

[126] In re Manuel J. Portuondo Co. (D. C.) 135 Fed. 592, 14 Am. Bankr. Rep. 337.

[127] In re Wilkes (D. C.) 112 Fed. 975, 7 Am. Bankr. Rep. 574.

[128] In re Muncie Pulp Co., 151 Fed. 732, 81 C. C. A. 116, 18 Am. Bankr. Rep. 56; National Bank of Commerce v. Williams, 159 Fed. 615, 86 C. C. A. 605, 20 Am. Bankr. Rep. 79; Cullen v. Armstrong (D. C.) 209 Fed. 704, 33 Am. Bankr. Rep. 735.

[129] Pontiac Buggy Co. v. Skinner, 158 Fed. 858, 20 Am. Bankr. Rep. 206. Compare American Woodworking Machinery Co. v. Norment, 157 Fed. 801, 19 Am. Bankr. Rep. 679; Bell v. Shaw, 230 Fed. 976, 145 C. C. A. 170, 36 Am. Bankr. Rep. 544; Emerson-Brantingham Implement Co. v. Lawson (D. C.) 237 Fed. 877, 38 Am. Bankr. Rep. 344; In re Sutton (D. C.) 244 Fed. 872, 40 Am. Bankr. Rep. 348.

[130] Pontiac Buggy Co. v. Skinner, 158 Fed. 858, 20 Am. Bankr. Rep. 206.

actual notice removing the necessity of showing constructive notice.[131] But in some states, a contract of this kind is valid only from the time of its record, as against creditors even with actual notice, and where this is the law, it would of course be void as against the trustee in bankruptcy.[132]

§ 372. **Statutory Liens.**—It is entirely within the power of a state legislature to create classes of liens by statutory enactment, in respect to property within the state, and such liens, being otherwise valid, will be protected in the bankruptcy courts.[133] But before a creditor can claim a lien given by a state statute on property of a bankrupt, he must perfect the same as required by such statute.[134] Thus, a lien which derives its existence wholly from a state statute, and the continuance of which is by such statute made dependent upon the commencement of a suit in a state court within a prescribed time, is not preserved as a valid incumbrance on the bankrupt's estate when no suit has been instituted in the state court, and no step taken in the bankruptcy proceedings equivalent to such suit, within the time limited by the law, the mere commencement of bankruptcy proceedings not being a sufficient compliance with the statute.[135] On the other hand, if the lien springs directly from the statute, or from the acts, transactions, or relations specified in the statute as the ground of it, and not from the steps prescribed by the statute as necessary to perfect or enforce it,—such as filing or recording a claim in a state court, or beginning a suit,—then it is not a lien "obtained through legal proceedings" in such sense as to be avoided by the subsequent bankruptcy of the debtor within four months, notwithstanding that some sort of legal proceedings may be necessary to perfect or secure it.[136] Among the kinds of liens thus preserved in the bankruptcy proceedings and following the property into the hands of the trustee, may be mentioned a lien given by statute for materials and supplies furnished to carry on the business of a manufacturing corporation,[137] a lien given by statute for the protection of keep-

[131] In re Bazemore, 189 Fed. 236, 26 Am. Bankr. Rep. 494.

[132] In re Builders' Lumber Co., 148 Fed. 244, 17 Am. Bankr. Rep. 449.

[133] In re Burt, 12 Blatchf. 252, 13 N. B. R. 137, Fed. Cas. No. 2,209; Moore v. Green, 145 Fed. 472, 76 C. C. A. 242, 16 Am. Bankr. Rep. 648; Tube City Min. & Mill Co. v. Otterson, 16 Ariz. 305, 146 Pac. 203, L. R. A. 1916E, 303.

[134] In re Franklin, 151 Fed. 642, 18 Am. Bankr. Rep. 218.

[135] In re Brunquest, 7 Biss. 208, 14 N. B. R. 529, Fed. Cas. No. 2,055.

[136] Moore v. Green, 145 Fed. 472, 76 C. C. A. 242, 16 Am. Bankr. Rep. 648; Norris v. Treuholm, 209 Fed. 827, 126 C. C. A. 551, 31 Am. Bankr. Rep. 353.

[137] In re Bennett, 153 Fed. 673, 82 C. C. A. 531, 18 Am. Bankr. Rep. 847; In re Starks-Ullman Saddlery Co., 171 Fed. 834, 96 C. C. A. 506, 22 Am. Bankr. Rep. 596.

ers of livery and boarding stables,[138] the lien of a state or municipality for taxes,[139] and a statutory lien for rent, the question whether it secures the rent which would be payable for the whole of the stipulated term, or for one year, or for a different period, being determined in accordance with the provisions of the statute under which it is claimed.[140] So, where a school board which has let a contract for the erection of a school building terminates the contract on the default of the contractor, and takes over the material remaining on hand, to use in finishing the building, it has a qualified property in, or a lien upon, such material, which is superior to the rights of the contractor's trustee in bankruptcy.[141]

§ 373. **Landlord's Lien for Rent.**—The common-law or statutory lien of a landlord for rent, including rent reserved under a ground-rent deed,[142] is of a nature to be preserved in bankruptcy proceedings against the tenant, and must be enforced against the goods and chattels in the trustee's hands, or their proceeds if sold, and the trustee cannot defeat the landlord's claim for the rent to become due during the remainder of the term by vacating the premises and surrendering possession.[143] But to bring about this result, there must be a valid lease in existence at the commencement of the bankruptcy proceedings. Thus, where the lease had terminated, but the tenant remained in possession under a contract to purchase, and was so holding at the time of his bankruptcy, the relation of landlord and tenant no longer existed, and the landlord had no lien on the tenant's personal property for subsequently accruing

[138] In re Pratesi, 126 Fed. 588, 11 Am. Bankr. Rep. 319; In re Mero, 128 Fed. 630, 12 Am. Bankr. Rep. 171.

[139] City of Waco v. Bryan, 127 Fed. 79, 62 C. C. A. 79, 11 Am. Bankr. Rep. 481.

[140] I. Trager Co. v. Cavaroc Co., 124 La. 611, 50 South. 598; Shapiro v. Thompson, 160 Ala. 363, 49 South. 391.

[141] Wilds v. Board of Education of New York, 186 App. Div. 472, 174 N. Y. Supp. 375, affirming 103 Misc. Rep. 318, 170 N. Y. Supp. 1033.

[142] Large v. Bosler, 2 Clark (Pa.) 29.

[143] Fudickar v. Glenn, 237 Fed. 808, 151 C. C. A. 50, 38 Am. Bankr. Rep. 237; Courtney v. Fidelity Trust Co., 219 Fed. 57, 134 C. C. A. 595, 33 Am. Bankr. Rep. 400; In re City Drug Store (D. C.) 224 Fed. 132, 35 Am. Bankr. Rep. 335; In re J. Sapinsky & Sons (D. C.) 206 Fed. 523, 30 Am. Bankr. Rep. 416; Mitchell Storebuilding Co. v. Carroll, 193 Fed. 616, 113 C. C. A. 484, 27 Am. Bankr. Rep. 894; Friedman v. Murphey (Ariz.) 124 Pac. 654; In re Meyer, 195 Fed. 653, 28 Am. Bankr. Rep. 17; In re Mitchell, 116 Fed. 87, 8 Am. Bankr. Rep. 324; Martin v. Orgain, 174 Fed. 772, 98 C. C. A. 246, 23 Am. Bankr. Rep. 454; I. Trager Co. v. Cavaroc Co., 124 La. 611, 50 South. 598; Shapiro v. Thompson, 160 Ala. 363, 49 South. 391; McLean v. Klein, 3 Dill. 113, Fed. Cas. No. 8,884; Austin v. O'Reilly, 2 Woods, 670, 12 N. B. R. 329, Fed. Cas. No. 665; In re Trim, 2 Hughes, 355, 5 N. B. R. 23, Fed. Cas. No. 14,174; Ex parte Morrow, 1 Low. 386, 2 N. B. R. 665, Fed. Cas. No. 9,850; In re Wynne, Chase, 227, 4 N. B. R. 23, Fed. Cas. No. 18,117; In re Hoagland, 18 N. B. R. 530, Fed. Cas. No. 6,545; In re Dunham, Fed. Cas. No. 4,145; In re Eckenroth, Fed. Cas. No. 4,265; Watson v. Lemar, Fed. Cas. No. 17,287; Loudon v. Blandford, 56 Ga. 150. See In re Gallacher Coal Co., 205 Fed. 183, 29 Am. Bankr. Rep. 766.

rent on the non-performance of the contract of purchase.[144] So, where the leasehold interest of the bankrupt tenant is sold by the trustee, the landlord has no lien on the proceeds of the sale for rent overdue at the time of the bankruptcy.[145] Also, if the statute makes any other condition than the mere failure to pay rent a prerequisite to the landlord's lien, that condition must be shown to exist before the lien can be claimed in bankruptcy.[146] Thus, where the state law is such that the landlord's lien attaches to goods and chattels on the demised premises when the same are levied on under an execution, it has been held that the landlord cannot claim a lien in the bankruptcy proceedings against the tenant by reason of the levy of an execution on the goods within four months prior to the bankruptcy proceedings, as the lien of the execution would be dissolved thereby.[147] But on the other hand, it has been held that if the court of bankruptcy takes possession of the chattels which would be liable to the lien and orders them sold, its process may be regarded as an equitable execution, for the purpose of preserving the landlord's lien, such a case being clearly within the equity of the statute.[148] But where the statute gives the lien, not upon mere

[144] Des Moines Nat. Bank v. Council Bluffs Sav. Bank, 150 Fed. 301, 18 Am. Bankr. Rep. 108. A landlord has no priority under a lease containing a covenant constituting the rent a lien or mortgage on all goods on the premises, where such lease is void as against the creditors of the tenant for not having been recorded as a chattel mortgage under the state laws. In re Dyke, 9 N. B. R. 430, Fed. Cas. No. 4,227. An agreement, nominally for the extension of a lease, may really constitute a contract for an additional separate term, to commence on the expiration of the term of the existing lease, and in this case it does not give a right to a lien for rent, where the tenant becomes bankrupt and his property is sold before the expiration of the first term. In re Southern Hardware & Supply Co. (D. C.) 210 Fed. 381, 32 Am. Bankr. Rep. 92. Where a landlord, before the expiration of the lease of an earlier tenant, who was indebted for rent, demised the premises to the bankrupt under a lease providing that it should not affect the former lease, or remedies for collection of rent, and the bankrupt took over property of the first tenant in the premises, it was held that the landlord's claim for rent against the first tenant could not be asserted against the bankrupt's estate as a priority claim, there being no right to distrain. In re West (D. C.) 253 Fed. 963, 42 Am. Bankr. Rep. 341.

[145] In re Ruppel (D. C.) 97 Fed. 778, 3 Am. Bankr. Rep. 233.

[146] As to the effect of recording the lease or failing to record it, see In re Floyd-Scott Co. (D. C.) 224 Fed. 987, 35 Am. Bankr. Rep. 463; Dellinger v. Waite-Thresher Co., 228 Fed. 506, 143 C. C. A. 88, 35 Am. Bankr. Rep. 802.

[147] In re Whealton Restaurant Co., 143 Fed. 921, 16 Am. Bankr. Rep. 294; In re Butler, 3 Pittsb. 369, 6 N. B. R. 501, Fed. Cas. No. 2,236; Appeal of Barnes, 76 Pa. St. 50, 13 N. B. R. 543.

[148] Longstreth v. Pennock, 20 Wall. 575, 22 L. Ed. 451; In re Hoover, 113 Fed. 136, 7 Am. Bankr. Rep. 330; In re W. R. Kuhn Co., 225 Fed. 13, 140 C. C. A. 473; In re Delaney (D. C.) 251 Fed. 425, 41 Am. Bankr. Rep. 601. But a landlord to whom rent is due for the use of the premises by the bankrupt as a store will not be required to bring an action in a state court for the establishment of his lien, as provided by the state statute, as a precedent step to the assertion of his rights against the bankrupt's property in the hands of the trustee, but he may at once prove his debt and be heard in the court of bankruptcy in support of his claim to priority. In

default in the payment of rent, but upon the levy of a distress warrant, the landlord will have no lien available in the bankruptcy proceedings unless he has levied his distraint before the filing of the petition in bankruptcy.[149] The fact that a distraint is necessary to perfect the inchoate lien does not make it a lien "obtained through legal proceedings" in such sense as to be dissolved by the adjudication in bankruptcy of the tenant within four months.[150]

The amount of rent for which the landlord may claim a lien, whether for a year, in addition to that already in arrear, for a year from the commencement of the bankruptcy proceedings, or to the end of the term, will depend upon the law of the particular state. But it is held that a provision in a coal mine lease, giving the lessor a lien to secure all amounts that might become due under the lease, does not extend to a claim for damages caused by the bankruptcy of the lessee and the consequent abandonment of the lease.[151]

§ 374. Liens of Mechanics and Materialmen.—The liens given by statute to mechanics, sub-contractors, and materialmen are not dissolved by the adjudication in bankruptcy of the owner, contractor, or other person liable, but on the contrary are preserved and may be enforced against the trustee in bankruptcy.[152] And the same is true of the statutory liens existing in some states for the wages of labor.[153] Liens of these kinds are not opposed to either the terms or the policy of the bankruptcy law, since they do not in any way prefer one creditor at the expense of another, nor diminish the general assets of the debtor other-

re Byrne, 97 Fed. 762, 3 Am. Bankr. Rep. 268.

[149] In re Potee Brick Co., 179 Fed. 525; Morgan v. Campbell, 22 Wall. 381, 22 L. Ed. 796; In re Joslyn, 2 Biss. 235, 3 N. B. R. 473, Fed. Cas. No. 7,550; Southern Ry. Co. v. Wilder, 231 Fed. 933, 146 C. C. A. 129, 36 Am. Bankr. Rep. 747; In re Grovenstein-Bishop Co. (D. C.) 223 Fed. 878, 35 Am. Bankr. Rep. 114. But see In re Rose, 3 N. B. R. 265, Fed. Cas. No. 12,043.

[150] In re West Side Paper Co., 162 Fed. 110, 89 C. C. A. 110, 20 Am. Bankr. Rep. 660 (reversing 159 Fed. 241), 20 Am. Bankr. Rep. 289; In re Potee Brick Co., 179 Fed. 525; Henderson v. Mayer, 225 U. S. 631, 32 Sup. Ct. 699, 56 L. Ed. 1233, 28 Am. Bankr. Rep. 387.

[151] In re Gallacher Coal Co. (D. C.) 205 Fed. 183, 29 Am. Bankr. Rep. 766.

[152] In re Grissler, 136 Fed. 754, 69 C. C. A. 406, 13 Am. Bankr. Rep. 508; In re Cramond, 145 Fed. 966, 17 Am. Bankr. Rep. 22; Hastings v. Thompson, 47 Pa. Super. Ct. 424; National Fire Proofing Co. v. Daly, 77 N. J. Eq. 583, 78 Atl. 1135; Clifton v. Foster, 103 Mass. 233, 4 Am. Rep. 539; In re Wilkinsburg Borough School Dist., 234 Pa. St. 373, 83 Atl. 410; Felin v. Conway, 32 Pa. Super. Ct. 171; Grainger & Co. v. Riley (C. C. A.) 201 Fed. 901, 29 Am. Bankr. Rep. 114; Church E. Gates & Co. v. Empire City Racing Ass'n, 225 N. Y. 142, 121 N. E. 741; George A. Lowe & Co. v. Leary, 49 Utah, 506, 164 Pac. 1052; A. B. Newbury Co. v. Tennant (N. J. Ch.) 113 Atl. 486.

[153] In re Kerby-Dennis Co., 95 Fed. 116, 36 C. C. A. 677, 2 Am. Bankr. Rep. 402; In re Laird, 109 Fed. 550, 48 C. C. A. 538, 6 Am. Bankr. Rep. 1; In re Lowensohn, 100 Fed. 776, 4 Am. Bankr. Rep. 79. In the case last cited, it appeared that a clothier gave out garments

wise applicable to the payment of his general creditors.[154] And although the local law requires that a mechanic's or materialman's lien shall be perfected by the filing or recording of a claim, or even the institution of a suit, within a limited time, yet this does not make it a lien "obtained through legal proceedings," in such sense that it will be dissolved by the subsequent adjudication in bankruptcy of the debtor within four months thereafter.[155] But questions often arise as to the validity of the lien where the work has been done or the materials furnished, but the required notice or claim has not been filed or recorded, at the time the bankruptcy proceedings are begun. The rule appears to be settled as follows: If, by the local law, the lien of a mechanic or materialman arises from the doing of the work and attaches to the building from that time, upon the condition subsequent that the lien creditor shall file or record a certain notice within a given time, the lien is not affected or impaired by the commencement of bankruptcy proceedings between the doing of the work and the filing of the notice, but the notice may be filed, and the lien thereby perfected, after the adjudication in bankruptcy, provided it is done within the time prescribed by the state statute;[156] but if the statute gives the lien only from the time of filing the notice, this must be done before the institution of the proceedings in bankruptcy, and if not, the trustee in bankruptcy will

in lots, to different tailors, to be made up by the piece and returned in whole or broken lots for examination, and to be paid for at stated intervals if approved, and the tailors employed other workmen in making up the goods. It was held that, as against the estate of the clothier in bankruptcy, the tailors had a lien upon all articles remaining in their hands, not only for the work done upon those articles, but also for work done upon any portions of the same specific lot which had been returned for examination and not yet paid for, and also that, where the whole of a particular lot had been returned for examination, this was not such an unqualified delivery of the goods as to deprive the workmen of their lien for labor bestowed on that lot, unless there had been such a delay in afterwards demanding payment as would amount to a waiver of the lien.

[154] In re Coulter, 2 Sawy. 42, 5 N. B. R. 64, Fed. Cas. No. 3,276.

[155] In re West Norfolk Lumber Co., 112 Fed. 759, 7 Am. Bankr. Rep. 648; In re Kerby-Dennis Co., 95 Fed. 116, 36 C. C. A. 677, 2 Am. Bankr. Rep. 402; s. c., 94 Fed. 818, 2 Am. Bankr. Rep. 218; In re Emslie, 102 Fed. 291, 42 C. C. A. 350, 4 Am. Bankr. Rep. 126; In re Beck, 2 Nat. Bankr. News, 532; Holland v. Cunliff, 96 Mo. App. 67, 69 S. W. 737; Kemp Lumber Co. v. Howard, 237 Fed. 574, 150 C. C. A. 456, 38 Am. Bankr. Rep. 608; Chickasaw Hotel Co. v. C. B. Barker Const. Co., 135 Tenn. 305, 186 S. W. 115, L. R. A. 1916F, 106.

[156] Reeves v. York Engineering & Supply Co., 249 Fed. 513, 161 C. C. A. 439; Fels v. George Lueders & Co., 246 Fed. 436, 158 C. C. A. 500, 40 Am. Bankr. Rep. 851; Pittsburgh Plate Glass Co. v. Kransz, 291 Ill. 84, 125 N. E. 730; Church E. Gates & Co. v. National Fair & Exposition Ass'n, 172 App. Div. 581, 158 N. Y. Supp. 1070; Hildreth Granite Co. v. City of Watervliet, 161 App. Div. 420, 146 N. Y. Supp. 449; Church E. Gates & Co. v. Jno. F. Stevens Const. Co., 220 N. Y. 38, 115 N. E. 22; Horton v. Queens County Machinery Corp., 101 Misc. Rep. 31, 166 N. Y. Supp. 662;

take the property free from any claims of mechanics or materialmen and they cannot thereafter raise a lien by filing their notices.[157]

For obvious reasons, while the law is liberal in favor of bona fide claimants of this kind, it is applied with some strictness in regard to the requirement that they shall clearly bring themselves within the class designated by the statute.[158] Thus, where a bank advanced money to a building contractor to enable him to complete his contract, in consideration of an assignment of the amount due him from the owner, it was held that the bank could not claim a lien in the character of a laborer or a materialman.[159] And though property is charged with valid liens of this kind, it cannot be withheld from the control of the court of bankruptcy, but must be turned over to the trustee to be administered for the benefit of all concerned, due recognition being given to the liens.[160] And further the lien claimants must discontinue any proceedings they may have begun in the state courts.[161] Nor can the claimant insist upon his lien in the bankruptcy proceedings if he has previously waived it by accepting security for his debt, unless, indeed, the security proves to have been entirely void.[162] Finally, if the state law is such that the liens of mechanics relate back to the commencement of the building, there can be no priority among the mechanics in the bankruptcy proceedings, but they all stand upon the same footing and are to be paid in full or pro rata as the funds may suffice.[163]

Moreau Lumber Co. v. Johnson, 29 N. D. 113, 150 N. W. 563, L. R. A. 1915F, 1132, Ann. Cas. 1917C, 290; Harrison v. Knafle, 128 Tenn. 329, 161 S. W. 1003; In re Coulter, 2 Sawy. 42, 5 N. B. R. 64, Fed. Cas. No. 3,276; In re McAllister-Newgord Co., 193 Fed. 265, 27 Am. Bankr. Rep. 459; In re Grissler, 136 Fed. 754, 69 C. C. A. 406, 13 Am. Bankr. Rep. 508; In re Georgia Handle Co., 109 Fed. 632, 48 C. C. A. 571, 6 Am. Bankr. Rep. 472; In re Lillington Lumber Co., 132 Fed. 886, 13 Am. Bankr. Rep. 153; Crane Co. v. Smythe, 94 App. Div. 53, 87 N. Y. Supp. 917; Sabin v. Connor, Fed. Cas. No. 12,197; Clifton v. Foster, 103 Mass. 233, 4 Am. Rep. 539, 3 N. B. R. 656; In re Dey, 9 Blatchf. 285, Fed. Cas. No. 3,871. But the notice or claim must be filed and it must be correct in form and substance. In re Shute (D. C.) 233 Fed. 544, 37 Am. Bankr. Rep. 554.

157 In re Roeber, 121 Fed. 449, 57 C. C. A. 565, 9 Am. Bankr. Rep. 303; In re Cramond, 145 Fed. 966, 17 Am. Bankr. Rep. 22; Lazzari v. Havens, 39 Misc. Rep. 255, 79 N. Y. Supp. 395; Garretson v. Clark (N. J. Eq.) 57 Atl. 414; In re Sabin, 12 N. B. R. 142, Fed. Cas. No. 12,194; In re Collins (D. C.) 235 Fed. 937, 37 Am. Bankr. Rep. 692.

158 Selling agents for a bankrupt manufacturing company cannot claim a lien under the description of workmen or laborers. In re Crawford Wollen Co. (D. C.) 218 Fed. 951, 34 Am. Bankr. Rep. 223.

159 In re Cramond, 145 Fed. 966, 17 Am. Bankr. Rep. 22.

160 In re Cramond, 145 Fed. 966, 17 Am. Bankr. Rep. 22. If the property is sold free of liens by the trustee in bankruptcy, those holding liens as mechanics or materialmen will have their claims transferred to the fund arising from the sale. In re Dubosky (D. C.) 253 Fed. 794.

161 In re Cook, 3 Biss. 116, Fed. Cas. No. 3,151.

162 In re Lynn Camp Coal Co., 168 Fed. 998, 22 Am. Bankr. Rep. 60.

163 In re Hoyt, 3 Biss. 436, Fed. Cas. No. 6,805.

§ 375. Liens Acquired by Legal Proceedings Before Bankruptcy.—Under the earlier of the two clauses of the bankruptcy act contrasted in a former section,[164] a lien "created by or obtained in or pursuant to any suit or proceeding at law or in equity" will be dissolved by the adjudication of the debtor within four months thereafter, if it appears that it was "obtained and permitted" while he was insolvent and that its enforcement will work a preference, or if the party to be benefited had reasonable cause to believe that the defendant was "insolvent and in contemplation of bankruptcy," or if such lien was "sought and permitted in fraud of the provisions of this act." Here the statute is satisfied by any one of the three alternatives. For example, if the enforcement of the lien will work a preference, it is not necessary that the creditor should have known, or had reasonable cause to believe, that the debtor was insolvent, nor that the lien should have been sought and permitted in fraud of the act.[165] And under the construction given to this provision, an attaching creditor "obtains" his lien when proceedings instituted by him result in its attaching to an insolvent's estate in such manner as to effect a preference, and the debtor "permits" it when he allows a state of facts to exist rendering such lien possible, and cannot and does not in good faith resist it.[166] But under the wider provisions of clause "f" of the sixty-seventh section, all liens obtained through legal proceedings against an insolvent debtor, within four months prior to the filing of a petition in bankruptcy by or against him, are annulled by his adjudication, irrespective of the question whether the debtor suffered or permitted the lien to be obtained, and irrespective of any knowledge by the creditor of the debtor's insolvency.[167] It is strictly necessary, however, that the lien should have been created within four months before the filing of the petition and that the debtor should have been insolvent at the time it was created.[168] And if a valid lien upon particular property or a fund has been acquired more than four months

[164] Supra, § 363.

[165] In re Burrus, 97 Fed. 926, 3 Am. Bankr. Rep. 296.

[166] In re Arnold, 94 Fed. 1001, 2 Am. Bankr. Rep. 180; In re Burrus, 97 Fed. 926, 3 Am. Bankr. Rep. 296.

[167] In re Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145. But this provision of the statute does not apply to property set apart by the bankruptcy court as exempt. Burcell v. Goldstein, 23 N. D. 257, 136 N. W. 243.

[168] Gay v. Ray, 195 Mass. 8, 80 N. E. 693; W. S. Danby Millinery Co. v. Dogan, 47 Tex. Civ. App. 323, 105 S. W. 337; In re Louisell Lumber Co., 209 Fed. 784, 126 C. C. A. 508, 31 Am. Bankr. Rep. 356. The time and manner in which a lien attaches to property through legal proceedings begun before bankruptcy depends wholly upon the law of the state in which the property is situated. In re Schow (D. C.) 213 Fed. 514. The taking possession of property of a corporation by a court through receivers in a creditors' suit constitutes a "levy" within § 67f of the Bankruptcy Act, and the jurisdiction of the court over the property

before bankruptcy proceedings, its enforcement within that time is not an illegal preference under the bankruptcy act.[169]

Of the term "legal proceedings," used in this connection, it has been said that these words are not terms of art. "They have no strictly technical meaning, but are here used in a general sense. In their narrower meaning, they signify a suit or proceeding at law or in equity. But in a wider sense, they embrace every proceeding established by law for acquiring a right or enforcing a remedy. In this sense, the foreclosure of a mortgage by advertisement under the statute is as truly a legal proceeding as a foreclosure by a suit in equity; the one is a statutory remedy out of court, the other a remedy in and through the court. Both are equally legal proceedings. If there were doubt in which sense the expression 'legal proceedings' is used in Section 67f, the wider sense should be adopted, ut res magis valeat quam pereat, that the main object of the act, viz., equality among creditors, may be saved and not lost."[170] As otherwise explained, the expression relates only to those actions and proceedings taken by creditors who, having no existing lien or right of lien resting in existing contract entered into in good faith, seek to obtain a preference by being first in the race of diligence, and the statute does not apply, for example, to a lien obtained by a landlord by the levy of a distress warrant for past due rent under a lease entered into in good faith and giving him the right to resort to that remedy.[171] But the statute plainly covers a seizure of property on a writ of replevin,[172] the lien secured by the filing of a creditor's bill,[173] or a suit to reach and subject the surplus income of an estate held in trust for the debtor,[174] or a suit to vacate a chattel mortgage, as being invalid against creditors.[175] But a mortgage creditor does not lose his lien by suing for and obtaining a decree of foreclosure and an advertisement of the prop-

is not affected by bankruptcy proceedings against the corporation instituted more than four months afterwards. Blair v. Brailey, 221 Fed. 1, 136 C. C. A. 524, 34 Am. Bankr. Rep. 12.

169 Wood v. Kerkeslager, 225 Pa. St. 296, 74 Atl. 174.

170 In re Emslie, 98 Fed. 716, 3 Am. Bankr. Rep. 516.

171 In re Robinson & Smith, 154 Fed. 343, 83 C. C. A. 121, 18 Am. Bankr. Rep. 563; Schall v. Kinsella, 117 La. 687, 42 South. 221; Bird v. City of Richmond, 240 Fed. 545, 153 C. C. A. 349, 39 Am. Bankr. Rep. 1; In re Mossler Co., 239 Fed. 262, 152 C. C. A. 250, 38 Am. Bankr. Rep. 604. But compare In re United Motor Chicago Co., 220 Fed. 772, 136 C. C. A. 378, 33 Am. Bankr. Rep. 694.

172 In re Hymes Buggy & Implement Co., 130 Fed. 977, 12 Am. Bankr. Rep. 477; In re Weinger, Bergman & Co., 126 Fed. 875, 11 Am. Bankr. Rep. 424; In re Haynes, 123 Fed. 1001, 10 Am. Bankr. Rep. 715.

173 In re Potee Brick Co., 179 Fed. 525. Compare Blick v. Nimmo, 121 Md. 139, 88 Atl. 116.

174 In re Tiffany, 133 Fed. 799, 13 Am. Bankr. Rep. 310.

175 Dunn Salmon Co. v. Pillmore, 55 Misc. Rep. 546, 106 N. Y. Supp. 88.

erty for sale, within four months prior to the debtor's bankruptcy, for the lien is not one created by the decree, but by the act of the parties, that is, by the mortgage itself.[178] Where property of a bankrupt, at the time of the bankruptcy, is in the lawful custody of a state court under seizure in a pending suit begun within four months, the court of bankruptcy has power to stay such suit and to direct the property to be turned over for administration in the bankruptcy proceedings.[177]

§ 376. Same; Attachment or Garnishment.—The lien acquired by an attachment of the property of an insolvent debtor is a lien "obtained through legal proceedings," both on general principles and by the explicit description of it as such in the bankruptcy law, and is dissolved by the filing of a petition in bankruptcy by or against the debtor, if that occurs within four months after its date.[178] And much more is this true of an attachment issued after the commencement of the bankruptcy proceedings.[179] But of course the statute does not apply to cases where the property seized under the attachment is exempt property of the bankrupt,[180] or where the person or corporation proceeded against in bankruptcy is not amenable to the bankruptcy law.[181] In other cases, however, the effect of the statute in dissolving attachment liens is not confined to those issuing from courts of the United States, but applies as well to the process of the state courts.[182] And the appointment by

[176] In re Gerdes, 102 Fed. 318, 4 Am. Bankr. Rep. 346.

[177] Orr v. Tribble, 158 Fed. 897, 19 Am. Bankr. Rep. 849; Stacy v. McNicholas, 76 Or. 167, 148 Pac. 67.

[178] In re Southern Arizona Smelting Co., 231 Fed. 87, 145 C. C. A. 275, 36 Am. Bankr. Rep. 827; In re Federal Biscuit Co., 214 Fed. 221, 130 C. C. A. 635, 32 Am. Bankr. Rep. 612; Ford v. Henderson, 91 Or. 701, 178 Pac. 381, 179 Pac. 558; Bear v. Chase (C. C. A.) 99 Fed. 920, 3 Am. Bankr. Rep. 746; In re Tune, 115 Fed. 906, 8 Am. Bankr. Rep. 285; Zeiber v. Hill, 1 Sawy. 268, 8 N. B. R. 239, Fed. Cas. No. 18,206; Lindner v. Brock, 40 Mich. 618; Howe v. Union Ins. Co., 42 Cal. 528, Fed. Cas. No. 6,776; Tootle v. Sheldon, 10 Neb. 44, 4 N. W. 358; Peck v. Jenness, 16 N. H. 516, 43 Am. Dec. 573; Ingraham v. Phillips, 1 Day (Conn.) 117; Reed v. Bullington, 49 Miss. 223, Third persons questioning the right of an attaching creditor may attack his lien on the ground of its being dissolved by bankruptcy proceedings begun against the debtor within four months. Dyke v. Farmersville Mill & Light Co. (Tex. Civ. App.) 175 S. W. 478. Where the state statute gives a right to an attachment for rent due, but requires it to be followed by a determination of the rights of the parties by a proceeding in court, this is not the equivalent of a common-law distress for rent, and therefore does not give the landlord's claim a preference, but, if taken within four months of a petition in bankruptcy, is dissolved thereby. Jones v. Ford, 254 Fed. 645, 166 C. C. A. 143, 43 Am. Bankr. Rep. 88.

[179] Phillips v. Helmbold, 26 N. J. Eq. 202.

[180] Robinson v. Wilson, 15 Kan. 595, 22 Am. Rep. 272, 14 N. B. R. 565; Burcell v. Goldstein, 23 N. D. 257, 136 N. W. 243; First International Bank v. Lee (N. D.) 141 N. W. 716.

[181] In re New Amsterdam Motor Co., 180 Fed. 943, 24 Am. Bankr. Rep. 757.

[182] Wood v. Carr, 73 S. W. 762, 24 Ky. Law Rep. 2144; Bank of Columbia v.

the state court of a receiver of the property of the debtor, and a transfer to him of the attached property, prior to the appointment of the trustee in bankruptcy, does not so alter the rights of the parties as to entitle the attaching creditor to preference in the payment of any judgment he may obtain.[183]

The effect of the dissolution of the attachment is to release the attached property,[184] though no order of dissolution may be entered in the court where the action is pending,[185] and a purchaser of the property under the attachment has no standing to maintain a bill to clear his title or set aside conveyances,[186] and further proceedings in the suit wherein the attachment issued may be enjoined by the court of bankruptcy.[187] The attached property must be surrendered to the trustee in bankruptcy.[188] But if the property attached has already been sold, and the proceeds paid over to the attaching creditor, it is doubtful whether he can be made to refund it at the suit of the trustee.[189]

The same principles apply to the process of garnishment. The rendition of a judgment against the garnishee creates a lien on the fund or property, and even the service of the writ, before judgment, if it does not create a lien, at least raises a specific right to a lien, and in either case the right or preference secured by the creditor is "obtained through legal proceedings," in such sense as to be dissolved by the subsequent adjudication of the debtor within four months.[190] The effect is to vest

Overstreet, 10 Bush (Ky.) 148, 13 N. B. R. 157.

[183] Miller v. Bowles, 58 N. Y. 253.

[184] Bank of Garrison v. Malley, 103 Tex. 562, 131 S. W. 1064; Lehman, Stern & Co. v. E. Martin & Co., 132 La. 231, 61 South. 212. Where an attachment is sued out against a defendant within four months of his bankruptcy, and is dissolved, a garnishment in aid of such attachment falls with it. Hobson-Starnes Coal Co. v. Alabama Coal & Coke Co., 189 Ala. 481, 66 South. 622. The filing of a petition in bankruptcy by an attaching creditor and delivery of the attached goods to the receiver in bankruptcy, will discharge the attachment if it was obtained within four months, and will pass the title to the receiver. Ernest Wolff Mfg. v. Battreal Shoe Co., 192 Mo. App. 113, 180 S. W. 396.

[185] Sullivan v. Rabb, 86 Ala. 433, 5 South. 746. See King v. Will J. Block Amusement Co., 193 N. Y. 608, 86 N. E. 1126.

[186] Hatfield v. Moller, 4 Fed. 717. But see In re Alabama Coal & Coke Co. (D. C.) 210 Fed. 940, 31 Am. Bankr. Rep. 387.

[187] In re Bellows, 3 Story, 428, Fed. Cas. No. 1,278; C. Tennant Sons & Co. v. New Jersey Oil & Meal Co., 78 Misc. Rep. 497, 139 N. Y. Supp. 1023; Pope v. Title Guaranty & Surety Co., 152 Wis. 611, 140 N. W. 348; In re Federal Biscuit Co., 203 Fed. 37, 29 Am. Bankr. Rep. 393.

[188] New Orleans Acid & Fertilizer Co. v. Grissom, 79 Miss. 662, 31 South. 336. In re Gilsonite Mines Co. (D. C.) 236 Fed. 1015, 37 Am. Bankr. Rep. 473. After the annulling of the lien of an attachment by the filing of a petition in bankruptcy, the sheriff holds merely as an involuntary bailee for the benefit of the trustee in bankruptcy. Gray v. Arnot, 31 N. D. 461, 154 N. W. 268.

[189] Botts v. Hammond (C. C. A.) 99 Fed. 917, 3 Am. Bankr. Rep. 775.

[190] In re Ransford, 194 Fed. 658, 28 Am. Bankr. Rep. 78; Longley Bros. v. McCann, 90 Ark. 252, 119 S. W. 268; Fairlamb v. Smedley Const. Co., 36 Pa. Super. Ct. 17; Hobbs v. Thompson, 160 Ala. 360, 49 South. 787, 18 Ann. Cas. 381;

in and transfer to the trustee in bankruptcy the indebtedness of the garnishee to the bankrupt, and he alone has the right to claim and collect it,[191] so that no judgment can thereafter be properly rendered against the garnishee in the suit of the creditor,[192] and if nevertheless, a judgment is so rendered, it is void, and must be treated as a nullity whenever drawn in question, whether directly or collaterally,[193] and the decree of the federal court adjudicating the principal debtor a bankrupt will constitute a complete defense to any attempt to enforce a judgment rendered by the state court against the garnishee.[194] Where a state statute provides for the filing of judgments recovered against employees of the state and for the payment of such judgments by state officers out of the salary or wages due to such employees (in lieu of allowing the garnishment of such wages or salaries), a lien thus acquired on the amount due an employee of the state is rendered void by his adjudication in bankruptcy, like any other lien, but the judgment itself is not affected, so that the lien exists upon all sums falling due after the adjudication in bankruptcy.[195]

But on the other hand, a lien by attachment or garnishment secured more than four months before the filing of the petition in bankruptcy is not dissolved by the adjudication, but remains a valid charge on the property or fund, which must be recognized and allowed in the bankruptcy proceedings.[196] But this is on the assumption that the

Cavanaugh v. Fenley, 94 Minn. 505, 103 N. W. 711, 110 Am. St. Rep. 382; Wilbur v. Wilson, Fed. Cas. No. 17,637; Howe v. Union Ins. Co., 42 Cal. 528, Fed. Cas. No. 6,776; In re Peck, 9 Ben. 169, 16 N. B. R. 43, Fed. Cas. No. 10,886. See London Guarantee & Accident Co. v. Mossness, 108 Ill. App. 440; Mechanics' & Traders' Ins. Co. v. McVay, 142 Ark. 522, 219 S. W. 34.

[191] Wright-Dalton-Bell-Anchor Store Co. v. Sanders, 142 Mo. App. 50, 125 S. W. 517; Peck Lumber Co. v. Mitchell, 1 Nat. Bankr. News, 262. Where a garnisher has notice of a prior lien on the money which he attempts to garnish, such lien will prevail against his rights, and also against a trustee in bankruptcy to whom the money was subsequently transferred, the latter also having notice of the prior lien. Gardner v. Planters' Nat. Bank, 54 Tex. Civ. App. 572, 118 S. W. 1146.

[192] Wright-Dalton-Bell-Anchor Store Co. v. Sanders, 142 Mo. App. 50, 125 S. W. 517.

[193] In re Beals, 116 Fed. 530, 8 Am. Bankr. Rep. 639. And see De Friece v. Bryant (D. C.) 232 Fed. 233, 37 Am. Bankr. Rep. 275.

[194] Hall v. Chicago, B. & Q. R. Co., 88 Neb. 20, 128 N. W. 645.

[195] Jefferson Transfer Co. v. Hull, 166 Wis. 438, 166 N. W. 1.

[196] Doe v. Childress, 21 Wall. 642, 22 L. Ed. 549; Crowe v. Reid, 57 Ala. 281; Martin v. Lile, 63 Ala. 406; Daggett v. Cook, 37 Conn. 341; Carr v. Thomas, 18 Fla. 736; Bowman v. Harding, 56 Me. 559; Currier v. King, 81 Vt. 285, 69 Atl. 873; Stickney & Babcock Coal Co. v. Goodwin, 95 Me. 246, 49 Atl. 1039, 85 Am. St. Rep. 408; Francis Batchelder & Co. v. Wedge, 80 Vt. 353, 67 Atl. 828; Bloch Bros. v. Moore (Ala.) 39 South. 1025; Allen v. Ingalls, 33 Nev. 281, 111 Pac. 34, 114 Pac. 758; In re Albrecht, 17 N. B. R. 287, Fed. Cas. No. 145; In re Maher, 169 Fed. 997, 22 Am. Bankr. Rep. 290; Holladay v. Hare, 69 Cal. 515, 11 Pac. 28; Ressmeyer v. Norwood, 117 Md. 320, 83 Atl. 347; In re J. L. Philips &

lien is valid and complete under the law of the state. Thus, to constitute an attachment of personal property, the officer must actually take it into his custody and control, and the mere taking of a receipt for certain property, followed by a return that he had attached it more than four months before the bankruptcy proceedings, though it would estop the receiptor from denying that there was an attachment, is not enough to create a lien as against the trustee in bankruptcy.[197] Having a valid lien, accruing more than four months before the bankruptcy, the creditor will be entitled to prosecute his action to judgment, at least so far as to obtain a decree in rem against the specific property attached, and to proceed to a sale of the property thereunder.[198] If the proceeds are not sufficient to satisfy his whole claim against the debtor, he may come into the bankruptcy proceedings with a claim for the balance, after crediting the amount realized under the attachment.[199]

§ 377. **Same; Judgment or Execution.**—The Bankruptcy Act provides that "all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt."[200] Consequently a creditor holding an unsatisfied judg-

Co. (D. C.) 224 Fed. 628, 34 Am. Bankr. Rep. 877; Coast & Lakes Contracting Corp. v. Martin, 92 Conn. 11, 101 Atl. 502; Light v. Hunt, 17 Ga. App. 491, 87 S. E. 763; Pelton v. Sheridan, 74 Or. 176, 144 Pac. 410; Citizens' Nat. Bank v. Dasher, 16 Ga. App. 33, 84 S. E. 482.

[197] In re Ashley, 19 N. B. R. 237, Fed. Cas. No. 581. See Marceline State Bank v. Smith, 122 Mo. App. 61, 98 S. W. 104; In re Schow (D. C.) 213 Fed. 514.

[198] In re Snell, 125 Fed. 154, 11 Am. Bankr. Rep. 35; May v. Courtnay, 47 Ala. 185; Hill v. Harding, 116 Ill. 92, 4 N. E. 361; Gillett v. McCarthy, 23 Kan. 668; Stoddard v. Locke, 43 Vt. 574, 5 Am. Rep. 308, 9 N. B. R. 71; Bates v. Tappan, 99 Mass. 376, 3 N. B. R. 647. See Ray v. Wight, 119 Mass. 426, 20 Am. Rep. 333, 14 N. B. R. 563.

[199] In re Knight, Yancey & Co., 190 Fed. 893, 26 Am. Bankr. Rep. 787.

[200] Bankruptcy Act 1898, § 67f. Note that the judgment itself is not dissolved, annulled, rendered void, or otherwise affected by the institution of proceedings in bankruptcy against the judgment debtor; only its lien is (in some circumstances) divested. It is true the section cited speaks of "levies, judgment, attachments, or other liens obtained through legal proceedings." But it is evident from the context that it is not the judgment as an obligation or an evidence of debt that is intended, but only its lien, or only the judgment in its aspect of creating a lien. Besides, the only prescribed effect of this annulment or avoidance is that the property affected by the judgment or lien shall be released from it. Further, judgments are provable debts in bankruptcy, and this could not be if they were rendered null and void by the proceedings. Hence, as merging the original cause of action, as an obligation, as an evidence of debt, as the basis for a new suit, as evidence in the courts of another state, as subject to revival by scire facias, and in all other respects save only the question of lien, the judgment is not affected. See Pope v. Title Guaranty & Surety Co., 152 Wis. 611, 140 N. W. 348. A judgment against the bankrupt will be effective as an es-

ment, or an execution levied on property of the debtor, can claim no preference or advantage over other creditors if the debtor is adjudged bankrupt within four months after its date. The judgment may remain as a provable debt against the bankrupt, but its lien is lost.[201] Such questions as whether a lien arises from the delivery of an execution to the sheriff before levy, or whether it covers property held under a contract of conditional sale, will be controlled by the law of the state, and the federal courts will be governed by the decisions of its highest tribunal.[202] The bankruptcy act is held applicable, in this particular, not only to judgments rendered in contested actions, but also to judgments by confession,[203] and judgments entered by consent,[204] and a judgment imposing a fine for a violation of a state law or a municipal ordinance is not excepted,[205] nor one for the purchase price of the property to which its lien attaches.[206] But the object of the statute is only to secure equality among creditors as of a certain date, that is, four months before bankruptcy. Hence it is not the judgment which it denounces, but only the lien or preference springing from it, and therefore it applies only to judgments of which a lien on property is a necessary result or concomitant. "A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so, the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial. Moreover, other provisions of the act render it unreasonable to impute the intention to annul all judgments recovered within four

toppel against the trustee and the estate, although, by the loss of its lien, the judgment creditor can only claim in competition with other creditors having equal rights. In re Stringer (D. C.) 230 Fed. 177, 37 Am. Bankr. Rep. 44; So again, where a judgment is rendered within four months before an adjudication of bankruptcy, it becomes a lien on any real estate of the bankrupt which the trustee elects not to take, although it is not effective against the trustee or persons claiming under him or against, the bankrupt personally. McCarty v. Light, 155 App. Div. 36, 139 N. Y. Supp. 853. And see People's Nat. Bank v. Maxson, 168 Iowa, 318, 150 N. W. 601.

201 In re Harrington, 200 Fed. 1010, 29 Am. Bankr. Rep. 666; Severin v. Robinson, 27 Ind. App. 55, 60 N. E. 966; L. Mohr & Sons v. Mattox, 120 Ga. 962, 48 S. E. 410; Burgett v. Paxton, 99 Ill. 288; Ades v. Caplan, 132 Md. 66, 103 Atl. 94, L. R. A. 1918B, 276; In re Beck (D. C.) 238 Fed. 653, 38 Am. Bankr. Rep. 797; Finney v. Knapp Co., 145 Ga. 400, 89 S. E. 413. See In re Surprenant (D. C.) 217 Fed. 470, 33 Am. Bankr. Rep. 454. Compare Doyle v. Hall, 86 Ill. App. 163.

202 Reardon v. Rock Island Plow Co., 168 Fed. 654, 94 C. C. A. 118, 22 Am. Bankr. Rep. 26; Pence v. Cochran, 6 Fed. 269.

203 In re Weeks, 2 Biss. 259, 4 N. B. R. 364, Fed. Cas. No. 17,350; Jordan v. Downey, 40 Md. 401, 12 N. B. R. 427; Hoover v. Greenbaum, 61 N. Y. 305.

204 In re Richard, 94 Fed. 633, 2 Am. Bankr. Rep. 506.

205 In re Green (D. C.) 179 Fed. 870, 24 Am. Bankr. Rep. 665.

206 In re O'Brien, 215 Fed. 129, 32 Am. Bankr. Rep. 347.

months."[207] Thus, a decree foreclosing a mortgage, entered within four months before the bankruptcy of the mortgagor, is not a judgment creating a lien, such as to be rendered void by the adjudication, but merely a decree for the enforcement of a prior lien, which is not affected by the proceedings in bankruptcy.[208] And so, a judgment dispossessing a tenant, rendered shortly before his bankruptcy, is not one which creates a lien on his estate.[209] Moreover, the statute does not apply to a lien which has already been merged into a title by sale on judicial process. Where a judgment has been recovered, an execution issued and levied, and a sale of the property made thereunder, all within four months prior to the bankruptcy, the title of the execution purchaser is expressly saved by the statute in case he bought in good faith and for value and without notice, and as to the proceeds of the sale, they may perhaps be recovered by the trustee in bankruptcy if they yet remain in the hands of the sheriff, but not after they have been paid over to the judgment creditor, saving questions as to preference or fraud.[210]

But if a lien was gained by the recovery of a judgment, or by the levy of an execution thereunder, more than four months before the institution of bankruptcy proceedings, it is not dissolved or affected by the adjudication of the debtor, but the creditor is entitled to claim and enforce the advantages of his position.[211] And it has been held that the

[207] Metcalf v. Barker, 187 U. S. 174, 23 Sup. Ct. 67, 47 L. Ed. 122, 9 Am. Bankr. Rep. 36; In re Kavanaugh (D. C.) 99 Fed. 928, 3 Am. Bankr. Rep. 832. A judgment creditor, who secured a decree setting aside as to him a conveyance by the bankrupt should not be restrained from levying execution on the property, though the decree was obtained within four months before the bankruptcy proceedings, other creditors not having participated. In re Betsekas (D. C.) 235 Fed. 1020, 38 Am. Bankr. Rep. 184. Where a judgment obtained more than four months before the judgment debtor was adjudicated a bankrupt did not create a lien, a levy within the four months is void as against the trustee in bankruptcy. Coppard v. Gardner (Tex. Civ. App.) 199 S. W. 650.

[208] In re McKane (D. C.) 152 Fed. 733; Harvard v. Davis, 145 Ga. 580, 89 S. E. 740.

[209] Plaut v. Gorham Mfg. Co. (D. C.) 174 Fed. 852, 23 Am. Bankr. Rep. 42. See In re Chambers (D. C.) 254 Fed. 506, 43 Am. Bankr. Rep. 22.

[210] Nelson v. Svea Pub. Co., 178 Fed. 136; In re Bailey, 144 Fed. 214, 16 Am. Bankr. Rep. 289; In re Franks, 95 Fed. 635, 2 Am. Bankr. Rep. 634; In re Francis-Valentine Co., 93 Fed. 953, 2 Am. Bankr. Rep. 188; In re Kenney, 95 Fed. 427, 2 Am. Bankr. Rep. 494; Dyson v. Harper, 54 Ga. 282; Clement v. King, 152 N. C. 456, 67 S. E. 1023. And see, supra, §§ 28, 233. Compare In re Breslauer, 121 Fed. 910, 10 Am. Bankr. Rep. 33. See Utah Ass'n of Credit Men v. Jones, 50 Utah, 519, 164 Pac. 1029; Keystone Brewing Co. v. Schermer, 241 Pa. 361, 88 Atl. 657.

[211] Lewin v. Telluride Iron Works Co. (C. C. A.) 272 Fed. 590, 47 Am. Bankr. Rep. 22; In re Bruce, 158 Fed. 123, 19 Am. Bankr. Rep. 770; United States Fidelity & Guaranty Co. v. Murphy, 4 Ga. App. 13, 60 S. E. 831; Tucker v. Denico, 27 R. I. 239, 61 Atl. 642; Meirkord v. Helming, 139 Iowa. 437, 116 N. W. 785; Kaminsky v. Horrigan, 2 Ga. App. 332, 58 S. E. 497; In re Fuller, 1 Sawy. 243, 4 N. B. R. 115, Fed. Cas. No. 5,148; Virginia-Carolina Chemical Co. v. Rylee, 139

statute does not affect the lien of an execution levied within the four months, but founded on a judgment recovered two years before.[212] But this is difficult to concede, in view of the fact that the statute expressly names "levies" as well as "judgments and other liens obtained through legal proceedings."[213] But the trustee in bankruptcy may attack the validity of the lien on other grounds, if any are open to him. The law recognizes as liens only those which are valid and binding under the law of the estate where the property is situated. Hence if the lien of a judgment has been lost by lapse of time, and the judgment become dormant, by the laws of the state, there is no lien which is enforceable in bankruptcy.[214] And so, where an execution has been returned "nulla bona,"[215] but not necessarily because a sale under the execution has been enjoined by strangers.[216] On the other hand, the validity of a levy which is valid under the state law, being a matter of record, is conclusive and cannot be enquired into in the bankruptcy proceedings, and if the recital of a levy is false, the officer may be held to answer for it to the proper party, but this does not entitle the trustee in bankruptcy to claim or hold the proceeds of sale.[217]

An execution levied upon property after the filing of a petition in bankruptcy, while it is not rendered void by § 67f of the Bankruptcy Act, which applies only to liens acquired prior to the filing of the petition, creates no lien which will be recognized by the court of bankruptcy.[218] And a money judgment rendered in a state court pending the bankruptcy proceedings does not impose a lien on lands forming a part of the bankrupt's non-exempt property.[219]

§ 378. Dissolution of Liens by Adjudication.—All liens obtained within four months prior to the adjudication in bankruptcy, whether voluntary or by the process of a state court, and whether the proceedings in bankruptcy are begun by a voluntary or an involuntary petition, are

Ga. 669, 78 S. E. 27; In re L'Hommedieu, 146 Fed. 708, 77 C. C. A. 134, 16 Am. Bankr. Rep. 850; In re Zeis, 245 Fed. 737, 158 C. C. A. 139, 40 Am. Bankr. Rep. 104; In re Pilcher & Son (D. C.) 228 Fed. 139, 36 Am. Bankr. Rep. 273; Robinson & Co. v. Cosner, 136 La. 595, 67 South. 468; Robinson v. Tischler, 69 Fla. 77, 67 South. 565; Kinney v. Avery & Co., 14 Ga. App. 180, 80 S. E. 663; In re Brinn (D. C.) 262 Fed. 527, 45 Am. Bankr. Rep. 74.

[212] In re Easley, 93 Fed. 419, 1 Am. Bankr. Rep. 715.

[213] Bankruptcy Act 1898, § 67f.

[214] In re Cozart, 3 N. B. R. 508, Fed. Cas. No. 3,313; In re Zeis (D. C.) 229 Fed. 472, 36 Am. Bankr. Rep. 581; In re Monarch Acetylene Co. (D. C.) 229 Fed. 474, 36 Am. Bankr. Rep. 598. See In re Fraser (D. C.) 261 Fed. 558, 44 Am. Bankr. Rep. 572.

[215] In re E. Matthews & Sons, 163 Fed. 127, 20 Am. Bankr. Rep. 570.

[216] In re Randolph, 187 Fed. 186, 26 Am. Bankr. Rep. 623.

[217] Armstrong v. Rickey, 2 N. B. R. 473, Fed. Cas. No. 546.

[218] In re Schow (D. C.) 213 Fed. 514.

[219] Chambers v. Kirk, 41 Okl. 696, 139 Pac. 986.

vacated by the adjudication of bankruptcy.[220] Although the filing of the petition in bankruptcy fixes the date from which the period of four months preceding is to be calculated, with reference to the dissolution of liens obtained within that period, it is not the filing of the petition which vacates the lien but the adjudication of the debtor as a bankrupt, and hence if an adjudication is denied and the petition dismissed, the lien remains in full force.[221] And even where the adjudication is duly made, it does not affect valid liens on such of the debtor's property as is exempt by law.[222] In other cases, however, the annulment of the lien follows automatically. That is to say, it is within the jurisdiction of the court of bankruptcy to order that the rights obtained under the levy attachment, or other lien shall be preserved for the benefit of the estate. But if no such order is made, the lien is dissolved without the necessity of any judgment to that effect on the part of the court of bankruptcy.[223] But it is entirely proper practice for the trustee in bankruptcy to apply to the state court where the proceeding is pending for an order discharging the attachment or other lien,[224] and for this purpose he need not make himself formally a party of record.[225] But laches of the trustee in failing to move for the dissolution of an attachment which is avoided by the adjudication in bankruptcy will not validate it.[226] The rights of the parties are not altered by the fact that a receiver of the debtor's estate had been appointed by the state court and the attached property turned over to him.[227] But if the property has already been sold under the process of the state court, the title of the purchaser is not impeachable in the bankruptcy proceedings, if he bought in good faith, for value, and without notice.[228]

The statute does not operate upon and dissolve liens obtained by execution, levy, attachment, or other process, as against all the world, but

[220] Archenhold v. Schaefer (Tex. Civ. App.) 205 S. W. 139; Greenberger v. Schwartz, 261 Pa. 265, 104 Atl. 573; In re Rosenthal (D. C.) 238 Fed. 597, 39 Am. Bankr. Rep. 30; In re American Candy Mfg. Co. (D. C.) 248 Fed. 145, 41 Am. Bankr. Rep. 461.

[221] Sullivan & Co. v. King, 31 Tex. Civ. App. 432, 72 S. W. 207.

[222] In re Snyder (D. C.) 216 Fed. 989, 33 Am. Bankr. Rep. 311; Jewett Bros. v. Huffman, 14 N. D. 110, 103 N. W. 408. And see supra, § 249. Compare In re Forbes, 186 Fed. 79, 108 C. C. A. 191, 26 Am. Bankr. Rep. 355; In re Tune, 115 Fed. 906, 8 Am. Bankr. Rep. 285. This rule applies also as to the bankrupt's after-acquired property. Taylor v. Buser (Sup.) 167 N. Y. Supp. 887.

[223] Goodnough Mercantile & Stock Co. v. Galloway, 171 Fed. 940, 22 Am. Bankr. Rep. 803; Thompson v. Fairbanks, 75 Vt. 361, 56 Atl. 11, 104 Am. St. Rep. 899; Goodnough Mercantile Co. v. Galloway, 48 Or. 239, 84 Pac. 1049; Watschke v. Thompson, 85 Minn. 105, 88 N. W. 263.

[224] Hardt v. Schuylkill Plush & Silk Co., 69 App. Div. 90, 74 N. Y. Supp. 549; Kent v. Downing, 44 Ga. 116, 10 N. B. R. 538; Louden v. King, 50 Ga. 302; King v. Loudon, 53 Ga. 64; Dickerson v. Spaulding, 7 Hun (N. Y.) 288, 15 N. B. R. 313.

[225] Louden v. King, 50 Ga. 302; King v. Loudon, 53 Ga. 64.

[226] Hardt v. Schuylkill Plush & Silk Co., 69 App. Div. 90, 74 N. Y. Supp. 549.

[227] Miller v. Bowles, 58 N. Y. 253.

[228] Zahm v. Fry, 10 Phila. (Pa.) 243, 9 N. B. R. 546, Fed. Cas. No. 18,198.

only as against the trustee in bankruptcy and those claiming under him.[229] And a court will not presume the appointment and qualification of a trustee, merely because the bankruptcy act provides for such appointment, when the question is as to the discharge of a lien alleged to be invalidated by the adjudication of the debtor.[230] In effect, this statutory dissolution of liens is for the benefit of creditors, not for the benefit of the bankrupt, and as to him all such liens remain in force notwithstanding his adjudication in bankruptcy, as, for instance with reference to his exempt property or property which the trustee disclaims or which never comes into his possession.[231] And although a sale of land on execution within four months before the defendant's adjudication in bankruptcy, may be avoided by his trustee, its nullity cannot be pleaded by a former grantee of the same property.[232] Nor does the adjudication of the principal debtor release the sureties on a replevin bond or forthcoming bond.[233]

§ 379. Insolvency of Debtor.—The bankruptcy act provides for the dissolution of liens obtained through any suit or proceeding at law or in equity begun against a person within four months before the filing of a petition in bankruptcy by or against him, if it appears that he permitted the attaching of such lien while he was insolvent and that it will effect a preference. or if the person to be benefited by it "had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy."[234] This was also the rule under the act of 1867 as interpreted by the courts.[235] It will be observed that the question as to the creditor is whether he had "reasonable cause to believe" the debtor insolvent—not what he did believe—the latter is immaterial. The creditor is not constituted the sole judge of the sufficiency of the evidence of his debtor's insolvency; that is for the court to determine, the lien being attacked.[236] Reasonable cause to believe a person to be insolvent means

[229] McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433; Frazee v. Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391.

[230] Schoenthaler v. Rosskam, 107 Ill. App. 427.

[231] Miller v. Barto, 247 Ill. 104, 93 N. E. 140; Rochester Lumber Co. v. Locke, 72 N. H. 22, 54 Atl. 705.

[232] Hutchins v. Cantu (Tex. Civ. App.) 66 S. W. 138.

[233] Kaminsky v. Horrigan, 2 Ga. App. 332, 58 S. E. 497; Ehrlich v. Sklamberg, 116 N. Y. Supp. 602; In re Federal Biscuit Co., 214 Fed. 221, 130 C. C. A. 635, 32 Am. Bankr. Rep. 612; Credit Ass'n of California v. Griffin, 32 Cal. App. 598, 163 Pac. 695. Compare Kaiser v. Richardson, 5 Daly (N. Y.) 301, 14 N. B. R. 391.

[234] Bankruptcy Act 1898, § 67c.

[235] Merchants' Nat. Bank v. Truax, 1 N. B. R. 545, Fed. Cas. No. 9,451; In re McDonough, 3 N. B. R. 221, Fed. Cas. No. 8,775; Driggs v. Moore, 1 Abb. U. S. 440, 3 N. B. R. 602, Fed. Cas. No. 4,083; In re Pierce, 2 Low. 343, Fed. Cas. No. 11,140; McCabe v. Goodwine, 65 Ind. 288. See Peckham v. Burrows, 3 Story, 544, Fed. Cas. No. 10,897.

[236] Hall v. Wager, 3 Biss. 28, 5 N. B. R. 181, Fed. Cas. No. 5,951.

knowledge of a state of facts which would put a prudent man upon inquiry as to the condition of the person with whom he is dealing.[237] "If it appears that the party making the conveyance was actually insolvent, and that the means of knowledge upon this subject were at hand, and that such facts and circumstances were known to the party receiving the conveyance as clearly put the assignee, transferree, or grantee of the property upon inquiry, it would seem to be just to hold that the party receiving the assignment, transfer, or conveyance, even if he omitted to make inquiries, had reasonable cause to believe that his assignor or grantor was insolvent."[238] Under these rules, reasonable cause to believe the debtor insolvent may be imputed to a creditor when he knows that the debtor cannot pay his debts in the ordinary course of his business[239] or that the debtor has been embarrassed for two years, had made small payments on overdue debts, has unavailingly applied for extensions of time, has been pressed by his creditors, and has declined to give a mortgage on the ground that it would injure his credit.[240] So the debtor's repeated failure to fulfill promises in regard to paying the claim, the creditor also having knowledge of other debts, charges him with notice of insolvency, or reasonable cause for belief,[241] and so also, where creditors have to sue for the collection of accounts long overdue, and the debtor submits to suits on claims against which he has no defense.[242] Again, where a creditor takes a check, the fact that payment of it is refused puts him upon inquiry,[243] and it is said that the existence of a financial crisis or panic constitutes of itself reasonable cause to believe persons otherwise in doubtful circumstances to be insolvent.[244] Under the definition of insolvency as accepted in the application of former bankruptcy laws (inability to meet debts as they mature in the ordinary course of trade), it was held that a creditor who has knowledge of any transactions by the debtor out of the ordinary course of trade is put upon inquiry as to his solvency,[245] and the giving of a mortgage to secure prior advances or a pre-existing debt is out of the usual course of business, and is therefore a circumstance to put the creditor upon inquiry.[246]

[237] Rison v. Knapp, 4 N. B. R. 349, Fed. Cas. No. 11,861; In re McDonough, 3 N. B. R. 221, Fed. Cas. No. 8,775; Webb v. Sachs, 4 Sawy. 158, 15 N. B. R. 168, Fed. Cas. No. 17,325.

[238] Scammon v. Cole, 3 Cliff. 472, 5 N. B. R. 257, Fed. Cas. No. 12,432.

[239] Wilson v. Brinkman, 2 N. B. R. 468, Fed. Cas. No. 17,794; In re Forsyth, 7 N. B. R. 174, Fed. Cas. No. 4,948.

[240] Hall v. Wager, 3 Biss. 28, 5 N. B. R. 181, Fed. Cas. No. 5,951.

[241] In re Armstrong, 9 Ben. 212, 16 N. B. R. 275, Fed. Cas. No. 539.

[242] Stranahan v. Gregory, 4 N. B. R. 427, Fed. Cas. No. 13,522; Mayer v. Hermann, 10 Blatchf. 256, Fed. Cas. No. 9,344; Dunning v. Perkins, 2 Biss. 421, Fed. Cas. No. 4,180.

[243] Warren v. Tenth Nat. Bank, 5 Ben. 395, 5 N. B. R. 479, Fed. Cas. No. 17,200.

[244] In re Clarke, 2 Hughes, 405, 10 N. B. R. 21, Fed. Cas. No. 2,843.

[245] Scammon v. Hobson, 1 Hask. 406, Fed. Cas. No. 12,434.

[246] In re Holland, 2 Hask. 90, Fed. Cas. No. 6,603; Wager v. Hall, 16 Wall. 584, 21 L. Ed. 504. But compare Ex

But on the other hand, the creditor is not to be charged with knowledge of his debtor's insolvency, or reasonable cause to believe in it, merely from the fact that he knows that the debtor is embarrassed in carrying on his business for want of means,[247] or that the debtor was short of funds on the particular occasion, and wished the creditor to take a note and mortgage in substitution for a check on a bank.[248] So the fact that a person doing a large business obtains renewals of his commercial paper, or under special circumstances pays a large discount, is not notice of insolvency where it appears that such commercial paper was selling at equal rates in the market.[249] And in a rural community. the mere nonpayment of a note at maturity is not sufficient evidence of insolvency to put a creditor on inquiry.[250]

As to the meaning of the phrase "contemplation of bankruptcy," some of the decisions under the former statutes applied the strict rule that this could only mean the debtor's contemplation of the commission of an act denounced by the statute as an act of bankruptcy, or his contemplation of a decree adjudicating him a bankrupt either on his own petition or in involuntary proceedings.[251] But other decisions held that the phrase means contemplation on the debtor's part of a state of insolvency such as to involve a thorough breaking up of his business, and hence something more than insolvency in the sense of mere inability to pay debts promptly and as they mature,[252] so that payments made or securities given by a party who knew himself to be insolvent, were not considered as being "in contemplation of bankruptcy" if, at the time, he fully expected to continue his business and retrieve his losses.[253]

But under the wider provision in a later clause of the same section of the statute, liens obtained through legal proceedings against an insolvent person, within four months before the filing of a petition in bankruptcy, are to be deemed null and void in case he is adjudged a bankrupt,[254] without reference to his contemplation of bankruptcy or to the creditor's knowledge or constructive notice of his insolvency. And "insolvency" does not here mean mere inability to pay debts, but "a person

parte Packard, 1 Low. 523, Fed. Cas. No. 10,650; McLean v. Lafayette Bank, 3 McLean, 587, Fed. Cas. No. 8,888.

247 In re Wynne, Chase, 227, 4 N. B. R. 23, Fed. Cas. No. 18,117.

248 Collins v. Bell, 3 N. B. R. 587, Fed. Cas. No. 3,010.

249 Golson v. Niehoff, 2 Biss. 434, 5 N. B. R. 56, Fed. Cas. No. 5,524.

250 Shafer v. Fritchery, 4 N. B. R. 548, Fed. Cas. No. 12,697.

251 Buckingham v. McLean, 13 How. 151, 14 L. Ed. 91; In re Craft, 6 Blatchf. 177, 2 N. B. R. 111, Fed. Cas. No. 3,317; In re Goldschmidt, 3 N. B. R. 164, 3 Ben. 379, Fed. Cas. No. 5,520.

252 Everett v. Stone, 3 Story, 446, Fed. Cas. No. 4,577; McLean v. Lafayette Bank, 3 McLean, 587, Fed. Cas. No. 8,888; Hutchins v. Taylor, Fed. Cas. No. 6,953; In re Dibblee, 3 Ben. 283, 2 N. B. R. 617, Fed. Cas. No. 3,884; Atkinson v. Farmers' Bank, Crabbe, 529, Fed. Cas. No. 609.

253 Atkinson v. Farmers' Bank, Crabbe, 529, Fed. Cas. No. 609.

254 Bankruptcy Act 1898, § 67f.

shall be deemed insolvent when the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." [255] To satisfy the statute, it is necessary that the debtor should have been insolvent at the time the lien attached or was obtained. If he was then solvent, the lien is not dissolved by his subsequent adjudication in bankruptcy, though it be within four months.[256] And his insolvency must be alleged in any proceeding to avoid or discharge the lien, and proved by satisfactory evidence.[257] The burden is on one who claims that a lien is void under this section of the Bankruptcy Act to plead and prove the insolvency of the person against whom the lien was obtained at the time of its being obtained.[258] Thus, the burden of proof being on the trustee, the lien of a lessor, perfected by levy of a distress warrant within four months of the bankruptcy of the lessee, cannot be set aside in the absence of evidence that the lessor had cause to believe a preference was given.[259]

§ 380. Date of Attaching of Lien as Affecting Dissolution.—After the filing of a petition in bankruptcy it is too late for any creditor to gain an advantage over others by fastening any kind of a lien upon property of the debtor.[260] Moreover, certain classes of liens acquired within four months prior to the filing of the petition are expressly avoided by the statute upon the subsequent adjudication of the debtor,[261] such as the lien of an execution and levy on personal property,[262] or that of a distress

[255] Bankruptcy Act 1898, § 1, clause 15.

[256] Newberry Shoe Co. v. Collier, 111 Va. 288, 68 S. E. 974; Jackson v. Valley Tie & Lumber Co., 108 Va. 714, 62 S. E. 964; D. C. Wise Coal Co. v. Columbia Zinc & Lead Co., 157 Mo. App. 315, 138 S. W. 67; W. S. Danby Millinery Co. v. Dogan, 47 Tex. Civ. App. 323, 105 S. W. 337; Stone-Ordean-Wells Co. v. Mark, 227 Fed. 975, 142 C. C. A. 433, 35 Am. Bankr. Rep. 663. But see In re Southern Arizona Smelting Co., 231 Fed. 87, 145 C. C. A. 275, 36 Am. Bankr. Rep. 827.

[257] Simpson v. Van Etten, 108 Fed. 199, 6 Am. Bankr. Rep. 204; Hardt v. Schuylkill Plush & Silk Co., 69 App. Div. 90, 74 N. Y. Supp. 549; Kellogg-Mackay-Cameron Co. v. William Schmidt Baking Co., 101 Ill. App. 209; In re Crafts-Riordon Shoe Co., 185 Fed. 931, 26 Am. Bankr. Rep. 449; Martin v. Oliver, 260 Fed. 89, 171 C. C. A. 125, 43 Am. Bankr. Rep. 739.

[258] Stone-Ordean-Wells Co. v. Mark, 227 Fed. 975, 142 C. C. A. 433, 35 Am. Bankr. Rep. 663.

[259] In re Mossler Co., 239 Fed. 262, 152 C. C. A. 250, 38 Am. Bankr. Rep. 604.

[260] Cox v. State Bank, 125 Fed. 654, 11 Am. Bankr. Rep. 112; In re Engle, 105 Fed. 893, 5 Am. Bankr. Rep. 372; Morgan v. Campbell, 22 Wall. 381, 22 L. Ed. 796; Kinmouth v. Braeutigam, 63 N. J. Eq. 103, 52 Atl. 226. But see In re Wodzicki (D. C.) 238 Fed. 571, 38 Am. Bankr. Rep. 282, holding that a judgment creditor of the bankrupt is entitled to money collected monthly from the salary of the bankrupt under execution under Code Civ. Proc. N. Y. § 1391, not only before the four-month period, but during it, where no trustee in bankruptcy has been appointed.

[261] As to the effect of liens attaching before the passage of the bankruptcy act, see In re Brown, 91 Fed. 358, 1 Am. Bankr. Rep. 107.

[262] Rothermel v. Moyer, 24 Pa. Super. Ct. 325.

warrant,[263] or the statutory lien acquired by the institution of proceedings against a manufacturing corporation by a laborer in its employment.[264] But generally speaking, if four months or more have intervened between the attaching of the lien and the institution of the bankruptcy proceedings, the lien is not annulled, but preserved, as in the case of the lien of an attachment,[265] or that acquired by the rendition and entry of a final judgment,[266] or the docketing of a judgment in the county where the debtor's land lies.[267] So, a deed takes effect from its delivery, if there are no restrictions upon the right of the grantee to record it, and it will give a title available as against a trustee in bankruptcy if delivered more than four months before the beginning of the bankruptcy proceedings, though not recorded until later,[268] and the same rule has been applied in the case of a writ of attachment issued more than four months before the bankruptcy, but amended within that period to cure a formal defect.[269]

The rule for determining when the four-months period begins and ends is furnished by the statute itself (Section 31), which provides that "whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first, and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday." This was also the rule under the former bankruptcy law.[270] Under this rule, an attachment or other lien acquired on February 8th (for example) will be dissolved by the filing of a petition in bankruptcy on June 8th following.[271] And the maxim that the law does not take account of fractions of a day has no application to transactions in bankruptcy, as the time thereof is made certain by record.[272]

But the doctrine of relation plays a very important part in determining this question of the dissolution of liens. Thus it is held by the great weight of authority, that a creditor who brings suit against his debtor and secures the issue and levy of an attachment, more than four

[263] In re D. H. Dougherty Co., 109 Fed. 480, 6 Am. Bankr. Rep. 457.

[264] In re Monroe Lumber Co., 186 Fed. 252, 24 Am. Bankr. Rep. 371.

[265] Hurlbutt v. Brown, 72 N. H. 235, 55 Atl. 1046; Tucker v. Denico, 26 R. I. 560, 59 Atl. 920.

[266] Hillyer v. Le Roy, 179 N. Y. 369, 72 N. E. 237, 103 Am. St. Rep. 919. See Buttz v. James, 33 N. D. 162, 156 N. W. 547; Ricks v. Smith, 20 Ga. App. 491, 93 S. E. 116.

[267] In re Dunavant, 96 Fed. 542, 3 Am. Bankr. Rep. 41.

[268] National Bank of Fredericksburg v. Conway, 1 Hughes, 37, 14 N. B. R. 513, Fed. Cas. No. 10,037.

[269] Harrington v. Fire Ass'n, Fed. Cas. No. 6,106.

[270] Richards v. Clark, 124 Mass. 491; Cooley v. Cook, 125 Mass. 406.

[271] In re Warner, 144 Fed. 987, 16 Am. Bankr. Rep. 519; Jones v. Stevens, 94 Me. 582, 48 Atl. 170.

[272] Westbrook Mfg. Co. v. Grant, 60 Me. 88, 11 Am. Rep. 181.

months before the filing of a petition in bankruptcy against the debtor, acquires a lien which will not be dissolved by the adjudication in bankruptcy, notwithstanding the fact that the judgment in the action, which enforces the lien, was rendered within the four-months period.[273] This is partly on the ground that such judgment, so far as concerns the purposes of the lien, relates back to the service of the attachment, and partly on the theory that the "judgments" spoken of in the statute as being dissolved by the adjudication of the debtor within four months are judgments which create a lien, and not those which merely enforce an existing lien.[274] On the same principle, the equitable lien arising from a creditor's bill to set aside a fraudulent conveyance, having its date from the filing of the bill, and not from the date of the decree rendered in the suit is not avoided by the bankruptcy proceedings, where the bill is filed more than four months prior to the petition in bankruptcy, though the decree is rendered within such four months.[275] So also, the title of a receiver appointed in proceedings supplementary to execution relates back to the date of the service of the order, and will be superior to that of the trustee in bankruptcy, if the order was served more than four months before the beginning of the bankruptcy proceedings, regardless of the fact that the receiver was appointed within that period.[276] And again where the law of the state gives a lien to an award of arbitrators, it is valid against the trustee in bankruptcy if the award was made more than four months before the bankruptcy, though the judgment confirm-

[273] Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, 9 Am. Bankr. Rep. 36; Yumet & Co. v. Delgado, 243 Fed. 519, 156 C. C. A. 217, 40 Am. Bankr. Rep. 293; In re Crafts-Riordon Shoe Co., 185 Fed. 931, 26 Am. Bankr. Rep. 449; In re United States Graphite Co., 161 Fed. 583, 20 Am. Bankr. Rep. 573; In re Beaver Coal Co., 113 Fed. 889, 51 C. C. A. 519, 7 Am. Bankr. Rep. 542; In re Blair, 108 Fed. 529, 6 Am. Bankr. Rep. 206; Jackson v. Valley Tie & Lumber Co., 108 Va. 714, 62 S. E. 964; Pepperdine v. Bank of Seymour, 100 Mo. App. 387, 73 S. W. 890; Wakeman v. Throckmorton, 74 Conn. 616, 51 Atl. 554; Hurlbutt v. Brown, 72 N. H. 235, 55 Atl. 1046; Kittredge v. Warren, 14 N. H. 509; Rowe v. Page, 54 N. H. 190, 13 N. B. R. 366; Hudson v. Adams, 18 N. B. R. 102, Fed. Cas. No. 6,832. Contra, see In re Johnson, 108 Fed. 373, 6 Am. Bankr. Rep. 202; Duffield v. Horton, 10 Hun (N. Y.) 140, 16 N. B. R. 59; In re Cook, 2 Story, 376, Fed. Cas. No. 3,162.

[274] Where the debtor gave a deed as security, which was dated and recorded more than four months before his bankruptcy, a judgment on the note secured by the deed is not invalidated by the adjudication in bankruptcy, though taken within the four months' period. Spradlin v. Kramer, 146 Ga. 396, 91 S. E. 409.

[275] Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, 9 Am. Bankr. Rep. 36; Doyle v. Heath, 22 R. I. 213, 47 Atl. 213; Snyder v. Smith, 185 Mass. 58, 69 N. E. 1089; Schoenthaler v. Rosskam, 107 Ill. App. 427; Taylor v. Taylor, 59 N. J. Eq. 86, 45 Atl. 440; Iselin v. Goldstein, 35 Misc. Rep. 489, 71 N. Y. Supp. 1069; Ninth Nat. Bank v. Moses, 39 Misc. Rep. 664, 80 N. Y. Supp. 617; In re O'Connor, 95 Fed. 943. Compare In re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815. See Jasper v. Rozinski, 228 N. Y. 349, 127 N. E. 189.

[276] Arnold v. Greene Gold-Silver Co., 68 Misc. Rep. 449, 125 N. Y. Supp. 29; Wrede v. Clark, 132 App. Div. 293, 117 N. Y. Supp. 5; Smith v. Meisenheimer, 104 Ky. 753, 47 S. W. 1087; In re West-

ing it was obtained within that time.[277] And so, the lien of a chattel mortgage depends upon the date of its execution, and not upon the subsequent act of the mortgagee in taking possession of the goods.[278] But the merely provisional or inchoate lien acquired by the service of garnishment process, which under the law of the state can be made effective only through the recovery of a judgment and a levy or demand thereunder, is not of a kind to be preserved in the bankruptcy proceedings where the judgment was given within the four months, irrespective of the time when the process was served.[279]

On the other hand, although the statute speaks of the dissolution of liens obtained through a suit or proceeding which was "begun" against a person within four months before his bankruptcy, this does not necessarily refer to the beginning of the suit or action itself, but to the beginning of that part or branch of the proceedings whose special object is to secure a lien on property.[280] And although it is competent for a state to provide by law that the lien of a judgment, in a certain class of cases, shall relate back to the institution of the suit, and the bankruptcy law will preserve such lien,[281] yet the lien obtained by the levy of an execution on property newly purchased or acquired by the debtor, within four months prior to the bankruptcy, will be dissolved by the adjudication, though the judgment was entered more than four months previously,[282] and so will the lien obtained on land in another county within the four-months period, by the transfer to that county of an older judgment.[283] So, although a judgment may have been standing for several years, yet if garnishment proceedings founded on it were begun within four months before the bankruptcy of the debtor, the lien thereby acquired will be dissolved,[284] and so of an attachment sued out within the prescribed period, no matter how long the original action may have been pending.[285] And again, where a creditor holding a note

ern Sav. Bank, 110 Misc. Rep. 444, 181 N. Y. Supp. 574. But see In re O'Connor, 95 Fed. 943.

277 In re Koslowski, 153 Fed. 823, 18 Am. Bankr. Rep. 723.

278 Thompson v. Fairbanks, 75 Vt. 361, 56 Atl. 11, 104 Am. St. Rep. 899. But see Bank of Leavenworth v. Hunt, 11 Wall. 391, 20 L. Ed. 190.

279 In re Lesser, 108 Fed. 201, 5 Am. Bankr. Rep. 326. But compare Albany & Northern Ry. Co. v. Dunlap Hardware Co., 8 Ga. App. 171, 68 S. E. 868.

280 In re Higgins, 97 Fed. 775, 3 Am. Bankr. Rep. 364.

281 Voyles v. Parker, 9 Biss. 326, 4 Fed. 210. The revival of a judgment by amicable scire facias and confession, though within four months thereafter the debtor is adjudged bankrupt, is not in fraud of the bankruptcy law. Kemmerer v. Tool, 81 Pa. St. 467, 12 N. B. R. 334.

282 In re Darwin, 117 Fed. 407, 54 C. C. A. 581, 8 Am. Bankr. Rep. 703; In re Spacht, 2 Nat. Bankr. News, 238.

283 Mencke v. Rosenberg, 202 Pa. St. 131, 51 Atl. 767, 90 Am. St. Rep. 618; In re Jackson Light & Traction Co. (C. C. A.) 269 Fed. 223, 46 Am. Bankr. Rep. 258.

284 Armour Packing Co. v. Wynn, 119 Ga. 683, 46 S. E. 865.

285 In re Higgins, 97 Fed. 775, 3 Am. Bankr. Rep. 364, disapproving In re De Lue, 91 Fed. 510, 1 Am. Bankr. Rep. 387.

with warrant of attorney to confess judgment enters up judgment thereon and levies on the debtor's property, the latter being then insolvent, and within four months thereafter a petition in bankruptcy is filed by or against the debtor, the lien is dissolved, notwithstanding the fact that the note was given more than four months before and at a time when the debtor was solvent.[286]

It is important to be observed that the provision of the Bankruptcy Act invalidating liens which were created within four months prior to the adjudication in bankruptcy refers only to such liens as are placed on the bankrupt's property within that period, whether by process of a court or the act of the parties, and it does not affect liens which were attached to the property when it came into the bankrupt's hands.[287]

§ 381. **Rights of Bona Fide Purchasers.**—In prescribing the dissolution of liens obtained within four months prior to bankruptcy, the statute saves the rights of innocent third parties by providing that "nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry." [288] Though awkward and obscure on its face, this proviso is interpreted by the courts to mean that an adjudication in bankruptcy shall not affect the title acquired by a bona fide purchaser at a sale under such levy, judgment, attachment, or other lien, provided he bought without notice of the debtor's insolvency or of his intention to prefer a creditor or work a fraud upon the act, and without reasonable cause for inquiry into the circumstances in this respect.[289] But it is intended only for the benefit of third persons so purchasing, and affords no protection to the creditor in the execution or attachment,[290]

[286] In re Richards, 96 Fed. 935, 37 C. C. A. 634, 3 Am. Bankr. Rep. 145; In re Rhoads, 98 Fed. 399, 3 Am. Bankr. Rep. 380; In re Engle, 105 Fed. 893, 5 Am. Bankr. Rep. 372; Ferguson v. Greth, 195 Pa. St. 272, 45 Atl. 735, 78 Am. St. Rep. 812.

[287] In re McAusland (D. C.) 235 Fed. 173, 37 Am. Bankr. Rep. 519.

[288] Bankruptcy Act 1898, § 67f, proviso.

[289] In re Kenney, 95 Fed. 427, 2 Am. Bankr. Rep. 494; State Bank v. Munroe, 109 Ill. App. 34; Jones v. Springer, 15 N. Mex. 98, 103 Pac. 265; Coppard v. Gardner (Tex. Civ. App.) 199 S. W. 650. Where a bank took an assignment of certain accounts receivable from the bankrupt to secure a present loan, within four months prior to his bankruptcy, in good faith and without notice or reasonable cause for inquiry, it was held entitled to the benefit of its lien as against a subsequent attachment sought to be preserved for the benefit of the estate. In re Alabama Coal & Coke Co. (D. C.) 210 Fed. 940, 31 Am. Bankr. Rep. 387.

[290] In re Kaupisch Creamery Co. (D. C.) 107 Fed. 93, 5 Am. Bankr. Rep. 790. Where an insolvent corporation confessed judgment in favor of a bank, which bought in its property at the execution sale, setting off the judgment against the purchase price, it was held that the bank was not a bona fide purchaser, within this provision of the Bankruptcy Act, because the lien of the judgment, destroyed by the adjudication in bankruptcy, was a preference. Grant v. National Bank of Auburn (D. C.) 232 Fed. 201, 37 Am. Bankr. Rep. 329.

nor to one acting in concert or collusion with him,[291] nor to the officer making the sale or who holds the proceeds thereof.[292] Further, a person is not to be considered a bona fide purchaser who, in addition to knowledge of suspicious circumstances, is aware that he is purchasing a large and valuable amount of property at a grossly inadequate consideration.[293] And where, a few days before an execution sale, one who became the purchaser was handed a copy of the debtor's assignment for the benefit of creditors, and the debtor was present at the sale and publicly announced that he was insolvent, and the assignee exhibited the assignment and forbade the sale, the purchaser had reasonable cause to believe that the sale would not stand, and he cannot hold his purchase against the trustee in bankruptcy of the debtor.[294] And the same rule has been applied against the purchaser at an execution sale who merely had heard rumors that the debtor had already been adjudged bankrupt, this being sufficient to put him upon inquiry.[295]

§ 382. Rights of Trustee as to Property Affected by Liens.—It is always open to the trustee in bankruptcy to contest the validity of liens asserted against property of the bankrupt estate, because he represents the creditors, and not the bankrupt, and, further, has the rights and status of a creditor armed with a lien.[296] Where, however, the validity of a lien (as, for example, a chattel mortgage) has been established by decree in a foreclosure suit before the bankruptcy proceedings were instituted, the trustee can have no greater rights than those of the bankrupt.[297] But where, with knowledge of the debtor's adjudication in bankruptcy and of the rights of the trustee under the Bankruptcy Act, certain creditors persisted in pressing attachment proceedings, ultimately recovering judgment, it was held that the trustee was not estopped to claim the property on the theory that he had allowed the creditors to persist.[298] And in general, where the lien of an attachment, execution, or other writ is dissolved by the adjudication of the debtor as a bankrupt within four months, it is the right and duty of the trustee in bankruptcy to demand and recover the property affected from the possession of the officer holding it under the writ,[299] and the

[291] In re Goldberg, 121 Fed. 578, 10 Am. Bankr. Rep. 97.

[292] Jones v. Stevens, 94 Me. 582, 48 Atl. 170; In re Kenney, 95 Fed. 427, 2 Am. Bankr. Rep. 494.

[293] In re Goldberg, 121 Fed. 578, 10 Am. Bankr. Rep. 97.

[294] Brown v. Case, 180 Mass. 45, 61 N. E. 279. And see Dreyer v. Kicklighter (D. C.) 228 Fed. 744, 36 Am. Bankr. Rep. 199.

[295] Wallace v. Camp, 200 Pa. 220, 49 Atl. 942.

[296] Butterfield v. Woodman, 223 Fed. 956, 139 C. C. A. 436, 34 Am. Bankr. Rep. 510; In re Shute (D. C.) 233 Fed. 544, 37 Am. Bankr. Rep. 554; Mechanics' & Traders' Ins. Co. v. McVay, 142 Ark. 522, 219 S. W. 34.

[297] Otto v. England, 99 Wash. 529, 169 Pac. 964.

[298] In re Gilsonite Mines Co. (D. C.) 236 Fed. 1015, 37 Am. Bankr. Rep. 473.

[299] In re Walsh Bros., 159 Fed. 560, 20 Am. Bankr. Rep. 472; In re Francis-Valentine Co. (C. C. A.) 94 Fed. 793, 2

pendency of an action of replevin in a state court against the officer by a stranger claiming ownership of the property is no justification for his refusal to surrender it,[300] and the trustee has sufficient title to maintain trover against the officer, after demand and refusal, and is not required to apply first to the court from which the process issued for an order for its delivery to him.[301] And the same course may be pursued against one who holds attached property under a receipt to the sheriff or a forthcoming bond.[302] Even if the property is in the possession of a receiver appointed by a state court, it should be surrendered to the trustee in bankruptcy, on his petition to the state court for an order to that effect.[303] It is probably unnecessary for the trustee formally to move the state court for the discharge or vacating of the judgment or other lien in question, though this is a proper practice.[304]

If the property has already been sold under the writ, the statute will not affect the title acquired by a purchaser at such sale taking without notice and in good faith.[305] But if the proceeds of the sale remain in the hands of the officer, they stand in lieu of the property sold. They do not belong to the lien creditor, but to the trustee in bankruptcy for the benefit of the general creditors. Hence the officer may be enjoined from paying over the money to the lien creditor, and he should turn it into the hands of the trustee in bankruptcy on his demand, and may be compelled to do so by order of the court of bankruptcy.[306] But if the money arising from the sale has been paid over to the lien creditor, it cannot be reclaimed from him by the trustee. For the statute does not apply to the case of a lien which has been satisfied and discharged by sale and the application of the proceeds to the

Am. Bankr. Rep. 522; In re Fellerath, 95 Fed. 121; In re Richards, 95 Fed. 258, 2 Am. Bankr. Rep. 518; In re Francis-Valentine Co., 93 Fed. 953, 2 Am. Bankr. Rep. 188; In re Benedict, 37 Misc. Rep. 230, 75 N. Y. Supp. 165; Smith v. Godwin, 145 N. C. 242, 58 S. E. 1089; Ansonia Brass & Copper Co. v. Pratt, 10 Hun (N. Y.) 443, 16 N. B. R. 170; In re P. J. Sullivan Co. (D. C.) 247 Fed. 139, 41 Am. Bankr. Rep. 189.

[300] In re Francis-Valentine Co. (C. C. A.) 94 Fed. 793, 2 Am. Bankr. Rep. 522.

[301] Cooley v. Cook, 125 Mass. 406.

[302] Parks v. Sheldon, 36 Conn. 466, 4 Am. Rep. 95; Towle v. Robinson, 15 N. H. 408.

[303] In re English, 127 Fed. 940, 62 C. C. A. 572, 11 Am. Bankr. Rep. 674; Ballin v. Ferst, 55 Ga. 546; Rodgers v. Forbes, 23 Ohio Cir. Ct. R. 438.

[304] Thompson v. Ragan, 117 Ky. 577, 78 S. W. 485; Gage v. Bates Machine Co., 71 N. H. 384, 52 Atl. 457. And see supra, § 378.

[305] In re Weitzel, 191 Fed. 463, 27 Am. Bankr. Rep. 370; In re Goldman, 102 Fed. 122, 4 Am. Bankr. Rep. 100; De Friece v. Bryant (D. C.) 232 Fed. 233, 37 Am. Bankr. Rep. 275. And see, supra, § 381. Compare Gray v. Arnot, 31 N. D. 461, 154 N. W. 268.

[306] Clark v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555, 9 Am. Bankr. Rep. 476; Bear v. Chase, 99 Fed. 920, 40 C. C. A. 182, 3 Am. Bankr. Rep. 746; In re Duguid, 100 Fed. 274, 3 Am. Bankr. Rep. 794; In re Kenney, 97 Fed. 554, 3 Am. Bankr. Rep. 353; In re Richards, 95 Fed. 258, 2 Am. Bankr. Rep. 518; In re Fellerath, 95 Fed. 121, 2 Am. Bankr. Rep. 40; In re Franks, 95 Fed. 635, 2 Am. Bankr. Rep. 634; Pennington v. Lowenstein, 1 N. B. R. 570, Fed. Cas. No. 10,938; In re Benedict, 37 Misc. Rep. 230, 75 N. Y. Supp. 165; Schmilovitz v.

debt before the filing of a petition in bankruptcy.[307] It has been held, however, that if a sheriff levies an execution on property of the debtor and sells it, after the filing of a petition in bankruptcy (which is said to have the effect of a caveat and an injunction to all the world), he is liable to the trustee in bankruptcy for the proceeds of the sale, though he has paid them over to the creditor before receiving any notice of the bankruptcy.[308] The rule that the trustee is entitled to the possession of property covered by a lien which is dissolved by the adjudication in bankruptcy is subject, however, to this limitation, that due recognition must be given to, and provision made for, other liens which are valid and unaffected by the bankruptcy and which affect the same property, for the trustee is only the representative of the general or unsecured creditors, and his right to the property is measured by the interest which they may have in it.[309] But the opinion has been advanced that if a judgment or other lien has been acquired within four months of the bankruptcy and is vacated thereby, the claim of the trustee is superior to that of any person claiming under some other and subsequent transfer or lien, even though the latter be innocent of any intent to obtain a preference, for such claimant would take subject to the lien invalidated by the adjudication in bankruptcy.[310]

§ 383. Conveyance or Surrender of Property Under Order of Court. —Where a claim to the possession of property of a bankrupt's estate, as against the trustee's right of possession, is based solely on the lien of an execution, attachment, or other writ or process, the lien of which

Bernstein, 22 R. I. 330, 47 Atl. 884; Kosches v. Libowitz (Tex. Civ. App.) 56 S. W. 613.

307 Farrell v. W. B. Lockett & Co., 115 Tenn. 494, 91 S. W. 209; Levor v. Seiter, 69 App. Div. 33, 74 N. Y. Supp. 499; Greene v. Montana Brewing Co., 28 Mont. 380, 72 Pac. 751; Davis v. Jewett Bros., 17 S. D. 410, 97 N. W. 16. Compare McCord v. McNeil, 4 Dill. 173, Fed. Cas. No. 8,714. And see Lewin v. Telluride Iron Works Co. (C. C. A.) 272 Fed. 590, 47 Am. Bankr. Rep. 22.

308 Miller v. O'Brien, 9 Blatchf. 270, 9 N. B. R. 26, Fed. Cas. No. 9,586; In re Grinnell, 7 Ben. 42, 9 N. B. R. 29, Fed. Cas. No. 5,830. And see Balms v. Hutton, 9 Bing. 471; Garland v. Carlisle, 10 Bing. 452.

309 See In re Torchia, 188 Fed. 207, 110 C. C. A. 248, 26 Am. Bankr. Rep. 579; Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816; Houston Ice & Brewing Co. v. Fuller, 26 Tex. Civ. App. 239, 63 S. W. 1048; McElvain v. Hardesty, 169 Fed. 31, 94 C. C. A. 399, 22 Am. Bankr. Rep. 320; In re Sink, 2 Nat. Bankr. News, 645; In re American Candy Mfg. Co., 256 Fed. 87, 167 C. C. A. 329, 43 Am. Bankr. Rep. 77; W. A. Liller Building Co. v. Reynolds, 247 Fed. 90, 159 C. C. A. 308, 40 Am. Bankr. Rep. 371. Where the trustee takes possession of mortgaged property, and, on foreclosure, the proceeds are insufficient to discharge the last mortgage, rents collected between the adjudication and the foreclosure may be required to be applied to the liquidation of such mortgage. In re Dooner v. Smith (D. C.) 243 Fed. 984, 40 Am. Bankr. Rep. 116. Expenses of operating vessels of a bankrupt shipowner by the trustee after adjudication are not chargeable to the proceeds of the vessels as against holders of maritime liens, where there are general funds of the estate. In re New England Transp. Co. (D. C.) 220 Fed. 203, 34 Am. Bankr. Rep. 323.

310 In re American Candy Mfg. Co.

is avoided by the adjudication in bankruptcy, the person or officer so in possession is not an adverse claimant, but holds as bailee for the trustee, and must deliver the property on a proper demand, and he may be required to do so by a summary order of the court of bankruptcy.[311] So the court may receive from one indebted to the bankrupt the amount of the debt, although it was garnished within four months before the adjudication in bankruptcy, and judgment entered therefor against such debtor in a state court, and may make such order as may be necessary to protect the garnishee.[312] Further, in order to secure full effect for the provision dissolving liens on the bankrupt's property in certain cases, and to enforce its surrender to the trustee for the benefit of the general creditors, the statute provides that "the court may order such conveyance as shall be necessary to carry the purposes of this section into effect."[313] Such a course might sometimes be necessary in the case of real property, but it is believed that this clause adds nothing to the substantive provisions of the section.

§ 384. Subrogation of Trustee to Rights of Lienholders.—The bankruptcy act makes provision for the preservation of liens, which otherwise would be dissolved by the adjudication, whenever an advantage is to be gained for the general estate by keeping them alive and subrogating the trustee to the rights of the lienholder,[314] chiefly in cases where, if this course were not pursued, the property affected would not come into the hands of the trustee at all, but would be claimed by the holder of a valid and undissolved lien, with a possible loss to the estate of its value over and above the amount of the incumbrance.[315]

(D. C.) 248 Fed. 145, 41 Am. Bankr. Rep. 461.

311 Staunton v. Wooden, 179 Fed. 61, 102 C. C. A. 355, 24 Am. Bankr. Rep. 736.

312 In re McCartney, 109 Fed. 621, 6 Am. Bankr. Rep. 367; In re Beck (D. C.) 238 Fed. 653.

313 Bankruptcy Act 1898, § 67f. See In re V. & M. Lumber Co., 182 Fed. 231.

314 Bankruptcy Act 1898, § 67b, c, f. On the construction and reconciliation of these provisions, see First Nat. Bank v. Guarantee Title & Trust Co., 178 Fed. 187, 101 C. C. A. 507, 24 Am. Bankr. Rep. 330; In re Baird, 126 Fed. 845, 11 Am. Bankr. Rep. 435.

315 Thompson v. Fairbanks, 75 Vt. 361, 56 Atl. 11, 104 Am. St. Rep. 899. And see Merchants' Nat. Bank v. Sexton, 228 U. S. 634, 33 Sup. Ct. 725, 57 L. Ed. 998, 30 Am. Bankr. Rep. 278; In re Schweitzer (D. C.) 217 Fed. 495, 33 Am. Bankr. Rep. 212. Where, shortly before the adjudication in bankruptcy, a creditor in a suit against the bankrupt attached the bankrupt's funds on deposit in a trust company, and the company thereafter by mistake paid them out on the bankrupt's check, it was held proper to order that the attachment be retained for the benefit of the estate, that the creditor assign his claim to the trustee for the benefit of the estate, and that the trustee should prosecute the suit to judgment to secure the attached funds, since the payment by mistake did not diminish the rights of the trustee as it would not have diminished those of the attaching creditor. In re Charles Wirth & Co. (D. C.) 266 Fed. 141, 45 Am. Bankr. Rep. 145. The trustee in bankruptcy, whose bankrupts had assigned to their creditors to secure loans certain notes held by the bankrupts secured by stock in trade and accounts, is entitled to participate in the collaterals to the extent that the funds of the

Indeed, it is said that these provisions of the statute were only designed to preserve some interest acquired by virtue of the invalid or dissolvable lien which would not otherwise pass to the trustee in bankruptcy,[316] since, to construe them as referring only to liens on property which, if such liens were annulled, would vest in the trustee, would restrict their application to a contingency already provided for in the statute.[317] To illustrate, a lien acquired by an attaching creditor on real property which, but for such attachment, would have passed to a subsequent purchaser under an unrecorded deed, should be preserved by order of the court of bankruptcy for the benefit of the bankrupt's estate, although it would be liable to dissolution as having been acquired within four months before the bankruptcy.[318] So where the debtor has sold personal property, but under circumstances such as to make the sale void as against attaching creditors, and an attachment has been levied within four months before the bankruptcy, its lien will not be dissolved, but will be preserved for the benefit of the estate.[319] Again, where a chattel mortgage given by the insolvent is void as against judgment creditors because not filed as required by law, but would be valid as to general creditors and would, as to them, entitle the mortgagee to the possession of the property, judgment liens which have attached (though within four months before the bankruptcy) will be preserved by subrogating the trustee to the rights of the judgment creditors.[320] And so as to the liens of execution creditors on property held by the insolvent debtor under a contract of conditional sale.[321] And on the same principle, any advantage which a creditor may have gained by taking the proper steps to subject to his claim property apparently belonging to the bankrupt or standing in his name, but claimed by a third party, should be preserved and transferred to the trustee in bankruptcy.[322]

This authority and discretion on the part of the court of bankruptcy with reference to the preservation of liens otherwise voidable, when an advantage is thereby to be gained for the benefit of the general estate,

bankrupt estate have been used to discharge a secured debt and acquire the collateral notes, including a deposit to the bankrupt's credit which the secured creditor set off against the debt. Merchants' Nat. Bank v. Sexton, 228 U. S. 634, 33 Sup. Ct. 725, 57 L. Ed. 998, 30 Am. Bankr. Rep. 278.

316 Goodnough Mercantile & Stock Co. v. Galloway, 171 Fed. 940, 22 Am. Bankr. Rep. 803.

317 First Nat. Bank v. Staake, 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967, 15 Am. Bankr. Rep. 639.

318 Receivers of Virginia Iron, Coal & Coke Co. v. Staake, 133 Fed. 717, 66 C. C. A. 547, 13 Am. Bankr. Rep. 281; First Nat. Bank v. Staake, 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967, 15 Am. Bankr. Rep. 639; In re Baird, 126 Fed. 845, 11 Am. Bankr. Rep. 435.

319 Love v. Hill, 21 Okl. 347, 96 Pac. 623.

320 In re Beede, 138 Fed. 441, 14 Am. Bankr. Rep. 697; Dunn Salmon Co. v. Pillmore, 55 Misc. Rep. 546, 106 N. Y. Supp. 88.

321 Rock Island Plow Co. v. Reardon, 222 U. S. 354, 32 Sup. Ct. 164, 56 L. Ed. 231, 27 Am. Bankr. Rep. 492.

322 In re Hammond, 98 Fed. 845; Patten v. Francis D. Carley & Co., 69 App.

is not confined to liens which would be void as creating a preference,[323] but extends to all classes of liens, such as the liens of judgments,[324] or executions.[325] And the title or lien acquired by an assignee under a general assignment, valid according to the law of the state where made, if it would be to the advantage of the estate when it has subsequently passed into bankruptcy, is not necessarily destroyed by the supersession of the assignment proceeding, but, if the court of bankruptcy will so order, may be retained by the trustee for the benefit of the creditors.[326] So, the trustee has such an interest in mortgaged land of the bankrupt as will entitle him to pay the mortgage debt and have the mortgage assigned to himself, although it is not in process of foreclosure, where such a course will benefit the estate by enabling him to sell the property to better advantage.[327] But it is said that the statute does not transfer to the trustee the right of a judgment creditor to enforce an equitable lien acquired by the filing of a creditor's bill before bankruptcy proceedings were begun.[328] Nor will the preservation of the lien and the subrogation of the trustee be ordered merely to enable him to defeat another lien on the same property which is valid and which possesses at least equal claims to the consideration of a court of equity.[329] And in any event, if the substitution of the trustee is desired, proper steps must be taken to that end before the lien is discharged.[330] And where a sheriff is holding property of the bankrupt

Div. 423, 74 N. Y. Supp. 993; In re Merrow, 131 Fed. 993, 12 Am. Bankr. Rep. 615.

323 In re Baird, 126 Fed. 845, 11 Am. Bankr. Rep. 435.

324 In re Beede, 138 Fed. 441, 14 Am. Bankr. Rep. 697; Wills v. E. K. Wood Lumber & Mill Co., 29 Cal. App. 97, 154 Pac. 613.

325 Reardon v. Rock Island Plow Co., 168 Fed. 654, 94 C. C. A. 118, 22 Am. Bankr. Rep. 26.

326 In re Fish Bros. Wagon Co., 164 Fed. 553, 21 Am. Bankr. Rep. 149.

327 In re Bacon, 132 Fed. 157, 12 Am. Bankr. Rep. 730. Where the legal title and the mortgagee's title thus vest in the trustee in bankruptcy of the mortgagor, there will be no merger of the mortgage lien, if it is to the advantage of the estate to keep the lien alive to defeat a junior mortgage. Fidelity & Deposit Co. v. Albrecht (Tex. Civ. App.) 171 S. W. 819. But where the lien of a mortgage is not dissolved by the adjudication in bankruptcy, because given more than two years before, the trustee in bankruptcy, if he redeems the property from the mortgage, does so as a mere volunteer, and cannot claim any right of subrogation to the lien of the mortgage. Brown v. Crawford (D. C.) 252 Fed. 248, 42 Am. Bankr. Rep. 263.

328 Taylor v. Taylor, 59 N. J. Eq. 86, 45 Atl. 440.

329 In re Sentenne & Green Co., 120 Fed. 436, 9 Am. Bankr. Rep. 648; In re Moore, 107 Fed. 234, 6 Am. Bankr. Rep. 175; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, 13 Am. Bankr. Rep. 437.

330 In re Walsh Bros (D. C.) 195 Fed. 576, 28 Am. Bankr. Rep. 243. The mere adjudication in bankruptcy and the appointment of a trustee do not automatically preserve the lien of an attachment, but there must be affirmative action of the court to that effect. In re Prentice (D. C.) 267 Fed. 1019, 46 Am. Bankr. Rep. 38. A referee in bankruptcy has power to order an attachment lien on a bankrupt's homestead, valid under the state law, preserved for the benefit of the estate. In re Malone's Estate (D. C.) 228 Fed. 566, 36 Am. Bankr. Rep. 364.

under a levy, voidable because made within the four months, and the trustee in bankruptcy takes possession of the property, the lien of the levy is wholly discharged, and the trustee cannot thereafter assert any rights under it as against an adverse claimant.[331]

§ 385. Rights and Remedies of Creditor on Dissolution of Lien.—If a lien obtained through legal proceedings is dissolved by the adjudication of the debtor in bankruptcy within four months thereafter, it is extinguished for any and all purposes, and cannot afterwards be made effective, even though the bankrupt fails to obtain his discharge.[332] The only remedy of the creditor in such a case is to prove his claim as a general creditor, and as such to share in the distribution of the estate,[333] applying to the court of bankruptcy for an application in his favor of the proceeds of the sale of the property by the trustee in bankruptcy if he has any superior claim on them.[334] But if he has paid off other liens or charges on the property affected by his lien, in order to preserve it, he is entitled to be repaid the amount thereof out of the general funds of the estate, though his own lien is dissolved by the bankruptcy proceedings, since his discharge of liens which otherwise would have bound the property in the hands of the trustee has pro tanto increased the assets of the estate.[335] A creditor in this situation is not required to execute an assignment to the trustee of his lien, as a condition precedent to his sharing in the distribution of the estate (unless its preservation for the benefit of the estate is ordered by the court), where he has refrained from enforcing his lien in obedience to an injunction from the bankruptcy court.[336] The dissolution of a lien on particular property, as having been obtained within the four-months period, does not enlarge other liens on the same property or affect their rank and priority.[337] Thus, the dissolution of an attachment lien by proceedings in bankruptcy does not enlarge the security of a junior lien. Where an attachment upon property of the bankrupt for its full value is dissolved by the adjudication, a judgment creditor who has made a levy of execution subsequent to such attachment is not entitled to priority of payment. All the right which the judgment creditor acquired was by a levy on property already incumbered to its full value, and such a levy does not give him security.[338]

331 Davis v. Compton, 158 Fed. 735, 85 C. C. A. 633, 20 Am. Bankr. Rep. 53. And see Green v. Hooper, 41 Nev. 12, 167 Pac. 23.

332 St. Cyr v. Daignault, 103 Fed. 854, 4 Am. Bankr. Rep. 638.

333 In re Brand, 2 Hughes, 334, 3 N. B. R. 324, Fed. Cas. No. 1,809; Cole v. Duncan, 58 Ill. 176.

334 D. C. Wise Coal Co. v. Columbia Zinc & Lead Co., 157 Mo. App. 315, 138 S. W. 67.

335 In re Baker, 1 Hask. 593, Fed. Cas. No. 762.

336 In re Carrier, 51 Fed. 900.

337 In re Nelson, 9 Ben. 238, 16 N. B. R. 312, Fed. Cas. No. 10,100.

338 In re Klancke, 4 Ben. 326, 4 N. B. R. 648, Fed. Cas. No. 7,864; In re Steele, 7 Biss. 504, 16 N. B. R. 105, Fed. Cas. No. 13,345.

§ 386. Costs and Fees Incurred Under Dissolved Lien.—Where a lien acquired by attachment, execution, or other process is dissolved by an adjudication in bankruptcy, the sheriff or other officer holding the property under his writ is entitled to his fees for services rendered up to the filing of the petition in bankruptcy,[339] but he has no lien on the property itself for such fees or his costs, unless such a lien is expressly given by the state statute. If it is, he must be paid his fees and expenses before being ordered to deliver up the property to the trustee in bankruptcy.[340] Otherwise he has no right to retain possession of the property as against the trustee until payment. His fees are taxable in the court from which the writ issued, and when there taxed and allowed, may be made the basis of a claim in the court of bankruptcy, but the property must be surrendered forthwith.[341] On the other hand, if he applies first to the court of bankruptcy for an allowance of his fees, and is dissatisfied with its decision, his only remedy is by appeal, and he cannot recur to the state court.[342] After the adjudication in bankruptcy the officer can make no fees or charges, except it may be for the preservation of the property as a temporary custodian. At that time he becomes a simple bailee of the property, holding the same for the use of the trustee to be subsequently appointed, and is not entitled to make additional costs in his official character.[343]

As for the creditor whose lien is dissolved by the bankruptcy proceedings, his claim for costs and disbursements incurred by him and for attorneys' fees is a provable debt in bankruptcy, but is not entitled to priority of payment, and is not a lien on the property affected or on the proceeds of the trustee's sale of it,[344] unless where such a lien is expressly given by the law of the state.[345] But a more liberal rule is applied in cases where the lien is ordered to be preserved for the benefit of the estate. Here the court may direct the payment out of the general funds, not only of the sheriff's costs and the disbursements of the lien

[339] Platt v. Stewart, 11 N. B. R. 191, Fed. Cas. No. 11,221; In re Welch, 5 Ben. 278, Fed. Cas. No. 17,367.

[340] Wilkinson v. Raymond, 80 App. Div. 378, 81 N. Y. Supp. 82; In re Housberger, 2 Ben. 504, 2 N. B. R. 92, Fed. Cas. No. 6,734.

[341] In re Francis-Valentine Co., 94 Fed. 793, 36 C. C. A. 499, 2 Am. Bankr. Rep. 522; In re Stevens, 2 Biss. 373, 5 N. B. R. 298, Fed. Cas. No. 13,392.

[342] Johnson v. Woodend, 44 Misc. Rep. 524, 90 N. Y. Supp. 43.

[343] In re Preston, 6 N. B. R. 545, Fed. Cas. No. 11,394; Barker v. McLeod, 14 Nev. 148.

[344] In re Allen, 96 Fed. 512, 3 Am. Bankr. Rep. 38; In re Young, 96 Fed. 606, 2 Am. Bankr. Rep. 673; Hanson v. Stephens, 116 Ga. 722, 42 S. E. 1028; In re Davis, 1 Hask. 232, Fed. Cas. No. 3,616; In re Preston, 6 N. B. R. 545, Fed. Cas. No. 11,394; In re Ward, 9 N. B. R. 349, Fed. Cas. No. 17,145. But if a lien creditor successfully prosecutes his claim to priority of payment, his attorney is entitled to a fee, which becomes a lien on the fund so secured for his client, and may be fixed and enforced by the court of bankruptcy. In re Rude, 101 Fed. 805, 4 Am. Bankr. Rep. 319.

[345] Gardner v. Cook, 7 N. B. R. 346, Fed. Cas. No. 5,226.

creditor, but also a reasonable compensation to attorneys for professional services previously rendered.[346] A somewhat similar case arises where a third person, having possession of goods of the bankrupt, refuses to surrender them to the trustee on the latter's demand, on the mistaken theory that he has a lien on them for storage. Though this claim is rejected, he will be entitled to suitable compensation for the storage and care of the goods from the time of the commencement of the proceedings in bankruptcy up to the time of the demand and refusal.[347]

§ 387. Proceedings to Establish or Enforce Liens.—An adjudication of bankruptcy brings the bankrupt's assets into the custody of the court of bankruptcy for administration, and a creditor of the bankrupt, having a lien on such property at that time, is not bound to follow the course of procedure prescribed by the state statute under which the lien arises, requiring certain action to be taken within a limited time for its preservation, but only to prove his claim in the character of a secured creditor as the bankruptcy law directs.[348] So, where the rules of a stock exchange give to members of the exchange a lien for debts due them from a defaulting member upon the proceeds of the sale of his seat, by proving their claims before a committee while the fund remains in their hands, but do not expressly assume to make this remedy exclusive, a court of bankruptcy, when equity requires it, may properly recognize and enforce such lien after the fund has come under its control.[349] For the purpose of asserting his lien, a secured creditor or pledgee of property is always entitled to intervene in the bankruptcy proceedings against his debtor.[350] And even where one has waived or relinquished his lien, through oversight or a mistake of fact not operating to the prejudice of any one else, he may come into the court of bankruptcy and ask to be restored to his lien, which relief will be granted if he shows himself entitled to it.[351]

The court of bankruptcy has jurisdiction to inquire into and determine the validity, extent, and priority of liens asserted upon any prop-

[346] Receivers of Virginia Iron, Coal & Coke Co. v. Staake, 133 Fed. 717, 66 C. C. A. 547, 13 Am. Bankr. Rep. 281; In re Jenks, 15 N. B. R. 301, Fed. Cas. No. 7,276; In re Ward, 9 N. B. R. 349, Fed. Cas. No. 17,145; Ex parte Holmes, 14 N. B. R. 493, Fed. Cas. No. 6,631.

[347] In re Kelly, 18 Fed. 528.

[348] In re Falls City Shirt Mfg. Co., 98 Fed. 592, 3 Am. Bankr. Rep. 437; In re Rude, 2 Nat. Bankr. News, 498; McFarland Carriage Co. v. Solanes, 108 Fed. 532, 6 Am. Bankr. Rep. 221. The provision of the bankruptcy act, that valid liens shall not be affected, relates only to the obligation of the contract, and not to the remedies for its enforcement, which may be changed without impairing the contract. In re Hasie, 206 Fed. 789, 30 Am. Bankr. Rep. 83.

[349] Hutchinson v. Otis, 115 Fed. 937, 53 C. C. A. 419, 8 Am. Bankr. Rep. 382, affirmed Hutchinson v. Otis, Wilcox & Co., 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, 10 Am. Bankr. Rep. 135.

[350] Fisher v. Cushman, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292, 4 Am. Bankr. Rep. 646; Ward v. First Nat. Bank, 202 Fed. 609, 29 Am. Bankr. Rep. 312.

[351] Hutchinson v. Otis, 115 Fed. 937, 53 C. C. A. 419, 8 Am. Bankr. Rep. 382,

erty of the bankrupt which has come into its actual or constructive possession, in a summary manner, or at any rate without the formalities attending a plenary suit, on the petition of the trustee desiring to contest the alleged lien or to settle any question in regard to it,[352] or on the petition of the lien claimant, without regard to the possession of the property, if the latter voluntarily comes into court asserting a lien on the property and seeking to have it established, protected, or enforced as against the trustee.[353] But if the property is in the possession of the claimant (as, for instance, a chattel mortgagee) his claims upon it cannot be determined in a summary proceeding at the instance of the trustee, unless with the consent of the lienor.[354] And where the question to be determined is a matter in controversy between third persons, the test of jurisdiction to hear and decide it is the necessity of so doing in order

affirmed Hutchinson v. Otis, Wilcox & Co., 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, 10 Am. Bankr. Rep. 135. And see In re Jamison Bros. & Co., 227 Fed. 30, 142 C. C. A. 3, 35 Am. Bankr. Rep. 725.

[352] Ex parte Christy, 3 How. 292, 11 L. Ed. 603; In re Eppstein, 156 Fed. 42, 84 C. C. A. 208, 19 Am. Bankr. Rep. 89; In re Hobbs & Co., 145 Fed. 211, 16 Am. Bankr. Rep. 544; In re Lemmon & Gale Co., 112 Fed. 296, 50 C. C. A. 247, 7 Am. Bankr. Rep. 291; In re Kellogg, 113 Fed. 120, 7 Am. Bankr. Rep. 623; In re Ellis Bros. Printing Co., 156 Fed. 430, 19 Am. Bankr. Rep. 472; Wakeman v. Throckmorton, 74 Conn. 616, 51 Atl. 554; Jungbecker v. Huber, 101 Tex. 148, 105 S. W. 487; In re Logan, 196 Fed. 678, 28 Am. Bankr. Rep. 543; Bear Gulch Placer Mining Co. v. Walsh, 198 Fed. 351, 28 Am. Bankr. Rep. 724; In re Hooven-Owens-Rentschler Co., 195 Fed. 424, 28 Am. Bankr. Rep. 135; Orinoco Iron Co. v. Metzel, 230 Fed. 40, 144 C. C. A. 338, 36 Am. Bankr. Rep. 247; T. E. Wells & Co. v. Sharp, 208 Fed. 393, 125 C. C. A. 609, 31 Am. Bankr. Rep. 344; Courtney v. Fidelity Trust Co., 210 Fed. 57, 134 C. C. A. 595, 33 Am. Bankr. Rep. 400; Story & Clark Piano Co. v. Holmes, 251 Fed. 565, 163 C. C. A. 559, 41 Am. Bankr. Rep. 668; In re Diamond's Estate, 259 Fed. 70, 170 C. C. A. 138, 44 Am. Bankr. Rep. 268; In re Wegman Piano Co. (D. C.) 228 Fed. 60, 36 Am. Bankr. Rep. 210; Karasik v. People's Trust Co. (D. C.) 241 Fed. 939, 39 Am. Bankr. Rep. 830; In re Einstein (D. C.) 245 Fed. 189, 40 Am. Bankr. Rep. 507; In re Kligerman (D. C.) 219 Fed. 758, 33 Am. Bankr. Rep. 608; In re Whiteside (D. C.) 230 Fed. 937, 36 Am. Bankr. Rep. 870; Brown Bros. Co. v. Smith Bros. Co. (D. C.) 231 Fed. 475, 37 Am. Bankr. Rep. 30; Spencer Commercial Club v. Bartmess (Ind. App.) 123 N. E. 435. The question whether or not a mortgage was a valid claim against the bankrupt estate cannot be decided in a suit by the trustee against others to set aside conveyances as preferential and as in fraud of creditors, those interested in the mortgage not being before the court. Smith v. Coury (D. C.) 247 Fed. 168, 41 Am. Bankr. Rep. 219.

[353] In re MacDougall, 175 Fed. 400, 23 Am. Bankr. Rep. 762; In re Platteville Foundry & Machine Co., 147 Fed. 828, 17 Am. Bankr. Rep. 291; Goodnough Mercantile & Stock Co. v. Galloway, 156 Fed. 504, 19 Am. Bankr. Rep. 244; In re Wegman Piano Co. (D. C.) 221 Fed. 128, 34 Am. Bankr. Rep. 490; Rhinelander v. Richards, 184 App. Div. 67, 171 N. Y. Supp. 436.

[354] In re Buntrock Clothing Co., 92 Fed. 886, 1 Am. Bankr. Rep. 454; Goodnough Mercantile & Stock Co. v. Galloway, 156 Fed. 504, 19 Am. Bankr. Rep. 244; In re L. B. Pickens & Bro., 184 Fed. 954, 26 Am. Bankr. Rep. 6; In re Munro, 195 Fed. 817, 28 Am. Bankr. Rep. 569; Spears v. Frenchton & B. R. Co., 213 Fed. 784, 130 C. C. A. 442, 31 Am. Bankr. Rep. 679; Commercial Security Co. v. Holcombe (C. C. A.) 262 Fed. 657, 44 Am. Bankr. Rep. 481; In re Valecia Condensed Milk Co. (D. C.) 233 Fed. 173, 37 Am. Bankr. Rep. 504; In re Petronio, 220 Fed. 269, 136 C. C. A. 285, 34 Am. Bankr. Rep. 470; In re Goldstein,

to administer the estate of the bankrupt.[355] Further, the court of bankruptcy will not undertake to determine or adjust liens upon property of the bankrupt, unless it appears that the trustee has at least a probable interest in it for the general creditors.[356]

In any petition for the recognition and enforcement of a lien the facts should be clearly and fully set forth, and the appropriate measure of relief asked for.[357] Such petition may be opposed by the trustee in bankruptcy without formal pleadings.[358] Where the facts rest in parol, they may be established by the evidence of the parties to the transaction, if credible and uncontradicted, without further testimony.[359] If the validity of the lien is contested on the ground that the debtor was insolvent at the time it was created the burden of proving such insolvency is on the party asserting it.[360] It is also within the jurisdiction of the court, admitting the validity of a lien claimed on property of the bankrupt, to order the sale of the property and the payment of the lien creditor out of the proceeds, preserving the remainder for the general creditors.[361]

§ 388. **Same; Proceedings in State Courts.**—The jurisdiction of a state court over a proceeding to establish and enforce a valid lien on property is not taken away by the mere fact of the intervening bankruptcy of the debtor; but unless its hand is stayed by the order of the court of bankruptcy, or the parties have placed themselves in a position where they can no longer invoke its jurisdiction, it may proceed, without regard to the bankruptcy proceedings, to render such judgment as may be appropriate in the case,[362] and having given such judgment or decree, it may thereafter grant the necessary process (or sanction the use of its

216 Fed. 887, 133 C. C. A. 91; In re Gottlieb & Co. (D. C.) 245 Fed. 139, 40 Am. Bankr. Rep. 247.

[355] In re Hobbs & Co. (D. C.) 145 Fed. 211, 16 Am. Bankr. Rep. 544; In re Graves (D. C.) 163 Fed. 358, 20 Am. Bankr. Rep. 818. See In re Traunstein (D. C.) 225 Fed. 317, 34 Am. Bankr. Rep. 482.

[356] In re Gibbs (D. C.) 109 Fed. 627, 6 Am. Bankr. Rep. 485; In re North Star Ice & Coal Co. (D. C.) 252 Fed. 301, 42 Am. Bankr. Rep. 76. But compare Chauncey v. Dyke Bros., 119 Fed. 1, 55 C. C. A. 579, 9 Am. Bankr. Rep. 444.

[357] Teter v. Viquesney, 179 Fed. 655, 103 C. C. A. 213, 24 Am. Bankr. Rep. 242; In re Gosch, 121 Fed. 604, 9 Am. Bankr. Rep. 613; In re George W. Shiebler & Co., 163 Fed. 545, 20 Am. Bankr. Rep. 777.

[358] In re Mulligan, 116 Fed. 715, 9 Am. Bankr. Rep. 8.

[359] Union Trust Co. v. Bulkeley, 150 Fed. 510, 80 C. C. A. 328, 18 Am. Bankr. Rep. 35.

[360] Jackson v. Valley Tie & Lumber Co., 108 Va. 714, 62 S. E. 964.

[361] In re Arden, 188 Fed. 475, 26 Am. Bankr. Rep. 684; In re Vastbinde, 132 Fed. 718, 13 Am. Bankr. Rep. 148.

[362] In re Brinn (D. C.) 262 Fed. 527, 45 Am. Bankr. Rep. 74; In re Stringer (D. C.) 230 Fed. 177, 37 Am. Bankr. Rep. 44; In re Pilcher & Son (D. C.) 228 Fed. 139, 36 Am. Bankr. Rep. 273; Hobbs v. Head & Dowst Co., 184 Fed. 409, 106 C. C. A. 519, 26 Am. Bankr. Rep. 63; Frazier v. Southern Loan & Trust Co., 99 Fed. 707, 40 C. C. A. 76, 3 Am. Bankr. Rep. 588; In re Maaget, 173 Fed. 232, 23 Am. Bankr. Rep. 14; In re Platteville Foundry & Machine Co., 147 Fed. 828, 17 Am. Bankr. Rep. 291; In re Major, 2 Hughes, 215, Fed. Cas. No. 8,981; Kimberlin v. Hartly, 1 McCrary, 136, 1 Fed. 571; Thames v. Miller, 2 Woods, 564, Fed. Cas. No. 13,860; Mattocks v.

necessary and appropriate process) for carrying the judgment or decree into operation, as, for instance, by levy on and sale of the bankrupt's property under execution, the same being subject to the lien, provided, of course, that such property is not already in the custody of the court of bankruptcy, and provided that such process is not enjoined or stayed by order of the latter court.[363] It is, in fact, a general rule that where the rights of the parties, urging claims that conflict with one another on the same property or fund, would be the same whether presented in the state court or in the court of bankruptcy, the court which first acquires jurisdiction of the property or fund may retain it for the purpose of a decision.[364] And when the state court has thus rendered a judgment or decree in a proceeding to establish and enforce a valid lien, not dissolved by the bankruptcy, its decision will be conclusive and binding on the trustee in bankruptcy, if he was heard in the case or had an opportunity to intervene,[365] and it cannot be reviewed, reversed, or modified by the court of bankruptcy.[366] And this rule holds good even though the lien

Farrington, 2 Hask. 331, Fed. Cas. No. 9,293; Kritzer v. Tracy Engineering Co., 16 Cal. App. 287, 116 Pac. 700; Mass v. Kuhn, 130 App. Div. 68, 114 N. Y. Supp. 444; Murphey v. Brown, 12 Ariz. 268, 100 Pac. 801; Linthicum v. Fenley, 11 Bush (Ky.) 131; Vance v. Lane's Trustee, 82 S. W. 297, 26 Ky. Law Rep. 619; Reed v. Equitable Trust Co., 115 Ga. 780, 42 S. E. 102; Dyson v. Harper, 54 Ga. 282; South End Imp. Co. v. Harden (N. J. Eq.) 52 Atl. 1127; Douglas v. St. Louis Zinc Co., 56 Mo. 388; Davis v. Lumpkin, 57 Miss. 506; Bradley v. United Wireless Telegraph Co., 79 N. J. Eq. 458, 81 Atl. 1107; Chickasaw Hotel Co. v. C. B. Barker Const. Co., 135 Tenn. 305, 186 S. W. 115, L. R. A. 1916F, 106; Robinson v. Tischler, 69 Fla. 77, 67 South. 565; Joseph Nelson Supply Co. v. Leary, 49 Utah, 493, 164 Pac. 1047; Strong v. Butte Central & Boston Copper Corp., 54 Mont. 584, 172 Pac. 1033; Bradley v. United Wireless Telegraph Co., 83 N. J. Eq. 688, 93 Atl. 1084; Schoenherr v. Van Meter, 215 N. Y. 548, 109 N. E. 625; Bank of Mendon v. Mell, 185 Mo. App. 510, 172 S. W. 484; Cook v. Wheeler (Mo. App.) 218 S. W. 929.

[363] In re Fraser (D. C.) 261 Fed. 558, 44 Am. Bankr. Rep. 572; In re Beck (D. C.) 238 Fed. 653; Houston v. Shear (Tex. Civ. App.) 210 S. W. 976. Contra, see George B. Matthews & Sons v. Joseph Webre Co. (D. C.) 213 Fed. 396, 32 Am. Bankr. Rep. 180; Tormey v. Miller, 31 Cal. App. 469, 160 Pac. 858. The bankruptcy of a contractor does not deprive the state court of jurisdiction to distribute funds in the owner's hands among mechanics' lien claimants and subcontractors. Gordon-Jones Const. Co. v. Welder, (Tex. Civ. App.) 201 S. W. 681. The possibility of selling land to better advantage through a receiver in bankruptcy does not require the judgment creditor to surrender the property to the receiver, thus depriving him of his right to collect his debt through the sheriff. Harvard v. Davis, 145 Ga. 580, 89 S. E. 740. And notwithstanding the bankruptcy of a mortgagor, the mortgagee is not deprived of his action against the sheriff for failing to make the money on execution. Lackenbach v. Finn, 26 Cal. App. 482, 147 Pac. 471. But in all such cases and proceedings, the state court will take care to extend proper protection to the estate of the bankrupt for the benefit of the general creditors. Lyttle v. National Surety Co., 43 App. D. C. 136.

[364] Pietri v. Wells, 137 La. 1087, 69 South. 847.

[365] In re Van Alstyne, 100 Fed. 929, 4 Am. Bankr. Rep. 42; Frazier v. Southern Loan & Trust Co., 99 Fed. 707, 40 C. C. A. 76, 3 Am. Bankr. Rep. 710; Jackson v. Valley Tie & Lumber Co., 108 Va. 714, 62 S. E. 964; Chickasaw Hotel Co. v. C. B. Barker Const. Co., 135 Tenn. 305, 186 S. W. 115, L. R. A. 1916F, 106; Eberle v. Drennan, 40 Okl. 59, 136 Pac. 162, 51 L. R. A. (N. S.) 68.

[366] In re Eash (D. C.) 157 Fed. 996, 19 Am. Bankr. Rep. 738; Farrell v. Wy-

in question is one which would be voidable under the bankruptcy act at the instance of the trustee in bankruptcy, if he does not seek to annul it or assert any right to the property in controversy.[367] But the jurisdiction of the state court in such cases is precarious, in the sense that it may be exercised only in the absence of some order or effective objection restraining the parties from proceeding. In the first place (as will be shown in the next section) the court of bankruptcy may enjoin the lien creditor from proceeding with his action in the state court. Or it may order a stay of a pending action in the state court until the question of the bankrupt's discharge has been determined,[368] though this will not ordinarily be done where it would result in injury to other lien claimants.[369] The absence of any such stay or injunction would seem to be sufficient authorization to the plaintiff to bring or proceed with his action. But courts of bankruptcy have sometimes taken the course of granting express permission to a lien claimant to sue in a state court for the enforcement of his lien, framing the order in such a manner as to preserve and insure an equitable distribution of the assets of the bankrupt.[370] Further, the creditor may be prevented from proceeding by an injunction procured by another creditor. But a state court will not grant an injunction, at the instance of a general creditor of an insolvent debtor, to tie up the assets of the debtor, which have come into the hands of another creditor by execution on the latter's judgment, until the former creditor can institute bankruptcy proceedings against the debtor.[371] Again, if the court of bankruptcy has assumed jurisdiction of a controversy respecting an alleged lien, the state court will naturally not attempt to interfere with the full exercise of that jurisdiction,[372] and if the property in question is in the custody of the court of bankruptcy, no one can proceed in a state court for the purpose of enforcing a lien on it, unless with the permission of the bankruptcy court.[373] And again, if the lien creditor has made himself a party to the proceedings in bank-

song, 246 Fed. 281, 159 C. C. A. 11, 40 Am. Bankr. Rep. 740. But see D. C. Wise Coal Co. v. Columbia Lead & Zinc Co., 123 Mo. App. 249, 100 S. W. 680, as to a judgment enforcing a lien dissolved by the adjudication in bankruptcy.

[367] Rochester Lumber Co. v. Locke, 72 N. H. 22, 54 Atl. 705. And see Davis v. Planters' Trust Co., 196 Fed. 970, 28 Am. Bankr. Rep. 495. A garnishee against whom judgment has been entered has no standing, after both the plaintiff and the defendant in the suit have been adjudicated bankrupts, to move the court to dissolve the garnishment and strike off the judgment, as only the trustee in bankruptcy of the defendant can take such action. Lamorelle v. Nass, 30 Pa. Super. Ct. 190. But see Armour Packing Co. v. Wynn, 119 Ga. 683, 46 S. E. 865.

[368] See supra, §§ 185–198.

[369] In re Grissler, 136 Fed. 754, 69 C. C. A. 406, 13 Am. Bankr. Rep. 508.

[370] Virginia Iron, Coal & Coke Co. v. Olcott, 197 Fed. 730, 117 C. C. A. 124, 28 Am. Bankr. Rep. 321.

[371] Vletor v. Lewis, 24 Misc. Rep. 515, 53 N. Y. Supp. 944.

[372] Beall v. Walker, 26 W. Va. 741.

[373] Owen v. Potter, 115 Mich. 556, 73 N. W. 977; Cohen v. Nixon & Wright (D. C.) 236 Fed. 407, 37 Am. Bankr. Rep. 646; Reeve v. Kernan, 85 N. J. Law,

ruptcy, he is subject to the jurisdiction of the court of bankruptcy and must work out his rights in that forum alone.[374]

§ 389. Same; Restraining Proceedings in State Courts.—An adjudication of bankruptcy draws the property and assets of the bankrupt within the exclusive jurisdiction of the court of bankruptcy for the purposes of administration and distribution, and it may defend that jurisdiction by all appropriate means.[375] Thereafter, if any creditor brings an action in a state court to establish or enforce a lien on any property of the bankrupt, at least without the permission of the bankruptcy court first obtained, it is an unwarrantable interference with its jurisdiction and control over the property, and the creditor will be enjoined from the further prosecution of his action.[376] And even though the action in the state court may have been pending at the time of the adjudication in bankruptcy, yet its further prosecution may be stayed or enjoined when it affects property which is in the actual custody or possession of the bankruptcy court through its trustee, receiver, or other officer,[377] or where the lien, if enforced, would constitute a preference voidable under the bankruptcy law,[378] or where it is of such a character as to be dissolved by the adjudication in bankruptcy, as having been acquired within four months prior thereto,[379] or even where the continuance of the action in the state court would embarrass the administration of the estate in bankruptcy.[380] And the jurisdiction of the federal court in these cases is not affected by the fact that the creditor's cause of action is such as would

641, 90 Atl. 285; Tube City Min. & Mill Co. v. Otterson, 16 Ariz. 305, 146 Pac. 203, L. R. A. 1916E, 303.

[374] Francisco v. Shelton, 85 Va. 779, 8 S. E. 789; Reed v. Bullington, 49 Miss. 223.

[375] In re Lines, 133 Fed. 803, 13 Am. Bankr. Rep. 318; In re Vastbinder, 132 Fed. 718, 13 Am. Bankr. Rep. 148.

[376] In re Emslie, 102 Fed. 291, 42 C. C. A. 350, 4 Am. Bankr. Rep. 126; Beall v. Walker, 26 W. Va. 741; In re Tune, 115 Fed. 906, 8 Am. Bankr. Rep. 285; In re Roger Brown & Co., 196 Fed. 758, 28 Am. Bankr. Rep. 336; In re Tomlinson, 193 Fed. 101, 27 Am. Bankr. Rep. 780; In re Trayna & Cohn (C. C. A.) 195 Fed. 486, 27 Am. Bankr. Rep. 594; In re Grafton Gas & Electric Light Co. (D. C.) 253 Fed. 668, 42 Am. Bankr. Rep. 567; In re Fraser, 261 Fed. 558, 44 Am. Bankr. Rep. 572. A federal district court has ancillary jurisdiction of a petition by a bankrupt's trustee, appointed in another district, to restrain the prosecution of distress proceedings by a landlord against property of the bankrupt within the district. In re Printograph Sales Co. (D. C.) 210 Fed. 567, 31 Am. Bankr. Rep. 539.

[377] In re Dana, 167 Fed. 529, 21 Am. Bankr. Rep. 683; In re Whitener, 105 Fed. 180, 44 C. C. A. 434, 5 Am. Bankr. Rep. 198; In re Neely, 108 Fed. 31; In re Morse (D. C.) 210 Fed. 900, 32 Am. Bankr. Rep. 207.

[378] Bear v. Chase, 99 Fed. 920, 40 C. C. A. 182, 3 Am. Bankr. Rep. 746; In re Kimball, 97 Fed. 29, 3 Am. Bankr. Rep. 161; In re McAusland (D. C.) 235 Fed. 173, 37 Am. Bankr. Rep. 519. Compare Heath v. Shaffer, 93 Fed. 647, 2 Am. Bankr. Rep. 98.

[379] In re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815; In re Pruschen, 1 Nat. Bankr. News, 526; In re Ransford, 194 Fed. 658, 28 Am. Bankr. Rep. 78.

[380] In re Gutman, 114 Fed. 1009, 8 Am. Bankr. Rep. 252; In re Munro, 195 Fed. 817, 28 Am. Bankr. Rep. 369; In re Roger Brown & Co., 196 Fed. 758, 116 C. C. A. 386, 28 Am. Bankr. Rep. 336; Virginia Iron, Coal & Coke Co. v. Olcott, 197 Fed. 730, 117 C. C. A. 124, 28 Am.

not be affected by the discharge of the debtor in bankruptcy,[381] or the fact that the bankrupt may already have received his discharge,[382] or the fact that the claim of the particular creditor is not mentioned in the bankrupt's schedules, at least where he has knowledge of the bankruptcy proceedings.[383] But the injunctive process of the court of bankruptcy should be confined to the parties litigating against the bankrupt in the state court. Even if the federal court has power to direct its injunction to the state court itself or the judge of that court, which is extremely doubtful, it should not be done, nor should the writ be so framed as to take the place of a writ of prohibition, unless in cases of imperative necessity.[384] Yet the state court should respect the purpose of the injunction, and refuse to sanction any further proceedings in the case by any of the parties.[385]

But on the other hand, it is a thoroughly well-established rule as between the federal and state courts, that the court which first acquires complete jurisdiction of a controversy shall be allowed to continue in the exercise of that jurisdiction to final judgment without interference by the other court. And on this principle, if a state court of competent jurisdiction has taken cognizance of an action to establish or enforce a lien on property of a debtor, and the action is pending at the time of his adjudication in bankruptcy, but the lien is not dissolved thereby, because it attached more than four months previously, the jurisdiction of the state court is not divested by the bankruptcy proceedings, and the federal court has no rightful authority to enjoin the creditor from the further prosecution of his action.[386] This rule applies with special force where the property to be affected is in the actual custody and possession of the

Bankr. Rep. 321; McLoughlin v. Knop (D. C.) 214 Fed. 260, 32 Am. Bankr. Rep. 582.

[381] Bear v. Chase, 99 Fed. 920, 40 C. C. A. 182, 3 Am. Bankr. Rep. 746. See In re Van Buren, 164 Fed. 883, 20 Am. Bankr. Rep. 896. And for even stronger reasons, the bankruptcy court will stay further proceedings in a state court on a judgment which is provable in the bankruptcy proceedings and where the debt evidenced by it would be barred by the bankrupt's discharge. In re Cunningham (D. C.) 253 Fed. 663, 42 Am. Bankr. Rep. 560; In re Lusch (D. C.) 251 Fed. 316, 42 Am. Bankr. Rep. 246.

[382] Southern Loan & Trust Co. v. Benbow, 96 Fed. 514, 3 Am. Bankr. Rep. 9; In re Driggs, 171 Fed. 897, 22 Am. Bankr. Rep. 621; In re Obergfall, 239 Fed. 850, 152 C. C. A. 636, 38 Am. Bankr. Rep. 645.

[383] In re Beerman, 112 Fed. 662, 7 Am. Bankr. Rep. 434. See In re Bluestone Bros., 174 Fed. 53, 23 Am. Bankr. Rep. 264.

[384] In re Dana, 167 Fed. 529, 93 C. C. A. 238, 21 Am. Bankr. Rep. 683.

[385] Levi v. Goldberg, 76 App. Div. 210, 78 N. Y. Supp. 367.

[386] Hobbs v. Head & Dowst Co., 231 U. S. 692, 34 Sup. Ct. 253, 58 L. Ed. 440, 31 Am. Bankr. Rep. 656; Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, 9 Am. Bankr. Rep. 36; Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 41 L. Ed. 128, 9 Am. Bankr. Rep. 47; Griffin v. Lenhart (C. C. A.) 266 Fed. 671, 45 Am. Bankr. Rep. 221; Broach v. Mullis (D. C.) 228 Fed. 551, 35 Am. Bankr. Rep. 841; In re Bach (D. C.) 212 Fed. 575; In re Wagner's Estate (D. C.) 206 Fed. 364, 30 Am. Bankr. Rep. 396; Griffin v. Smith, 177 Cal. 481, 171 Pac. 92; Pickens v. Dent, 106 Fed. 653, 45 C. C. A. 522, 5 Am. Bankr. Rep. 644; In re United Wireless Telegraph Co., 192 Fed. 238, 27

state court,[387] or its receiver.[388] Further, and as a general rule, it is only proceedings directly against the bankrupt himself that may be thus stayed or enjoined. "The fact that a trustee in bankruptcy may be interested in the result of a litigation which is pending between third parties in a state court does not entitle him to have the proceedings in such action stayed, as between such third parties, and to have the controversy transferred for adjudication to the bankruptcy court." [389] Thus, the court of bankruptcy has no jurisdiction to enjoin the plaintiff in a suit against the bankrupt in a state court from collecting his judgment from the surety on the bankrupt's bail bond.[390] And so also, a pending suit will not ordinarily be stayed unless the trustee in bankruptcy shows that he has some interest in it as the representative of the general creditors, or that such a course may result in securing for them some surplus over the claims of the lien creditor.[391]

§ 390. Same; Foreclosure of Mortgages.—A mortgage creditor has the right to institute proceedings in the court of bankruptcy to enforce his lien and to reach other assets.[392] But proceedings of this kind are generally taken in the state courts. And it is a general rule that the jurisdiction of a state court over a pending foreclosure suit is not divested by the adjudication of the mortgagor in bankruptcy, and if the mortgage was given more than four months before the filing of the petition in bankruptcy, and its validity is not assailed on any other ground under

Am. Bankr. Rep. 1; In re Shinn, 185 Fed. 990, 25 Am. Bankr. Rep. 833; Ex parte Donaldson, 6 Phila. (Pa.) 443, 1 N. B. R. 181, Fed. Cas. No. 3,981; Clarke v. Rist, 3 McLean, 494, Fed. Cas. No. 2,861. Compare New River Coal Land Co. v. Ruffner Bros., 165 Fed. 881, 91 C. C. A. 559, 20 Am. Bankr. Rep. 100; In re Baughman, 138 Fed. 742, 15 Am. Bankr. Rep. 23.

[387] Tennessee Producer Marble Co. v. Grant, 135 Fed. 322, 67 C. C. A. 676, 1 Am. Bankr. Rep. 288; In re Seebold, 105 Fed. 910, 45 C. C. A. 117, 5 Am. Bankr. Rep. 358; White v. Thompson, 119 Fed. 868, 56 C. C. A. 398, 9 Am. Bankr. Rep. 653; In re Shoemaker, 112 Fed. 648, 7 Am. Bankr. Rep. 437; Downer v. Brackett, 21 Vt. 599, Fed. Cas. No. 4,043.

[388] In re Sterlingworth Ry. Supply Co., 165 Fed. 267, 21 Am. Bankr. Rep. 342.

[389] In re Horton, 102 Fed. 986, 43 C. C. A. 87; Tripplehorn v. Cambron, 250 Fed. 605, 162 C. C. A. 621, 41 Am. Bankr. Rep. 334.

[390] Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620, 9 Am. Bankr. Rep. 525.

[391] In re Mercedes Import Co., 166 Fed. 427, 92 C. C. A. 179, 20 Am. Bankr. Rep. 648; In re Arden, 188 Fed. 475, 26 Am. Bankr. Rep. 684; Hardcastle v. National Clothing Co., 137 Tenn. 64, 191 S. W. 524. Where bankrupts unlawfully pledged bonds deposited with them, but in which they had no ownership, the return of the bonds to the trustee does not vest the bankrupt estate with any interest therein, and therefore a petition by the trustee for an order staying an action in a state court by the owner for their recovery will be denied. In re Amy (C. C. A.) 263 Fed. 8, 45 Am. Bankr. Rep. 15.

[392] Owen v. Potter, 115 Mich. 556, 73 N. W. 977. A mortgagee who files his claim as a secured claim in the bankruptcy proceedings, but does not have his right to foreclose the mortgage adjudicated in the federal court, is not thereby barred or estopped from suing in the state court. Stewart-Noble Drug Co. v. Bishop-Babcock-Becker Co., 62 Colo. 197, 162 Pac. 159.

the bankruptcy law, the state court may proceed to foreclosure and sale, and the mortgagee should not be stayed by injunction from either the court of bankruptcy or the state court.[393] In such a case, the trustee in bankruptcy is a proper party to the suit in the state court, where he must appear and assert his rights, and he should apply for leave to intervene, or he may be directed by the bankruptcy court so to apply,[394] although, if he does not ask to be joined as party, it is not necessary to stay the proceedings and compel him to come in.[395] But if he does not become a party, while this will not affect the validity of a decree of foreclosure, it will leave his rights in equity unaffected by the decree,[396] unless where he has disclaimed any interest in the property.[397] Instead of a decree of foreclosure, the state court may, in proper circumstances make its order giving the trustee in bankruptcy the right to redeem, or if he has no funds in hand for that purpose, it may order a sale under the mortgage, with directions that the surplus shall be paid into court for the benefit of the trustee.[398] But no deficiency decree can be ren-

[393] Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136; Garrison v. Kurt, 249 Fed. 672, 161 C. C. A. 582, 41 Am. Bankr. Rep. 291; In re United States Chrysotile Asbestos Co. (D. C.) 253 Fed. 294, 41 Am. Bankr. Rep. 774; Martin v. Bankers' Trust Co., 18 Ariz. 55, 156 Pac. 87, Ann. Cas. 1918E, 1240; Albert Pick & Co. v. Natalby, 211 Ill. App. 486; Abney-Barnes Co. v. Davy-Pocahontas Coal Co., 83 W. Va. 292, 98 S. E. 298; In re Rohrer, 177 Fed. 381, 100 C. C. A. 613, 24 Am. Bankr. Rep. 52; Clark v. Norwalk Steel & Iron Co., 188 Fed. 999; In re Lattimer, 174 Fed. 824, 23 Am. Bankr. Rep. 388; In re McKane, 158 Fed. 647, 18 Am. Bankr. Rep. 594; In re Gerdes, 102 Fed. 318, 4 Am. Bankr. Rep. 346; Wikle v. Jones, 133 Ga. 266, 65 S. E. 577; Parks v. Baldwin, 123 Ga. 869, 51 S. E. 722; Harvey v. Smith, 179 Mass. 592, 61 N. E. 217; Furth v. Stahl, 205 Pa. St. 439, 55 Atl. 29; Carter v. People's Nat. Bank, 109 Ga. 573, 35 S. E. 61; Merrill v. Jordan, 60 N. H. 425; Lenihan v. Hamann, 55 N. Y. 652; Cutter v. Dingee, 8 Ben. 469, 14 N. B. R. 295, Fed. Cas. No. 3,518; In re Irving, 8 Ben. 463, 14 N. B. R. 289, Fed. Cas. No. 7,073; Getz v. First Nat. Bank, Fed. Cas. No. 5,374. Compare Carpenter v. O'Connor, 16 Ohio Cir. Ct. R. 526; In re Doran, 154 Fed. 467, 83 C. C. A. 265, 18 Am. Bankr. Rep. 760.

[394] Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; In re Gerdes, 102 Fed. 318, 4 Am. Bankr. Rep. 346; Heath v. Shaffer, 93 Fed. 647, 2 Am. Bankr. Rep. 98; In re Porter, 109 Fed. 111, 6 Am. Bankr. Rep. 259. In such an action, the defense of usury is available to the trustee in bankruptcy. In re Kellogg, 121 Fed. 333, 57 C. C. A. 547, 10 Am. Bankr. Rep. 7; In re Miller, 118 Fed. 360, 9 Am. Bankr. Rep. 274. Where a trustee in bankruptcy intervenes in a foreclosure proceeding pending in a state court, he thereby recognizes the jurisdiction of that court. O'Reilly v. Pietri, 135 La. 1, 64 South. 922.

[395] Oliver v. Cunningham (C. C.) 6 Fed. 60.

[396] In re Soltmann, 249 Fed. 455, 161 C. C. A. 413, 41 Am. Bankr. Rep. 42; Goldsmith v. Winner Shingle Co., 96 Wash. 516, 165 Pac. 392; Cobleigh v. Spitznagle, 120 Ill. App. 110; Leary v. Shaffer, 79 Ind. 567. A trustee in bankruptcy, by applying to a state court to set aside an order granting executory process for the foreclosure of a mortgage, could not impair or affect the jurisdiction of the court of bankruptcy to enjoin the foreclosure. George B. Matthews & Sons v. Joseph Webre Co. (D. C.) 213 Fed. 396, 32 Am. Bankr. Rep. 180.

[397] Scott v. Gordon, 109 Mo. App. 695, 83 S. W. 550.

[398] Jobbins v. Montague, 23 N. J. Eq. 182.

dered against the mortgagor, at least until the question of his discharge has been determined.[399]

But the court of bankruptcy is not without jurisdiction to stop the prosecution of a foreclosure suit, where such a course is necessary for the proper exercise of its own jurisdiction or the effective administration of the estate in bankruptcy. Such is the case where the foreclosure suit was not begun until after the institution of the bankruptcy proceedings,[400] where the validity of the mortgage is denied on common-law grounds,[401] or where its lien is claimed to have been dissolved by the adjudication in bankruptcy following within four months after it was given,[402] or where the giving of the mortgage was the very act of bankruptcy on which the adjudication was based,[403] or where the proceedings taken by the holder of a chattel mortgage were not such as to bring the property within the jurisdiction of the state court.[404] So also, where it appears that it would be for the interest of the creditors at large to have mortgaged real estate taken by the trustee and administered with the remainder of the assets, preserving the lien of the secured creditor, the court of bankruptcy has jurisdiction to order the trustee to take possession of the property, and to enjoin the secured creditor from selling it or otherwise interfering with it,[405] as where it appears that its value greatly exceeds the amount of the incumbrance and that the surplus is more likely to be realized by a sale made by the trustee,[406] or that the mortgagee is endeavoring to delay the sale un-

[399] Scott v. Ellery, 142 U. S. 381, 12 Sup. Ct. 233, 35 L. Ed. 1050; McKay v. Funk, 37 Iowa, 661, 13 N. B. R. 334.

[400] In re San Gabriel Sanatorium Co., 102 Fed. 310, 42 C. C. A. 369, 4 Am. Bankr. Rep. 197. McLoughlin v. Knop (D. C.) 214 Fed. 260, 32 Am. Bankr. Rep. 582. A summary sale of property of a bankrupt by the trustee in a deed of trust, made while the property was in the possession of the trustee in bankruptcy of the grantor, and made without the consent of the court of bankruptcy, is void. In re Hasie (D. C.) 206 Fed. 789, 30 Am. Bankr. Rep. 83.

[401] In re Duryea, 17 N. B. R. 495, Fed. Cas. No. 4,196.

[402] In re Oxley, 182 Fed. 1019, 25 Am. Bankr. Rep. 656.

[403] In re Donnelly, 188 Fed. 1001, 26 Am. Bankr. Rep. 304. But an adjudication that a mortgage is invalid as an illegal preference does not prevent the mortgagee from suing in a state court to foreclose the mortgage, so far as the same affects exempt property. Morris v. Covey, 104 Ark. 226, 148 S. W. 257.

[404] In re Brooks (D. C.) 91 Fed. 508, 1 Am. Bankr. Rep. 531.

[405] In re Booth (D. C.) 96 Fed. 943, 2 Am. Bankr. Rep. 770; In re Zehner, 193 Fed. 787, 27 Am. Bankr. Rep. 536.

[406] In re Ball (D. C.) 118 Fed. 672, 9 Am. Bankr. Rep. 276; In re Zehner (D. C.) 193 Fed. 787, 27 Am. Bankr. Rep. 536. Where there was a growing crop on the mortgaged real property of the bankrupt, which the trustee had been directed by the creditors to cultivate and harvest, the mortgagee should not be permitted to foreclose, though he might have any relief to which he would be entitled in equity, and, when the property was eventually sold, he would not suffer any diminution of right or be subjected to any greater expense than by a foreclosure in the state court. George B. Matthews & Sons v. Joseph Webre Co. (D. C.) 213 Fed. 396, 32 Am. Bankr. Rep. 180. But the court of bankruptcy has no power to enjoin the sale of the bankrupt property to be made by a state officer pursuant to a decree of foreclosure by a state court, merely to permit the trustee in

reasonably and to prevent the property from bringing a fair price,[407] or where a large and valuable tract of land is incumbered by numerous mortgages, the separate foreclosure of which would involve heavy expense and leave little or nothing for the general creditors, while such a result could be avoided by administering the property in the bankruptcy proceeding.[408] Another course open to the court of bankruptcy is to permit the mortgage creditor to continue his action in the state court, making the trustee a party, in order that all questions as to its validity under the state laws may be there determined, but at the same time to reserve to the trustee the right to sell the property in the bankruptcy proceedings and hold the proceeds to await the decision of the state court.[409] But where the whole property of the bankrupt, including that affected by the lien of a mortgage, has been sold in the bankruptcy proceedings, the secured creditor can enforce his lien upon the proceeds by proper application to the court of bankruptcy, and in these circumstances a foreclosure suit in a state court is unnecessary.[410]

§ 391. Same; Proceedings Out of Court.—After an adjudication of bankruptcy, all the property of the bankrupt which comes into the possession and custody of the trustee must be administered solely by him and in accordance with the directions of the bankruptcy law, and lien creditors cannot interfere with his possession and administration by availing themselves of remedies which they hold by virtue of their contracts or which are given to them by statute to be exercised out of court. Thus, as to such property, a landlord cannot enforce his claim for rent by distress, but is only entitled to proceed against the trustee in the bankruptcy court.[411] So a creditor cannot levy execution on real property on which his judgment is a lien unless permitted by the court of bankruptcy.[412] And a pre-existing tax lien cannot be converted into a full title by taking out a tax deed, without the sanction of the court.[413] The court of bankruptcy, in the exercise of its equitable powers, may protect the estate of the bankrupt in its custody from a fraudulent and excessive assessment for taxes.[414] But aside from this, and even where

bankruptcy to try to secure a purchaser and to advertise the sale more extensively. In re Schmidt (D. C.) 224 Fed. 814, 35 Am. Bankr. Rep. 1.

[407] In re Holloway (D. C.) 93 Fed. 638, 1 Am. Bankr. Rep. 659.

[408] In re Pittlekow (D. C.) 92 Fed. 901, 1 Am. Bankr. Rep. 472.

[409] In re Johnson, 127 Fed. 618, 11 Am. Bankr. Rep. 544. As to the mortgagee's claim on rents and profits of the property collected by the trustee while in possession, see In re Chase, 133 Fed. 79, 13 Am. Bankr. Rep. 294; In re Hollenfeltz, 94 Fed. 629, 2 Am. Bankr. Rep. 499.

[410] Owen v. Potter, 115 Mich. 556, 73 N. W. 977.

[411] In re Bishop, 153 Fed. 304, 18 Am. Bankr. Rep. 635; In re Printograph Sales Co. (D. C.) 210 Fed. 567, 31 Am. Bankr. Rep. 539.

[412] In re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815.

[413] In re Eppstein, 156 Fed. 42, 84 C. C. A. 208, 19 Am. Bankr. Rep. 89.

[414] Cross v. Georgia Iron & Coal Co., 250 Fed. 438, 162 C. C. A. 508, 41 Am. Bankr. Rep. 385.

no fraud is alleged, the sale for taxes or for special assessments of property belonging to a bankrupt estate and in the custody of the court of bankruptcy, if made without the leave of that court, is void.[415] But purchasers at tax sales of the bankrupt's property, which are avoided at the instance of trustee, will be entitled to reimbursement for the amount paid and subsequent taxes, with interest, just as in the case of a redemption, without regard to the selling price of the property at a bankruptcy sale.[416] On the same general principle, a creditor may be restrained from proceeding to sell property under the power contained in a chattel mortgage or a deed of trust.[417] But the case is different with a pledgee holding property of the bankrupt under a valid contract of pledge to secure a genuine debt. As the property is not in the custody or possession of the court of bankruptcy, it has no jurisdiction over it further than to protect the interests of general creditors against any fraudulent or oppressive conduct on the part of the pledgee or in respect to any surplus. Hence the pledgee, acting fairly, has the right to sell the property in accordance with the terms of the contract and apply the proceeds in payment of his debt, accounting to the trustee for any surplus, and he will not be enjoined from so doing.[418] And on the same principle, where one is employed in the capacity of a factor to purchase goods for a bankrupt, and the goods so bought are not shipped and sold under the bankrupt's instructions because of his bankruptcy, the factor is entitled to sell the property for the best price obtainable and charge the bankrupt with the loss in satisfaction of his lien.[419]

[415] Dayton v. Stanard, 241 U. S. 588, 36 Sup. Ct. 695, 60 L. Ed. 1190, 37 Am. Bankr. Rep. 259.

[416] Stanard v. Dayton, 220 Fed. 441, 137 C. C. A. 35, 33 Am. Bankr. Rep. 682.

[417] In re Hasie, 206 Fed. 789, 30 Am. Bankr. Rep. 83; In re Nathan, 92 Fed. 590; In re Jersey Island Packing Co., 138 Fed. 625, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560, 14 Am. Bankr. Rep. 689.

[418] Hiscock v. Varick Bank, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945, 18 Am. Bankr. Rep. 1; John Mathews, Inc. v. Knickerbocker Trust Co., 192 Fed. 557, 113 C. C. A. 29, 27 Am. Bankr. Rep. 627; In re Ironclad Mfg. Co., 192 Fed. 318; In re Peacock, 178 Fed. 851, 24 Am. Bankr. Rep. 159; In re Mertens, 144 Fed. 818; 75 C. C. A. 548, 15 Am. Bankr. Rep. 362; In re Mayer, 157 Fed. 836, 19 Am. Bankr. Rep. 356; In re Browne, 104 Fed. 762, 5 Am. Bankr. Rep. 220. Compare In re Cobb, 96 Fed. 821, 3 Am. Bankr. Rep. 129. But where bonds deposited as collateral to a corporation's note were simple promises to pay, not secured, and had never been issued by the bankrupt until delivery to secure the bankrupt's note, the creditor was held not entitled to sell the bonds to realize funds with which to pay the note, since to do so would simply increase the corporation's indebtedness, to the prejudice of other creditors. In re Matthews, 188 Fed. 445, 26 Am. Bankr. Rep. 19.

[419] Couturie v. Roensch (Tex. Civ. App.) 134 S. W. 413.

CHAPTER XXI

SUITS BY AND AGAINST TRUSTEES IN BANKRUPTCY

§ 392. **Trustee's Right of Action in General.**—Although the bankruptcy statute does not explicitly grant to trustees in bankruptcy the authority to sue in their own names, or indeed to sue at all, yet the right of a trustee to bring and maintain whatever suit may become necessary in the process of collecting and reducing to money the assets of the estate may be derived by clear and necessary implications from various

provisions of the act,[1] and in fact this right is to be regarded as a necessary incident to his office as trustee.[2] The only limitations upon this right, as stated in a decision under the former statute, are "first, that the thing sought to be recovered shall be such as, when recovered, shall be assets of the estate, and second, that the action brought shall not be an action of tort for damages such as, at common law, is strictly personal and dies with the person."[3] But aside from questions of preference or fraudulent conveyance, it is necessary that the relation of debtor and creditor should have existed between the defendant and the bankrupt, or circumstances must have existed which equity would hold equivalent to such relation.[4] Thus, the trustee cannot maintain a suit for the recovery of a statutory forfeiture not claimed by the bankrupt either before or after the beginning of the bankruptcy proceedings.[5] But since the statute vests him with title to all the bankrupt's property as of the date when he was adjudged a bankrupt, the trustee is not hampered in suing for its recovery by the previous appointment of a receiver in a creditor's bill and the transfer of the legal title to such receiver.[6] The trustee, it will be observed, may and should sue in his own name, not in the name of the bankrupt nor as use plaintiff,[7] but he may, in proper cases, intervene in suits pending by or against the bankrupt at the date of the adjudication,[8] and he may, under the direction of the court or with its approval, submit controversies to arbitration or effect their compromise,[9] and the death or removal of a trustee in bankruptcy does not abate any pending suit which he was prosecuting or defending.[10] Further, as the trustee represents all the creditors of the bankrupt, he may institute all such proceedings to avoid illegal transactions as any of the creditors might,[11] and the appointment of a trustee in bankruptcy dispenses with

[1] Pease v. McQuillin, 180 Mass. 135, 61 N. E. 819; Brunnemer v. Cook & Bernheimer Co., 89 App. Div. 406, 85 N. Y. Supp. 954; Johnson v. Bishop, Woolw. 324, 8 N. B. R. 533, Fed. Cas. No. 7,573; Babbitt v. Burgess, 2 Dill. 169, 7 N. B. R. 561, Fed. Cas. No. 693; Barber v. Wiemer, 183 Iowa, 72, 165 N. W. 440.

[2] McLanahan v. Blackwell, 119 Ga. 64, 45 S. E. 785.

[3] Trustees of Mutual Building Fund v. Bosseiux, 4 Hughes, 387, 3 Fed. 817.

[4] Monroe v. Bushnell, 158 Mich. 115, 122 N. W. 508.

[5] Bromley v. Smith, 2 Biss. 511, 5 N. B. R. 152, Fed. Cas. No. 1,922.

[6] Shainwald v. Davis, 69 Fed. 687. But a trustee in bankruptcy has no right to sue on an agreement made between state receivers of the bankrupt and one of its creditors; the receivers must settle with the court which appointed them. Love v. Export Storage Co., 143 Fed. 1, 74 C. C. A. 155, 16 Am. Bankr. Rep. 171.

[7] Ward v. Jenkins, 10 Metc. (Mass.) 583; West v. Bank of Lahoma, 16 Okl. 508, 86 Pac. 59.

[8] See supra, § 198. But the trustee has a discretion in this matter, and may properly refuse to continue the prosecution of a suit which cannot result in benefit to the estate. In re Throckmorton, 149 Fed. 145, 79 C. C. A. 15, 17 Am. Bankr. Rep. 856.

[9] Bankruptcy Act 1898, §§ 26, 27. See Hiram Blow Stave Co.'s Trustee v. Paducah Cooperage Co., 158 Ky. 833, 166 S. W. 615. And see supra, § 304.

[10] Bankruptcy Act 1898, § 46. And see Pace v. Ficklin's Ex'x, 76 Va. 292.

[11] Crane v. Brewer, 73 N. J. Eq. 558.

the necessity of a judgment and execution in favor of any or all of the creditors, as a preliminary, for example, to equitable proceedings to reach equitable assets of the bankrupt.[12] And rights of creditors enforceable under state statutes are enforceable by the trustee in bankruptcy, though not made available to him by the specific terms of the Bankruptcy Act.[13] So also, the trustee may pay off a creditor and be subrogated to his rights in a pending suit against a third person, if it will be for the benefit of the estate.[14] But the trustee represents the whole body of creditors, and his administration must be for their equal and common benefit. Hence he cannot ordinarily maintain an action in the name or for the benefit of a single creditor or for the advantage of less than all.[15]

As the trustee is the representative of the creditors, and not of the bankrupt, his rights of action are by no means limited to suits which the bankrupt himself might have brought or maintained. Even if the bankrupt is disqualified from suing on a particular contract, for failure to comply with some requirement of the state law, it does not follow that his trustee is similarly disqualified.[16] But besides this, the trustee may avoid numerous kinds of transactions which would have been good and valid as against the bankrupt. Thus, he may recover property in the hands of the bankrupt's assignee for the benefit of creditors;[17] he may sue to set aside fraudulent transfers of property or payments of money made by the bankrupt;[18] he may recover money paid or property trans-

68 Atl. 78. And see In re Geiver, 193 Fed. 128, 28 Am. Bankr. Rep. 413.

[12] McKey v. Emanuel, 263 Ill. 276, 104 N. E. 1051; Sherwood v. Holbrook, 178 App. Div. 462, 165 N. Y. Supp. 514.

[13] Courtney v. Fidelity Trust Co., 219 Fed. 57, 134 C. C. A. 595, 33 Am. Bankr. Rep. 400.

[14] In re Babcock, 3 Story, 393, Fed. Cas. No. 696.

[15] Stevenson v. Bird, 168 Ala. 422, 53 South. 93; Smith v. Lawton, 39 Ga. 29. Compare In re Bothe, 173 Fed. 597, 97 C. C. A. 547, 23 Am. Bankr. Rep. 151. A bill on behalf of creditors by a trustee in bankruptcy to enforce a constructive trust in real estate held by the debtor's wife may be maintained though there is only one creditor entitled to the benefit of the suit. Duncan v. Lum, 201 Ala. 192, 77 South. 718.

[16] Thomas v. Birmingham Ry., Light & Power Co., 195 Fed. 340, 28 Am. Bankr. Rep. 152. In this case it was held that, if a contract made in a given state by a foreign corporation and to be performed there is void because of the failure of the corporation to comply with the law of the state, its trustee in bankruptcy cannot sue on the contract in a federal court. But it was intimated that if the effect of the state statute was merely to disqualify the foreign corporation from maintaining a suit, it would not follow that the trustee could not sue. A corporation's participation in the illegal issuance of its bonds, contrary to the state law, does not prevent relief to its trustee in bankruptcy suing to compel their return. In re Progressive Wall Paper Corp., 229 Fed. 489, 143 C. C. A. 557, L. R. A. 1916E, 563.

[17] See, infra, Chapter XXII.

[18] See infra, Chapter XXIII. Where a third person bought the bankrupt's entire stock of goods, within four months before the bankruptcy, and without complying with the Bulk Sales law of the state, the stock belongs to the trustee in bankruptcy as against the purchaser, and the latter is liable to the trustee in trover without a demand. Philoon v. Babbitt, 119 Me. 172, 109 Atl. 817. So, the holders of bonds of a corporation

ferred by a debtor in contemplation of bankruptcy to an attorney at law, for services to be rendered in the bankruptcy proceedings, at least in so far as the same shall exceed a reasonable compensation;[19] and he may maintain suits to set aside preferences given to particular creditors or to recover their proceeds.[20] Moreover, if an execution was levied on property of one who afterwards became bankrupt, and within such a time as to be avoided by the adjudication in bankruptcy, the trustee may claim the proceeds of the sale on such execution if they remain in the hands of the sheriff or have been paid into court, or if the money has been paid over to the execution creditor, the trustee may maintain a plenary suit against him to recover the proceeds as a voidable preference.[21] So also, the trustee of a bankrupt corporation may maintain appropriate proceedings to enforce the liability of stockholders on their unpaid subscriptions for stock,[22] and he may sue for the recovery of dividends unlawfully paid out of capital,[23] or for the recovery of capital or assets wrongfully or fraudulently withdrawn by officers and stockholders, or wrongfully paid over to them within four months before the adjudication in bankruptcy.[24] Where the bankrupt was a minority stockholder in a corporation, and it is claimed that stock was fraudulently issued to other holders, the trustee may maintain a bill to have the shares returned, but he must offer to return the amount paid.[25] Moreover, the trustee of a bankrupt stockholder in a corporation succeeds to the bankrupt's title to the stock and to all of his rights and remedies in respect to dividends declared or which ought to have been declared; and so,

which are adjudged to be void may be required by the court of bankruptcy, at the instance of the trustee, to surrender the bonds. In re Franklin Brewing Co. (D. C.) 254 Fed. 910, 43 Am. Bankr. Rep. 111.

[19] Bankruptcy Act 1898, § 60d.

[20] In re Walsh Bros., 163 Fed. 352, 21 Am. Bankr. Rep. 14; Rosenthal v. Bronx Nat. Bank (D. C.) 222 Fed. 83, 35 Am. Bankr. Rep. 273; Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955. And see, generally, infra, Chapter XXIX.

[21] In re Bailey, 144 Fed. 214, 16 Am. Rep. 289; In re Knickerbocker, 121 Fed. 1004, 10 Am. Bankr. Rep. 381; In re Blair, 102 Fed. 987, 4 Am. Bankr. Rep. 220; Horton v. Bamford, 79 N. J. Eq. 356, 81 Atl. 761; Jordan v. Downey, 40 Md. 401. The trustee in bankruptcy is entitled to sue for property sold under execution within four months before bankruptcy, or its value, without tendering back the amount paid. Dreyer v. Kicklighter (D. C.) 228 Fed. 744, 36 Am. Bankr. Rep. 199.

[22] Kiskadden v. Steinle (C. C. A.) 203 Fed. 375, 29 Am. Bankr. Rep. 346; Babbitt v. Read, 173 Fed. 712, 23 Am. Bankr. Rep. 254; Edwards v. Schillinger, 148 Ill. App. 227; Rathbone v. Ayer, 84 App. Div. 186, 82 N. Y. Supp. 235; Stocker v. Davidson, 74 Kan. 214, 86 Pac. 136, 118 Am. St. Rep. 315; Smoot v. Perkins (Tex. Civ. App.) 195 S. W. 988, and see, supra, §§ 148, 149. Compare Hunt v. Sharkey, 20 Cal. App. 690, 130 Pac. 21. And see, also, Rosoff v. Gilbert Transp. Co., 204 Fed. 349, 30 Am. Bankr. Rep. 359.

[23] Cottrell v. Albany Card & Paper Mfg. Co., 142 App. Div. 148, 126 N. Y. Supp. 1070. See Sherwood v. Holbrook, 98 Misc. Rep. 668, 163 N. Y. Supp. 326.

[24] Johnson v. Canfield-Swigart Co., 292 Ill. 101, 126 N. E. 608; Arnold v. Knapp, 75 W. Va. 804, 84 S. E. 895.

[25] Abele v. S. A. Meagher Co., 227 Mass. 427, 116 N. E. 805.

where the directors of a corporation, in order to protect the bankrupt and to hold out money which ought to go to his creditors, fail to declare a dividend which they might and should declare, the trustee may maintain a suit to compel the declaration of a dividend and its payment to him.[26]

On similar principles, the trustee may sue for the recovery of usurious interest paid by the bankrupt.[27] But he cannot recover from the bankrupt's creditor securities pledged to secure the payment of a usurious loan without tendering the amount lawfully due, where that is what the law of the state requires.[28] The trustee may also sue for the bankrupt's share in a community estate,[29] and he has an absolute right to partition against the bankrupt's wife.[30] He may also sue for an interest in a remainder assigned by the bankrupt,[31] for property erroneously or improvidently surrendered to claimants by a previous receiver of the same estate in bankruptcy,[32] for the profits of a manufacturing plant leased by the bankrupt corporation,[33] and for an accounting on the part of a pledgee of property of the bankrupt, who has sold the same improvidently or contrary to the agreement of pledge.[34] Also it is within the province of a trustee in bankruptcy to maintain suits for the removal of clouds on the title of property coming into his hands as trustee.[35]

As a membership in a stock exchange, board of trade, or similar organization, held by the bankrupt, becomes assets of his estate in bankruptcy, if it has an actual market value and is salable, it passes to his trustee, and the latter may take such steps as are necessary to convert it into money, and therefore may maintain a suit against the exchange or board, or its governing authorities, to compel the issuance to him of a membership certificate, but only for the purpose of a sale.[36]

The statute also vests the trustee with title to "rights of action arising upon contracts or from the unlawful taking or detention of, or

[26] In re Brantman, 244 Fed. 101, 156 C. C. A. 529, 40 Am. Bankr. Rep. 18.

[27] Darby v. Boatmen's Sav. Inst., 1 Dill. 141, 4 N. B. R. 600, Fed. Cas. No. 3,571; Bromley v. Smith, 2 Biss. 511, 5 N. B. R. 152, Fed. Cas. No. 1,922. And see supra, § 344.

[28] Rice v. Schneck, 189 App. Div. 877, 179 N. Y. Supp. 335.

[29] Collins v. Bryan, 40 Tex. Civ. App. 88, 88 S. W. 432.

[30] Harlin v. American Trust Co., 67 Ind. App. 213, 119 N. E. 20.

[31] Clowe v. Seavey, 74 Misc. Rep. 254, 131 N. Y. Supp. 817.

[32] Whitney v. Wenman, 140 Fed. 959, 14 Am. Bankr. Rep. 591.

[33] Gill v. Bell's Knitting Mills, 137 App. Div. 553, 121 N. Y. Supp. 692.

[34] In re Peacock, 178 Fed. 851, 24 Am. Bankr. Rep. 159. Where defendant took charge of a corporation's business under a factor's agreement entitling him to a lien for advances on stock, accounts receivable, etc., the corporation's trustee in bankruptcy was held entitled to an accounting from defendant for merchandise sold, or its value, for accounts collected, and for loans and advances. Boise v. Talcott (D. C.) 212 Fed. 268, 38 Am. Bankr. Rep. 838.

[35] Lance v. Tainter, 137 N. C. 249, 49 S. E. 211; Gazlay v. Williams, 147 Fed. 678, 77 C. C. A. 662, 14 L. R. A. (N. S.) 1199, 17 Am. Bankr. Rep. 249.

[36] Board of Trade of City of Chicago v. Weston, 243 Fed. 332, 156 C. C. A. 112, 40 Am. Bankr. Rep. 263.

injury to, his [the bankrupt's] property." [37] Consequently the trustee may sue not only on contractual rights of action vested in the bankrupt at the time of the adjudication,[38] but also on such torts as are not purely personal but involve pecuniary injury or loss or diminution of the estate in bankruptcy.[39] Creditors who obtain possession of the debtor's property without his authority or consent, and proceed to administer it, by turning it into money and paying off debts and claims, are also liable to his trustee in bankruptcy afterwards appointed, who may sue them as for a conversion, or, waiving the tort, for the value of the property.[40] But the trustee cannot maintain a suit in tort for conspiracy in assisting the bankrupt to place his property beyond the reach of creditors, against persons who are alleged to have performed their acts of conspiracy pending the bankruptcy proceedings, but before the adjudication, where it is not alleged that any of the defendants received any portion of the estate, and the only result of the conspiracy is to turn the bankrupt's property into money in his hands, for which he has failed to account to the trustee.[41] The bankrupt himself is also liable at the suit of his trustee for a tort committed on the bankrupt's property when he went into bankruptcy, and it is no defense to such an action that he has no property of his own with which to respond.[42] But it cannot be maintained that it is the duty of the trustee to bring suits for the infringement of a patent owned by the bankrupt, or that his failure to do so is negligence.[43]

Causes of action may of course also accrue to the trustee out of his dealings with other persons in his official character as trustee. For example, where a bankrupt's trustee was in possession of certain machines which had been received by the bankrupt under a contract of conditional sale, and at the direction of the seller, but through a mistake on his own part, the trustee delivered certain of them to a third person, without payment and without authority from the bankruptcy court, it was held that the trustee was entitled to recover from such person either the machines or their value.[44]

§ 393. **Trustee's Right of Action Exclusive.**—Upon an adjudication in bankruptcy, the bankrupt's property and rights of action vest in

[37] Bankruptcy Act 1898, § 70a.

[38] See supra, § 342.

[39] Supra, § 343. And see Brunnemer v. Cook & Bernheimer Co., 89 App. Div. 406, 85 N. Y. Supp. 954.

[40] In re Thomas, 199 Fed. 214, 29 Am. Bankr. Rep. 945. And see State Bank of Chicago v. Cox, 143 Fed. 91, 74 C. C. A. 285, 16 Am. Bankr. Rep. 32.

[41] Friedman v. Myers, 30 Ohio Cir. Ct. R. 303.

[42] Carr v. Gale, 3 Woodb. & M. 38, Fed. Cas. No. 2,435.

[43] Kittle v. Hall, 29 Fed. 508.

[44] In re Caldwell Machinery Co. (D. C.) 215 Fed. 428.

his trustee, and thereafter suits in respect to the same must be brought in the name of the trustee, not in that of the bankrupt.[45] If the bankrupt sues, it is a good plea in abatement that he has been adjudicated and a trustee appointed.[46] And conversely, it is no defense to a suit by the trustee to recover a debt due to the bankrupt that the same debt has been claimed by the bankrupt as a set-off in a pending suit.[47] The trustee's right of action is also exclusive of that of the creditors. If he refuses or neglects to bring a suit which they deem necessary or advisable, their remedy is to apply to the court of bankruptcy for an order compelling him to do so, or, in extreme cases, for his removal and the appointment of a new trustee.[48] Before the election and qualification of a trustee, it is true, any creditor of the bankrupt has the right to institute a suit to set aside a fraudulent conveyance or recover a preference, but when a trustee is elected pending such a suit, he is entitled to become a party plaintiff therein.[49] And after the trustee is in the exercise of his official functions it belongs to him alone to institute and maintain a suit of this character, at least to the exclusion of any creditor who has not a special lien on the property in question, and certainly to the exclusion of all simple-contract creditors.[50] And the fact that creditors of a bankrupt had acquired a lien on property fraudulently transferred more than four months before the bankruptcy, and are therefore entitled to sue to set aside the conveyance, notwithstanding the bankruptcy proceedings, does not deprive the bankrupt's trustee of the right to maintain a similar suit, especially where the creditors

[45] Dessau v. Johnson, 66 How. Prac. (N. Y.) 4; Rea v. Richards, 56 Ala. 396; First Nat. Bank v. Waite, 57 Vt. 608; Elderkin v. Elderkin, 1 Root (Conn.) 139.

[46] Cook v. Lansing, 3 McLean, 571, Fed. Cas. No. 3,162.

[47] Miller v. Delaware, L. & W. R. Co., Fed. Cas. No. 9,566.

[48] In re Oakley (D. C.) 215 Fed. 265, 31 Am. Bankr. Rep. 806; Miners' & Merchants' Bank v. Union Loan & Trust Co., 5 Alaska, 511. And, see supra, § 281. That a creditor of a bankrupt is dissatisfied with the manner in which the trustee is discharging his duties does not justify him in standing aloof from the bankruptcy proceedings and bringing an independent suit to recover his debt. De Muth v. Faw, 103 Wash. 279, 174 Pac. 18. As to the rights of creditors in respect to directing the trustee to bring suits, and the discretion of the trustee in submitting to a vote of the creditors the question whether particular action shall be taken, see supra, § 282. Compare Davis v. W. F. Vandiver & Co., 143 Ala. 202, 38 South. 850, where it is said that if creditors, acting independently, bring suits for the recovery of assets which the trustee is negligently or intentionally permitting to escape, it does not lie with the trustee to complain of their action.

[49] Frost v. Latham & Co., 181 Fed. 866, 25 Am. Bankr. Rep. 313.

[50] Lovell v. Latham & Co. (D. C.) 211 Fed. 374, 32 Am. Bankr. Rep. 191; Viquesney v. Allen, 131 Fed. 21, 65 C. C. A. 259, 12 Am. Bankr. Rep. 402; Moore-Schafer Shoe Mfg. Co. v. Billings, 46 Or. 401, 80 Pac. 422; New Orleans Nat. Banking Ass'n v. Le Breton, 4 Woods, 203, 14 Fed. 646. But see Googins v. Skillings, 118 Me. 299, 108 Atl. 50, holding that a creditor may proceed in the state courts to set aside a fraudulent transfer as to him, notwithstanding the debtor's bankruptcy, if the trustee takes no action or if the creditor's claim is not provable in bankruptcy.

have not yet brought their suit, and are joined as defendants in the trustee's suit.[51]

§ 394. Leave or Direction to Sue.—In respect to suits pending by or against the bankrupt at the time of the adjudication, it appears that the intervention of the trustee or his substitution as a party must have the sanction of the court of bankruptcy. For the language of the statute is that he "may, with the approval of the court, be permitted to prosecute" a suit begun by the bankrupt, or, if the pending action was against the bankrupt as defendant, that "the court may order the trustee to enter his appearance and defend."[52] Before attempting to take the place of the bankrupt in a pending suit, therefore, the trustee should obtain the consent or order of the court of bankruptcy.[53] But it is otherwise as to actions which the trustee begins on his own account after taking charge of the estate, whether the suit is to collect a debt, set aside a fraudulent transfer, or recover a preference. His right to bring such actions is clearly conferred by the statute, and his duty to do so is incident to his office and does not depend upon the orders or instructions of the court. Any such suit may be brought in a state court by the trustee on his own initiative and responsibility, without first obtaining the leave or direction of the court of bankruptcy, and the fact that he proceeds without any order from that court is no defense or valid objection.[54] It is true that the statute requires trustees to collect and liquidate the assets of the estate "under the direction of the court," but this does not require an express order or direction to institute any particular suit.[55] However, it is also true that a trustee who hesitates or refuses to bring a suit for the recovery of assets may be ordered to do so on the petition of a creditor, provided the latter will give a bond to protect the estate from liability for costs and expenses.[56]

In the particular case of a proceeding by the trustee of a bankrupt corporation to collect unpaid subscriptions to its capital stock, there must first be an order of the court of bankruptcy directing the insti-

51 Thomas v. Roddy, 122 App. Div. 851, 107 N. Y. Supp. 473.

52 Bankruptcy Act 1898, § 11b, c.

53 Hahlo v. Cole, 112 App. Div. 636, 98 N. Y. Supp. 1049; In re Haensell, 91 Fed. 355, 1 Am. Bankr. Rep. 286; The Alert, 199 Fed. 542.

54 Traders' Ins. Co. v. Mann, 118 Ga. 381, 45 S. E. 426; Chalman v. Dodd, 23 Ga. App. 653, 99 S. E. 150. Cartwright v. West, 155 Ala. 619, 47 South. 93; Chism v. Citizens' Bank, 77 Miss. 599, 27 South. 637; Chism v. Bank of Friars Point (Miss.) 27 South. 610; Edwards v. Schillinger, 148 Ill. App. 227; Avery v. Ryerson, 34 Mich. 362; Hallack v. Tritch, 17 N. B. R. 293, Fed. Cas. No. 5,956. Compare Chisolm v. Wallace, 146 Ala. 683, 40 South. 219. And see, under the act of 1867, Pollock v. Hill, 69 Ala. 515; Maybin v. Raymond, 15 N. B. R. 353, Fed. Cas. No. 9,338. As to necessity of previous demand or notice to defendant, see Grant v. National Bank of Auburn, 197 Fed. 581, 28 Am. Bankr. Rep. 712.

55 Callahan v. Israel, 186 Mass. 383, 71 N. E. 812.

56 In re Bailey (D. C.) 151 Fed. 953, 18 Am. Bankr. Rep. 226. And see, supra, § 282.

tution of proceedings against the delinquent stockholders and notice to them and an opportunity to be heard as to the validity of the claim.[57] But if these conditions are fulfilled, they can question the validity of the order authorizing suit only in a direct proceeding in the court of bankruptcy.[58]

§ 395. Suit by Foreign Assignee in Bankruptcy.—The American rule as to the effect of foreign bankruptcy on the property of the bankrupt, as stated by Story, is that an adjudication abroad is not regarded as vesting the assignee with title to the property of the debtor which may be without the jurisdiction of the country where the proceedings take place, or that, if it is recognized as having that effect (which is the case in some of our courts), at least it is universally held that we are not bound by comity to give effect to foreign bankruptcy laws to the extent of impairing the remedies, or lessening the securities, which our laws have provided for our own citizens.[59] But while the right of a foreign assignee in bankruptcy, as respects the assets of the bankrupt, must yield to the claims of creditors of the bankrupt seeking the aid of the domestic courts, yet such foreign assignee may, as the representative of the bankrupt, sue to collect the assets to the same extent as the bankrupt could have done had not bankruptcy intervened, though whether he may sue in his own name or must sue in the name of the bankrupt is a local question, depending upon whether or not an assignment by operation of law is sufficient to enable the assignee to sue in his own name.[60]

§ 396. Suits Against Trustee.—A trustee in bankruptcy may be sued by any one having a valid claim against him for acts done in the administration of the estate, as, for the recovery of money which has come into his hands but which does not constitute assets of the estate, properly belonging to the plaintiff, or for the conversion of goods similarly claimed by such plaintiff as his own.[61] So, a suit may be main-

[57] Chamberlain v. Piercy, 82 Wash. 157, 143 Pac. 977; Natwick v. Terwilliger, 24 Wyo. 253, 157 Pac. 696, 160 Pac. 338. And see, supra, § 148. Compare Porter v. Hughes, 198 Ala. 36, 73 South. 400.

[58] Bernard v. Carr, 167 N. C. 481, 83 S. E. 816.

[59] Story, Conflict of Laws (8th edn.) pp. 565, 575. And see supra, § 14.

[60] Hunt v. Jackson, 5 Blatchf. 349, Fed. Cas. No. 6,893; Blane v. Drummond, 1 Brock. 62, Fed. Cas. No. 1,531; Merrick's Estate, 5 Watts & S. (Pa.) 9; In re Merrick, 2 Ashm. (Pa.) 485. Contra, Mosselman v. Caen, 34 Barb. (N. Y.) 66; s. c., 1 Hun, 647, 4 Thomp. & C. 171, 10 N. B. R. 512.

[61] In re Snelling, 202 Fed. 258; Gardner v. Planters' Nat. Bank, 54 Tex. Civ. App. 572, 118 S. W. 1146; Schall v. Kinsella, 117 La. 687, 42 South. 221; Hosmer v. Jewett, 6 Ben. 208, Fed. Cas. No. 6,713; Smith v. Gordon, 6 Law Rep. 313, Fed. Cas. No. 13,052; State v. Trustees of University, 65 N. C. 714, 5 N. B. R. 466, Fed. Cas. No. 10,318; Cogdell v. Exum, 69 N. C. 464, 12 Am. Rep. 657, 10 N. B. R. 326.

tained against the trustee to establish the validity and lien of an incumbrance on property of the bankrupt in his hands,[62] or by a chattel mortgagee to establish his claim upon the fund arising from the trustee's sale of the mortgaged goods, where a sum was ordered reserved out of the proceeds of the sale to satisfy any liens which might be established,[63] or the trustee may officially be made a defendant in a suit to foreclose a mortgage on property of the bankrupt, commenced after his appointment and qualification.[64] So also, an action lies against him for money received by him as assets of the estate and not paid over to creditors,[65] or for wrongfully paying out a fund in his hands to other creditors than the one solely entitled to it.[66] But a suit against the trustee is not a proper or permissible procedure for one who is simply a creditor of the bankrupt and seeks thereby to collect his debt. He must take the course prescribed by the statute, proving his claim in the bankruptcy proceedings and taking his dividend with the rest.[67] Nor can one sue the trustee in a state court whose claim is properly to be presented to the court of bankruptcy as a part of the legitimate expenses of administration.[68] And the bankrupt himself has no standing to sue the trustee in respect to any property vesting in the latter by virtue of the adjudication.[69]

If the trustee dies or absconds pending the suit, his co-trustee or his successor in the office of trustee may be brought in.[70] As to the defenses available to the trustee in such an action, it is said that he is limited to such defenses on behalf of creditors as they themselves would be entitled to rely upon.[71] But clearly he may plead usury, and probably it is his duty to do so,[72] or the illegality of the consideration, as where the note in suit was given in a gambling transaction.[73] As to

[62] Chattanooga Nat. Bank v. Rome Iron Co., 99 Fed. 82, 3 Am. Bankr. Rep. 582; Nauman Co. v. Bradshaw, 193 Fed. 350, 113 C. C. A. 274, 27 Am. Bankr. Rep. 565.

[63] Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885.

[64] Landon v. Townshend, 112 N. Y. 93, 19 N. E. 424, 8 Am. St. Rep. 712.

[65] Hall v. Cushing, 8 Mass. 521. A trustee in bankruptcy, who has been charged by the bankruptcy court in a summary proceeding with the value of property which came into his possession as assets of the estate, and was improperly delivered by him to a firm in which he was a partner, may be enjoined by a state court from using the partnership assets to satisfy the judgment against himself. Hebert v. Crawford, 228 U. S. 204, 33 Sup. Ct. 484, 57 L. Ed. 800, 30 Am. Bankr. Rep. 24.

[66] United States v. Dewey, 39 Fed. 251.

[67] Catlin v. Foster, 1 Sawy. 37, 3 N. B. R. 540, Fed. Cas. No. 2,519.

[68] In re Empire Construction & Supply Co., 157 Fed. 495, 19 Am. Bankr. Rep. 704.

[69] In re Kranich, 174 Fed. 908, 23 Am. Bankr. Rep. 550.

[70] Fenton v. Collerd, 8 Ben. 27, 11 N. B. R. 535, Fed. Cas. 4,731.

[71] Marine Sav. Bank v. Norton, 160 Mich. 614, 125 N. W. 754.

[72] In re Hoole, 3 Fed. 496. And see supra, § 344.

[73] In re Hill, 187 Fed. 214, 26 Am. Bankr. Rep. 133.

the form of action, the rule is that if the trustee is alleged to have in his possession, or to have converted to the use of the estate, property which did not constitute a part of the assets in bankruptcy, he may be sued in trespass or trover for its value by the rightful owner,[74] but not in replevin, since the latter form of action would involve the physical change of possession of property which, being in the hands of the trustee as an officer, is in the custody and exclusive control of the court of bankruptcy.[75] And for similar reasons, a state court has no jurisdiction to entertain a suit to enjoin the collection of assets by a trustee in bankruptcy.[76] As to the other incidents of a suit against the trustee, it may be remarked that the rule applies that one who purchases pendente lite is bound by the subsequent proceedings,[77] and that if the trustee, being made a defendant to a suit, fails to come in and assert his rights, he will be just as much barred by a default judgment or decree as any other party.[78] But when a judgment has been recovered against the trustee in his official capacity (that is, a judgment which is effective against the estate in bankruptcy rather than against the trustee personally) there should be no attempt to collect it by the ordinary process of execution.[79] The plaintiff must seek his remedy in the court of bankruptcy, which, having exclusive possession and jurisdiction to administer the estate, and having control over the trustee as its officer, can make all proper orders relating to the satisfaction and payment of the judgment.[80]

[74] In re Spitzer, 130 Fed. 879, 66 C. C. A. 35, 12 Am. Bankr. Rep. 346; In re Russell (C. C. A.) 101 Fed. 248, 3 Am. Bankr. Rep. 658; Truda v. Osgood, 71 N. H. 185, 51 Atl. 633. But compare In re Mertens, 131 Fed. 507, 12 Am. Bankr. Rep. 698.

[75] Weeks v. Fowler, 71 N. H. 221, 51 Atl. 624; Crosby v. Spear, 98 Me. 542, 57 Atl. 881, 99 Am St. Rep. 424; Concord Iron & Metal Co. v. Couch, 75 N. H. 593, 73 Atl. 301; Yegen v. Northern Pac. Ry. Co., 19 N. D. 70, 121 N. W. 205. But see Ayers v. Farwell, 196 Mass. 349, 82 N. E. 35, holding that one may maintain replevin in a state court to obtain possession of the property of a bankrupt, after the adjudication in bankruptcy, but before anything else has been done to obtain possession of his property in the federal courts. And see Exler v. Wickes Bros., 263 Pa. 150, 106 Atl. 233.

[76] Southern v. Fisher, 6 S. C. 345, 16 N. B. R. 414; Keegan v. King, 96 Fed. 758, 3 Am. Bankr. Rep. 79.

[77] Kimberling v. Hartly, 1 McCrary, 136, 1 Fed. 571.

[78] Turner v. Indianapolis, B. & W. Ry. Co., 8 Biss. 380, Fed. Cas. No. 14,259.

[79] In re Stringer (D. C.) 230 Fed. 177, 37 Am. Bankr. Rep. 44.

[80] J. B. McFarlan Carriage Co. v. Solanas, 106 Fed. 145, 45 C. C. A. 253, 5 Am. Bankr. Rep. 442, dissenting opinion of Shelby, J. The opinion of the majority of the court was based on the theory that the fund or property in question was not a part of the assets of the estate in bankruptcy. See Smith v. Berman, 8 Ga. App. 262, 68 S. E. 1014. But a court of bankruptcy cannot, by a summary order, require a trustee to pay a judgment for costs rendered against him in another jurisdiction, where there are no funds of the estate in his hands. In re Howard, 130 Fed. 1004, 12 Am. Bankr. Rep. 462.

As to suits in which the object is to recover damages from the trustee personally, it is ruled that he is not liable to suit in a state court for any acts done in the performance of his duty under the orders of the court of bankruptcy.[81] But on the other hand he may be sued for damages for any wrongful acts which were entirely beyond his authority or duty and which resulted in injury to third persons.[82] Conversely, for such acts the estate of the bankrupt is not liable, but only the trustee individually.[83] Finally, in his administration of the property, the trustee in subject to the police regulations of the state. Thus, the jurisdiction of the court of bankruptcy over the estate of the bankrupt does not exclude the jurisdiction of the state courts to entertain an action for the abatement of a liquor nuisance on property of the estate, that being a matter of police regulation, which does not interfere with the proper jurisdiction of the federal court.[84]

§ 397. Same; Leave of Court.—Under the former bankruptcy law, it was held that an assignee in bankruptcy could not be sued in a state court unless upon leave first obtained from the court of bankruptcy under which he was acting.[85] And the same rule has been applied under the present statute to suits against trustees in bankruptcy, where the object of the suit is to recover or reclaim specific property claimed by the trustee to constitute part of the estate in his hands and which he has reduced to possession.[86] A suit of this character brought against him without leave may be enjoined, at his request, by the bankruptcy court,[87] or, if leave to sue was improvidently granted, it may be revoked by the court of bankruptcy on being fully advised of all the facts.[88] But if the

[81] Wood v. Cummings, 197 Mass. 80, 83 N. E. 318.

[82] Berman v. Smith, 171 Fed. 735, 22 Am. Bankr. Rep. 662. An action lies against a trustee in bankruptcy for willful injury to creditors of the estate, resulting from his omission or improper performance of his duties as to notifying them of meetings, or retaining sufficient funds to provide for their known but undetermined claims. Russell v. Phelps, 42 Mich. 377, 4 N. W. 1.

[83] Adams v. Meyers, 1 Sawy. 306, 8 N. B. R. 214, Fed. Cas. No. 62.

[84] Radford v. Thornell, 81 Iowa, 709, 45 N. W. 890.

[85] Price v. Price, 4 Hughes, 438, 48 Fed. 823.

[86] In re Russell, 101 Fed. 248, 41 C. C. A. 323, 3 Am. Bankr. Rep. 658; Turrentine v. Blackwood, 125 Ala. 436, 28 South. 95, 82 Am. St. Rep. 254; Carney v. Averill, 110 Me. 172, 85 Ala. 494.

[87] Lloyd v. Ball, 77 Fed. 365.

[88] In re Schermerhorn, 145 Fed. 341, 76 C. C. A. 215, 16 Am. Bankr. Rep. 507. Where the bankruptcy court had granted leave for the institution of a foreclosure suit after the election of the trustee, so that the state court's jurisdiction over the parties had not attached before the property came into the possession of the bankruptcy court, and it appeared that there were sufficient assets to pay the mortgage debt sought to be foreclosed, as well as the two prior mortgages, but that the validity and amounts due on the three mortgages were disputed, and the same issue would be presented as to the prior mortgages as was involved in the mortgage on which foreclosure was begun, it was

object of the suit is only to establish a lien or recover a money judgment, and it does not seek in any way to disturb the trustee's possession of property in his hands, or to interfere with or contravene the proceedings of the courts of bankruptcy, there is authority in support of the view that it may be maintained without leave of the bankruptcy court,[89] especially in view of the act of Congress which permits receivers appointed by the federal courts to be sued without previous leave,[90] which certainly applies to receivers in bankruptcy,[91] and may easily be extended by analogy so as to include trustees.

§ 398. **Enjoining Proceedings Against Trustee.**—Since the possession of property of a bankrupt by his trustee is the possession of the court of bankruptcy, and that possession cannot be lawfully disturbed or ousted by any person without the permission of the court, the court has undoubted power and jurisdiction to enjoin any proceeding intended to take specific property out of the hands of the trustee.[92] And a similar rule applies to any proceeding which would seriously interfere with the administration of the estate in bankruptcy or cause unnecessary loss to creditors, as, for example, a suit in ejectment to recover premises leased to the bankrupt and which the receiver in bankruptcy continues to occupy for the purpose of closing up the business of the bankrupt.[93] But the court will not stay suits proceeding in the state courts between different creditors of the bankrupt, when the trustee in bankruptcy already has possession of the property which is the subject-matter of such suits, and cannot be bound or in any way affected by the results of such litigation.[94] And where a suit in equity is pending in another court to establish a lien on a fund in the hands of a trustee in bankruptcy, it is doubtful whether that court has jurisdiction to restrain the trustee from distributing the fund to creditors, pending the determination of the suit, probably the better rule requiring the complainant to resort to the court of bankruptcy for an order to that effect.[95]

held that the further prosecution of the foreclosure proceedings should be stayed. In re Locust Building Co. (D. C.) 272 Fed. 988, 47 Am. Bankr. Rep. 136.

[89] Gardner v. Planters' Nat. Bank of Honey Grove, 54 Tex. Civ. App. 572, 118 S. W. 1146; In re Smith (D. C.) 121 Fed. 1014, 9 Am. Bankr. Rep. 603.

[90] Act Cong. August 13, 1888, 25 Stat. 436.

[91] In re Kanter & Cohen, 121 Fed. 984, 58 C. C. A. 260, 9 Am. Bankr. Rep. 372.

[92] In re Schermerhorn, 145 Fed. 341, 76 C. C. A. 215, 16 Am. Bankr. Rep. 507; Lloyd v. Ball, 77 Fed. 365; In re Russell, 101 Fed. 248, 41 C. C. A. 323, 3 Am. Bankr. Rep. 658; Keegan v. King, 96 Fed. 758, 3 Am. Bankr. Rep. 79; In re People's Mail S. S. Co., 3 Ben. 226, 2 N. B. R. 552, Fed. Cas. No. 10,970; Hewett v. Norton, 1 Woods, 68, 13 N. B. R. 276, Fed. Cas. No. 6,441; In re Miller, 6 Biss. 30, Fed. Cas. No. 9,551; Wagner v. Mt. Carmel Iron Works (C. C. A.) 270 Fed. 80, 46 Am. Bankr. Rep. 508.

[93] In re Chambers, 98 Fed. 865, 3 Am. Bankr. Rep. 537.

[94] Main v. Bromley, 6 Fed. 477.

[95] Chattanooga Nat. Bank v. Rome

§ 399. **Garnishment of Trustee.**—Like a receiver in equity or an assignee in insolvency, a trustee in bankruptcy cannot be required, by the process of garnishment, to account to a judgment creditor of the bankrupt with respect to money or property in his hands as such trustee, for it is in the custody of the law and under the control of the court of bankruptcy alone, and moreover the trustee does not hold as the debtor or the agent of the bankrupt, but adversely to him.[96] So also with respect to garnishment proceedings instituted by one holding a judgment or other claim against a creditor of the bankrupt estate. Neither money in the hands of the trustee which is distributable in the form of dividends, nor money payable under a composition agreement, can be reached or tied up by the process of attachment or garnishment from another court.[97] And this is true even after a dividend has been declared, the precise sum ascertained to which the particular creditor will be entitled, and the trustee ordered to pay him that sum. Still a judgment creditor of that creditor cannot obtain satisfaction of his claim by garnishment of such distributive share. For it remains within the exclusive jurisdiction of the court of bankruptcy, not only until its payment to the creditor is ordered, but until it has actually been paid to him.[98]

§ 400. **Nature and Form of Remedy.**—If the trustee in bankruptcy brings his action in the court of bankruptcy, it will be governed by the ordinary rules of procedure in the federal courts, such as that which preserves the distinction between legal and equitable causes of action, and if the suit is essentially one of equitable cognizance, it will be triable by the court without a jury.[99] On the other hand, if he goes into the state courts, he must bring an action recognized by the state laws as appro-

Iron Co., 99 Fed. 82, 3 Am. Bankr. Rep. 582.

[96] Colby v. Coates, 6 Cush. (Mass.) 558; Lord v. Meachem, 32 Minn. 66, 19 N. W. 346; Oliver v. Smith, 5 Mass. 183; Field v. Jones, 11 Ga. 413; Com. v. Hide & Leather Ins. Co., 119 Mass. 155. But see In re Kranich, 182 Fed. 849, 25 Am. Bankr. Rep. 50. It appears that a judgment creditor of the bankrupt may maintain garnishment proceedings against the trustee, when the latter has collected a note after it had been set apart to the bankrupt as exempt. Barker-Bond Lumber Co. v. Whaley, 117 Va. 642, 86 S. E. 160.

[97] In re Kohlsaat, 18 N. B. R. 570, Fed. Cas. No. 7,918.

[98] In re Cunningham, 19 N. B. R. 276, Fed. Cas. No. 3,478.

[99] Dokken v. Page, 147 Fed. 438, 77 C. C. A. 674, 17 Am. Bankr. Rep. 228. But in bankruptcy cases, as in others, the Act of March 3, 1915, 38 Stat. 956 (Comp. St. 1916, §§ 1251a–1251c), applies, which provides that, when a suit at law should have been brought in equity or a suit in equity at law, the court shall order any necessary amendment, and that any party shall have the right at any stage of the action to amend so as to obviate the objection that the suit was not brought on the right side of the court.

priate to secure the relief for which he asks,[100] and he will be bound by the rules of procedure in the state courts.[101]

When the action is to recover the value of a preferential transfer of property by the bankrupt, assumpsit is an appropriate form of action.[102] For the conditional obligation of the creditor to make restitution in case the debtor is adjudged bankrupt within four months and the trustee elects to sue, gives rise to a quasi contract sufficient to sustain this form of action. An action of tort is also suitable, and is the remedy perhaps more usually adopted, but the tort may be waived.[103] If the action concerns goods in the possession of a third person, but claimed as assets of the estate in bankruptcy, the trustee may maintain the action of replevin.[104] If the object of the suit is to recover the value of property transferred by the bankrupt in fraud of the act or for the purpose of hindering or defrauding his creditors, the proper form of action is trover.[105] But in the case of a sale of the debtor's property under attachment, if the trustee desires to pursue the attaching creditor, the officer making the sale, and the purchaser at the sale, on the ground that the attachment was dissolved by the debtor's adjudication in bankruptcy and that the defendants had notice thereof, the proper form of action is trespass, and not trover.[106] A suit by a trustee in bankruptcy against a mortgagee of

[100] McCormick v. Page, 96 Ill. App. 447. And see Day v. Luna Park Co., 174 Ill. App. 477.

[101] Bacon v. George, 206 Mass. 566, 92 N. E. 721. In a suit by a trustee in bankruptcy to set aside a fraudulent conveyance of the bankrupt, the trustee must bring his case within the rules of pleading and proof prescribed by the statutes and decisions of the state wherein the suit is brought. Coleman v. Hagey, 252 Mo. 102, 158 S. W. 829.

[102] Chicago Title & Trust Co. v. First Nat. Bank of Chicago, 174 Ill. App. 339, affirmed, Chicago Title & Trust Co. v. National Storage Co., 260 Ill. 485, 103 N. E. 227. See McCulloch v. Davenport Savings Bank (D. C.) 226 Fed. 309, 35 Am. Bankr. Rep. 765. In an action to recover a preference given a creditor within four months before the adjudication of bankruptcy, where the value of the property converted is certain and known and properly alleged, the action may be considered as arising upon an implied contract, so that garnishment may issue. State v. Superior Court for King County, 105 Wash. 676, 178 Pac. 827. See Parker v. Sherman, 212 Fed. 917, 129 C. C. A. 437, holding that property transferred by a bankrupt so as to effect a preference, or its value, may be recovered by a suit in equity.

[103] Reber v. Ellis Bros., 185 Fed. 313, 25 Am. Bankr. Rep. 567; Edwards v. Schillinger Bros. Co., 153 Ill. App. 219.

[104] Gordon v. Farrington, 46 Mich. 420, 9 N. W. 456; Godwin v. Tuttle, 70 Or. 424, 141 Pac. 1120. And see, supra, § 316.

[105] Lyon v. Clark, 129 Mich. 381, 88 N. W. 1046; Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955; Chickering v. Raymond, 15 Ill. 362; Carr v. Gale, 3 Woodb. & M. 38, Fed. Cas. No. 2,435. See Shuman v. Fleckenstein, 4 Sawy. 174, 15 N. B. R. 224, Fed. Cas. No. 12,826; Brooke v. McCracken, 10 N. B. R. 461, Fed. Cas. No. 1,932; Philoon v. Babbitt, 119 Me. 172, 109 Atl. 817. And see, supra, § 316. One receiving corporate checks for an officer's individual liability, under circumstances which would put him on notice, is liable to the corporation, whether or not the rights of creditors intervene, and hence, on the bankruptcy of the corporation, its trustee may maintain an action for the conversion. Heig v. Caspary, 191 App. Div. 560, 181 N. Y. Supp. 633.

[106] Wallace v. Camp, 200 Pa. St. 220, 49 Atl. 942. See Gaytes v. American, 5

the bankrupt to recover possession of property taken by the mortgagee under an alleged invalid mortgage is an independent and plenary suit by the trustee, and the mortgagee, answering to the merits, thereby admits the trustee's capacity to sue.[107]

The trustee may also, of course, have such other remedies as are available to any ordinary litigant. Thus, if property seized by the marshal has been surrendered to a claimant on a forthcoming bond, and the title of the claimant is finally adjudged invalid, but he is then insolvent, the trustee may proceed directly on the bond.[108] He may also maintain a writ of error to reverse a judgment rendered against the bankrupt.[109] But a refund of taxes formerly paid by the bankrupt and ordered by the state legislature to be restored to him, cannot be enforced by mandamus against the state auditor.[110] And the trustee in bankruptcy of a tenant in common will not be allowed to sue in a state court for partition, when the provisions of the state laws and those of the bankruptcy act, which would be applicable to the resulting sale, are so irreconcilable that a conflict of jurisdiction would inevitably arise between the state court and the court of bankruptcy.[111]

§ 401. Suits in Equity by Trustee.—A trustee in bankruptcy is by no means limited to actions at law for such aid as he needs in collecting the assets of the estate, but may also bring a bill in equity, in the proper court, when the case is properly one of equitable cognizance.[112] Thus, the trustee in bankruptcy of a corporation seeking to recover from a stockholder because of the issuance to him of stock in exchange for property at an overvaluation, is exercising the rights of a creditor armed with process and must sue in equity.[113] So, trustees in bankruptcy may re-

Biss. 86, 14 N. B. R. 141, Fed. Cas. No. 5,286; Chicago Title & Trust Co. v. First Nat. Bank of Chicago, 174 Ill. App. 339. Compare Withoft v. Western Meat Co. (D. C.) 210 Fed. 986.

[107] In re Federal Contracting Co., 212 Fed. 688, 129 C. C. A. 224, 32 Am. Bankr. Rep. 381.

[108] Storrs v. Engel, 3 Hughes, 414, 19 N. B. R. 90, Fed. Cas. No. 13,494.

[109] Day v. Laflin, 6 Metc. (Mass.) 280. And see supra, § 193.

[110] Graham v. Norton, 15 Wall. 427, 21 L. Ed. 177.

[111] Lindsay v. Runkle, 82 Ohio St. 325, 92 N. E. 489, 29 L. R. A. (N. S.) 659, 137 Am. St. Rep. 781.

[112] In re Plant (D. C.) 148 Fed. 37, 17 Am. Bankr. Rep. 272. But see In re Beihl (D. C.) 197 Fed. 870, 28 Am. Bankr. Rep. 310. A trustee in bankruptcy may maintain a suit for the appointment of a receiver and for the marshalling of the assets of the defendant corporation, where it appears that it was a mere dummy and nothing more than an agent of the bankrupt, its assets having always been (at least equitably) the bankrupt's, and such assets being in danger of being dissipated and fraudulently made away with. Hardy v. Oregon Eilers Music House, 99 Or. 340, 195 Pac. 563. So a trustee in bankruptcy may maintain a bill to subject the bankrupt's interest in a testamentary trust estate to the payment of the bankrupt's creditors. Forbes v. Snow (Mass.) 131 N. E. 299.

[113] Courtney v. Youngs, 202 Mich. 384, 168 N. W. 441. As to suits to recover unpaid subscriptions to the capital stock of the bankrupt corporation, see Shiffer v. Akenbrook (Ind. App.) 130 N. E. 241; Kaye v. Metz (Cal.) 198 Pac. 1047.

sort to a bill in equity in the federal court to protect their right to the possession of property belonging to the bankrupt, as against one claiming a right to a portion of it and who interfered with the efforts of the trustees to obtain possession of any of it.[114] A complaint or petition by the trustee, addressed to the bankruptcy court in the exercise of its equity powers, praying an accounting for damages resulting from the appointment of a receiver, which was secured through imposition on the court, is not beyond the equitable jurisdiction of the court of bankruptcy.[115] And if the trustee desires the reformation of a contract for a conditional sale to the bankrupt, he can only obtain this relief upon a bill regularly filed.[116]

But he must pursue appropriate remedies in all cases, and not resort to equity when he has a plain and adequate remedy at law, nor seek an injunction, receivership, or other equitable relief, where the proper course is to bring trover or replevin, or where a simple money judgment will give him all the relief to which he is entitled.[117] Where the object is to set aside a fraudulent conveyance or recover the value of property fraudulently transferred by the debtor, a bill in equity in the form of a creditor's bill may be an appropriate form of action,[118] though, as stated in the preceding section, if the trustee seeks merely to recover the value of property so transferred, trover will lie. In the case of an alleged preferential payment by the bankrupt, where no actual fraud is charged, and there is no demand for the cancellation or setting aside of any conveyance, it is thought that a bill in equity will not lie, the case being one for an action at law as for money had and received,[119] though some of the

[114] Atherton v. Beaman (D. C.) 256 Fed. 871, 42 Am. Bankr. Rep. 631.

[115] In re Veler, 249 Fed. 633, 161 C. C. A. 543, 41 Am. Bankr. Rep. 736.

[116] In re Bondurant Hardware Co. (D. C.) 231 Fed. 247, 37 Am. Bankr. Rep. 308.

[117] In re Oregon Iron Works, 4 Sawy. 169, 17 N. B. R. 404, Fed. Cas. No. 10,562; Sessler v. Nemcof (D. C.) 183 Fed. 656, 25 Am. Bankr. Rep. 618. Where the liability of stockholders of a bankrupt corporation on their unpaid stock subscriptions is unconditional, and an order of the bankruptcy court for payment of the subscriptiions is not a condition precedent to their liability, the trustee cannot maintain a bill in the bankruptcy court against the stockholders, on the theory of avoiding a multiplicity of suits, but the proper remedy is a separate action at law against each stockholder. Kelley v. Gill, 245 U. S. 116, 38 Sup. Ct. 38, 62 L. Ed. 185, 40 Am. Bankr. Rep. 421. But where defendant declared a forfeiture under a contract providing for the construction of a railroad by the bankrupts, it was held that, on a suit for an accounting by the trustee of the bankrupts, in which general relief was prayed, the court had authority to grant relief on account of the forfeiture of property not included in the contract, and the trustee was not required to bring an action at law for conversion: Stennick v. Jones, 252 Fed. 345, 164 C. C. A. 269.

[118] Stotesbury v. Cadwallader, 10 Phila. (Pa.) 281, Fed. Cas. No. 13,498; Taylor v. Rasch, 5 N. B. R. 399, Fed. Cas. No. 13,801; Simpson v. Western Hardware & Metal Co. (D. C.) 227 Fed. 304, 35 Am. Bankr. Rep. 851; McCabe v. Guido, 116 Miss. 858, 77 South. 801; Weidhorn v. Levi, 253 U. S. 268, 40 Sup. Ct. 534, 64 L. Ed. 898, 45 Am. Bankr. Rep. 493.

[119] Simpson v. Western Hardware &

federal courts justify the maintenance of a bill in equity in this case on the ground that it is analogous to a creditor's suit to vacate a fraudulent conveyance.[120] And where the trustee in bankruptcy is proceeding against the officers and directors of a corporation to recover preferential payments and sums received by them as the result of a conspiracy, and the transactions necessitate the marshalling of assets, he may sue in equity, as the remedy at law in such a case would be inadequate.[121]

§ 402. **Summary Proceedings in Court of Bankruptcy.**—When the trustee seeks to recover property of the bankrupt which is in the hands of a third person, who makes no claim of title to it in his own right, he need not resort to a plenary suit, but may institute summary proceedings in the court of bankruptcy by a simple petition and order to show cause.[122] This is the case where the third person holds the property as the agent or bailee of the bankrupt, not pretending himself to be the owner,[123] or where the object of the proceeding is to reach surplus income in the hands of a testamentary trustee,[124] or where the person holding the property is a mere cover or receptacle for it, for the purpose of concealing it and placing it beyond the reach of the bankrupt's creditors,[125] providing, in the latter case, that the property can be followed

Metal Co. (D. C.) 227 Fed. 304, 35 Am. Bankr. Rep. 851; Maxwell v. Davis Trust Co., 69 W. Va. 276, 71 S. E. 270; Reber v. Ellis Bros. (D. C.) 185 Fed. 313, 25 Am. Bankr. Rep. 567; Edwards v. Schillinger Bros., 153 Ill. App. 219; People's Bank of Mobile v. McAleer, 204 Ala. 101, 85 South. 413; Irons v. Bias, 85 W. Va. 493, 102 S. E. 126.

[120] Pond v. New York Nat. Exchange Bank (D. C.) 124 Fed. 992, 10 Am. Bankr. Rep. 343; Parker v. Black (D. C.) 143 Fed. 560, 16 Am. Bankr. Rep. 202; Parker v. Sherman, 212 Fed. 917, 129 C. C. A. 437.

[121] Johnson v. Harrison, 199 Mich. 221, 165 N. W. 773.

[122] In re Goldstein, 216 Fed. 887, 133 C. C. A. 91; Bank of Brookings v. Aurora Grain Co., 43 S. D. 591, 181 N. W. 909; In re Fogelman, 188 Fed. 755, 26 Am. Bankr. Rep. 742; In re Holland, 176 Fed. 624, 23 Am. Bankr. Rep. 835; In re Holbrook Shoe & Leather Co., 165 Fed. 973, 21 Am. Bankr. Rep. 511; In re Wiesen Bros., 138 Fed. 164, 15 Am. Bankr. Rep. 27; In re Breslauer, 121 Fed. 910, 10 Am. Bankr. Rep. 33. And see supra, § 22. If no adverse claim to money or property was made at the time the petition in bankruptcy was filed, the title thereto passes to the trustee on his appointment, and the court has jurisdiction to require its surrender to him by a summary order, notwithstanding any adverse right subsequently asserted by the party in possession. In re Davis, 119 Fed. 950, 9 Am. Bankr. Rep. 670.

[123] Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, 7 Am. Bankr. Rep. 224; Wayne Knitting Mills v. Nugent, 104 Fed. 530, 4 Am. Bankr. Rep. 747; In re Shea (D. C.) 211 Fed. 365, 31 Am. Bankr. Rep. 697. Where a corporation is in bankruptcy, an officer of the corporation who has wrongfully retained some of its property may be summarily ordered to surrender it to the trustee, and it is immaterial that he personally did not submit to the court's jurisdiction. In re Auto Safety Signal Lamp Co. (D. C.) 237 Fed. 299, 37 Am. Bankr. Rep. 17.

[124] In re Baudouine (D. C.) 96 Fed. 536, 3 Am. Bankr. Rep. 55.

[125] In re Eilers Music House (C. C. A.) 270 Fed. 915, 46 Am. Bankr. Rep. 526; In re Looschen Piano Case Co. (D. C.) 261 Fed. 93, 44 Am. Bankr. Rep. 190; In re Hopkins, 229 Fed. 378, 143 C. C. A. 498, 36 Am. Bankr. Rep. 158; Salsburg v. Blackford, 204 Fed. 438, 122 C. C. A. 624, 29 Am. Bankr. Rep. 320; In re Friedman (D. C.) 153 Fed. 939, 18

into his hands and sufficiently identified to enable the marshal to take possession of it without mistake.[126] So, where there is a covinous contrivance between the bankrupt and others to embezzle the estate for the benefit of the bankrupt and his preferred creditors, the court may interpose by injunction.[127] Again, where the bankrupt, after the filing of the petition, sells goods in his possession to one chargeable with knowledge of the fraudulent character of the transaction, the court of bankruptcy may compel the restitution of the property or its proceeds in a summary proceeding.[128] Likewise, money paid by a bankrupt to one of his creditors, after the filing of the petition in bankruptcy, thus necessarily creating a preference, is recoverable by the trustee in a summary proceeding, without the need of resorting to a plenary suit.[129] And so also of money which was deposited to release an attachment, within the four months preceding the bankruptcy, and which was paid over to the attaching creditor after the adjudication.[130] And the claim of a bank, asserting the right to set off the deposit of a bankrupt against an indebtedness to it, is not adverse in such sense as to require a plenary suit by the trustee, where the deposit was made after the filing of the petition in bankruptcy.[131] And so also where an insolvent debtor has made a gift of personal property to his wife, or given her a bill of sale, without any actual change of possession.[132] And attaching creditors may also be proceeded against summarily, when their levies constituted the act of bankruptcy on which the adjudication was based, or where made after the filing of the petition and with knowledge thereof.[133] And this applies also to an execution sale of the debtor's property, if held after the filing of the petition, and if the judgment creditor and the purchaser are chargeable with knowledge of the pendency of the bankruptcy proceedings,[134] although if a sale on execution has been held and the proceeds

Am. Bankr. Rep. 712. But compare In re Mayer (D. C.) 98 Fed. 839, 3 Am. Bankr. Rep. 533; In re Stevens, Fed. Cas. No. 13,390. A court of bankruptcy has jurisdiction by summary order to direct the delivery of property to a trustee by a corporation which was formed by the bankrupt, with his near relatives as incorporators, to hold the property beyond the reach of his creditors. W. A. Liller Bldg. Co. v. Reynolds, 247 Fed. 90, 159 C. C. A. 308, 40 Am. Bankr. Rep. 371.

[126] In re Jackier (D. C.) 179 Fed. 720, 24 Am. Bankr. Rep. 790. See In re Rosenzweig (D. C.) 206 Fed. 360, 30 Am. Bankr. Rep. 680.

[127] In re Connolly (D. C.) 100 Fed. 620, 3 Am. Bankr. Rep. 842; In re Smith, Fed. Cas. No. 12,993.

[128] In re Denson (D. C.) 195 Fed. 854, 28 Am. Bankr. Rep. 158.

[129] In re R. & W. Skirt Co., 222 Fed. 256, 138 C. C. A. 67, 34 Am. Bankr. Rep. 353; In re Leigh (D. C.) 208 Fed. 486, 31 Am. Bankr Rep. 379.

[130] In re O. L. Ward & Co. (D. C.) 242 Fed. 999, 39 Am. Bankr. Rep. 506.

[131] Reed v. Barnett Nat. Bank of Jacksonville. 250 Fed. 983, 163 C. C. A. 233, 41 Am. Bankr. Rep. 419.

[132] In re Pierce, 7 Biss. 426, 15 N. B. R. 449, Fed. Cas. No. 11,139; In re Norris, 177 Fed. 598, 24 Am. Bankr. Rep. 444.

[133] Bear v. Chase (C. C. A.) 99 Fed. 920, 3 Am. Bankr. Rep. 746; In re Graessler & Reichwald, 154 Fed. 478, 83 C. C. A. 304, 18 Am. Bankr. Rep. 694.

[134] In re Breslauer, 121 Fed. 910, 10 Am. Bankr. Rep. 33.

paid over to the judgment creditor before the commencement of the bankruptcy proceedings, the mere fact that the judgment and sale are voidable under the bankruptcy act will not enable the trustee to recover the proceeds in a summary proceeding; his remedy is a plenary suit to recover the proceeds as a preference.[135] It is also held that a person claiming property as collateral security pledged to him by the bankrupt may be summarily ordered to surrender it, if the referee decides that the title to it is in the estate.[136] And so a proceeding to recover or reduce the amount of money paid by a bankrupt to his counsel, in contemplation of bankruptcy and for services to be rendered therein, may be summary.[137]

Further, it is very important to be noticed that, if the court of bankruptcy is in the actual possession of any given property, through its officers, such as the referee, a receiver, or a trustee in bankruptcy, it has jurisdiction to determine in a summary proceeding all claims of third persons asserting ownership of it or liens upon it, whether hostile and adverse or not.[138] If property once in the possession or custody of the trustee in bankruptcy is taken from him by an adverse claimant by force or fraud or trick, no doubt the court has power to vindicate its authority by summary orders for its restoration. But if an agent or representative of the trustee (such as a watchman placed in charge) peaceably surrenders the possession of the property without force or threats, merely yielding to the demand of the adverse claimant, it seems that the trustee has lost the possession which would entitle him to protection by summary order of the bankruptcy court.[139]

On similar principles, where a claimant of property and the receiver or trustee in bankruptcy have entered into an agreement concerning the disposition to be made of it, the court of bankruptcy may enforce compliance by either party, without any independent suit for that purpose, and by mere summary order.[140] But jurisdiction to foreclose a mortgage

[135] In re Resnek, 167 Fed. 574, 21 Am. Bankr. Rep. 740.

[136] In re Belfast Mesh Underwear Co., 185 Fed. 834. But see In re Bacon, 210 Fed. 129, 126 C. C. A. 643, 31 Am. Bankr. Rep. 777.

[137] In re Wood, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046, 20 Am. Bankr. Rep. 1.

[138] Gray v. Gudger, 260 Fed. 931, 171 C. C. A. 573, 44 Am. Bankr. Rep. 228; In re Joseph R. Marquette, Jr., Inc., 254 Fed. 419, 166 C. C. A. 51, 42 Am. Bankr. Rep. 555; Lawhead v. Monroe Bldg. Co., 252 Fed. 758, 164 C. C. A. 598, 41 Am. Bankr. Rep. 800; In re Dashiel, 246 Fed. 366, 158 C. C. A. 430, 40 Am. Bankr. Rep. 649; In re Midtown Contracting Co. (D. C.) 238 Fed. 871, 38 Am. Bankr. Rep. 278; Cohen v. Nixon & Wright (D. C.) 236 Fed. 407, 37 Am. Bankr. Rep. 646; In re Schmick Handle & Lumber Co. (D. C.) 233 Fed. 446, 37 Am. Bankr. Rep. 494; In re Flanigan (D. C.) 228 Fed. 339, 35 Am. Bankr. Rep. 807; In re Rathman, 183 Fed. 913, 106 C. C. A. 253, 25 Am. Bankr. Rep. 246; In re Plymouth Elevator Co. (D. C.) 191 Fed. 633. See Johnston v. Spencer, 195 Fed. 215, 115 C. C. A. 167, 27 Am. Bankr. Rep. 800; Shea v. Lewis, 206 Fed. 877, 124 C. C. A. 537.

[139] In re Mid-Valley Coal Co., 251 Fed. 815, 163 C. C. A. 649, 42 Am. Bankr. Rep. 301.

[140] In re Hollingsworth & Whitney

on the estate of the bankrupt, at the instance of the mortgagee, is not included in the powers to be exercised summarily,[141] nor can the court thus determine the rights of a third person who is apparently a joint owner of certain property with the bankrupt, although the trustee alleges that he is only nominally connected with it and has no real financial interest in it,[142] nor is this an appropriate proceeding for the trustee of a bankrupt corporation who seeks to compel a stockholder to pay the corporate debts because of his alleged participation in a fraudulent overvaluation of the corporation's assets in payment for stock.[143]

The summary jurisdiction of a court of bankruptcy may not only be invoked at the instance of the trustee, but also against him, since he is an officer of the court and always subject to its lawful orders. Thus, if the judgment of a competent court has decided that a fund in his hands does not belong to the estate in bankruptcy, but to a third person, he may be summarily ordered to pay it over.[144]

§ 403. Same; Against Adverse Claimants.—A stranger to the bankruptcy proceedings, setting up an adverse title to property which is claimed by the trustee in bankruptcy as assets of the estate, cannot be compelled to submit his claim to adjudication in a summary proceeding in the court of bankruptcy, provided his claim is made with the apparent intention of defending it in good faith and is not merely colorable, but is entitled to be heard in a plenary suit, at law or in equity as the case may require.[145] Of course, however, this is a right which the claimant may waive, and he may do so by surrendering the disputed property to the trustee for sale and presenting to the bankruptcy court his claim

Co., 242 Fed. 753, 155 C. C. A. 341, 39 Am. Bankr. Rep. 678.

[141] In re Casey, 10 Blatchf. 376, 8 N. B. R. 71, Fed. Cas. No. 2,495.

[142] In re Brodbine, 93 Fed. 643, 2 Am. Bankr. Rep. 53.

[143] In re Haley, 158 Fed. 74, 85 C. C. A. 404; In re Howe Mfg. Co., 193 Fed. 524, 27 Am. Bankr. Rep. 477.

[144] In re Howard, 135 Fed. 721, 68 C. C. A. 359, 14 Am. Bankr. Rep. 296; International Agricultural Corp. v. Sparks (D. C.) 250 Fed. 318, 40 Am. Bankr. Rep. 80.

[145] Smith v. Mason, 14 Wall. 419, 20 L. Ed. 748; In re Midtown Contracting Co., 243 Fed. 56, 155 C. C. A. 586, 39 Am. Bankr. Rep. 578; Eisenberg v. Weisskopf, 258 Fed. 617, 170 C. C. A. 71, 43 Am. Bankr. Rep. 548; In re Phœnix Planing Mill (D. C.) 250 Fed. 898, 42 Am. Bankr. Rep. 143; In re Cotton (D. C.) 209 Fed. 124, 31 Am. Bankr. Rep. 568; Charles H. Brown Paint Co. v. Rockhold (C. C. A.) 269 Fed. 139, 46 Am. Bankr. Rep. 246; First Nat. Bank v. Hopkins (C. C. A.) 199 Fed. 873, 29 Am. Bankr. Rep. 434; In re Cantelo Mfg. Co., 201 Fed. 158, 29 Am. Bankr. Rep. 704; Johnston v. Spencer, 195 Fed. 215, 115 C. C. A. 167, 27 Am. Bankr. Rep. 800; In re Denson, 195 Fed. 854, 28 Am. Bankr. Rep. 158; In re Iron Clad Mfg. Co., 194 Fed. 906; In re Mimms & Parham, 193 Fed. 276, 27 Am. Bankr. Rep. 469; In re Big Cahaba Coal Co., 190 Fed. 900, 26 Am. Bankr. Rep. 910; In re Jackier, 179 Fed. 720, 24 Am. Bankr. Rep. 790; Cooney v. Collins, 176 Fed. 189, 99 C. C. A. 543, 23 Am. Bankr. Rep. 840; In re Hersey, 171 Fed. 998, 22 Am. Bankr. Rep. 856; In re Driggs, 171 Fed. 897, 22 Am. Bankr. Rep. 621; In re Horgan, 158 Fed. 774, 86 C. C. A. 130, 19 Am. Bankr. Rep. 857; In re Edwards, 156 Fed. 794, 19 Am. Bankr. Rep. 632; In re Sunseri, 156 Fed. 103, 18 Am. Bankr. Rep. 231; In re Davis

against the proceeds,[146] or by answering the trustee's petition for the surrender of the property by defending on the merits without raising any objection to the jurisdiction of the court or referee.[147] But jurisdiction is not conferred by the appearance of the adverse claimant in answer to an order to show cause, merely for the purpose of filing an answer asserting his claim and his intention to contest the application.[148]

The case of a transfer or conveyance of property by the bankrupt which the trustee claims to have been fraudulent and void as against creditors, but which the grantee claims to have been in good faith and for a consideration, falls within this rule, and the issue cannot be tried in summary proceedings,[149] nor can that which is presented when the trustee seeks to recover money or property on the ground that the transaction constituted a preference voidable under the statute, and is met with a denial apparently interposed in good faith.[150] The wife of the bankrupt may be an adverse claimant, within this rule, if the law of the state removes the common-law disabilities of married women and gives them capacity to contract as if sole,[151] and the holder of an assignment of money due to the bankrupt from a third person at the date of the bankruptcy is an adverse claimant,[152] and so is a bank in which the bankrupt has money on deposit, but which claims the right to

Tailoring Co., 144 Fed. 285, 16 Am. Bankr. Rep. 486; In re New York Car Wheel Works, 132 Fed. 203, 13 Am. Bankr. Rep. 60; In re Green, 108 Fed. 616, 6 Am. Bankr. Rep. 270; In re Sheinhaum, 107 Fed. 247, 5 Am. Bankr. Rep. 187; In re Baudouine, 101 Fed. 574, 41 C. C. A. 318, 3 Am. Bankr. Rep. 651; In re Cohn, 98 Fed. 75, 3 Am. Bankr. Rep. 421; Mitchell v. McClure, 91 Fed. 621, 1 Am. Bankr. Rep. 53; In re Staib, 3 Fed. 209; In re Griffith, 1 Nat. Bankr. News, 546; In re Fowler, 1 Nat. Bankr. News, 215; In re Waitzfelder, 18 N. B. R. 260, Fed. Cas. No. 17,049; In re Bonesteel, 7 Blatchf. 175, 3 N. B. R. 517, Fed. Cas. No. 1,627; Ferguson v. Peckham, 6 N. B. R. 569, Fed. Cas. No. 4,741. As to an amendment, converting a summary proceeding into a plenary suit, see In re Boston-Cerrillos Mines Corporation, 206 Fed. 794, 30 Am. Bankr. Rep. 739.

[146] In re Plymouth Elevator Co., 191 Fed. 633.

[147] In re Carrier, 48 Fed. 161; In re Emrich, 101 Fed. 231, 4 Am. Bankr. Rep. 89; People v. Brennan, 3 Hun (N. Y.) 666, 12 N. B. R. 567; In re Brantman, 244 Fed. 101, 156 C. C. A. 529, 40 Am. Bankr. Rep. 18. Where a court of bankruptcy would have jurisdiction of a plenary suit by the trustee, the fact that he proceeds by petition as for a summary order is immaterial, if the parties appear and there is a full hearing on the merits, and in such case the proceeding will be treated as a plenary suit. In re Eilers Music House (C. C. A.) 274 Fed. 330.

[148] In re Walsh Bros., 163 Fed. 352, 21 Am. Bankr. Rep. 14; Board of Education of Salt Lake City v. Leary, 236 Fed. 521, 149 C. C. A. 573, 38 Am. Bankr. Rep. 289.

[149] Camp v. Zellars, 94 Fed. 799, 36 C. C. A. 501; In re Tarbox, 185 Fed. 985, 26 Am. Bankr. Rep. 432; In re Carter, 1 Nat. Bankr. News, 162.

[150] In re Scherber, 131 Fed. 121, 12 Am. Bankr. Rep. 616; In re Adams, 130 Fed. 788, 12 Am. Bankr. Rep. 367; In re Keystone Press, 203 Fed. 710, 29 Am. Bankr. Rep. 715.

[151] Blumberg v. Ryan, 107 Fed. 673, 46 C. C. A. 552, 6 Am. Bankr. Rep. 20; Shea v. Lewis, 206 Fed. 877, 124 C. C. A. 537, 30 Am. Bankr. Rep. 436.

[152] In re Lineberry, 183 Fed. 338, 25 Am. Bankr. Rep. 164.

set off a debt due to it from the bankrupt,[153] and so is the surety on a bail-bond of the bankrupt, with whom the latter, before the commencement of the bankruptcy proceedings, had deposited money to indemnify him against liability,[154] and a stockholder in the bankrupt corporation against whom the trustee is proceeding to compel him to pay the balance due on his subscription for stock.[155] An adverse claim, such as to require determination in a plenary proceeding, and not by a mere summary inquiry, is also presented by one who had obtained a lien on property of the bankrupt under such circumstances that it was not dissolved by the adjudication in bankruptcy;[156] by an execution creditor to whom the sheriff paid over the money collected under the levy, though this was done after the filing of the petition in bankruptcy;[157] by a receiver appointed by a state court of competent jurisdiction and who has property of the bankrupt in his possession;[158] by one claiming title to and the right of possession of land which is also claimed by the trustee in bankruptcy as assets of the estate;[159] by one who had contracted with the bankrupt for the purchase of land and now demands specific performance of the contract;[160] by a city which, under the terms of a contract for the removal of refuse, on its abandonment by the contractor, took possession of his plant for the purpose of continuing the work pending a new contract.[161] Where the Post Office Department had issued a "fraud order" against the bankrupt, and, pending a hearing on it, had ordered his mail impounded by the local postmaster, it was held that the postmaster's possession of the bankrupt's mail was so far adverse to the claim of the receiver in bankruptcy that the latter's demand for it could not be disposed of on a summary motion.[162] And the summary jurisdiction of the court of bankruptcy does not extend to a

[153] In re Gill, 190 Fed. 726, 111 C. C. A. 454, 26 Am. Bankr. Rep. 883; First Nat. Bank v. Hopkins, 199 Fed. 873, 118 C. C. A. 321, 29 Am. Bankr. Rep. 434.

[154] In re Horgan, 158 Fed. 774, 86 C. C. A. 130, 19 Am. Bankr. Rep. 857; Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620, 9 Am. Bankr. Rep. 525.

[155] In re Howe Mfg. Co. (D. C.) 193 Fed. 524, 27 Am. Bankr. Rep. 477; In re La Jolla Lumber & Mill Co. (D. C.) 243 Fed. 1004, 40 Am. Bankr. Rep. 273; In re Manufacturers' Box & Lumber Co. (D. C.) 251 Fed. 957, 41 Am. Bankr. Rep. 763.

[156] American Trust & Savings Bank v. Ruppe, 237 Fed. 581, 150 C. C. A. 463, 38 Am. Bankr. Rep. 621; In re Goldberg & Sagman (D. C.) 232 Fed. 194, 36 Am. Bankr. Rep. 736. But see In re Hansen (D. C.) 268 Fed. 904, 45 Am. Bankr. Rep. 713.

[157] Stone-Ordean-Wells Co. v. Mark, 227 Fed. 975, 142 C. C. A. 433, 35 Am. Bankr. Rep. 663; In re Cox-Rackley Co. (D. C.) 245 Fed. 367, 40 Am. Bankr. Rep. 487.

[158] Martin v. Oliver, 260 Fed. 89, 171 C. C. A. 125, 43 Am. Bankr. Rep. 739; In re Diamond's Estate, 259 Fed. 70, 170 C. C. A. 138, 44 Am. Bankr. Rep. 268.

[159] Peters v. Bowers, 61 Colo. 534, 158 Pac. 1101.

[160] Dreyer v. Perkins, 217 Fed. 889, 133 C. C. A. 599, 33 Am. Bankr. Rep. 232.

[161] In re Dailey, 255 Fed. 529, 166 C. C. A. 597, 42 Am. Bankr. Rep. 731.

[162] In re Rice (D. C.) 256 Fed. 858, 43 Am. Bankr. Rep. 153.

re-examination of the amount of a fee paid by the bankrupt to his attorney, where the contract with the attorney was not made by the debtor in contemplation of bankruptcy,[163] nor to the question whether salaries voted and paid by the bankrupt corporation to its officers were illegal, the trustee seeking their return over the objection of such officers.[164] And the court has no summary jurisdiction to determine that the property and capital stock of a second corporation was the property of the bankrupt corporation.[165] And it should be noted that the fact that the value of the property in controversy may be small, will not warrant the bankruptcy court in summarily determining the question of the right and title to it.[166]

But on the other hand, where the trustee of a corporation in bankruptcy files a petition against two of its officers in their official capacity to compel them to account for the proceeds of sales of the corporation's stock and also to pay the balance due on their own shares, and it appears that they had controlled the corporation absolutely from its inception, the other incorporators and directors being mere dummies, they cannot be regarded as adverse claimants, in determining the jurisdiction of the court of bankruptcy.[167] And so, where a receiver in bankruptcy, with the consent of the court, has vacated premises of which a third person was claiming the right of possession, and the latter has thereupon resumed the possession, a subsequently appointed trustee of the estate cannot oust the possessor and get possession of the premises by a summary proceeding.[168] But it has been held that the court of bankruptcy may summarily require a person in possession to turn over property to the trustee, although held under a claim of title, where such title depends on a question of law and not of fact.[169]

§ 404. Same; Determination of Character of Claim.—Whenever a trustee in bankruptcy lays claim to money or property which is in the possession of a third person, and petitions for an order requiring its surrender to him, the court of bankruptcy has jurisdiction to cite such person to show cause why he should not be required to yield up the money or property to the trustee.[170] And if the respondent denies that the property in question belongs to the estate in bankruptcy and sets up

[163] Tripp v. Mitschrich, 211 Fed. 424, 128 C. C. A. 96, 31 Am. Bankr. Rep. 662.

[164] In re Franklin Brewing Co. (C. C. A.) 263 Fed. 512, 45 Am. Bankr. Rep. 7.

[165] Looschen Land & Building Co. v. Milson (C. C. A.) 266 Fed. 359, 46 Am. Bankr. Rep. 30.

[166] In re McCracken (D. C.) 234 Fed. 776, 37 Am. Bankr. Rep. 745.

[167] In re Kornit Mfg. Co., 192 Fed. 392, 27 Am. Bankr. Rep. 244. But see In re Spalding Cotton Mills, 193 Fed. 554.

[168] In re Rothschild, 154 Fed. 194, 83 C. C. A. 288, 18 Am. Bankr. Rep. 682.

[169] In re Michaelis & Lindeman, 196 Fed. 718.

[170] In re Waukesha Water Co., 116 Fed. 1009, 8 Am. Bankr. Rep. 715.

a claim of title in himself, the court has jurisdiction to inquire and determine whether or not such claim is genuine, really adverse, and interposed in good faith. If it shall determine that such claim is merely colorable or fictitious, frivolous on its face or plainly false, or manifestly pretended and without any foundation in law, it may proceed to make the order asked by the trustee; but on the other hand, if it shall be determined that the respondent's claim to the property is genuine and interposed in good faith and with the intention of supporting it, the court cannot proceed to inquire into the merits, but must dismiss the petition and remit the trustee to his remedy by a plenary suit.[171] In other words, if the respondent's plea sets forth facts showing that his claim is adverse and in good faith, the trustee should file a pleading denying the averments relating to this point, and an issue should be framed as to whether the claim pleaded is substantial or merely colorable, and this point should be decided on investigation; it is error simply to overrule the plea and proceed to judgment.[172] If there is nothing to impeach the good faith of the claim, and it is substantiated by verified pleadings or oral testimony, the issue cannot be heard summarily.[173] In fact, it has been said that it is only in clear cases, in which the proof is decisive, that the court of bankruptcy is justified in making a peremptory order for the surrender of property.[174]

An investigation of the facts may also disclose other reasons why a summary adjudication would be inappropriate, if indeed permissible at all. Thus, where a petitioner claimed a leasehold interest in certain lands and the ownership of certain structures thereon, and an adjudi-

[171] Courtney v. Shea, 225 Fed. 358, 140 C. C. A. 382, 34 Am. Bankr. Rep. 753; In re Franklin Brewing Co. (D. C.) 257 Fed. 135, 43 Am. Bankr. Rep. 663; In re Resnek, Shapiro & Co. (D. C.) 246 Fed. 879, 39 Am. Bankr. Rep. 816; In re Markel (D. C.) 228 Fed. 926, 35 Am. Bankr. Rep. 318; In re Luken, 216 Fed. 890, 133 C. C. A. 94; In re Radley Steel Const. Co. (D. C.) 212 Fed. 462; Johnston v. Spencer, 195 Fed. 215, 27 Am. Bankr. Rep. 800; In re Ironclad Mfg. Co. (C. C. A.) 191 Fed. 831, 27 Am. Bankr. Rep. 490; In re Rathman, 183 Fed. 913, 106 C. C. A. 253, 25 Am. Bankr. Rep. 246; In re Norris, 177 Fed. 598, 24 Am. Bankr. Rep. 444; In re Hayden, 172 Fed. 623, 22 Am. Bankr. Rep. 764; In re Ellis Bros. Printing Co., 156 Fed. 430, 19 Am. Bankr. Rep. 472; In re Gilroy & Bloomfield, 140 Fed. 733, 14 Am. Bankr. Rep. 627; In re Kane, 131 Fed. 386, 12 Am. Bankr. Rep. 444; In re Teschmacher & Mrazay, 127 Fed. 728, 11 Am. Bankr. Rep. 547; In re Breslauer, 121 Fed. 910, 10 Am. Bankr. Rep. 33; In re Baird, 116 Fed. 765, 8 Am. Bankr. Rep. 649; In re Tune, 115 Fed. 906, 8 Am. Bankr. Rep. 285.

[172] In re Gill, 190 Fed. 726, 111 C. C. A. 454, 26 Am. Bankr. Rep. 883; In re Vocke (D. C.) 242 Fed. 963, 38 Am. Bankr. Rep. 536.

[173] In re Kane (D. C.) 131 Fed. 386, 12 Am. Bankr. Rep. 444. Where claimants of assets sought to be recovered by a bankrupt's trustee objected to summary proceedings, denied that they held possession for the bankrupt, and testified to facts which, if true, showed title and possession in themselves prior to the institution of the bankruptcy proceedings, the court should dismiss the proceeding. In re Goldstein, 216 Fed. 889, 133 C. C. A. 93.

[174] In re Gilroy & Bloomfield (D. C.) 140 Fed. 733, 14 Am. Bankr. Rep. 627.

cation of his title would require other parties to be brought in, his summary petition to restrain the trustee from selling such lands as belonging to the bankrupt cannot be granted, but that question should be left for determination in a plenary action.[175] And it has been pointed out that the bankruptcy court's jurisdiction to proceed in a summary manner to vest its receiver or the trustee with possession of property depends upon facts which may be disclosed from time to time, so that, while it may have jurisdiction of a summary proceeding at its institution, it may be ousted of that jurisdiction by claims interposed by third parties.[176]

§ 405. **Joinder of Causes of Action.**—A trustee in bankruptcy stands in the place of the creditors of the bankrupt, and has the same rights and may pursue the same remedies in their behalf as they would have been entitled to if there had been no adjudication of bankruptcy; and in a suit against the bankrupt and his transferees, to set aside alleged fraudulent conveyances of property, the trustee has the right to include all such matters and causes of action as might have been included by the creditors in a creditors' bill against the defendants.[177] Thus, a petition by the trustee against the bankrupt and one of his creditors, to procure the setting aside of a mortgage on land, a chattel mortgage, and a lease of real and personal property, all made by the bankrupt at different times to the defendant creditor, and alleged to be fraudulent as to other creditors, and to have been given and accepted with intent to prefer the creditor receiving the same, is not demurrable for multifariousness.[178] And so, a bill is not multifarious though brought to recover from several defendants different portions of the estate of the debtor, if the alleged illegal transfers were the result of a common purpose on the part of the defendants to dismember the estate.[179]

§ 406. **Jurisdiction; Statutory Provisions.**—The bankruptcy act provides that "the United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted, and such controversies had been between

[175] In re Moose River Lumber Co. (D. C.) 251 Fed. 409, 42 Am. Bankr. Rep. 242.

[176] Morgan v. Chicago & N. W. R. Co., 167 Wis. 48, 166 N. W. 777.

[177] Norcross v. Nathan, 99 Fed. 414, 3 Am. Bankr. Rep. 613; Spaulding v. McGovern, 10 N. B. R. 188, Fed. Cas. No. 13,217.

[178] Carter v. Hobbs, 92 Fed. 594, 1 Am. Bankr. Rep. 215; Hunt v. Doyal, 128 Ga. 416, 57 S. E. 489.

[179] Van Kleeck v. Miller, 19 N. B. R. 484, Fed. Cas. No. 16,860.

the bankrupts and such adverse claimants." [180] This is to be understood, not as a grant of jurisdiction to the circuit courts (or the district courts as their successors), but as a limitation upon the jurisdiction which they might otherwise have claimed. It means that jurisdiction shall not be conferred on a federal court by the mere fact that a trustee in bankruptcy is a party to the action, so as to make the case one "arising under the laws of the United States," but that, to confer such jurisdiction, the requisite diversity of citizenship must have existed between the bankrupt and the other party to the suit.[181] The same section of the bankruptcy act then proceeds as follows: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." [182] During the first few

[180] Bankruptcy Act 1898, § 23a.

[181] It is the citizenship of the bankrupt and of the adverse claimant which determines the jurisdiction; the citizenship of the trustee is not material. The plain meaning of the statute seems to be that if the bankrupt and the adverse claimant could have invoked the jurisdiction of the federal court, so also may the trustee and the adverse claimant, but not otherwise. In other words, all suits which could not have been brought in the federal courts because the parties were citizens of the same state, or because the amount involved was not sufficient, are left to the same forum which would have had jurisdiction of them, and they are not to be maintained in a federal court merely because a trustee in bankruptcy is now substituted as a party instead of the bankrupt himself. The object of inserting this provision was undoubtedly this: It had been settled by the courts that any controversy involving the construction or application of the national bankruptcy law was a case "arising under the laws of the United States," and therefore one of which the federal circuit courts might take cognizance, either originally or on removal from a state court, without regard to the citizenship of the parties. See Burbank v. Bigelow, 92 U. S. 179, 23 L. Ed. 542; Lathrop v. Drake, 91 U. S. 516, 23 L. Ed. 414; Payson v. Coffin, 4 Dill. 386, Fed. Cas. No. 10,858; Noyes v. Willard, 1 Woods, 187, Fed. Cas. No. 10,374; Payson v. Dietz, 2 Dill. 504, 8 N. B. R. 193, Fed. Cas. No. 10,861; Olney v. Tanner, 19 N. B. R. 178, Fed. Cas. No. 10,506; Spaulding v. McGovern, 10 N. B. R. 188, Fed. Cas. No. 13,217; Flanders v. Abbey, 6 Biss. 16, Fed. Cas. No. 4,851; Branard v. Hartford, P. & F. R. Co., Fed. Cas. No. 1,003; Brown v. White, 16 Fed. 900; Hallack v. Tritch, 17 N. B. R. 293, Fed. Cas. No. 5,956. It would follow, therefore, that, without the restrictive provision of this clause of the act, all the litigation arising in the settlement of the estate would be thrown into the federal circuit courts (or into the district courts, since the abolition of the circuit courts), and the state courts would be deprived of the jurisdiction which they would have had over such cases if bankruptcy proceedings had not intervened. The purpose of the act, then, is to counteract this effect of the bankruptcy proceedings, and to restrict the jurisdiction of the federal courts to those cases in which it would have existed before their commencement. In other words, the trustee must seek his remedy, or defend actions against him, in the same courts which would have been open to the bankrupt, whether those courts be state or national courts. And adverse claimants cannot be brought into the federal courts, nor seek those courts of their own accord, unless a sufficient ground of jurisdiction appears independently of the bankruptcy of the other party. Of course these remarks are subject to the qualification (as will appear in the text above) that, since the amendments to the bankruptcy act, state and federal courts have concurrent jurisdiction of suits by trustees to avoid fraudulent conveyances or recover preferences.

[182] Bankruptcy Act 1898, § 23b.

years after the enactment of the statute, the inferior federal courts were disposed to find the definition of their jurisdiction in the broad provisions of the seventh clause of the second section of the statute, that the courts of bankruptcy shall have jurisdiction to "cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided," and they held that the provision above quoted from the twenty-third section of the act related only to the venue of actions,[183] or that it was a limitation upon the jurisdiction of the circuit courts of the United States, but not upon that of the courts of bankruptcy.[184] But this theory was expressly rejected by the Supreme Court of the United States, which ruled that the twenty-third section was intended to define and limit the jurisdiction of the courts of bankruptcy, and that that section operated as an exception to, or limitation upon, the more general expressions of the second section; so that jurisdiction of civil actions at law and plenary suits in equity, to determine title to and reduce to possession alleged assets of the bankrupt, could not be claimed under the second section if not within the terms of the twenty-third.[185] But this section has since been amended by Congress so as to give to the courts of bankruptcy and the state courts concurrent jurisdiction of suits by trustees to set aside fraudulent conveyances or to recover preferences.[186] This legislation is not unconstitutional as imposing on state courts jurisdiction over causes of action which arise solely under the constitution and laws of the United States.[187] The final clause of the twenty-third section, that "the United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act," has no applicability to civil actions, the "offenses enumerated" meaning the crimes described elsewhere in the act.[188] Since the abolition of the circuit courts, this criminal jurisdiction is vested in the district courts, but not in their capacity as courts of bankruptcy, but in their capacity as courts having general jurisdiction for the trial of criminal offenses under the laws of the United States.

[183] In re Woodbury, 98 Fed. 833, 3 Am. Bankr. Rep. 457.

[184] Louisville Trust Co. v. Marx, 98 Fed. 456, 3 Am. Bankr. Rep. 450; Cox v. Wall, 99 Fed. 546; In re Newberry, 97 Fed. 24, 3 Am. Bankr. Rep. 158; In re Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117.

[185] Bardes v. First Nat. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, 4 Am. Bankr. Rep. 163.

[186] Act Cong. Feb. 3, 1903, 32 Stat. 797; Act Cong. June 25, 1910, 36 Stat. 838.

[187] French v. R. P. Smith & Sons Co., 81 Minn. 341, 84 N. W. 44.

[188] Goodier v. Barnes, 94 Fed. 798, 2 Am. Bankr. Rep. 328.

§ 407. Same; Jurisdiction of Court of Bankruptcy.—In view of the specific limitations upon the jurisdiction of the courts of bankruptcy set forth in the preceding section, it is no longer held that the mere fact that the plaintiff in a suit is a trustee in bankruptcy is sufficient to give jurisdiction to a federal court,[189] but on the contrary, that such court has no jurisdiction of a formal action at law or a plenary suit in equity between a trustee in bankruptcy and an adverse claimant, unless the action might have been maintained in that court by the bankrupt himself, if bankruptcy proceedings had not intervened.[190] The exceptions to this rule are found in cases where the trustee's suit is to recover a preference unlawfully given or to set aside a fraudulent transfer of property. If the claim advanced in his suit is founded on either of these grounds, it is within the jurisdiction of the court of bankruptcy.[191] Thus, the trustee of a bankrupt corporation may sue in the bankruptcy court to recover unearned dividends illegally paid to a stockholder,[192] but he cannot, in that forum, maintain an action against directors of the corporation on an allegation that the defendants, by false pretenses, have withdrawn and appropriated its funds.[193]

Since the statute speaks of "suits" by the trustee, we must distinguish between such proceedings as are properly called "suits" or "controversies at law or in equity" and those which are merely "proceedings in bankruptcy" or administrative measures in the process of collecting and distributing the estate. Of the latter character, and therefore maintainable in the court of bankruptcy, is a proceeding to determine the relative rights of the bankrupt and the pledgee of certain of his property;[194] a proceeding to compel the vendor of a number of lots to the bankrupt, holding a purchase-money mortgage, to fulfill his agreement to release given lots on proportional payments, the trustee desiring to exercise the right of redemption as to certain of the lots;[195] or a bill by the trustee to protect his possession of property of the bankrupt, threatened by one who claims ownership of a part of it.[196] So a contract made with a receiver in bankruptcy, by which a third person is allowed the use of machinery or equipment belonging to the bankrupt for a temporary purpose, on an agreement to return it when that pur-

189 McEldowney v. Card, 193 Fed. 475, 27 Am. Bankr. Rep. 937.

190 Brumby v. Jones, 141 Fed. 318, 72 C. C. A. 466, 15 Am. Bankr. Rep. 578; Plaut v. Gorham Mfg. Co., 174 Fed. 852, 23 Am. Bankr. Rep. 42; Real Estate Trust Co. v. Thompson, 112 Fed. 945, 7 Am. Bankr. Rep. 520; In re Vadner (D. C.) 259 Fed. 614. Compare In re Hammond, 98 Fed. 845.

191 Milkman v. Arthe, 223 Fed. 507, 139 C. C. A. 55, 34 Am. Bankr. Rep. 536.

192 Seegmiller v. Day, 249 Fed. 177, 161 C. C. A. 213, 41 Am. Bankr. Rep. 317.

193 Park v. Cameron, 237 U. S. 616, 35 Sup. Ct. 719, 59 L. Ed. 1147, 34 Am. Bankr. Rep. 849.

194 In re Miller Pure Rye Distilling Co., 214 Fed. 189, 130 C. C. A. 537.

195 In re East Stroudsburg Supply & Construction Co. (D. C.) 248 Fed. 356, 41 Am. Bankr. Rep. 57.

196 Atherton v. Beaman (D. C.) 256 Fed. 871, 42 Am. Bankr. Rep. 631.

pose is accomplished and meantime to give security against loss or damage, may be enforced by appropriate proceedings in the court of bankruptcy.[197] So again, a proceeding by the trustee of a bankrupt corporation to have an assessment ordered on unpaid stock is not a "suit" within the meaning of the statute, but is an administrative proceeding within the jurisdiction of the court of bankruptcy, since it does not require notice to nor the presence of the stockholders, whose personal rights are not involved, but remain to be determined in subsequent suits to collect the assessment if made.[198] But on the other hand, where the liability of stockholders of the bankrupt corporation for the unpaid balances of their stock is unconditional, so that an assessment or order by the bankruptcy court is not a condition precedent, the trustee cannot maintain a bill against them collectively in the court of bankruptcy, but must proceed by separate suit at law against each stockholder in the court having jurisdiction in each case.[199] But the court of bankruptcy has jurisdiction of a controversy between persons, each claiming the right to a conveyance of land as a purchaser from the trustee in bankruptcy, since, while the title remains in the trustee, its jurisdiction with respect to such lands is exclusive.[200] On similar principles, the court of bankruptcy has jurisdiction of proceedings to recover property in the possession of a receiver appointed by a state court,[201] or of an application for the rejection of a claim and, in addition thereto, to require the creditor to repay to the trustee the amount of a dividend previously paid on the claim,[202] or of a proceeding to reexamine and reduce a payment made by an intending bankrupt to an attorney for services to be rendered in the bankruptcy proceedings.[203] But it is also true that the provision of the statute which allows the court of bankruptcy to take jurisdiction of controversies with the consent of the proposed defendant relates only to plenary actions, and does not enlarge such portion of the court's jurisdiction as may be exercised summarily, even with the consent of the respondent.[204]

[197] Board of Road Com'rs of Monroe County v. Keil, 259 Fed. 76, 170 C. C. A. 144, 44 Am. Bankr. Rep. 259.

[198] In re Newfoundland Syndicate (D. C.) 196 Fed. 443, 28 Am. Bankr. Rep. 119; In re Crystal Spring Bottling Co. (D. C.) 96 Fed. 945, 3 Am. Bankr. Rep. 194.

[199] Kelley v. Gill, 245 U. S. 116, 38 Sup. Ct. 38, 62 L. Ed. 185, 40 Am. Bankr. Rep. 421.

[200] In re Henderson, 142 Fed. 568, 15 Am. Bankr. Rep. 760. This decision was reversed (Henrie v. Henderson, 145 Fed. 316, 76 C. C. A. 196, 16 Am. Bankr. Rep. 617), but on the ground that the sale to one of the contending parties had been confirmed and the price paid, though no deed made, before any controversy arose.

[201] In re Hecox (C. C. A.) 164 Fed. 823, 21 Am. Bankr. Rep. 314.

[202] Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814.

[203] In re Wood, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046, 20 Am. Bankr. Rep. 1.

[204] In re Teschmacher & Mrazay, 127 Fed. 728, 11 Am. Bankr. Rep. 547.

It is also to be noticed that, since this portion of the statute only speaks of suits "by" the trustee, it places no restriction upon the jurisdiction of the court of bankruptcy as to suits "against" the trustee or the estate; so that, when its jurisdiction is voluntarily invoked by an adverse claimant as plaintiff, it may take cognizance of the action without regard to the citizenship of the parties or the amount in controversy.[205] And the official responsibility of a trustee in bankruptcy for acts done in his character as trustee must be enforced in the court under whose jurisdiction he is proceeding.[206] But nothing in the bankruptcy act operates to abolish the distinction between legal and equitable remedies so far as regards suits or controversies arising out of, but not constituting a part of, the bankruptcy proceeding. Hence a suit in equity by a trustee is not maintainable in the district court, though otherwise within its jurisdiction, where a plain, adequate, and complete remedy might be had at law.[207]

§ 408. Same; Claims on Property in Possession of Trustee or Custody of Court.—On the general principle that possession of a res draws to the court jurisdiction to determine all conflicting claims and interests asserted against it, it is well settled that, if any particular item or parcel of property has come into the custody of the court of bankruptcy, by actual possession vesting in one of its officers, such as a trustee or receiver, and is claimed as a part of the estate in bankruptcy, that court has full jurisdiction to hear and determine all controversies involving the assertion of a title to such property, or a right or interest in it, or a lien upon it, in a summary manner if that form of proceeding is otherwise justified, or else in a plenary action where all necessary parties are duly served and brought into court.[208] Thus, property having been found in the possession of the bankrupt and having passed into the possession of his trustee, the court of bankruptcy has jurisdiction to determine the claim of a third person, who sold the property to the bankrupt and as-

[205] In re McCallum, 113 Fed. 393, 7 Am. Bankr. Rep. 596; In re Whitener, 105 Fed. 180, 44 C. C. A. 434, 5 Am. Bankr. Rep. 198; Swann v. Sanborn, 4 Woods, 625, Fed. Cas. No. 13,675. The Supreme Court of the District of Columbia, sitting as a court of equity, has jurisdiction to entertain a suit for the establishment of an equitable lien against the estate of a bankrupt. Crosby v. Ridout, 27 App. D. C. 481.

[206] Carbondale School Dist. v. Hourigan, 267 Pa. 154, 110 Atl. 173.

[207] Warmath v. O'Daniel, 199 Fed. 87, 86 C. C. A. 277, 20 Am. Bankr. Rep. 101. See Grant v. National Bank of Auburn, 197 Fed. 581, 28 Am. Bankr. Rep. 712.

[208] Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157, 14 Am. Bankr. Rep. 45; Clay v. Waters, 178 Fed. 385, 101 C. C. A. 645, 24 Am. Bankr. Rep. 293; Bray v. United States Fidelity & Guaranty Co., 170 Fed. 689, 96 C. C. A. 9, 22 Am. Bankr. Rep. 363; Thomas v. Woods, 173 Fed. 585, 97 C. C. A. 535, 23 Am. Bankr. Rep. 132; Treat v. Wooden, 138 Fed. 934, 14 Am. Bankr. Rep. 736; J. B. McFarlan Carriage Co. v. Solanas, 106 Fed. 145, 45 C. C. A. 253, 5 Am. Bankr. Rep. 442; In re Kellogg, 113 Fed. 120, 7 Am. Bankr. Rep. 623; In re Rodgers, 125 Fed. 169, 60 C. C. A. 567, 11 Am. Bankr. Rep. 79; In re McCallum, 113 Fed. 393, 7 Am. Bankr.

serts the right to rescind the sale for fraud.[209] And so, bailors or consignors, who permit their goods in the hands of the bankrupt to pass into the custody of the receiver or trustee, cannot occupy the position of adverse claimants in determining the jurisdiction of the court.[210] And generally, a controversy between a trustee in bankruptcy and one asserting an adverse title to property which is in the custody of the court is a "proceeding in bankruptcy" of which the court has jurisdiction, and not a "controversy at law or in equity" such as can only be tried there with the consent of the proposed defendant.[211] So also, a court of bankruptcy has jurisdiction to determine a controversy as to the ownership of property between the trustees of two different estates, both of which are being administered by such court.[212]

The same rule applies to the assertion and denial of liens upon property in the custody of the court. This one point being established (possession of the property by an officer of the court) it has jurisdiction of a proceeding in equity to establish the lien of a mortgage or other incumbrance upon the property,[213] or to impeach the validity of an existing mortgage covering the property,[214] or to set aside the mortgage as fraudulent or preferential or as having been given within four months previous to the bankruptcy,[215] or to recover property unlawfully sold on foreclosure of a chattel mortgage after the adjudication in bankruptcy and before a trustee could be appointed,[216] though not of a suit to foreclose a mortgage,[217] and (at least before the amendments to the bankruptcy act) not of a proceeding to impeach a mortgage as fraudulent where the property affected is in the possession of the creditor, and not of the trustee.[218] Again, if there are conflicting liens or claims upon

Rep. 596; Davis v. Coe, 19 Ohio Cir. Ct. R. 639; In re Sabin, 18 N. B. R. 151, Fed. Cas. No. 12,195; Dunlop v. Baker, 239 Fed. 193, 152 C. C. A. 181, 38 Am. Bankr. Rep. 369; Bennette v. Lawis (Tex. Civ. App.) 176 S. W. 660; Darrough v. First Nat. Bank, 56 Okl. 647, 156 Pac. 191.

209 In re Mertens, 131 Fed. 507, 12 Am. Bankr. Rep. 624.

210 In re Leeds Woolen Mills, 129 Fed. 922, 12 Am. Bankr. Rep. 136; In re McCallum, 113 Fed. 393, 7 Am. Bankr. Rep. 596.

211 In re Rochford, 124 Fed. 182, 59 C. C. A. 388, 10 Am. Bankr. Rep. 608; In re Leeds Woolen Mills, 129 Fed. 922, 12 Am. Bankr. Rep. 136. See Havens & Geddes Co. v. Pierek, 120 Fed. 244, 57 C. C. A. 37, 9 Am. Bankr. Rep. 569.

212 In re Rosenberg, 116 Fed. 402, 8 Am. Bankr. Rep. 624.

213 Cleminshaw v. International Shirt & Collar Co., 165 Fed. 797, 21 Am. Bankr. Rep. 616; In re Goldberg & Sagman (D. C.) 232 Fed. 194, 36 Am. Bankr. Rep. 736.

214 In re Kellogg, 121 Fed. 333, 57 C. C. A. 547, 10 Am. Bankr. Rep. 7; In re Waterloo Organ Co., 118 Fed. 904, 9 Am. Bankr. Rep. 427.

215 In re McMahon, 147 Fed. 684, 77 C. C. A. 668, 17 Am. Bankr. Rep. 530; Carter v. Hobbs, 92 Fed. 594, 1 Am. Bankr. Rep. 215; Galbraith v. Robson-Hilliard Grocery Co., 216 Fed. 842, 133 C. C. A. 46.

216 In re Brooks, 91 Fed. 508, 1 Am. Bankr. Rep. 531.

217 In re San Gabriel Sanatorium Co. 111 Fed. 892, 50 C. C. A. 56, 7 Am. Bankr. Rep. 206.

218 Bardes v. Hawarden Nat. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, 4 Am. Bankr. Rep. 163.

property which is in the lawful custody of the court of bankruptcy, it has jurisdiction to determine the same, even though the trustee has no interest in the question.[219] And the court has jurisdiction of a petition laying claim to a fund which is alleged to have come into the hands of the trustee.[220] And it has authority to determine the amount to which the wife of the bankrupt is entitled under her agreement for the release of her inchoate dower interest.[221]

In order thus to confer jurisdiction, there must be actual possession on the part of the receiver or trustee, not a mere claim to possession. But it may be constructive or symbolic. Thus, where the trustee in bankruptcy locks up the bankrupt's store and keeps the key, this brings the goods in the store into the custody and jurisdiction of the court of bankruptcy.[222] And jurisdiction, having thus vested in virtue of possession of the res, cannot be divested or impaired by the unauthorized surrender of possession of the property by the officers of the court or by a seizure thereof by an adverse claimant.[223]

§ 409. Same; Independent Suits Against Third Persons.—A district court of the United States, in its capacity as a court of bankruptcy, has no jurisdiction of an independent suit brought by a trustee in bankruptcy against a stranger (that is, one who has not been in any way made a party to the bankruptcy proceedings) to collect a debt due to the bankrupt or to recover money or property claimed as assets of his estate, unless by consent of the proposed defendant, such jurisdiction being expressly denied by the twenty-third section of the bankruptcy act.[224]

[219] Nisbet v. Federal Title & Trust Co., 229 Fed. 644, 144 C. C. A. 54, 36 Am. Bankr. Rep. 222.

[220] Wuerpel v. Commercial Germania Trust & Sav. Bank, 238 Fed. 269, 151 C. C. A. 285, 38 Am. Bankr. Rep. 223; In re Einstein (D. C.) 245 Fed. 189, 40 Am. Bankr. Rep. 507.

[221] In re Dialogue (D. C.) 241 Fed. 290, 39 Am. Bankr. Rep. 70.

[222] Wood v. Cummings, 197 Mass. 80, 83 N. E. 318.

[223] In re Schermerhorn, 145 Fed. 341, 76 C. C. A. 215, 16 Am. Bankr. Rep. 507; Plaut v. Gorham Mfg. Co., 159 Fed. 754, 20 Am. Bankr. Rep. 269. See, per contra, Waite v. Gottstein (D. C.) 224 Fed. 281, 35 Am. Bankr. Rep. 353.

[224] Bardes v. First Nat. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, 4 Am. Bankr. Rep. 163; Wall v. Cox, 181 U. S. 244, 21 Sup. Ct. 642, 45 L. Ed. 845, 5 Am. Bankr. Rep. 727; Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620, 9 Am. Bankr. Rep. 525; Board of Education of Salt Lake City v. Leary, 236 Fed. 521, 149 C. C. A. 573, 38 Am. Bankr. Rep. 289; Kelley v. Aarons (D. C.) 238 Fed. 996, 39 Am. Bankr. Rep. 115; De Friece v. Bryant (D. C.) 232 Fed. 233, 37 Am. Bankr. Rep. 275; In re Flanigan (D. C.) 228 Fed. 339, 35 Am. Bankr. Rep. 807; Chicago Title & Trust Co. v. National Storage Co., 260 Ill. 485, 103 N. E. 227; In re Yorkville Coal Co., 211 Fed. 619, 128 C. C. A. 570, 33 Am. Bankr. Rep. 633; In re Ballou (D. C.) 215 Fed. 810, 33 Am. Bankr. Rep. 21; In re Lummus (D. C.) 214 Fed. 891; In re Horgan (C. C. A.) 164 Fed. 415, 21 Am. Bankr. Rep. 31; In re Bailey, 156 Fed. 691, 19 Am. Bankr. Rep. 470; Hull v. Burr, 153 Fed. 945, 83 C. C. A. 61, 18 Am. Bankr. Rep. 541; Hatch v. Curtin, 146 Fed. 200, 16 Am. Bankr. Rep. 629; In re Flynn & Co., 126 Fed. 422, 11 Am. Bankr. Rep. 318; In re Hartman, 121 Fed. 940, 10 Am. Bankr. Rep. 387; In re Rochford, 124 Fed. 182, 59 C. C. A. 388,

There are, however, four important exceptions to this rule or qualifications of it. First, as to any property which has come into the hands of the trustee, the bankruptcy court has jurisdiction to determine adverse claims to it or liens asserted upon it.[225] Second, since the amendments to the bankruptcy law passed in 1903 and 1910, the court has jurisdiction if the suit is to set aside a fraudulent transfer or conveyance or to recover a preference.[226] Third, if the requisite diversity of citizenship exists, that is, if the bankrupt and the defendant in such action are citizens of different states, and the jurisdictional amount is involved, the action might have been brought in a federal circuit court, and therefore, the circuit courts having been abolished by the act of 1911 and their jurisdiction transferred to the district courts, such an action may now be brought in a district court in the circumstances supposed, though in trying such a suit it does not sit as a court of bankruptcy.[227] Fourth, if the action is one involving a federal question, or arises under the laws of the United States (other than the bankruptcy act itself), so that the bankrupt himself might have sued in a federal court regardless of the question of citizenship, so may his trustee. A suit by a trustee in bankruptcy against a national bank, to recover usurious interest received by the defendant from the bankrupt, is of this character.[228]

10 Am. Bankr. Rep. 608; J. B. McFarlan Carriage Co. v. Solanas, 106 Fed. 145, 45 C. C. A. 253, 5 Am. Bankr. Rep. 442; In re Tollett, 105 Fed. 425, 5 Am. Bankr. Rep. 305; In re Silberhorn, 105 Fed. 899, 5 Am. Bankr. Rep. 568; Chattanooga Nat. Bank v. Rome Iron Co., 99 Fed. 82, 3 Am. Bankr. Rep. 582; Woods v. Forsyth, Fed. Cas. No. 17,992. Under the provisions of the Bankruptcy Act, § 23, the court of bankruptcy has no jurisdiction of controversies with adverse claimants whose claims do not rest upon mere pretense, put forward in bad faith, whether the issue depends upon a question of law or one of fact. In re Midtown Contracting Co., 243 Fed. 56, 155 C. C. A. 586, 39 Am. Bankr. Rep. 578.

[225] Chattanooga Nat. Bank v. Rome Iron Co., 99 Fed. 82, 3 Am. Bankr. Rep. 582.

[226] Act Cong. Feb. 3, 1903, 32 Stat. 797; Act Cong. June 25, 1910, 36 Stat. 838. Even under these amendments, the court of bankruptcy has no jurisdiction of an action by a trustee in bankruptcy to recover property from a third person who sets up an adverse claim to it in his own right, where the trustee does not contend that the property was ever "transferred" to the defendant by the bankrupt, but only that the defendant holds it under a secret trust for the bankrupt. Newcomb v. Biwer, 199 Fed. 529, 29 Am. Bankr. Rep. 15.

[227] In re MacDougall, 175 Fed. 400, 23 Am. Bankr. Rep. 762; Sims v. Union Assur. Soc., 129 Fed. 804; In re Nugent, 105 Fed. 581, 44 C. C. A. 620, 5 Am. Bankr. Rep. 176. Diversity of citizenship between the defendant and the trustee in bankruptcy is not necessary; the test is whether the citizenship of the bankrupt and of the defendant is such that the former might have sued in a federal court if bankruptcy had not intervened. Bush v. Elliott, 202 U. S. 477, 26 Sup. Ct. 668, 50 L. Ed. 1114, 15 Am. Bankr. Rep. 656. The District Court, in a suit by a trustee in bankruptcy against nonresidents and residents, has no jurisdiction of residents merely holding claims against the bankrupt and having nothing belonging to him, where many necessary parties are nonresidents and cannot be brought in. In re Smith Const. Co. (D. C.) 224 Fed. 228, 35 Am. Bankr. Rep. 227.

[228] Reed v. American-German Nat. Bank, 155 Fed. 233, 19 Am. Bankr. Rep. 140.

Subject to these exceptions, the general rule is well established. Thus, the bankruptcy court has no jurisdiction of an action of replevin, brought by a receiver or trustee in bankruptcy to recover the possession of chattels alleged to belong to the bankrupt but held adversely by the defendant under a claim of title,[229] nor of a suit by the trustee of a bankrupt corporation to compel a stockholder to pay corporate debts because of his alleged participation in a fraudulent overvaluation of the corporate assets in payment for stock,[230] nor of an action to enforce a mechanic's lien existing in favor of the bankrupt, a contractor, at the date of his adjudication.[231] Again, while the trustee may petition the court to examine summarily into the reasonableness of a fee paid by a prospective bankrupt to his attorney, yet if, instead of taking this course, he files a petition to compel the attorney to account for moneys claimed to have been paid to him in contemplation of bankruptcy, the case falls within the jurisdictional clause of the statute, and cannot be maintained in the bankruptcy court except with the consent of the defendant.[232] A federal District Court has no jurisdiction to make partition of real estate between a trustee in bankruptcy and the wife of the bankrupt, and cannot authorize her to sell her interest; the most it can do is to order the sale of the bankrupt's interest.[233] Where the trustee in bankruptcy sues to recover property on two theories, one of which would entitle him to sue in the federal court, but his evidence fails to sustain that theory, the court will not retain jurisdiction to determine his right to recover under the other theory, but will require him to proceed in the proper state court.[234]

§ 410. Same; Preferences and Fraudulent Conveyances.—The Bankruptcy Act of 1898, as it stood originally, contained the following restrictive provision in section 23b: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." And under this provision it was held that no jurisdiction was vested in the courts of bankruptcy to determine actions brought for the purpose of vacating fraudulent transfers or recovering preferences, unless with the consent of the

[229] Mitchell v. McClure, 178 U. S. 539, 20 Sup. Ct. 1000, 44 L. Ed. 1182, 4 Am. Bankr. Rep. 177.

[230] In re Haley, 158 Fed. 74, 85 C. C. A. 404. Nor of a bill in equity against the stockholders of a bankrupt corporation collectively, to force payment of the unpaid balances on their subscriptions for stock. Kelley v. Gill, 245 U. S. 116, 38 Sup. Ct. 38, 62 L. Ed. 185, 40 Am. Bankr. Rep. 421.

[231] In re Grissler, 136 Fed. 754, 69 C. C. A. 406, 13 Am. Bankr. Rep. 508.

[232] In re Raphael (C. C. A.) 192 Fed. 874.

[233] Harlin v. American Trust Co., 67 Ind. App. 213, 119 N. E. 20.

[234] Kaigler v. Gibson (D. C.) 264 Fed. 240, 45 Am. Bankr. Rep. 462.

proposed defendant, or unless such diversity of citizenship existed and such an amount was involved as to give them jurisdiction of the controversy, not, indeed, as bankruptcy courts, but as federal District Courts.[235] But much dissatisfaction and inconvenience resulted from this rule, and the twenty-third section of the statute was twice amended by Congress, first, by the Act of February 5, 1903 (32 Stat. 797), and second by the Act of June 25, 1910 (36th Stat. 838). The net result of these amendments is to except from the rule of jurisdiction originally laid down in the statute "suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e." The first of these exceptions relates to the recovery of preferences given within four months of the filing of the petition in bankruptcy. The second relates to the setting aside of conveyances made to hinder, delay, or defraud creditors, made within a like period. The third is the provision by which "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided."

It is therefore now held that the courts of bankruptcy have jurisdiction (not exclusive of the jurisdiction of the state courts, but concurrent with them) of plenary proceedings at law or in equity brought by a trustee in bankruptcy to set aside unlawful preferences or fraudulent transfers of property given or made within the four months preceding the filing of the petition in bankruptcy, or to avoid transfers by the bankrupt which any creditor of his might have avoided; that this jurisdiction may be exercised without the consent of the defendant; and that it does not depend upon diversity of citizenship or the amount involved.[236] It is to be noticed, however, that as to the first two exceptions—preferences and conveyances to defraud creditors—the transaction must have occurred within four months prior to the bankruptcy proceedings; as to the third—transfers which a creditor might have

[235] Bardes v. First Nat. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, 4 Am. Bankr. Rep. 163; Mitchell v. McClure, 178 U. S. 539, 20 Sup. Ct. 1000, 44 L. Ed. 1182, 4 Am. Bankr. Rep. 177.

[236] Flanders v. Coleman, 250 U. S. 223, 39 Sup. Ct. 472, 63 L. Ed. 948, 43 Am. Bankr. Rep. 563; Stellwagen v. Clum, 245 U. S. 605, 38 Sup. Ct. 215, 62 L. Ed. 507, 41 Am. Bankr. Rep. 1; Collett v. Adams, 249 U. S. 545, 39 Sup. Ct. 372, 63 L. Ed. 764, 43 Am. Bankr. Rep. 496; Brent v. Simpson, 238 Fed. 285, 151 C. C. A. 301, 38 Am. Bankr. Rep. 813; Golden Hill Distilling Co. v. Logue, 243 Fed. 342, 156 C. C. A. 122, 39 Am. Bankr. Rep. 731; Kaigler v. Gibson (D. C.) 264 Fed. 240, 45 Am. Bankr. Rep. 462; Ward v. Central Trust Co. of Illinois (C. C. A.) 261 Fed. 344, 44 Am. Bankr. Rep. 323; Breit v. Moore, 220 Fed. 97, 135 C. C. A. 573, 34 Am. Bankr. Rep. 295; Davis v. Gates (D. C.) 235 Fed. 192, 37 Am. Bankr. Rep. 818; Hawkins v. Dannenberg Co. (D. C.) 234 Fed. 752, 37 Am. Bankr. Rep. 262; In re Vadner (D. C.) 259 Fed. 614; Newcomb v. Biwer (D. C.) 199 Fed. 529, 29 Am. Bankr. Rep. 15; Parker v. Sherman (D. C.) 195 Fed. 648, 28 Am. Bankr. Rep. 379; McElvain v. Hardesty, 169 Fed. 31, 94 C. C. A. 399, 22 Am. Bankr. Rep. 320; Wallace v. Jefferson County Sav. Bank (C. C. A.)

avoided,—the time limit does not seem to apply.[237] It should also be remarked that the trustee may sue in the bankruptcy court to recover a payment which is declared to be preferential by the law of the state, though it is not a preference under the bankruptcy act, if it comes within the definition of a fraudulent transfer.[238] But these provisions of the statute must be construed with reasonable strictness. Thus, the bankruptcy court has no jurisdiction of a suit in equity by the trustee to recover land, possession of which the bankrupt had surrendered to his father within four months before the adjudication, on the theory that title had passed to the bankrupt by virtue of a parol gift from the father.[239] So, it has been held that an action by a trustee in bankruptcy to recover damages from defendants, upon allegations that they conspired with the bankrupt, knowing him to be insolvent, and pursuant to such conspiracy he purchased goods on credit, which he turned over to defendants for less than their value, is an action merely to recover damages for the conspiracy, and not to set aside a fraudulent transfer of property, and therefore not within the jurisdiction of the court of bankruptcy.[240] The federal court cannot obtain jurisdiction by substituted service over nonresident assignees in a suit by a trustee in bankruptcy to set aside as a preference an assignment of a debt owing to the bankrupt by a nonresident.[241]

§ 411. Same; Suits Which Bankrupt Could Not Have Maintained. —The twenty-third section of the bankruptcy act provides that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." Before the amendments to this section, giving the district courts jurisdiction of suits to avoid preferences and fraudulent conveyances, there was much doubt as to whether it should be held applicable to this class of actions. For such suits could not be maintained by the bankrupt at all, and therefore it could not be said that there was any court "where the bankrupt might have brought or prosecuted them," with the inevitable result that the trustee could not bring or prosecute

157 Fed. 838; Off v. Hakes, 142 Fed. 364, 73 C. C. A. 464, 15 Am. Bankr. Rep. 696; Frost v. Latham & Co., 181 Fed. 866, 25 Am. Bankr. Rep. 313; Lynch v. Bronson, 160 Fed. 139, 20 Am. Bankr. Rep. 409; Bowman v. Alpha Farms, 153 Fed. 380, 18 Am. Bankr. Rep. 700; Horskins v. Sanderson, 132 Fed. 415, 13 Am. Bankr. Rep. 101; McNulty v. Feingold, 129 Fed. 1001, 12 Am. Bankr. Rep. 338; Kraver v. Abrahams, 203 Fed. 782, 29 Am. Bankr. Rep. 365. As to the jurisdiction of the state courts, see Craig v. Cox, (Mo.) 232 S. W. 77.

[237] Hall v. Glenn (D. C.) 247 Fed. 997, 39 Am. Bankr. Rep. 54.

[238] Grandison v. Robertson (D. C.) 220 Fed. 985, 34 Am. Bankr. Rep. 609.

[239] Flanders v. Coleman (D. C.) 249 Fed. 757, 41 Am. Bankr. Rep. 727.

[240] Lynch v. Bronson (D. C.) 177 Fed. 605, 24 Am. Bankr. Rep. 513.

[241] Murphy v. Ford Motor Co. (D. C.) 241 Fed. 134, 39 Am. Bankr. Rep. 665.

such actions, "unless by consent of the proposed defendant," a reductio ad absurdum. Accordingly it was held in numerous decisions that this provision of the statute applied only to suits upon causes of action originally vested in the bankrupt, and which he might have maintained if there had been no adjudication in bankruptcy, such as actions upon contracts and to collect debts, and not to suits upon causes of action created by the bankruptcy proceedings, or vesting originally in the trustee as trustee.[242] Yet this argument, plausible as it appears, did not find favor with the Supreme Court of the United States,[243] and the decision was ultimately against the right of the trustee to sue on such causes of action in the courts of bankruptcy, and this remained the rule until Congress amended the section in question (as set forth in the preceding pages) by an express grant of jurisdiction to the district courts over just such causes of action.

§ 412. Same; Consent or Waiver of Objections.—The provision of the twenty-third section of the bankruptcy act which permits the bringing of suits by a trustee in bankruptcy in courts other than those in which the bankrupt himself might have sued, "by consent of the proposed defendant," is to be regarded, not as conferring jurisdiction, but merely as giving a personal privilege to the defendant which he may waive; and his "consent" need not have been given before the suit was instituted, nor need it expressly appear of record, but it may be sufficiently shown by conduct necessarily implying such consent.[244] Thus, if an adverse claimant of property, or a creditor alleged to have received a preference or a voidable lien, voluntarily appears in the court of bankruptcy and himself invokes its jurisdiction in his own behalf, that court may proceed to determine the controversy,[245] as where such a claimant applies to the court of bankruptcy for an order or decree recognizing and establishing his claims or giving him any affirmative relief whatever,[246] or where he pleads a set-off, on which he asks judg-

[242] In re Baudouine, 101 Fed. 574, 41 C. C. A. 318, 3 Am. Bankr. Rep. 651; Skillin v. Magnus, 162 Fed. 689, 19 Am. Bankr. Rep. 397; Pepperdine v. Headley, 98 Fed. 863, 3 Am. Bankr. Rep. 455; Murray v. Beal, 97 Fed. 567, 3 Am. Bankr. Rep. 284; Carter v. Hobbs, 92 Fed. 594, 1 Am. Bankr. Rep. 215; In re Gutwillig, 90 Fed. 481, 1 Am. Bankr. Rep. 78; Jones v. Smith, 38 Fed. 380; Main v. Glen, 7 Biss. 86, Fed. Cas. No. 8,973.

[243] Bardes v. First Nat. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1182.

[244] McEldowney v. Card, 193 Fed. 475, 27 Am. Bankr. Rep. 937; In re Dialogue (D. C.) 241 Fed. 290, 39 Am. Bankr. Rep. 70.

[245] In re D. H. McBride & Co., 132 Fed. 285, 12 Am. Bankr. Rep. 81; In re Riker, 109 Fed. 63, 48 C. C. A. 220, 5 Am. Bankr. Rep. 720; Philips v. Turner, 114 Fed. 726, 52 C. C. A. 358, 8 Am. Bankr. Rep. 171; Fisher v. Cushman, 103 Fed. 860, 43 C. C. A. 381, 4 Am. Bankr. Rep. 646; In re Hadden Rodee Co., 135 Fed. 886, 13 Am. Bankr. Rep. 604; In re Drag (D. C.) 254 Fed. 474, 43 Am. Bankr. Rep. 59.

[246] In re Mertens, 131 Fed. 507, 12 Am. Bankr. Rep. 698; In re Riker, 109 Fed. 63, 48 C. C. A. 220, 5 Am. Bankr. Rep.

ment,[247] or where he shows that the money claimed to be recovered from him by the trustee is also claimed by a third party and that he occupies the position of a mere stakeholder and offers to pay the money into court.[248] Moreover, if the defendant in an action by the trustee enters a general appearance and pleads to the merits, and proceeds to a hearing before the referee or court, without raising any objection to the jurisdiction of the court, he must be taken to have "consented" that the court might try the case, and cannot object to the jurisdiction after a decision adverse to him.[249] And parties denying a bankruptcy court's jurisdiction over them and answering to the merits at the same time, are estopped from raising the jurisdictional question,[250] although an answer to the merits accompanied with a motion to dismiss for want of jurisdiction, which motion was expressly reserved in the answer, does not give defendant's consent to the jurisdiction of the court.[251] But a mere entry of a general appearance is not a waiver of objections to the jurisdiction, when the petition of the trustee does not state a cause of action, and objection to the jurisdiction is promptly taken upon the filing of an amended petition.[252] So also, a respondent who files a paper in which he sets up that the court is without jurisdiction of the action, and who repeats and urges the same objection in a proceeding to have the judge of the court of bankruptcy review a decision of the referee adverse to him, cannot be said to have consented to the jurisdiction, although he also excepts to the petition as not stating a cause of action and further pleads a general denial.[253] A special and limited appear-

720; s. c., 107 Fed. 96, 5 Am. Bankr. Rep. 720. But see In re Keystone Press, 203 Fed. 710, 29 Am. Bankr. Rep. 715.

[247] McEldowney v. Card, 193 Fed. 475, 27 Am. Bankr. Rep. 937.

[248] In re Blake, 150 Fed. 279, 17 Am. Bankr. Rep. 668.

[249] Fairbanks Steam Shovel Co. v. Wills, 240 U. S. 642, 36 Sup. Ct. 466, 60 L. Ed. 841, 36 Am. Bankr. Rep. 754; Seegmiller v. Day, 249 Fed. 177, 161 C. C. A. 213, 41 Am. Bankr. Rep. 317; Alco Film Corp. v. Alco Film Service of Minnesota, 234 Fed. 55, 148 C. C. A. 71, 37 Am. Bankr. Rep. 307; Jones v. Blair, 242 Fed. 783, 155 C. C. A. 371, 39 Am. Bankr. Rep. 569; In re Berry (D. C.) 247 Fed. 700, 41 Am. Bankr. Rep. 357; Gooch v. Stone, 257 Fed. 631, 168 C. C. A. 581, 44 Am. Bankr. Rep. 86; Detroit Trust Co. v. Pontiac Sav. Bank (C. C. A.) 196 Fed. 29, 27 Am. Bankr. Rep. 821; McEldowney v. Card, 193 Fed. 475, 27 Am. Bankr. Rep. 937; In re Elletson Co., 174 Fed. 859, 23 Am. Bankr. Rep. 530; Mitchell v. Mitchell, 147 Fed. 280, 17 Am. Bankr. Rep. 382; In re Blake, 150 Fed. 279, 17 Am. Bankr. Rep. 668; Ryttenberg v. Schefer, 131 Fed. 313, 11 Am. Bankr. Rep. 652; In re Durham, 114 Fed. 750, 8 Am. Bankr. Rep. 115; Sinsheimer v. Simonson, 106 Fed. 870; In re Leeds Woolen Mills, 129 Fed. 922, 12 Am. Bankr. Rep. 136; In re Steuer, 104 Fed. 976, 5 Am. Bankr. Rep. 209; In re Emrich, 101 Fed. 231, 4 Am. Bankr. Rep. 89; In re Connolly, 100 Fed. 620, 3 Am. Bankr. Rep. 842; Cohen v. American Surety Co., 192 N. Y. 227, 84 N. E. 947; In re Raphael, 192 Fed. 874, 113 C. C. A. 198.

[250] In re Franklin Brewing Co. (D. C.) 257 Fed. 135, 43 Am. Bankr. Rep. 663.

[251] Kaigler v. Gibson (D. C.) 264 Fed. 240, 45 Am. Bankr. Rep. 462.

[252] In re Hemby-Hutchinson Pub. Co. (D. C.) 105 Fed. 909, 5 Am. Bankr. Rep. 569.

[253] In re Michie (D. C.) 116 Fed. 749, 8 Am. Bankr. Rep. 734.

ance, for a purpose only subsidiary to the main issue and not involving a final determination of the controversy, does not give consent to the jurisdiction.[254] And the appearance of a stockholder of a bankrupt corporation to contest a petition by the trustee asking that an assessment be made on all stock not fully paid for does not confer jurisdiction on the court of bankruptcy to adjudicate his personal liability for such an assessment.[255] Of course, the mere proof of claims against a bankrupt does not constitute a consent to the jurisdiction of the federal court in a suit subsequently brought by the trustee against the claimant.[256]

It is also to be observed that the consent of a defendant to be sued in the court of bankruptcy means consent to the tribunal in which the controversy is to be carried on, and not to the mode of procedure, which is regulated by general principles of law, unless other provision is made,[257] and if the mode of procedure adopted is unlawful, the appearance of the defendant and his contesting the proceedings will not confer jurisdiction.[258] It was also held that the consent of the defendant, provided for in this part of the bankruptcy act, governing the jurisdiction of suits by a trustee in bankruptcy, was not intended to enlarge the jurisdiction of the federal circuit courts so as to confer a jurisdiction which they would not have because of diverse citizenship of the parties or because of a federal question being involved.[259]

§ 413. Same; Federal Courts in Other Districts.—Under the bankruptcy statute as originally enacted, the district courts had no auxiliary or ancillary jurisdiction to be exercised in aid of bankruptcy proceedings in progress in another district.[260] But this defect in the law was remedied by an act of Congress, passed in 1910, which provided that courts of bankruptcy shall be authorized to "exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."[261] It is apprehended that this properly relates only to steps or proceedings in the bankruptcy case proper, that is, the making of such orders and giving such aid to the trustee as may properly be done in a summary manner upon his peti-

[254] Board of Road Com'rs of Monroe County v. Keil, 259 Fed. 76, 170 C. C. A. 144, 44 Am. Bankr. Rep. 259.

[255] Bergdoll v. Harrigan (C. C. A.) 263 Fed. 279, 44 Am. Bankr. Rep. 633.

[256] Tate v. Brinser (D. C.) 226 Fed. 878, 34 Am. Bankr. Rep. 660.

[257] In re Raphael, 192 Fed. 874, 113 C. C. A. 198, 27 Am. Bankr. Rep. 708.

[258] Sinsheimer v. Simonson, 107 Fed. 898, 47 C. C. A. 51, 5 Am. Bankr. Rep. 537.

[259] Lovell v. Isidore Newman & Son, 227 U. S. 412, 33 Sup. Ct. 375, 57 L. Ed. 577, 29 Am. Bankr. Rep. 482.

[260] Hull v. Burr, 153 Fed. 945, 83 C. C. A. 61, 18 Am. Bankr. Rep. 541; In re Von Hartz, 142 Fed. 726, 74 C. C. A. 58, 15 Am. Bankr. Rep. 747.

[261] Act Cong. June 25, 1910, 36 Stat. 838.

tion.[262] As to plenary actions, for the recovery of property against adverse claimants or the like, the jurisdiction of the courts of bankruptcy is territorially restricted, and such a court cannot take jurisdiction of a trustee's suit for the recovery of property outside the boundaries of its own district, but, in order to obtain the possession of such property or its avails, the trustee must invoke the jurisdiction of the proper local court, either state or federal.[263] Since the amendments of 1903 and 1910 (giving to courts of bankruptcy jurisdiction of suits to recover preferences or to avoid fraudulent conveyances, without the consent of the defendant), a trustee in bankruptcy who desires to bring a suit of such a character, may go into the federal district court in the district where the proposed defendant resides and there prosecute his action.[264] So also, he may sue in another district to collect the assets of the estate,[265] to recover a sum of money due to the bankrupt under a written contract,[266] or to redeem mortgaged property of the bankrupt.[267] But the jurisdiction thus to be exercised by the court in another district in a plenary suit is not a jurisdiction in bankruptcy, but its ordinary jurisdiction, in law or equity as the case may be, and therefore the trustee must pursue the same remedies and is subject to the same rules as those would be whose rights he represents, that is, either the bankrupt or the creditors according to the nature of the suit.[268] Thus, the trustee cannot maintain a

[262] See Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969, 23 Am. Bankr. Rep. 519; In re Elkus, 216 U. S. 115, 30 Sup. Ct. 377, 54 L. Ed. 407; The Alert, 199 Fed. 542; In re Lipman, 201 Fed. 169, 29 Am. Bankr. Rep. 139; Rogers v. Chicamauga Trust Co., 253 Fed. 541, 165 C. C. A. 211. A bankruptcy court in ancillary proceedings has power to discharge a bankrupt from an arrest made prior to the bankruptcy proceedings, where he has the substantive right to relief. In re Madigan (D. C.) 254 Fed. 221, 41 Am. Bankr. Rep. 770.

[263] In re Brittania Mining Co., 197 Fed. 459, 28 Am. Bankr. Rep. 651; Paine v. Caldwell, 1 Hask. 452, 6 N. B. R. 558, Fed. Cas. No. 10,674; In re Geller (D. C.) 216 Fed. 558.

[264] Parker v. Sherman, 195 Fed. 648, 28 Am. Bankr. Rep. 379; Teague v. Anderson Hardware Co., 161 Fed. 765, 20 Am. Bankr. Rep. 424; Lawrence v. Lowrie, 133 Fed. 995, 13 Am. Bankr. Rep. 297; Hills v. F. D. McKinniss Co., 188 Fed. 1012, 26 Am. Bankr. Rep. 329; Sherman v. Bingham, 3 Cliff. 552, 7 N. B. R. 490, Fed. Cas. No. 12,762. The Bankruptcy Act authorizes suits by a trustee in bankruptcy to recover preferences to be brought in the federal District Court of the district where the real or personal property is situated, although the bankruptcy proceedings were instituted, and the defendant resides, in another district in the same state. Collett v. Adams, 249 U. S. 545, 39 Sup. Ct. 372, 63 L. Ed. 764, 43 Am. Bankr. Rep. 496.

[265] Knauth, Nachod & Kuhne v. Latham & Co., 219 Fed. 721, 135 C. C. A. 419, 33 Am. Bankr. Rep. 631; West v. Empire Life Ins. Co. (D. C.) 242 Fed. 605, 40 Am. Bankr. Rep. 93; In re Sage (D. C.) 224 Fed. 525, 35 Am. Bankr. Rep. 436; Hartman v. Ackoury (D. C.) 210 Fed. 188, 31 Am. Bankr. Rep. 514; In re Farrell (C. C. A.) 201 Fed. 338; In re Rathfon Bros., 200 Fed. 108, 29 Am. Bankr. Rep. 22; Shainwald v. Lewis, 6 Sawy. 585, 5 Fed. 510; Goodall v. Tuttle, 3 Biss. 219, 7 N. B. R. 193, Fed. Cas. 5,533; In re Murphy, 2 Nat. Bankr. News, 393.

[266] Babbitt v. Burgess, 2 Dill. 169, 7 N. B. R. 561, Fed. Cas. No. 693.

[267] Barnard v. Hartford, P. & F. R. Co., Fed. Cas. No. 1,003.

[268] Markson v. Heaney, 1 Dill. 497, 4 N. B. R. 510, Fed. Cas. No. 9,098; In re

plenary suit in a court of bankruptcy of another district to recover alleged excessive payments or transfers to counsel made by the bankrupt in contemplation of bankruptcy and for services to be rendered therein, when the court in which the proceeding is pending has made no order for the re-examination and reduction of such payments or transfers.[269] Where a bankrupt's estate is in course of administration in one district, a creditor may go into another district with a bill in equity seeking to impress a trust in his favor upon property of the bankrupt found there; but if the allegations of the bill are insufficient to trace his funds into any specific property, so that the suit must be regarded as an attempt to secure priority of payment out of the bankrupt's estate on account of moneys fraudulently obtained by him and put into his business, it must be dismissed.[270]

§ 414. Same; Jurisdiction of State Courts.—Under former bankruptcy statutes, many state courts held that they had no jurisdiction of actions brought by trustees in bankruptcy to recover property alleged to have been transferred by the bankrupt in violation of, or in fraud of, the provisions of the bankruptcy act, as in cases of preferences and fraudulent conveyances, but that the jurisdiction of the federal courts in such cases was exclusive.[271] The objection of these courts to entertaining suits of this character was principally founded on two considerations; first, that a court of equity should not take cognizance of a bill unless it has complete control over all the matters in controversy, either directly or by coercion of the parties, and this does not exist in the case of a trustee in bankruptcy; second, that the avoidance of a conveyance or wresting from a creditor a preference which he has obtained is in the nature of a penalty, and as this penalty is imposed by the laws of the United States, and not by the laws of the particular state, the courts of the state should not enforce it, more especially as preferential transfers are only forbidden by the bankruptcy act and are not contrary to public policy or good morals.[272] But these views have not prevailed.

Williams, 123 Fed. 321, 10 Am. Bankr. Rep. 538; Hull v. Burr, 153 Fed. 945, 83 C. C. A. 61, 18 Am. Bankr. Rep. 541. And see United States Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055, 28 Am. Bankr. Rep. 207; Scott v. George's Creek Coal & Iron Co., 202 Fed. 251.

269 In re Wood, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046, 20 Am. Bankr. Rep. 1.

270 Knauth, Nachod & Kuhne v. Latham & Co., 242 U. S. 426, 37 Sup. Ct. 139, 61 L. Ed. 404, 38 Am. Bankr. Rep. 660; Jaffe v. Pyle, 242 Fed. 67, 155 C. C. A. 11, 40 Am. Bankr. Rep. 219.

271 Olcott v. McLean, 10 Hun (N. Y.) 277, 16 N. B. R. 79; Brigham v. Claflin, 31 Wis. 607, 11 Am. Rep. 623; Bromley v. Goodrich, 40 Wis. 131, 22 Am. Rep. 685, 15 N. B. R. 289; Gilbert v. Priest, 65 Barb. (N. Y.) 444; Shaw v. Meldrum, 14 Abb. Prac. (N. Y.) N. S. 165 note; Voorhies v. Frisbie, 25 Mich. 476, 12 Am. Rep. 291, 8 N. B. R. 152; Redd v. Wallace, 145 Ala. 209, 40 South. 407. Compare Otis v. Hadley, 112 Mass. 100; Dambmann v. White, 48 Cal. 439.

272 Voorhies v. Frisbie, 25 Mich. 476, 12 Am. Rep. 291, 8 N. B. R. 152; Brig-

Especially in view of the provisions of the bankruptcy act, as amended, giving "concurrent jurisdiction" to the state and federal courts of actions of the kind mentioned, it is now held that any state court of competent jurisdiction may enforce actionable rights arising under the bankruptcy law.[273] Such a court, in passing upon the claims of a trustee in bankruptcy, is not proceeding under the bankruptcy law, but simply recognizes that statute as the source of the trustee's title, in the same manner as it would if he derived his title from a deed or contract.[274] Yet it should be remarked that Congress would have no authority to impose upon state courts the duty of hearing and determining controversies between trustees in bankruptcy and adverse claimants, by denying jurisdiction of such controversies to the federal courts. The jurisdiction exercised by the state courts concurrently with the federal courts, in enforcing rights and duties created by an act of Congress, is purely discretionary on their part, and may at any time be renounced or incumbered with onerous conditions.[275]

Accordingly, it is now thoroughly well settled that any state court which would have jurisdiction of the subject-matter as between citizens of the state, and which acquires jurisdiction of the persons of the litigants, has jurisdiction, concurrent with that of the courts of bankruptcy, of actions by trustees in bankruptcy to set aside alleged fraudulent transfers or conveyances of property made by the bankrupts upon whose estates they are appointed to administer,[276] though, in case the conveyance is voidable at the suit of the trustee only because it is voidable under the laws of the state, the trustee must show that he represents creditors of that class who alone would be entitled to attack it, as, for ex-

ham v. Claflin, 31 Wis. 607, 11 Am. Rep. 623. Compare Tinker v. Van Dyke, 1 Flip. 521, 14 N. B. R. 112, Fed. Cas. No. 14,058.

[273] Maxwell v. Davis Trust Co., 69 W. Va. 276, 71 S. E. 270; Nisbet v. Sigel-Campion Live Stock Commission Co., 21 Colo. App. 494, 123 Pac. 110; Robinson v. White, 97 Fed. 33; Van Zandt v. Parson, 81 Or. 453, 159 Pac. 1153; Bennette v. Lewis (Tex. Civ. App.) 176 S. W. 660. But any suit brought in a state court by a trustee in bankruptcy, except as specially authorized by the bankruptcy law, is without the jurisdiction of the court. Glover v. Love, 68 Ala. 219.

[274] Cook v. Whipple, 55 N. Y. 150, 14 Am. Rep. 202, 9 N. B. R. 155. Suits brought by a trustee in bankruptcy in a state court will be tried the same as any other actions and according to the rules of evidence prevailing in the state court. Barber v. Wiemer, 183 Iowa, 72, 165 N. W. 440. Where an action by a trustee in bankruptcy is brought in a state court, the measure of his relief in the first instance is determined there, but the state court is not concerned with the distribution of the proceeds of his recovery, as that belongs to the court of bankruptcy. Bergin v. Blackwood, 141 Minn. 325, 170 N. W. 508. The state court has jurisdiction to allow a defendant a set-off against the claim of the plaintiff suing as a trustee in bankruptcy. Gill v. Farmers' & Merchants' Bank (Mo. App.) 195 S. W. 538.

[275] In re Woodbury (D. C.) 98 Fed. 833, 3 Am. Bankr. Rep. 457.

[276] Frank v. Vollkommer, 205 U. S. 521, 27 Sup. Ct. 596, 51 L. Ed. 911, 17 Am. Bankr. Rep. 806; McKenna v. Simpson, 129 U. S. 507, 9 Sup. Ct. 365, 32 L. Ed. 771; Johnston v. Forsyth Mercantile

ample, creditors having a lien on the particular property.[277] In the same way, the state courts have jurisdiction over an action by a trustee in bankruptcy to recover money or property paid or transferred by the bankrupt to a creditor by way of a voidable preference.[278] But in an action of the latter sort in a state court, it is not permissible to enter into an inquiry into the validity of all other claims against the bankrupt and into the question whether other creditors have received voidable preferences and have not been required to surrender them, since this would, in effect, transfer the administration of the bankrupt's estate from the bankruptcy court to the state court.[279] So also, the state courts have jurisdiction of actions by trustees in bankruptcy to collect the assets of the estate, realize on choses in action, enforce contracts, and recover debts due to the bankrupt,[280] and to hear and determine the rights or

Co., 127 Fed. 845, 11 Am. Bankr. Rep. 669; In re Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73; Robinson v. White, 97 Fed. 33, 3 Am. Bankr. Rep. 88; Cox v. Wall, 99 Fed. 546; Norcross v. Nathan, 99 Fed. 414, 3 Am. Bankr. Rep. 613; Andrews v. Mather, 134 Ala. 358, 32 South. 738; Rison v. Powell, 28 Ark. 427; Hull v. Hudson, 9 Del. Ch. 205, 80 Atl. 674; Hobbs v. Frazier, 61 Fla. 611, 55 South. 848; Isett v. Stuart, 80 Ill. 404, 22 Am. Rep. 194; Lyon v. Clark, 124 Mich. 100, 82 N. W. 1058, 83 N. W. 694; Sheldon v. Parker, 66 Neb. 610, 92 N. W. 923, 95 N. W. 1015; Bindseil v. Smith, 61 N. J. Eq. 654, 47 Atl. 456; Jones v. Schermerhorn, 53 App. Div. 494, 65 N. Y. Supp. 999; Bouton v. Wheeler, 118 App. Div. 426, 104 N. Y. Supp. 33; Small v. Muller, 67 App. Div. 143, 73 N. Y. Supp. 667; Breckons v. Snyder, 211 Pa. St. 176, 60 Atl. 575; Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229; Blick v. Nimmo, 121 Md. 139, 88 Atl. 116; Googins v. Skillings, 118 Me. 299, 108 Atl. 50; Koger v. Clark (Tex. Civ. App.) 216 S. W. 434; Hull v. Forty-Second St. Storage House, 166 App. Div. 739, 152 N. Y. Supp. 303; Corey v. Blackwell Lumber Co., 24 Idaho, 642, 135 Pac. 742; Union Banking Co. v. Truscott Boat Mfg. Co., 189 Mich. 698, 155 N. W. 717; Parker v. Wagoner (Sup.) 169 N. Y. Supp. 1107; American Bottle Co. v. Finney, 203 Ala. 92, 82 South. 106.

[277] Sparks v. Weatherley, 176 Ala. 324, 58 South. 280.

[278] Claflin v. Houseman, 93 U. S. 130, 23 L. Ed. 833; Russell v. Owen, 61 Mo. 185, 15 N. B. R. 322; Dambmann v. White, 48 Cal. 439, 12 N. B. R. 438; Jordan v. Downey, 40 Md. 401, 12 N. B. R. 427; Boudinot v. Hamann, 117 Iowa, 22, 90 N. W. 497; Goodrich v. Wilson, 119 Mass. 429, 14 N. B. R. 555; Detroit Trust Co. v. Old Nat. Bank, 155 Mich. 61, 118 N. W. 729; Drew v. Myers, 81 Neb. 750, 116 N. W. 781, 17 L. R. A. (N. S.) 350; Bindseil v. Cashion, 60 N. J. Eq. 116, 45 Atl. 697; Vollkommer v. Frank, 107 App. Div. 594, 95 N. Y. Supp. 324; Stern v. Mayer, 99 App. Div. 427, 91 N. Y. Supp. 292; Silberstein v. Stahl, 32 Misc. Rep. 353, 66 N. Y. Supp. 646; Exler v. American Box Co., 226 Pa. St. 384, 75 Atl. 661, 134 Am. St. Rep. 1067; Maxwell v. Davis Trust Co., 69 W. Va. 276, 71 S. E. 270.

[279] Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 27 Sup. Ct. 391, 51 L. Ed. 596, 17 Am. Bankr. Rep. 675; Cartwright v. West, 185 Ala. 41, 64 South. 293.

[280] Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; Burbank v. Bigelow, 92 U. S. 179, 23 L. Ed. 542; Cox v. Wall, 99 Fed. 546; Heath v. Shaffer, 93 Fed. 647, 2 Am. Bankr. Rep. 98; In re Gerdes, 2 Nat. Bankr. News, 131; In re Murphy, 2 Nat. Bankr. News, 393; Clark v. Ewing, 9 Biss. 440, 3 Fed. 83; Farnham v. Friedmeyer, 109 Ill. App. 54; McIntyre v. Malone, 3 Neb. (Unof.) 159, 91 N. W. 246; Frank v. McAdams, 32 Misc. Rep. 512, 66 N. Y. Supp. 379; Peiper v. Harmer, 8 Phila. (Pa.) 100; Tennyson v. Beggs, 176 Cal. 255, 168 Pac. 140; Gray v. Arnot, 31 N. D. 461, 154 N. W. 268; Petrie v. Buffington, 79 W. Va. 113, 90 S. E. 557; Scott v. Gillespie, 103 Kan. 745, 176 Pac. 132. In the case last cited, it was held that a state court has jurisdiction of a suit by a trustee in bankruptcy to construe a will under which the bankrupt

titles of third persons, not parties to the bankruptcy proceedings, claiming property adversely to the bankrupt or in hostility to the trustee.[281] And certain rights, arising under the laws of the state, may be determinable exclusively in the state courts. Thus a bank which had been appointed a depositary for bankruptcy funds became insolvent and passed into the hands of the state superintendent of banks. A trustee in bankruptcy claimed that deposits made by him in such bank in his official character were entitled to priority of payment out of its assets, in view of the act of Congress giving preference to debts due to the United States. But the state statute declares that dividends to be paid by the superintendent of banks, out of the assets of institutions in his charge, shall be paid to such persons and in such amounts as shall be directed by the local state court. On this state of facts, it was held that the question raised by the trustee in bankruptcy was within the exclusive jurisdiction of the state court, and could not be determined on a motion in the court of bankruptcy for an order requiring the superintendent of banks to pay out money so deposited.[282]

The residence of a trustee in bankruptcy, for the purpose of fixing the place of trial in the state courts, is the principal office and place of business of the bankrupt corporation, and not his personal residence, as he is the "party" prosecuting the action.[283]

In selecting the state court in which to bring his action, the trustee in bankruptcy must naturally have regard to the extent and character of its jurisdiction as defined by the laws of the state. Thus, a suit properly cognizable only in equity should not be brought in a court having no chancery jurisdiction. But an action which merely seeks a money judgment, to recover an amount alleged to have been paid out by the bankrupt to a creditor as a preference, is not a suit in equity but an action at law,[284] but on the other hand, it is not triable in a state court of inferior and limited statutory jurisdiction.[285] In one state, it

was claimed to be a devisee. While a trustee in bankruptcy must resort to the courts of the state where the bankrupt corporation resides, he may therein enforce rights and avail himself of remedies which are open to him as a representative of the creditors of the bankrupt, though they would not be available to the corporation itself. Kelley v. Abbott (Cal) 196 Pac. 39.

[281] In re Russell, 101 Fed. 248, 41 C. C. A. 323, 3 Am. Bankr. Rep. 658; McLeod's Trustee v. McLeod, 89 S. W. 199; 28 Ky. Law Rep. 284; In re Kane (D. C.) 152 Fed. 587, 18 Am. Bankr. Rep. 654. A proceeding for partition between a trustee in bankruptcy and the bankrupt's wife is a controversy arising from the settlement of the bankrupt's estate, as distinguished from a proceeding in bankruptcy proper, and hence the state courts have jurisdiction. Harlin v. American Trust Co., 67 Ind. App. 213, 119 N. E. 20.

[282] In re Bologh (D. C.) 185 Fed. 825, 25 Am. Bankr. Rep. 726.

[283] Allen v. McCormick, 110 Misc. Rep. 254, 180 N. Y. Supp. 116.

[284] Cohen v. Small, 190 N. Y. 568, 83 N. E. 1123; Merritt v. Halliday, 107 App. Div. 596, 95 N. Y. Supp. 331.

[285] Dyer v. Kratzenstein, 103 App. Div. 404, 92 N. Y. Supp. 1012. An inferior state court, which has no equitable jurisdiction, cannot entertain an intervention

is held that, in an action by a trustee in bankruptcy to vacate a deed executed by the bankrupt, a state court has jurisdiction of the subject-matter, notwithstanding the fact that the property is located in another state.[286] But elsewhere it is held that a trustee in bankruptcy cannot maintain, in the district court of one county, a suit to set aside as fraudulent a sale of land made under a decree of the district court of another county, in a foreclosure suit against the bankrupt which was pending therein when the petition in bankruptcy was filed.[287] Assuming that the state court has jurisdiction of an action by the trustee, or of one in which he voluntarily appears, its judgment rendered in the case is binding and conclusive upon him and upon those whom he represents,[288] and it is thereafter too late for him to allege that the federal court alone had jurisdiction of the controversy,[289] nor will the judgment of the state court be reviewed or in any manner revised by the court of bankruptcy.[290]

Suits against a trustee in bankruptcy, as well as suits in his favor, may be maintained in the state courts. Thus, under proper conditions, an action of trover will lie in a state court to recover the value of property unlawfully taken by the trustee as a part of the bankrupt estate but really belonging to the plaintiff.[291] So also, such a court may have jurisdiction of a suit to quiet title to real estate, at the instance of a person in possession, against the bankrupt and his trustee,[292] and of a suit by the solvent partner of a solvent firm against the trustee in bankruptcy of the insolvent partner for an accounting and to gain control of the administration of the firm's assets.[293] And it is said that a suit by a state against one of its own citizens, being a trustee in bankruptcy, cannot be maintained in a federal court but only in a court of the state.[294] But claims against a bankrupt's estate are not to be settled or liquidated by suit in a state court (unless so ordered by the court of bankruptcy), since this is properly a step or proceeding in the bankruptcy case.[295]

by a mortgagor's trustee in bankruptcy to set aside, as preferential and fraudulent, the mortgage which is being foreclosed. Hawkins v. Dannenberg Co. (D. C.) 234 Fed. 752, 37 Am. Bankr. Rep. 262.

[286] Bowler v. First Nat. Bank, 21 S. D. 449, 113 N. W. 618, 130 Am. St. Rep. 725.

[287] W. C. Belcher Land Mortg. Co. v. Bush (Tex. Civ. App.) 67 S. W. 444.

[288] Winchester v. Heiskell, 119 U. S. 450, 7 Sup. Ct. 281, 30 L. Ed. 462; Lindstroth Wagon Co. v. Ballew, 149 Fed. 960, 79 C. C. A. 470, 18 Am. Bankr. Rep. 23.

[289] Scott v. Kelly, 22 Wall. 57, 22 L. Ed. 729.

[290] Robinson v. White, 97 Fed. 33, 3 Am. Bankr. Rep. 88.

[291] Weeks v. Fowler, 71 N. H. 518, 53 Atl. 543. And see supra, § 396.

[292] Reinhard v. Reinhard, 22 Ohio Cir. Ct. R. 362.

[293] Williams v. Lane, 158 Cal. 39, 109 Pac. 873.

[294] State v. Trustees of University, 65 N. C. 714, 1 Hughes, 133, Fed. Cas. No. 10,318, 5 N. B. R. 466.

[295] In re Heim Milk Product Co., 183 Fed. 787, 25 Am. Bankr. Rep. 746.

Nor will a state court take jurisdiction of any action which seeks to determine the title to, or gain the possession of, any property which has already passed into the actual custody of the court of bankruptcy,[296] and for this reason, an action of replevin will not lie in a state court against the trustee.[297] And where the state court has no jurisdiction of the subject-matter of an action against a trustee in bankruptcy, the trustee cannot confer jurisdiction by answering and praying for affirmative relief.[298] Further, the judgment rendered by a state court against a trustee in bankruptcy, while it may bind him personally, is not effective against the assets of the bankrupt in his hands for administration, and hence, if such a judgment undertakes to direct the payment of a certain sum out of such assets, it is erroneous and not at all binding on the court of bankruptcy.[299] But the state courts have not always been willing to concede this last proposition. Thus, in New Jersey, it is said that where a trustee in bankruptcy voluntarily submits himself and his rights to the jurisdiction of a state court in an action to foreclose a chattel mortgage upon outstanding accounts of the bankrupt, he cannot lawfully avoid the enforcement of a decree requiring him to account for money received by him resulting from the accounts, wherever the same may have been collected.[300]

§ 415. Same; Conflicting Jurisdiction.—So much has been said in an earlier section,[301] concerning conflicts of jurisdiction between the state courts and the courts of bankruptcy, that little remains to be here added, except to reiterate the general principle that each court will respect the jurisdiction of the other lawfully acquired, and neither will attempt to disturb or interfere with the possession of property rightfully in the custody and under the control of the other.[302] Thus, for

[296] In re Reynolds, 127 Fed. 760, 11 Am. Bankr. Rep. 758; Mishawaka Woolen Mfg. Co. v. Powell, 98 Mo. App. 530, 72 S. W. 723. The fact that a trustee in bankruptcy claims to be in possession of land as an asset of the bankrupt's estate does not prevent a third person from bringing an action therefor against him in a state court. Peters v. Bowers, 61 Colo. 534, 158 Pac. 1101.

[297] Supra, § 396. But compare Cooke v. Scovel, 68 N. J. Law, 484, 53 Atl. 692. See In re International Piano Mfg. Co. (D. C.) 268 Fed. 430, 46 Am. Bankr. Rep. 127.

[298] Goodnough Mercantile Co. v. Galloway, 48 Or. 239, 84 Pac. 1049.

[299] In re Central Bank, 8 Ben. 114, 12 N. B. R. 286, Fed. Cas. No. 2,549; Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885; In re Rogers & Stefani, 156 Fed. 267, 19 Am. Bankr. Rep. 566.

[300] Commercial Trust Co. v. Drayton, 90 N. J. Eq. 264, 105 Atl. 241.

[301] Supra, § 26.

[302] In re Kellogg, 121 Fed. 333, 57 C. C. A. 547, 10 Am. Bankr. Rep. 7; Bear v. Chase, 99 Fed. 920, 40 C. C. A. 182, 3 Am. Bankr. Rep. 746; Daughters v. Christy, 223 Ill. 612, 79 N. E. 292; National Surety Co. v. Medlock, 2 Ga. App. 665, 58 S. E. 1131; Simmons v. Richards, 28 Tex. Civ. App. 112, 66 S. W. 687; Scott v. George's Creek Coal & Iron Co., 202 Fed. 251; Mutual Life Ins. Co. v. Fleischman, 149 App. Div. 23, 133 N. Y. Supp. 512; Harlin v. American Trust Co., 67 Ind.

instance, if property which is claimed as part of the assets of an estate in bankruptcy is found to be in the possession of a receiver previously appointed by a state court, the proper course is for the trustee in bankruptcy to apply to the state court for an order directing the receiver to turn over the property to him, which order the state court may and should make; but if it refuses, the trustee should not seek coercive means to force the surrender of the property, but should intervene in the proceedings in the state court for the protection of the interests which he represents.[303] So again, neither of the courts will undertake to review, modify, or vacate a judgment lawfully rendered by the other in the due exercise of its jurisdiction.[304]

§ 416. Limitation of Actions.—The provision of the bankruptcy act of 1867 in regard to the limitation of actions was as follows: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." [305] Though there was some disposition to hold that this applied only to controversies over which a federal circuit court would have jurisdiction,[306] the more general opinion was that the statute might be pleaded effectually in any court, whether of the state or federal system,[307] especially in view of the plain policy of the bankruptcy law to effect a speedy, as well as an equal, distribution of the bankrupt's assets among his creditors.[308] The provision was held not to be a mere limitation on the remedy, but an extinction of the right, so that after two years the office of the assignee in bankruptcy expired both for the purpose of suing and of

App. 213, 119 N. E. 20; Broussard v. Le Blanc (Tex. Civ. App.) 182 S. W. 78; Meek v. Eggerman, 56 Okl. 388, 155 Pac. 522. See First Trust & Savings Bank v. Bitter Root Valley Irr. Co. (D. C.) 237 Fed. 733, 38 Am. Bankr. Rep. 626.

303 Carling v. Seymour Lumber Co., 113 Fed. 483, 51 C. C. A. 1, 8 Am. Bankr. Rep. 29; In re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815; Mauran v. Crown Carpet Lining Co., 23 R. I. 324, 50 Atl. 331; Wilson v. Parr, 115 Ga. 629, 42 S. E. 5. See In re Sage (D. C.) 224 Fed. 525, 35 Am. Bankr. Rep. 436; In re Diamond's Estate, 259 Fed. 70, 170 C. C. A. 138. And see supra, § 27.

304 In re Reynolds, 133 Fed. 585, 13 Am. Bankr. Rep. 245; Robinson v. White, 97 Fed. 33, 3 Am. Bankr. Rep. 88; Clendening v. Red River Valley Nat. Bank, 12 N. D. 51, 94 N. W. 901; In re Vadner (D. C.) 259 Fed. 614. But a bankruptcy court has jurisdiction of a suit to set aside a fraudulent transfer consummated by foreclosure of a mortgage in a city court of limited jurisdiction and with no affirmative equitable powers, and is not prevented by comity from taking jurisdiction. Trice v. Coolidge Banking Co. (D. C.) 242 Fed. 175, 39 Am. Bankr. Rep. 843.

305 Rev. Stat. U. S. § 5057.

306 Sedgwick v. Casey, 4 Ben. 562, 4 N. B. R. 496, Fed. Cas. No. 12,610.

307 Comegys v. McCord, 11 Ala. 932; Archer v. Brown, 1 Fla. 219.

308 Bailey v. Glover, 21 Wall. 342, 22 L. Ed. 636.

being sued.[309] The provision of the present statute is quite different. It is as follows: "Suit shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed."[310] It is undoubtedly within the power of Congress, in establishing a uniform system of bankruptcy, to prescribe a uniform rule on the subject of the limitation of actions, whether by or against a trustee in bankruptcy, and the rule so established must of necessity supersede all state legislation on the subject which may conflict with it. The rule prescribed is applicable in all courts, state as well as federal, and its effect may be in some cases to prolong, and in others to shorten, the period of limitation given by the law of the state.[311] But since the title of the trustee in bankruptcy relates back to the date of the adjudication, but no further, if a particular cause of action was then barred by the state statute of limitations, the trustee cannot sue upon it.[312] But it is not necessary that a cause of action should originally accrue or arise within two years before suit is brought upon it by the trustee; he may sue at any time within two years after the closing of the estate, provided the cause of action existed at the time of the filing of the petition in bankruptcy.[313] But where the action is commenced in due season, but the trustee directs the clerk of the court not to issue the summons, and it is not issued or served until more than two years after the closing of the estate, the action will be barred.[314]

§ 417. Same; What Suits and Proceedings Barred.—Generally speaking, the special statute of limitations prescribed by the bankruptcy act applies to all judicial contests between the trustee in bankruptcy and any person whose interest is adverse to his,[315] and hence to a suit to collect a debt or recover any property constituting assets of the estate,[316] an action to compel specific performance of a contract to sell and convey land to the bankrupt,[317] to set aside a deed absolute in form under which the grantee claimed adversely to the bankrupt,[318] to annul a judg-

309 McLaughlin v. Upton, 2 Wyo. 32.

310 Bankruptcy Act 1898, § 11d.

311 Peiper v. Harmer, 8 Phila. (Pa.) 100, 5 N. B. R. 252; Rock v. Dennett, 155 Mass. 500, 30 N. E. 171; Arnold Grocery Co. v. Shackelford (Ga.) 79 S. E. 470.

312 In re Dunavant, 96 Fed. 542, 3 Am. Bankr. Rep. 41; Sheldon v. Parker, 66 Neb. 610, 92 N. W. 923, 95 N. W. 1015; Cohen v. George, 149 Ga. 701, 101 S. E. 803.

313 Trustees of Mutual Building Fund v. Bosseiux, 4 Hughes, 387, 3 Fed. 817.

314 Walker v. Towner, 4 Dill. 165, 16 N. B. R. 285, Fed. Cas. No. 17,089.

315 Bailey v. Glover, 21 Wall. 342, 22 L. Ed. 636.

316 Jenkins v. International Bank, 106 U. S. 571, 2 Sup. Ct. 1, 27 L. Ed. 304; Doty v. Johnson, 6 Fed. 481; Payson v. Coffin, 4 Dill. 386, Fed. Cas. No. 10858; Ross v. Wilcox, 134 Mass. 21; Arnold Grocery Co. v. Shackelford, 140 Ga. 585, 79 S. E. 470. But see Smith v. Crawford, 6 Ben. 497, 9 N. B. R. 38, Fed. Cas. No. 13,030.

317 Ruff's Appeal, 117 Pa. St. 310, 11 Atl. 553.

318 Jenkins v. Rosenberg, 105 Ill. 157.

ment confessed by the bankrupt under such circumstances as to make it a voidable preference,[319] to enforce against stockholders of the bankrupt corporation the payment of the balance due on their shares,[320] or to compel a transfer of stock on the books of the corporation,[321] as also to an action against the administrator of a deceased bankrupt to recover the proceeds of insurance policies on the bankrupt's life,[322] or to set aside a sale under foreclosure of a mortgage,[323] or a tax deed on property of the estate in bankruptcy,[324] or a suit to enjoin the trustee in bankruptcy from selling property claimed adversely by the plaintiff.[325] But it was held that the corresponding clause of the act of 1867 did not apply to a proceeding against the bankrupt himself, not cast in the form of a plenary suit, to compel him to surrender property omitted from his schedule and alleged to be fraudulently withheld from the trustee,[326] nor to a proceeding taken merely as a step in the administration of the estate and involving merely the authority of the court of bankruptcy to ascertain and settle liens claimed upon the property of the estate,[327] nor to a proceeding to review a bill in equity.[328] It was also considered that the provision of the act of 1867 should not be held to apply to actions founded upon causes arising after the estate comes to the hands of the trustee,[329] and hence not to adverse claims arising out of an equitable attachment and an assignment of the bankrupt's interest under a testamentary trust, where both attachment and assignment were subsequent to the assignment in bankruptcy.[330] And it seems that, even in cases where the trustee in bankruptcy would be barred by the statute, it will not prevent an action by his grantee.[331]

§ 418. Same; Ignorance of Cause of Action and Concealed Frauds.—The bankruptcy act of 1867 prohibited the maintenance of any action by or against the assignee when brought "more than two years after the cause of action accrued." But it was generally held that when the assignee's cause of action arose from a fraud concealed by the opposite

[319] Reber v. Gundy, 16 Fed. 801.

[320] Payson v. Coffin, 5 Dill. 473, Fed. Cas. No. 10,859.

[321] Moses v. St. Paul, 67 Ala. 168.

[322] Avery v. Cleary, 132 U. S. 604, 10 Sup. Ct. 220, 33 L. Ed. 469.

[323] Phelan v. O'Brien, 12 Fed. 428.

[324] Gage v. Du Puy, 127 Ill. 216, 19 N. E. 878.

[325] West Portland Homestead Ass'n v. Lownsdale, 17 Fed. 205, 9 Sawy. 106.

[326] Phelps v. McDonald, 99 U. S. 298, 25 L. Ed. 473; Thomas v. Blythe, 55 Fed. 961, 5 C. C. A. 356. Compare Leech v. Dawson, 23 Fed. 654.

[327] In re Anderson, 23 Fed. 482. But see In re Churchman, 5 Fed. 181; In re Krogman, 5 N. B. R. 116, Fed. Cas. No. 7,936.

[328] Wilt v. Stickney, 15 N. B. R. 23, Fed. Cas. No. 17,854. But see Webster v. Gaff, 6 Colo. 475.

[329] Bowen v. Delaware, L. & W. R. Co., 153 N. Y. 476, 47 N. E. 907, 60 Am. St. Rep. 667. Compare Norton v. De La Villebeuve, 1 Woods, 163, 13 N. B. R. 304, Fed. Cas. No. 10,350; Rock v. Dennett, 155 Mass. 500, 30 N. E. 171.

[330] Hammond v. Whittredge, 204 U. S. 538, 27 Sup. Ct. 396, 51 L. Ed. 606.

[331] Burton v. Perry, 146 Ill. 71, 34 N. E. 60.

party, or which from its nature remained secret, the statute did not begin to run until the fraud was discovered,[332] at least if there was no reason to impute laches to the assignee or want of due diligence in discovering the fraud.[333] It was said: "The courts have ingrafted on this act the recognized rule as to statutes of limitation, that if the facts on which any right of action is based have been fraudulently concealed by the parties in interest, or if the fraud is of such a character as conceals itself, the statute will only commence to run from the date of the discovery of the fraud, or of such information as, if diligently followed up, would discover it." [334] But this implied exception can be supported only on the theory that a cause of action cannot properly be said to "accrue" until the plaintiff has knowledge of the circumstances on which his action may be based. The language of the present bankruptcy act is essentially different. It provides that "suit shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed." [335] This appears to be absolutely prohibitive, and to admit of no exception whatever. If, therefore, an estate has been closed for more than two years, and then a fraud is unearthed which resulted in withholding assets which should have been administered in the bankruptcy proceedings, it appears that the proper course for the trustee is to apply for an order reopening the estate.

§ 419. Same; Parties Affected by Statute.—On this point the provisions of the act of 1867 and those of the present statute are sufficiently similar to make the earlier decisions of the courts instructive. The clause relating to the limitation of actions in the act of 1867 referred to suits "between an assignee in bankruptcy and a person claiming an adverse interest;" that in the act of 1898 relates to suits "by or against a trustee of a bankrupt estate." Under the former act it was held that the limitation did not apply to an action by or against a purchaser from the assignee in bankruptcy, where the cause of action arose after the purchase,[336] although, if the statute had already begun to run against the assignee at the time of the sale, it would continue to run against

[332] Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395; Bailey v. Glover, 21 Wall. 342, 22 L. Ed. 636; Scott v. Devlin, 89 Fed. 970; Shainwald v. Davids, 69 Fed. 687; Duff v. First Nat. Bank, 13 Fed. 65; Martin v. Fullings, 3 Fed. 206; Nicholas v. Murray, 5 Sawy. 320, 18 N. B. R. 469, Fed. Cas. No. 10,223; Pritchard v. Chandler, 2 Curt. 488, Fed. Cas. No. 11,436; Forbes v. Overby, 4 Hughes, 441, Fed. Cas. No. 4,928a; Fullings v. Fullings, Fed. Cas. No. 5,151a; Toney v. Spragins, 80 Ala. 541.

[333] Pearsall v. Smith, 149 U. S. 231, 13 Sup. Ct. 833, 37 L. Ed. 713; Andrews v. Dole, 11 N. B. R. 352, Fed. Cas. No. 373.

[334] Yancy v. Cothran, 32 Fed. 687; Bailey v. Glover, 21 Wall. 342, 22 L. Ed. 636.

[335] Bankruptcy Act 1898, § 11a.

[336] Brewer v. Yazoo & M. V. R. Co., 128 La. 544, 54 South. 987; Burton v. Perry, 146 Ill. 71, 34 N. E. 60.

his vendee,[337] and of course the latter could not sue on a cause of action which was already barred before the transfer of the property to him.[338] It was also held that the limitation did not affect an action brought by the bankrupt himself respecting property rights which the assignee had abandoned or had elected not to take,[339] nor a suit by a person claiming under a conveyance made by the bankrupt before the adjudication in bankruptcy.[340] So also, where a decree was made by the court of bankruptcy establishing the priority of the lien of one certain creditor over all other creditors, it was held that a creditor who had not been made a party to the proceeding and had no notice of it was not barred by the statute from asserting his rights more than two years after the date of the decree.[341] But where a creditor brings an action to set aside an alleged fraudulent conveyance, not claiming any peculiar rights for himself, but simply because the assignee has refused to sue, he is as much bound by the statute as the assignee himself would be.[342]

§ 420. Same; Pleading the Statute.—The special short statute of limitations prescribed by the bankruptcy act, like any other statute of limitations, must be taken advantage of either by demurrer or answer; if not pleaded, it will be waived, since it does not take away the jurisdiction of the court in which the action may be brought, but only puts an end to the action if seasonably set up.[343] And therefore if an action begun by the bankrupt, and in which the trustee is substituted as plaintiff, is allowed to proceed to judgment without any objection being taken on the ground that the statute of limitations had run against it, the proceeds of the judgment cannot be claimed by the bankrupt, but belong to the estate in bankruptcy.[344]

§ 421. Same; Laches of Trustee or Claimants.—Even without special reference to the statute of limitations, an action by a trustee in bankruptcy to collect a debt, avoid a fraudulent conveyance, or recover a preference, may be successfully defended on the ground of his laches, if he has unreasonably and negligently refrained from asserting his claims as trustee, and rights have meanwhile accrued which are of

[337] Greene v. Taylor, 132 U. S. 413, 10 Sup. Ct. 138, 33 L. Ed. 411; Rock v. Dennett, 155 Mass. 500, 30 N. E. 171.

[338] Lewis v. Prendergast, 45 Minn. 533, 48 N. W. 439.

[339] Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609. See Maybin v. Raymond, 15 N. B. R. 353, Fed. Cas. No. 9,338; Brewer v. Brewer, 145 La. 835, 83 South. 30.

[340] Ludeling v. Chaffe, 143 U. S. 301, 12 Sup. Ct. 439, 36 L. Ed. 313.

[341] Tennessee & C. R. Co. v. East Alabama Ry. Co., 75 Ala. 516, 51 Am. Rep. 475.

[342] Freelander v. Holloman, 9 N. B. R. 331, Fed. Cas. No. 5,081.

[343] Upton v. McLaughlin, 105 U. S. 640, 26 L. Ed. 1197; Bartles v. Gibson, 17 Fed. 293.

[344] Maybin v. Raymond, 15 N. B. R. 353, Fed. Cas. No. 9,338.

value and should be respected.[345] Thus, the statute requires claims against an estate in bankruptcy to be exhibited within one year after the adjudication, and also requires a creditor who has received a preference to surrender the same as a condition precedent to his right to prove his claim. But where a trustee in bankruptcy failed to take any steps towards the avoidance of an alleged preference until the year had so nearly expired that there did not remain to the preferred creditor a reasonably sufficient time in which to surrender his preference and prove his claim, it was held that the trustee's subsequent suit to avoid the preference should be dismissed on account of his laches.[346] But the trustee is not barred, on the ground of laches, from asserting rights under the liens of execution creditors upon property held by the bankrupt under a contract of conditional sale, which liens had been preserved for the benefit of the estate by order of the court of bankruptcy, simply because he first based his right to relief solely upon the ground that an unlawful preference was created through the payment of an indebtedness by the transfer of the property to the vendor by the bankrupt when insolvent.[347] And the trustee in bankruptcy of a corporation whose treasurer had used its funds without authority to purchase stocks in his own name, which he pledged with a bank as collateral for his notes, was held not barred by laches from proceeding to enforce the constructive trust affecting the stock in favor of the company, where it appeared that the last of the stock had been purchased in October, 1912, and the petition in bankruptcy was filed in May, 1915, and the stock did not come into the possession of the bank until the day of the assignment in bankruptcy.[348] So, the fact that the trustee allowed an attaching creditor to proceed to judgment in his suit against a debtor of the bankrupt, is not necessarily laches preventing him from proceeding to set aside the judgment.[349]

Laches may also be imputed to claimants against the estate in bankruptcy. Thus, where a claimant had been fraudulently induced to sell goods to the bankrupt, which were delivered December 9, 1912, and had

[345] Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915; Kinder v. Scharff, 231 U. S. 517, 34 Sup. Ct. 164, 58 L. Ed. 343; Swartz v. Frank, 183 Mo. 438, 82 S. W. 60; Beall v. Dushne, 149 Pa. St. 439, 24 Atl. 284; Jacobson v. Sims, 60 Atl. 185.

[346] Swartz v. Frank, 183 Mo. 438, 82 S. W. 60. But a delay of four months on the part of a trustee in bankruptcy, after the filing of a claim against the estate, before he moved that it should be expunged unless a preference were first surrendered, was held not such laches as to defeat his right, where no injury resulted to the creditor. In re Star Spring Bed Co. (C. C. A.) 265 Fed. 133, 45 Am. Bankr. Rep. 650, affirming (D. C.) 257 Fed. 176, 43 Am. Bankr. Rep. 328.

[347] Rock Island Plow Co. v. Reardon, 222 U. S. 354, 32 Sup. Ct. 164, 56 L. Ed. 231, 27 Am. Bankr. Rep. 492.

[348] Millard v. Green, 94 Conn. 597, 110 Atl. 177, 9 A. L. R. 1610.

[349] Wilson v. Van Buren County Farmers' Mut. Fire Ins. Co., 184 Mich. 530, 151 N. W. 752.

knowledge of the bankruptcy proceedings between the 10th and 12th of the same month, but filed no intervening petition claiming the goods or the proceeds until May 24, 1913, it was held that his right to rescind the sale was barred by laches.[350]

§ 422. **Same; Effect of Reopening Estate.**—The bankruptcy act of 1898 authorizes a court of bankruptcy to close the estate of a bankrupt whenever it appears that it has been fully administered, and to reopen such an estate whenever it appears that it was closed before being fully administered.[351] And when a closed estate is reopened on a petition by creditors or the former trustee, showing that certain solvent claims had not been collected, subsequent suits brought to collect such claims are not barred by the special statute of limitations, although the estate was not reopened until more than two years after the final settlement and closing of it.[352] But the opinion has been advanced that an estate cannot thus be reopened for the purpose of allowing the trustee to bring a suit to set aside an alleged fraudulent conveyance by the bankrupt, on the theory that property conveyed away by a bankrupt, although for the purpose of defrauding his creditors, is not property of his estate until the sale is set aside, and therefore the existence of a cause of action in the trustee to vacate such a conveyance is insufficient to show that the estate was not fully administered when it was closed by order of the court.[353]

§ 423. **Parties.**—In an action by a trustee in bankruptcy, the complaint should represent him as suing in his official capacity, and not as an individual, but when this is done, the fact that his name, in the caption, is followed by the word "trustee," instead of the words "as trustee," is immaterial.[354] If the same trustee is appointed for two bankrupts individually and also for the firm of which they are the members, in the same proceeding, he holds but one office, and may sue to set aside a fraudulent conveyance made by the bankrupts jointly.[355] He generally sues in his own name as trustee in bankruptcy, but if a technical legal title to the property in suit is outstanding in the name of another, it will be necessary for the trustee (the local rules of practice so requiring) to use the name of such other as the nominal plaintiff

[350] In re Watmough (D. C.) 210 Fed. 539, 32 Am. Bankr. Rep. 59. And see In re Jamison Bros. & Co., 227 Fed. 30, 142 C. C. A. 3, 35 Am. Bankr. Rep. 725.

[351] Bankruptcy Act 1898, § 2, clause 8.

[352] Bilafsky v. Abraham, 183 Mass. 401, 67 N. E. 318. Contra, under the act of 1867, see Geisreiter v. Sevier, 33 Ark. 522; Scott v. Little, 76 Fed. 563.

[353] Kinder v. Sharff, 129 La. 218, 55 South. 769.

[354] Newland v. Zodikow, 39 Misc. Rep. 541, 80 N. Y. Supp. 375.

[355] Wright v. Simon, 52 Misc. Rep. 360, 102 N. Y. Supp. 1108.

in the action.[356] Conversely, in any proceedings affecting property or assets of the estate, the trustee in bankruptcy must be made a party, or he will not be bound by the decree.[357] Thus, he is a necessary party to a bill to foreclose a mortgage given by the bankrupt.[358] As to the joinder of parties, bankruptcy follows the general rule of equity, that all those should be brought in who have any interests in the subject-matter of the suit or claims upon it, or whose rights may be prejudicially affected by the decree to be made in the case, in order that complete justice to all concerned may be effected at one time.[359] Thus, a trustee in bankruptcy, suing for money paid by the bankrupt to a corporation without consideration, should, as a protection in case the corporation might be or become insolvent, join as defendants all those shown by the complaint to be personally liable.[360] And all the shareholders of an insolvent corporation who received dividends paid out of capital assets, may be joined in one action instituted by the trustee in bankruptcy to recover the amount of the dividends.[361] So in a suit by a trustee in bankruptcy, based upon a state statute which prohibits transfers to corporate officers and directors when the corporation's insolvency is imminent, with intent to prefer, all the various officers and directors may be made parties defendant, although they are not equally liable and though they were not all concerned in such transfer.[362] But an objection on the ground of a want of necessary parties will be available only in so far as it prevents the doing of complete justice without the presence of the omitted parties, and it will not be allowed to prevent relief which can be given as between the parties before the court, and which will not affect the rights of the omitted parties.[363] But on the

[356] Bacon v. George, 206 Mass. 566, 92 N. E. 721; Traders' Ins. Co. v. Mann, 118 Ga. 381, 45 S. E. 426. After the adjudication, an action against a debtor of the bankrupt cannot be maintained in the name of the bankrupt's previous assignee for creditors, nor by the trustee suing in the name of such assignee. Gilbert v. Mechanics' & Metals' Nat. Bank, 95 Misc. Rep. 364, 160 N. Y. Supp. 710.

[357] Atkinson v. Farmers' Bank, Crabbe, 529, Fed. Cas. No. 609. See Virginia-Carolina Chemical Co. v. Floyd, 158 N. C. 455, 74 S. E. 465; Magruder v. Hattiesburg Trust & Banking Co., 108 Miss. 857, 67 South. 485.

[358] Clark v. Clark, 56 N. H. 105.

[359] United Sheet & Tin Plate Co. v. Hess, 159 Fed. 889, 87 C. C. A. 69, 20 Am. Bankr. Rep. 254; In re Kane, 161 Fed. 633, 20 Am. Bankr. Rep. 616; In re Beede, 126 Fed. 853, 11 Am. Bankr. Rep. 387; In re Baudoulne, 9 Fed. 536, 3 Am. Bankr. Rep. 55. See In re Frey's Estate, 237 Pa. St. 269, 85 Atl. 147; West v. Empire Life Ins. Co. (D. C.) 237 Fed. 303, 38 Am. Bankr. Rep. 462. And see, as to the right of intervention in suits brought by the trustee in bankruptcy, West v. Empire Life Ins. Co. (D. C.) 242 Fed. 605, 40 Am. Bankr. Rep. 93.

[360] Billings v. Charles Millar & Son Co. (D. C.) 227 Fed. 185, 35 Am. Bankr. Rep. 846.

[361] Carlisle v. Ottley, 143 Ga. 797, 85 S. E. 1010, L. R. A. 1917C, 393, Ann. Cas. 1917A, 573. And see Sherrill v. Hutson, 187 Ala. 189, 65 South. 538.

[362] Sherwood v. Holbrook, 178 App. Div. 462, 165 N. Y. Supp. 514.

[363] Greenhall v. Carnegie Trust Co. (D. C.) 180 Fed. 812, 25 Am. Bankr. Rep.

other hand, it is not necessary to bring in parties who may have some contingent or ultimate rights in the subject of the suit, if those rights are not to be affected by the proceeding immediately before the court.[364] Thus, ordinarily, in suits to vacate fraudulent transfers and the like, judgment creditors of the bankrupt are not necessary parties.[365] So, in a suit to set aside a transfer of the bankrupt's interest in a partnership to a third person, the bankrupt's partner is not a necessary party.[366] And in an action to vacate an alleged fraudulent chattel mortgage, persons to whom the bankrupt had subsequently given other chattel mortgages on the same property are not necessary parties.[367] And a fraudulent transferee of property, who has transferred the property to another fraudulent transferee, need not be joined.[368] And in a suit by the trustee against the bankrupt's wife, to whom he had assigned policies of insurance on his life, to determine the amount of premiums paid in fraud of creditors, the insurer is not a necessary party.[369] And it is no objection to the trustee's bringing a suit to recover assets in the form of a creditors' bill, that there are also other creditors of the defendant, for in such a bill, the complainant sues as one of a class for the benefit of all members thereof who may become parties.[370] But if property of the bankrupt is subject to a valid lien, the mere taking possession of the property by the court of bankruptcy does not make the holder of the lien a party to the proceedings in bankruptcy.[371] In a suit by a trustee to establish rights in property within the district, a non-resident defendant claiming adversely may be brought in by an order and service by publication.[372]

§ 424. Same; Joinder of Bankrupt.—The bankrupt is neither a necessary nor a proper party to any action relative to the assets of his estate in the hands of his trustee; and it is not necessary to join him as a party of record in any such proceeding, whether the suit be brought by the trustee or brought against him, and whether its object is to

300; Peninsula Bank of Williamsburg v. Wolcott, 232 Fed. 68, 146 C. C. A. 260, Ann. Cas. 1918C, 477; 36 Am. Bankr. Rep. 327.

364 Vollkommer v. Frank, 107 App. Div. 594, 95 N. Y. Supp. 324; Bank of Waldron v. Euper, 93 Ark. 609, 125 S. W. 1022.

365 Traders' Bank v. Campbell, 14 Wall. 87, 20 L. Ed. 832; Smith v. Belden, 35 Misc. Rep. 113, 71 N. Y. Supp. 246; Grant v. National Bank of Auburn, 19 Fed. 581, 28 Am. Bankr. Rep. 712.

366 Lamb v. Hall, 147 Cal. 37, 81 Pac. 286.

367 Shanks v. National Casket Co., 95 App. Div. 187, 88 N. Y. Supp. 839.

368 Skillen v. Endelman, 39 Misc. Rep. 261, 79 N. Y. Supp. 413.

369 Bailey v. Wood, 202 Mass. 562, 89 N. E. 149.

370 Stotesbury v. Cadwallader, 10 Phila. (Pa.) 281, Fed. Cas. No. 13,498. But see Biggs v. Westen, 248 Mo. 333, 154 S. W. 708.

371 In re Platteville Foundry & Machine Co., 147 Fed. 828, 17 Am. Bankr. Rep. 291. But see Exler v. Wickes Bros., 263 Pa. 150, 106 Atl. 233.

372 Horskins v. Sanderson, 132 Fed.

collect a debt, recover a preference, avoid a fraudulent transfer, or establish a title to, or lien upon, property in the possession of the trustee.[373]

§ 425. **Representation of Trustee by Counsel for Bankrupt.**—Since the interests of the trustee in bankruptcy are usually antagonistic to those of the bankrupt, and since it is frequently the duty of the former to frustrate the latter's fraudulent attempts to conceal assets or put them beyond the reach of creditors, or to benefit one creditor at the expense of others, it is clearly contrary to the policy of the law that the same attorney should act both for the trustee and for the bankrupt. And this has been enacted into a rule of court in some of the federal districts. But it has been held that such a rule applies only to proceedings in the bankruptcy case before the bankruptcy court. that it has no application to a suit by the trustee in a state court, and that it is no defense to a suit brought by a trustee in bankruptcy, in equity, to recover assets of the bankrupt alleged to be in the possession of the defendant, that the plaintiff's attorney was attorney for the bankrupt in the bankruptcy proceedings.[374]

§ 426. **Injunction and Receivership.**—It has already been shown that the court of bankruptcy has authority, pending adjudication upon a petition in bankruptcy or pending the appointment of a trustee, to enjoin all persons from intermeddling with the property of the bankrupt or from disposing of such property as may be in their hands, and also, if necessary for the preservation of the estate, to take possession of it through a receiver.[375] It remains to be stated that the trustee in bankruptcy, when proceeding to collect the assets, may also have the aid of these powerful remedies when necessary.[376] When he brings suit to recover an alleged preference or to set aside an alleged fraudulent conveyance, he may obtain an injunction restraining the defendant from disposing of the property or letting it go out of his hands pending the suit,[377] provided he shows some emergency justifying such action or

415, 13 Am. Bankr. Rep. 101; Olcott v. Maclean, 73 N. Y. 223.

[373] Wall v. Cox, 101 Fed. 403, 41 C. C. A. 408, 4 Am. Bankr. Rep. 659; Cox v. Wall, 99 Fed. 546; Goodnough Mercantile & Stock Co. v. Galloway, 156 Fed. 504, 19 Am. Bankr. Rep. 244; Buckingham v. Estes, 128 Fed. 584, 63 C. C. A. 20, 12 Am. Bankr. Rep. 182; French v. R. P. Smith & Sons Co., 81 Minn. 341, 84 N. W. 44; Edwards v. Schillinger, 148 Ill. App. 227; Frank v. Musliner, 76 App. Div. 616, 78 N. Y. Supp. 369; Fry v. Street, 37 Ark. 39. But see Kimbrough v. Alred, 202 Ala. 413, 80 South. 617.

[374] Callahan v. Israel, 186 Mass. 383, 71 N. E. 812.

[375] See supra, §§ 205, 210.

[376] A court of bankruptcy has power to enjoin the violation of a contract made with a trustee in bankruptcy. In re Consumers Albany Brewing Co. (D. C.) 224 Fed. 235, 35 Am. Bankr. Rep. 358.

[377] In re Norris, 177 Fed. 598, 24 Am.

some imminent danger of loss which the court would be unable to redress,[378] and where his claim is to the possession of specific property, presently within the reach of the court, he may be entitled to an injunction restraining its shipment out of the district until after the termination of the suit.[379] But this remedy cannot be availed of where the defendant has rights in the property which are independent of the bankruptcy proceedings and not to be affected thereby. Thus, a trustee in bankruptcy of a husband cannot maintain a bill to restrain the husband and wife from alienating property which they hold by that peculiar tenure still surviving in some states, known as "tenancy by entireties."[380] In cases where the remedy by injunction does not appear sufficient, and particularly where it appears that the defendant in the action is not solvent, or would be financially unable to restore the value of the property in suit if he should meanwhile dispose of it, the trustee may apply for the appointment of a receiver to take charge of it, and this should be granted in a proper case.[381] This was held properly done, for instance, in a case where the property alleged to have been fraudulently transferred to the defendants was a stock of merchandise, and it appeared that it consisted of goods subject to deterioration and fluctuation in price, and that it had not been inventoried, so that its value could not be correctly estimated, and that the defendants were probably not worth much more than the amount of their debts.[382] But proof of the defendant's insolvent or at least unstable financial condition is essential to the granting of this relief,[383] and a receiver should not be appointed where there is a probability that a

Bankr. Rep. 444; In re Schwartzman, 167 Fed. 399, 21 Am. Bankr. Rep. 885; Blake v. Nesbet, 144 Fed. 279, 16 Am. Bankr. Rep. 269; In re Latimer, 141 Fed. 665, 15 Am. Bankr. Rep. 461; Jobbins v. Montague, 23 N. J. Eq. 182; Hane v. Crown & Keystone Co. (D. C.) 223 Fed. 439, 35 Am. Bankr. Rep. 175; Hall v. Glenn (D. C.) 247 Fed. 997, 39 Am. Bankr. Rep. 54; In re Schilling (D. C.) 264 Fed. 357, 45 Am. Bankr. Rep. 147.

[378] Beecher v. Bininger, 7 Blatchf. 170, Fed. Cas. No. 1,222; Rowland v. Auto Car Co., 133 Fed. 835, 13 Am. Bankr. Rep. 799. Application by a trustee in bankruptcy for a preliminary injunction to restrain defendants from transferring property alleged to have been acquired by them through a preferential transfer should be denied, where the only allegations connecting them with the transaction or charging their intention to sell the property are made on information and belief, and there is no allegation or showing of their insolvency. Lyle v. Perry (D. C.) 250 Fed. 307, 42 Am. Bankr. Rep. 307.

[379] Pyle v. Texas Transport & Terminal Co., 185 Fed. 309, 25 Am. Bankr. Rep. 829.

[380] Weiss v. Beihl, 232 Pa. St. 97, 81 Atl. 148.

[381] Petrie v. Buffington, 79 W. Va. 113, 90 S. E. 557.

[382] Cox v. Wall, 99 Fed. 546.

[383] Webb v. Manheim, 109 App. Div. 63, 95 N. Y. Supp. 1003; McKenzie v. Thomas, 118 Ga. 728, 45 S. E. 610. Where respondent corporation did an independent business and had goods honestly belonging to it and creditors to whom it was indebted, and was not insolvent, a receiver should not be appointed to assist a trustee in bankruptcy of re-

valid claim of set-off existing in the defendant may wipe out the indebtedness sued for.[384] In any case, a receiver thus appointed should only be charged with the preservation of the property, and he should not be authorized to sell it,[385] unless possibly in the case of perishable property.[386] Even if a sufficient case for the appointment of a receiver is not made out, the trustee in bankruptcy, suing in equity to establish rights in property, may have a writ of sequestration to prevent the removal of the property from the district.[387] And if his attempt to realize the value of assets claimed to belong to the estate in bankruptcy, by a suit to quiet title, is met by an assertion of title on the part of the defendant and an attempt to enjoin him from proceeding with his suit, the opinion has been advanced that he may be entitled to a writ of prohibition, addressed to the state court in which the injunction is asked, forbidding it to grant the writ.[388]

§ 427. **Pleading; Allegations of Trustee's Bill or Complaint.**—In any bill or complaint by a trustee in bankruptcy, it is first of all necessary for him to show his official capacity and right to sue, by alleging the adjudication of bankruptcy and his own appointment as trustee.[389] But it is probably not necessary to set out in detail the various steps in the bankruptcy proceeding, but only the two essential facts of the adjudication and appointment, which may be alleged to have been by orders or decrees "duly made or given."[390] The trustee should also aver that he is the beneficial owner of the property in question, or that it belongs to the bankrupt's estate, or was held for him

spondent's managing stockholder to trace property which he fraudulently concealed from his creditors by means of respondent corporation. Sprague v. L. D. Margolis Co. (D. C.) 211 Fed. 171.

384 Rowland v. Auto Car Co., 133 Fed. 835, 13 Am. Bankr. Rep. 799.

385 Small v. Muller, 67 App. Div. 143, 73 N. Y. Supp. 667.

386 Cox v. Wall, 99 Fed. 546.

387 Horskins v. Sanderson, 132 Fed. 415, 13 Am. Bankr. Rep. 101, citing Steam Stone Cutter Co. v. Sears, 20 Blatchf. 23, 9 Fed. 8; Same v. Jones, 21 Blatchf. 138, 13 Fed. 567.

388 Hudson v. Judge of Superior Court, 42 Mich. 239, 3 N. W. 850, 913.

389 Van Slyke v. Huntington (C. C. A.) 265 Fed. 86, 45 Am. Bankr. Rep. 173. But the trustee's complaint need not aver permission to bring the suit, as he derives that authority from the bankruptcy act. Harlin v. American Trust Co., 67 Ind. App. 213, 119 N. E. 20. It is probably not necessary for the trustee to allege that he has not been discharged as a trustee before the institution of the suit, but an admission to that effect may be availed of by the defendant. Bausman v. Mead, 182 Ill. App. 35.

390 In re Seger Bros. Co. (D. C.) 243 Fed. 459, 39 Am. Bankr. Rep. 669; Bouton v. Wheeler, 118 App. Div. 426, 104 N. Y. Supp. 33; Mears v. Shaw, 32 Mont. 575, 81 Pac. 338; Wheelock v. Lee, 15 Abb. Prac. N. S. (N. Y.) 24, 10 N. B. R. 363; Seaton v. Scovill, 18 Kan. 433, 21 Am. Rep. 212, note, 26 Am. Rep. 779. It has been said that, in suing for the recovery of assets, the trustee need not aver in his complaint the various steps in the bankruptcy proceeding, as they are not ultimate but probative facts; the pleading is good if he alleges ownership in himself, for under such an allegation he can prove the bankruptcy and his own

or for his benefit, as the case may be,[391] and should show whether the right of action is one vesting originally in himself as trustee or one originally accruing to the bankrupt,[392] but when he sues in trover for a conversion of goods occurring either before or after the bankruptcy, he may join in the declaration a count upon the bankrupt's title and a count upon the trustee's title.[393] If the action is at law, and for the recovery of money alleged to belong to the bankrupt, a demand should be alleged and also the fact that the money has not already been paid over to the bankrupt,[394] but in equity, no allegation of a previous demand is necessary, the rule in equity being that the bringing of the suit is itself a sufficient demand.[395] But where, pending an action on an unpaid stock subscription, a trustee in bankruptcy was appointed and substituted as plaintiff, it was held that the complaint must allege notice to the stockholder and an opportunity to be heard as to the validity of claims.[396] And the opinion has been advanced that, since a trustee in bankruptcy should not delay in taking charge of the property of the estate, if his delay would work any injustice to parties interested, a bill by the trustee to gain possession of property of the bankrupt should show that there has been no unnecessary delay.[397] When the action is to recover a mere debt, or, generally, where it is a suit which the bankrupt himself might have prosecuted, it is not necessary for the trustee to allege that he has not sufficient assets in his hands to pay all the debts of the estate,[398] but otherwise where the suit is to set aside a fraudulent transfer or recover the proceeds thereof.[399]

appointment. Dambmann v. White, 48 Cal. 439. But if he undertakes to set out in detail the manner in which he claims to have become the owner of the property, by alleging the proceedings in bankruptcy, it is fatal to the declaration if he omits to allege the adjudication in bankruptcy. Wright v. Johnson, 8 Blatchf. 150, 4 N. B. R. 626, Fed. Cas. No. 18,082. But compare, as to this last point, Lakin v. First Nat. Bank, 13 Blatchf. 83, Fed. Cas. No. 7,999. Where the plaintiff's appointment as trustee in bankruptcy is denied, it must be proved, and judgment given in his favor without proof of such appointment is erroneous. Van Houten v. Oliver, 91 N. Y. Supp. 36. Further, as to showing authority of trustee to sue, see Security Trust Co. v. Glazier, 170 Mich. 26, 135 N. W. 904; Anderson v. Stayton State Bank, 82 Or. 357, 159 Pac. 1033.

ty Co., 174 Ala. 490. 57 South. 34. Where

[391] A. Dreher & Co. v. National Sure-

summary process of the bankruptcy court is invoked against a third person, alleged to be in possession of property of the bankrupt, want of title in the defendant, or that his title is merely colorable, must be alleged and proved. In re Flanigan (D. C.) 228 Fed. 339, 35 Am. Bankr. Rep. 807.

[392] Murray v. Beal, 97 Fed. 567, 3 Am. Bankr. Rep. 284.

[393] Burns v. O'Gorman Co., 150 Fed. 226, 17 Am. Bankr. Rep. 815.

[394] Cohen v. Wagar, 87 App. Div. 255, 84 N. Y. Supp. 377.

[395] Wright v. Skinner, 136 Fed. 694, 14 Am. Bankr. Rep. 500.

[396] Chamberlain v. Piercy, 82 Wash. 157, 143 Pac. 977.

[397] Trenholm v. Miles, 106 Miss. 467, 64 South. 209.

[398] Drew v. Myers, 81 Neb. 750, 116 N. W. 781, 17 L. R. A. (N. S.) 350; Benner v. Billings, 107 Wash. 1, 181 Pac. 19.

[399] Seager v. Armstrong, 95 Minn. 414,

The trustee's declaration, complaint, or bill is likewise subject to the ordinary rules of pleading which require certainty and definiteness in the statement of a plaintiff's case and the inclusion of all facts necessary to make out a clear right of action. Examples of the application of these rules may be seen in the cases cited in the margin.[400] On an issue in bankruptcy as to the priority of a mortgage lien, the bill should allege the names of all the creditors of the bankrupt other than the mortgagee, the amounts of their debts, the character of the same, and when they arose or were created.[401]

§ 428. **Pleading; Defenses to Trustee's Bill or Complaint.**—In an action by a trustee in bankruptcy, the defendant may deny the plaintiff's official capacity or right to sue, which constitutes a plea in bar, and not in abatement,[402] or he may allege that a suit upon the same cause of action, brought by the bankrupt himself in another court, and in which the trustee should have intervened, is still pending and undetermined.[403] If the trustee's bill is to set aside a conveyance or transfer and contains allegations of fraud, there must be an answer denying the fraud, without which a general demurrer should not be allowed.[404] And generally in actions of this kind, although the answer need not set forth in detail all the circumstances of the transaction, it should be responsive to the bill and should contain specific allegations covering the ground of intended defense, as, that the defendant paid a present and adequate consideration in cash, that he purchased in good faith and without intention to delay or defraud the bankrupt's creditors, or otherwise as the case may be.[405] So, in an action to recover an alleged preference, the defend-

104 N. W. 479; Roney v. Conable, 125 Iowa, 664, 101 N. W. 505; Mayhew v. Todisman, 246 Mo. 288, 151 S. W. 436; Grant v. National Bank of Auburn, 197 Fed. 581, 28 Am. Bankr. Rep. 712. Contra, Kraver v. Abrahams, 203 Fed. 782, 29 Am. Bankr. Rep. 365.

[400] See Crowe v. Baumann, 190 Fed. 399, 27 Am. Bankr. Rep. 100; Cohen v. Wagar, 183 N. Y. 33, 75 N. E. 691; Rathbone v. Ayer, 84 App. Div. 186, 82 N. Y. Supp. 235; Carr v. Myers, 211 Pa. St. 349, 60 Atl. 913; Herzberg v. Riddle, 171 Ala. 368, 54 South. 635; Dickey v. Gray Lumber Co., 127 Ga. 460, 56 S. E. 481; Smith v. Auerbach, 2 Mont. 348; McKey v. Smith, 255 Ill. 465, 99 N. E. 695; Sparks v. Weatherly (Ala.) 58 South. 280; Rodolf v. First Nat. Bank, 30 Okl. 631, 121 Pac. 629, 41 L. R. A. (N. S.) 204; In re Berkman, 201 Fed. 180; In re Young, 206 Fed. 187, 31 Am. Bankr. Rep. 82; Ratcliff v. Clendenin, 232 Fed. 61, 146 C. C. A. 253; Johnson v. Canfield-Swigart Co., 292 Ill. 101, 126 N. E. 608; Corey v. Blackwell Lumber Co., 24 Idaho, 642, 135 Pac. 742.

[401] Teague v. Anderson Hardware Co., 161 Fed. 765, 20 Am. Bankr. Rep. 424.

[402] Peel v. Ringgold, 6 Ark. 546. As to pleading an estoppel against the trustee in bankruptcy, see Coleman v. Northwestern Mut. Life Ins. Co., 273 Mo. 620, 201 S. W. 544.

[403] Radford v. Folsom, 4 McCrary, 527, 14 Fed. 97.

[404] Johnston v. Forsyth Mercantile Co., 127 Fed. 845, 11 Am. Bankr. Rep. 669.

[405] McNulty v. Wiesen, 130 Fed. 1012, 12 Am. Bankr. Rep. 341. Or that the property in question was exempt from execution and therefore not within the statute. Meyer v. Perkins, 20 Cal. App. 661, 130 Pac. 206. Where the conveyance of a bankrupt is attacked as in fraud of creditors, the grantee may plead limita-

ant should plead the essential facts of his defense, as, that the property transferred did not belong to the bankrupt, but to his wife,[406] that he had no knowledge of the insolvency of the debtor and no reasonable cause to believe that a preference was intended,[407] or that the goods in question were not taken by defendant in payment of a debt, but on the rescission of a sale of them to the bankrupt, which had been induced by the latter's false and fraudulent representations,[408] or, in the case of an attaching creditor, that the debtor was not insolvent when the attachment and judgment were secured and that the judgment has been paid.[409] But in a suit by a bankrupt's trustee to set aside certain alleged preferential transfers of personal property, a cross-bill by interveners seeking to impress a trust in their favor on certain property in the hands of the trustee, is not germane to the original bill and therefore is without equity.[410] And in a suit by the trustee to set aside a conveyance made by the bankrupt within four months of the filing of the petition, the grantee cannot defend on the ground that the rents of the property, which was in the possession of a receiver, were sufficient to pay all claims filed in the bankruptcy court, where it does not appear that the grantee consented to such use of the rents, inasmuch as the rents, in the event of a decree sustaining the conveyance, would belong to him.[411]

§ 429. **Pleadings in Suits Against Trustees.**—A bill in equity against a trustee in bankruptcy which alleges that the complainant held a mortgage on property of the bankrupt, and was induced by the fraudulent representations of the bankrupt to release the same, and offers to restore the consideration received therefor, states a sufficient cause of action for equitable relief by the restoration of the lien.[412] But great particularity is required in the case of a petition for the restoration to the plaintiff of goods in the hands of the trustee, and which the plaintiff claims under his right to rescind the contract by which they were sold to the bankrupt, on account of its having been induced by the latter's fraud. Such a petition must not only allege all the facts necessary to entitle the petitioner to rescind, but must also set out all the circum-

tions as a defense to the bankrupt's liabilities existing antecedently to the conveyance. Pace's Trustee v. Pace, 162 Ky. 457, 172 S. W. 925.

406 Goode v. Elwood Lodge, 160 Ind. 251, 66 N. E. 742.

407 Gamble v. Elkin, 205 Pa. St. 226, 54 Atl. 782.

408 American Lumber & Mfg. Co. v. Taylor, 137 Fed. 321, 70 C. C. A. 21, 14 Am. Bankr. Rep. 231.

409 Farmers' Nat. Bank v. Slaton, 180 Ky. 700, 203 S. W. 565.

410 Lovell v. Latham & Co. (D. C.) 211 Fed. 374, 32 Am. Bankr. Rep. 191. As to a crossbill setting off claims in favor of the defendant, see West v. Cowan, 189 Ala. 138, 66 South. 816.

411 Ward v. Central Trust Co. (C. C. A.) 261 Fed. 344, 44 Am. Bankr. Rep. 323.

412 Cleminshaw v. International Shirt & Collar Co., 165 Fed. 797, 21 Am. Bankr. Rep. 616.

stances of the transaction and describe the goods in detail. It has been said, in fact, the petition "should contain all the allegations necessary to sustain a complaint in trover and conversion, or required by the strictest practice in an affidavit for replevin." [413] A petition to have assets, transferred by a judgment debtor to the bankrupt, applied to the payment of the judgment, must allege that an execution against the debtor was returned nulla bona.[414] The trustee in bankruptcy, though he has the rights of an attaching creditor, is not ipso facto a bona fide purchaser for value, and that he is such, unaffected by outstanding equities against the bankrupt, is an affirmative defense, which must be pleaded and proved.[415]

§ 430. Burden of Proof and Evidence in Trustee's Suit.—In an action in a state court by a trustee in bankruptcy, it is not necessary for him to establish the jurisdiction of the court of bankruptcy or the petition on which the bankruptcy proceedings were based, in order to sustain the action; but it is sufficient for him to show the adjudication in bankruptcy and his appointment as trustee.[416] And this may be done by introducing in evidence a certified copy of the order approving his bond, which is declared by the bankruptcy act to be "conclusive evidence of the vesting in him of the title to the property of the bankrupt." [417] The presumption is in favor of the regularity of all the proceedings leading up to the appointment of the trustee, and that, as trustee, he has complied with all the requirements of the law and is qualified to act.[418] Thus, he is not required to produce record proof of an acceptance in writing of his appointment as trustee, or that he has given notice of such appointment.[419] He is presumed to represent the creditors of the bankrupt, and the burden is on one who denies his authority to prove the contrary.[420]

[413] In re Levi & Pickard, 155 Fed. 262, 7 Am. Bankr. Rep. 430. But compare In re Pierce (C. C. A.) 157 Fed. 757, 19 Am. Bankr. Rep. 664.

[414] In re Goldberg & Sagman (D. C.) 232 Fed. 194, 36 Am. Bankr. Rep. 736.

[415] Coates v. Smith, 81 Or. 556, 160 Pac. 517.

[416] Cone v. Purcell, 56 N. Y. 649; Carr v. Gale, 2 Ware, 330, Fed. Cas. No. 2,434; Burk v. Winters, 28 Ark. 6, 15 N. B. R. 140. But see Pace v. Roberts, Johnson & Rand Shoe Co., 103 Mo. App. 662, 78 S. W. 52, where it was held that, since the bankruptcy law primarily commits the making of an adjudication in bankruptcy to the judge of the court, and only in his absence authorizes the clerk to refer the case to the referee, where an action is brought by a trustee in bankruptcy, and it appears that the adjudication was made by a referee, the jurisdiction of the referee must be established by affirmative proof that the judge was absent. And see also McKey v. Smith, 255 Ill. 465, 99 N. E. 695.

[417] Bankruptcy Act 1898. § 21e. See Wilson v. Taylor, 154 N. C. 211, 70 S. E. 286; Kieffer Bros. v. Wohl, Man. Unrep. Cas. (La.) 385.

[418] Breckons v. Snyder, 211 Pa. St. 176, 60 Atl. 575; Laubaugh v. Pennsylvania R. Co., 28 Pa. Super. Ct. 247.

[419] Rogers v. Stevenson, 16 Minn. 68 (Gil. 56); Wooldbridge v. Rickert, 33 La. Ann. 234. And see Babbitt v. Walbrun, 6 N. B. R. 359, Fed. Cas. No. 695.

[420] Oliver v. Hilgers, 88 Minn. 35, 92 N. W. 511.

Where the suit is to recover specific property or its proceeds, the trustee must assume the burden of proving that it belonged to the bankrupt at the time of the adjudication, but this need not be done by direct or positive testimony, if the circumstances of the case do not permit it, but by evidence of facts sufficiently strong to justify the jury in inferring such ownership.[421] So, if the suit is for the recovery of money or property in the hands of a third person, but alleged to belong to the bankrupt, it is essential to show the actual possession of the property by the defendant, and the trustee has the burden of establishing this fact. But since a proceeding of this kind is not criminal in its nature,—although the defendant may be punished for contempt if he fails to comply with an order of the court requiring him to surrender the property,—the trustee is only bound to establish his possession by evidence plain and convincing beyond reasonable controversy.[422] The trustee has also the burden of showing exactly what property of the bankrupt is in the defendant's possession,[423] but if he shows the fraudulent possession of property of the bankrupt by the defendant, he may recover the value of the goods, even if they cannot be precisely identified,[424] and if a fund is once traced into the hands of the defendant, the latter must assume the burden of making some reasonable explanation of its disposition, in order to avoid being required to surrender it.[425] If the action is to recover property conveyed away in fraud of creditors or by way of preference, the trustee has the burden of showing the wrongful character of the transaction, or the defendant's knowledge of its purpose, as the case may be.[426] So, the burden of proving that a sale of property of the bankrupt by one holding it in pledge, made conformably to the contract of pledge, was

421 Burleigh v. Foreman, 130 Fed. 13, 64 C. C. A. 381, 12 Am. Bankr. Rep. 88; Clay v. Waters (C. C. A.) 161 Fed. 815, 20 Am. Bankr. Rep. 561; Waters v. Davis, 145 Fed. 912, 76 C. C. A. 444, 16 Am. Bankr. Rep. 667; Talcott v. Goodwin, 3 Day (Conn.) 264; Makins v. Crocker. 193 Fed. 976, 113 C. C. A. 596; Union Trust & Savings Bank v. Amery, 72 Wash. 648, 131 Pac. 199; Collier v. Hopper, 133 Ark. 599, 202 S. W. 687; Ferris v. G. W. Collier Estate, 20 Ga. App. 148, 92 S. E. 758.

422 In re Alphin & Lake Cotton Co., 134 Fed. 477. 14 Am. Bankr. Rep. 194; In re Feldser, 134 Fed. 307, 14 Am. Bankr. Rep. 216; Mowry v. Reed, 187 Mass. 174, 72 N. E. 936; Clay v. Waters (C. C. A.) 161 Fed. 815, 20 Am. Bankr. Rep. 561; In re Rosenzweig, 206 Fed. 360, 30 Am. Bankr. Rep. 680.

423 Mattley v. Wolfe, 175 Fed. 619, 23 Am. Bankr. Rep. 673.

424 In re Jackier, 179 Fed. 720, 24 Am. Bankr. Rep. 790; Page v. Moore, 235 Pa. St. 161, 83 Atl. 580. And see Potter v. American Printing & Lithographing Co., 182 Iowa, 458, 165 N. W. 1044.

425 In re Alphin & Lake Cotton Co., 134 Fed. 477, 14 Am. Bankr. Rep. 194; Pope v. Cantwell, 206 Fed. 908; In re Silverman, 206 Fed. 960; Woodford v. Rice, 207 Fed. 473, 30 Am. Bankr. Rep. 455.

426 Smith v. Auerbach, 2 Mont. 348; Lynam v. Belfast Nat. Bank, 98 Me. 448, 57 Atl. 799. More particularly, as to burden of proof in actions to set aside fraudulent conveyances, see infra, § 466, and as to preferences, see infra, § 614. On the general rule, see Ignatius v. Farmers' State Bank. 272 Fed. 33, 47 Am. Bankr. Rep. 42; Minott v. Johnson (Me.) 113 Atl. 464; Tobin v. Hewitt Co. (Mo. App.) 232 S. W. 257.

unfair or otherwise voidable, is on the trustee.[427] It may also be necessary for the trustee to prove the insolvency of the bankrupt at a given date.[428] But the testimony of the bankrupt at the preliminary examination before the referee, touching his assets and liabilities, is not admissible for this purpose, as the issue is not between the same parties.[429]

§ 431. Evidence in Actions Against Trustee.—One seeking to recover or reclaim property from a trustee in bankruptcy has the burden of proving that it constituted part of the bankrupt's estate when the same passed into the hands of the trustee.[430] And since, presumptively, any property in the possession of the bankrupt and passing from him to his trustee belongs to the estate, the burden is on a claimant to show his superior title or right thereto.[431] Evidence that the bankrupt did not include the property in his schedule of assets filed in the bankruptcy proceeding is indeed admissible on this issue,[432] but it ordinarily requires stronger proof, and it is said such a claim cannot be supported by the uncorroborated testimony of the claimant, where, if true, he could have produced other evidence to fortify it.[433] Likewise the burden is on the claimant to establish by evidence the particular ground on which he claims the property or fund as against the creditors represented by the trustee, as, that the sale of the property to the bankrupt was induced by false and fraudulent representations as to his financial condition,[434] that the sale was conditional and the article not accepted by the bankrupt,[435] or that the transaction was not a sale, but a mere consignment for sale, the title remaining in the claimant.[436]

§ 432. Liability of Trustee for Costs.—As to whether a trustee in bankruptcy, suing as plaintiff in a state court, should be required to furnish security for costs, the matter depends upon the local law and prac-

427 Hiscock v. Varick Bank, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945, 18 Am. Bankr. Rep. 1; Commercial-Germania Trust & Sav. Bank v. Conner, 114 Miss. 644, 75 South. 445.

428 See Clark v. Mulcahy, 190 Mass. 64, 76 N. E. 236; In re F. M. & S. Q. Carlile, 199 Fed. 612, 29 Am. Bankr. Rep. 373; Ernst v. Mechanics' & Metals Nat. Bank, 200 Fed. 295. In the absence of countervailing evidence, there is a presumption that a bankrupt was insolvent at the close of the day preceding that on which an involuntary petition was filed against him, followed by an adjudication. In re Star Spring Bed Co. (C. C. A.) 265 Fed. 133, 45 Am. Bankr. Rep. 650.

429 Breckons v. Snyder, 211 Pa. St. 176, 60 Atl. 575.

430 In re Marsh, 116 Fed. 396, 8 Am. Bankr. Rep. 576.

431 In re Burke, 168 Fed. 994, 22 Am. Bankr. Rep. 69; In re Heckathorn, 144 Fed. 499, 16 Am. Bankr. Rep. 467.

432 Rudy v. Katz, 66 S. W. 18, 23 Ky. Law Rep. 1697.

433 In re Mayer, 156 Fed. 432, 19 Am. Bankr. Rep. 480.

434 Ellett-Kendall Shoe Co. v. Ward, 187 Fed. 982, 110 C. C. A. 320, 26 Am. Bankr. Rep. 114; In re O'Connor, 114 Fed. 777, 9 Am. Bankr. Rep. 18; In re Berg, 183 Fed. 885, 25 Am. Bankr. Rep. 170.

435 In re Simpson Mfg. Co., 130 Fed. 307, 64 C. C. A. 553, 12 Am. Bankr. Rep. 212.

436 In re Leeds Woolen Mills, 129 Fed. 922, 12 Am. Bankr. Rep. 136.

tice.[437] As to his personal liability for the costs of an unsuccessful suit, the question may be governed by the state law, as where a statute exempts "trustees of an express trust" from personal liability for costs in the absence of misconduct or bad faith, within which rule it is held that a trustee in bankruptcy is the trustee of an express trust, and the question of his liability is not affected by the fact that the fund is under the jurisdiction and control of another court.[438] But the question most frequently arises on an application to charge the costs of a suit upon the estate in bankruptcy, as a part of the trustee's legitimate expenditures. And here the rule is that the estate must bear the costs of actions or proceedings properly undertaken by the trustee for the purpose of recovering assets or contesting spurious claims, but he will not be allowed the costs of unfounded or unnecessary litigation, and more especially he is personally chargeable with costs incurred wilfully or recklessly in litigation, when the exercise of ordinary prudence and foresight would have taught him that litigation was unnecessary or would fail.[439] It will be seen that there is no undue severity in this rule, when it is remembered that the trustee, if doubtful of the probable success of a contemplated suit, may require those creditors who insist upon it to indemnify him against the costs.[440]

[437] See Forman v. Campbell, 9 Ben. 472, Fed. Cas. No. 4,939; Hall v. Waterbury, 5 Abb. New Cas. (N. Y.) 356.

[438] Reade v. Waterhouse, 52 N. Y. 587, 10 N. B. R. 277.

[439] In re Josephson, 121 Fed. 146, 9 Am. Bankr. Rep. 608; Kingsbury v. Powers, 131 Ill. 182, 22 N. E. 479; In re Preston, 6 N. B. R. 454, Fed. Cas. No. 11,394; In re Brinkman, 6 N. B. R. 541, Fed. Cas. No. 1,883.

[440] See supra, § 283.

CHAPTER XXII

RIGHTS OF TRUSTEE AS AGAINST PRIOR ASSIGNEE FOR CREDITORS

§ 433. Assignment an Act of Bankruptcy.—Under the bankruptcy act of 1867, the making of an assignment for the benefit of creditors, without preferences, was not necessarily an act of bankruptcy. If the assignor had a purpose to hinder, delay, or defraud creditors, or to defeat or delay the operation of the bankruptcy act, it was ground for adjudging him bankrupt. But it depended upon his intention in making the assignment, and this was a question of fact,[1] although it was sometimes held that such an assignment would be presumed to have been made with the intention of delaying the operation of the bankruptcy law, where the exercise of the powers granted by the assignment would necessarily have that effect.[2] But this has been changed by the present statute. Under its terms, and without any reference to the purpose or intent of the debtor, it is made an act of bankruptcy if a person shall have "made a general assignment for the benefit of his creditors," [3] within four months prior to the filing of the petition in bankruptcy. Hence such an assignment is ipso facto cause for an adjudication in bankruptcy, if made the basis of an application in due time by the requisite number of creditors, although made under a state insolvency law and in strict compliance with its provisions,[4] and notwithstanding that it may provide for the equal distribution of the debtor's property among all his creditors, without any preferences.[5]

[1] Langley v. Perry, 2 N. B. R. 596, Fed. Cas. No. 8,067.

[2] In re Chamberlain, 3 N. B. R. 710, Fed. Cas. No. 2,574.

[3] Bankruptcy Act 1898, § 3a. And see supra, § 91. Assignment for benefit of creditors as an act of bankruptcy when made by a partnership, see supra, § 113. When made by a corporation, supra, § 144.

[4] In re Curtis, 91 Fed. 737, 1 Am. Bankr. Rep. 440.

[5] In re Temple, 4 Sawy. 92, 17 N. B. R. 345, Fed. Cas. No. 13,825.

§ 434. Effect of Adjudication in Bankruptcy on Previous Assignment.—A general assignment for the benefit of creditors, though an act of bankruptcy and liable to be avoided by the subsequent adjudication of the assignor as a bankrupt, is not void originally, but only voidable; it remains valid unless and until such an adjudication is made.[6] Potentially it is a fraud upon the bankruptcy law and upon the creditors, since its necessary effect (if allowed to stand) is to defeat the operation of the bankruptcy law and to deprive creditors of the benefit of all the provisions of that act which are made for their protection and meant to secure a speedy and equal distribution of the estate.[7] The assignment is therefore voidable at the instance of the creditors, provided a sufficient number of them, owning a sufficient amount of claims, will join in a petition in bankruptcy.[8] Of course they are not compelled to take this step. If they are satisfied to have the debtor's property collected and distributed by his voluntary assignee, if they do not see any advantage in bringing it into bankruptcy, or if they are simply indifferent to their rights, they may acquiesce in the assignment, present and prove their claims, and waive their right to invoke the jurisdiction of the court of bankruptcy. Or the same result will follow if they neglect for more than four months to file a petition in bankruptcy. The mere existence of a bankruptcy law which creditors may set in motion if they choose, does not prevent the administration of the estate by the voluntary assignee, if creditors acquiesce in it. As stated above, the assignment is not void ab initio, but only voidable. But if, on the other hand, the creditors, or a sufficient proportion of them, choose to have the assignment vacated and the estate administered in bankruptcy, then it is voidable at their option, and if they file a petition in the proper federal court, alleging the assignment as an act of bankruptcy and praying for an adjudication in bankruptcy against the debtor, they thereby take the proper and only necessary step for avoiding the assignment. And if thereupon the assignor is adjudged bankrupt, the decree of adjudication ipso facto annuls or dissolves the assignment and subjects the assigned property to the exclusive and

[6] Gilbert v. Mechanics' & Metals Nat. Bank, 172 App. Div. 25, 157 N. Y. Supp. 953; Charles Roesch & Sons Co. v. Mumford, 230 Fed. 56, 144 C. C. A. 354; In re Romanow, 92 Fed. 510, 1 Am. Bankr. Rep. 461; Ostrander v. Meunch, 12 Fed. 562; Barnes v. Rettew, Fed. Cas. No. 1,019; Maltbie v. Hotchkiss, 38 Conn. 80, 9 Am. Rep. 364, 5 N. B. R. 485; Cook v. Rogers, 31 Mich. 391, 13 N. B. R. 97; Thrasher v. Bentley, 59 N. Y. 649; Bostwick v. Burnett, 7 N. Y. 317. Until an assignment for the benefit of creditors is expressly accepted, it is a mere power and therefore revocable, and the bankruptcy of the assignor operates as a revocation. Ashley v. Robinson, 29 Ala. 112, 65 Am. Dec. 387.

[7] In re Gutwillig, 92 Fed. 337, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388; s. c. below, 90 Fed. 475, 1 Am. Bankr. Rep. 78.

[8] In re Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117.

complete jurisdiction of the court of bankruptcy.[9] That this consequence necessarily follows the adjudication in bankruptcy will be plainly seen from a moment's consideration of the results which would follow from an opposite construction. "It is an extraordinary proposition that the bankruptcy court can be asked to discharge a person from all his debts who has, by an assignment to a private assignee, placed all his property where it can be administered only by the tribunals of the state. A system of bankruptcy which would thus, in practice, permit a discharge of the debtor without a simultaneous administration and distribution of the property among the creditors, would be a monstrosity."[10] Nor is the situation in any way affected by the fact that proceedings have been taken in a state court to have the administration of the assigned estate take place under its supervision and control. The pendency of such proceedings, or the making of orders or decrees by the state court, will not prevent an adjudication of bankruptcy, but on the contrary, when the adjudication is made, it ousts the jurisdiction of the state court and establishes the jurisdiction of the bankruptcy court, which is exclusive and which relates back to the commission of the act of bankruptcy, that is, the making of the assignment.[11] And if the assignment falls to the ground in consequence of the adjudication in bankruptcy, so also do all rights and interests created by it or growing out of it. The various rights of creditors thereafter are to be determined according to the provisions of the bankruptcy law, not according to the deed of assignment nor according to the state insolvency law under which it may have been made,[12] and the money and property are to be distributed by the trustee in bankruptcy, and not by the assignee.[13] If the deed of assignment created any liens or trusts, they are annulled by the adjudication, and the property is not subject to them as it passes

[9] Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117; In re Smith, 92 Fed. 135, 2 Am. Bankr. Rep. 9; In re Gutwillig, 90 Fed. 475, 1 Am. Bankr. Rep. 78; In re Smith, 4 Ben. 1, 3 N. B. R. 377, Fed. Cas. No. 12,974; Hobson v. Markson, 1 Dill. 421, Fed. Cas. No. 6,555; Globe Ins. Co. v. Cleveland Ins. Co., 14 N. B. R. 311, Fed. Cas. No. 5,486; Waring v. Buchanan, 19 N. B. R. 502, Fed. Cas. No. 17,176; In re Croughwell, 9 Ben. 360, 17 N. B. R. 337, Fed. Cas. No. 3,440; Dolson v. Kerr, 52 How. Prac. (N. Y.) 481, 16 N. B. R. 405; Cohen v. American Surety Co., 192 N. Y. 227, 84 N. E. 947.

[10] In re Brodhead, 3 Ben. 106, 2 N. B. R. 278, Fed. Cas. No. 1,918.

[11] Stellwagen v. Clum, 245 U. S. 605, 38 Sup. Ct. 215, 62 L. Ed. 507, 41 Am. Bankr. Rep. 1; In re Knight, 125 Fed. 35, 11 Am. Bankr. Rep. 1; In re Lengert Wagon Co., 110 Fed. 927, 6 Am. Bankr. Rep. 535; In re Curtis, 91 Fed. 737, 1 Am. Bankr. Rep. 440, affirmed, 94 Fed. 630, 36 C. C. A. 430, 2 Am. Bankr. Rep. 226.

[12] In re Bousfield & Poole Mfg. Co., 17 N. B. R. 153, Fed. Cas. No. 1,704. After the adjudication in bankruptcy, an action against the debtor of the bankrupt cannot be maintained by the bankrupt's assignee for the benefit of creditors. Gilbert v. Mechanics' & Metals Nat. Bank, 95 Misc. Rep. 364, 160 N. Y. Supp. 710.

[13] Sedgwick v. Place, 3 N. B. R. 302 Fed. Cas. No. 12,623.

into the hands of the trustees in bankruptcy.[14] So also, if the assignment gives a preference to any creditor, it is avoided in bankruptcy, and the preferred creditor can claim no advantage from it.[15]

§ 435. Assignment More Than Four Months Before Bankruptcy.—In order to take advantage of a general assignment, as an act of bankruptcy, creditors must file their petition within four months. But this time does not expire until four months after the date of recording or registering the assignment, if that is required or permitted by law, or if it is not, then four months from the date when the petitioning creditors receive actual notice of the assignment, or if they have no actual notice, then four months from the date when the assignee takes notorious, exclusive, or continuous possession of the property.[16] If the limited period as thus defined is allowed to lapse without the filing of a petition in bankruptcy, then creditors must be presumed to have waived or acquiesced in the act of bankruptcy, and the assignment is not avoided or in any way affected by the bankruptcy law, but must stand or fall upon its own merits, being open to attack only in the state courts and only under the provisions of the state laws. The bankruptcy law does not attempt to supervise or inquire into proceedings under an assignment for creditors or under state insolvency laws begun more than four months before the institution of bankruptcy proceedings.[17] If the debtor is thereafter adjudged bankrupt (though it must necessarily be on other grounds than the making of the assignment), the assignment cannot be set aside at the instance of the trustee in bankruptcy, and the latter will not be entitled to the possession and administration of the assigned estate as against the voluntary assignee, but he will only take such rights as the bankrupt had or could himself claim at the date of the bankruptcy.[18] At the very least it may be said that the court of bankruptcy will not undertake to review the accounts of the assignee, or to reverse or annul any act of his in collecting or paying out the estate,

[14] In re Slomka, 122 Fed. 630, 58 C. C. A. 322, 9 Am. Bankr. Rep. 635.

[15] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1.

[16] Bankruptcy Act 1898, § 3b.

[17] In re Creech Bros. Lumber Co., 240 Fed. 8, 153 C. C. A. 44, 39 Am. Bankr. Rep. 487; In re Bridge (D. C.) 230 Fed. 184, 37 Am. Bankr. Rep. 53; In re Boner, 169 Fed. 727, 22 Am. Bankr. Rep. 151; Pelton v. Sheridan, 74 Or. 176, 144 Pac. 410.

[18] Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377; In re Kimball, 16 N. B. R. 188, Fed. Cas. No. 7,770; In re Arledge, 1 N. B. R. 644, Fed. Cas. No. 533; Hoague v. Cumner, 187 Mass. 296, 72 N. E. 956; Mathews v. Stewart, 44 Mich. 209, 6 N. W. 633. Where an assignment for the benefit of creditors was valid and not subject to attack because of the assignor's bankruptcy, a judgment of the state court confirming the title of the assignee and ordering a sale of the property was held not subject to attack in the federal court on the ground that it gave a preference, but the trustee in bankruptcy could assert his rights only in the state court. Stern v. Truax (D. C.) 236 Fed. 1014, 38 Am. Bankr. Rep. 418.

antedating the adjudication in bankruptcy, though perhaps the trustee may lay claim to any property remaining undistributed in the hands of the assignee at that date, on the theory that such assignee is the "agent" of the bankrupt and therefore amenable to the jurisdiction of the courts of bankruptcy. This doctrine finds support in at least one of the adjudged cases.[19]

§ 436. Enjoining Action by Assignee.—When an insolvent debtor makes a general assignment for the benefit of his creditors, and, within four months thereafter, a petition in bankruptcy against him is filed, it is within the power and jurisdiction of the court of bankruptcy to make an order, pending the hearing on such petition, enjoining the assignee from disposing of or interfering with the property transferred to him under the assignment, or exercising any acts of ownership or control, and this course is particularly proper when it appears that the assignee is about to make a sale of the property or to pay out money in his hands, so that, if an adjudication in bankruptcy is ultimately made, assets of the estate might thus be withdrawn from the reach of the trustee.[20] So also, after a decree of adjudication is made, and pending the appointment of a trustee in bankruptcy, the court may enjoin the voluntary assignee from disposing of the property or exercising any of the powers given him by the assignment, except merely to hold possession of the property and preserve it.[21] And if the circumstances warrant such a course, the court of bankruptcy, pending a determination on the petition, may appoint a receiver (or the marshal) to take the property out of the hands of the assignee and hold it until the dismissal of the petition or the appointment of a trustee.[22] But this action can only be taken by the court of bankruptcy, and creditors must apply to that court if they desire to take precautions for the preservation of the estate. If, pending a hearing on the petition in bankruptcy, the creditors simply go into a state court and there protest against any further proceedings under the assignment, this will not have the effect of a writ of injunction from the court of bankruptcy.[23]

[19] In re Carver, 113 Fed. 138, 7 Am. Bankr. Rep. 539.

[20] In re Gutwillig, 92 Fed. 337, 34 C. C. A. 377, 1 Am. Bankr. Rep. 388; Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Sievers, 91 Fed. 366, 1 Am. Bankr. Rep. 117; In re Skoll, 16 N. B. R. 175, Fed. Cas. No. 12,926. See Ex parte Nightingale, Fed. Cas. No. 10,263, holding that a mere possibility of waste or misapplication of the bankrupt's estate by the assignee will not justify an injunction.

[21] Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co., 99 Fed. 699, 3 Am. Bankr. Rep. 704.

[22] In re Etheridge Furniture Co., 92 Fed. 329, 1 Am. Bankr. Rep. 112; Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; Sedgwick v. Place, 3 N. B. R. 139, Fed. Cas. No. 12,619.

[23] In re Scholtz, 106 Fed. 834, 5 Am. Bankr. Rep. 782.

§ 437. Trustee's Proceedings to Avoid or Set Aside Assignment.—Under the former bankruptcy law it was held that the title to property embraced in a general assignment for the benefit of creditors did not vest in a trustee in bankruptcy subsequently appointed by the mere force of the adjudication and his appointment as trustee. It was voidable at his instance, but to enable him to gain possession and administration of the property it was necessary for him to bring an action against the assignee to have the assignment set aside, just as he must sue to avoid a fraudulent conveyance or recover a preference.[24] But under the present statute, the rules are essentially different. It is true that an assignment is not absolutely void, but only voidable. But it is voidable at the instance of the creditors, and they elect to avoid it, and take the necessary steps to avoid it, when they file the petition in bankruptcy. If an adjudication follows, it avoids the assignment automatically and of its own force. The trustee thereupon becomes invested with title to the property embraced in the assignment, and he does not take title as the successor of the assignee, but as the successor of the bankrupt. No suit or proceeding on his part to avoid the assignment is required, but the assignee may be summarily cited to appear in the bankruptcy proceedings and surrender the property in his hands.[25]

In effect, an assignee for the benefit of creditors, as the law now stands, is charged with knowledge that he is acting under an instrument which of itself is an act of bankruptcy, and that if the assignor, in proceedings commenced within four months after the assignment, is adjudged bankrupt, he will hold the assigned estate merely for the use of the bankrupt's creditors, to be administered in the bankruptcy court.[26] The assignee is therefore charged with notice of the subse-

[24] Means v. Dowd, 128 U. S. 273, 9 Sup. Ct. 65, 32 L. Ed. 429; Wehl v. Wald, 18 Blatchf. 163, 3 Fed. 93; Olney v. Tanner, 21 Blatchf. 540, 18 Fed. 636; Harding v. Crosby, 17 Blatchf. 348, Fed. Cas. No. 6,050; In re Pierce, 3 N. B. R. 258, Fed. Cas. No. 11,141; Macdonald v. Moore, 8 Ben. 579, 15 N. B. R. 26, Fed. Cas. No. 8,763; Cragin v. Thompson, 2 Dill. 513, 12 N. B. R. 81, Fed. Cas. No. 3,320; Von Hein v. Elkus, 8 Hun (N. Y.) 516; Barnewall v. Jones, 14 N. B. R. 278, Fed. Cas. No. 1,027; Linder v. Lewis, 4 Fed. 318; Sparhawk v. Drexel, 12 N. B. R. 450, Fed. Cas. No. 13,204; Johnson v. Rogers, 15 N. B. R. 1, Fed. Cas. No. 7,408; Haas v. O'Brien, 66 N. Y. 597, 16 N. B. R. 508; Barnes v. Rettew, 8 Phila. 133, Fed. Cas. No. 1,019.

[25] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; In re Smith, 92 Fed. 135, 2 Am. Bankr. Rep. 9; Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210, 2 Am. Bankr. Rep. 383; Comingor v. Louisville Trust Co., 108 S. W. 950, 33 Ky. Law Rep. 53; In re Stokes, 103 Fed. 312; In re Thompson, 122 Fed. 174, 10 Am. Bankr. Rep. 242; In re Stewart, 179 Fed. 222, 102 C. C. A. 348; Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, 5 Am. Bankr. Rep. 623; Whittlesey v. Philip Becker & Co., 142 App. Div. 313, 126 N. Y. Supp. 1046; Rogers v. Abbot, 206 Mass. 270, 92 N. E. 472, 138 Am. St. Rep. 394. And see cases cited, supra, § 434, and infra, §§ 438, 439.

[26] In re Bombino, 44 Utah, 141, 138 Pac. 1155.

quent filing of a petition in bankruptcy against his assignor, and if the adjudication is made, the assignee becomes a mere custodian without title.[27] In such circumstances, the court of bankruptcy obtains exclusive jurisdiction, and has power to remove the assignee, irrespective of his good faith and standing, and to appoint its own receiver.[28]

§ 438. Recovery of Assets by Trustee.—When a voluntary assignment for the benefit of creditors is avoided by the subsequent adjudication of the assignor in bankruptcy, the trustee in bankruptcy becomes entitled to the possession and administration of the estate covered by the assignment and may require the assignee to account to him and to surrender the property in his hands.[29] And although the law of the state may require such assignments to be carried out under the direction or supervision of a state court, and the property assigned is in process of administration in the manner prescribed by the law; this does not make a case of concurrent jurisdiction, nor give the state court such a prior right of possession as will prevent the court of bankruptcy from assuming exclusive jurisdiction of the bankrupt's estate.[30] If the state statute does not go to the length of making such an assignee an officer of the state court, property in his hands is not in the custody of the law or the possession of the court.[31] So, if the assignee is cited to account in a state court, he may show, in bar of the proceeding, that the property has been taken from him under a decree of the court of bankruptcy and that he has accounted in the latter court.[32] Nor is the

[27] In re Louis Neuburger, Inc. (D. C.) 233 Fed. 701, 37 Am. Bankr. Rep. 248.

[28] In re D. & E. Dress Co. (D. C.) 244 Fed. 885, 40 Am. Bankr. Rep. 360.

[29] Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 Am. Bankr. Rep. 412; In re Knight, 125 Fed. 35, 11 Am. Bankr. Rep. 1; Hobson v. Markson, 1 Dill. 421, Fed. Cas. No. 6,555; Comingor v. Louisville Trust Co., 108 S. W. 950, 33 Ky. Law Rep. 53. A petition by the trustee in bankruptcy for an order requiring the surrender of property by the assignee need not allege a previous demand. Comingor v. Louisville Trust Co., 108 S. W. 950, 33 Ky. Law Rep. 53. Under the bankruptcy act of 1867, it was held that an order or decree for the surrender of property by the assignee should not include property exempt from execution. Grow v. Ballard, 2 N. B. R. 194, Fed. Cas. No. 5,848. But this is probably not the case under the present statute, since it intends that the trustee shall take possession of the exempt property, as well as all other property, and provides for his setting it apart to the bankrupt.

[30] In re Smith, 92 Fed. 135, 2 Am. Bankr. Rep. 9. But if the assignee alleges that he is under the control and direction of the state court, there is nothing to prevent the trustee from applying to that court for an order directing the surrender of the property to him, just as he would do in the case of a receiver. See Cragin v. Thompson, 2 Dill. 513, 12 N. B. R. 81, Fed. Cas. No. 3,320.

[31] Jones v. McCormick Harvesting Mach. Co., 82 Fed. 295, 27 C. C. A. 133; Lehman v. Rosengarten, 23 Fed. 642.

[32] Burkholder v. Stump, 8 Phila. (Pa.) 172, 4 N. B. R. 597, Fed. Cas. No. 2,165. And on the other hand, though the assignee's accounts have been approved by the state court, he may still be required to account to the court of bankruptcy, as the jurisdiction of the latter court is paramount and cannot be defeated by any proceedings in the state court. In

pendency of an action of replevin against him any excuse for his failure to surrender to the trustee in bankruptcy that portion of the estate affected by the proceeding.[33] If the assignee is prosecuting an action to recover property of the assigned estate, when a trustee in bankruptcy is appointed, the latter may intervene in the action and assume control of it, and need not begin a new suit.[34] The assignee may also be required to execute any conveyance which may be necessary to show a clear title in the trustee or enable him more effectually to proceed with the collection of the assets.[35] And if the assignee neglects or refuses to account for the money and property in his hands, on being cited and ordered to do so, the trustee in bankruptcy has a right of action against the surety on the assignment bond.[36]

§ 439. Same; Summary Proceedings and Attachment for Contempt. —When a debtor who has made a general assignment for the benefit of his creditors is adjudged bankrupt within four months thereafter, the court of bankruptcy has jurisdiction and power to make an order requiring the assignee to submit his accounts and to turn over to the trustee in bankruptcy all money and property in his hands, and this does not require a plenary suit at law or in equity, but may be done in a summary proceeding.[37] For the assignee in such a case is not an adverse claimant. He is merely the agent of the assignor for the distribution of the proceeds of the property, and, as such agent, his possession is that of his principal.[38] Or as otherwise stated, the assignee "is a mere naked bailee for the creditors, without a shred of title or lawful authority to the possession of the bankrupt's estate, and it would certainly be strange if, when the bankruptcy court finds property in the possession of such a bailee, it may not in a summary way require him to surrender possession to the court which alone has the

re Louis Neuburger, Inc., 240 Fed. 947, 153 C. C. A. 633, 39 Am. Bankr. Rep. 139.

[33] In re Solomon, 2 Nat. Bankr. News, 460.

[34] Collateral Security Bank v. Fowler, 42 Md. 393, 12 N. B. R. 289.

[35] Burkholder v. Stump, 8 Phila. (Pa.) 172, 4 N. B. R. 597, Fed. Cas. No. 2,165.

[36] Cohen v. American Surety Co., 192 N. Y. 227, 84 N. E. 947.

[37] Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, 5 Am. Bankr. Rep. 623; In re McCrum, 214 Fed. 207, 130 C. C. A. 555, 32 Am. Bankr. Rep. 604; In re Karp (D. C.) 228 Fed. 798, 36 Am. Bankr. Rep. 414; In re Reiswig (D. C.) 253 Fed. 390, 42 Am. Bankr. Rep. 161; In re Stewart, 179 Fed. 222, 102 C. C. A. 348, 24 Am. Bankr. Rep. 691; In re Smith (D. C.) 92 Fed. 135, 2 Am. Bankr. Rep. 9; In re Stokes (D. C.) 106 Fed. 312, 6 Am. Bankr. Rep. 262; In re Thompson (D. C.) 122 Fed. 174, 10 Am. Bankr. Rep. 242.

[38] In re McCrum, 214 Fed. 207, 130 C. C. A. 555, 32 Am. Bankr. Rep. 604; Galbraith v. Vallely (C. C. A.) 261 Fed. 670, 44 Am. Bankr. Rep. 523; In re Diamond's Estate, 259 Fed. 70, 170 C. C. A. 138, 44 Am. Bankr. Rep. 268; In re Colwell Lead Co. (D. C.) 241 Fed. 922, 39 Am. Bankr. Rep. 228; In re Stewart, 179 Fed. 222, 102 C. C. A. 348, 24 Am. Bankr. Rep. 691.

power to administer the estate."[39] But even a summary proceeding requires notice to the party to be charged and that he shall have an opportunity to be heard. Such an order cannot be made on the ex parte application of the trustee without bringing in the assignee or affording him an opportunity to show cause against the petition. If these conditions are not fulfilled, an order for the surrender of property is without jurisdiction, and the assignee cannot be punished for failure to obey it.[40] And in any event, the process of attachment for contempt should not be used to force the restitution of money or property which it is no longer possible for the assignee to surrender. Thus, if he has already paid out a portion of the estate committed to him, in the form of counsel fees or other necessary or proper disbursements, or if he retained a portion of it as his own commission and has spent such sum and is unable to replace it, this is a good answer, so far as it goes, to a rule to show cause why he should not be adjudged in contempt for failure to pay over the money to the trustee in bankruptcy. For a court cannot by contempt proceedings undertake to compel the performance of something which the respondent is wholly unable to perform, even though he became so through his own fault or improvidence, where it arose through a mere misconception of his legal rights and duties.[41]

§ 440. **Nature of Trustee's Title to Property Assigned.**—The trustee in bankruptcy does not succeed the voluntary assignee in title or estate. His title is a wholly new one, founded alone on the provisions of the bankruptcy act, and not in any way connected with or dependent on the title vested in the assignee. And hence he does not take the estate subject to any preferences or priorities created by the deed of assignment or by the acts of the assignee.[42] But a title or lien acquired by the voluntary assignee, which would be to the advantage of the estate when it has subsequently passed into bankruptcy, is not necessarily destroyed by the supersession of the assignment proceeding, but, upon

[39] In re Smith, 92 Fed. 135, 2 Am. Bankr. Rep. 9.

[40] Smith v. Belford, 106 Fed. 658, 45 C. C. A. 526, 5 Am. Bankr. Rep. 291; In re Banzai Mfg. Co., 183 Fed. 298, 105 C. C. A. 510, 25 Am. Bankr. Rep. 497; In re Manning, 123 Fed. 179, 10 Am. Bankr. Rep. 497.

[41] Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, 7 Am. Bankr. Rep. 421; Sinsheimer v. Simonson, 107 Fed. 898, 47 C. C. A. 51, 5 Am. Bankr. Rep. 537; In re Klein, 116 Fed. 523, 8 Am. Bankr. Rep. 559; In re Stewart, 179 Fed. 222, 102 C. C. A. 348; In re Banzai Mfg. Co., 183 Fed. 298, 105 C. C. A. 510, 25 Am. Bankr. Rep. 497.

[42] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; Alexander v. Galt, 9 Fed. 149. Contra, under the act of 1867, see In re Beisenthal, 10 Ben. 42, 18 N. B. R. 120, Fed. Cas. No. 1,235; Johnson v. Rogers, 15 N. B. R. 1, Fed. Cas. No. 7,408; In re Beadle, 5 Sawy. 351, Fed. Cas. No. 1,155; Reeser v. Johnson, 76 Pa. St. 313.

the order of the court of bankruptcy, it may be retained by the trustee for the benefit of the creditors.[43]

§ 441. Estate Partly Settled by Assignee.—Where an assignee, appointed in insolvency proceedings under a state law, or by a general deed of assignment, has taken charge of the debtor's property, sold it, and distributed the proceeds to creditors, acting in all respects in entire good faith and in conformity to the state law and the orders of the state court, and afterwards proceedings in bankruptcy against the assignor are had and a trustee appointed, the assignee is not to be held personally liable to the trustee in bankruptcy for the value of the property or its proceeds. In such a case the trustee "must seek his remedy against those who have received payments from the defendant in contravention of the bankruptcy act."[44] This rule holds good even if the assignee has paid out the money of the estate to creditors preferred by the deed of assignment. Their preferences may be unlawful under the bankruptcy law and voidable by the trustee, but the amount cannot be recovered from the assignee personally.[45] But the assignee must stop all administration of the estate immediately upon the appointment of a trustee in bankruptcy, or at least as soon as he receives notice. Thereafter the title is vested in the trustee, and the assignee holds the property remaining in his hands merely as an agent or bailee, and has no further duty with reference to it except as to mere safe keeping. At least it may be said that, after the filing of a petition in bankruptcy, a common-law assignee acts at his peril in carrying on the bankrupt's business, in selling it out or winding it up, or in doing anything beyond what is necessary to preserve such property as was in his hands when the petition was filed. Common-law assignments, it is true, are not outlawed by the Bankruptcy Act, and where the creditors allow the assignee to continue in possession and operate the business, he is not necessarily to be charged with a resulting loss, whether occurring before or after the filing of the petition in bankruptcy. But the burden is upon him to satisfy the bankruptcy court that in carrying on the business after the institution of bankruptcy proceedings he acted in good faith and with sound business judgment; and he may be held liable for a loss incurred by him in carrying on the business, where there is no finding that it was good judgment on his part to continue the business, and where he does not show what part of the loss was incurred before and what part after the filing of the petition in bankruptcy.[46] If, after

[43] In re Fish Bros. Wagon Co. (C. C. A.) 164 Fed. 553, 21 Am. Bankr. Rep. 149.

[44] Cragin v. Thompson, 2 Dill. 513, 12 N. B. R. 81, Fed. Cas. No. 3,320; In re Walker, 18 N. B. R. 56, Fed. Cas. No. 17,063.

[45] Jones v. Kinney, 5 Ben. 259, 4 N. B. R. 649, Fed. Cas. No. 7,473.

[46] In re Karp (D. C.) 228 Fed. 798, 36 Am. Bankr. Rep. 414.

the trustee has demanded the surrender of the property, the assignee pays it out in the form of dividends to creditors, he is personally liable to replace it, and it is immaterial that the trustee did not sue out an injunction to restrain him from disposing of the estate, a mere demand for it being enough.[47]

§ 442. Rights of Purchasers from Assignee and Paid Creditors.—A sale of property by an assignee for the benefit of creditors to a purchaser in good faith for a valuable consideration conveys a title which will prevail against the claims of a trustee in bankruptcy of the assignor subsequently appointed, and the latter cannot recover the property from the purchaser.[48] But if there is no more than an uncompleted agreement for a sale, the purchaser not having made any payment on the property, it is avoided by the adjudication in bankruptcy and the trustee may claim the property.[49] So also, one who buys property from the assignee after the filing of the petition in bankruptcy and with knowledge thereof, cannot be called a purchaser in good faith, and he acquires no title superior to that of the trustee; but his equities in respect to the property or the money which he has paid for it may depend on many circumstances, and can be settled in the court of bankruptcy, which may, if necessary, bring in the assignee.[50] With regard to creditors who have received payment from the assignee, it may be remarked that if they were granted a preference by the terms of the assignment, and knew or had reasonable cause to believe, when receiving the money from the assignee, that it was in pursuance of the debtor's intention to prefer them, it is a clear case of a voidable preference under the bankruptcy law, and the trustee may force the restitution of the money so paid.[51] So also he may recover money disbursed in satisfaction of a lien of such a character as to be dissolved by the adjudication in bankruptcy.[52]

§ 443. Appointment of Assignee as Trustee.—Where one who has made an assignment for the benefit of creditors is afterwards adjudged bankrupt, it may be the wish of the creditors that the assignee should be appointed and serve as trustee in bankruptcy. There is no absolute rule of law to prevent this, and the assignee may be eminently well

[47] Ostrander v. Meunch, 2 McCrary, 267, 12 Fed. 562.

[48] Goldsmith v. Hapgood, Holmes, 454, Fed. Cas. No. 5,522.

[49] In re Knight, 125 Fed. 35, 11 Am. Bankr. Rep. 1. Mistake of a common-law assignee in selling personal property to which his assignor had no title does not impose any lien or trust in favor of the purchaser upon the proceeds in the hands of a subsequent trustee in bankruptcy. In re Goyette & Levigne (D. C.) 244 Fed. 638, 40 Am. Bankr. Rep. 109.

[50] Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, 5 Am. Bankr. Rep. 623.

[51] In re Meyer, 2 N. B. R. 422, Fed. Cas. No. 9,515.

[52] Linder v. Lewis, 4 Fed. 318.

qualified to act as trustee in virtue of his special knowledge of the business or affairs of the bankrupt, or for other personal reasons. The court may therefore approve the election of the assignee as trustee by the creditors, under special circumstances, but will not ordinarily do so where he is accountable to the estate for money or property in his hands and also has a claim against it for compensation for his services as assignee or for disbursements made. "There is both a practical and a legal presumption against the propriety of such an appointment, for the reason that as assignee he is an accounting party to the estate, and as trustee will have to investigate his own account." [53] Such a person, however, may be appointed temporary receiver of the estate in bankruptcy. And if he turns over to himself, as such receiver, the funds in his hands as assignee, without retaining any sum therefrom as compensation for his past services, he submits both the fund and himself to the jurisdiction of the court of bankruptcy with respect to his right to an allowance for such services.[54]

§ 444. **Credits and Allowances to Assignee.**—When an assignee for the benefit of creditors is required to surrender the estate committed to him by the assignment, at the instance of a trustee in bankruptcy subsequently appointed, and in order that the property may be administered in bankruptcy, he is entitled to an allowance for the actual and necessary expenses incurred by him in collecting, caring for, and preserving the property from the time he took charge of it as assignee up to the date of the adjudication in bankruptcy.[55] Thus, where the assignee, during the time the property remained in his care, and before the adjudication in bankruptcy, collected bills due to the bankrupt, continued insurance on the property, arranged for guarding the same, collected outstanding goods, conducted correspondence, made an inventory, and incurred a liability for rent, it was held that he had a lien on the assets for these necessary disbursements.[56] So he should be reimbursed for money paid for rent of the premises and for wages paid to clerks, workmen, and servants,[57] and for taxes paid on the property, the same being a valid lien which the trustee would have had to discharge if the assignee had not done so,[58] and he may be allowed the costs and expenses of a sale of the property or a portion of it, if it

[53] In re Kellar (C. C. A.) 192 Fed. 830.

[54] In re Klein, 116 Fed. 523, 8 Am. Bankr. Rep. 559.

[55] In re Mays, 114 Fed. 600, 7 Am. Bankr. Rep. 764; In re Tatum, 112 Fed. 50, 7 Am. Bankr. Rep. 52; Burkholder v. Stump, 8 Phila. (Pa.) 172, 4 N. B. R. 597, Fed. Cas. No. 2,165; Wehl v. Wald, 18 Blatchf. 495, 6 Fed. 163; In re Pauly, 1 Nat. Bankr. News, 405. Compare In re Stubbs, 4 N. B. R. 376, Fed. Cas. No. 13,557.

[56] In re Chase, 124 Fed. 753, 59 C. C. A. 629, 10 Am. Bankr. Rep. 677.

[57] Eichholz v. Polack, 140 App. Div. 551, 125 N. Y. Supp. 1108.

[58] In re Cohn, 6 N. B. R. 379, Fed. Cas. No. 2,966.

appears that the sale was an advantageous one and beneficial to the estate.[59] The assignee may even be allowed reimbursement for expenses incurred by him after the adjudication in bankruptcy, provided they were incurred, and reasonably necessary, in the care and preservation of the property, though such expenditures will be strictly scrutinized. Thus, in the bankruptcy of a mercantile firm, which had previously made an assignment for the benefit of creditors, where there was an interval of some time between the adjudication and the appointment of a receiver by the court of bankruptcy, and meanwhile the assignee carried on the business, it was considered that he should be reimbursed for money paid to employees and for rent of the business premises paid during that period.[60]

But so far as regards the assignee's claim for compensation for his own personal services in connection with the assigned estate, there has been great difference of opinion. Some of the decisions, both under the present bankruptcy act and earlier acts, have maintained the theory that an assignment for creditors is at least constructively a fraud upon the bankruptcy law and that the assignee must be regarded as a participant in the fraud and therefore precluded from benefiting by it, so that the allowance to be made to him must be restricted to money out of pocket and cannot include any commissions or other remuneration for his own services.[61] But an equally respectable body of authorities repudiated this view, and held the assignee entitled to reasonable compensation for his time, care, and labor expended for the benefit of the assigned estate.[62] And the Supreme Court of the United States has finally declared that, if there was nothing inherently fraudulent or illegal in the assignment and the assignee was not a party to any actual fraud, he should not be deprived of compensation for his services rendered under the assignment, in so far as the same were beneficial to the estate, merely because of the fact that the assignment was an act of

[59] In re Scholtz, 106 Fed. 834, 5 Am. Bankr. Rep. 782; In re Cohn, 6 N. B. R. 379, Fed. Cas. No. 2,966; Clark v. Marx, 6 Ben. 275, Fed. Cas. No. 2,830; Jackson v. McCulloch, 1 Woods, 433, 13 N. B. R. 283, Fed. Cas. No. 7,140.

[60] In re Morris & Rice (D. C.) 258 Fed. 712, 44 Am. Bankr. Rep. 146.

[61] In re Congdon, 129 Fed. 478, 11 Am. Bankr. Rep. 219; In re Mays, 114 Fed. 600, 7 Am. Bankr. Rep. 764; In re Tatum, 112 Fed. 50, 7 Am. Bankr. Rep. 52; Wilbur v. Watson, 111 Fed. 493, 7 Am. Bankr. Rep. 54; In re Peter Paul Book Co., 104 Fed. 786, 5 Am. Bankr. Rep. 105; Stearns v. Flick, 103 Fed. 919, 4 Am. Bankr. Rep. 723; Hunker v. Bing, 9 Fed. 277; In re Cohn, 6 N. B. R. 379, Fed. Cas. No. 2,966; In re Stubbs, 4 N. B. R. 376, Fed. Cas. No. 13,557; In re Pauly, 1 Nat. Bankr. News, 405.

[62] In re Stewart, 179 Fed. 222, 102 C. C. A. 348; In re Chase, 124 Fed. 753, 59 C. C. A. 629, 10 Am. Bankr. Rep. 677; Summers v. Abbott, 122 Fed. 36, 58 C. C. A. 352, 10 Am. Bankr. Rep. 254; In re Klein, 116 Fed. 523, 8 Am. Bankr. Rep. 559; In re Scholtz, 106 Fed. 834, 5 Am. Bankr. Rep. 782; Wald v. Wehl, 18 Blatchf. 495, 6 Fed. 163; Jackson v. McCulloch, 1 Woods, 433, 13 N. B. R. 283, Fed. Cas. No. 7,140; Catlin v. Foster, 1 Sawy. 37, 3 N. B. R. 540, Fed Cas. No. 2,519.

bankruptcy on which creditors could, if they chose, institute proceedings. The court pointed out that an assignment is not void from its inception, but only voidable in case proceedings in bankruptcy follow within four months; that the assignee acts lawfully in what he does before proceedings in bankruptcy are begun, and that, although the avoidance of the assignment by the adjudication in bankruptcy may relate back to the making of the assignment, still this mere fiction of relation is not enough to forbid an allowance to the assignee for beneficial services rendered before the adjudication; and added: "We are not prepared to go further than to allow compensation for services which were beneficial to the estate, beyond that point we must throw the risk of his conduct on the assignee, as he was chargeable with knowledge of what might happen." [63]

The question of allowing compensation to attorneys for legal services rendered to the assignee stands upon the same basis. The claim of an attorney for fees for such services must be worked out through the assignee, and cannot be put higher than the assignee's claim for allowances. But in so far as professional services were beneficial to the estate, they are a proper subject for allowance. If the assignee has paid the attorney's fees, he may claim reimbursement; if not, the attorney may stand in his place and claim a lien on the assets for the reasonable value of his services.[64] But an attorney's charge for preparing the deed of assignment is not entitled to preference, though it may be proved as an unsecured claim against the bankrupt's estate.[65]

But neither the assignee nor his attorney will be entitled to claim any compensation for services or expenses rendered or incurred in unsuccessfully attempting to resist the adjudication in bankruptcy or in the endeavor to maintain his own title and possession.[66] Nor can

[63] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1. And see Macdonald v. Moore, 15 N. B. R. 26, Fed. Cas. No. 8,763; White v. Hill, 148 Mass. 396, 19 N. E. 407; Clark v. Sawyer, 151 Mass. 64, 23 N. E. 726; Perry-Mason Shoe Co. v. Sykes, 72 Miss. 390, 17 South. 171, 28 L. R. A. 277. The state court may make allowances for compensation for services rendered under an assignment for the benefit of creditors, before the bankruptcy proceedings against the assignor were instituted, if the claim therefor is presented before the adjudication in bankruptcy. In re Bombino, 44 Utah, 141, 138 Pac. 1155.

[64] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; Summers v. Abbott, 122 Fed. 36, 58 C. C. A. 352, 10 Am. Bankr. Rep. 254; In re Scholtz, 106 Fed. 834, 5 Am. Bankr. Rep. 782; Platt v. Archer, 13 Blatchf. 351, Fed. Cas. No. 11,214; In re Marble Products Co., 199 Fed. 668, 29 Am. Bankr. Rep. 384. Contra, see In re Cohn, 6 N. B. R. 379, Fed. Cas. No. 2,966; Eichholz v. Polack, 140 App. Div. 551, 125 N. Y. Supp. 1108.

[65] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1.

[66] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; In re Stewart, 179 Fed. 222, 102 C. C. A. 348; Platt v. Archer, 13 Blatchf. 351, Fed. Cas. No. 11,214; Clark v. Marx, 6 Ben. 275, Fed. Cas. No. 2,830.

the assignee be reimbursed for expenses or fees incurred by him in dealing with the assigned property after the date of the adjudication in bankruptcy,[67] nor for any items which will result in subjecting the estate to double charges for the same thing.[68]

As to the mode of enforcing the assignee's claim, it is held that he has a lien on the assets in his hands for his necessary expenses and for the value of his services which were beneficial to the estate, and is therefore entitled to a preference in payment.[69] If he submits himself to the jurisdiction of the court of bankruptcy, and that court makes an order requiring him to surrender to the trustee the assets in his hands, it may expressly except from the operation of the order such sums as he may be entitled to claim by way of credit or allowance.[70] Or if he is sued by the trustee in bankruptcy for the surrender of the estate, he may set off his claim for compensation and expenses against the amount demanded of him by the trustee.[71] But in respect to such credits and allowances, the assignee must be considered as occupying the position of an "adverse claimant." And therefore the court of bankruptcy has no jurisdiction to adjudicate the merits of his claim to retain out of the estate money disbursed by him, or which he claims on account of his commission as assignee, unless he consents to the exercise of such jurisdiction.[72]

[67] In re Solomon, 2 Nat. Bankr. News, 460.

[68] In re Kurth, 17 N. B. R. 573, Fed. Cas. No. 7,948; In re Kingman, 1 Nat. Bankr. News, 518.

[69] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; In re Chase, 124 Fed. 753, 59 C. C. A. 629, 10 Am. Bankr. Rep. 677. Compare In re Lains, 16 N. B. R. 168, Fed. Cas. No. 7,989; In re Rogers, 116 Fed. 435, 8 Am. Bankr. Rep. 723.

[70] Neill v. Jackson, 8 Fed. 144.

[71] Catlin v. Foster, 1 Sawy. 37, 3 N. B. R. 540, Fed. Cas. No. 2,519.

[72] Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, 7 Am. Bankr. Rep. 421; Galbraith v. Vallely, 255 U. S. —, 41 Sup. Ct. 415, 65 L. Ed. —, 46 Am. Bankr. Rep. 553.

CHAPTER XXIII

FRAUDULENT CONVEYANCES VOIDABLE BY TRUSTEE

§ 445. **Statutory Provisions.**—The bankruptcy act provides that the trustee in bankruptcy shall be vested by operation of law with "the title of the bankrupt" to "property transferred by him in fraud of his creditors."[1] Since the bankrupt himself has no title whatever to property transferred by him, though in fraud of creditors, it is evident that this clause is self-contradictory and without effect. But the subject is covered by other provisions of the statute which are more explicit and consistent. The sixty-seventh section contains the following language: "All conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the

[1] Bankruptcy Act 1898, § 70a.

law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors."[2] This evidently refers to such conveyances and transfers as would be fraudulent and voidable at common law and at the instance of creditors.

The same section contains the following further provision: "All conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee [probably meaning the trustee in bankruptcy] and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."[3] This is plainly meant to cover such conveyances and transfers as are denounced as fraudulent by the local statutory law, but which are not so at common law. Since both these provisions are found in a section of the act which bears the general heading "Liens," and since five of the six subdivisions of that section relate distinctly and exclusively to liens, properly so called, the natural reading of the language which we have quoted above would restrict it likewise to liens operating in fraud of creditors, as distinguished from transfers by deed or bill of sale. But in view of the broad terms employed ("conveyances, transfers, assignments, or incumbrances") the courts have felt constrained to give this part of the section a much wider scope than the general title of the section would warrant. But the conveyances or transfers intended by this part of the section are only such as are fraudulent either at common law or under the statutes of the state, as distinguished from those which are in fraud of the bankruptcy act itself.[4] It is further necessary to remark that, while both of the provisions quoted require that the conveyance, etc., shall have been made within four months prior to the filing of the petition in bankruptcy, the former (relating to conveyances fraudulent at common law) requires an intent and purpose on the part of the debtor to hinder or defraud his creditors, but not that he should have been insolvent at the time, whereas the latter cannot be brought into play unless the debtor was insolvent when the conveyance, etc., was made, but does not require any purpose on his part with reference to obstructing or defraud-

[2] Bankruptcy Act 1898, § 67e.
[3] Bankruptcy Act 1898, § 67e, in finem.
[4] Allen v. Montgomery, 48 Miss. 101, 10 N. B. R. 503; Bailey v. Wood, 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1912A, 950.

ing creditors, but only that the particular transaction should be "held null and void as against the creditors" by the laws of the state.

Still another part of the statute provides that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value." [5] It might naturally be supposed that this clause was intended to add nothing to the description of conveyances and incumbrances which should be void or voidable under the act, but was merely meant as an explicit declaration concerning the trustee's right of action, namely, that he should be vested with the same right of action to avoid transfers and incumbrances which would be possessed by any creditor of the bankrupt if bankruptcy had not intervened. But it is significant that this clause omits all reference to the four-months' limitation. And consequently it is held that, if there be any kind of transfer of property which a creditor of the grantor might have avoided, though it was neither made with intent to delay or defraud creditors nor is denounced as void by the laws of the state, then the trustee in bankruptcy may avoid it, and without any regard to the time when it was made as compared with the date of bankruptcy.[6] But the effect of this clause is merely to vest the trustee with the same rights possessed by the creditor; it does not clothe him with any new or additional right in the premises over those possessed by the creditor, and he is subject to the same limitations and disabilities which would have beset the creditor in the prosecution of the action on his own behalf; and the rights of the parties are to be determined, not by any provisions of the Bankruptcy Act, but by the applicable principles of the common law or the laws of the state in which the right of action may arise.[7]

§ 446. Rights of Trustee as to Transfers.—With respect to the ownership of property in general, and so far as regards valid sales, liens, and incumbrances, the trustee merely succeeds to the title of the bank-

[5] Bankruptcy Act 1898, § 70e.

[6] Joseph v. Raff, 176 N. Y. 611, 68 N. E. 1118; Treseder v. Burgor, 130 Wis. 201, 109 N. W. 957; Friedman v. Verchofsky, 105 Ill. App. 414; Sharp v. Fitzhugh, 75 Ark. 562, 88 S. W. 929; Boyd v. Arnold, 103 Ark. 105, 146 S. W. 118; Thomas v. Fletcher, 153 Fed. 226, 18 Am. Bankr. Rep. 623; In re Toothaker Bros., 128 Fed. 187, 12 Am. Bankr. Rep. 99; In re Schenck, 116 Fed. 554, 8 Am. Bankr. Rep. 727; Irwin v. Maple, 252 Fed. 10, 164 C. C. A. 122, 41 Am. Bankr. Rep. 532; Neuburger v. Felis, 203 Ala. 142, 82 South. 172.

[7] Davis v. Willey (D. C.) 263 Fed. 588, 45 Am. Bankr. Rep. 348; Coleman v. Hagey, 252 Mo. 702, 158 S. W. 829.

rupt and has no stronger rights than he,[8] and if the filing of a petition in bankruptcy were merely an appropriation by the bankrupt of his property for the payment of his debts, like a common-law assignment, the trustee would be equally bound with the bankrupt in respect to prior conveyances and transfers made in fraud of creditors.[9] But by the express terms of the act, the trustee represents creditors, succeeds to their rights, and is invested with the same rights of action which they would have had (if bankrupcy had not intervened) concerning any such conveyances or transfers.[10] It follows that the trustee in bankruptcy may, by proper proceedings, avoid or annul any transfer made by the bankrupt which any creditor might have attacked by similar proceedings.[11] In fact, the trustee occupies exactly as strong a position, and especially since the amendment of 1910, as a creditor who has levied an attachment or one who holds a judgment or an unsatisfied execution,[12]

[8] In re Great Western Mfg. Co., 152 Fed. 123, 81 C. C. A. 341, 18 Am. Bankr. Rep. 259.

[9] At common law, the right of a creditor to attack and set aside a conveyance made by his debtor, on the ground of fraud, does not pass to an assignee or trustee appointed by the debtor. It will not pass to an assignee for the benefit of creditors, unless by force of some statute of the state. Sandwich Mfg. Co. v. Wright, 22 Fed. 631; Fourth Street Nat. Bank v. Millbourne Mills Co.'s Trustee, 172 Fed. 177, 96 C. C. A. 629, 22 Am. Bankr. Rep. 442.

[10] In re Lukens, 138 Fed. 188, 14 Am. Bankr. Rep. 683; Fourth Street Nat. Bank v. Millbourne Mills Co.'s Trustee, 172 Fed. 177, 96 C. C. A. 629, 22 Am. Bankr. Rep. 442; In re Rodgers, 125 Fed. 169, 60 C. C. A. 567, 11 Am. Bankr. Rep. 79; Pfeiffer v. Roe, 108 App. Div. 54, 95 N. Y. Supp. 1014; In re Grocers' Baking Co. (D. C.) 266 Fed. 900, 46 Am. Bankr. Rep. 150. The fact that, long before the institution of bankruptcy proceedings, there were creditors who were entitled under the state law to attack a particular transfer or conveyance by their debtor, as being fraudulent as to them, though not fraudulent as to subsequent creditors, does not give those creditors any priority in the bankruptcy proceedings, nor prevent the application of the provision of the Bankruptcy Act for the dissolution of liens obtained within four months; the trustee in bankruptcy succeeds to the rights of all the creditors in such matters. Globe Bank & Trust Co. v. Martin, 236 U. S. 288, 35 Sup. Ct. 377, 59 L. Ed. 583, 34 Am. Bankr. Rep. 162.

[11] Sanborn-Cutting Co. v. Paine, 244 Fed. 672, 157 C. C. A. 120, 40 Am. Bankr. Rep. 525; In re Cutler & John (D. C.) 228 Fed. 771, 36 Am. Bankr. Rep. 420; Wright v. H. B. Ehrlich & Co., 146 Ga. 400, 91 S. E. 412; Beasley v. Smith, 144 Ga. 377, 87 S. E. 293; Albert Pick & Co. v. Natalby, 211 Ill. App. 486; Blake v. Thwing, 185 Ill. App. 187; Gregory v. Binghamton Trust Co., 168 App. Div. 805, 154 N. Y. Supp. 376; Bronaugh v. Evans, 204 Ala. 153, 85 South. 556; Ignatius v. Farmers' State Bank (C. C. A.) 272 Fed. 33, 47 Am. Bankr. Rep. 42; Minott v. Johnson (Me.) 113 Atl. 464; Durrett v. Harris (Ark.) 228 S. W. 386; Thomas v. Roddy, 122 App. Div. 851, 107 N. Y. Supp. 473; Cox v. Wall, 132 N. C. 730, 44 S. E. 635; Landis v. McDonald, 88 Mo. App. 335; Studebaker Bros. Mfg. Co. v. Elsey-Hemphill Carriage Co., 152 Mo. App. 401, 133 S. W. 412; Earle v. National Metallurgic Co., 77 N. J. Eq. 17, 76 Atl. 555; Hunt v. Doyal, 128 Ga. 416, 57 S. E. 489; In re Mullen, 101 Fed. 413, 4 Am. Bankr. Rep. 224; Everett v. Stone, 3 Story, 446, Fed. Cas. No. 4,557; Bradshaw v. Klein, 2 Biss. 20, 1 N. B. R. 542, Fed. Cas. No. 1,790; In re Metzger, 2 N. B. R. 355, Fed. Cas. No. 9,510; In re Leland, 7 Ben. 156, 9 N. B. R. 209, Fed. Cas. No. 8,230; In re Leland, 10 Blatchf. 503, Fed. Cas. No. 8,234.

[12] In re Rodgers, 125 Fed. 169, 60 C. C. A. 567, 11 Am. Bankr. Rep. 79; Bunnell v. Bronson, 78 Conn. 679, 63 Atl.

and he may maintain a suit to set aside any fraudulent conveyance, made within four months before the filing of the petition in bankruptcy, which could have been attacked by creditors in that position,[13] although the particular transaction would have been valid and binding as between the immediate parties to it,[14] so that the bankrupt himself could not have sustained an action to recover the money or property, vacate the conveyance, or otherwise annul his own act.[15] But more than this, the act provides (§ 67e) that property conveyed in fraud of creditors shall "be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee," and also (§ 70a) that the trustee shall be vested with title to property conveyed by the bankrupt in fraud of his creditors. As to such property, therefore, the trustee is not merely a successor to the rights of defrauded creditors, but he is invested with the title,[16] and may sue to vacate or avoid any fraudulent transfer of the bankrupt's property, whether or not there is any creditor armed with a lien or otherwise in position to attack such transfer,[17] and a bill by the trustee for this purpose should be maintained in his own name as

396; Putnam v. Southworth, 197 Mass. 270, 83 N. E. 887; In re Carpenter, 125 Fed. 831, 11 Am. Bankr. Rep. 147. Since an execution creditor may maintain an action of trespass on the case against persons who have fraudulently conspired to secrete and transfer the property of the debtor, such an action may be maintained by the debtor's trustee in bankruptcy subsequently appointed, by virtue of the amendment of 1910 giving him the rights and remedies of an execution creditor. Sattler v. Slonimsky, 199 Fed. 592, 28 Am. Bankr. Rep. 729.

[13] Allen v. Massey, 17 Wall. 351, 21 L. Ed. 542; In re Ricketts, 234 Fed. 285, 148 C. C. A. 187, 37 Am. Bankr. Rep. 124; Winslow v. Staab, 233 Fed. 305, 36 Am. Bankr. Rep. 626; Riggs v. Price, 277 Mo. 333, 210 S. W. 420; Park v. South Bend Chilled Plow Co. (Tex. Civ. App.) 199 S. W. 843; Grand Rapids Trust Co. v. Nichols, 199 Mich. 126, 165 N. W. 667; Miley v. Heaney, 169 Wis. 58, 169 N. W. 64; Schmitt v. Dahl, 88 Minn. 506, 93 N. W. 665, 67 L. R. A. 590; Adams' Assignee v. Branch, 3 Ky. Law Rep. 178; McMaster v. Campbell, 41 Mich. 513, 2 N. W. 836. A corporation's trustee in bankruptcy has capacity to contest the validity of a mortgage covering the bankrupt's real and personal property. Pacific State Bank v. Coats, 205 Fed. 618, 123 C. C. A. 634, 30 Am. Bankr. Rep. 665. The trustee in bankruptcy of a corporation is entitled to maintain a bill to set aside transfers of property by the corporation to one of its directors as in fraud of its creditors. Henderson v. Garner, 200 Ala. 59, 75 South. 387.

[14] Adams v. Merchants' Nat. Bank, 9 Biss. 396, 2 Fed. 174; Crooks v. Stuart, 2 McCrary, 13, 7 Fed. 800; Mann v. Flower, 25 Minn. 500.

[15] Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314; Bennett v. Ætna Ins. Co., 201 Mass. 554, 88 N. E. 335, 131 Am. St. Rep. 414; Carr v. Gale, 3 Woodb. & M. 38, Fed. Cas. No. 2,435.

[16] Hillyer v. Le Roy, 84 App. Div. 129, 82 N. Y. Supp. 80; Annis v. Butterfield, 99 Me. 181, 58 Atl. 898; Starks v. Curd, 88 Ky. 164, 10 S. W. 419; In re Wynne, Chase, 227, 4 N. B. R. 23, Fed. Cas. No. 18,117; Mann v. Flower, 25 Minn. 500; Neuburger v. Felis, 203 Ala. 142, 82 South. 172; Barrett v. Kaigler, 200 Ala. 404, 76 South. 320; Buttz v. James, 33 N. D. 162, 156 N. W. 547; Ernest Wolff Mfg. Co. v. Battreal Shoe Co., 192 Mo. App. 113, 180 S. W. 396.

[17] Sheldon v. Parker, 66 Neb. 610, 92 N. W. 923, 95 N. W. 1015. See also Faulkner v. Kaplon, 203 Fed. 114. Compare Coleman v. Hagey (Mo.) 158 S. W. 829. This provision of the Bankruptcy Act vests in the trustee title to all property transferred by the bankrupt at any time, in fraud of creditors existing at the

trustee, and not in the name of the bankrupt or of any creditor.[18] But as it is the duty of a trustee in bankruptcy to represent the unsecured creditors, he is not entitled to sue to annul a conveyance merely as given in fraud of a creditor who has a lien on the property.[19] Nor can the trustee complain of the fraudulent character of a mortgage given by a purchaser from the bankrupt to a third person, unless he can impeach the sale from the bankrupt to the purchaser on other grounds.[20]

§ 447. **Election by Trustee.**—It is not the imperative duty of a trustee in bankruptcy to reclaim and attempt to recover all the property alleged to have been conveyed away by the bankrupt in fraud of his creditors. There may be circumstances rendering the necessary litigation so costly, protracted, and doubtful that the ultimate benefit to the estate might be very small. In such cases he may elect to claim the property and proceed for its recovery or not to do so, and if he does not elect to take it within a reasonable time, it is deemed an election to reject it.[21] And if he has once elected not to attempt to set aside a conveyance or transfer by the bankrupt, he cannot afterwards come into equity to attack it.[22] Thus, where a debtor, within four months before his bankruptcy, sold and assigned certain accounts to a third person, and his trustee, with full knowledge of the facts, applied for and obtained an order from the court of bankruptcy requiring the bankrupt to turn over a part of the proceeds of the sale which had not been accounted for, such action of the trustee was held an election to affirm the sale and he could not thereafter maintain a petition against the assignee to recover the accounts, on the ground that the sale was fraudulent.[23]

§ 448. **Trustee's Right of Action Exclusive.**—The provisions of the bankruptcy law relating to fraudulent conveyances by the bankrupt have the effect, not only to vest in the trustee in bankrutpcy the right to maintain actions for the avoidance of such conveyances, but also to take away that right from creditors. After the adjudication in bankruptcy and the appointment of a trustee,[24] no creditor has the right to institute legal proceedings to set aside a transfer or conveyance alleged to have been fraudulent, as that right pertains to the trustee alone.[25] And the adjudi-

time of the bankruptcy. Barrett v. Kaigler, 200 Ala. 404, 76 South. 320.

18 Exchange Nat. Bank v. Stewart, 158 Ala. 218, 48 South. 487.

19 Cowan v. Staggs (Ala.) 59 South. 153.

20 Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119.

21 Nash v. Simpson, 78 Me. 142, 3 Atl. 53. And see supra, §§ 282, 283, 321.

22 Laughlin v. Calumet & C. Canal & Dock Co., 65 Fed. 441, 13 C. C. A. 1. And see Greenhall v. Carnegie Trust Co., 180 Fed. 812, 25 Am. Bankr. Rep. 300.

23 Thomas v. Sugerman (C. C. A.) 157 Fed. 669, 19 Am. Bankr. Rep. 509.

24 As to the right of creditors to institute such an action after the adjudication in bankruptcy, but before any trustee has been appointed, see Guaranty Title & Trust Co. v. Pearlman, 144 Fed. 550, 16 Am. Bankr. Rep. 461.

25 Trimble v. Woodhead, 102 U. S. 647, 26 L. Ed. 290; Glenny v. Langdon, 98 U.

cation in bankruptcy and appointment of a trustee constitute a complete defense to a creditor's bill filed for such a purpose in a state court.[26] Further, the refusal or failure of the trustee in bankruptcy to sue for the avoidance of an alleged fraudulent conveyance within the time prescribed by law, or at all, does not transfer the right to any creditor or to the creditors generally, nor authorize them to sue in their own behalf.[27] The remedy of creditors who are dissatisfied with the refusal or inactivity of the trustee is to apply to the court of bankruptcy for an order directing the trustee to institute the necessary proceedings. If the court is satisfied that such action should be taken and will probably result in benefit to the estate, it has power to require the trustee to proceed,[28] though, in doubtful cases, the creditors who insist on the suit being brought may be required to indemnify the trustee against the costs and expenses.[29]

§ 449. Conditions Precedent to Trustee's Action.—Since the bankruptcy law vests the trustee with title to all property conveyed by the bankrupt in fraud of creditors, he may proceed to recover such property notwithstanding the fact that there may be, at the time, no creditor who has put his claim in judgment and thus placed himself in a position to assail the transfer as fraudulent. The trustee's title "accrues by force of the act, and not through the right of the creditor to assert the fraud." [30] Moreover, the bankruptcy law makes it impossible for creditors to re-

S. 20, 25 L. Ed. 43; Wright v. H. B. Ehrlich & Co., 146 Ga. 400, 91 S. E. 412; Kimbrough v. Alred, 202 Ala. 413, 80 South. 617; McMahon v. Pithan, 167 Iowa, 498, 147 N. W. 920; Barnes Mfg. Co. v. Norden, 67 N. J. Law, 493, 51 Atl. 454; In re Gray, 47 App. Div. 554, 62 N. Y. Supp. 618; Elder's Ex'rs v. Harris, 76 Va. 187; Bolling v. Munchus, 59 Ala. 482; Thurmond v. Andrews, 10 Bush (Ky.) 400, 13 N. B. R. 157; Anderson v. Anderson, 80 Ky. 638; Allen v. Montgomery, 48 Miss. 101, 10 N. B. R. 503; Goodwin v. Sharkey, 5 Abb. Prac. N. S. (N. Y.) 64, 3 N. B. R. 558; Scott v. Devlin, 89 Fed. 970; In re Lowe, 19 Fed. 589; New Orleans Nat. Banking Ass'n v. Le Breton, 14 Fed. 646; Allen v. Massey, 1 Dill. 40, 4 N. B. R. 248, Fed. Cas. No. 231. Contra, see Board of Directors v. Lowrance, 111 S. C. 295, 97 S. E. 830. As to suits begun by creditors more than four months before the bankruptcy, the right to continue them after the appointment of a trustee, and the preference gained by the suing creditors, see Boyd v. Arnold, 103 Ark. 105, 146 S. W. 118; Hillyer v. Le Roy, 179 N. Y. 369, 72 N. E. 237, 103 Am. St. Rep. 919.

[26] Leseure v. Weaver, 108 Ill. App. 616.

[27] Moyer v. Dewey, 103 U. S. 301, 26 L. Ed. 394; Ruhl-Koblegard Co. v. Gillespie, 61 W. Va. 584, 56 S. E. 898, 10 L. R. A. (N. S.) 305, 11 Ann. Cas. 929. Compare Bates v. Bradley, 24 Hun (N. Y.) 84.

[28] Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; McMaster v. Campbell, 41 Mich. 513, 2 N. W. 836; Freelander v. Holloman, 9 N. B. R. 331, Fed. Cas. No. 5,081. See Casey v. Baker (D. C.) 212 Fed. 247, 32 Am. Bankr. Rep. 311, holding that it is the trustee's duty, if properly indemnified, to sue to set aside fraudulent transfers, and if he refuses, an interested party may sue in his own name, making the trustee a defendant, or may be permitted to sue in the trustee's name.

[29] See supra, § 283.

[30] Platt v. Matthews, 10 Fed. 280. A trustee may maintain a suit to recover property fraudulently conveyed without

duce their claims to judgment after the adjudication, although this is usually necessary as a condition precedent to the right to avoid a fraudulent conveyance, or even that the creditor should hold an execution returned unsatisfied.[31] But the trustee occupies the position of an execution creditor, and hence it is not a pre-requisite to his right to institute proceedings for such purpose, nor a condition to his action, that judgments at law should have been obtained upon the claims of the creditors in whose behalf the equitable remedy is invoked.[32] Nor is any demand necessary before the commencement of an action by the trustee to recover property unlawfully transferred by the bankrupt,[33] neither is he bound to tender to the purchaser the amount which the latter may have paid to the bankrupt.[34] But the trustee is bound to show some actionable injury to himself, or rather to the estate which he represents, and therefore an action will not lie to avoid an alleged fraudulent sale of personal property, where the goods have already been seized under a warrant in bankruptcy and turned over to the trustee, whose possession is undisputed.[35]

§ 450. **Same; Proof of Debts and Insufficiency of Assets.**—In a suit to set aside a fraudulent conveyance or transfer, the trustee must be prepared to show that there were creditors of the bankrupt at the time of the alleged fraud, except in those cases where the transaction may be regarded as fraudulent with respect to subsequent creditors.[36] Also he must allege and show that there are proved and allowed claims against the estate in bankruptcy, or at least provable debts, at the time of bringing the suit, for otherwise there would be no one for him to represent and a recovery would simply inure to the benefit of the bankrupt himself, which is not the purpose of the act.[37] Hence, if the creditors pur-

proving injury or first obtaining judgment on his claim. Davis v. Gates (D. C.) 235 Fed. 192, 37 Am. Bankr. Rep. 818.

[31] Thomas v. Roddy, 122 App. Div. 851, 107 N. Y. Supp. 473; Riker v. Gwynne, 116 N. Y. Supp. 10.

[32] Mitchell v. Mitchell, 147 Fed. 280, 17 Am. Bankr. Rep. 382; Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229; Thomas v. Roddy, 122 App. Div. 851, 107 N. Y. Supp. 473; Crary v. Kurtz, 132 Iowa, 105, 105 N. W. 590, 109 N. W. 452, 119 Am. St. Rep. 549; Beasley v. Coggins, 48 Fla. 215, 37 South. 213, 5 Ann. Cas. 801; Hobbs v. Frazier, 61 Fla. 611, 55 South. 848; Hood v. Blair State Bank, 3 Neb. (Unof.) 432, 91 N. W. 701; Ryan v. Rogers, 14 Idaho, 309, 94 Pac. 427; Cragin v. Carmichael, 2 Dill. 519, 11 N. B. R. 511, Fed. Cas. No. 3,319; Baldwin v. Kingston (D. C.) 247 Fed. 163, 40 Am. Bankr. Rep. 641; Riggs v. Price, 277 Mo. 333, 210 S. W. 420. It is not even necessary for the trustee, before suing to set aside fraudulent transfers, to wait for the formal allowance of creditors' claims in the bankruptcy proceedings, if they have been presented and filed. Brewer v. Brown, 268 Ill. 562, 109 N. E. 264.

[33] Goldberg v. Harlan, 33 Ind. App. 465, 67 N. E. 707.

[34] Johnston v. Forsyth Mercantile Co., 127 Fed. 845, 11 Am. Bankr. Rep. 669.

[35] Smith v. Claflin, 19 N. B. R. 523, Fed. Cas. No. 13,026.

[36] Union Trust Co. v. Amery, 67 Wash. 1, 120 Pac. 539; Cobb v. First Nat. Bank (D. C.) 263 Fed. 1000, 45 Am. Bankr. Rep. 48.

[37] Crary v. Kurtz, 132 Iowa, 105, 105 N. W. 590, 109 N. W. 452, 119 Am. St.

porting to be represented in the action by the trustee have failed to present their claims for allowance within the time required by the statute, and are therefore barred from participation in the estate, the action cannot be maintained.[38] Such a suit may be prosecuted for the sole benefit of one person, if he is the only creditor of the bankrupt,[39] but not where that creditor has so conducted himself with reference to the transaction in suit as to estop himself from alleging its fraudulent character.[40] Further, and to put himself in a position analogous to that of a creditor holding an execution returned unsatisfied, the trustee must aver that the assets of the estate in his hands are not sufficient to satisfy the claims filed against it,[41] though it is said that this is not necessary where the bankrupt states in his petition or schedule that he has no assets.[42]

§ 451. Nature and Form of Transaction.—Under the broad and comprehensive language of the statute, relating to "conveyances, transfers, assignments, or incumbrances" of property, it may be stated in the most general terms that any disposition of real or personal property by a debtor which would have been void as against his creditors, as being fraudulent at common law or under the statutes of the state, if no petition in bankruptcy had been filed against him, will be equally void as against creditors represented by his trustee in bankruptcy.[43] And first, one may lawfully sell any part of his property for a present fair consideration, even though he is insolvent, and the transfer will not be voidable in bankruptcy, if the laws of the state were complied with in respect to delivery and other such requisites,[44] and there was no intent to place the property beyond the reach of creditors. But a transfer of property for a past consideration, or in discharge of an unsecured debt, will gen-

Rep. 549; Leavengood v. McGee, 50 Or. 233, 91 Pac. 453: Nicholas v. Murray, 5 Sawy. 320, 18 N. B. R. 469, Fed. Cas. No. 10,223. See Treseder v. Burgor, 130 Wis. 201, 109 N. W. 957. Compare Donegan v. Davis, 66 Ala. 362.

[38] Cartwright v. West, 173 Ala. 198, 55 South. 917.

[39] Level Land Co. v. Sivyer, 112 Wis. 442, 88 N. W. 317.

[40] Parker v. Travers, 74 N. J. Eq. 812, 71 Atl. 612.

[41] Knapp v. Milwaukee Trust Co., 216 U. S. 545, 30 Sup. Ct. 412, 54 L. Ed. 610; Prescott v. Galluccio, 164 Fed. 618, 21 Am. Bankr. Rep. 229; Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229; Flint v. Chaloupka, 81 Neb. 87, 115 N. W. 535; Shelly v. Nolen, 38 Tex. Civ. App. 343, 88 S. W. 524; McKey v. Smith, 255 Ill. 465, 99 N. E. 695; Hibschman v. Bevis, 103 Wash. 317, 174 Pac. 5. Compare Entwisle v. Cohen, 141 App. Div. 834, 125 N. Y. Supp. 935.

[42] In re Schoenfield, 190 Fed. 53, 27 Am. Bankr. Rep. 64.

[43] Bankruptcy Act 1898, §§ 67e, 70e. And see Union Trust & Sav. Bank v. Amery, 72 Wash. 648, 131 Pac. 199; In re Wynne, Chase, 227, 4 N. B. R. 23, Fed. Cas. No. 18,117; In re Morrill, 2 Sawy. 356, 8 N. B. R. 117, Fed. Cas. No. 9,821; Smith v. Ely, 10 N. B. R. 553, Fed. Cas. No. 13,044; Blake v. Thwing, 185 Ill. App. 187.

[44] In re Ozark Cooperage & Lumber Co., 180 Fed. 105, 103 C. C. A. 603, 24 Am. Bankr. Rep. 835; Burnes v. Epstein, 201 Fed. 393. And see Meyer v. Perkins, 20 Cal. App. 661, 130 Pac. 206. The mere fact that the defendant, having purchased property from the bankrupt, got it at a bargain price or for much less than its actual value, is not

erally be voidable either as a preference or as a fraud on the creditors.[45] So where a pretended sale is merely colorable, and amounts to no more than a device to put the apparent title in a third person while the debtor remains the real owner,[46] or where a chose in action is assigned to a third person, without any consideration, but merely that he may collect the money and hand it to the bankrupt,[47] or where the sale includes the fixtures and furniture and the lease of the debtor's place of business, and so deprives him of the means of continuing his business,[48] or where a voluntary settlement by a debtor effects the payment of debts and contingent liabilities existing at the time, but by means of contracting other obligations which afterwards result in his insolvency.[49]

Again, trustees in bankruptcy very frequently find the wife of the bankrupt in the possession and apparent ownership of considerable property, which is not satisfactorily accounted for. Undoubtedly a wife is entitled to all she obtains from sources independent of her husband, and cannot be molested therein by his creditors.[50] And she may honestly acquire property directly from him, if she gives an adequate consideration. But the peculiar relation of the parties offers a special temptation to an insolvent or embarrassed man who is seeking the means to evade the just demands of his creditors and place property beyond their reach. Hence a transfer of property by a debtor to his wife, either directly or through an intermediary, should be carefully scrutinized, and it will be voidable at the instance of his trustee in bankruptcy if found to have been without consideration and in contemplation of insolvency, or merely colorable, the wife taking the record title, but the husband retaining all the fruits of ownership and the power of disposition.[51]

enough to warrant setting aside the sale as fraudulent, since mere inadequacy of price is not alone a proof of fraud. Klein v. Gallin, 141 N. Y. Supp. 831.

[45] Carpenter v. Karnow, 193 Fed. 762, 28 Am. Bankr. Rep. 21; Greenhall v. Carnegie Trust Co., 180 Fed. 812, 25 Am. Bankr. Rep. 300; In re Connelly, 204 Fed. 479, 30 Am. Bankr. Rep. 340; Raley v. Raymond Bros. Co., 73 Neb. 496, 103 N. W. 57; In re Ansley Bros., 153 Fed. 983, 18 Am. Bankr. Rep. 457. But where a debtor, shortly before his bankruptcy, conveys real and personal property which he had previously sold and for which he had received payment, but had not yet conveyed, the conveyance is not void, although the debtor knew that he was insolvent, as the title to such propery was merely held by him in trust for the purchaser. Steadman v. Caswell, 2 Hask. 375, Fed. Cas. No. 13,330a.

[46] In re Siegel, 164 Fed. 559, 21 Am. Bankr. Rep. 154; Visanska v. Cohen, 165 Fed. 552, 21 Am. Bankr. Rep. 350; In re Irwin (D. C.) 268 Fed. 162, 46 Am. Bankr. Rep. 288.

[47] O'Sullivan's Trustee v. Douglass, 98 S. W. 990, 30 Ky. Law Rep. 366. An advancement made to enable the bankrupt to keep in business long enough to prevent the avoidance of prior preferences is a fraud on the Bankruptcy Act, so that the trustee can recover property assigned in consideration of the advancement. Rubenstein v. Lottow, 220 Mass. 156, 107 N. E. 718.

[48] Brooks v. D'Orville, 7 Ben. 485, Fed. Cas. No. 1,951.

[49] Spaulding v. McGovern, Fed. Cas. No. 13,218.

[50] In re Eldred, 3 N. B. R. 256, Fed. Cas. No. 4,328.

[51] Henkel v. Seider, 163 Fed. 553, 20 Am. Bankr. Rep. 773; In re Smith, 100

For somewhat similar reasons, the courts have often denounced the scheme by which an embarrassed merchant or manufacturer procures the organization of a corporation, to which he transfers his stock and property, ostensibly as his successor in business, but which is really conducted thereafter solely for his own benefit, the purpose being to delay and defraud his creditors by interposing an apparently new ownership between the property and their claims. Such a transfer is voidable in bankruptcy.[52] But it is otherwise where the creditors themselves engineer the formation of the corporation, or cause it to be operated for their benefit, rather than for that of the debtor.[53]

Again, one may take a mortgage or other security upon the property of an insolvent or failing debtor, and maintain it as against his trustee in bankruptcy, provided full and present consideration was given and there was no knowledge of an intent to defraud or to give a preference.[54] Nor is the enforcement of an existing mechanic's lien necessarily invalid as against subsequent proceedings in bankruptcy,[55] nor a transaction the effect of which is merely to render specific a previously existing general lien,[56] or to convert alimony due and accruing under a decree of court into an annuity for life secured by a duly recorded mortgage of specific property.[57] But a mortgage or other security newly given for a debt past due is generally voidable in bankruptcy, either as a preference or as a fraud on the other creditors.[58] And even giving present

Fed. 795, 3 Am. Bankr. Rep. 95; In re Wood, 5 Fed. 443; Fisher v. Henderson, 8 N. B. R. 175, Fed. Cas. No. 4,820; Lawrence v. Graves, 5 N. B. R. 279, Fed. Cas. No. 8,138; Saxton v. Sebring, 96 App. Div. 570, 89 N. Y. Supp. 372; Breschemier v. Houston (Iowa) 96 N. W. 756; In re Eldred, 3 N. B. R. 256, Fed. Cas. No. 4,328; Jackson v. Jetter (Iowa) 142 N. W. 431; Block v. Academy Ball Room, Inc. (D. C.) 221 Fed. 1004, 34 Am. St. Rep. 675; Milkman v. Arthe (D. C.) 213 Fed. 642.

[52] In re Berkowitz, 173 Fed. 1013, 22 Am. Bankr. Rep. 233; In re Holbrook Shoe & Leather Co., 165 Fed. 973, 21 Am. Bankr. 511; In re Medina Quarry Co., 179 Fed. 929, 24 Am. Bankr. Rep. 769; Ludvigh v. American Woolen Co., 159 Fed. 796, 19 Am. Bankr. Rep. 795; Foster v. Hip Lung Ying Kee & Co., 243 Ill. 163, 90 N. E. 375. See In re L. M. Alleman Hardware Co., 158 Fed. 119, 19 Am. Bankr. Rep. 765; In re Jamaica Slate Roofing & Supply Co., 200 Fed. 460; Hane v. Crown & Keystone Co. (D. C.) 223 Fed. 439, 35 Am. Bankr. Rep. 175; Osborn v. Peace (D. C.) 215 Fed. 181.

[53] In re A. L. Robertshaw Mfg. Co., 133 Fed. 556, 13 Am. Bankr. Rep. 409.

[54] Grinstead v. Union Savings & Trust Co., 190 Fed. 546, 111 C. C. A. 398, 27 Am. Bankr. Rep. 123; Lindley v. Ross, 200 Fed. 733, 29 Am. Bankr. Rep. 610; First Nat. Bank v. Haverkampf, 16 N. M. 497, 121 Pac. 31. See, supra, § 366 et seq. A conveyance of property by a bankrupt to a mortgagee in payment of that and other valid liens is not voidable in the bankruptcy proceedings. Meservey v. Roby, 198 Fed. 844, 117 C. C. A. 486, 28 Am. Bankr. Rep. 529.

[55] Fehling v. Goings, 67 N. J. Eq. 375, 58 Atl. 642. See supra, § 374.

[56] Duplan Silk Co. v. Spencer, 115 Fed. 689, 53 C. C. A. 321, 8 Am. Bankr. Rep. 367.

[57] Savage v. Savage, 141 Fed. 346, 72 C. C. A. 494, 15 Am. Bankr. Rep. 599.

[58] Johnstone v. Babb, 240 Fed. 668, 153 C. C. A. 466, 38 Am. Bankr. Rep 715; MacHenry v. Dwelling Building & Loan Ass'n, 259 Fed. 880, 44 Am. Bankr. Rep. 234; In re National Boat & Engine Co. (D. C.) 216 Fed. 208, 33 Am. Bankr. Rep. 154; In re Salvator Brewing Co., 183 Fed. 910, 25 Am. Bankr. Rep. 536;

consideration will not always save it. For a temporary loan at exorbitant interest, upon the conveyance of the insolvent borrower's whole assets, is a fraud on the bankruptcy law and therefore void.[59] The same is true of a mortgage given by a corporation to secure the personal indebtedness of its principal stockholder,[60] or one which lacks the consent of the necessary proportion of the stockholders, as provided by the state statute.[61] And a chattel mortgage comes within the terms of the bankruptcy law, and may be avoided by the trustee, if fraudulent and void as against creditors, whether for failure to record, or because there was no change of possession, or the mortgagor was not bound to account for sales, or for other reasons.[62] And so of a pledge of personal property as security for the payment of an existing debt, disguised as a bill of sale with a separate instrument of defeasance without change of possession.[63]

Bradley v. Farwell, Holmes, 433, Fed. Cas. No. 1,779; Bradley v. Converse, 4 Cliff. 375, Fed. Cas. No. 1,776; Durack v. Wilson, 46 Misc. Rep. 237, 94 N. Y. Supp. 232; Mathews v. Hardt, 79 App. Div. 570, 80 N. Y. Supp. 462. That a renewal of a chattel mortgage may be invalid as against the trustee in bankruptcy of the debtor, see Scott v. One Thousand Island Boat & Engine Co., 134 N. Y. Supp. 150. A mortgage of all the mortgagor's property to secure overdue notes representing moneys advanced to take up other notes for the mortgagor, the latter bearing indorsements which were alleged to have been forged, must be deemed a conveyance made to hinder or defraud creditors, so as to be voidable by the mortgagor's trustee in bankruptcy. Dean v. Davis, 242 U. S. 438, 37 Sup. Ct. 130, 61 L. Ed. 419, 38 Am. Bankr. Rep. 664. Where the majority stockholder of a corporation, with knowledge of its precarious financial condition, agreed to sell to the corporation its own stock of a par value of $5,100 for $2,000, receiving $500 in cash and notes secured by a deed of trust covering all the corporation's assets for the balance, the transaction was fraudulent as against the corporation's creditors and void as against its trustee in bankruptcy. M. V. Moore & Co. v. Gilmore, 216 Fed. 99, 132 C. C. A. 343.

[59] Brooks v. Davis, Fed. Cas. No. 1,950.

[60] American Wood Working Machinery Co. v. Norment (C. C. A.) 157 Fed. 801, 19 Am. Bankr. Rep. 679.

[61] In re Eagle Steam Laundry Co., 176 Fed. 740, 23 Am. Bankr. Rep. 859.

[62] In re Geiver, 193 Fed. 128, 28 Am. Bankr. Rep. 413; Egan State Bank v. Rice, 119 Fed. 107, 56 C. C. A. 157, 9 Am. Bankr. Rep. 437; In re Platts, 110 Fed. 126, 6 Am. Bankr. Rep. 568; Kappner v. St. Louis & St. J. R. Ass'n, 3 Dill. 228, Fed. Cas. No. 7,612; In re Leland, 10 Blatchf. 503, Fed. Cas. No. 8,234; In re Jaconson & Perrill, 200 Fed. 812, 29 Am. Bankr. Rep. 603; Johnson v. Dismukes, 204 Fed. 382, 29 Am. Bankr. Rep. 686; In re Raney, 202 Fed. 996. Compare In re Durham, 114 Fed. 750, 8 Am. Bankr. Rep. 115. See supra, § 367. And see also In re Purtell (D. C.) 215 Fed. 191; Peterson v. Sabin, 214 Fed. 234, 130 C. C. A. 608, 32 Am. Bankr. Rep. 599; In re Haywood Wagon Co., 219 Fed. 655, 135 C. C. A. 391, 33 Am. Bankr. Rep. 618; In re F. H. Saunders & Co., 272 Fed. 1003, 47 Am. Bankr. Rep. 117; Zehner v. Southern Surety Co., 272 Fed. 954, 47 Am. Bankr. Rep. 132; General Securities Co. v. Driscoll (C. C. A.) 271 Fed. 296; In re Pine Tree Lumber Co. (C. C. A.) 269 Fed. 515, 46 Am. Bankr. Rep. 463; In re Bonk (D. C.) 268 Fed. 1012, 46 Am. Bankr. Rep. 389.

[63] In re Groezinger (D. C.) 199 Fed. 935, 28 Am. Bankr. Rep. 732. See In re American Fibre Reed Co. (D. C.) 206 Fed. 309, 30 Am. Bankr. Rep. 223; Home Bond Co. v. McChesney, 210 Fed. 893, 127 C. C. A. 552; Petition of National Discount Co. (C. C. A.) 272 Fed. 570, 47 Am. Bankr. Rep. 12.

Money also is property within the meaning of the law, and its transfer may be fraudulent as against creditors. Thus, where the owner of all the stock of a trading corporation, when it was indebted and within four months prior to the filing of a petition in bankruptcy against it, transferred the greater part of its bank deposit, which constituted practically its sole assets, to himself in payment of alleged claims, leaving not enough to pay other claims, it was held that the transaction constituted not only a preference, but also a transfer with intent to hinder and defraud creditors.[64] So, where the bankrupt, who was the owner of a business corporation, at a time when it was desperately involved, diverted revenues of its business for his own benefit and that of others by overpayments for services, exorbitant hire of teams, and other expenses, his trustee in bankruptcy was held entitled to reach such money and property in the hands of those benefited.[65] So where one who knows himself to be insolvent makes a payment on a debt barred by the statute of limitations, the resulting implied promise to pay the remainder of the outlawed debt is an "incumbrance" which may be avoided by the trustee in bankruptcy, since its effect is to defeat the defense of limitations, and that is a valuable right which passes to his creditors in bankruptcy.[66] On similar principles, where property is purchased by a man with his own money, but, by his direction or procurement, the conveyance is made to his wife and the title vested in her, it may properly be said, within the meaning of the bankruptcy law, that the money so paid by him is "transferred," and if this is done in fraud of his creditors, the title to the fund will pass to his trustee in bankruptcy, and the land, as representing it, may be subjected to the administration of the estate.[67] And of course the rule is the same when any third person, other than the bankrupt's wife, is made the cover to receive the title, the bankrupt furnishing the money.[68] But one may loan money to his wife to enable her to purchase real estate, and if the loan is repaid before the institution of bankruptcy proceedings against the husband, the land cannot be taken from the wife or impressed with a trust for the husband's creditors.[69] It may also be a fraudulent "transfer" of property, within the meaning of the statute, when funds are diverted by an insolvent debtor from the claims of his creditors and invested in a homestead,[70] or when a payment to a creditor covers not

[64] Boston West Africa Trading Co. v. Quaker City Morocco Co. (C. C. A.) 261 Fed. 665, 44 Am. Bankr. Rep. 315.

[65] Kimbrough v. Alred, 202 Ala. 413, 80 South. 617.

[66] In re Salmon (D. C.) 239 Fed. 413, 38 Am. Bankr. Rep. 692.

[67] Platt v. Mead, 9 Fed. 91; In re Meyers, 2 Ben. 424, 1 N. B. R. 581, Fed. Cas. No. 9,518; In re Schonberg, 7 Ben. 211, Fed. Cas. No. 12,477.

[68] Hyde v. Cohen, 11 N. B. R. 461, Fed. Cas. No. 6,967; Parker v. Travers, 74 N. J. Eq. 812, 71 Atl. 612.

[69] Clark v. Else, 21 S. D. 112, 110 N. W. 88.

[70] Painter v. Napoleon Township, 190 Fed. 637, 26 Am. Bankr. Rep. 324; John-

only existing debts but also the amount of a note not yet due.[71] But a set-off by a bank of a deposit account due to a bankrupt against his liability to the bank on a note is not a "transfer of property" by the bankrupt.[72] A gift of money or property of considerable value by a husband to his wife is in fraud of his creditors, and recoverable by his trustee in bankruptcy, if made while he was insolvent and in contemplation of the bankruptcy which shortly followed,[73] and this includes payments made by him on policies of insurance on his own life for the wife's benefit.[74]

So again, a debtor may "transfer" his property to another by voluntarily confessing judgment in favor of such other and allowing him to issue execution and make a levy and sale resulting in his becoming the purchaser.[75] But the plaintiff in a pending suit has the right to abandon or settle the contest at any stage, at his election, and on his subsequent adjudication as a bankrupt his trustee has no cause of action growing out of the settlement of the case, unless in the direction of pursuing the proceeds of a compromise actually received by the bankrupt.[76] And where property of the debtor is sold under execution in coercive adversary proceedings, in which he made an active though unsuccessful defense, it cannot be said that the sale is in any sense a fraud upon his creditors.[77]

§ 452. Sales of Merchandise in Bulk.—Where a merchant sells his entire stock in trade at one time to one purchaser, it is such an unusual occurrence and so far out of the ordinary course of business as to be presumptive evidence of fraud and to charge the purchaser with knowledge of the facts and with bad faith, so that the burden is on him to sustain the validity of his purchase by showing that he took all reasonable and proper steps to ascertain the seller's financial condition and that he bought in good faith and for a present fair consideration.[78] And if it is

son v. May, 16 N. B. R. 425, Fed. Cas. No. 7,397. But see In re Letson, 157 Fed. 78, 84 C. C. A. 582, 19 Am. Bankr. Rep. 506.

[71] Irish v. Citizens' Trust Co., 163 Fed. 880, 21 Am. Bankr. Rep. 39.

[72] Booth v. Prete, 81 Conn. 636, 71 Atl. 938, 20 L. R. A. (N. S.) 863, 15 Ann. Cas. 306. See In re United Grocery Co. (D. C.) 253 Fed. 267, 41 Am. Bankr. Rep. 824.

[73] Wiley v. McBride, 74 Ark. 34, 85 S. W. 84; In re Friedman, 153 Fed. 939.

[74] In re Bear, 11 N. B. R. 46, Fed. Cas. No. 1,178.

[75] Grant v. National Bank of Auburn, 197 Fed. 581, 28 Am. Bankr. Rep. 712.

[76] Edington v. Masson, 177 Fed. 209, 101 C. C. A. 379, 24 Am. Bankr. Rep. 183.

[77] Nelson v. Svea Pub. Co., 178 Fed. 136.

[78] Walbrun v. Babbitt, 16 Wall. 577, 21 L. Ed. 489; In re Calvi, 185 Fed. 642, 26 Am. Bankr. Rep. 206; Dokken v. Page, 147 Fed. 438, 77 C. C. A. 674, 17 Am. Bankr. Rep. 228; In re Knopf, 144 Fed. 245, 16 Am. Bankr. Rep. 432; In re Hemstreet, 139 Fed. 958, 14 Am. Bankr. Rep. 823; Norton v. Billings, 9 Biss. 528, 4 Fed. 623; Main v. Glen, 7 Biss. 86, Fed. Cas. No. 8,973; In re Dean, 2 N. B. R. 89, Fed. Cas. No. 3,700; Foster v. Hackley, 2 N. B. R. 406, Fed. Cas. No. 4,971; Parker v. Sherman, 201 Fed. 155; In re Lipman, 201 Fed. 169,

shown that the sale was made secretly, or with an evident desire to conceal it, that it was made at night, or made hurriedly and with little or no preliminary negotiation, that it was made after a superficial examination of the goods or without taking an inventory, and particularly if the price paid was considerably less than the value of the goods, these are indicia of fraud counting heavily against the purchaser in the trustee's suit to set aside the sale as fraudulent.[79] Such a transaction may also be held void under § 67e of the Bankruptcy Law, as a transfer "held null and void under the laws of the state," since the "bulk sales laws" now in force in numerous states forbid such a transfer except where certain conditions are complied with.[80] But if the state law is construed as available only in favor of those creditors whose claims arose from the sale of the stock of merchandise or some part of it, and only as giving such a creditor a lien, analogous to a vendor's lien, which may be enforced by appropriate legal proceedings in the event of a sale in violation of the provisions of the act, but not as enabling any creditor to treat the sale as a nullity and proceed with the collection of his entire debt, then a sale made in defiance of the statute is not such a one as may be impeached by the trustee in bankruptcy of the seller, for the general estate of the seller can derive no benefit from such impeachment.[81] Further, where personal property, part of the bankrupt merchant's stock in trade, was sold to the same defendant, but at three different times, shortly before bankruptcy, the goods not comprising the entire stock in trade, it was not a sale in bulk.[82] Substantially the same rules apply to the case of a mortgage covering an entire stock in trade or the whole assets of a partnership or corporation.[83]

§ 453. "Preference" and "Fraudulent Transfer" Distinguished.—There is a marked distinction, which should be constantly kept in view, between a payment or transfer of property constituting a "preference" and a "fraudulent conveyance." It is true that a given transaction by an insolvent debtor may constitute both a preference and a fraudulent

29 Am. Bankr. Rep. 139. Compare Shelton v. Price, 174 Fed. 891, 23 Am. Bankr. Rep. 431.

[79] Dokken v. Page, 147 Fed. 438, 77 C. C. A. 674, 17 Am. Bankr. Rep. 228; In re Knopf, 146 Fed. 109, 17 Am. Bankr. Rep. 48; Johnston v. Forsyth Mercantile Co., 155 Fed. 268, 19 Am. Bankr. Rep. 48.

[80] In re Clayton (D. C.) 259 Fed. 911, 43 Am. Bankr. Rep. 687; Brown v. Kossove, 255 Fed. 806, 167 C. C. A. 134, 43 Am. Bankr. Rep. 408; In re Thompson (D. C.) 242 Fed. 602, 40 Am. Bankr. Rep. 82; Philoon v. Babbitt, 119 Me. 172, 109 Atl. 817; Niklaus v. Lessenhop, 99 Neb. 803, 157 N. W. 1019.

[81] Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119. And see Gorham v. Buzzell (D. C.) 178 Fed. 596, 24 Am. Bankr. Rep. 440.

[82] Carpenter v. Karnow (D. C.) 193 Fed. 762, 28 Am. Bankr. Rep. 21. And see Sabin v. Horenstein, 260 Fed. 754, 171 C. C. A. 492, 44 Am. Bankr. Rep. 422.

[83] Pollock v. Jones, 124 Fed. 163, 61 C. C. A. 555, 10 Am. Bankr. Rep. 616; Zartman v. First Nat. Bank, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083.

transfer.[84] But a transfer of money or property by an insolvent is not necessarily fraudulent under § 67e of the Bankruptcy Act, merely because it results in giving a preference to the creditor as defined in § 60 of the Act.[85] But though a preferential transfer is not in itself, or in its inception, fraudulent, it may be so manipulated or carried into later steps in an attempt to defeat a recovery by the trustee in bankruptcy as to bring the parties within that part of the statute which relates to fraudulent conveyances.[86] Thus where a creditor, having secured from his insolvent debtor a transfer of property, the enforcement of which would effect a preference under the Bankruptcy Act, advanced money to the debtor, upon an assignment of certain book accounts, for the purpose of tiding the insolvent over the period of four months, so that the preference could not be vacated in the bankruptcy proceedings, it was held that the trustee could recover the value of the accounts.[87] These distinctions may be further illustrated by some quotations from judicial opinions. "A consideration of the provisions of the bankruptcy law as to preferences and conveyances shows that there is a wide difference between the two, notwithstanding they are sometimes spoken of in such a way as to confuse the one with the other. A preference, if it have the effect of enabling one creditor to obtain a greater portion of the estate than others of the same class, is not necessarily fraudulent. Preferences are set aside when made within four months, with a view of obtaining an equal distribution of the estate, and in such cases it is only essential to show a transfer by an insolvent debtor to one who himself or by his agent knew of the intention to create a preference." [88] "In a preferential transfer, the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors which it is the policy of the law to enforce when all cannot be fully paid. In a fraudulent transfer the fraud is actual,—the bankrupt has secured an advantage for himself out of what in law should belong to his creditors, and not to him." [89] "A preferential payment may be constructively fraudulent, but it is not in and of itself a fraudulent conveyance. It can only become the latter in the unusual case where actual fraud in addition to the preference is established. Thus, a secret trust in favor of a person making such payments might turn

[84] Chapman v. Hunt (D. C.) 248 Fed. 160, 41 Am. Bankr. Rep. 482; Smith v. Coury (D. C.) 247 Fed. 168, 41 Am. Bankr. Rep. 219.

[85] Watson v. Adams, 242 Fed. 441, 155 C. C. A. 217, 39 Am. Bankr. Rep. 473.

[86] Watson v. Adams, 242 Fed. 441, 155 C. C. A. 217, 39 Am. Bankr. Rep. 473.

[87] Rubenstein v. Lottow, 223 Mass. 227, 111 N. E. 973.

[88] Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 22 Am. Bankr. Rep. 1.

[89] In re Maher, 144 Fed. 503, 16 Am. Bankr. Rep. 340. And see Meservey v. Roby, 198 Fed. 844, 117 C. C. A. 486, 28 Am. Bankr. Rep. 529; In re Doyle, 199 Fed. 247, 29 Am. Bankr. Rep. 102.

a mere preference into a fraudulent conveyance." [90] The question whether a given transaction constitutes the one or the other is therefore a question of fact, depending, on the one hand, on the fraudulent purpose and intent of the debtor, or, on the other hand, on the creditor's knowledge or reasonable cause to believe that a preference was intended. But if, in a case of payments made to certain creditors to the exclusion of others, there is any substantial evidence of an intent to delay or defraud the unpaid creditors, it is properly submitted to the consideration of the jury.[91]

It follows that a payment of money or a transfer of property by an insolvent debtor, for the purpose of discharging or securing a bona fide existing debt, in good faith and without any intent to affect other creditors injuriously beyond what must necessarily result from the corresponding diminution of the debtor's assets, is not in itself a "fraudulent transfer," nor evidence of an intent to delay or defraud creditors, and is not voidable by the trustee in bankruptcy unless violative of those provisions of the statute which relate specifically to preferences.[92] In order to recover money paid or property transferred by way of preference, it is necessary for the trustee to show that "the person receiving it, or to be benefited thereby, or his agent acting therein, had reasonable cause to believe that it was intended thereby to give a preference." [93] Lacking proof of such cause of belief, a transaction such as we have supposed above, is not voidable under those provisions of the law which relate to fraudulent conveyances.[94] It is not enough to show that the debtor intended to give a preference, or that he had a fraudulent design to exclude his other creditors or make them suffer.[95] But conversely, if the debtor intended to give a preference, and the creditor knew it or had reasonable cause to believe it, the transfer is voidable in the character of a preference, without regard to an actual fraudulent intent on either part.[96] Thus, a mortgage given by an insolvent debtor, subsequently and within four months, adjudged a bankrupt, to secure money

[90] Van Iderstine v. National Discount Co., 174 Fed. 518, 98 C. C. A. 300, 23 Am. Bankr. Rep. 345. And see Githens v. Shiffler, 112 Fed. 505, 7 Am. Bankr. Rep. 453; In re Doyle, 199 Fed. 247, 29 Am. Bankr. Rep. 102; Ex parte Stubbins, L. R. 17 Ch. Div. 58; Kingsbury v. First Nat. Bank, 71 Kan. 570, 81 Pac. 187; Studebaker Bros. Mfg. Co. v. Elsey-Hemphill Carriage Co., 152 Mo. App. 401, 133 S. W. 412. Compare In re Hill, 140 Fed. 984, 15 Am. Bankr. Rep. 499; Allen v. French, 178 Mass. 539, 60 N. E. 125.

[91] Webb's Trustee v. Lynchburg Shoe Co., 106 Va. 726, 56 S. E. 581.

[92] Coder v. Arts, 152 Fed. 943, 82 C. C. A. 91, 18 Am. Bankr. Rep. 513; Manning v. Evans, 156 Fed. 106, 19 Am. Bankr. Rep. 217; Congleton v. Schreihofer (N. J. Eq.) 54 Atl. 144; Maffi v. Stephens (Tex. Civ. App.) 93 S. W. 158.

[93] Bankruptcy Act 1898, § 60b.

[94] Townes v. Alexander, 69 S. C. 23, 48 S. E. 214; Sargent v. Blake, 160 Fed. 57, 87 C. C. A. 213, 20 Am. Bankr. Rep. 115.

[95] Blakey v. Boonville Nat. Bank, 95 Fed. 267, 2 Am. Bankr. Rep. 459.

[96] Ferguson v. Lederer, Strauss & Co., 128 Iowa, 286, 103 N. W. 794.

borrowed at the time for the purpose of preferring certain of his creditors, is voidable, provided the lender knew or had reason to believe that such was his purpose.[97] But it must be admitted that, although the theoretical distinction is clear, the complex circumstances of many cases often make it difficult to draw the line sharply. Thus, in one case a corporation executed mortgages covering all its property, to certain favored creditors, who were not pressing it for payment nor asking to be secured, intending thereby to force indulgence from its other creditors and further advances from those secured. It was held that the mortgages were intended to "hinder, delay, and defraud" creditors, and were on that ground voidable in bankruptcy.[98]

§ 454. Transfers Void Under State Laws.—By the express provisions of the bankruptcy law all transfers, conveyances, or incumbrances of property made by an insolvent debtor, within four months before his bankruptcy, are voidable at the suit of the trustee in bankruptcy, if held null and void as against creditors by the law of the state, whether or not they would be voidable at common law, and whether or not within the specific denouncements of the bankruptcy act.[99] Thus where the action is to set aside a conveyance alleged to be fraudulent and void under the state law, actual fraud or an actual fraudulent intent is not necessary to be made out unless the state law requires it. If that law avoids, as to creditors, transactions only presumptively fraudulent, or attended by "legal" as distinguished from "actual" fraud, the same will be void at the suit of the trustee in bankruptcy.[100] And in determining the validity of any transfer or incumbrance alleged to be voidable under the law of the state, and assailed distinctly on that ground, the courts of bankruptcy will follow and be governed by the applicable decisions of the courts of the state.[101] In the case of a conflict of laws,

[97] In re Pease, 129 Fed. 446, 12 Am. Bankr. Rep. 66.

[98] In re Steininger Mercantile Co., 107 Fed. 669, 46 C. C. A. 548, 6 Am. Bankr. Rep. 68.

[99] Allen v. Massey, 17 Wall. 351, 21 L. Ed. 542; In re Bement, 172 Fed. 98, 96 C. C. A. 412, 22 Am. Bankr. Rep. 616; Wright v. Sampter, 152 Fed. 196, 18 Am. Bankr. Rep. 355; In re Broome, 3 Ben. 488, 3 N. B. R. 343, Fed. Cas. No. 1,966; In re J. S. Appel Suit & Cloak Co., 198 Fed. 322, 28 Am. Bankr. Rep. 818; Pew v. Price, 158 S. W. 338, 251 Mo. 614; Goodwin v. Tuttle, 70 Or. 424, 141 Pac. 1120.

[100] In re Geiver, 193 Fed. 128, 28 Am. Bankr. Rep. 413.

[101] Allen v. Massey, 17 Wall. 351, 21 L. Ed. 542; Chicago Bank v. Kansas Bank, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341; Etheridge v. Sperry, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171; Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, 13 Am. Bankr. Rep. 437; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956, 14 Am. Bankr. Rep. 74; Swager v. Smith (C. C. A.) 194 Fed. 762, 27 Am. Bankr. Rep. 660; Howard v. Prince, 1 Hughes, 239, 11 N. B. R. 322, Fed. Cas. No. 6,762; Sieg v. Greene, 225 Fed. 955, 141 C. C. A. 79, Ann. Cas. 1917C, 1006, 35 Am. Bankr. Rep. 150; Deupree v. Watson, 216 Fed. 483, 132 C. C. A. 543; In re Thorson Bros. (D. C.) 209 Fed. 961;

where the transfer sought to be set aside was a transfer of real property, the law of that state will govern in which the property is situated.[102] In the case of a contract, the decision will be made in accordance with the law of the place of its performance, rather than that of the place where the contract was made.[103] In a case where personal property of the bankrupt, mortgaged in Illinois, was, with the consent of the mortgagees, removed to Tennessee, and thence to Mississippi, and finally to Arkansas, where the mortgagor was adjudged bankrupt, it was held that the rights of the mortgagees and the general creditors must be determined by the laws of Arkansas.[104]

In the case of a chattel mortgage, aside from any question of actual fraud or of an intention to contravene or defeat the bankruptcy law, the validity of such an instrument is to be tested by the law of the state; and if that law prescribes certain conditions as essential to its validity when attacked by other creditors,—such as registration or filing for record, change of possession, accountability for sales out of stock, or the like,—the trustee in bankruptcy may assail and avoid it for lack of compliance with those conditions.[105] So he may take advantage of

Stewart v. Asbury, 199 Mo. App. 123, 201 S. W. 949; Woodman v. Butterfield, 116 Me. 241, 101 Atl. 25; Holbrook v. International Trust Co., 220 Mass. 150, 107 N. E. 665; Potter v. American Printing & Lithographing Co., 182 Iowa, 458, 165 N. W. 1044.

[102] Hall v. Glenn (D. C.) 247 Fed. 997, 39 Am. Bankr. Rep. 54.

[103] Gielow v. Eastern Shore Shipbuilding Corp. (D. C.) 265 Fed. 845.

[104] In re Davies (D. C.) 256 Fed. 52, 43 Am. Bankr. Rep. 458.

[105] Holt v. Crucible Steel Co., 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756, 27 Am. Bankr. Rep. 856; Angle v. Bankers' Surety Co., 244 Fed. 401, 157 C. C. A. 27, 41 Am. Bankr. Rep. 90; Scandinavian-American Bank v. Sabin, 227 Fed. 579, 142 C. C. A. 211, 36 Am. Bankr. Rep. 151; Massachusetts Bonding & Ins. Co. v. Kemper, 220 Fed. 847, 136 C. C. A. 593, 34 Am. Bankr. Rep. 80; Millikin v. Second Nat. Bank, 206 Fed. 14, 124 C. C. A. 148, 30 Am. Bankr. Rep. 477; Smith v. Carukin, 259 Fed. 51, 170 C. C. A. 51, 44 Am. Bankr. Rep. 278; Calkins v. Lichtig, 251 Fed. 844, 164 C. C. A. 60, 42 Am. Bankr. Rep. 306; In re Palmer (D. C.) 218 Fed. 74, 33 Am. Bankr. Rep. 689; In re Cooper's Estate (D. C.) 226 Fed. 317, 35 Am. Bankr. Rep. 321; In re Roberts (D. C.) 227 Fed. 177, 36 Am. Bankr. Rep. 137; In re Schilling (D. C.) 251 Fed. 972, 41 Am. Bankr. Rep. 698; Rader v. Star Mill & Elevator Co., 258 Fed. 599, 169 C. C. A. 541, 43 Am. Bankr. Rep. 754; In re Steiner (D. C.) 249 Fed. 880; In re Perpall (C. C. A.) 261 Fed. 858, 44 Am. Bankr. Rep. 519; In re Roseboom (D. C.) 253 Fed. 136, 42 Am. Bankr. Rep. 437; Stewart v. Asbury, 199 Mo. App. 123, 201 S. W. 949; Goldberg v. Brule Timber Co., 140 Minn. 335, 168 N. W. 22; Davis v. Harlow, 130 Md. 165, 100 Atl. 102; In re Noethen, 195 Fed. 573, 27 Am. Bankr. Rep. 910; In re Jules & Frederic Co., 193 Fed. 533, 27 Am. Bankr. Rep. 136; Alter v. Clark, 193 Fed. 153; In re Geiver, 193 Fed. 128, 28 Am. Bankr. Rep. 413; In re Jackson Brick & Tile Co., 189 Fed. 636, 26 Am. Bankr. Rep. 915; Mishawaka Woolen Mfg. Co. v. Teasdale, 145 Wis. 73, 129 N. W. 671; Low v. Taylor, 73 N. J. Eq. 406, 68 Atl. 128; In re Walden Bros. Clothing Co., 199 Fed. 315, 29 Am. Bankr. Rep. 80; L. A. Becker Co. v. Gill (C. C. A.) 206 Fed. 36, 30 Am. Bankr. Rep. 429; In re United States Lumber Co., 206 Fed. 236, 30 Am. Bankr. Rep. 682. And see supra, § 367. Compare Johnstone v. Babb, 240 Fed. 668, 153 C. C. A. 466, 38 Am. Bankr. Rep. 715; In re Mosher (D. C.) 224 Fed. 739, 35 Am. Bankr. Rep. 284; Davis v. Hanover Savings Fund Society, 210 Fed. 768, 127 C. C. A. 318, 31 Am. Baukr. Rep. 368.

A mortgage covering both real and per-

a state law which avoids, as to creditors, a mortgage made by any corporation while insolvent or when its insolvency is imminent,[106] or made without such authorization or consent on the part of the stockholders as is required by the state law,[107] or, following the course of judicial decisions in the state, he may assail the validity of a chattel mortgage where the principal part of the property covered consists of articles perishable in their nature or which would ordinarily be consumed in the use before a sale on foreclosure could be made.[108] But where the failure to file or record a chattel mortgage in accordance with the laws of the state is cured by the act of the mortgagee in taking actual possession of the mortgaged property before the bankruptcy proceedings, the lien of the mortgage will be good as against the trustee in bankruptcy, unless he can find some other ground to attack it than the mere want of record;[109] and if the mortgage was valid between the parties and given in good faith more than four months prior to the bankruptcy proceedings, the act of the mortgagee in taking possession within that period is not a voidable transfer.[110]

The rule is substantially the same as to contracts of conditional sale. The claim of the vendor will not prevail against the trustee in bankruptcy of the purchaser if the contract was not acknowledged, filed, recorded, etc., as required by the laws of the state.[111] And a contract for

sonal property and duly recorded as a real-estate mortgage, is nevertheless void as against the mortgagor's trustee in bankruptcy unless also recorded as a chattel mortgage. Pacific State Bank v. Coats, 205 Fed. 618, 123 C. C. A. 634, Ann. Cas. 1913E, 846, 30 Am. Bankr. Rep. 655.

106 McGill v. Commercial Credit Co. (D. C.) 243 Fed. 637, 39 Am. Bankr. Rep. 702; Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co., 67 N. J. Eq. 602, 60 Atl. 940, 3 Ann. Cas. 393.

107 In re Progressive Wall Paper Corp. (D. C.) 230 Fed. 171, 37 Am. Bankr. Rep. 207.

108 Swager v. Smith, 194 Fed. 762, 114 C. C. A. 482, 27 Am. Bankr. Rep. 660.

109 Coggan v. Ward, 215 Mass. 13, 102 N. E. 336; First Nat. Bank v. Wegener, 94 Or. 318, 181 Pac. 990, 186 Pac. 41; Jones v. Bank of Excelsior Springs, 201 Mo. App. 545, 213 S. W. 892. Compare Schaupp v. Miller (D. C.) 206 Fed. 575, 30 Am. Bankr. Rep. 699.

110 Kettenbach v. Walker, 32 Idaho, 544, 186 Pac. 912.

111 L. A. Becker Co. v. Gill, 206 Fed. 36, 124 C. C. A. 170, 30 Am. Bankr. Rep. 429; Gielow v. Eastern Shore Shipbuilding Corp. (D. C.) 265 Fed. 845; In re Bennett (D. C.) 264 Fed. 533, 45 Am. Bankr. Rep. 565; In re A. E. Savage Baking Co. (D. C.) 259 Fed. 976, 43 Am. Bankr. Rep. 721; In re Mutual Motors Co. (D. C.) 260 Fed. 341, 44 Am. Bankr. Rep. 337; In re Capital City Cap Co. (D. C.) 251 Fed. 664, 41 Am. Bankr. Rep. 604; In re Kruse (D. C.) 234 Fed. 470, 37 Am. Bankr. Rep. 687; Columbus Merchandise Co. v. Kline (D. C.) 248 Fed. 296; In re M. L. B. Sturkey Co. (D. C.) 224 Fed. 251, 35 Am. Bankr. Rep. 371; In re Pacific Electric & Automobile Co. (D. C.) 224 Fed. 220, 35 Am. Bankr. Rep. 222; In re Vandewater & Co. (D. C.) 219 Fed. 627, 33 Am. Bankr. Rep. 671; In re Johnson (D. C.) 215 Fed. 666, 33 Am. Bankr. Rep. 104; In re O'Brien (D. C.) 215 Fed. 129, 32 Am. Bankr. Rep. 347; In re Johnson (D. C.) 212 Fed. 311, 31 Am. Bankr. Rep. 579; In re United States Lumber Co. (D. C.) 263 Fed. 236, 30 Am. Bankr. Rep. 682. Compare Baker Ice Machine Co. v. Bailey, 209 Fed. 603, 126 C. C. A. 425, 31 Am. Bankr. Rep. 593; Delaval Separator Co. v. Jones, 117 Me. 95, 102 Atl. 968.

the absolute sale of goods to the bankrupt, but with a reservation of a lien for the purchase price, must be recorded, if that is required by the law of the state, in order to be valid against the trustee in bankruptcy.[112] So, where a contract for the sale of fertilizers on credit to the bankrupt provided that the proceeds of sales made by him should be held for the seller to be applied on the price, it was held that such debts constituted personal property and required the contract to be recorded, under the local law, in default of which the seller was not entitled to a lien as against the trustee in bankruptcy.[113] But a mining lease reserving a lien for royalties is not a conveyance to secure a debt, such as must be recorded in Alabama, but is valid and enforceable, on the bankruptcy of the lessee, for past-due royalties.[114] So, also, the trustee in bankruptcy, as the representative of creditors, may resist adverse claims to property or liens thereon on the ground of failure of compliance with a state statute providing that every sale of goods in the possession of the vendor, not accompanied by immediate delivery and change of possession, shall be presumed fraudulent as to creditors,[115] or one regulating sales in bulk,[116] or a state law or course of judicial decisions invalidating an assignment of a chose in action unless there is delivery of the property or the evidence of it and notice given to the person against whom it is available.[117] In South Carolina, an assignment of a bond for title, and the recording of such an instrument, without its being proved in the manner required by law, by one who subsequently became bankrupt, is a nullity.[118] And under the law of Mississippi, requiring transfers between husband and wife to be in writing and recorded, in order to be good as against third persons, the trustee in bankruptcy of a married woman may recover a stock of goods verbally transferred.[119] So also, a trustee in bankruptcy may defeat an adverse

[112] Walter A. Wood Mowing & Reaping Machine Co. v. Croll, 231 Fed. 679, 145 C. C. A. 565, 36 Am. Bankr. Rep. 610; In re Stoughton Wagon Co., 231 Fed. 676, 145 C. C. A. 562, 36 Am. Bankr. Rep. 592; In re American Steel Supply Syndicate (D. C.) 256 Fed. 876, 43 Am. Bankr. Rep. 271.

[113] Townsend v. Ashepoo Fertilizer Co., 212 Fed. 97, 128 C. C. A. 613, 31 Am. Bankr. Rep. 682.

[114] In re Gallagher Coal Co. (D. C.) 205 Fed. 183, 29 Am. Bankr. Rep. 766.

[115] Skillen v. Endelman, 39 Misc. Rep. 261, 79 N. Y. Supp. 413; In re Waite-Robbins Motor Co. (D. C.) 192 Fed. 47, 27 Am. Bankr. Rep. 541; In re Colonial Mill & Lumber Co. (D. C.) 215 Fed. 640. See Williamson v. Richardson, 205 Fed. 245, 123 C. C. A. 427, 30 Am. Bankr. Rep. 559. As to the law of Pennsylvania applicable to such sales, see In re Komara, 251 Fed. 47, 163 C. C. A. 297, 42 Am. Bankr. Rep. 236.

[116] In re Schoenfield (D. C.) 190 Fed. 53, 27 Am. Bankr. Rep. 64. And see, supra, § 452.

[117] In re Hawley Down Draft Furnace Co. (D. C.) 230 Fed. 471, 36 Am. Bankr. Rep. 584. See In re Rosenthal (D. C.) 238 Fed. 597, 39 Am. Bankr. Rep. 30; Ward v. American Agricultural Chemical Co., 232 Fed. 119, 146 C. C. A. 311, 36 Am. Bankr. Rep. 321.

[118] In re Rosenthal (D. C.) 238 Fed. 597, 39 Am. Bankr. Rep. 30.

[119] McCabe v. Guido, 116 Miss. 858, 77 South. 801.

claim to property by relying upon a state statute prohibiting any corporation, while incurring debts and liabilities, from giving to a stockholder and director for the benefit of another stockholder or director any part of its capital.[120] And a transfer or mortgage of property, which is invalid under the law of the state because made to one having knowledge or reasonable cause to suspect that it was made with the intention of hindering or defrauding creditors, will be voidable by the trustee in bankruptcy.[121] But the case must be brought within the very terms of the statute. Thus, where it provides that certain transfers of property shall be declared void "at the suit of any creditor," it cannot be invoked in a case where bankruptcy proceedings were instituted before any such suit was commenced.[122] And though the rights of a trustee in bankruptcy and those of an assignee in insolvency under the state statute are defined in similar terms, yet it does not follow that a state statute making a certain transfer void as against an assignee eo nomine will also make it void as against a trustee in bankruptcy.[123] If the state statute requires the recording of conveyances, chattel mortgages, conditional sales, etc., in order to make them valid as against subsequent purchasers and incumbrancers in good faith without notice, but not as against general creditors, a transfer which is good between the parties though not recorded is not avoidable by the trustee in bankruptcy, since he does not come within either of those descriptions.[124] But if the statute makes an unrecorded transfer or contract voidable at the instance of "creditors," then it may be avoided by the trustee in bankruptcy, not only because he represents the creditors, but because, since the 1910 amendment to the Bankruptcy Act, he has the status of a creditor armed with a lien.[125]

[120] Hazard v. Wight, 201 N. Y. 399, 94 N. E. 855.

[121] In re Walden Bros. Clothing Co. (D. C.) 199 Fed. 315, 29 Am. Bankr. Rep. 80.

[122] In re Chadwick (D. C.) 140 Fed. 674, 15 Am. Bankr. Rep. 528. And see Mayhew v. Todisman, 246 Mo. 288, 151 S. W. 436.

[123] In re Loveland, 155 Fed. 838, 84 C. C. A. 72, 19 Am. Bankr. Rep. 18.

[124] Carey v. Donohue, 240 U. S. 430, 36 Sup. Ct. 386, 60 L. Ed. 726, L. R. A. 1917A, 295, 36 Am. Bankr. Rep. 704; Martin v. Commercial Nat. Bank, 228 Fed. 651, 143 C. C. A. 173, 36 Am. Bankr. Rep. 25; In re I. S. Remson Mfg. Co., 232 Fed. 594, 146 C. C. A. 552, 36 Am. Bankr. Rep. 799; In re Virgin (D. C.) 224 Fed. 128, 35 Am. Bankr. Rep. 494; Robertson v. Schlotzhauer, 243 Fed. 324, 156 C. C. A. 104, 40 Am. Bankr. Rep. 237; In re Dagwell (D. C.) 263 Fed. 406, 45 Am. Bankr. Rep. 358; Johnson v. Barrett (D. C.) 237 Fed. 112, 38 Am. Bankr. Rep. 464; In re Bolstad (D. C.) 224 Fed. 283, 35 Am. Bankr. Rep. 355; Toof v. City Nat. Bank, 206 Fed. 250, 124 C. C. A. 118, 30 Am. Bankr. Rep. 79; In re Mosher (D. C.) 224 Fed. 739, 35 Am. Bankr. Rep. 284.

[125] National Bank of Bakersfield v. Moore, 247 Fed. 913, 160 C. C. A. 103, 41 Am. Bankr. Rep. 409; Hawkins v. Dannenberg Co. (D. C.) 234 Fed. 752, 37 Am. Bankr. Rep. 262; In re Marriner (D. C.) 220 Fed. 542, 34 Am. Bankr. Rep. 444; In re Pittsburgh-Big Muddy Coal Co., 215 Fed. 703, 132 C. C. A. 81. See In re Wall (D. C.) 207 Fed. 994, 29 Am. Bankr. Rep. 901; In re White's Express Co., 215 Fed. 894, 132 C. C. A. 234, 33 Am. Bankr. Rep. 74.

If it is voidable only at the instance of a creditor who has taken some positive step, such as attaching the property or otherwise fixing a lien upon it, then it may be avoided by the trustee only in case a superior position has been gained by some creditor whom he represents or whose place he is entitled to take, before the recording.[126] Thus, if the law of the state is such that a chattel mortgage is voidable only in favor of a creditor who fixes a lien on the property before the instrument is recorded, and if it is in fact recorded before the bankruptcy proceedings and before any creditor has acquired superior rights, though within the four months' period, it is valid as against the trustee, because the latter acquires his lien or status as a lien creditor only upon and by the bankruptcy proceedings.[127] It is true, however, that a mortgage given by a bankrupt, though for a valid consideration and valid as between the parties, if withheld from record in pursuance of an agreement between them, so as not to impair the mortgagor's credit, may be set aside at the suit of his trustee as a fraudulent transaction.[128] But the mere failure to record the instrument is not sufficient evidence of an agreement between the bankrupt and the mortgagee to withhold it from record for improper purposes.[129] Finally, it should be remembered that although an instrument may escape the charge of being a fraudulent transfer, the circumstances may still be such as to render it voidable as a preference.[130]

§ 455. Transfers Fraudulent as to Partnership or Individual Creditors.—The trustee of a bankrupt partnership can sue to set aside fraudulent transfers of its property or assets on the same grounds and under the same conditions as in the case of an individual bankruptcy.[131] But since the bankruptcy of a firm does not necessarily involve that of its members, the distinction must be carefully drawn between transfers or conveyances by the firm and such as are made by the partners individually. Thus, the validity of a mortgage given by the partnership as such is not affected by bankruptcy proceedings within four months thereafter against one of the partners alone.[132] It is a fundamental rule of

[126] Bradley v. Robie (C. C. A.) 266 Fed. 884, 46 Am. Bankr. Rep. 93; In re Brown (D. C.) 228 Fed. 533, 35 Am. Bankr. Rep. 826; In re Bradley (D. C.) 263 Fed. 446, 45 Am. Bankr. Rep. 30; American Laundry Machinery Co. v. Everybody's Laundry, 185 Iowa, 760, 171 N. W. 161.

[127] Martin v. Commercial Nat. Bank, 245 U. S. 513, 38 Sup. Ct. 176, 62 L. Ed. 441, 40 Am. Bankr. Rep. 765.

[128] National Bank of Athens v. Shackelford, 208 Fed. 677, 125 C. C. A. 575, 31 Am. Bankr. Rep. 464.

[129] In re Anderson (D. C.) 252 Fed. 272, 41 Am. Bankr. Rep. 731.

[130] Bunch v. Maloney, 233 Fed. 967, 147 C. C. A. 641, 37 Am. Bankr. Rep. 369.

[131] Barker v. Franklin, 37 Misc. Rep. 292, 75 N. Y. Supp. 305; Shainwald v. Lewis (D. C.) 6 Sawy. 556, 6 Fed. 753; Hull v. Hudson, 9 Del. Ch. 205, 80 Atl. 674.

[132] McNair v. McIntyre, 113 Fed. 113, 51 C. C. A. 89, 7 Am. Bankr. Rep. 638.

equity as well as of bankruptcy that partnership assets are for partnership creditors and individual assets for individual creditors,[133] and any attempt to appropriate assets of the one class to the satisfaction of creditors of the other class is fraudulent in law. Hence where an insolvent partnership, within four months prior to its bankruptcy, incumbers its property to secure the individual debt of one partner, or pays such debt with firm assets, the transfer is voidable by the trustee,[134] unless in the case where all who were creditors of the firm at the time consented to the transaction or were paid off before the bankruptcy.[135] Again, the dissolution of a partnership while insolvent, and the division of the firm property among the partners, to be held as their individual property, thus giving individual creditors a more advantageous position than firm creditors, the latter being justly and equitably entitled to priority of payment from such property, is contrary to the whole theory of the bankruptcy law; and where such dissolution takes place within four months before the firm is adjudged bankrupt, it will be treated as a void transfer, and the property in the hands of both partners will be treated as firm property, without regard to any actual fraudulent intention on their part.[136] More especially, a pretended dissolution of a partnership, with a fraudulent intention to place the continuing partner in such a position that he could claim individual exemptions in bankruptcy out of the firm's assets is ineffectual as against partnership creditors.[137] Different problems arise where one of the partners of an insolvent firm sells and transfers his entire interest in the firm and its business to his co-partner, the latter agreeing to assume the firm debts. Such a transfer is not necessarily fraudulent and voidable under the bankruptcy law,[138] but it is so if made in contemplation of the bankruptcy of the continuing partner and with no bona fide expectation of continuing the business,[139] or if the sale was fictitious, the money paid being covertly returned to the buyer and afterwards used in the firm's business.[140] And a chattel mortgage taken by the retiring partner and covering all the goods in stock and to be acquired, and which is by agreement kept from the record, is fraudulent and void as to subsequent creditors.[141] So also,

[133] Supra, § 123.

[134] In re W. J. Floyd & Co., 156 Fed. 206, 19 Am. Bankr. Rep. 438. But see Crawford v. Sternberg, 220 Fed. 73, 135 C. C. A. 641, 33 Am. Bankr. Rep. 677.

[135] Merchants' Bank v. Thomas, 121 Fed. 306, 57 C. C. A. 374, 10 Am. Bankr. Rep. 299; Thompson v. First Nat. Bank, 84 Miss. 54, 36 South. 65.

[136] In re Head, 114 Fed. 489, 7 Am. Bankr. Rep. 556; In re Terens, 175 Fed. 495, 23 Am. Bankr. Rep. 680. See Hodgskin v. Heim, 33 Misc. Rep. 548, 67 N. Y. Supp. 876.

[137] In re Abrams, 193 Fed. 271, 34 Am. Bankr. Rep. 552.

[138] In re Rudnick, 102 Fed. 750, 4 Am. Bankr. Rep. 531.

[139] In re Byrne, 1 N. B. R. 464, Fed. Cas. No. 2,270.

[140] Burrill v. Lawry, 2 Hask. 228, 18 N. B. R. 367, Fed. Cas. No. 2,199.

[141] In re Stephens, 3 Biss. 187, 6 N. B. R. 533, Fed. Cas. No. 13,365.

where a firm which became bankrupt paid a substantial sum of money to one of the partners in return for his investment in the business, after he saw that it was not going to be profitable, and when the partners knew that the financial condition of the firm was precarious, it was held that this constituted a withdrawal of the partner's interest before the firm's debts were paid, and he was therefore bound to repay the amount to the firm's trustee in bankruptcy.[142]

§ 456. Property or Rights Transferred.—Under the provisions of the Bankruptcy Act relating to fraudulent transfers of "property," that term is taken in a very wide sense. It may include money, if a payment is made with a purpose to benefit one creditor at the expense of others or to defeat the operation of the bankruptcy law.[143] It may include a growing crop on land owned or rented by the debtor,[144] or a piece of jewelry given to a friend.[145] It may include the furniture and other belongings of the debtor's own house, when given to his wife without consideration and while he is insolvent.[146] It may also include a lease or leasehold interest, if it has value,[147] or a claim for money or other chose in action,[148] or the salary of a city official, when assigned by him in fraud of his creditors,[149] or a policy of life insurance having a cash surrender value,[150] or a paid-up endowment life policy taken out by the bankrupt, the insured, and transferred to his wife.[151] But since creditors can be defrauded only by the transfer of something to which they might have had recourse for the satisfaction of their claims, the statute does not apply to a transfer of real property in which the bankrupt had no beneficial interest though he held the legal title, such title being held merely in trust for his wife.[152] And the trustee in bankruptcy cannot maintain an action to recover property which never stood in the bankrupt's name, although he paid the price of it, when it was transferred directly from the seller to a third person, notwithstanding this course was taken in pursuance of a purpose, on the part of the bankrupt and the person taking the title, to hinder and defraud creditors, since the property cannot be said to have

[142] In re Rosenthal (D. C.) 200 Fed. 190, 29 Am. Bankr. Rep. 515.

[143] Smith v. Powers (D. C.) 255 Fed. 582, 43 Am. Bankr. Rep. 303; Wartell v. Moore (C. C. A.) 261 Fed. 762, 44 Am. Bankr. Rep. 624.

[144] Crawford v. Broussard, 260 Fed. 122, 171 C. C. A. 158, 43 Am. Bankr. Rep. 603, 44 Am. Bankr. Rep. 187.

[145] Pollock v. Simon (D. C.) 205 Fed. 1005, 30 Am. Bankr. Rep. 390.

[146] In re Pierce, 7 Biss. 426, 15 N. B. R. 449, Fed. Cas. No. 11,139.

[147] Jones v. Slauson, 33 Fed. 632; Lyon v. Moore, 259 Ill. 23, 102 N. E. 179.

[148] O'Sullivan's Trustee v. Douglass, 98 S. W. 990, 30 Ky. Law Rep. 366. See Williamson v. Colcord, 1 Hask. 620, 13 N. B. R. 319, Fed. Cas. No. 17,752.

[149] O'Sullivan's Trustee v. Douglass, 98 S. W. 990, 30 Ky. Law Rep. 366.

[150] Kirkpatrick v. Johnson, 197 Fed. 235, 28 Am. Bankr. Rep. 291.

[151] Bailey v. Wood, 202 Mass. 549, 89 N. E. 147, 25 L. R. A. (N. S.) 722.

[152] Phillips v. Kleinman, 232 Pa. St. 571, 81 Atl. 648.

been transferred by the bankrupt.[153] So also with respect to exempt property. Since this could not in any event be reached by creditors, they are not defrauded by its transfer. And any mortgage or conveyance of a homestead or other exempt property which would be good against the debtor under the state law will also be good against his trustee in bankruptcy.[154] And in some of the federal courts (following the local law and decisions) it is held that the use of money or of the proceeds of non-exempt property by an insolvent debtor to purchase a homestead, or to discharge a lien thereon, is not fraudulent and does not invalidate his claim to the homestead exemption, or give his trustee in bankruptcy the right to subject the homestead to a lien for the amount so diverted from his creditors.[155]

§ 457. Time of Conveyance or Transfer.—The sixty-seventh section of the bankruptcy act gives to a trustee in bankruptcy the right to avoid any conveyance, transfer, assignment, or incumbrance of the bankrupt's property which would be fraudulent and voidable as to his creditors under the principles of the common law, or which would be held null and void as to such creditors under the laws of the state where the property is situated, but expressly limits this right to transactions occurring within four months prior to the filing of the petition in bankruptcy. Therefore if no petition in bankruptcy is filed by or against the debtor until more than four months have elapsed after a sale or other transfer of property by him, or the giving of a mortgage thereon, or a gift or a preferential payment or an assignment for creditors, the transaction will remain valid so far as the bankruptcy law is concerned, and cannot be impeached by a trustee in bankruptcy subsequently appointed.[156] But the transfer must have been made, or the lien given, more than four months before the bankruptcy. If made or given within that period, it will not be saved by the fact that it merely carried into effect an agreement entered into

[153] London v. Epstein, 138 App. Div. 513, 123 N. Y. Supp. 399.

[154] In re National Grocer Co., 181 Fed. 33, 24 Am. Bankr. Rep. 360; Cowan v. Burchfield, 180 Fed. 614, 25 Am. Bankr. Rep. 293; Hackney v. First Nat. Bank, 68 Neb. 588, 94 N. W. 805, 98 N. W. 412. See Bohannon v. Clark, 78 S. W. 479, 25 Ky. Law Rep. 1710.

[155] In re Wilson, 123 Fed. 20, 59 C. C. A. 100, 10 Am. Bankr. Rep. 522; Gray v. Brunold, 140 Cal. 615, 74 Pac. 303. Contra, In re Boston, 98 Fed. 587, 3 Am. Bankr. Rep. 388.

[156] Sturdivant Bank v. Schade (C. C. A.) 195 Fed. 188, 27 Am. Bankr. Rep. 673; In re Shinn, 185 Fed. 990, 25 Am. Bankr. Rep. 833; Little v. Holley-Brooks Hardware Co., 133 Fed. 874, 67 C. C. A. 46, 13 Am. Bankr. Rep. 422; In re Kindt, 101 Fed. 107, 4 Am. Bankr. Rep. 148; Joseph v. Raff, 176 N. Y. 611, 68 N. E. 1118; Murphy v. W. T. Murphy & Co., 126 Iowa, 57, 101 N. W. 486; McIntire v. Jennings, 38 Wash. 119, 80 Pac. 278; Eason v. Garrison, 36 Tex. Civ. App. 574, 82 S. W. 800; Watson v. Taylor, 21 Wall. 378, 22 L. Ed. 576; In re Braus, 248 Fed. 55, 160 C. C. A. 195, 40 Am. Bankr. Rep. 668; Johnson v. Wilson (D. C.) 217 Fed. 99, 33 Am. Bankr. Rep. 518; First Nat. Bank v. Exchange Nat. Bank, 179 App. Div. 22, 153 N. Y. Supp. 818, 164 N. Y. Supp. 1092. See In re Taylor, 95 Fed. 956; Merrill v. Hussey, 101 Me. 439, 64 Atl. 819.

at an earlier date.[157] Again, it is the date when the transfer or incumbrance is executed, not the date when it is recorded, which fixes the question of its validity in bankruptcy.[158] This may seem inequitable as to creditors, who may have no means of discovering an unrecorded mortgage or the like. But it is a necessary deduction from the language of the statute, which takes the time of recording an instrument as the starting point for the period of limitations in two particular cases, namely, with reference to the time when a petition must be filed after the commission of an act of bankruptcy and with reference to the recovery of preferences, but makes no mention whatever of such an exception to the period of limitation prescribed by the section relating to fraudulent conveyances. Under former bankruptcy laws, it was held that the trustee might recover property conveyed away by the bankrupt with intent to defraud his creditors, though the conveyance was made before the passage of the bankruptcy act.[159] But in view of the fact that the present statute speaks of conveyances, etc., made "subsequent to the passage of this act," the contrary rule must now be applied.[160] Although the statute makes no specific provision covering the case of a sale or transfer of property by the bankrupt after the filing of the petition against him, yet such an attempt to control the disposition of his assets is of course a fraud upon the law itself, and is clearly voidable by the trustee in bankruptcy, at least when made to a party chargeable with knowledge of the facts.[161]

But another part of the bankruptcy act provides that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred,

[157] Vitzthum v. Large, 162 Fed. 685, 20 Am. Bankr. Rep. 666. But compare Goodnough Mercantile & Stock Co. v. Galloway, 171 Fed. 940, 22 Am. Bankr. Rep. 803. And see Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co. (C. C. A.) 175 Fed. 335, 23 Am. Bankr. Rep. 595, holding that property delivered by a bankrupt in good faith within four months prior to the bankruptcy on a previous contract of sale does not vest in the trustee, even though the transfer may be voidable as a preference.

[158] Bonner v. First Nat. Bank, 248 Fed. 692, 160 C. C. A. 592, 41 Am. Bankr. Rep. 60; Davis v. Hanover Savings Fund Society, 210 Fed. 768, 127 C. C. A. 318, 31 Am. Bankr. Rep. 368; Getman v. Lippert, 171 App. Div. 536, 157 N. Y. Supp. 867; Underleak v. Scott, 117 Minn. 136, 134 N. W. 731; Dean v. Plane, 96 Ill. App. 428, affirmed, 195 Ill. 495, 63 N. E. 274. Contra, Cartwright v. West, 185 Ala. 41, 64 South. 293; Sieg v. Greene, 225 Fed. 955, 141 C. C. A. 79, Ann. Cas. 1917C, 1006, 35 Am. Bankr. Rep. 150; In re Tysor-Cheatham Mercantile Co. (D. C.) 178 Fed. 733, 24 Am. Bankr. Rep. 434; Arnold v. Eastin's Trustee, 116 Ky. 686, 76 S. W. 855, 25 Ky. Law Rep. 895.

[159] Bradshaw v. Klein, 2 Biss. 20, 1 N. B. R. 542, Fed. Cas. No. 1,790; Carr v. Hilton, 1 Curt. 230, Fed. Cas. No. 2,436; In re Hollenshade, 2 Bond, 210, 2 N. B. R. 651, Fed. Cas. No. 6,610; In re Rosenfield, 1 N. B. R. 575, Fed. Cas. No. 12,058; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494.

[160] In re Brown, 91 Fed. 358; Gardner v. Haines, 19 S. D. 514, 104 N. W. 244. Compare Shelley v. Nolen, 39 Tex. Civ. App. 307, 88 S. W. 524.

[161] In re Denson, 195 Fed. 854, 28 Am. Bankr. Rep. 158.

unless he was a bona fide holder for value prior to the date of the adjudication." [162] It is very difficult to reconcile this broad and sweeping declaration with the more precise details concerning fraudulent conveyances given in the sixty-seventh section of the act. As stated in an earlier part of this chapter,[163] a reasonable construction of the act as a whole would lead to the conclusion that this declaration was not meant to add anything to the description of conveyances and incumbrances which should be voidable in bankruptcy, but should be taken merely as an explicit affirmation of the trustee's right of action in such cases. But it omits any mention of a limitation of time within which the transfer of property must have been made, and the courts have unanimously decided that, if a trustee in bankruptcy bases his suit distinctly on this provision of the statute,—that is, on his statutory right to avoid any transfer of property which any creditor of the bankrupt might have avoided,—then it is immaterial whether the transfer or conveyance which he attacks was made more or less than four months before the filing of the petition in bankruptcy.[164] But the opinion has been advanced that, in this case, a recovery by the trustee will inure to the benefit of only those creditors whose claims antedated the conveyance or transfer set aside.[165]

§ 458. Insolvency of Debtor.—As before stated, subdivision "e" of the sixty-seventh section of the bankruptcy act is divisible into two parts, the former relating to conveyances or incumbrances of property fraudulent as against creditors under the principles of the common law, and the latter to transfers of property held null and void as against creditors by the law of the state. The latter provision requires that the transfer shall have been made by the bankrupt "while insolvent;" the former contains no such restriction. Yet an intent to "hinder, delay, or defraud" creditors in the act of conveying or incumbering property is seldom if ever compatible with a condition of solvency. Hence the re-

[162] Bankruptcy Act 1898, § 70e.

[163] Supra, § 445.

[164] Stellwagen v. Clum, 245 U. S. 605, 38 Sup. Ct. 215, 62 L. Ed. 507, 41 Am. Bankr. Rep. 1; Cooper Grocery Co. v. Penland, 247 Fed. 480, 159 C. C. A. 534, 40 Am. Bankr. Rep. 589; Scales v. Holje, 41 Cal. App. 733, 183 Pac. 308; Riggs v. Price, 277 Mo. 333, 210 S. W. 420; Thomas v. Fletcher, 153 Fed. 226, 18 Am. Bankr. Rep. 623; In re Toothaker Bros., 128 Fed. 187, 12 Am. Bankr. Rep. 99; In re Schenck, 116 Fed. 554, 8 Am. Bankr. Rep. 727; Cartwright v. West, 155 Ala. 619, 47 South. 93; Commercial State Bank & Trust Co. v. Bates, 96 Miss. 386, 51 South. 599; Joseph v. Raff, 176 N. Y. 611, 68 N. E. 1118; Treseder v. Burgor, 130 Wis. 201 109 N. W. 957; Friedman v. Verschofsky, 105 Ill. App. 414; Sharp v. Fitzhugh, 75 Ark. 562, 88 S. W. 929; Boyd v. Arnold, 103 Ark. 105, 146 S. W. 118; Underleak v. Scott, 117 Minn. 136, 134 N. W. 731; Cookingham v. Ferguson, 8 Blatchf. 488, 4 N. B. R. 635, Fed. Cas. No. 3,182; Cady v. Whaling, 7 Biss. 430, Fed. Cas. No. 2,285; In re Herpich, 7 Biss. 387, 15 N. B. R. 426, Fed. Cas. No. 6,418; Knowlton v. Moseley, 105 Mass. 136. Compare Smith v. Seibel (D. C.) 258 Fed. 454, 44 Am. Bankr. Rep. 499.

[165] American Trust & Savings Bank v. Duncan, 254 Fed. 780, 166 C. C. A. 226, 43 Am. Bankr. Rep. 7.

quirement of insolvency, expressly stated in the latter part of the subdivision, may fairly be read into the former part by implication. And it follows as a general rule that a conveyance or incumbrance of property made at a time when the debtor was solvent is not voidable at the suit of his trustee, although bankruptcy follows within four months.[166] And if the trustee, in such an action, does not allege insolvency at the date of the transfer or offer evidence tending to show that fact, the court will presume that the bankrupt was solvent at that time.[167] But the opinion has sometimes been advanced that a transfer of property is voidable by the trustee if the remaining assets of the debtor would be insufficient to pay his debts, or in other words that, although he may have been solvent before making the particular transfer of property which is in question, yet if that transfer left him insolvent, the statute is satisfied.[168] And this doctrine derives some support from the declaration of the bankruptcy act that a person shall be deemed insolvent when his property, exclusive of that conveyed in fraud of creditors, is insufficient in amount, at a fair valuation, to pay his debts.[169] But it is thought that this general definition cannot prevail over the explicit provision of the statute that a fraudulent conveyance shall be void if made by the bankrupt "while insolvent." This obviously means that he must be insolvent before and at the moment of making the transfer. If he is solvent then, it can scarcely be said that the transfer was made "while" insolvent, merely because its effect is to leave him with insufficient assets. And this latter view is supported by cases of respectable authority.[170] But when the point at which insolvency becomes material has been determined, the condition itself is to be ascertained by applying the statutory definition, taking into account all the primary and contingent indebtedness of the bankrupt and all his property, the latter at a fair valuation.[171]

But under section 70e of the Bankruptcy Act, the trustee may avoid

[166] Adams v. Collier, 122 U. S. 382, 7 Sup. Ct. 1208, 30 L. Ed. 1207; Butcher v. Cantor, 185 Fed. 945, 26 Am. Bankr. Rep. 424; Metropolitan Nat. Bank v. Rogers, 53 Fed. 776, 3 C. C. A. 666; Richardson v. Winnissimmet Nat. Bank, 189 Mass. 25, 75 N. E. 97; Mercer's Trustee v. Mercer, 74 S. W. 285, 24 Ky. Law Rep. 2469; Dutton v. Cloar, 26 Tex. Civ. App. 547, 65 S. W. 70; Schilling v. Curran, 30 Mont. 370, 76 Pac. 998; In re Cornwall, 9 Blatchf. 114, 6 N. B. R. 305, Fed. Cas. No. 3,250; Sedgwick v. Wormser, 7 N. B. R. 186, Fed. Cas. No. 12,626; Sedgwick v. Lynch, 5 Ben. 489, 8 N. B. R. 289, Fed. Cas. No. 12,615; In re Sola e Hijo (C. C. A.) 261 Fed. 822, 44 Am. Bankr. Rep. 372; In re Stringer, 253 Fed. 352, 165 C. C. A. 134, 41 Am. Bankr. Rep. 510.

[167] Schilling v. Curran, 30 Mont. 370, 76 Pac. 998.

[168] National Bank & Loan Co. v. Spencer, 53 App. Div. 547, 65 N. Y. Supp. 1001; Hamlin v. Arbolino, 72 Misc. Rep. 190, 131 N. Y. Supp. 45. See Weld v. McKay, 218 Fed. 807, 134 C. C. A. 495, 34 Am. Bankr. Rep. 52.

[169] Bankruptcy Act 1898, § 1, clause 15.

[170] Upson v. Mt. Morris Bank, 103 App. Div. 367, 92 N. Y. Supp. 1101; Schilling v. Curran, 30 Mont. 370, 76 Pac. 998; Owens v. Daniel, 230 Fed. 101, 144 C. C. A. 399, 36 Am. Bankr. Rep. 433.

[171] Rutland County Nat. Bank v. Graves, 156 Fed. 168, 19 Am. Bankr. Rep.

any transfer by the bankrupt which any creditor of the latter might have avoided under the laws of the state, without regard to the bankrupt's condition of solvency or insolvency at the date of the transfer.[172]

§ 459. Intention of Debtor.—In the case of conveyances held null and void as to creditors under the laws of the particular state, it is probably not necessary to show an actual fraudulent purpose on the part of the debtor, in order to avoid them in bankruptcy, since these laws usually apply to cases of constructive, technical, or presumed fraud.[173] But where an action to avoid a conveyance or incumbrance is based on the provision of the bankruptcy law which makes such transfers or liens voidable when made within four months prior to bankruptcy and "with the intent and purpose to hinder, delay, or defraud his creditors, or any of them," an actual fraudulent purpose on the part of the debtor is an essential element of the trustee's right of action, and unless it is affirmatively established the transaction must stand good.[174] It is not enough to show that the necessary consequence of the transfer or incumbrance is to hinder creditors in enforcing their claims, or that it defrauds them in the sense of leaving the debtor insolvent or even penniless, or that the property so disposed of was more in value than the debtor could rightfully withdraw from the reach of his creditors.[175] The statute cannot be read as denouncing any transfer which produces a given result, irrespective of the motive. On the contrary it is aimed only at such conveyances as would be fraudulent and voidable at common law or under the statute of Elizabeth, and under the bankruptcy act, as in those cases, an actual fraudulent intent on the part of the debtor is essential.[176] Thus, a sale, payment, or mortgage made in

446; Bailey v. Wood, 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913A, 950; Gill v. Ely-Norris Safe Co., 170 Mo. App. 478, 156 S. W. 811.

[172] Baldwin v. Kingston (D. C.) 247 Fed. 163, 40 Am. Bankr. Rep. 641; Holbrook v. International Trust Co., 220 Mass. 150, 107 N. E. 665; Buttz v. James, 33 N. D. 162, 156 N. W. 547.

[173] Lavender v. Bowen (Iowa) 101 N. W. 760.

[174] Van Iderstine v. National Discount Co., 174 Fed. 518, 98 C. C. A. 300, 23 Am. Bankr. Rep. 345; Coder v. Arts, 152 Fed. 943, 82 C. C. A. 91, 18 Am. Bankr. Rep. 513; In re Kayserm, 177 Fed. 383, 100 C. C. A. 615, 24 Am. Bankr. Rep. 174; Rutland County Nat. Bank v. Graves, 156 Fed. 168, 19 Am. Bankr. Rep. 446; In re Burnstine, 131 Fed. 828, 12 Am. Bankr. Rep. 596; Thompson v. Fairbanks, 75 Vt. 361, 56 Atl. 11, 104 Am. St. Rep. 899 (affirmed, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, 13 Am. Bankr. Rep. 437); Conley v. Nelin (Tex. Civ. App.) 128 S. W. 424; Barnard v. Davis, 54 Ala. 565; Vowinkel v. Moser, 213 Pa. St. 587, 63 Atl. 130. But if a conveyance was made with an intent on the part of the bankrupt to defraud his creditors, it is voidable, though free from any moral turpitude. Reed v. Chase (Mass.) 130 N. E. 257.

[175] Adams v. Collier, 122 U. S. 382, 7 Sup. Ct. 1208, 30 L. Ed. 1207. See Bryant v. Wolf, 94 Misc. Rep. 683, 158 N. Y. Supp. 678.

[176] Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, 22 Am. Bankr. Rep. 1; Sargent v. Blake, 160 Fed. 57, 87 C. C. A. 213, 17 L. R. A. (N. S.) 1040, 15 Ann. Cas. 58, 20 Am. Bankr. Rep. 115; In re Braus, 248 Fed. 55, 160 C. C. A. 195, 40 Am.

good faith and for the honest purpose of discharging a debt, and in the expectation that by so doing the person could continue in business, cannot be set aside as a fraudulent transfer, whatever may be the effect on the other creditors,[177] nor would it be voidable where a fair and honest sale of property was made with the particular view of keeping out of bankruptcy.[178] Such a transaction might indeed be voidable as a preference, but that would be under a different provision of the bankruptcy act and would require, on the part of the creditor receiving it, knowledge or reasonable cause to believe that a preference was intended. On similar principles, though a man is insolvent, he may give to his wife a reasonable and suitable amount of money for current household expenses,[179] and a transfer of exempt property is not voidable by the trustee.[180] But a conveyance of property by a debtor for the purpose of compelling a creditor to compromise, by the hindrance and delay thereby occasioned, is voidable as to all creditors.[181]

§ 460. Same; Intention as to Future Creditors.—A conveyance or transfer by a person who afterwards becomes bankrupt may be avoided by the trustee as a fraud upon creditors whose claims accrued after the conveyance or transfer, that is, if it was made by the bankrupt with the expectation of incurring future debts and with a distinct purpose to hinder or defraud those who should subsequently become his creditors.[182] But this cannot be the case with regard to debts which the bankrupt then did not expect to incur or creditors whose existence he then had no reason to anticipate.[183] Questions of this kind, however, most frequently arise where a person puts his property in the name of his wife or children, and afterwards incurs debts and becomes bankrupt.

Bankr. Rep. 668; Johnson v. Barrett (D. C.) 237 Fed. 112, 38 Am. Bankr. Rep. 464; Boise v. Talcott (C. C. A.) 264 Fed. 61, 45 Am. Bankr. Rep. 117; Jackson v. Jetter, 160 Iowa, 571, 142 N. W. 431; Bryant v. Wolf, 94 Misc. Rep. 683, 158 N. Y. Supp. 678; Kentucky Bank & Trust Co. v. Pritchett, 44 Okl. 87, 143 Pac. 338. The law implies a fraudulent intent from a debtor's conveyance with a secret trust reserved for his benefit. Devorkin v. Security Bank & Trust Co., 243 Fed. 171, 156 C. C. A. 37, 39 Am. Bankr. Rep. 738. A mortgage given by a bankrupt to secure advances to be made to a corporation of which he was an officer and stockholder, and on whose paper he was indorser, to be used in carrying out contracts in which he was vitally interested, is not necessarily fraudulent nor preferential. Angle v. Bankers' Surety Co. (D. C.) 210 Fed. 289, 32 Am. Bankr. Rep. 71; In re Mosher (D. C.) 224 Fed. 739, 35 Am. Bankr. Rep. 284.

[177] Tiffany v. Lucas, 15 Wall. 410, 21 L. Ed. 198. And see Richardson v. Germania Bank, 263 Fed. 320, 45 Am. Bankr. Rep. 351.

[178] Darby v. Lucas, 1 Dill. 164, Fed. Cas. No. 3,573; Mercer v. Warfield's Guardian, 1 Ky. Law Rep. 273.

[179] Gray v. Brunold, 140 Cal. 615, 74 Pac. 303.

[180] Bohannon v. Clark, 78 S. W. 479, 25 Ky. Law Rep. 1710.

[181] Voorheis v. Blanton, 89 Fed. 885, 32 C. C. A. 384.

[182] Greil v. Durr, 203 Ala. 644, 84 South. 743; Lummis v. Crosby, 176 App. Div. 315, 162 N. Y. Supp. 444; Calkins v. Lichtig, 251 Fed. 844, 164 C. C. A. 60, 42 Am. Bankr. Rep. 306.

[183] Greil v. Durr, 203 Ala. 644, 84 South. 743.

It is clearly held that a person who is free from debt, or at any rate abundantly able to meet such debts as he may have, may convey property without consideration to his wife or child, by way of settlement, gift, or advancement, and subsequent creditors cannot attack the transfer merely on the ground of its being voluntary. If it was made in good faith and without any fraudulent purpose at the time, it is not voidable though the grantor thereafter contracts debts, becomes insolvent, and is thrown into bankruptcy.[184] But if a person is engaged in a hazardous business and fears loss, and conveys property to his wife or children as an anchor to protect his family in case of insolvency, or if he takes this course because he is about to embark in new enterprises or speculations and means to secure his property against seizure for the debts which he expects to contract, then the transfer is fraudulent as to those who subsequently become his creditors and will be voidable by his trustee in bankruptcy.[185] "In order to defeat a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do so supervene, the settler proposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable." [186]

§ 461. **Consideration.**—A sale, assignment, or mortgage of property by one who is afterwards adjudged a bankrupt is not voidable at the instance of his trustee if the purchaser or mortgagee took the same in good faith and gave a present consideration fairly proportioned to the value of the property, irrespective of the motive or purpose of the bankrupt.[187] This rule rests not only upon the explicit provisions of

184 Warren v. Moody, 122 U. S. 132, 7 Sup. Ct. 1063, 30 L. Ed. 1108; Savage v. Savage, 141 Fed. 346, 72 C. C. A. 494, 15 Am. Bankr. Rep. 599; Herring v. Richards, 1 McCrary, 570, 3 Fed. 439; Sedgwick v. Place, 5 Ben. 184, 5 N. B. R. 168, Fed. Cas. No. 12,620; Jones v. Clifton, 2 Flip. 191, 18 N. B. R. 125, Fed. Cas. No. 7,457; Anonymous 1 Wall. Jr. 107, Fed. Cas. No. 474.

185 Beasley v. Coggins, 48 Fla. 215, 37 South. 213, 5 Ann. Cas. 801; United States v. Griswold, 7 Sawy. 311, 8 Fed. 556; Barker v. Smith, 2 Woods, 87, 12 N. B. R. 474, Fed. Cas. No. 986; Scott v. Mead, 37 Fed. 865; Sedgwick v. Place, 12 Blatchf. 163, 10 N. B. R. 28, Fed. Cas. No. 12,621; Burdick v. Gill, 2 McCrary, 486, 7 Fed. 668; Antrim v. Kelly, 4 N. B. R. 587, Fed. Cas. No. 494; Case v. Phelps, 39 N. Y. 164, 5 N. B. R. 452; Caller v. McNabb, Fed. Cas. No. 2,322. Compare In re Foss, 147 Fed. 790, 17 Am. Bankr. Rep. 439.

186 Smith v. Vodges, 92 U. S. 183, 23 L. Ed. 481.

187 Watson v. Adams, 242 Fed. 441, 155 C. C. A. 217, 39 Am. Bankr. Rep. 473; In re Baar, 213 Fed. 628, 130 C. C. A. 292; National Bank of Goldsboro v. Hill (D. C.) 226 Fed. 102; In re Paul, 260 Fed. 114, 171 C. C. A. 150; Phillips v. Carter (D. C.) 266 Fed. 444, 46 Am. Bankr. Rep. 33; Lewis v. Julius (D. C.) 212 Fed. 225, 31 Am. Bankr. Rep. 515; Sullivan v. Myer, 137 Tenn. 412, 193 S. W. 124; Potter v. American Printing & Lithographing Co., 182 Iowa, 458, 165 N. W. 1044; Anderson v. J. O. & N. B. Chenault, 208 Fed. 400, 125 C. C. A. 616, 31 Am. Bankr. Rep. 349; Vollmer v. Plage, 186 Fed. 598, 26 Am. Bankr. Rep. 590;

the bankruptcy act,[188] but is also supported by sound reason, because the net result of such a transaction is not to impair the remedies of creditors nor to diminish the aggregate of the assets upon which they may have recourse for the satisfaction of their claims.[189] Even a sale by an insolvent trader of his entire stock in trade, if for its full value, and without any marks of secrecy, haste, or intent to defraud or prefer, cannot be impeached in his subsequent bankruptcy.[190] Although it may be proved or admitted that the transfer was made with intent to defraud creditors, yet if it is also established that the purchaser acted in good faith, then the only question for decision is whether the price paid was a present fair consideration.[191] But the fact of payment and the amount of the consideration must be clearly and fully established by satisfactory evidence.[192]

The consideration may be cash or solvent credit.[193] It may consist in the surrender of securities of equal value,[194] or real property deeded in exchange for other land;[195] or the assumption of the unpaid balance of purchase money due on the property transferred,[196] or the relinquishment of a dower interest in the bankrupt's lands, at least to the extent of the value of the dower released.[197] Marriage may be a good consid-

In re McCord (C. C. A.) 174 Fed. 820, 23 Am. Bankr. Rep. 164; Perry v. Avery, 148 Mich. 211, 111 N. W. 746; Schilling v. Curran, 30 Mont. 370, 76 Pac. 998; Rosenfeld v. Siegfried, 91 Mo. App. 169; Mathews v. Hardt, 79 App. Div. 570, 80 N. Y. Supp. 462; Friedman v. Verchofsky, 105 Ill. App. 414; Piedmont Sav. Bank v. Levy, 138 N. C. 274, 50 S. E. 657, 3 Ann. Cas. 785; In re Pusey, 7 N. B. R. 45, Fed. Cas. No. 11,478; In re Keefer, 4 N. B. R. 389, Fed. Cas. No. 7,636; Flournoy v. Newton, 8 Ga. 306. Where the bankrupt executed a mortgage to induce the defendant to make advances to a construction company, a misapplication of the advances by an officer of the company, with the consent of the bankrupt, furnishes no ground to avoid the mortgage. Angle v. Bankers' Surety Co., 244 Fed. 401, 157 C. C. A. 27, 41 Am. Bankr. Rep. 90.

188 Bankruptcy Act 1898, § 69d, e.

189 For instance, where land purchased with the separate funds of the bankrupt's wife was conveyed to the bankrupt without the consent of the wife, under a promise that the bankrupt would immediately reconvey the land to his wife, who had no knowledge that the conveyance had not been properly made to her in the first instance until shortly before the bankrupt in fact reconveyed the land prior to the bankruptcy, it was held that such reconveyance was not fraudulent as against the trustee in bankruptcy. Young v. Allen, 207 Fed. 318, 125 C. C. A. 68, 30 Am. Bankr. Rep. 261.

190 In re Strenz (D. C.) 8 Fed. 311.

191 Montgomery v. McNicholas (D. C.) 138 Fed. 956, 15 Am. Bankr. Rep. 93.

192 Greensfelder v. Corbett, 190 Ill. 565, 60 N. E. 847.

193 Unmack v. Douglass, 75 Conn. 633, 55 Atl. 12; Grandison v. Robertson, 231 Fed. 785, 145 C. C. A. 605, 36 Am. Bankr. Rep. 452. A mortgage given by one subsequently bankrupt, to induce persons to indorse his note so that he could obtain a loan, is not a preference or fraudulent conveyance. In re Mosher (D. C.) 224 Fed. 739, 35 Am. Bankr. Rep. 284.

194 Shaffer v. Fritchery, 4 N. B. R. 548, Fed. Cas. No. 12,697; First State Bank v. Sibley County Bank, 96 Minn. 456, 105 N. W. 485, 489; Butterfield v. Woodman, 223 Fed. 956, 139 C. C. A. 486, 34 Am. Bankr. Rep. 510. See In re Farrand (D. C.) 235 Fed. 809, 38 Am. Bankr. Rep. 101.

195 Hoffman v. Chicago Title & Trust Co., 198 Ill. 452, 64 N. E. 1027.

196 Unmack v. Douglass, 75 Conn. 633, 55 Atl. 12. See Gray v. Breckheimer, 193 App. Div. 231, 183 N. Y. Supp. 748.

197 Moore v. Green, 145 Fed. 472, 76 C. C. A. 242, 16 Am. Bankr. Rep. 648;

eration for a transfer of property, but not where the gift to the wife consists of house furnishings of large value bought on credit, she having knowledge of the husband's insolvency, and the whole transaction being part of a scheme to defraud his creditors,[198] nor where the woman had a husband living and was therefore incapable of entering into the marriage contract with the bankrupt.[199] So, past services rendered by a relative in the capacity of a housekeeper, which were given gratuitously at the time and not regarded as the foundation of any indebtedness, cannot support a transfer of property as against the trustee in bankruptcy.[200] And in a suit by the trustee to recover the consideration for an annuity purchased by the bankrupt in fraud of creditors, the payments to begin several years later, the execution of the insurance company's executory contract does not constitute a payment of value which would prevent a termination of the contract and recovery of the consideration.[201]

A mortgage, deed of trust, or other form of security, based solely upon an antecedent debt and without any new consideration, is voidable if given within four months before bankruptcy, because it lacks the saving element of a "present fair consideration," because it operates as a preference, and because it is constructively fraudulent, since it removes from the reach of general creditors part of the assets to which they might have had recourse.[202] Where the mortgagor or other lien is given partly to secure an old debt, but partly also in consideration

Baldwin v. Kingston (D. C.) 247 Fed. 163, 40 Am. Bankr. Rep. 641; Greil v. Durr, 203 Ala. 644, 84 South. 743.

[198] Hosmer v. Tiffany, 54 Misc. Rep. 402, 105 N. Y. Supp. 1055. Where the value of property transferred by a bankrupt to his wife was not disproportionate to his pecuniary obligation to support her, in a suit by his trustee against the wife to set aside the conveyance as in violation of the Bankruptcy Act, the equitable doctrine that, where the consideration for a conveyance is inadequate, the conveyance will be sustained to the extent of the consideration actually given, has no application. Baldwin v. Kingston, 257 Fed. 554, 168 C. C. A. 538, 44 Am. Bankr. Rep. 12.

[199] Hosmer v. Tiffany, 115 App. Div. 303, 100 N. Y. Supp. 797.

[200] Bartlett v. Mercer, 8 Ben. 439, Fed. Cas. No. 1,078.

[201] Smith v. Mutual Life Ins. Co., 178 Fed. 510, 24 Am. Bankr. Rep. 514.

[202] Morgan v. First Nat. Bank, 145 Fed. 466, 76 C. C. A. 236, 16 Am. Bankr. Rep. 639; William Firth Co. v. South Carolina Loan & Trust Co., 122 Fed. 569, 59 C. C. A. 73; Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co., 67 N. J. Eq. 602, 60 Atl. 940; Lehrenkrauss v. Bonnell, 138 App. Div. 493, 122 N. Y. Supp. 866; In re Antisdel, 18 N. B. R. 289, Fed. Cas. No. 490; Gillespie v. McKnight, 3 N. B. R. 468, Fed. Cas. No. 5,435; Wilson v. Mitchell-Woodbury Co., 214 Mass. 514, 102 N. E. 119; In re Petersen (D. C.) 252 Fed. 849, 40 Am. Bankr. Rep. 653. But see Hagar v. Watt (D. C.) 232 Fed. 373, 36 Am. Bankr. Rep. 370. Compare Watson v. Adams, 242 Fed. 441, 155 C. C. A. 217, 39 Am. Bankr. Rep. 473, holding that there is nothing inherently fraudulent in a bankrupt's recognizing and paying a debt honestly due to his wife, though it is barred by limitations. That a transfer by a failing husband to his wife, though absolute in form, was in fact a mortgage, does not show that it was fraudulent, where she did not claim the value of the property, but only a lien for a debt. Weld v. McKay, 218 Fed. 807, 134 C. C. A. 495, 34 Am. Bankr. Rep. 52.

of fresh advances, it will constitute a valid lien to the extent of the new consideration (if otherwise unimpeachable) but no further.[203] And indeed, although the consideration may consist wholly of a present loan or advance of money, without including any past debts, still the mortgage will be sustainable in bankruptcy only to the extent of the money actually advanced, with proper interest, not to the extent of an exaggerated or fictitious value recited in the notes or mortgage.[204]

Where the transaction in question is a sale of goods, it will be voidable in bankruptcy if the price paid was so inadequate that it cannot be regarded as a "fair consideration."[205] But if the transfer was made in good faith and for a valuable consideration, it is not necessary, in order to save it, to show strictly that the price paid was fully equal to the value of the property, provided it was not so inadequate as to amount in itself to an actual fraud on creditors.[206] Or, as otherwise stated, the sale will not be set aside on this ground unless there was such a gross inadequacy of price as would put the purchaser upon inquiry as to the fraudulent intent of the seller in disposing of the goods,[207] or such as would impress him with the conviction that the sale could not have been made in good faith.[208]

§ 462. Knowledge, Bad Faith, or Participation of Transferee.—A transfer or incumbrance of property cannot be set aside, although the party making it is insolvent at the time and is adjudged bankrupt within four months, if the person receiving it, in addition to giving a present fair consideration, is a "purchaser in good faith,"[209] even though

[203] In re Grocers' Baking Co. (D. C.) 266 Fed. 900, 46 Am. Bankr. Rep. 150; City Nat. Bank v. Bruce, 109 Fed. 69, 48 C. C. A. 236, 6 Am. Bankr. Rep. 311; Phillips v. Kahn, 96 App. Div. 166, 89 N. Y. Supp. 250; Asbury Park Building & Loan Ass'n v. Shepherd (N. J. Eq.) 50 Atl. 65; Bankruptcy Act 1898, § 67d, as amended by Act Cong. June 25, 1910, 36 Stat. 838.

[204] In re Sawyer (D. C.) 130 Fed. 384, 12 Am. Bankr. Rep. 269; Jackson v. Sedgwick (C. C.) 189 Fed. 508, 26 Am. Bankr. Rep. 836.

[205] Ott v. Doroshow (D. C.) 147 Fed. 762, 17 Am. Bankr. Rep. 417; Myers v. Fultz, 124 Iowa, 437, 100 N. W. 351; Gans v. Weinstein, 83 App. Div. 358, 82 N. Y. Supp. 280.

[206] Meservey v. Roby, 198 Fed. 844, 117 C. C. A. 486, 28 Am. Bankr. Rep. 529. A sale by the directors of a bankrupt corporation shortly before its bankruptcy may be held valid, notwithstanding a subsequent offer of a slightly increased price. In re Copiag-Lindenhurst Co. (D. C.) 240 Fed. 431, 39 Am. Bankr. Rep. 412.

[207] Dunlop v. Thomas, 28 Wash. 521, 68 Pac. 909.

[208] Myers v. Fultz, 124 Iowa, 437, 100 N. W. 351.

[209] Greey v. Dockendorff, 231 U. S. 513, 34 Sup. Ct. 166, 58 L. Ed. 339, 31 Am. Bankr. Rep. 407; Weld v. McKay, 218 Fed. 807, 134 C. C. A. 495, 34 Am. Bankr. Rep. 52; Young v. Allen, 207 Fed. 318, 125 C. C. A. 68, 30 Am. Bankr. Rep. 261; Shelton v. Price (D. C.) 174 Fed. 891, 23 Am. Bankr. Rep. 431; Chicago Title & Trust Co. v. First Nat. Bank, 174 Ill. App. 339; Potter v. American Printing & Lithographing Co., 182 Iowa, 458, 165 N. W. 1044; Knisely v. People's Sav. Bank, 199 Mich. 501, 165 N. W. 673; Coleman v. Dana, 191 Mo. App. 370, 178 S. W. 256; Pratt v. Christie, 95 App. Div. 282, 88 N. Y. Supp. 585; Kennedy v. Pierce's Loan Co., 100 Mo. App. 269, 73

a fraudulent intent on the part of the bankrupt to cheat or obstruct his creditors is fully made out.[210] But on the other hand, if the purchaser or incumbrancer acted in collusion with the bankrupt, participated in his fraudulent purpose, or even had a guilty knowledge of it, the sale or lien cannot stand as against the trustee in bankruptcy.[211] Knowledge on the part of the purchaser or lienor, such as will defeat the transaction, is knowledge that the bankrupt is not acting in good faith and with an honest purpose but is seeking to gain an advantage for himself by defeating or obstructing his creditors,[212] or, as otherwise stated, knowledge that there are equitable claims upon the property in question such as should prevent the debtor from disposing of it in the way and at the price intended.[213] This knowledge may be constructive as well as actual. If there are any circumstances attending the transaction sufficient to arouse the suspicions of an ordinarily careful and prudent person, then the purchaser is bound to exercise ordinary diligence in making and pursuing inquiries in order to ascertain whether or not the seller can make a transfer of the property which will not be in violation of the bankruptcy law, and he will be chargeable with any knowledge which such reasonable inquiries would have revealed.[214] Thus, a voluntary transfer of all his property by a person in failing or insolvent condition is a circumstance so out of the ordinary as to put

S. W. 357; Clarke v. Sherman, 128 Iowa, 353, 103 N. W. 982; Bunnell v. Bronson, 78 Conn. 679, 63 Atl. 396; Lewis v. First Nat. Bank, 46 Or. 182, 78 Pac. 990. Compare Beecher v. Clark, 12 Blatchf. 256, 10 N. B. R. 385, Fed. Cas. No. 1,223.

210 In re Benjamin, 140 Fed. 320, 15 Am. Bankr. Rep. 351; Schilling v. Curran, 30 Mont. 370, 76 Pac. 998. Compare Sherman v. Luckhardt, 67 Kan. 682, 74 Pac. 277; Lehrenkrauss v. Bonnell, 138 App. Div. 493, 122 N. Y. Supp. 866; Clowe v. Seavey, 208 N. Y. 496, 102 N. E. 521; Illoway v. Daly, 65 Pa. Super. Ct. 333.

211 McAtee v. Shade (C. C. A.) 185 Fed. 442, 26 Am. Bankr. Rep. 151; Bolander v. Gentry, 36 Cal. 105, 95 Am. Dec. 162, 2 N. B. R. 655; Crump v. Chapman, 1 Hughes, 183, 15 N. B. R. 571, Fed. Cas. No. 3,455. And see Grant v. National Bank of Auburn, 197 Fed. 581, 28 Am. Bankr. Rep. 712. Compare Lyon v. Wallace, 221 Mass. 351, 108 N. E. 1075. And see Reed v. Chase (Mass.) 130 N. E. 257.

212 In re Soudan Mfg. Co., 113 Fed. 804, 51 C. C. A. 476, 8 Am. Bankr. Rep. 45; Houck v. Christy, 152 Fed. 612, 81 C. C. A. 602, 18 Am. Bankr. Rep. 330. A deed of trust executed to secure a present advancement by the beneficiary, with knowledge of the bankrupt's insolvency, in order to take up notes held by a pressing creditor, with knowledge that foreclosure would result in the reduction of the value of the bankrupt's assets, the payment of a preferred debt, and failure to pay other debts, is constructively fraudulent and invalid under the Bankruptcy Act. Dean v. Davis, 212 Fed. 88, 128 C. C. A. 658, 31 Am. Bankr. Rep. 808.

213 Friedman v. Verchofsky, 105 Ill. App. 414.

214 In re Moody, 134 Fed. 628, 14 Am. Bankr. Rep. 272; In re Calvi, 185 Fed. 642, 26 Am. Bankr. Rep. 206; McWilliams v. Thomas (Tex. Civ. App.) 74 S. W. 596; Gans v. Weinstein, 37 Misc. Rep. 209, 75 N. Y. Supp. 155; Lumpkin v. Foley (C. C. A.) 204 Fed. 372, 29 Am. Bankr. Rep. 673; Lewis v. Julius (D. C.) 212 Fed. 225, 31 Am. Bankr. Rep. 515; Blake v. Thwing, 185 Ill. App. 187. Contra, see Chambers v. Continental Trust Co. (D. C.) 235 Fed. 441, 38 Am. Bankr. Rep. 78.

the transferee upon inquiry, though he himself acted in good faith, and if he could have discovered by such inquiry that it was the purpose of the grantor to defraud his creditors and secure the property for himself and his children, the transfer will be held void.[215] The same rule applies where a bankrupt merchant sells his entire stock of goods. Mere personal good faith on the part of the purchaser is not enough to save the transaction. He should inquire into the transaction to see if a fraud upon creditors is intended, and if he omits to do so, he does not occupy the position of a bona fide purchaser.[216] And mortgaging an entire stock of goods is an act out of the ordinary course of business, and is evidence of the mortgagor's intention to hinder and delay creditors, and charges the mortgagee with notice that the mortgagor is insolvent.[217] But a mortgagee is not to be charged with knowledge of a fraudulent purpose on the part of the debtor merely because he is aware that a large part of the money borrowed is to be used in paying outstanding unsecured debts,[218] nor merely because he has acted as attorney for the bankrupt.[219] On the other hand, where a mortgagor of chattels is selling off the goods for his own use with the consent of the mortgagee, the latter is not a bona fide holder of the mortgage.[220]

An even stronger case is presented where the person taking the property, or acquiring a lien on it, acted in collusion with the seller or mortgagor, not only knowing of his fraudulent purpose, but joining in the transaction for the purpose of assisting him in carrying it out. Here the sale or lien is voidable at the instance of the trustee in bankruptcy, even though it was based upon an honest debt or though the purchaser gave full value.[221] In this connection, an agreement to withhold the deed or mortgage from the record is a suspicious circumstance and one which requires explanation. It is not of itself such evidence of a fraudulent purpose as to constitute fraud in law, and so to warrant setting aside the conveyance or mortgage without more, but it is a fact which constitutes more or less cogent evidence of a want of good

[215] Clowe v. Seavey, 208 N. Y. 496, 102 N. E. 521, 47 L. R. A. (N. S.) 284.

[216] Bentley v. Young (D. C.) 210 Fed. 202, 31 Am. Bankr. Rep. 506.

[217] Pierre Banking & Trust Co. v. Winkler, 39 S. D. 454, 165 N. W. 2.

[218] Van Iderstine v. National Discount Co., 227 U. S. 575, 33 Sup. Ct. 343, 57 L. Ed. 652, 29 Am. Bankr. Rep. 478; In re Soudan Mfg. Co., 113 Fed. 804, 51 C. C. A. 476, 8 Am. Bankr. Rep. 45.

[219] Webb v. Manheim, 109 App. Div. 63, 95 N. Y. Supp. 1003.

[220] Skillen v. Endelman, 39 Misc. Rep. 261, 79 N. Y. Supp. 413; Pierre Banking & Trust Co. v. Winkler, 39 S. D. 454, 165 N. W. 2.

[221] Gorham v. Buzzell, 178 Fed. 596, 24 Am. Bankr. Rep. 440; In re Kyte, 182 Fed. 166, 25 Am. Bankr. Rep. 337; In re Pease, 129 Fed. 446, 12 Am. Bankr. Rep. 66; E. S. Bonnie & Co. v. Perry's Trustee, 117 Ky. 459, 78 S. W. 208; Parker v. Travers, 74 N. J. Eq. 812, 71 Atl. 612; Babbitt v. Walbrun, 6 N. B. R. 359, Fed. Cas. No. 695. And see In re Groezinger, 199 Fed. 935, 28 Am. Bankr. Rep. 732.

faith, according to the particular situation of the parties and the intent as indicated by all the facts and circumstances of the case.[222]

§ 463. Rights and Liabilities of Transferees.—When a sale or incumbrance of property is set aside at the instance of the trustee in bankruptcy as fraudulent in fact, the buyer or lienor having taken in bad faith, with knowledge of the circumstances, or having participated in the bankrupt's fraudulent purpose, such transferee is not entitled to retain any portion of the property, or to receive credit for property or money actually advanced, in other words, he loses any consideration which he may have given for the transfer.[223] Neither is he entitled to reimbursement for the cost of improvements made on the property or for money advanced to reduce incumbrances.[224] And the fact that the fraudulent vendee of real property, prior to accepting an absolute transfer of it from the bankrupt, held a mortgage upon the same property will not entitle him to a lien thereon.[225] But if the transferee acted in good faith, having no knowledge of the fraudulent design of the bankrupt and giving value, and it is therefore decided that the transfer is not void in toto, but only voidable to the extent of the excess of the value of the property over the consideration given, then the transferee is entitled to be protected to the extent of the actual present consideration paid or given,[226] and the trustee cannot have the sale or mortgage

[222] Rogers v. Page, 140 Fed. 596, 72 C. C. A. 164, 15 Am. Bankr. Rep. 502; Cowan v. Burchfield, 180 Fed. 614, 25 Am. Bankr. Rep. 293; Dean v. Plane, 195 Ill. 495, 63 N. E. 274.

[223] Feilbach Co. v. Russell, 233 Fed. 412, 147 C. C. A. 348, 37 Am. Bankr. Rep. 285; In re Friedman (D. C.) 241 Fed. 603, 39 Am. Bankr. Rep. 777; Rubenstein v. Lottow, 220 Mass. 156, 107 N. E. 718; Blake v. Thwing, 185 Ill. App. 187; Johnson v. Cohn, 39 Misc. Rep. 189, 79 N. Y. Supp. 139; Rosenbluth v. De Forrest & Hotchkiss Co., 85 Conn. 40, 81 Atl. 955; Holloway v. Brame, 83 Miss. 335, 36 South. 1; Allen v. French, 180 Mass. 487, 62 N. E. 987; Jackson v. Sedgwick, 193 Fed. 374; Scammon v. Hobson, 1 Hask. 406, Fed. Cas. No. 12,434. A creditor to whom a bankrupt has granted a preference cannot surrender part of the property received in partial reduction of the damages sustained by the estate in bankruptcy. Wilson v. Mitchell-Woodbury Co., 214 Mass. 514, 102 N. E. 119. But a purchaser of property of a corporation within four months prior to the adjudication of the corporation in bankruptcy, who complied with a request of the seller's president by applying a portion of the purchase price toward discharging personal debts incurred for the corporation's benefit, cannot be required to make such payments a second time to the corporation's trustee in bankruptcy. Doughty v. Moors, 41 Cal. App. 664, 183 Pac. 199.

[224] In re Liller, (D. C.) 253 Fed. 845. 42 Am. Bankr. Rep. 621; In re Mead, 19 N. B. R. 81, Fed. Cas. No. 9,365. Compare Sieg v. Greene, 225 Fed. 955, 141 C. C. A. 79, Ann. Cas. 1917C, 1006, 35 Am. Bankr. Rep. 150; In re Bradley (C. C.) 263 Fed. 446, 45 Am. Bankr. Rep. 30.

[225] Railton v. Chicago Title & Trust Co., 125 Ill. App. 617, affirmed 224 Ill. 485, 79 N. E. 600. See Utah Ass'n of Credit Men v. Jones, 49 Utah, 519, 164 Pac. 1029.

[226] In re Howard (D. C.) 207 Fed. 402, 31 Am. Bankr. Rep. 251; Golden & Co. v. Loving, 42 App. D. C. 489; Payne v. Sehon, Stevenson & Co., 81 W. Va. 128, 94 S. E. 34; Jackson v. Sedgwick, 189 Fed. 508, 26 Am. Bankr. Rep. 836; In re Chase, 133 Fed. 79, 13 Am. Bankr. Rep.

cancelled and recover the specific property without returning the consideration received,[227] or giving bonds to secure the transferee for the amount that is found to be due to him.[228] And even though a transfer is set aside as being fraudulent as to the creditors of the grantor, still it may remain good as between the parties to it. Thus, where a deed of land from the bankrupt to his wife is vacated as voluntary and therefore fraudulent, still the wife is entitled to a homestead allowance out of the proceeds of the property.[229] And if the trustee in bankruptcy sues the transferee for the value of the property and recovers a judgment, and the transferee thereupon pays the judgment, he becomes invested with full title to the property itself, in so far as title was vested in the bankrupt or the trustee.[230]

It is sometimes impossible for the fraudulent transferee to restore the property to the trustee in the condition in which he received it, as, for instance, in consequence of a loss by fire. In this case, the rule appears to be that the proceeds of insurance on a building which stood on land which had been conveyed to the insured in fraud of the grantor's creditors do not take the place of the property destroyed, and the grantor's trustee in bankruptcy may not recover them.[231]

Where an assignment of a cause of action constitutes an unlawful preference in bankruptcy, but no steps are taken in the bankruptcy court to set it aside, it is not subject to collateral attack by a defendant in an action of fraud by the assignor to the use of the assignee.[232]

§ 464. Rights of Bona Fide Purchasers.—Although one may have acquired property under such circumstances that the transfer constituted a fraud upon the creditors of the grantor, and therefore may be unable to hold the property as against the grantor's trustee in bank-

294; Paddock v. Fish, 10 Fed. 125; Clowe v. Seavey, 74 Misc. Rep. 254, 131 N. Y. Supp. 817; Weatherwax v. Gorman, 150 Mich. 316, 113 N. W. 1105. And see Unity Banking & Sav. Co. v. Boyden, 159 Fed. 916, 87 C. C. A. 96, 20 Am. Bankr. Rep. 264. Where, after the execution of a fraudulent bill of sale of a certain vessel, the buyer paid various claims which were valid liens thereon, and after the sale had been adjudged void at the instance of the seller's trustee in bankruptcy, the buyer voluntarily surrendered the vessel to the trustee, it was held that the court had no further jurisdiction to require the trustee to reimburse the buyer to the amount of the liens so paid as a condition to decreeing a delivery to the trustee. Arnold v. Eastin's Trustee, 116 Ky. 686, 76 S. W. 855. As to the right of the grantee or lienor to add interest to the amount of his valid claims, see Dean v. Plane, 195 Ill. 495, 63 N. E. 274; Senft v. Lewis, 239 Fed. 116, 152 C. C. A. 158, 39 Am. Bankr. Rep. 240.

227 Sharood v. Jordan, 90 Minn. 249, 95 N. W. 1108.

228 Horton v. Bamford, 79 N. J. Eq. 356, 81 Atl. 761.

229 Smith v. Kehr, 2 Dill. 50, Fed. Cas. No. 13,071, affirmed in Kehr v. Smith, 20 Wall. 31, 22 L. Ed. 313.

230 Thompson v. Toland, 48 Cal. 99.

231 Trenholm v. Klinker, 108 Miss. 263, 66 South. 738, Ann. Cas. 1917E, 289; Underwood v. Winslow, 234 Mass. 550, 125 N. E. 631.

232 Leonard v. Springer, 174 Ill. App. 516.

ruptcy, yet, until proceedings for its recovery are begun, his title is defeasible only and not absolutely void, and therefore he may in the mean time convey a good and unimpeachable title to a third person, and if the latter took in good faith, gave value, and had no notice of the facts which would invalidate the title of his immediate grantor, the trustee in bankruptcy has no remedy against him.[233] The trustee may indeed proceed against the fraudulent grantee and recover judgment for the value of the property transferred,[234] and if the third purchaser gave a mortgage for part of the price, the trustee in bankruptcy may claim the mortgage and the right to enforce it, as representing the bankrupt's creditors,[235] but in no case should the court decree the setting aside of the conveyance from the bankrupt to his immediate grantee, since this would have the effect to cloud the title of the innocent holder.[236] On the same principle, if a fraudulent grantee of property executes a mortgage on the same to one who lends his money in good faith, on the credit of the mortgagor's apparent title and without notice of any claims which might be asserted against that title by the trustee in bankruptcy of the grantor, the rights of such mortgagee must be fully recognized and protected in the bankruptcy proceedings,[237] provided he has recorded his mortgage before the adjudication in bankruptcy.[238] So also, the bankruptcy law does not prevent a creditor of the fraudulent grantee, without notice, from acquiring rights in the property superior to those of the trustee in bankruptcy of the grantor, as, by levying an attachment on the property.[239] So also, the bona fide purchaser of negotiable paper secured by a mortgage, before maturity and without notice, takes the mortgage, as he does the notes, free from equities arising between the previous parties thereto, and also free from any latent equity existing in a trustee in bankruptcy at the time of the assignment of the notes, of which latent equity there is no

[233] Bush v. Export Storage Co., 136 Fed. 918, 14 Am. Bankr. Rep. 138; Paddock v. Fish, 10 Fed. 125; Jarrell v. Harrell, 1 Woods, 476, 7 N. B. R. 400, Fed. Cas. No. 7,222; Dennett v. Mitchell, Fed. Cas. No. 3,789; Judson v. Kelty, 5 Ben. 348, 6 N. B. R. 165, Fed. Cas. No. 7,567; Coolidge v. Ayers, 76 Vt. 405, 57 Atl. 970; Hackney v. First Nat. Bank, 68 Neb. 588, 94 N. W. 805, 98 N. W. 412; Unmack v. Douglass, 75 Conn. 633, 55 Atl. 12; Union Trust & Savings Bank v. Amery, 72 Wash. 648, 131 Pac. 199; Watson v. Adams, 242 Fed. 441, 155 C. C. A. 217, 39 Am. Bankr. Rep. 473; Merrick v. Pattison, 85 Wash. 240, 147 Pac. 1137; Gray v. Breslof (D. C.) 273 Fed. 526.

[234] Hackney v. First Nat. Bank, 68 Neb. 588, 94 N. W. 805, 98 N. W. 412; Gray v. Breslof (D. C.) 273 Fed. 526.

[235] Prescott v. Galluccio, 164 Fed. 618, 21 Am. Bankr. Rep. 229.

[236] Skillin v. Maibrunn, 176 N. Y. 588, 68 N. E. 1124.

[237] Putnam v. Southworth, 197 Mass. 270, 83 N. E. 887; Brooks v. D'Orville, 7 Ben. 485, Fed. Cas. No. 1,951; Sedgwick v. Place, 12 Blatchf. 163, 10 N. B. R. 28, Fed. Cas. No. 12,621; Angle v. Bankers' Surety Co., 244 Fed. 401, 157 C. C. A. 27, 41 Am. Bankr. Rep. 90.

[238] Putnam v. Southworth, 197 Mass. 270, 83 N. E. 887.

[239] In re Mullen, 101 Fed. 413, 4 Am. Bankr. Rep. 224.

notice actual or constructive.[240] And therefore he is entitled to protection and to the benefit of his security, as against the trustee, although his immediate vendor held it under such circumstances of fraud as would have made him liable to an action by the trustee to set aside the security.[241]

But a purchaser from the fraudulent grantee may of course be chargeable with the consequences of the original fraud, if he knew of it. But this must be clearly made out. The mere fact that there was something unusual in the original transaction (as, that it embraced the whole of a stock of goods) may not be enough to charge him with notice.[242] But if he had reasonable cause to believe that the transfer was fraudulent, or was aware of suspicious circumstances and omitted to make proper inquiries, he cannot claim to occupy the position of an innocent purchaser without notice.[243] And although the mere institution of proceedings in bankruptcy does not give constructive notice to third persons that they must be on their guard in dealing with property which the bankrupt had previously conveyed or incumbered, because there may be ground to attack such conveyance or incumbrance as fraudulent,[244] yet after the trustee in bankruptcy has begun his action to set aside a transfer of property as fraudulent, no third person can acquire a good title to it from the defendant in that action.[245]

§ 465. **Jurisdiction, Form of Action, Parties, and Pleading.**—A suit by a trustee in bankruptcy to set aside an alleged fraudulent conveyance by the bankrupt may be maintained either in the court of bankruptcy or in any state court which would have had jurisdiction of a similar action by the creditors; for this purpose the jurisdiction of the two courts is concurrent.[246] But when the court of bankruptcy has taken

[240] In re Schwarz, 200 Fed. 309, 29 Am. Bankr. Rep. 700. This rule is firmly settled so far as the federal courts are concerned, by the decision in Carpenter v. Longan, 16 Wall. 271, 21 L. Ed. 313, though it must be admitted that elsewhere there is considerable conflict of authority upon the question. See Clement v. Saratoga Holding Co., 161 App. Div. 898, 145 N. Y. Supp. 628, holding that the purchaser must bring himself within the definition of a bona fide holder under the Bankruptcy Act, and not merely within the definitions of a state law on the subject of negotiable instruments.

[241] Myers v. Hazzard, 4 McCrary, 94, 50 Fed. 155.

[242] Babbitt v. Walbrun, 1 Dill. 19, 4 N. B. R. 121, Fed. Cas. No. 694. See Faulkner v. Kaplon, 203 Fed. 114. The purchaser of mortgaged premises is not charged with notice of the mortgagor's fraudulent intent as to creditors by his knowledge of the fact that the mortgage was not recorded, that the parties to it were brothers-in-law, that the mortgagor was heavily indebted, or that he retained possession of the property after the mortgage. Kimbrough v. Alred, 202 Ala. 413, 80 South. 617.

[243] Darby v. Lucas, 1 Dill. 164, Fed. Cas. No. 3,573; In re Moody, 134 Fed. 628, 14 Am. Bankr. Rep. 272.

[244] In re Mullen, 101 Fed. 413, 4 Am. Bankr. Rep. 224; Paddock v. Fish, 10 Fed. 125.

[245] Brewster v. Goff, 164 Fed. 127, 21 Am. Bankr. Rep. 239.

[246] Johnston v. Forsyth Mercantile Co., 127 Fed. 845, 11 Am. Bankr. Rep. 669; Carter v. Hobbs, 92 Fed. 594, 1 Am.

jurisdiction, any proceedings in the state court which would interfere with the full exercise of that jurisdiction or with its control of the property in suit may be restrained.[247] Formerly, a suit of this character might also be brought in a federal circuit court.[248] And under the present statute it appears that a non-resident defendant may be sued in the federal district court of the district where he is domiciled, since jurisdiction is given to "any" court of bankruptcy.[249] Where an action of this kind has been begun in a United States court by judgment creditors, its jurisdiction to proceed with the case is probably not affected by the filing of a petition in bankruptcy against the debtor,[250] but it should not take jurisdiction of a creditor's bill when proceedings in bankruptcy have already been commenced.[251]

Since a trustee's suit to set aside a fraudulent transfer of property is in the nature of a creditor's bill, he may appropriately proceed by a bill in equity, notwithstanding the fact that there may be a remedy at law.[252] Or, according to the circumstances of the particular case, he may bring an action for money had and received,[253] or trover,[254] or assumpsit where the goods transferred have been converted into money.[255] But the claims of the trustee against an alleged fraudulent transferee or preferred creditor cannot be determined summarily by the court of bankruptcy on motion and rule.[256] If the trustee, upon his appointment, finds a suit already commenced and in progress in a state court by one or more of the creditors to set aside a fraudulent conveyance by the bankrupt, he may apply to the court of bankruptcy for permission to intervene in such action, and leave will generally be granted if it appears to be for the best interests of the estate.[257]

Bankr. Rep. 215. And see Whittington v. Simmons, 32 Ark. 377. Supra, §§ 410–414.

247 Kellogg v. Russell, 11 Blatchf. 519, 11 N. B. R. 121, Fed. Cas. No. 7,666.

248 Woolridge v. McKenna, 8 Fed. 650; Nicholas v. Murray, 5 Sawy. 320, Fed. Cas. No. 10,223.

249 Bankruptcy Act 1898, §§ 67e, 70e, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797.

250 National Bank of the Republic v. Hobbs, 118 Fed. 626, 9 Am. Bankr. Rep. 190.

251 Cruchet v. Red River Min. Co., 155 Fed. 486, 18 Am. Bankr. Rep. 814.

252 Parker v. Black, 151 Fed. 18, 80 C. C. A. 484, 18 Am. Bankr. Rep. 15; Wall v. Cox, 101 Fed. 403, 41 C. C. A. 408, 4 Am. Bankr. Rep. 659; Cox v. Wall, 99 Fed. 546; Schrenkeisen v. Miller, 9 Ben. 55, Fed. Cas. No. 12,480; In re Hunt, 2 N. B. R. 539, Fed. Cas. No. 6,881; Lisberger v. Garnett, 1 Hughes, 620, Fed. Cas. No. 8,383; Gnichtel v. First Nat. Bank, 66 N. J. Eq. 88, 53 Atl. 1041; Thompson v. First Nat. Bank, 84 Miss. 54, 36 South. 65. Compare Gray v. Beck, 6 Fed. 595. And see Frank v. Musliner, 76 App. Div. 616, 78 N. Y. Supp. 369; Blake v. Thwing, 185 Ill. App. 187.

253 Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314.

254 Mowry v. Reed, 187 Mass. 174, 72 N. E. 936.

255 Lyon v. Clark, 129 Mich. 381, 88 N. W. 1046.

256 Supra, § 403. See In re Green (D. C.) 207 Fed. 693, 30 Am. Bankr. Rep. 464.

257 In re Riker, 107 Fed. 96, 5 Am. Bankr. Rep. 720; Kimmouth v. Braeutigam (N. J. Eq.) 57 Atl. 1013; Bunch v. Smith, 116 Tenn. 201, 93 S. W. 80; At-

The bankrupt himself is neither a necessary nor a proper party to a bill in equity by his trustee to set aside an alleged fraudulent conveyance or transfer.[258] But where several persons are all connected with various fraudulent undertakings for the purpose of preventing the bankrupt's property from reaching the control of the trustee, although they are not all connected with each fraudulent act, but some of them performed one act and some another, all tending to the same result, the trustee may join them all in one suit to obtain possession of the property involved.[259] But in a suit to recover a preferential transfer only those persons who have received some benefit or advantage from it are proper defendants.[260]

As to matters of pleading and practice, the trustee's suit will be governed by the laws and rules of the court where it is brought, and where that is a federal court, the suit is treated as one in equity and will be governed by the rules of pleading and practice in equity, independently of the state practice.[261] But in any case, the trustee's bill or complaint must set forth specifically all the facts and circumstances necessary to show the nature of the transaction in controversy and its fraudulent character.[262] Thus, as a basis for the suit, the bill must show that there were creditors existing at the time of the transfer which is attacked, or else allege such a fraudulent intent as would make the transfer or conveyance void as against subsequent creditors; and it must state the aggregate amount of the claims proved in the bankruptcy proceedings and aver that the assets are not sufficient to satisfy such claims; but it is not necessary to name the unsecured creditors whom

kins v. Globe Bank & Trust Co. (Ky.) 124 S. W. 879; Tharp v. Tharp's Trustee (Ky.) 119 S. W. 814. See Davis v. W. F. Vandiver & Co., 143 Ala. 202, 38 South. 850.

[258] Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381; Benton v. Allen, 2 Fed. 448; Huntington v. Saunders, 14 Fed. 907.

[259] Potts v. Hahn, 32 Fed. 660; Jones v. Slauson, 33 Fed. 632; Strasburger v. Bach, 157 Fed. 918, 19 Am. Bankr. Rep. 732; Norcross v. Nathan, 99 Fed. 414, 3 Am. Bankr. Rep. 613; Rubenstein v. Lottow, 220 Mass. 156, 107 N. E. 718.

[260] Page v. Moore, 179 Fed. 988, 24 Am. Bankr. Rep. 745.

[261] Westall v. Avery, 171 Fed. 626, 96 C. C. A. 428, 22 Am. Bankr. Rep. 673.

[262] Flanders v. Coleman, 250 U. S. 223, 39 Sup. Ct. 472, 63 L. Ed. 948, 43 Am. Bankr. Rep. 563; In re McIntosh, 150 Fed. 546, 80 C. C. A. 250, 18 Am. Bankr. Rep. 169; Johnston v. Forsyth Mercantile Co., 127 Fed. 845, 11 Am. Bankr. Rep. 669; Comstock v. Tracey, 46 Fed. 162; Gray v. Brunold, 140 Cal. 615, 74 Pac. 303; Crim v. Rice, 232 Fed. 570, 146 C. C. A. 528, 37 Am. Bankr. Rep. 320; Kimbrough v. Alred, 202 Ala. 413, 80 South. 617; Ury v. Van Every, 181 Cal. 604, 188 Pac. 985; McKey v. Cochran, 262 Ill. 376, 104 N. E. 693. A bill by the trustee of a bankrupt corporation to recover the amount paid by the corporation on an accommodation note in fraud of its creditors while insolvent, is insufficient if it does not allege that the holder knew of the fraud. Gullege v. Woods, 108 Miss. 233, 66 South. 536. If a trustee, suing to recover property fraudulently transferred, seeks to recover property subsequently acquired by the transferee as the proceeds of the transferred property, the complaint must show the necessary facts. Hane v. Crown & Keystone Co (D. C.) 223 Fed. 439, 35 Am. Bankr. Rep. 175.

the trustee represents nor to specify or describe their respective debts.[263] The bill must also offer to do equity. For instance, if the transaction was fraudulent only in part, the defendant being entitled to retain or receive what he gave in the way of a present valid consideration, the trustee must offer in his bill to pay the defendant what may equitably be due to him.[264]

Such a bill, seeking to set aside a chattel mortgage and a sale thereunder, and also an assignment for the benefit of creditors, as fraudulent against creditors, and to recover the property, is not multifarious, its object being to recover the estate and clear it of incumbrances, and all the acts of the defendants having been done with a common purpose.[265] The answer should deny specifically the essential allegations of the bill,[266] and may plead any proper defense, but it is not necessarily a defense that the property is already in the possession of the trustee, having been seized by the marshal,[267] nor that the bankrupt's discharge was granted notwithstanding opposition to it on the ground of the same alleged fraudulent transaction.[268] As to pleading the statute of limitations as a defense, it was formerly held that the trustee could not maintain the suit if a similar action by creditors would have been barred by the state statute.[269] But since his title is based on the bankruptcy act, and since the operation of that act cannot be in any way affected by state legislation, it is thought that the only applicable statute of limitations is that contained in the bankruptcy act itself, to the effect that "suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed."[270]

§ 466. **Burden of Proof and Evidence.**—In a suit to set aside an alleged fraudulent transfer of property, the trustee must assume the burden of proving the fraud charged by clear and satisfactory evidence.[271]

[263] Cartwright v. West, 185 Ala. 41, 64 South. 293; Barrett v. Kaigler, 200 Ala. 404, 76 South. 320; Riggs v. Price, 277 Mo. 333, 210 S. W. 420.

[264] Albert Pick & Co. v. Natalby, 211 Ill. App. 486.

[265] Platt v. Preston, 19 N. B. R. 241, Fed. Cas. No. 11,219. And see O'Farrell v. Poston, 105 S. C. 30, 89 S. E. 483.

[266] Prestridge v. Wallace, 155 Ala. 540, 46 South. 970.

[267] Kellogg v. Russell, 11 Blatchf. 519, 11 N. B. R. 121, Fed. Cas. No. 7,666.

[268] Jones v. Milbank, 6 Lans. (N. Y.) 73.

[269] Jones v. Smith, 38 Fed. 380; Martin v. Smith, 1 Dill. 85, 4 N. B. R. 274, Fed. Cas. No. 9,164. And see Lehman v. La Forge, 42 Fed. 493.

[270] Bankruptcy Act 1898, § 11d. And see Bean v. Brookmire, 1 Dill. 25, 4 N. B. R. 196, Fed. Cas. No. 1,168.

[271] Osley v. Adams (C. C. A.) 268 Fed. 114, 46 Am. Bankr. Rep. 40; Reed v. Chase (Mass.) 130 N. E. 257; Angle v. Bankers' Surety Co., 244 Fed. 401, 157 C. C. A. 27, 41 Am. Bankr. Rep. 90; Johnstone v. Babb, 240 Fed. 668, 153 C. C. A. 466, 38 Am. Bankr. Rep. 715; In re Mosher (D. C.) 224 Fed. 739, 35 Am. Bankr. Rep. 284; In re Grocers' Baking Co. (D. C.) 266 Fed. 900, 46 Am. Bankr. Rep. 150; French v. Cunningham (C. C. A.) 261 Fed. 909, 44 Am. Bankr. Rep. 534; Murray v. Ray, 251 Fed. 866, 164 C. C. A. 82, 42 Am. Bankr. Rep. 315; Peterson v. Mettler, 198 Fed. 938, 29 Am. Bankr. Rep. 158; Jacobs v. Van Sickel, 123 Fed. 340, 10 Am. Bankr. Rep.

A purpose to hinder or defraud creditors, and knowledge thereof on the part of the transferee, cannot be presumed from the bare fact of a conveyance of property by one who was then insolvent and afterwards becomes bankrupt,[272] though proof of highly suspicious facts in connection with the transfer or in the conduct of the parties may make out a prima facie case of fraud.[273] But the fact alone that a sale is made out of the usual course of business of the debtor is not sufficient to stamp the transaction as fraudulent, though it may be a badge of fraud, depending for its effect on the surrounding facts.[274] In this connection, the trustee is entitled to avail himself, in like manner as any judgment creditor, of a decree of a state court declaring the transfer or conveyance by the debtor to have been fraudulent and void,[275] and every declaration of the bankrupt in reference to defrauding his creditors and acts on his part showing the nature and intent of the fraudulent scheme are admissible where a prima facie case of conspiracy is made out.[276] And it may be shown that, eight days after another sale made a month before the sale in question, a secret agreement was entered into between the parties whereby the vendor was reinvested with an interest in the property sold.[277] But evidence of transactions with others than the transferee in question, proper to be considered in deter-

519; Benton v. Allen, 2 Fed. 448; Joseph v. Raff, 176 N. Y. 611, 68 N. E. 1118; Klein v. Gallin, 141 N. Y. Supp. 831; Smith v. Eldredge, 143 N. Y. Supp. 87; Kanne v. Kanne, 119 Minn. 265, 138 N. W. 25; Halbert v. Pranke, 91 Minn. 204, 97 N. W. 976; Sharood v. Jordan, 90 Minn. 249, 95 N. W. 1108; Bailey v. Wood, 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913A, 950; Eason v. Garrison, 36 Tex. Civ. App. 574, 82 S. W. 800; Falls City Tinware Co.'s Trustee v. Levine, 104 S. W. 716, 31 Ky. Law Rep. 1103; Coleman v. Hagey (Mo.) 158 S. W. 829; Horine v. Luria, 49 Pa. Super. Ct. 171; Gilmore v. Wall, 31 Okl. 754, 123 Pac. 1060; McCrory v. Donald, 192 Ala. 312, 68 South. 306; McKey v. Cochran, 262 Ill. 376, 104 N. E. 693; Finch v. Cecil, 170 N. C. 114, 86 S. E. 991; Holbrook v. International Trust Co., 220 Mass. 150, 107 N. E. 665; Putnam v. United States Trust Co., 223 Mass. 199, 111 N. E. 969; Jones v. Shiro, 116 Me. 512, 102 Atl. 76. In a suit by a trustee in bankruptcy to reach property transferred by the bankrupt to his wife, the mere fact that neither husband nor wife was called by the defense, does not sustain the plaintiff's burden of showing a secret trust. Lyon v. Wallace, 221 Mass. 351, 108 N. E. 1075.

[272] Webb's Trustee v. Lynchburg Shoe Co., 106 Va. 726, 56 S. E. 581; Dutton v. Cloar, 26 Tex. Civ. App. 547, 65 S. W. 70; Love v. Export Storage Co., 143 Fed. 1, 74 C. C. A. 155, 16 Am. Bankr. Rep. 171. Compare Thomas v. Roddy, 122 App. Div. 851, 107 N. Y. Supp. 473. And see Fouche v. Shearer, 172 Fed. 592, 22 Am. Bankr. Rep. 828; Phillips v. Huffaker, 35 Cal. App. 531, 170 Pac. 431.

[273] In re Hunt, 2 N. B. R. 539, Fed. Cas. No. 6,881. In a creditors' suit against the members of an insolvent banking firm, to set aside alleged fraudulent transfers of the bank's assets the failure of the defendants to produce the important books of the bank when required, or to account for the same, raises a presumption of fraud of the most damaging character. National Bank of Republic v. Hobbs, 118 Fed. 626, 9 Am. Bankr. Rep. 190.

[274] Houck v. Christy, 152 Fed. 612, 81 C. C. A. 602, 18 Am. Bankr. Rep. 330; Babbitt v. Walbrun, 1 Dill. 19, 4 N. B. R. 121, Fed. Cas. No. 694.

[275] In re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815.

[276] Tyler v. Angevine, 15 Blatchf. 536, Fed. Cas. No. 14,306.

[277] Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395.

mining the bankrupt's intention, or as bearing on the question of his insolvency, is not admissible against the transferee without evidence that he had knowledge of such transactions.[278] So, evidence of what the bankrupt said to the defendant some days before, when he borrowed the money of him, as to what he wanted it for, or of statements then made by the bankrupt as to his financial condition, or of the time fixed for repayment, has no bearing on the question whether the defendant knew or had reasonable cause to believe the bankrupt was insolvent when he repaid the loan.[279] And testimony that the bankrupt secreted the money which he received on the sale in question, for the purpose of defrauding his creditors, does not show that the defendant had any knowledge of such fraudulent intent.[280] And so, where a bill of sale is attacked as fraudulent, evidence that the bankrupt secreted certain of his property is not admissible except for the purpose of showing what goods were on hand at the date of the bill of sale.[281] And generally, the trustee's case must fail where the only witnesses introduced, who were the parties to the transaction attacked, all testify that the transfer was made in good faith and for a fair consideration.[282]

It is also necessary for the trustee to prove that there were creditors of the bankrupt whose claims were in existence at or before the time of the transaction assailed as fraudulent, or else that he had, at that time, a fraudulent intention as to those who might afterwards become his creditors.[283] Likewise the trustee must not only allege but prove that the assets of the estate in bankruptcy are not sufficient to satisfy the claims against it, and on this point, evidence as to all the claims, whether secured or unsecured, will be admissible.[284]

It is also incumbent on the trustee to prove, by competent and satisfactory evidence, that the bankrupt was insolvent at the time of the transaction in question and that the transferee knew of it or had sufficient cause to believe it.[285] The insolvency may be shown by the books

[278] Doxsee v. Waddick, 122 Iowa, 599, 98 N. W. 483.

[279] Goodrich v. Wilson, 119 Mass. 429, But see Johnson v. Canfield-Swigart Co., 292 Ill. 101, 126 N. E. 608.

[280] Schilling v. Curran, 30 Mont. 370, 76 Pac. 998.

[281] Frank v. Musliner, 76 App. Div. 616, 78 N. Y. Supp. 369.

[282] Entwisle v. Seidt, 155 Fed. 864, 19 Am. Bankr. Rep. 185.

[283] In re Snodgrass, 209 Fed. 325, 126 C. C. A. 251, 31 Am. Bankr. Rep. 601; Coleman v. Hagey, 252 Mo. 102, 158 S. W. 829; Longbottom v. Emery, 261 Pa. 163, 104 Atl. 561; Scales v. Holje, 41 Cal. App. 733, 183 Pac. 308.

[284] Riggs v. Price, 277 Mo. 333, 210 S. W. 420.

[285] Van Iderstine v. National Discount Co., 174 Fed. 518, 98 C. C. A. 300, 23 Am. Bankr. Rep. 345; Gans v. Weinstein, 83 App. Div. 358, 82 N. Y. Supp. 280; Joseph v. Raff, 176 N. Y. 611, 68 N. E. 1118; Horton v. Bamford, 79 N. J. Eq. 356, 81 Atl. 761; Way v. Ruff, 112 Minn. 57, 127 N. W. 564, 609; Moran v. Morgan, 252 Fed. 719, 164 C. C. A. 559, 42 Am. Bankr. Rep. 430. Compare Senft v. Lewis, 239 Fed. 116, 152 C. C. A. 158, 39 Am. Bankr. Rep. 240.

of the bankrupt, including private memorandum books,[286] or by the debtor's schedules in bankruptcy, if filed shortly after the transfer in question,[287] but not if filed more than a year after the transaction which is alleged to have been fraudulent.[288] Evidence that a bankrupt, while insolvent, conveyed valuable property to his brother for an inadequate consideration, that by agreement between them the brother withheld the deeds from record, and that the bankrupt afterwards borrowed large sums of money on his representation that he owned such property, will be sufficient to establish actual fraud and entitle the bankrupt's trustee to recover the property.[289] Where the transfer attacked is a payment of money, it is not necessary to trace it to the present possession of the defendant.[290] Where the trustee's contention is that the bankrupt conspired with several other persons to secure or convert his property, and withdraw it from the reach of the creditors, he will establish his case by proof that any two of the defendants acted in concert in the fraudulent scheme, though he may be unable to prove that all of the defendants were parties to the conspiracy.[291]

On the other hand, at least when the trustee has made out a prima facie case, the defendant must assume the burden of proving that he was a purchaser for value and in good faith and for a fair consideration.[292] For this purpose he must be allowed to present all competent evidence bearing on the question of the good faith of the transaction and the consideration given.[293] And he is not estopped from claiming that the conveyance in question was valid as to him by the fact that

[286] In re E. S. Wheeler & Co., 158 Fed. 603, 85 C. C. A. 425, 19 Am. Bankr. Rep. 641.

[287] Saxton v. Sebring, 96 App. Div. 570, 89 N. Y. Supp. 372.

[288] Barr v. Sofranski, 130 App. Div. 783, 115 N. Y. Supp. 533.

[289] Peterson v. Mettler, 198 Fed. 938, 29 Am. Bankr. Rep. 158.

[290] Smith v. Mutual Life Ins. Co. (C. C.) 178 Fed. 510, 24 Am. Bankr. Rep. 514.

[291] McGill v. Commercial Credit Co. (D. C.) 243 Fed. 637, 39 Am. Bankr. Rep. 702; Gregory v. Binghamton Trust Co., 168 App. Div. 805, 154 N. Y. Supp. 376; Saxton v. Sebring, 96 App. Div. 570, 89 N. Y. Supp. 372.

[292] Owens v. Daniel, 230 Fed. 101, 144 C. C. A. 399, 36 Am. Bankr. Rep. 433; Klinger v. Hyman, 223 Fed. 257, 138 C. C. A. 499, 34 Am. Bankr. Rep. 338; Harvey v. Stowe, 219 Fed. 17, 134 C. C. A. 635; Rison v. Parham, 219 Fed. 176, 134 C. C. A. 550, 33 Am. Bankr. Rep. 571; Stroecker v. Patterson, 220 Fed. 21, 135 C. C. A. 597, 34 Am. Bankr. Rep. 287; Sturdivant Bank v. Schade, 195 Fed. 188, 115 C. C. A. 140, 27 Am. Bankr. Rep. 673; Harper v. Sanderson (D. C.) 264 Fed. 857, 45 Am. Bankr. Rep. 579; In re Musica (D. C.) 263 Fed. 156, 44 Am. Bankr. Rep. 628; Winslow v. Staab (D. C.) 233 Fed. 305, 36 Am. Bankr. Rep. 626; Bentley v. Young (D. C.) 210 Fed. 202, 31 Am. Bankr. Rep. 506; Pope v. Cantwell (D. C.) 206 Fed. 908, 30 Am. Bankr. Rep. 802; Lawrence v. Lowrie (D. C.) 133 Fed. 995, 13 Am. Bankr. Rep. 297; Garland v. Arrowood, 177 N. C. 371, 99 S. E. 100; McNamara v. Farnsworth, 106 Wash. 523, 180 Pac. 466; Abele v. Beacon Trust Co., 228 Mass. 438, 117 N. E. 833; Eberline v. Prager, 209 Mich. 322, 176 N. W. 428; Lockhart v. Edge, 40 S. D. 307, 167 N. W. 164; Wick v. Hickey (Iowa) 103 N. W. 469.

[293] Joseph v. Raff, 176 N. Y. 611, 68 N. E. 1118; Hunt v. Doyal, 128 Ga. 416, 57 S. E. 489. The bona fide character of a conveyance by a failing husband to his wife may be established by the uncorroborated, but uncontradicted, testimony

the adjudication in bankruptcy was based upon an allegation that it was a fraudulent conveyance and an act of bankruptcy,[294] nor by the fact that the same transaction was specified as a ground of opposition to the bankrupt's application for discharge.[295] The question whether or not the conveyance or transfer drawn in question was fraudulent is a question of fact,[296] which must go to the jury.[297]

§ 467. **Nature and Extent of Trustee's Recovery.**—In the case of a fraudulent conveyance of real property, vacated at the suit of the trustee in bankruptcy, the plaintiff is entitled to a decree declaring and establishing the title as vested in him,[298] or requiring the defendant to execute the necessary deed.[299] In the case of a fraudulent transfer of a note and mortgage, the trustee is entitled to an order requiring that they shall be assigned to him.[300] If the property transferred was a certificate of corporate stock, and it still remains in the hands of the defendant, he may be required to surrender the certificate itself to the trustee in bankruptcy and to account for dividends received.[301] If the property in controversy consisted of chattels, they are to be delivered in specie to the trustee.[302] And generally, if it is in the power of the fraudulent transferee to restore the status quo by delivering to the trustee the identical property which he received from the bankrupt, this is the relief which the trustee must seek and obtain, and he cannot abandon the pursuit of the property itself and simply have a judgment in personam for its value against the defendant.[303] In the case of a fraudulent payment of money, however, the natural and only appropriate judgment is one against the transferee personally for the sum shown to have been received by him.[304] Where the transfer assailed consisted in the assign-

of the husband or wife. Weld v. McKay, 218 Fed. 807, 134 C. C. A. 495, 34 Am. Bankr. Rep. 52.

294 In re Marter, 12 N. B. R. 185, Fed. Cas. No. 9,143.

295 Bradley v. Hunter, 50 Ala. 265.

296 Bailey v. Wood, 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913A, 950; Webb's Trustee v. Lynchburg Shoe Co., 107 Va. 807, 60 S. E. 130.

297 Coolidge v. Ayers, 76 Vt. 405, 57 Atl. 970; Dutton v. Cloar, 26 Tex. Civ. App. 547, 65 S. W. 70; Sherman v. Luckhardt, 96 Mo. App. 320, 70 S. W. 388.

298 Currie v. Look, 14 N. D. 482, 106 N. W. 131. And see Bergin v. Blackwood, 145 Minn. 363, 177 N. W. 493.

299 McFarland v. Goodman, 6 Biss. 111, 11 N. B. R. 134, Fed. Cas. No. 8,789.

300 Clarke v. Sherman, 128 Iowa, 353, 103 N. W. 982.

301 Wasey v. Holbrook, 141 App. Div. 336, 125 N. Y. Supp. 1087. See In re Kessler & Co., 174 Fed. 906, 23 Am. Bankr. Rep. 391.

302 Edwards v. Schillinger Bros. Co., 153 Ill. App. 219.

303 Phillips v. Sedgwick, 95 U. S. 3, 24 L. Ed. 591; Wasey v. Holbrook, 141 App. Div. 336, 125 N. Y. Supp. 1087; Off v. Hakes, 142 Fed. 364, 73 C. C. A. 464, 15 Am. Bankr. Rep. 696. But if the surrender of certificates of corporate stock (the property fraudulently transferred) would offer insufficient relief because of their depreciation in value, the court may render a personal judgment against the transferee. Wasey v. Holbrook, 65 Misc. Rep. 84, 120 N. Y. Supp. 675. And see Gill v. Ely-Norris Safe Co., 170 Mo. App. 478, 156 S. W. 811.

304 Andreas' Assignee v. Rust, 3 Ky. Law Rep. 772; Greenhall v. Carnegie Trust Co. (D. C.) 180 Fed. 812, 25 Am.

ment of a judgment, the collection of the judgment should not be enjoined, but the court should direct payment to be made to the trustee in bankruptcy.[305]

But if the property has passed into the possession of a bona fide holder for value, taking by assignment or transfer from the original fraudulent transferee without notice, so that it can no longer be reclaimed or recovered by the trustee in bankruptcy, then the appropriate relief of the latter is a judgment for damages against the fraudulent grantee, measured by the value of the property, [306] and including, in the case of real estate, the rents and profits which he received or should have received from it while in his hands.[307] The value of the property, for the purpose of the trustee's recovery, is not measured by the price the fraudulent transferee paid for it,[308] nor necessarily by its estimated value at the time of the transfer, but rather by the price for which he sold it to the present holder.[309] In this sense and to this extent, he may be held to account for any profit he made out of the property.[310] Thus, for instance, where a new corporation, organized to succeed the bankrupt, took the latter's assets under a lease which was void for fraud as against creditors, and operated the bankrupt's property for a considerable period, the corporation is not to be considered as a mere trespass-

Bankr. Rep. 300; Smith v. Mutual Life Ins. Co. (C. C.) 158 Fed. 365, 19 Am. Bankr. Rep. 707. The trustee's recovery should be limited to the amount by which the assets of the estate have been depleted by the transaction complained of. Continental & Commercial Trust & Sav. Bank v. Breen & Kennedy, 188 Ill. App. 467. But chattel mortgagees who had wrongfully foreclosed cannot complain because the mortgagor's trustee in bankruptcy recovers a judgment for the value of the property which exceeds the claims filed in the court of bankruptcy, especially if the judgment provides that any surplus left after administering the bankrupt's estate shall be returned to the mortgagees. Simpson v. Combes, 107 Wash. 575, 182 Pac. 566.

[305] Barnard v. Davis, 54 Ala. 565.

[306] Skillin v. Maibrunn, 176 N. Y. 588, 68 N. E. 1124; Pfeiffer v. Roe, 108 App. Div. 54, 95 N. Y. Supp. 1014; Gray v. Brunold, 140 Cal. 615, 74 Pac. 303.

[307] Gray v. Chase, 184 Mass. 444, 68 N. E. 676.

[308] In re Denson (D. C.) 195 Fed. 854, 28 Am. Bankr. Rep. 158. In a suit to recover property sold under execution within four months before bankruptcy, or its value, the value at the time of the execution sale should be adopted as the basis for the decree. Dreyer v. Kicklighter (D. C.) 228 Fed. 744, 36 Am. Bankr. Rep. 199. Where the bankrupt spent his money in making improvements on the land of another, with the latter's consent, knowing that he did not retain sufficient property to satisfy his creditors, the lien of the trustee in bankruptcy on the land is merely for the increased value by reason of such improvements, and not for the amount actually expended. Garland v. Arrowood, 179 N. C. 697, 103 S. E. 2. Where a corporation never received any consideration for a note given to one of its directors, he is liable to the company's trustee in bankruptcy for the amount he has received on account of the note, with interest. Schmid v. Neuberger, 174 App. Div. 670, 160 N. Y. Supp. 701.

[309] Russell v. Powell, 38 Wash. 651, 80 Pac. 837.

[310] Shuman v. Fleckenstein, 4 Sawy. 174, 15 N. B. R. 224, Fed. Cas. No. 12,826. See Dunlop v. Thomas, 28 Wash. 521, 68 Pac. 909.

er, but is liable in an accounting for its acts under the lease for the net profits earned after allowance of expenditures other than taxes.[311]

In the case of a joint purchase, fraudulent and voidable under the bankruptcy act, each purchaser is liable for the full value of the property, although they were interested in different proportions.[312] But where the actual purchaser was only acting as agent for another, and surrendered the property to his principal, it would be error to make an order requiring the agent to turn over the property to the trustee.[313] So where the fraudulent transaction consisted of a sale of the bankrupt's property and application of the proceeds to the discharge of an unrecorded chattel mortgage, and the trustee's action is to set aside the sale, the court should not adjudge that the mortgage be canceled, the mortgagee not being a party to the suit, and the mortgage not being void to the extent that it evidenced a debt, though not a lien against subsequent creditors.[314] It should also be remarked in this connection that, as against the trustee in bankruptcy, the wife of the bankrupt is not barred or estopped to claim dower by reason of her having joined her husband in a deed which is fraudulent as to creditors, and which has for that reason been set aside at the instance of the trustee. When the deed is decreed to be fraudulent and void at the suit of the trustee, he cannot set it up to defeat the right of the wife to dower. "Such a position involves this inconsistency, viz., that it asks that the same instrument be held void as to creditors, and then, in their favor, held valid as to the wife." [315]

§ 468. Rights of Creditors in Property or Fund Recovered.—It is well settled that when the trustee in bankruptcy procures a fraudulent conveyance or transfer of property of the bankrupt to be set aside, and the property subjected to the payment of the provable debts in bankruptcy, this will inure to the benefit of all the creditors of the bankrupt having provable claims, including those whose claims accrued subsequent to the transfer, and not merely to the advantage of those who, as existing creditors, or holding judgment, would have been entitled to attack the conveyance at the time it was made.[316] Thus, a fraudu-

[311] In re Medina Quarry Co., 179 Fed. 929, 24 Am. Bankr. Rep. 769.

[312] Schulenburg v. Kabureck, 2 Dill. 132, Fed. Cas. No. 12,487.

[313] In re Denson, 195 Fed. 854, 28 Am. Bankr. Rep. 158.

[314] E. S. Bonnie & Co. v. Perry's Trustee, 117 Ky. 459, 78 S. W. 208.

[315] Cox v. Wilder, 2 Dill. 45, 7 N. B. R. 241, Fed. Cas. No. 3,308.

[316] Globe Bank & Trust Co. v. Martin, 236 U. S. 289, 35 Sup. Ct. 377, 59 L. Ed. 583, 34 Am. Bankr. Rep. 162; Kehr v. Smith, 20 Wall. 31, 22 L. Ed. 313; Platt v. Mead, 9 Fed. 91; In re Lowe, 19 Fed. 589; Smith v. Kehr. 2 Dill. 50, 7 N. B. R. 97, Fed. Cas. No. 13,071; Pratt v. Curtis, 2 Low. 87, 6 N. B. R. 139, Fed. Cas. No. 11,375; White v. Jones, 6 N. B. R. 175, Fed. Cas. No. 17,550; Treseder v. Burger, 130 Wis. 201, 109 N. W. 957; Maffi v. Stephens, 49 Tex. Civ. App. 354, 108 S. W. 1008. See, also, In re Martin, 193 Fed. 841, 113 C. C. A. 627, 27 Am. Bankr. Rep. 545; Boyd v. Arnold, 103 Ark. 105, 146 S. W. 118; Allen v.

lent conveyance being good as between the parties to it, a judgment thereafter recovered does not attach as a lien on the property, and when it is vacated at the suit of the trustee, there is no superior equity, or right to prior satisfaction, in a creditor who holds a judgment.[317] So, a creditor's bill instituted subsequent to an adjudication in bankruptcy against the debtor, to set aside a chattel mortgage and a sale of a stock of merchandise, does not give rise to a lien in favor of the creditor filing the same on the goods sought to be reached.[318]

McMannes, 156 Fed. 615, 19 Am. Bankr. Rep. 276; Shaver v. Mowry, 262 Pa. 381, 105 Atl. 505; Riggs v. Price, 277 Mo. 333, 210 S. W. 420.

[317] Neal v. Foster, 36 Fed. 29; Wood v. Wright, 9 Biss. 365, 4 Fed. 511. See Pool v. Ragland, 57 Ala. 414.

[318] Moore-Schafer Shoe Mfg. Co. v. Billings, 46 Or. 401, 80 Pac. 422.

CHAPTER XXIV

SALES OF PROPERTY BY TRUSTEES

§ 469. Authority of Trustees and Orders of Court.—Before the appointment of a trustee in bankruptcy, the court has authority to order the sale of particular assets of the bankrupt if special circumstances render it necessary or desirable.[1] But when a trustee is appointed he becomes invested by operation of law with title to all the non-exempt property of the bankrupt and is charged with the duty of reducing the same to money. This applies to all property in the possession of the bankrupt when the proceedings were instituted.[2] Property salable by the trustee may thus include such diverse items as, for instance, a mining lease,[3] the equity or right of redemption in property of the bankrupt which has been sold on foreclosure,[4] and a right of action against a railroad for damages to property in transit.[5] Where a promissory note becomes the property of an estate in bankruptcy, it is said that title thereto cannot be passed in any other way than by a sale in bankruptcy.[6] The personal medical and surgical practice and good will of a bankrupt as a physician are not subject to sale by his trustee, although his proper-

[1] In re Hitchings, 4 N. B. R. 384, Fed. Cas. No. 6,542; In re Vila, Fed. Cas. No. 16,941. And see supra, § 217.

[2] In re Union Trust Co., 122 Fed. 937, 59 C. C. A. 461, 9 Am. Bankr. Rep. 767; Olitsky v. Estersohn, 90 N. J. Eq. 459, 108 Atl. 88; Gee v. Parks (Tex. Civ. App.) 193 S. W. 767.

[3] In re Barnhardt Coal & Limestone Co. (D. C.) 265 Fed. 385, 44 Am. Bankr. Rep. 170.

[4] In re Ohio Copper Mining Co. (D. C.) 237 Fed. 490, 38 Am. Bankr. Rep. 548.

[5] Southern Ry. Co. v. Avey, 173 Ky. 598, 191 S. W. 460.

[6] Segen v. Fabacher, 136 La. 568, 67 South. 369.

ty interest in a practice and good will purchased from another may be so sold.[7]

As it is the duty of the trustee to sell every right, title, interest, or claim of the bankrupt to which he can give a title, and for which he can find a purchaser, it is held that property conveyed in fraud of creditors more than four months prior to the filing of the petition in bankruptcy may be sold by the trustee, and the purchaser will take such title as the trustee may have had, together with the right to institute an action in his own name to set aside the fraudulent conveyance.[8] But this does not apply to the right to recover property transferred by the bankrupt as a preference, since it is the clear intention of the Bankruptcy Act that no one but the trustee can maintain such an action.[9] The trustee, however, may and should sell even contingent, uncertain, or litigated claims, if any one will pay a substantial price for them.[10] If he fails or refuses to sell available assets for the benefit of the creditors, he may be held personally responsible.[11] But the power of the trustee to sell and convey the bankrupt's estate is wholly statutory, and a sale otherwise than as the statute directs will not be valid.[12] If the sale is to be private instead of public, or if the property is incumbered with valid liens, the trustee must have an order of the court to authorize it, and if he proceeds without such an order, the sale is a nullity.[13] But except in these cases, he may and should proceed on his own responsibility, and no special order of court is necessary to enable him to give a good title.[14] General directions as to the conduct of bankruptcy sales are given in the statute and the general orders,[15] and the particular court of bankruptcy may make a standing rule or order prescribing when and how such sales are to be held, and in ordinary cases, the trustee needs no further or specific authority or direction.[16] It is otherwise, however, when the trustee has never gained possession of the property in question and the title is in litigation. If such property can be sold at all, it may only be done

[7] In re Myers, 208 Fed. 407, 125 C. C. A. 569, 31 Am. Bankr. Rep. 24.

[8] In re Downing, 201 Fed. 93, 119 C. C. A. 431, 29 Am. Bankr. Rep. 228; Strong v. Durdle, 94 Wash. 157, 162 Pac. 6. Contra, Neuberger v. Felis, 203 Ala. 142, 82 South. 172.

[9] Lovell v. Latham & Co. (D. C.) 211 Fed. 374, 32 Am. Bankr. Rep. 191.

[10] In re Gutterson (D. C.) 136 Fed. 698, 14 Am. Bankr. Rep. 495. And see In re Crouse (D. C.) 196 Fed. 907, 28 Am. Bankr. Rep. 540.

[11] In re Jackson, 2 N. B. R. 508, Fed. Cas. No. 7,127.

[12] Wisner v. Brown, 50 Mich. 553, 15 N. W. 901.

[13] In re Eden Musee American Co. (D. C.) 230 Fed. 925, 36 Am. Bankr. Rep. 111.

[14] In re La France Copper Co. (D. C.) 205 Fed. 207, 30 Am. Bankr. Rep. 381; Olitsky v. Estersohn, 90 N. J. Eq. 459, 108 Atl. 88; Hallyburton v. Slagle, 130 N. C. 482, 41 S. E. 877; In re White, 2 Ben. 85, Fed. Cas. No. 17,531; Curdy v. Stafford, 88 Tex. 120, 30 S. W. 551.

[15] Bankruptcy Act 1898, § 70b; General Order No. 18.

[16] Farmers' Loan & Trust Co. v. Eno, 35 Fed. 89; In re La France Copper Co., 205 Fed. 207, 30 Am. Bankr. Rep. 381.

under an order of the court of bankruptcy, made on the trustee's petition and after notice to the parties claiming adversely.[17]

If, for any reason, a special order of the court is sought and obtained for the sale, it should fix the time and place of the sale. It would be irregular and void for omitting these details,[18] but not because it does not fix an upset price for the property.[19] An order of this kind is administrative rather than judicial; it is not to be relied on as an adjudication that the property in question belonged to the bankrupt.[20] For the purpose of making such an order, the referee is the court and may exercise its full powers,[21] and the trustee's petition for authority to sell should be filed with the referee and not with the clerk of the court.[22] In the case of joint trustees, all should join in the petition. But in a case where the creditors irregularly elected two trustees instead of three, and the two so chosen presented a petition for authority to sell assets, and afterwards the creditors appointed a third trustee, it was held that the irregularity was cured by his joining in the petition.[23] The pendency of composition proceedings may prevent a sale of the bankrupt's assets, if all

[17] See Shaw v. Lindsey, 60 Ala. 344; In re Ludwigson, 3 Woods, 13, Fed. Cas. No. 8,601; Knight v. Cheney, 5 N. B. R. 305, Fed. Cas. No. 7,883; Stanley v. Sutherland, 54 Ind. 339. A sale by the trustee of property of the bankrupt which has never come into his possession, but is in the possession of another claiming a lien thereon, though confirmed by the bankruptcy court, does not vest in the buyer the title and right to immediate possession necessary to maintain trover. American Bottle Co. v. Finney, 203 Ala. 92, 82 South. 106.

[18] Osborn v. Baxter, 4 Cush. (Mass.) 406.

[19] Schuler v. Hassinger, 177 Fed. 119, 100 C. C. A. 539, 24 Am. Bankr. Rep. 184. Instead of directly ordering a sale, the court may direct the trustee to receive bids and submit them to the court with recommendations. In re Glas-Shipt Dairy Co., 239 Fed. 122, 152 C. C. A. 164, 38 Am. Bankr. Rep. 554.

[20] Wilkins v. Tourtellott, 28 Kan. 825. But a sale of personal property by a trustee in bankruptcy, acting under an order of sale issued by the court, is a "judicial sale." Carney v. Averill, 110 Me. 172, 85 Atl. 494; American Bottle Co. v. Finney, 203 Ala. 92, 82 South. 106. In a proceeding by a trustee for an order authorizing the sale of real estate in his possession, the court of bankruptcy is without jurisdiction to cite into court a mortgagee of such land and adjudicate upon the validity of his mortgage, without his consent and over his objection. In re Henderson (D. C.) 206 Fed. 139, 30 Am. Bankr. Rep. 468. But an adverse claimant of property, which is also claimed by the trustee in bankruptcy, has no standing to object to an order directing the trustee to sell his "right, title, and interest" in the property. In re Vanoscope Co., 244 Fed. 445, 157 C. C. A. 71, 40 Am. Bankr. Rep. 70.

[21] In re Sanborn, 96 Fed. 551, 3 Am. Bankr. Rep. 54; In re Bank of North Carolina, 19 N. B. R. 164, Fed. Cas. No. 896; In re Styer, 98 Fed. 290, 3 Am. Bankr. Rep. 424. But it is said (in the case last cited) that if the property is in the hands of a receiver at the time of the adjudication in bankruptcy, an order for its appraisement and sale can be made only by the judge sitting as the court of bankruptcy. An order for the sale of property of a bankrupt is none the less an order of court because signed by the judge. There is no practical distinction in a court of bankruptcy between an order of the judge and an order of the court, because the court in bankruptcy is always open, and whenever the judge acts, wherever he may be, the act is the act of the court. In re Mott, 6 Fed. 685.

[22] In re William F. Fisher & Co., 135 Fed. 223, 14 Am. Bankr. Rep. 366.

[23] In re William F. Fisher & Co., 135 Fed. 223, 14 Am. Bankr. Rep. 366.

nas been done that is necessary to make the composition effective.[24] But on the other hand, the sale is not void merely because it does not follow immediately after the order authorizing it, nor even because so long a period as six years is allowed to elapse.[25] But when the trustee once sells particular property at public auction, he divests himself of all title to it, and an attempted second sale thereafter is entirely void.[26] It remains to be added that where the bankrupt's assets include a stock of liquors, the trustee may sell them in bulk without being obliged to take out a license or pay a tax under either state or federal laws.[27]

§ 470. Sale of Incumbered Property.—Where the real estate of a bankrupt is incumbered by valid liens, the trustee may sell it either subject to the incumbrances or absolutely and free therefrom. But in the latter case, he must, before selling, obtain from the bankruptcy court an order for that purpose; and if he sells the property without such order, he can only sell it subject to the incumbrances, and the purchaser will take no better title than the bankrupt had; that is, he will take only the bankrupt's equity of redemption, or take the property subject to the liens.[28] And where property is thus sold subject to liens, by order of the court of bankruptcy, it passes out of its jurisdiction, and the state courts may then proceed to enforce the liens,[29] and by ordering and confirming a sale under a mortgage, the bankruptcy court exhausts its jurisdiction, so as to invalidate a subsequent sale under a purported vendor's lien.[30] If the trustee obtains an order for the sale of the property, but the order does not mention liens, it will be construed as only authorizing a sale subject to existing valid liens.[31] But the trustee may petition for and obtain an order directing the sale to be made subject to a

[24] In re William F. Fisher & Co., 135 Fed. 223, 14 Am. Bankr. Rep. 366.

[25] Potter v. Martin, 122 Mich. 542, 81 N. W. 424.

[26] Townshend v. Thomson, 60 N. Y. Super. Ct. 454, 18 N. Y. Supp. 870.

[27] In re Becker, 2 Nat. Bankr. News, 225. And see Wildermuth v. Cole, 77 Mich. 483, 43 N. W. 889; State v. Johnson, 33 N. H. 441; Gignoux v. Bilbruck, 63 N. H. 22; Williams v. Troop, 17 Wis. 463.

[28] See v. Rogers, 31 W. Va. 473, 7 S. E. 436; Ray v. Norseworthy, 23 Wall. 238, 23 L. Ed. 116; In re Mebane, 3 N. B. R. 347, Fed. Cas. No. 9,380; In re Addison, 3 Hughes, 430, Fed. Cas. No. 76; Boulware v. Hartsook's Adm'r, 83 Va. 679, 3 S. E. 289; King v. Bowman, 24 La. Ann. 506; In re McClellan, 1 N. B. R. 389, Fed. Cas. No. 8,694; In re Stewart, 193 Fed. 791, 27 Am. Bankr. Rep. 529; In re States Printing Co., 241 Fed. 245, 154 C. C. A. 165, 38 Am. Bankr. Rep. 722; Charak v. Durphee (D. C.) 252 Fed. 885, 42 Am. Bankr. Rep. 110; Kelly v. Minor, 252 Fed. 115, 164 C. C. A. 227, 41 Am. Bankr. Rep. 275; In re Cutler & John (D. C.) 228 Fed. 771, 36 Am. Bankr. Rep. 420. One buying property at a bankruptcy sale, subject to the lien of a mortgage thereon, does not thereby assume payment of the mortgage debt, but he becomes the owner of the property subject to the incumbrance. Kerman v. Leeper (Mo. App.) 157 S. W. 984.

[29] Beall v. Walker, 26 W. Va. 741.

[30] J. M. West Lumber Co. v. Lyon, 53 Tex. Civ. App. 648, 116 S. W. 652.

[31] In re Platteville Foundry & Machine Co., 147 Fed. 828, 17 Am. Bankr. Rep. 291; Ex parte City of Anderson, 82 S. C. 131, 63 S. E. 534.

certain specified lien or incumbrance,[32] or, vice versa, to be made free from a specified lien. In either case, the sale will not divest a superior lien not mentioned in the order and the holder of which was not made a party to the proceeding.[33] But if there is a direction to sell free from first or superior liens, the fact that inferior liens are not mentioned will not prevent their being divested in accordance with the ordinary rule governing judicial sales.[34]

Where other courts have taken full jurisdiction of property on which liens are asserted, the court of bankruptcy will not ordinarily interfere.[35] And where it is reasonably certain that the market value of the property does not exceed the amount of the valid liens upon it, it is not the duty of the trustee to petition for its sale, nor is it a proper exercise of the court's discretion to order it sold.[36] For such a course would result in no benefit to the general creditors, and would amount merely to putting through a sale for the benefit of the lien-holder, saving him the cost of foreclosure and making the expense fall unjustifiably upon the general estate.[37] In such a case, it is entirely proper for the court to order the surrender of the property to the lien creditor, if he will take it in satisfaction of his claim; if not, he should be allowed to foreclose on his own account.[38]

§ 471. Sale Free of Incumbrances.—The court of bankruptcy has power and authority to order the sale of any property of the bankrupt free and clear of all liens or incumbrances then resting upon it, transferring the liens to the fund realized by the sale, or rather, transforming the lien creditors' contractual right into an equity to claim satisfaction out of the proceeds of the sale.[39] But in order to do this, it is absolutely

[32] For form of petition and order for sale of property subject to liens, see Official Form No. 44.

[33] In re McGilton, 3 Biss. 144, 7 N. B. R. 294, Fed. Cas. No. 8,798; Cain v. Sheets, 77 Ala. 492; Bassett v. Thackara, 72 N. J. Law, 81, 60 Atl. 39. In a proceeding by a trustee for an order authorizing the sale of real estate in his possession, the bankruptcy court does not have jurisdiction to cite into court a mortgagee of such real estate and adjudicate upon the validity of his mortgage, without his consent or over his objection. In re Henderson, 206 Fed. 139.

[34] McKay v. Hamlll (C. C. A.) 185 Fed. 11, 26 Am. Bankr. Rep. 164.

[35] In re Taliafero, 3 Hughes, 422, Fed. Cas. No. 13,736.

[36] In re Rose, 193 Fed. 815, 26 Am. Bankr. Rep. 752; In re Foster, 181 Fed. 703, 25 Am. Bankr. Rep. 96; In re Union Trust Co., 122 Fed. 937, 59 C. C. A. 461, 9 Am. Bankr. Rep. 767; In re Mebane, 3 N. B. R. 347, Fed. Cas. No. 9,380; In re Ludwigson, 3 Woods, 13, Fed. Cas. No. 8,601; In re Dillard, 2 Hughes, 190, 9 N. B. R. 8, Fed. Cas. No. 3,912; In re Hahnlen, Fed. Cas. No. 5,901; In re Bowie, 1 N. B. R. 628, Fed. Cas. No. 1,728.

[37] In re Cogley, 107 Fed. 73, 5 Am. Bankr. Rep. 731.

[38] Equitable Loan & Security Co. v. R. L. Moss & Co., 125 Fla. 609, 60 C. C. A. 345, 11 Am. Bankr. Rep. 111; In re Rose, 193 Fed. 815, 26 Am. Bankr. Rep. 752; In re Lausman, 183 Fed. 647, 25 Am. Bankr. Rep. 186.

[39] Ray v. Norseworthy, 23 Wall. 128, 23 L. Ed. 116; In re Kohl-Hepp Brick Co., 176 Fed. 340, 100 C. C. A. 260, 23 Am. Bankr. Rep. 822; In re Loveland, 155 Fed. 838, 84 C. C. A. 72, 19 Am. Bankr. Rep. 18; Sturgiss v. Corbin, 141

essential that each lien creditor whose rights may be affected should have personal notice of the trustee's application for an order directing the sale to be made in this manner, and be accorded an opportunity to present any objections he may have,[40] unless his conduct at or after the sale may be taken as a waiver of notice or acquiescence in the order of the court, as, where he was present at the sale and raised no objections,[41] or where he brings trover against the trustee for the conversion of the property sold.[42] The actual consent of the lien creditor to a sale of the property free of liens will of course obviate any possible question as to the jurisdiction and power of the court.[43] But jurisdiction is based upon the court's control over the estate in bankruptcy, and the consent of a creditor is not essential to the authority of the court to decide how the

Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543; In re Leslie-Judge Co. (C. C. A.) 272 Fed. 886, 46 Am. Bankr. Rep. 707; In re North Star Ice & Coal Co. (D. C.) 252 Fed. 301, 42 Am. Bankr. Rep. 76; In re West (D. C.) 232 Fed. 903, 37 Am. Bankr. Rep. 421; In re Whiteside (D. C.) 230 Fed. 937, 36 Am. Bankr. Rep. 870; In re Progressive Wall Paper Corp. (D. C.) 222 Fed. 87, 35 Am. Bankr. Rep. 508; In re Pittsburgh-Big Muddy Coal Co., 215 Fed. 703, 132 C. C. A. 81; In re Roger Brown & Co., 196 Fed. 758, 28 Am. Bankr. Rep. 336; In re Trayna & Cohn, 195 Fed. 486, 27 Am. Bankr. Rep. 594; In re Shoe & Leather Reporter, 129 Fed. 588, 64 C. C. A. 156, 12 Am. Bankr. Rep. 248; In re Torchia, 185 Fed. 576, 26 Am. Bankr. Rep. 188; In re United States Graphite Co., 161 Fed. 583, 20 Am. Bankr. Rep. 573; In re Keet, 128 Fed. 651, 11 Am. Bankr. Rep. 117; In re Prince & Walter, 131 Fed. 546, 12 Am. Bankr. Rep. 675; In re Union Trust Co., 122 Fed. 937, 59 C. C. A. 461, 9 Am. Bankr. Rep. 767; Southern Loan & Trust Co. v. Benbow, 96 Fed. 514, 3 Am. Bankr. Rep. 9; In re Pittelkow, 92 Fed. 901, 1 Am. Bankr. Rep. 472; In re Worland, 92 Fed. 893, 1 Am. Bankr. Rep. 450; In re Mead, 58 Fed. 312; In re Kahley, 2 Biss. 383, 4 N. B. R. 378, Fed. Cas. No. 7,593; In re Kirtland, 10 Blatchf. 515, Fed. Cas. No. 7,851; Sutherland v. Lake Superior Ship Canal, R. & I. Co., 9 N. B. R. 298, Fed. Cas. No. 13,643; In re Rhodes, 3 Pittsb. 340, Fed. Cas. No. 11,746; Giveen v. Smith, 1 Hask. 358, Fed. Cas. No. 5,467; In re Barrow, 1 N. B. R. 481, Fed. Cas. No. 1,057; Foster v. Ames, 1 Low. 313, 2 N. B. R. 455, Fed. Cas. No. 4,965; In re Columbian Metal Works, 3 N. B. R. 75, Fed. Cas. No. 3,039; Meeks v. Whatley, 48 Miss. 337, 10 N. B. R. 498; Blair v. Carter's Adm'r, 78 Va. 621; Toler v. Crowder, 127 Ark. 552, 192 S. W. 905. The power of a court of bankruptcy to order a sale of the bankrupt's property free from liens is not expressly conferred, but it is necessarily implied, since such a sale is often necessary to the due execution of the power and duty to reduce the assets to money and distribute it to creditors. Gantt v. Jones, 272 Fed. 117.

[40] Factors' & Traders' Ins. Co. v. Murphy, 111 U. S. 738, 4 Sup. Ct. 679, 28 L. Ed. 582; Ray v. Norseworthy, 23 Wall. 128, 23 L. Ed. 116; In re Kohl-Hepp Brick Co., 176 Fed. 340, 100 C. C. A. 260, 23 Am. Bankr. Rep. 822; In re Stewart, 193 Fed. 791, 27 Am. Bankr. Rep. 529; In re Saxton Furnace Co., 136 Fed. 697, 14 Am. Bankr. Rep. 483; In re Gerdes, 102 Fed. 318, 4 Am. Bankr. Rep. 346; Anonymous, Fed. Cas. No. 456; Ex parte Drewry, 2 Hughes, 435, Fed. Cas. No. 4,081; In re Taliafero, 3 Hughes, 422, Fed. Cas. No. 13,736; In re Major, 2 Hughes, 215, Fed. Cas. No. 8,981; In re Rowland, 2 Hughes, 210, Fed. Cas. No. 12,096; Murphy v. Factors' & Traders'. Ins. Co., 33 La. Ann. 454; Meeks v. Whatley, 48 Miss. 337, 10 N. B. R. 498.

[41] Giveen v. Smith, 1 Hask. 358, Fed. Cas. No. 5,467.

[42] In re Platteville Foundry & Machine Co., 147 Fed. 828, 17 Am. Bankr. Rep. 291.

[43] Chauncey v. Dyke Bros., 119 Fed. 1, 55 C. C. A. 579, 9 Am. Bankr. Rep. 444; In re Caldwell, 178 Fed. 377, 24

property shall be sold.[44] The mortgagee or other lienor must indeed have notice and a hearing, but he may be brought in by a rule to show cause,[45] and while the court will give due weight to any objections which he may interpose, it is not constrained by them. In other words, the mere fact that a lien creditor objects is not enough to prevent the court from ordering a sale free of incumbrances, if that course shall appear best for the general interests of the estate.[46] So mortgaged chattels may be ordered sold free of liens notwithstanding the fact that the mortgagee has, by his contract, a right to the immediate possession of the goods and desires to avail himself of that right.[47]

When a sale is made under an order of this kind, the purchaser will take an entirely free and unincumbered title,[48] and it is entirely immaterial that the proceeds of the sale may not be sufficient to discharge the various liens on the property or even the senior lien alone.[49] Of course it is for the interest of the mortgagee or other creditor to attend the sale and bid enough to protect himself, or at least to see that the final bid is not less than what he considers the fair market value of the property. If an outsider becomes the purchaser, the rights of the mortgagee or other lienor are transferred to the fund arising from the sale, and as the lien is extinguished, it is not necessary for him to take any further steps in the way of continuing or renewing it.[50]

Am. Bankr. Rep. 495. Where a lienholder accepted service of the petition to sell the property free from liens, it amounted to a consent to that mode of sale. Gugel v. New Orleans Nat. Bank, 239 Fed. 676, 152 C. C. A. 510, 39 Am. Bankr. Rep. 160.

[44] In re Kronrot, 183 Fed. 653, 25 Am. Bankr. Rep. 738; In re Howard (D. C.) 207 Fed. 402, 31 Am. Bankr. Rep. 251.

[45] In re E. A. Kinsey Co., 184 Fed. 694, 106 C. C. A. 648, 25 Am. Bankr. Rep. 651.

[46] In re E. A. Kinsey Co., 184 Fed. 694, 106 C. C. A. 648, 25 Am. Bankr. Rep. 651; In re Howard, 207 Fed. 402.

[47] Foster v. Ames, 1 Low. 313, 2 N. B. R. 455, Fed. Cas. No. 4,965. And a clause in a mortgage securing bonds, giving the holders the right to bid on their bonds at any foreclosure sale, does not in any way limit the power of a court of bankruptcy to sell the property free from liens. In re Franklin Brewing Co., 249 Fed. 333, 161 C. C. A. 341, 41 Am. Bankr. Rep. 51.

[48] Ray v. Norseworthy, 23 Wall. 128, 23 L. Ed. 116. A sale of a bankrupt's mortgaged property free from liens under an order of the bankruptcy court gives the purchaser the same title as if the sale were made in any other court of equity to foreclose the mortgage or marshal the assets of an insolvent, and his title is good against the privies of the mortgagor and mortgagee, including the wife of the mortgagor when she has renounced her dower. Gantt v. Jones (C. C. A.) 272 Fed. 117, 46 Am. Bankr. Rep. 351. Since in bankruptcy the court can order the sale of the property free from incumbrances, where the mortgagee consents to such sale his lien on the land is wiped out, and no release of the mortgage (as provided in the state statute) is necessary to pass the title. Toler v. Crowder, 127 Ark. 552, 192 S. W. 905.

[49] Houston v. City Bank of New Orleans, 6 How. 486, 12 L. Ed. 526; In re Sanborn (D. C.) 96 Fed. 551, 3 Am. Bankr. Rep. 54.

[50] Gantt v. Jones (C. C. A.) 272 Fed. 117, 46 Am. Bankr. Rep. 351; In re Bradley (C. C. A.) 269 Fed. 784; In re Plantations Co. (D. C.) 270 Fed. 273, 46 Am. Bankr. Rep. 318; Moran v. Schnugg, 7 Ben. 399, Fed. Cas. No. 9,786; Shinn v. Kemp & Hebert, 73 Wash. 254, 131 Pac. 822. Where the trustee in bankruptcy,

The power thus vested in the court of bankruptcy may be exercised by the referee. That is, the referee has authority, in the exercise of a judicial discretion, to order the sale of property free from liens, transferring the claims of lien creditors to the proceeds of sale, and to confirm the sale when made.[51]

But the court of bankruptcy will not order the trustee to sell property free of liens, unless satisfied that the interests of the general creditors will be advanced thereby, by the production of a fund available for their claims over and above the liens, and that the interests of creditors holding liens will not be injuriously affected.[52] The proper inquiry for both the trustee and the court is: On what terms will the property bring most for the creditors, subject to or discharged from the incumbrances upon it?[53] As illustrating the circumstances which may properly influence the court in deciding this question, we may mention a case where a portion of the bankrupt's property was subject to a valid attachment lien, and it appeared that the sale of the attached property by the sheriff would dismember the property and result in destroying its value, while a sale of the whole property by the bankrupt's trustee would enable the creditors to obtain a better price. Here it was held proper to order the sale free from liens.[54] So where, by a prompt sale of the bankrupt's assets, interest accruing on liens thereon and taxes would be saved, and the sale could be made by the trustee with less expense than by the sheriff on foreclosure of the liens, and a sale by the trustee would enable the estate to be settled promptly, without awaiting the outcome of an action by lien creditors to enforce their

knowing the facts creating an equitable lien on property, sold the property and used the proceeds in paying costs of administration primarily chargeable against the general assets, a court of equity, following the maxim that equity will look upon that as done which ought to have been done, will follow the proceeds into the entire mass of the estate, giving the party injured by the unlawful diversion a priority of right over the other creditors. In re Plantations Co. (D. C.) 270 Fed. 273, 46 Am. Bankr. Rep. 318.

[51] In re Miners' Brewing Co., 162 Fed. 327, 20 Am. Bankr. Rep. 717; In re Sanborn, 96 Fed. 551, 3 Am. Bankr. Rep. 54; In re Waterloo Organ Co., 118 Fed. 904, 9 Am. Bankr. Rep. 427.

[52] In re Fayetteville Wagon-Wood & Lumber Co., 197 Fed. 180, 28 Am. Bankr. Rep. 307; In re Shaeffer, 105 Fed. 352, 5 Am. Bankr. Rep. 248; In re Styer, 98 Fed. 290, 3 Am. Bankr. Rep. 424; In re Pittelkow, 92 Fed. 901, 1 Am. Bankr. Rep. 472. See Equitable Trust Co. v. Vanderbilt Realty Improvement Co., 155 App. Div. 723, 140 N. Y. Supp. 1008; In re Progressive Wall Paper Corp. (D. C.) 222 Fed. 87, 35 Am. Bankr. Rep. 508.

[53] In re National Iron Co., 10 Phila. (Pa.) 274, 8 N. B. R. 422, Fed. Cas. No. 10,045.

[54] In re United States Graphite Co., 161 Fed. 583, 20 Am. Bankr. Rep. 573. The sale of personalty of a bankrupt separate from the realty, which together constituted and were used as a business plant and were mortgaged as such, thus destroying the business entity of the property, is erroneous. In re Franklin Brewing Co., 249 Fed. 333, 161 C. C. A. 341, 41 Am. Bankr. Rep. 51.

liens, and the bankrupt's wife had quitclaimed her dower in the property to the trustee, these facts were held sufficient to move the court to exercise its discretion to order an immediate sale of the assets free from the liens.[55]

§ 472. **What Interests Not Divested.**—Since a trustee in bankruptcy can sell no more than the bankrupt himself owned, a sale of real estate by the trustee does not bar or extinguish an inchoate right of dower therein existing in the bankrupt's wife.[56] But as it is highly desirable to make the sale free from such dower right, as the property will ordinarily bring a much better price, the wife's consent to release her dower should be obtained if possible, and in that case she may be compensated by a fair allowance out of the proceeds of the sale.[57] For reasons of another kind, it has generally been held that the liens of state and municipal taxes are not divested by a bankruptcy sale, even though ordered to be made free of all incumbrances,[58] unless, perhaps, as suggested in one of the cases, the revenue officer or other proper representative of the state is made a party to the trustee's application for an order of sale.[59] But in a case where the court of bankruptcy ordered the sale of real estate subject only to a first mortgage thereon, it was held that all other liens were divested, including a lien for taxes, and this,

[55] In re Keet, 128 Fed. 651, 11 Am. Bankr. Rep. 117.

[56] Porter v. Lazear, 109 U. S. 84, 3 Sup. Ct. 58, 27 L. Ed. 865; In re Shaeffer, 105 Fed. 352, 5 Am. Bankr. Rep. 248; In re Hays (C. C. A.) 181 Fed. 674, 24 Am. Bankr. Rep. 669; In re Angier, 4 N. B. R. 619, Fed. Cas. No. 388; Dwyer v. Garlough, 31 Ohio St. 158; Kelso's Appeal, 102 Pa. St. 7; Lazear v. Porter, 87 Pa. St. 513, 30 Am. Rep. 380; Worcester v. Clark, 2 Grant (Pa.) 84; Cooper v. Tabor, 8 Wkly. Notes Cas. (Pa.) 341. See Baird v. Winstead, 123 N. C. 181, 31 S. E. 390; Kelly v. Minor, 252 Fed. 115, 164 C. C. A. 227; Haggett v. Jones, 111 Me. 348, 89 Atl. 140; Harlin v. American Trust Co., 67 Ind. App. 213, 119 N. E. 20. Under the law of Pennsylvania, this question is doubtful. There are some decisions holding that, since the 1910 amendment to the Bankruptcy Act, which gives to the trustee in bankruptcy the rights and status of a creditor holding a judgment or other lien, the land of a Pennsylvania bankrupt can be sold free from the dower rights of his wife, such rights under the state laws being subject to the claims of creditors. In re Kligerman (D. C.) 253 Fed. 778, 42 Am. Bankr. Rep. 670; In re Codori (D. C.) 207 Fed. 784, 30 Am. Bankr. Rep. 453. But the decision in In re Chotiner (D. C.) 216 Fed. 916, is directly to the contrary.

[57] Savage v. Savage, 141 Fed. 346, 72 C. C. A. 494, 3 L. R. A. (N. S.) 923, 15 Am. Bankr. Rep. 599. And see In re Strauch (D. C.) 208 Fed. 842, 31 Am. Bankr. Rep. 36; Carver v. Ward, 81 W. Va. 644, 95 S. E. 828. In a case where the bankrupt's wife had an inchoate dower interest in the surplus proceeds of his lands sold under foreclosure, it was directed that one-third of such surplus should be invested in government bonds, to be held by the clerk after settlement of the estate. In re Munford (D. C.) 255 Fed. 108, 43 Am. Bankr. Rep. 218.

[58] In re Gerry, 112 Fed. 958, 7 Am. Bankr. Rep. 459; In re Keller, 109 Fed. 131, 6 Am. Bankr. Rep. 351; Stokes v. State, 46 Ga. 412, 9 N. B. R. 191, 12 Am. Rep. 588. Compare In re New York & Philadelphia Package Co. (D. C.) 225 Fed. 219, 35 Am. Bankr. Rep. 94.

[59] Meeks v. Whatley, 48 Miss. 337, 10 N. B. R. 498.

although a statute of the state provided that taxes should be a continuing lien on property notwithstanding a judicial sale of it, unless the proceeds of the sale were sufficient to pay them, where it further appeared that this statute was not enacted until after the creation of the first mortgage and that it was not retroactive.[60] There are some other exceptional cases in which outstanding interests in realty will not be divested by the sale. Thus, a person holding the legal title to lands, but bound under a deed of trust to account to third persons for specific interests therein, conveyed the same to his trustee in bankruptcy. No issues were framed or determined in the court of bankruptcy as between the trustee and such third persons, and at the trustee's sale, the bankrupt repurchased the lands. It was held that the sale did not divest the interests of the third persons, and that the bankrupt took the lands still burdened with the trust.[61] So, where certain realty was conveyed by an alleged fraudulent conveyance from husband to wife, and subsequently they jointly executed a mortgage thereon to a third party, it was held that the subsequent private sale in bankruptcy of the realty in question as the property of the husband could not discharge the land from the lien of the mortgage, since the mortgage was good under the wife's title, which would remain perfect until directly impeached by the husband's creditors.[62]

§ 473. **Sale of Perishable Property.**—Where property of a bankrupt is of a perishable nature and must be disposed of immediately in order to prevent its dissipation or loss, it may be ordered sold at any time after the filing of the petition in bankruptcy, even before the adjudication,[63] or before the appointment of a trustee.[64] These cases, as well as the more ordinary cases of sales by trustees, are covered by the General Orders in bankruptcy, wherein it is provided that "upon petition by a bankrupt, creditor, receiver, or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court."[65] When the trustee has sold property as perishable, and his action is confirmed by the court on his petition, it is not necessary to state the grounds on which the property, taken as a whole, was

[60] In re Prince & Walter, 131 Fed. 546, 12 Am. Bankr. Rep. 675.

[61] Roby v. Colehour, 146 U. S. 153, 13 Sup. Ct. 47, 36 L. Ed. 922.

[62] Schwartz v. Kleber (Pa.) 7 Atl. 209.

[63] In re Kelly Dry-Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528.

[64] Supra, § 217.

[65] General Order No. 18, par. 3. For form of petition and order for sale of

considered to be in the nature of perishable property.[66] But the court has no power to order the sale of such property unless it is in the possession of the bankrupt or the trustee or of some officer of the court appointed to take charge of it, such as the marshal or a receiver.[67] An order authorizing the receiver of a bankrupt to sell perishable property consisting of produce in storage, "at public or private sale within his discretion, at current rates, without notice," will justify a sale in bulk of all the property in the hands of a warehouseman, after it has been offered in car load lots.[68] An order for the sale of perishable property is within the jurisdiction and authority of the referee in bankruptcy.[69]

§ 474. Land in Another District or State.—As the jurisdiction of the court of bankruptcy embraces all the property of the bankrupt wherever situate, it is not bound by state laws or state lines in ordering its sale. Thus, a state statute providing that lands taken in execution shall be sold in the county where the property is situated has no application to a proceeding in bankruptcy in a federal court, and a trustee in bankruptcy may conduct a sale of land in a county other than that in which the land lies.[70] So the fact that land of a bankrupt may be situated in a state beyond the federal district where the proceedings are pending is no obstacle to converting it into cash for the benefit of the estate. If the trustee has taken possession, it is within the custody of the court of bankruptcy, and the referee has jurisdiction to order its sale free from liens.[71] As to the place where the sale should be conducted, in the case of land in another state, it has been held that the trustee may hold the sale at the place where he would sell any chattel, that is, where the estate is being administered.[72] Generally, however, it would be more advantageous to sell the property where it lies. But when this is done, it is not necessary for the trustee to

perishable property, see Official Form No. 46.

[66] Rogers v. Abbot, 206 Mass. 270, 92 N. E. 472, 138 Am. St. Rep. 394.

[67] In re Metzler, 1 Ben. 356, 1 N. B. R. 38, Fed. Cas. No. 9,512.

[68] In re Roberts, 166 Fed. 96, 92 C. A. 80, 21 Am. Bankr. Rep. 573.

[69] This appears from Official Form No. 46, which is expressly prepared to be signed by the referee. And see In re Kelly Dry-Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528. It was held otherwise under the act of 1867. See In re Graves, 2 Ben. 100, 1 N. B. R. 237, Fed. Cas. No. 5,709.

[70] James v. Koy (Tex. Civ. App.) 59 S. W. 295. And the Act of Congress of March 3, 1893, requiring sales of land to be made on the property or at the courthouse in the county where the land lies, does not apply to sales in bankruptcy proceedings. In re Britannia Mining Co. (C. C. A.) 203 Fed. 450, 29 Am. Bankr. Rep. 472; In re La France Copper Co., 205 Fed. 207, 30 Am. Bankr. Rep. 381.

[71] In re Wilka, 131 Fed. 1004, 12 Am. Bankr. Rep. 727; Robertson v. Howard, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174, 30 Am. Bankr. Rep. 611; T. E. Wells & Co. v. Sharp, 208 Fed. 393, 125 C. C. A. 609, 31 Am. Bankr. Rep. 344.

[72] Oakey v. Corry, 10 La. Ann. 502. And see In re Britannia Mining Co., 197 Fed. 459, 28 Am. Bankr. Rep. 651.

go in person to the place of sale, in order to be present and superintend it, but he may employ an auctioneer to conduct the sale. It was so held in a case where the land to be sold was situated in Arizona, but the estate in bankruptcy was being administered in Massachusetts.[73]

§ 475. **Notice.**—The act provides that creditors shall have ten days' notice by mail (unless they waive notice in writing) of all proposed sales of the bankrupt's property.[74] This is in order that they may have an opportunity to appear and show cause against the proposed sale or against the time, place, or terms of sale.[75] But the courts incline to the opinion that the only requirements as to notice of bankruptcy sales which the courts are bound to regard are to be found in the bankruptcy act itself, and therefore that the act of Congress of March 3, 1893, requiring publication of notice of judicial sales once a week for four weeks, does not apply.[76] But when the time fixed by order for the sale has expired without the sale being held, notice to creditors and others interested must be given de novo before a new order of sale is made.[77] In addition to this, all holders of liens on the property and claimants of interests therein must be served with notice or process, which must affirmatively appear by the record, or the sale will be ineffectual to divest their liens or interests.[78] Under the former bankruptcy law it was held that the requirement of notice of the time and place of sale of the bankrupt's real estate was directory only, affecting the accountability of the trustee but not the title of a purchaser in good faith.[79] This may well be the case as to the notice required to be mailed to creditors. But it is otherwise as to adverse claimants and lien holders. Even such an one, however, may waive the objection of a want of notice; and he will be held to have done so where he is personally present at the sale and interposes no objection.[80] The notice for the sale should of course con-

[73] In re National Mining Exploration Co., 193 Fed. 232, 27 Am. Bankr. Rep. 92.

[74] Bankruptcy Act 1898, § 58a (4).

[75] In re Vila, 5 Law Rep. 17, Fed. Cas. No. 16,941.

[76] Robertson v. Howard, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174, 30 Am. Bankr. Rep. 611; In re Edes, 135 Fed. 595, 14 Am. Bankr. Rep. 382; In re National Mining Exploration Co., 193 Fed. 232, 27 Am. Bankr. Rep. 92. But see, contra, In re Britannia Mining Co., 197 Fed. 459, 28 Am. Bankr. Rep. 651.

[77] Allgair v. William F. Fisher & Co., 143 Fed. 962, 75 C. C. A. 148, 16 Am. Bankr. Rep. 278.

[78] Factors' & Traders' Ins. Co. v. Murphy, 111 U. S. 738, 4 Sup. Ct. 679, 28 L. Ed. 582; Ex parte Bryan, 2 Hughes, 273, 14 N. B. R. 71, Fed. Cas. No. 2,061; Moorman v. Arthur, 90 Va. 455, 18 S. E. 869; In re Platteville Foundry & Machine Co, 147 Fed. 828, 17 Am. Bankr. Rep. 291; In re Reading Hat Mfg. Co. (D. C.) 224 Fed. 786, 34 Am. Bankr. Rep. 884; Pace v. Berry, 176 Ky. 61, 195 S. W. 131. And see supra, § 471. Notice to the trustee in a mortgage is enough to give jurisdiction over holders of the bonds secured. Equitable Trust Co. v. Vanderbilt Realty Improvement Co., 155 App. Div. 723, 140 N. Y. Supp. 1008. Stockholders of a bankrupt corporation are not entitled to this notice. In re Witherbee (C. C. A.) 202 Fed. 896, 30 Am. Bankr. Rep. 314.

[79] Crowley v. Hyde, 116 Mass. 589.

[80] Keyser v. Wessel, 128 Fed. 281, 62

tain such particulars, as to the description of the property to be sold, the time and place of sale, and the like, as are ordinarily required in notices of judicial sales or sales by executors or receivers. A notice in bankruptcy, serving in a double capacity, as a notice to creditors that application for a sale of property will be made, and as notice to bidders that they may attend and offer bids, though irregular, will not vitiate the sale, if it is shown that the notice was freely advertised, and it does not appear that further publicity would have produced a better bid.[81] It is also to be observed that, while the statute requires notice to be given to creditors of sales by trustees, it does not require notice to be given of sales by pledgees, and hence a trustee, while acting as receiver, is not chargeable for a sale of pledged collaterals under an order authorizing a public or private sale thereof, without notice to creditors.[82]

§ 476. **Manner and Conduct of Sale.**—The General Orders provide that "all sales shall be by public auction unless otherwise ordered by the court," but that "upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee."[83] By making this order the Supreme Court must be regarded as having construed the Bankruptcy Act in such a manner as that a court of bankruptcy or a referee has discretionary power to order a private sale of the bankrupt's property, with or without notice.[84] But authorization from the court is strictly necessary. A private sale made by the trustee without an order of the court allowing him so to sell is void.[85] As to the distinction between public and private sales, it is held that there is a "public" sale in bankruptcy, where all persons are permitted to bid, where bids are not held open except with the bidders' consent, and where notice inviting bids is publicly given, though the sale is not made by auction, and is combined with a meeting of the creditors of the bankrupt held for the purpose of enabling such creditors to vote on the acceptance of the bid

C. C. A. 650, 12 Am. Bankr. Rep. 126; In re Caldwell, 178 Fed. 377, 24 Am. Bankr. Rep. 495.

[81] In re Nevada-Utah Mines & Smelters Corp. 198 Fed. 497, 28 Am. Bankr. Rep. 409.

[82] In re James Carothers & Co., 193 Fed. 687, 27 Am. Bankr. Rep. 921.

[83] General Order No. 18. For form of petition and order for sale of real estate at auction, see Official Form No. 42. For form of petition and order for private sale of property, see Official Form No. 45.

[84] In re Hawkins, 125 Fed. 633, 11 Am. Bankr. Rep. 49; In re Edes, 135 Fed. 595, 14 Am. Bankr. Rep. 382; In re Gutterson, 136 Fed. Cas. 698, 14 Am. Bankr. Rep. 495; In re Knox Automobile Co. (D. C.) 210 Fed. 569, 32 Am. Bankr. Rep. 67.

[85] Reid v. Robrecht, 102 Cal. 520, 36 Pac. 875. Compare Curdy v. Stafford, 88 Tex. 120, 30 S. W. 551.

or bids made.[86] It is also a permissible method of conducting a sale in bankruptcy for the trustee, under an order of court, to invite sealed bids for specified property, to be accompanied by certified checks for a certain amount, such bids to be opened in the presence of the referee on a day and at an hour named, and the property to be awarded to the highest bidder, subject to confirmation by the court, upon the hearing and determination of objections, which are directed to be filed by a certain day and appointed to be heard on a designated other day.[87] A petition by the trustee to the bankruptcy court for an order authorizing a meeting of creditors, the object of the meeting being to enable the creditors to act upon any bid for certain property of the bankrupt which may be submitted at the meeting, is irregular, but yet is sufficient to authorize the referee to act upon it, and is sufficient notice that a sale is proposed.[88]

It is a rule applicable to trustees under deeds of trust and similar instruments that any sale of the property must be made by the trustee himself in person,[89] and that he must be present during the whole of the sale.[90] But there is no specific requirement in the bankruptcy act that sales shall be made personally by the trustee, and therefore it is held to be within the power and discretion of the court of bankruptcy to appoint commissioners to make a given sale,[91] or to appoint an auctioneer to sell property of a bankrupt's estate in advance of any particular occasion therefor.[92] The trustee may also employ an auctioneer to cry the sale, but only under the authority of the court.[93]

The time and place of the sale are generally to be fixed by the trustee. And here it should be remembered that it is his duty to sell the property of the estate to the best possible advantage, and to choose a time when there is a good market for the property, wherein he should exercise not only fidelity to his trust, but also good business judgment and sagacity. And if he sacrifices the property by selling at an improper or ill-chosen time, though his intentions were good, he will be liable for the deficiency

[86] In re Nevada-Utah Mines & Smelters Corp., 198 Fed. 497, 28 Am. Bankr. Rep. 409. On appeal in this case ([C. C. A.] 202 Fed. 126, 29 Am. Bankr. Rep. 754), it was held that a sale made under an order passed at a meeting of creditors, according to a notice addressed to "creditors, stockholders, and other parties in interest," but not inviting the public to attend and bid, was a private sale, but was justified in the circumstances of the case.

[87] See In re Chandler (C. C. A.) 194 Fed. 944, 28 Am. Bankr. Rep. 89.

[88] In re Nevada-Utah Mines & Smelters Corp., 198 Fed. 497, 28 Am. Bankr. Rep. 409.

[89] Fuller v. O'Neil, 69 Tex. 349, 6 S. W. 181, 5 Am. St. Rep. 59.

[90] Brickenkamp v. Rees, 69 Mo. 426.

[91] Sturgiss v. Corbin, 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543.

[92] In re Benjamin, 136 Fed. 175, 69 C. C. A. 191, 14 Am. Bankr. Rep. 481.

[93] In re National Mining Exploration Co., 193 Fed. 232, 27 Am. Bankr. Rep. 92; In re Pegues, 3 N. B. R. 80, Fed. Cas. No. 10,907.

in the proceeds of the sale.[94] Still, the object of the bankruptcy act is an expeditious settlement and distribution of the estate, and the trustee cannot keep the creditors waiting indefinitely in the hope that the property will eventually command a better price. It is his duty to sell the property with all reasonable promptness, unless all the creditors will consent to a delay.[95] But a mere mistake in judgment as to the proper place for the sale will not invalidate it, in the absence of fraud or collusion.[96] In pursuance of his duty to realize as much as possible for the creditors, it is also incumbent upon the trustee not to sell in bulk, but to divide the property into portions, if susceptible of division, and if it will thus command a higher price; if his failure to do this results in a sacrifice of the property, the sale will be set aside.[97] Anything like collusion or an attempt to stifle competition will of course invalidate the sale but this result does not follow because of a private arrangement between the attorney for the purchaser and the auctioneer that the bid of any other person should be raised $50 each time until a sign to stop was given.[98] The property should be sold to the highest bidder, and a "bid" means an offer by a purchaser to pay something to the trustee for the property purchased which the trustee may distribute among creditors.[99] The "highest bidder" is the one who makes the highest bid in good faith. For a trustee is not bound to accept every bid, and the court will always sustain him in refusing bids which would manifestly frustrate the very object and purpose of the sale.[100] And a bid which was not accepted will not give the bidder any standing to complain either of its rejection of a sale to another at a higher price.[101] Generally speaking, the trustee is bound to obtain the best possible price, under the conditions attending the sale, and will be held responsible for any negligence in failing to do so.[102]

[94] See Snyder's Adm'rs v. McComb's Ex'x, 39 Fed. 292; Melick v. Voorhees, 24 N. J. Eq. 305; Holbrook v. Coney, 25 Ill. 543.

[95] Hart v. Crane, 7 Paige (N. Y.) 37.

[96] Hills v. Alden, 2 Hask. 299, Fed. Cas. No. 6,507.

[97] In re Lloyd, 11 Fed. 586; Chesley v. Chesley, 49 Mo. 540; Smith v. Scholtz, 68 N. Y. 41. But a sale of a bankrupt's assets en masse, for a larger sum than was bid for the property in parcels, under the court's order of sale, will be held valid. In re Haywood Wagon Co., 219 Fed. 655, 135 C. C. A. 391, 33 Am. Bankr. Rep. 618.

[98] In re Ketterer Mfg. Co., 156 Fed. 719, 19 Am. Bankr. Rep. 638. And see In re Ohio Copper Mining Co. (D. C.) 237 Fed. 490, 38 Am. Bankr. Rep. 548.

[99] In re J. B. & J. M. Cornell Co. (D. C.) 186 Fed. 859, 26 Am. Bankr. Rep. 252. A sale through bankruptcy proceedings is a judicial sale, subject to the same rules as an auction; so that a bid may be withdrawn before the hammer falls. In re Glas-Shipt Dairy Co., 239 Fed. 122, 152 C. C. A. 164, 38 Am. Bankr. Rep. 554. But see In re Lane Lumber Co., 207 Fed. 762, 125 C. C. A. 300, 31 Am. Bankr. Rep. 148.

[100] Gray v. Veirs, 33 Md. 18.

[101] In re Chandler (C. C. A.) 194 Fed. 944, 28 Am. Bankr. Rep. 89. But see In re Williams, 197 Fed. 1, 116 C. C. A. 523, 28 Am. Bankr. Rep. 258.

[102] In re Ryan, 6 N. B. R. 235, Fed. Cas. No. 12,182; In re Knott, Fed. Cas. No. 7,893; Hawkins v. Alston, 4 Ired. Eq. (39 N. C.) 137.

§ 477. **Terms of Sale.**—There is nothing in the bankruptcy act which specifically forbids the sale of a bankrupt's property by the trustee on credit. And under the act of 1867, it was held that a sale so made was not necessarily invalid for that reason alone.[103] But a trustee who sells on any other terms than immediate cash takes a serious responsibility, and one which he should not assume without the express permission of the court or the consent of all the creditors. At least, it has been held that if the trustee, without the sanction of the court, sells the effects of the estate on credit, taking the purchasers' notes for the price, and then is so dilatory or negligent in his efforts to collect the notes that he suffers them to become outlawed, he is personally responsible for the loss, whether the makers of the notes were originally responsible or not.[104] It is also a requirement of the statute that "all real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value."[105] The appraisers should value the property at its fair market price, that is, the price which it might be expected to bring at a private sale in the ordinary course of business or in the ordinary methods of selling such property, and not at the price which it might be expected to bring at a forced sale. This is shown by the fact that the law does not require the property to bring its appraised value, but only provides that, if it is sold without the approval of the court, it must bring not less than three-fourths of that value.

§ 478. **Who may purchase.**—A referee in bankruptcy cannot, directly or indirectly, purchase any property of an estate in bankruptcy over which he has jurisdiction as a referee. This is expressly forbidden by the act, and moreover, it is made a criminal offense and conviction thereof vacates his office.[106] For similar reasons, one who has been employed in appraising the property cannot buy it, either directly or through the agency of an attorney.[107] Neither can the trustee himself

[103] Traer v. Clews, 115 U. S. 528, 6 Sup. Ct. 155, 29 L. Ed. 467. Compare (as to sales by assignees for the benefit of creditors), Muller v. Norton, 132 U. S. 501, 10 Sup. Ct. 147, 33 L. Ed. 397; Schuler v. Israel, 27 Fed. 851; Meacham v. Sternes, 9 Paige (N. Y.) 398.

[104] In re Newcomb, 32 Fed. 826.

[105] Bankruptcy Act 1898, § 70b. And see supra, § 300. An appraisal made by persons appointed by the court will be presumed honest and accurate, and while the approval of the court is not necessary if the property is sold for as much as 75 per cent. of the appraised value, yet, if a less sum is bid, the court is bound to exercise its best discretion in the matter. In re American Beaver Co. (D. C.) 242 Fed. 599, 39 Am. Bankr. Rep. 603.

[106] Bankruptcy Act 1898, § 39b, par. 3; Id., § 29c, par. 2.

[107] In re Frazin & Oppenheim, 181 Fed. 307, 24 Am. Bankr. Rep. 598.

become the purchaser at his own sale. This is forbidden on principles of public policy.[108] Such a sale will be set aside; and though the trustee may not be required to lose the value of improvements made by him on the property after the sale, yet it is not enough to prevent a resale that he accounts for the value of the property at the time of the sale, if it largely appreciated thereafter.[109] Still, there may be exceptional circumstances in which it will be proper for the court to permit the trustee to become a bidder at his own sale. Thus in one case, where real estate came to the trustee incumbered with liens exceeding its value, the trustee himself being one of the judgment creditors, it was held competent for the court to grant him leave to proceed in a state court to sell the property on his judgment and to bid in his individual right at the sheriff's sale.[110] So a sale in bankruptcy is not voidable because one of the three trustees of the bankrupt was a stockholder and officer of a new corporation organized for the purpose of purchasing the bankrupt's property, when the creditors appointed him with full knowledge of this fact, and the new company was promoted by a reorganization committee of the bankrupt's creditors for the purchase of the property, and all the stockholders of the bankrupt corporation were given full opportunity to participate.[111] Where the subject of the sale was certain claims against the United States, and they were bought by a person who had formerly been the manager of the bankrupt corporation, and he had more knowledge of the merit of the claims and more confidence of ultimate success in collecting them than the creditors had, it was held that this did not require that the sale should be set aside, where there was no fraud or concealment, and the creditors had an opportunity to ascertain for themselves the situation in respect to the claims.[112] Where land of the bankrupt is sold subject to a mortgage, the mortgagee, not having proved his claim in the bankruptcy proceeding, may, like any other person, bid for the bankrupt's equity of redemption.[113] The wife of the bankrupt may become a purchaser at the sale, but she has the burden of showing that the purchase was not made with money furnished by the bankrupt.[114]

There is nothing to prevent the bankrupt himself from buying any portion of his former assets when offered for sale by his trustee, if he can pay the price either out of his exempt property or out of property acquired after the adjudication; and if he does so purchase, he will take

[108] Citizens' Bank v. Ober, 1 Woods, 80, 13 N. B. R. 328, Fed. Cas. No. 2,731.

[109] In re Hawley, 117 Fed. 364, 9 Am. Bankr. Rep. 61.

[110] In re Carrier, 39 Fed. 193.

[111] In re National Mining Exploration Co., 193 Fed. 232, 27 Am. Bankr. Rep. 92.

[112] Bray v. United States Fidelity & Guaranty Co. (C. C. A.) 267 Fed. 533, 45 Am. Bankr. Rep. 395.

[113] In re Old Oregon Mfg. Co. (D. C.) 236 Fed. 804, 38 Am. Bankr. Rep. 409.

[114] Woodford v. Rice (D. C.) 207 Fed. 473, 30 Am. Bankr. Rep. 455.

a new title, embracing all the interest which the trustee had to convey.[115] So he may make the purchase through an attorney.[116] And it does not invalidate the sale that the successful bid was made by an attorney employed by the purchaser for that purpose and that the attorney had acted as counsel for the bankrupt and also for the trustee in rendering certain legal services required locally, where he had no connection with the bankruptcy proceedings.[117] Any collusive or fraudulent combination among creditors or other bidders will of course be ground for setting aside the sale.[118] But when the property of a bankrupt corporation is for sale, it is perfectly proper for the bondholders, stockholders, or officers to form a syndicate or a reorganization committee or a new corporation, for the purpose of bidding on the property and acquiring it if they can fairly, and if they make no attempt to stifle or exclude independent competition.[119]

§ 479. **Rights and Liabilities of Purchasers.**—The powers of a trustee in bankruptcy are in no sense judicial, and his acts bind only those whom he represents. In the sale of the bankrupt's estate, he acts only for the creditors who prove their claims, and in such matters he can conclude the rights of no one else.[120] And a purchaser at a bankruptcy sale must take notice that nothing is sold except the bankrupt's interest.[121] Thus, where the trustee sells land, the title to which was acquired by the bankrupt after the filing of the petition in bankruptcy,

[115] Hallyburton v. Slagle, 130 N. C. 482, 41 S. E. 877; Gates v. Fraser, 9 Ill. App. 624; Udall v. School District No. 4, 48 Vt. 588; Arnold v. Leonard, 12 Smedes & M. (Miss.) 258.

[116] Beall v. Chatham, 100 Tex. 371, 99 S. W. 1116.

[117] In re National Mining Exploration Co., 193 Fed. 232, 27 Am. Bankr. Rep. 92.

[118] In re Troy Woolen Co., 8 Blatchf. 465, 4 N. B. R. 629, Fed. Cas. No. 14,201.

[119] In re Pittsburgh Dick Creek Mining Co., 197 Fed. 106, 28 Am. Bankr. Rep. 613; In re Prudential Outfitting Co. (D. C.) 250 Fed. 504, 41 Am. Bankr. Rep. 621. Schuler v. Hassinger, 177 Fed. 119, 100 C. C. A. 539, 24 Am. Bankr. Rep. 184. In the case last cited it was said: "That there should be a reorganization agreement for the purpose of buying in the property of the bankrupt corporation cannot be objected to. In fact it furnishes the only way that a large diversified property and plant like that of the S. Company can be sold and purchased without disastrous results to creditors and stockholders, and the creditors have every right to organize themselves for the purpose of protecting their interests. These are propositions that need neither argument nor authority to support. That the trustees should in good faith encourage and approve a plan which looked to the successful settlement and winding up of the bankruptcy estate, and which met with the approval of creditors and had the consent of all classes interested, was perfectly proper."

[120] Second Nat. Bank v. National State Bank of New Jersey, 10 Bush (Ky.) 367.

[121] Asheville Supply & Foundry Co. v. Machin, 150 N. C. 738, 64 S. E. 887. And see Whitman v. Cammack, 7 Rob. (La.) 361; Shesler v. Patton, 114 App. Div. 846, 100 N. Y. Supp. 286. Where a bankrupt constructed an addition to a leased building on leased ground, the question whether such building constituted a fixture, or whether it was removable, as against the landlord, by a purchaser at a sale of the bankrupt's assets, could not be determined in advance of a sale and an attempt to sever. In re Gorwood, 138 Fed. 844, 15 Am. Bankr. Rep. 107.

the burden is on him and those who claim under him to show that the land equitably belonged to the bankrupt when the petition was filed.[122] Further, although a sale is ordered and confirmed by the court, this is not an adjudication that the property sold belonged to the estate of the bankrupt, but only that whatever title the bankrupt had to the property legally passed to the purchaser at the sale.[123] Further, it is a well-settled principle of law that there is no warranty in judicial sales and that the rule of caveat emptor applies to such sales with full force.[124] But a court of equity, in pursuance of justice, may set aside a sale made by a trustee in bankruptcy where it is shown that the purchaser has been innocently misled by the advertised notice of the sale.[125] But where the purchaser was expressly informed that the trustee was selling only such title as he possessed, and knew that such title was in litigation, and that the trustee assumed no personal responsibility and did not warrant the title or salability of the property, the purchaser cannot recover the money paid therefor, when it is subsequently determined that the trustee had no interest which he could convey.[126] In fact, it is the duty of an intending purchaser at such a sale to make an independent investigation of the nature and validity of the bankrupt's title, and to follow up all inquiries which are suggested by his discovery of doubtful or suspicious circumstances, otherwise he is in no position to ask aid or relief from the court.[127] But he is entitled to rely on an absolute compliance with the terms of the sale, and on the absolute fairness of an auction conducted under the order of the court.[128] He is not bound to see that every particular in the appointment and qualification of the trustee has been complied with.[129]

The purchaser becomes so far a party to the proceedings as to give the court of bankruptcy jurisdiction to make any and all orders necessary to compel him to complete his purchase.[130] And if he abandons his

[122] Wilkins v. Tourtellott, 28 Kan. 825.

[123] Chellis v. Coble, 37 Kan. 558, 15 Pac. 505. Where a bankrupt has no title to land, a sale thereof by the trustee conveys no title as against persons not parties to the bankruptcy proceeding. Anderson v. Daugherty, 169 Ky. 308, 183 S. W. 545.

[124] A person purchasing the bankrupt's assets from the trustee is charged with knowledge of any lack of authority on the part of the trustee, and also of the fact that the sale must be approved. In re Eden Musee American Co. (D. C.) 230 Fed. 925, 36 Am. Bankr. Rep. 111. Where the trustee sells property which never has been in his possession, the proceeds must stand for the benefit of one having a valid claim or lien upon it. Johnson v. American Smelting & Refining Co., 99 Neb. 633, 157 N. W. 337.

[125] Searcy v. McChord, 1 Fed. 261. And see In re Mott, 1 N. B. R. 223, Fed. Cas. No. 9,879; Carney v. Averill, 110 Me. 172, 85 Atl. 494.

[126] In re Frasin (C. C. A.) 201 Fed. 343, 29 Am. Bankr. Rep. 212; Taylor v Kimmerle, 232 Fed. 134, 146 C. C. A. 326, 37 Am. Bankr. Rep. 34.

[127] Webber v. Clark, 136 Ill. 256, 26 N. E. 360, 32 N. E. 748.

[128] In re Kronrot, 183 Fed. 653, 25 Am. Bankr. Rep. 738.

[129] Zeigler v. Shomo, 78 Pa. St. 357.

[130] Where, after a sale in bankruptcy, but before its confirmation by the court,

purchase, without any attempt to secure the property (transferable only on certain conditions) he will be liable for the loss on a resale.[131] So long as the proceedings are pending in the court of bankruptcy, as, on application to have the sale confirmed, the property is still within the control of that court, and it may give the purchaser what aid he may need.[132] But when the sale has been made, the proceeds received by the trustee, and the sale ratified by the court, it has no further jurisdiction over the property, and cannot interfere, by injunction or otherwise, to protect the purchaser against the assertion of adverse claims. He is thereafter left to himself, and must protect his own interests in any appropriate court, but cannot treat the bankruptcy court as a general warrantor of title.[133] As stated in one of the cases: "The court does not follow the property of the estates of bankrupts into the hands of purchasers, but only to the hands of purchasers. After they have once had the property, they must take care of it and of the possession of it." [134]

Where the property sold is a chose in action, the purchaser may of course sue on it, and it is sufficient evidence of the authority of the trustee in bankruptcy that he acted as such, without record evidence thereof.[135] And where a debt due to the bankrupt from a third person is sold, it cannot be offset by a debt due from the bankrupt to such third person which was acquired after the bankruptcy.[136] Where an equity of redemption is sold and a valid conveyance made, the purchaser may maintain a suit to redeem.[137] The special short statute of limitations contained in the bankruptcy act does not apply to actions by purchasers to recover property or collect debts bought by them.[138]

the property is so seriously damaged by a flood as to become substantially worthless, the loss cannot be visited upon the purchaser; the court has a judicial discretion to exercise in the matter of confirming the sale, and it would be an abuse of such discretion to require the purchaser to bear the loss. In re Finks, 224 Fed. 92, 139 C. C. A. 648, 34 Am. Bankr. Rep. 749.

131 Snyder v. Bougher, 214 Pa. St. 453, 63 Atl. 893; In re Myers-Wolf Mfg. Co. (C. C. A.) 205 Fed. 289, 30 Am. Bankr. Rep. 572.

132 Potter v. Martin, 122 Mich. 542, 81 N. W. 424.

133 Adams v. Crittenden, 17 Fed. 42; Briggs v. Stephens, 7 Law Rep. 281, Fed. Cas. No. 1,873; Henrie v. Henderson, 145 Fed. 316, 76 C. C. A. 196, 16 Am. Bankr. Rep. 617.

134 In re Hale, 19 N. B. R. 330, Fed. Cas. No. 5,912. Assets of a bankrupt corporation having been sold to a reorganization committee, a court in a bankruptcy proceeding has no jurisdiction to control the rights to be given by such committee to stockholders of the old company in the reorganization. In re Witherbee, 202 Fed. 896, 30 Am. Bankr. Rep. 314.

135 Arnold v. Leonard, 12 Smedes & M. (Miss.) 258. See Breakstone v. Buffalo Foundry & Machine Co., 79 Misc. Rep. 496, 141 N. Y. Supp. 159; Jennings v. Whitney, 224 Mass. 138, 112 N. E. 655.

136 Judson v. Lathrop, 6 La. Ann. 587.

137 Davis v. Ives, 75 Conn. 611, 54 Atl. 922. But the right of a mortgagor (under a state statute) to redeem within two years after a foreclosure does not pass to a purchaser from his trustee in bankruptcy. Leith v. Galloway Coal Co., 189 Ala. 204, 66 South. 149.

138 Judson v. Lathrop, 6 La. Ann. 587.

§ 480. Nature and Extent of Title Conveyed.—A purchaser at a trustee's sale of the property of a bankrupt acquires no higher title or greater rights than the bankrupt himself had in the property sold.[139] Thus, a deed of land given on such a sale conveys only an interest in the surface of the land, when the bankrupt had previously conveyed by a recorded deed the coal and other minerals underlying it.[140] So, where the tenant of a building places fixtures therein, the purchaser of the same from his trustee in bankruptcy acquires only such right to remove the fixtures as the tenant may have had.[141] And one who buys land from a trustee in bankruptcy knowing that the bankrupt held the land in trust for another, though by a deed absolute in form, acquires no title on which he can maintain a writ of entry.[142] One who buys the bankrupt's interest in a contract for the conveyance of land to him has all the rights therein which the bankrupt would have had but for the bankruptcy.[143] And a sale by the trustee of land held in trust by the bankrupt to secure debts due to himself passes to the purchaser the debts secured as well as the legal estate in the land, and entitles him to possession until the debts are paid.[144] It is to be observed that the purchaser acquires whatever title the bankrupt had in the land at the time of the sale, and if the bankrupt acquired any better or different title from the time of the adjudication in bankruptcy to the time the sale was made, that title inures to the benefit of the purchaser.[145] But it is otherwise as to a title vesting in the bankrupt by devise after the sale.[146] It is also a general principle that a purchaser of property at a bankruptcy sale takes it subject to all the equities with which it was chargeable in the hands

[139] McKiernan v. Fletcher, 2 La. Ann. 438; Wallace v. Meeks, 99 Ark. 350, 138 S. W. 638; Watson v. Conrad, 38 W. Va. 536, 18 S. E. 744; Winter, Loeb & Co. v. Montgomery Cooperage Co., 169 Ala. 628, 53 South. 905; Noyes v. Willard, 1 Woods, 187, Fed. Cas. No. 10,374; Converse v. Sorley, 39 Tex. 515; Roberts v. W. H. Hughes Co., 86 Vt. 76, 83 Atl. 807; Osborn v. Mills, 20 Cal. App. 346, 128 Pac. 1009; Brown v. Brown, 172 Ky. 754, 189 S. W. 921; Bailey v. Anderson, 142 Ga. 11, 82 S. E. 290. The sale and conveyance by a trustee of a bankrupt, in which the only property described was real estate, does not pass title to a house standing on the property, which, to the knowledge of the purchaser, belonged to another person. Sacred Heart Roman Catholic Church v. Vedder, 80 Misc. Rep. 541, 142 N. Y. Supp. 870. One purchasing a note at a bankruptcy sale after its maturity acquires only such title or interest as the bankrupt had, and the maker has the right to the same defenses against the purchaser that he would have if the trustee in bankruptcy were the plaintiff. Phillips v. Matthews, 205 Ala. 480, 88 South. 641.

[140] Catlin Coal Co. v. Lloyd, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216. And so also as to a mining lease. See Pittsburgh & West Virginia Gas Co. v. Ankrom, 83 W. Va. 81, 97 S. E. 593, 5 A. L. R. 1157.

[141] Jacob v. Kellogg, 56 Misc. Rep. 661, 107 N. Y. Supp. 713. See Sacred Heart Roman Catholic Church v. Vedder, 80 Misc. Rep. 541, 142 N. Y. Supp. 870.

[142] Faxon v. Folvey, 110 Mass. 392.

[143] Harriman v. Tyndale, 184 Mass. 534, 69 N. E. 353.

[144] Green v. Green, 79 N. C. 343.

[145] McAlpine v. Tourtelotte, 24 Fed. 69.

[146] Wilson v. Dresser, 152 Ill. 387, 38 N. E. 888.

of the bankrupt.[147] And unless the court of bankruptcy orders the property sold free of incumbrances, the purchaser will take it subject to all valid and recorded liens, that is, he will take only the equity of redemption, and the holder of a mortgage or other lien may proceed to enforce it against such purchaser,[148] or, conversely, the purchaser will have the right to redeem from a mortgage or other lien or from a sale on foreclosure thereof.[149] But the purchaser will be protected against a prior unrecorded deed of the bankrupt if he has no notice of it and is not chargeable with knowledge of facts sufficient to put him on inquiry.[150] But an announcement made at the sale, concerning the existence of an unrecorded mortgage or deed, will charge the purchaser with notice.[151] And where the order of court directing the sale authorizes the trustee to sell only the right, title, and interest of the bankrupt in the property and to convey by a quitclaim deed, a purchaser who has actual notice of an agreement made by the bankrupt and binding him to pay certain royalties on mining operations conducted on the land to the former owner, the same constituting a covenant running with the land, will take subject to the same and not free from it.[152] But if a previous conveyance, transfer, or assignment of the property in question, made by the bankrupt, is voidable under the bankruptcy law as having been preferential or as made in fraud of creditors, the purchaser of the property at the trustee's sale of it will succeed to the trustee's right to vacate or annul such transfer or assignment, and may maintain an appropriate action to do so.[153]

147 Renick v. Dawson, 55 Tex. 102; Baker v. Vining, 30 Me. 121, 50 Am. Dec. 617; Anderson v. Miller, 7 Smedes & M. (Miss.) 586; Steadman v. Taylor, 77 N. C. 134; Consolidated Arizona Smelting Co. v. Hinchman, 212 Fed. 813, 129 C. C. A. 267.

148 In re Wylie, 153 Fed. 281, 82 C. C. A. 411, 18 Am. Bankr. Rep. 503; In re Allin, 12 Fed. 433; Bucknam v. Dunn, 2 Hask. 215, 16 N. B. R. 470, Fed. Cas. No. 2,096; In re Cooper, 16 N. B. R. 178, Fed. Cas. No. 3,190; Horkan v. Eason, 10 Ga. App. 236, 73 S. E. 352; Owen v. Potter, 115 Mich. 556, 73 N. W. 977; Moore v. First Nat. Bank, 135 Ark. 369, 205 S. W. 902; Collier v. Seward & Roper, 116 Va. 377, 82 S. E. 100; Crouch v. Fahl, 63 Ind. App. 257, 113 N. E. 1009. One buying property at a bankruptcy sale subject to a mortgage thereon does not assume payment of the mortgage debt, but becomes owner of the property subject to the incumbrance. Kerman v. Leeper, 172 Mo. App. 286, 157 S. W. 984.

149 Greene v. Taylor, 132 U. S. 415, 10 Sup. Ct. 138, 33 L. Ed. 411.

150 Webber v. Clark, 136 Ill. 256, 26 N. E. 360, 32 N. E. 748; Holbrook v. Dickenson, 56 Ill. 497; Lynch v. Johnson, 170 N. C. 110, 86 S. E. 995.

151 Roberts v. W. H. Hughes Co., 86 Vt. 76, 83 Atl. 807.

152 Hinchman v. Consolidated Arizona Smelting Co., 198 Fed. 907, 29 Am. Bankr. Rep. 893.

153 In re Downing (C. C. A.) 201 Fed. 93, 29 Am. Bankr. Rep. 228; Bryan v. Madden, 79 App. Div. 636, 80 N. Y. Supp. 1131; s. c., 109 App. Div. 876, 90 N. Y. Supp. 465; Dwinel v. Perley, 32 Me. 197; Bartles v. Gibson, 17 Fed. 293; Hinton v. Williams, 170 N. C. 115, 86 S. E. 994; Finney v. Knapp Co., 145 Ga. 400, 89 S. E. 413. But see Annis v. Butterfield, 99 Me. 181, 58 Atl. 898; Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co. (C. C. A.) 175 Fed. 335, 23 Am. Bankr. Rep. 595.

Whatever title the purchaser takes, it is understood to be absolute and final, and not provisional or defeasible. The court has no power to deprive him of whatever rights he may acquire by his purchase, and therefore cannot grant leave to a creditor of the estate, or to any one else, to redeem from the sale on reimbursing the purchaser.[154] The latter will also be entitled to the rents and profits of real property purchased from the day of the sale, and not merely from the date of its confirmation.[155] But he cannot claim the bankrupt's right to any portion of the crops growing on the land and stipulated to be paid to him by way of rent.[156] Where the property sold consists of a going business, the purchaser will take it with the good will, if that was meant to be included in the sale,[157] and he may probably continue the business in the name of the former owner, a corporation,[158] or at least, he will have the right to advertise himself, by store signs or otherwise, as the "successor" of the bankrupt in the business.[159] Taxes due on the property at the time of the sale will of course be taken into account in fixing the price.[160] But taxes assessed after the sale, though before the payment of the balance of the purchase price and delivery of the deed must be paid by the purchaser, and he cannot claim reimbursement out of the funds of the estate, and this although the sale was made free of liens and incumbrances, since this applies only to such liens as existed at the date of the sale.[161]

[154] In re Novak, 111 Fed. 978, 7 Am. Bankr. Rep. 267.

[155] Hall v. Scovel, 10 N. B. R. 295, Fed. Cas. No. 5,945. As to application of rents on interest and principal of prior mortgage, see In re Ketterer Mfg. Co., 162 Fed. 583, 20 Am. Bankr. Rep. 694.

[156] In re Bledsoe, 12 N. B. R. 402, Fed. Cas. No. 1,533. A parol agreement to plant, cultivate, and care for an orchard on the land of another, and to divide the net proceeds after the trees have come to bearing age, is a mere license, and does not pass under a sale of the licensee's property in bankruptcy. McFerren v. Deardorff, 69 Pa. Super. Ct. 154.

[157] James Van Dyk Co. v. F. V. Reilly Co., 73 Misc. Rep. 87, 130 N. Y. Supp. 755. The sale by a corporation's trustee in bankruptcy of the assets and property of its business, without its good will and trade marks, destroys both the good will and trade marks as things of value, and will preclude the trustee from thereafter selling them as property of the bankrupt, and if he attempts to do so, he may be restrained. In re Jaysee Corset Co., 201 Fed. 779, 29 Am. Bankr. Rep. 856.

[158] S. F. Myers Co. v. Tuttle, 188 Fed. 532, 26 Am. Bankr. Rep. 541.

[159] Freeman v. Freeman, 86 App. Div. 110, 83 N. Y. Supp. 478. See Hotel Claridge Co. v. George Rector, Inc., 164 App. Div. 185, 149 N. Y. Supp. 748.

[160] As to trustee's sale of land free from lien of taxes, see supra, § 472. The liability of a purchaser of the bankrupt's real estate for taxes thereon, constituting a lien under the law of the state, depends on the terms of the sale. In re Reading Hat Mfg. Co. (D. C.) 224 Fed. 786, 34 Am. Bankr. Rep. 884. The purchaser at a bankruptcy sale of property on which a city had a lien for taxes takes it subject to the taxes, if the sale was not declared to be free of tax liens, and the city had no notice of the bankruptcy proceedings or that its claim was or would be adjudicated therein. Citizens' Savings Bank v. City of Paducah, 159 Ky. 583, 167 S. W. 870.

[161] In re Crowell (D. C.) 199 Fed. 659, 29 Am. Bankr. Rep. 308. And see In re Reading Hat Mfg. Co. (D. C.) 239 Fed. 357, 39 Am. Bankr. Rep. 207.

Where certain personal property was not inventoried as an asset of the bankrupt's estate in the possession of the trustee, or as property to which the trustee claimed title, and was not mentioned in the appraisal nor in any transfer from the trustee, the purchaser of the bankrupt's property from the trustee acquired no legal title to that particular property.[162]

§ 481. **Approval or Confirmation of Sale.**—The statute directs that "real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value."[163] This is construed to mean that any sale for which it is practicable to obtain the approval of the court of bankruptcy must be approved or confirmed, and that the sale passes no title until approved or confirmed, either expressly or impliedly.[164] And if the matter is drawn in question, a purchaser under a trustee's sale which was not approved by the court has the burden of proving that it was impracticable to make the sale subject to such approval.[165] The authority of the court in this respect may be exercised by the referee.[166] And since only the "approval" of the court is spoken of, it is not necessary that there should be a formal order confirming the sale in so many words. Thus, where, after an alleged unauthorized sale of the bankrupt's assets, the trustee applied for an order directing that the proceeds be delivered to him, which was duly entered by the court, this was held to constitute an affirmance of the sale.[167] But where the trustee makes a sale under order of the court and reports it for confirmation, the general rules governing judicial sales apply, and the validity of the title acquired depends upon the validity of the order of confirmation.[168] The creditors of the estate are not entitled to notice of an application for the confirmation of a sale.[169] But they may, it appears, offer objections to its confirmation if they have any substantial reasons for so doing. An unsuccessful bid-

[162] Ellis v. Feeney & Sheehan Building Co., 187 App. Div. 481, 176 N. Y. Supp. 61. And see Union Trading Co. v. Drach, 58 Colo. 550, 146 Pac. 767.

[163] Bankruptcy Act 1898, § 70b. Under the act of 1867, some of the courts of bankruptcy made a practice of not having trustees' sales reported to them for confirmation. See In re Alden, 16 N. B. R. 39, Fed. Cas. No. 151; In re Donnell, Fed. Cas. No. 3,986a.

[164] In re Shea, 126 Fed. 153, 61 C. C. A. 219, 11 Am. Bankr. Rep. 207; Everett v. Selden & Wright, 127 La. 573, 53 South. 867. Compare James v. Koy (Tex. Civ. App.) 59 S. W. 295.

[165] Davis v. Ives, 75 Conn. 611, 54 Atl. 922.

[166] In re American Beaver Co. (D. C.) 242 Fed. 599, 39 Am. Bankr. Rep. 603: Davis v. Ives, 75 Conn. 611, 54 Atl. 922.

[167] Mason v. Wolkowich, 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765, 17 Am. Bankr. Rep. 709.

[168] J. M. West Lumber Co. v. Lyon, 53 Tex. Civ. App. 648, 116 S. W. 652.

[169] In re Nevada-Utah Mines & Smelters Corp., 198 Fed. 497, 28 Am. Bankr. Rep. 409. Compare In re Peabody, 16 N. B. R. 243, Fed. Cas. No. 10,866.

der at the sale may object to confirmation, but not merely on the ground that he would have bid more if the property had been sold as a whole instead of separately. But the high bidder has a standing in court to urge the acceptance of his bid and the confirmation of the sale.[170] No case has been found in which the bankrupt himself was admitted to oppose the confirmation of a sale; but in one instance this right was given to the heirs of a deceased bankrupt (whose estate had proved to be solvent) on their objection that the land in question, which was in another state, had not been appraised, and was insufficiently advertised.[171]

As to the matters to be considered on such an application, the approval or disapproval of the sale rests very much in the discretion of the court,[172] and it may withhold its approval on account of mere inadequacy of price, without more;[173] it is not necessary that there should be fraud shown, or such gross inadequacy of price as to be proof of fraud.[174] Still it must be remembered that the purchaser at the sale has substantial rights, which are to receive the first consideration. The highest bidder at the sale, provided he is able and willing to comply with the terms of sale, is entitled to have his bid accepted and reported for confirmation, and to have the sale to him confirmed, if the sale was made on sufficient notice and for a fair price, and there appears to have been a compliance with all necessary and proper requirements for holding the sale, and honesty and fair dealing in the sale itself.[175] But the court may impose equitable terms or conditions upon the purchaser, as, for instance, by requiring him to give security for the payment of future rent on the sale of a leasehold interest.[176] An order of confirmation has

[170] Jacobsohn v. Larkey, 245 Fed. 538, 157 C. C. A. 650, L. R. A. 1918C, 176, 40 Am. Bankr. Rep. 563.

[171] In re Irvine (D. C.) 255 Fed. 168, 43 Am. Bankr. Rep. 155.

[172] In re Sanborn, 96 Fed. 551, 3 Am. Bankr. Rep. 54. Olitsky v. Estersohn, 90 N. J. Eq. 459, 108 Atl. 88.

[173] See In re Ohio Copper Mining Co. (D. C.) 237 Fed. 490, 38 Am. Bankr. Rep. 548; Bryant v. Charles L. Stockhausen Co. (C. C. A.) 271 Fed. 921, 46 Am. Bankr. Rep. 414.

[174] In re Groves, 2 Nat. Bankr. News, 30; In re O'Fallon, 2 Dill. 548, Fed. Cas. No. 10,445. See In re Thompson, 1 Nat. Bankr. News, 355. The court, in deciding whether or not to confirm or approve a sale, where the only question is whether the price offered is the best that could be obtained, should consider what is for the benefit of the creditors in general, and may properly be influenced by their wishes, if a large majority concur in their views. See In re Peerless Finishing Co., 199 Fed. 350, 28 Am. Bankr. Rep. 429.

[175] In re Williams, 197 Fed. 1, 28 Am. Bankr. Rep. 258; In re National Mining Exploration Co., 193 Fed. 232, 27 Am. Bankr. Rep. 92; In re Throckmorton, 149 Fed. 145, 79 C. C. A. 15, 17 Am. Bankr. Rep. 856; In re Ewing, 16 Fed. 753; In re Kronrot, 183 Fed. 653, 25 Am. Bankr. Rep. 738. Where the high bid at a bankruptcy sale does not amount to 75 per cent. of the appraised value, the bidder does not acquire an equitable title to the property. In re American Beaver Co. (D. C.) 242 Fed. 599, 39 Am. Bankr. Rep. 603.

[176] In re Varley & Bauman Clothing Co., 188 Fed. 761, 26 Am. Bankr. Rep. 104. Where the referee, as part of a composition plan, sold property of a bankrupt, and confirmation of the sale was conditioned upon confirmation of the offer of composition by the court, the

the effect of a judgment and may raise an estoppel against parties whose rights were before the court,[177] but it is not a ratification of any act of the trustee done in excess of his authority, where it does not appear that the excess of power exercised was brought to the knowledge of the court.[178] The order of confirmation relates back to the date of the sale, so as to invest the purchaser with the character of an owner from the day of his purchase.[179]

§ 482. **Payment or Recovery of Purchase Money.**—The court of bankruptcy has jurisdiction and power to enforce in a summary manner the completion of the contract of sale, and to compel the purchaser to pay the stipulated price, which may also include interest if there has been unreasonable delay.[180] On the other hand, the purchaser may be entitled to a deduction or refund of part of the purchase money on account of a shortage in the quantity of the property sold.[181] And he may even be entitled to be excused from paying any part of the price, or to a restoration of what he may have paid, when it proves impossible for the trustee to make a title.[182] An order for a sale in bankruptcy may properly contain a provision that, in case of a purchase by a lien creditor, he may have credit on the price for such portion thereof as would otherwise accrue to him by reason of his lien.[183] And on the same principle, where property incumbered by a mortgage securing an issue of

sale is null and void, where the offer of composition is rejected. In re Kligerman (D. C.) 253 Fed. 778, 42 Am. Bankr. Rep. 670.

177 Blood v. Munn, 155 Cal. 228, 100 Pac. 694.

178 In re McGilton, 3 Biss. 144, 7 N. B. R. 294, Fed. Cas. No. 8,798.

179 Lathrop v. Nelson, 4 Dill. 194, Fed. Cas. No. 8,111. A contract of sale made between the court as the vendor of property through the agency of a trustee, and the purchaser, is not regarded as consummated until it has received the sanction and ratification of the court. If the purchaser has not assumed the responsibility of protecting the property, by taking possession of it, any loss that may be sustained by its injury or deterioration, in the interval between the sale and final ratification, falls upon the vendor. Still it gives to the purchaser an inchoate and equitable title, which becomes complete by the ratification of the court. The ratification retroacts, and the purchaser is regarded, by relation, as the owner from the period of sale. He is entitled to the intermediate rents and profits; he cannot escape from the sale because disadvantageous; and he is bound to pay interest on the purchase money from its date. Wagner v. Cohen, 6 Gill (Md.) 97, 46 Am. Dec. 660. And see In re Finks, 224 Fed. 92, 139 C. C. A. 648, 34 Am. Bankr. Rep. 749.

180 Mason v. Wolkowich, 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765, 17 Am. Bankr. Rep. 709; In re Myers-Wolf Mfg. Co., 205 Fed. 289, 123 C. C. A. 441, 30 Am. Bankr. Rep. 572.

181 In re Drumgoole, 140 Fed. 208, 15 Am. Bankr. Rep. 261. See Owens v. Bruce, 109 Fed. 72, 48 C. C. A. 239, 6 Am. Bankr. Rep. 322. And see In re McCann (D. C.) 250 Fed. 1006, 42 Am. Bankr. Rep. 155.

182 In re Caponigri, 210 Fed. 897, 127 C. C. A. 466, 32 Am. Bankr. Rep. 158. In re Miller (D. C.) 171 Fed. 263; In re Comer & Co. (D. C.) 171 Fed. 261.

183 Clark Hardware Co. v. Sauve, 220 Fed. 102, 136 C. C. A. 194, 33 Am. Bankr. Rep. 674. And see Baker Motor Vehicle Co. v. Hunter, 238 Fed. 894, 152 C. C. A. 28, 39 Am. Bankr. Rep. 122.

bonds is sold in bankruptcy, the holders of bonds, if they become the purchasers, must be permitted to use their bonds in paying the purchase price.[184] But this does not apply where the bonds are void under the constitution of the state.[185] And the court will not ratify a sale where the bondholders of the bankrupt corporation, who do not include all of its creditors, propose to take over its property and assets, by transfer to a new corporation, and to pay the non-included creditors only a percentage of their claims or else give them obligations of the new corporation, for the court has no power thus arbitrarily to preclude the claims of the non-assenting creditors.[186]

§ 483. **Conveyance and Delivery.**—In the case of sales of real property of an estate in bankruptcy, the statute directs that the title "shall be conveyed to the purchaser by the trustee."[187] The deed should be made in exact accordance with the directions of the court, but an error in this respect will be cured by an order confirming the deed.[188] It should be executed by the trustee in his official capacity, as by describing himself as "trustee in bankruptcy,"[189] but need not contain a recital of the order of the court of bankruptcy authorizing the sale to be

[184] In re Fayetteville Wagon-Wood & Lumber Co., 197 Fed. 180, 28 Am. Bankr. Rep. 307; In re Saxton Furnace Co., 136 Fed. 697, 14 Am. Bankr. Rep. 483; In re Waterloo Organ Co., 118 Fed. 904, 9 Am. Bankr. Rep. 427; Schuler v. Hassinger, 177 Fed. 119, 100 C. C. A. 539, 24 Am. Bankr. Rep. 184. In the case last cited it was said: "The proposition that the terms of sale were unequal and unfair, and competition was thereby stifled, is based upon the fact that the purchaser was permitted, by the terms of the order of sale, to turn in, in payment of the price, admitted securities [bonds of the bankrupt corporation], the argument being that the holders of securities could buy without paying cash, while an outsider would be compelled to pay cash. The contention in this case seems to disregard the general rule which prevails in all foreclosure and execution sales, wherein it is not deemed proper and necessary to require purchasers to put up cash with one hand to take it down with the other."

[185] In re Wyoming Valley Ice Co., 153 Fed. 787.

[186] In re J. B. & J. M. Cornell Co., 186 Fed. 859, 26 Am. Bankr. Rep. 252.

[187] Bankruptcy Act 1898, § 70c. Where there is a valid sale, under which the price has been paid, the mere failure to deliver a deed will not authorize a resale. In re King, 3 Fed. 839. Under the act of 1867, it was held that the cost of making and acknowledging the deed must be borne by the purchaser. In re Davenport, 3 N. B. R. 77, Fed. Cas. No. 3,587; In re Tulley, 3 N. B. R. 82, Fed. Cas. No. 14,235. The present statute, however, casts upon the trustee the duty of conveying the title, and would authorize the cost of a deed to be included in his account of expenses incurred in administering the estate. But undoubtedly it would be competent for the court (as is often done in foreclosure sales) to order that "conveyancing shall be at purchaser's cost."

[188] Harman v. Stearns, 95 Va. 58, 27 S. E. 601.

[189] Coryell v. Klehm, 157 Ill. 462, 41 N. E. 864. An individual deed by a trustee in bankruptcy of property held in his official capacity, after the title had revested in the bankrupt, is ineffective for any purpose. Calligan v. Calligan, 259 Ill. 52, 102 N. E. 247. Where a deed by a trustee in bankruptcy is relied on in an action against strangers, preliminary proof of the trustee's title and his authority to make the sale is necessary. Brown v. White, 153 Ky. 452, 156 S.

private,[190] and will be sufficient to pass title although not sealed.[191] It should, however, be acknowledged before a competent officer,[192] and should contain a sufficient description of the property to identify it with reasonable certainty.[193] It should run to the purchaser at the sale, unless he directs it to be made out in the name of some other person,[194] and a state court has no jurisdiction to enjoin the execution of a deed to the purchaser, on a bill filed by one claiming to be jointly interested with him in the purchase of the property.[195] In the absence of specific covenants of title, they are not to be read into a trustee's deed by implication.[196] And the duty of the trustee to the purchaser ceases upon the delivery of a good and sufficient deed. Thus, a bankrupt in possession of realty at the time of its sale by his trustee, who thereafter agrees with the purchaser to vacate on a certain day, holds as a tenant under the purchaser, and a petition will not lie by the trustee in bankruptcy for delivery of possession.[197]

In case of the sale of personal property, the duty of the trustee is to deliver it to the purchaser. But it is said that his authority as trustee ceases when he has sold the property, and his subsequent failure to make delivery is a personal, and not an official, breach of duty.[198] On his refusal to deliver, the purchaser may maintain trover against him in a state court, to which action, however, an order of the court of bankruptcy setting aside the sale would be a complete defense.[199] In the case of intangible property or choses in action, delivery to the purchaser will include whatever is necessary to make his title clear and his ownership effective, as, for instance, a written assignment of a mortgage which was the subject of the sale.[200] But on the sale of a negotiable note by a trustee in bankruptcy, after its indorsement by the payee, or where it was payable to bearer, it is not necessary in order to pass title that the trustee should indorse the note, mere delivery being sufficient.[201] An assignment by a trustee in bankruptcy in pursuance of an order of sale of the bankrupt's bills receivable includes a debt due

W. 96. But see, as to aiding the trustee's deed by presumptions after a great lapse of time, Lacey v. Southern Mineral Land Co. (Ala.) 60 South. 283.

190 Ryder v. Rush, 102 Ill. 338.

191 Westfeldt v. Adams, 131 N. C. 379, 42 S. E. 823.

192 Harris v. Pratt, 37 Kan. 316, 15 Pac. 216.

193 James v. Koy (Tex. Civ. App.) 59 S. W. 295.

194 Wilson v. Winslow, 145 Mass. 339, 14 N. E. 103. And see Olitsky v. Estersohn, 90 N. J. Eq. 459, 108 Atl. 88.

195 Henderson v. Henrie, 61 W. Va. 183, 56 S. E. 369, 11 Ann. Cas. 741.

196 Clark v. Post, 113 N. Y. 17, 20 N. E. 573.

197 In re Hale, 19 N. B. R. 330, Fed. Cas. No. 5,912.

198 Sheldon v. Rounds, 40 Mich. 425.

199 Ives v. Tregent, 29 Mich. 390, 14 N. B. R. 60.

200 In re Franklin Sav. Fund Soc., Fed. Cas. No. 5,059.

201 Wade v. Elliott, 11 Ga. App. 646, 75 S. E. 989; Arnold v. Leonard, 12 Smedes & M. (Miss.) 258.

to the bankrupt for goods sold, although the debt, without the knowledge of the trustee or the purchaser, had been previously reduced to judgment.[202]

§ 484. **Application of Proceeds.**—Out of the proceeds of a trustee's sale are to be paid first the costs and expenses of the sale,[203] and then any proper expenses incurred in caring for the property or putting it in condition to be sold, such as premiums for insurance,[204] and the value of improvements put upon the property by a purchaser at a former sale which was set aside.[205] Where the property is incumbered by a valid mortgage or other lien, it is wrong practice to charge the mortgagee with a proportionate part of the costs and expenses of the sale, but these should first be paid out of the proceeds, and then the mortgage creditor should be paid in full if the fund is sufficient for that purpose.[206] But the commissions of the trustee and referee do not outrank the mortgage debt, in case of a deficiency. That is, if the proceeds of sale are no more than sufficient to pay the mortgage, the holder of it is entitled to the full amount without deduction for such commissions, at least if there is any general fund of the estate against which they can be charged,[207] except, perhaps, in cases where the mortgagee himself petitioned for the sale or knew of it and made no objection.[208] But

202 Rogers v. Abbot, 206 Mass. 270, 92 N. E. 472, 138 Am. St. Rep. 394.

203 In re Utt, 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383; Arnold v. Greene Gold-Silver Co., 68 Misc. Rep. 449, 125 N. Y. Supp. 29; In re Johnston, Fed. Cas. No. 7,424; In re Whitehead, 2 N. B. R. 599, Fed. Cas. No. 17,562; In re Johnson (D. C.) 224 Fed. 180. Counsel for the trustee may be allowed a fee as a charge against the fund arising from a sale of real estate in which both the bankrupt and the estate of an insolvent decedent held an interest, where his services were for the benefit of both classes of creditors. In re Tietje (D. C.) 263 Fed. 917, 44 Am. Bankr. Rep. 638.

204 In re Prince & Walter, 131 Fed. 546, 12 Am. Bankr. Rep. 675.

205 In re William F. Fisher & Co., 148 Fed. 907, 17 Am. Bankr. Rep. 404.

206 In re Sanderlin, 109 Fed. 857, 6 Am. Bankr. Rep. 384; McNair v. McIntyre, 113 Fed. 113, 51 C. C. A. 89, 7 Am. Bankr. Rep. 638. But see In re Howard, 207 Fed. 402. Only those fees, charges, and expenses necessary for the preservation of the property and the foreclosure of the lien may be charged against the fund realized from the sale, without the consent of a lienholder, of a bankrupt's property subject to the lien, the sale having been made free from liens. In re New York & Philadelphia Package Co. (D. C.) 225 Fed. 219, 35 Am. Bankr. Rep. 94.

207 In re Harralson, 179 Fed. 490, 103 C. C. A. 70, 24 Am. Bankr. Rep. 715; In re Stewart, 193 Fed. 791, 27 Am. Bankr. Rep. 529; In re Blue Ridge R. Co., 2 Hughes, 224, 13 N. B. R. 315, Fed. Cas. No. 1,570. The necessary expenses of the sale should be allowed, but not the expenses of administration in the bankruptcy court. The court cannot sell mortgaged premises free of the lien and use the proceeds in paying the expenses of administration, but may ascertain the amount actually due and make proper allowances for the expense of so doing. In re Howard (D. C.) 207 Fed. 402, 31 Am. Bankr. Rep. 251.

208 In re Torchia, 188 Fed. 207, 110 C. C. A. 248, 26 Am. Bankr. Rep. 579; In re Chambersburg Silk Mfg. Co., 190 Fed. 411, 26 Am. Bankr. Rep. 107.

where a first mortgage lien on the property is paid in full, not only the costs of sales but also commissions of officers may be satisfied out of the balance before any distribution to holders of valid but inferior liens, on the principle that the expenses of creating a fund are to be paid out of it.[209]

If the sale was made subject to incumbrances, the holder of a lien remains undisturbed in the possession of his security, but he cannot claim payment out of the proceeds of the sale.[210] On the other hand, if the sale was ordered to be made free of incumbrances, the liens of mortgagees and other secured creditors are transferred to the fund arising from the sale.[211] And this will apply to a creditor whose lien expired by limitation between the making of the order for sale and the actual sale; for a conversion will be regarded as having been made at the time of the order for the sale, and therefore whatever claim was a lien on the land when the order was made will be entitled to share in the proceeds.[212] A creditor whose lien is thus transferred is entitled to priority of payment out of the proceeds of the sale to the full amount of his debt.[213] And if the fund is sufficient for the purpose, he will also be entitled to interest on his claim up to the day of the sale,[214] and to reimbursement for money paid by him for insurance on the property, if that expenditure was authorized by the mortgage,[215] and a reasonable fee to his attorney for services rendered in connection with the sale and the distribution of the proceeds, but not necessarily the full ten per cent. stipulated for in the mortgage.[216] The order of liens is not displaced by a sale in bankruptcy, and if there are several liens on the property sold, they are transferred to the proceeds of the sale in the same relative rank and priority and are to be paid accordingly, so far as the fund will suffice.[217]

[209] In re Torchia, 185 Fed. 576, 26 Am. Bankr. Rep. 188.

[210] In re Gerry, 112 Fed. 957, 7 Am. Bankr. Rep. 461.

[211] In re Randolph, 187 Fed. 186, 26 Am. Bankr. Rep. 623; McKay v. Hamill, 185 Fed. 11, 26 Am. Bankr. Rep. 164; Goodnough Mercantile & Stock Co. v. Galloway, 171 Fed. 940, 22 Am. Bankr. Rep. 803; In re Vogt, 163 Fed. 551, 20 Am. Bankr. Rep. 457; In re Bourlier Cornice & Roofing Co., 133 Fed. 958, 13 Am. Bankr. Rep. 585; Crampton v. Massie, 236 Fed. 900, 150 C. C. A. 162.

[212] Davis v. Stitzer, 19 N. B. R. 61, Fed. Cas. No. 3,654.

[213] In re Lausman, 183 Fed. 647, 25 Am. Bankr. Rep. 186; In re Stevens, 173 Fed. 842, 23 Am. Bankr. Rep. 239; In re Oconee Milling Co., 109 Fed. 886, 48 C. C. A. 703; In re Mebane, 3 N. B. R. 347, Fed. Cas. No. 9,380.

[214] In re Stevens, 173 Fed. 842, 23 Am. Bankr. Rep. 239; In re Fabacher, 193 Fed. 556, 27 Am. Bankr. Rep. 534; Coder v. Arts, 152 Fed. 943, 82 C. C. A. 91, 18 Am. Bankr. Rep. 513; In re Devore, 16 N. B. R. 56, Fed. Cas. No. 3,847; In re Hershberger (D. C.) 208 Fed. 94, 30 Am. Bankr. Rep. 635.

[215] In re Fabacher, 193 Fed. 556, 27 Am. Bankr. Rep. 534.

[216] In re Fabacher, 193 Fed. 556, 27 Am. Bankr. Rep. 534.

[217] In re Bartenbach, 11 N. B. R. 61, Fed. Cas. No. 1,068; In re Worland, 92

Where claimants have liens on separate portions of the property, all of which is sold as a whole for a lump sum, it is the duty of the referee to apportion the proceeds among such claimants, and in so doing, if he has no other evidence on which to decide, he may properly fix the value of the various portions in accordance with the bids made previously for portions of the property when offered separately.[218] But where property is sold as an entirety and for a lump sum, only part of which is subject to a valid lien, and it would be impossible to determine with any accuracy how much of the price was given in consideration of the incumbered portion, there cannot be an apportionment of the gross price, so as to entitle the lien-holder to a preference to the extent of his claim, at least where he permitted the sale to be made in that manner and did not insist on a sale in portions.[219] But it seems that he may save his rights by a timely objection and by procuring a reservation of them in the order for sale, in which case it becomes the duty of the referee to recognize and enforce such rights, taking evidence, if necessary, to determine as nearly as possible what portion of the proceeds of the sale represented the property covered by the lien.[220] But all that has been said above applies only in the case of liens which are recognized as valid and binding by the laws of the state and are otherwise free from defect or infirmity. There can, for example, be no claim to priority of payment out of the proceeds of a bankruptcy sale in favor of one who asserts a vendor's lien on the property when the law of the state does not recognize any lien existing in an unpaid vendor apart from his legal estate in the land,[221] nor in favor of the holder of a mechanic's lien which is defective on its face,[222] or the holder of a mortgage on the bankrupt's liquor license, when the pledging of such property is discountenanced by the local law as contrary to public policy.[223]

Fed. 893, 1 Am. Bankr. Rep. 450. And see Chauncey v. Dyke Bros., 119 Fed. 1, 55 C. C. A. 579, 9 Am. Bankr. Rep. 444; In re Cullen, 176 Fed. 463, 23 Am. Bankr. Rep. 793; In re Jamison Bros. & Co., 209 Fed. 541, 126 C. C. A. 363, 30 Am. Bankr. Rep. 972.

218 In re Benz, 218 Fed. 50, 134 C. C. A. 26, 33 Am. Bankr. Rep. 363.

219 Keyser v. Wessel, 128 Fed. 281, 62 C. C. A. 650, 12 Am. Bankr. Rep. 126; In re Smith, 123 Fed. 188, 10 Am. Bankr. Rep. 586; Vollmer v. McFadgen (C. C. A.) 161 Fed. 914, 20 Am. Bankr. Rep. 540; In re Gerry, 112 Fed. 957, 7 Am. Bankr. Rep. 461; In re Klapholz, 113 Fed. 1002, 7 Am. Bankr. Rep. 703. And see In re James Carothers & Co., 182 Fed. 501; First Savings & Banking Co., v. Kilmer (C. C. A.) 263 Fed. 497, 45 Am. Bankr. Rep. 366; In re B. A. Lockwood Grain Co. (D. C.) 225 Fed. 873, 35 Am. Bankr. Rep. 640.

220 George Carroll & Bro. Co. v. Young, 119 Fed. 576, 56 C. C. A. 380, 9 Am. Bankr. Rep. 643.

221 In re Clark, 118 Fed. 358, 9 Am. Bankr. Rep. 252. See In re Rector's, 220 Fed. 645, 136 C. C. A. 253.

222 In re Miners' Brewing Co., 162 Fed. 327, 20 Am. Bankr. Rep. 717.

223 In re McArdle, 126 Fed. 442, 11

The proceeds of a sale in bankruptcy are not to be charged with the costs and expenses of proceedings by creditors which were terminated or rendered nugatory by the bankruptcy proceedings. Thus, where a distress warrant had been issued but was stayed by bankruptcy proceedings against the tenant, and the goods were sold by the receiver in bankruptcy, it was held that the constable was not entitled to fees out of the proceeds as for a sale.[224]

If disputes arise among the claimants of the proceeds of sale, or as to the order of distribution, the court of bankruptcy (including the referee) has authority and jurisdiction to hear and determine the validity, extent, and relative priority of all claims,[225] but not to adjudicate upon the rights of one who claims an interest adverse to the bankrupt and who is a stranger to the proceedings.[226] If any balance remains, after paying the expenses and satisfying valid liens, the trustee will retain it as a part of the general funds of the estate for distribution to general creditors.[227]

§ 485. Vacating and Setting Aside Sale.—A state court has no jurisdiction, for any cause whatever, to interfere with or set aside a sale of a bankrupt's property by the trustee.[228] But the court of bankruptcy may vacate or annul such a sale, when sufficient reason is shown, and may proceed to do so in a summary manner, unless rights of third persons have intervened,[229] in which case the remedy must be sought in a plenary action against the purchaser and others concerned.[230] And it is no obstacle that the sale has been consummated by the delivery of a deed to the purchaser. If such deed was executed by the trustee improvidently, irregularly, or without due authority, or was procured by imposition or fraud practiced upon the court, or if it was designedly so drawn as to grant more than the order of the court warranted or to vary from it in material particulars, and if the title is still in the purchaser at the sale, who is chargeable with notice of the fraud or irregularity, the court has jurisdiction to vacate the sale and order the deed to be sur-

Am. Bankr. Rep. 358. See In re Fisher, 98 Fed. 89, 3 Am. Bankr. Rep. 406.

[224] In re Hageman (D. C.) 218 Fed. 708.

[225] In re Miners' Brewing Co. (D. C.) 162 Fed. 327, 20 Am. Bankr. Rep. 717; Leech v. Kay (C. C.) 4 Fed. 72; Globe Bank & Trust Co. v. Martin, 236 U. S. 289, 35 Sup. Ct. 377, 59 L. Ed. 583, 34 Am. Bankr. Rep. 162; In re Bradley (D. C.) 263 Fed. 446, 45 Am. Bankr. Rep. 30; Durand v. Brown, 236 Fed. 609, 149 C. C. A. 605; Danville Ben. & Bldg. Ass'n v. Huff (C. C. A.) 262 Fed. 403, 45 Am. Bankr. Rep. 124; In re National Boat & Engine Co. (D. C.) 216 Fed. 208, 33 Am. Bankr. Rep. 154.

[226] In re Muhlhauser, 121 Fed. 669, 57 C. C. A. 423, 10 Am. Bankr. Rep. 236.

[227] In re Sanderlin, 109 Fed. 857, 6 Am. Bankr. Rep. 384.

[228] Akins v. Stradley, 51 Iowa, 414, 1 N. W. 609.

[229] In re Mott, Fed. Cas. No. 9,878.

[230] In re Charles Knosher & Co., 197 Fed. 136, 28 Am. Bankr. Rep. 747; In re Herdic, 40 Fed. 360.

rendered and canceled.[231] And even the intervening rights of a third person who has bought the property, or a part of it, from the original purchaser may not be sufficient to prevent the setting aside of a fraudulent or irregular sale, where the circumstances indicate knowledge or complicity on the part of such third person, or, assuming his innocence, it is possible to restore him to his original situation.[232]

But it is not consistent with the effective administration of the bankruptcy law that trustees' sales should be constantly overhauled for trivial causes. On the contrary, such sales should not be set aside except for cause sufficient to move the conscience of the court,[233] or where, as stated in one of the cases, "it would be a gross discredit to the administration of justice if the sale should be permitted to stand." [234] But it is essential that the sale should be fair and open, and any manipulation of it which tends to prevent the attendance of bidders, or to stifle competition among them, will be sufficient ground for vacating it.[235] Inadequacy of price will also be ground for setting aside a sale in bankruptcy, but only in case it is unconscionable or so gross as fairly to raise a presumption of fraud.[236] No general rule can be formulated on this point. But it is said that the appraisal fixes the value of the bankrupt's property, in the absence of reliable evidence impeaching it, and a sale for more than the appraised value, confirmed by the court, will not be set aside by an ap-

[231] In re Hyde, 19 Blatchf. 115, 6 Fed. 587; In re King, 3 Fed. 839; In re Stevenson, 6 Fed. 710. On the trustee's bill filed for this purpose, there must be a tender to the purchaser of the sum he bid at the sale. Lanham v. State Bank of Rome (C. C. A.) 268 Fed. 458, 46 Am. Bankr. Rep. 55.

[232] In re Frazin & Oppenheim, 181 Fed. 307, 24 Am. Bankr. Rep. 598; In re Finlay, 104 Fed. 675, 4 Am. Bankr. Rep. 745; In re Stevenson, 6 Fed. 710.

[233] In re Metallic Specialty Mfg. Co., 193 Fed. 300, 27 Am. Bankr. Rep. 408; Bray v. U. S. Fidelity & Guaranty Co. (C. C. A.) 267 Fed. 533, 45 Am. Bankr. Rep. 395.

[234] In re Troy Woolen Co., 8 Blatchf. 465, 4 N. B. R. 629, Fed. Cas. No. 14,201.

[235] In re Shea, 126 Fed. 153, 61 C. C. A. 219, 11 Am. Bankr. Rep. 207; In re Ethier, 118 Fed. 107, 9 Am. Bankr. Rep. 160. But see In re Pittsburgh Dick Creek Mining Co., 197 Fed. 106, 28 Am. Bankr. Rep. 613, where it was held that a sale otherwise satisfactory will not be set aside at the instance of a creditor who alleges that there was a conspiracy to keep him away from the sale and otherwise to defraud him of his just rights, since, if such was really the case, he has a remedy at law for damages. And see In re Kronrot, 183 Fed. 653, 25 Am. Bankr. Rep. 738. An agreement between two creditors to bid against each other at a bankruptcy sale, until a certain figure was reached, in order to induce other bids, and if no higher bids were received to buy the property for their joint account and divide the profits, is not invalid. Schaap v. Robinson, 133 Ark. 113, 201 S. W. 292. The fact that the only other bidder at a bankruptcy sale was a puffer employed to run up bids is not ground for releasing the successful bidder, if there was no assurance to the puffer or belief that he would not be held liable. Williams v. Hogue, 219 Fed. 182, 134 C. C. A. 556, 34 Am. Bankr. Rep. 40.

[236] In re National Mining Exploration Co., 193 Fed. 232, 27 Am. Bankr. Rep. 92; In re Burr Mfg. & Supply Co., 217 Fed. 16, 133 C. C. A. 126; In re Metallic Specialty Mfg. Co., 193 Fed. 300, 27 Am. Bankr. Rep. 408; In re Shapiro, 154 Fed. 673, 19 Am. Bankr. Rep. 125; In re Throckmorton, 149 Fed. 145, 79 C. C. A. 15, 17 Am. Bankr. Rep. 856; In re Bousfield, 16 N. B. R. 481, Fed. Cas. No.

pellate court on the ground of inadequacy of price.[237] And the mere fact that the property has increased in value since the sale, or that it is discovered to possess a value which was not then suspected, will not warrant annulling the sale,[238] nor will the naked fact that a third person offers to pay a better price than that realized at the sale.[239] But an offer of an advanced price, made by a genuine and responsible bidder, is strong evidence that the price given at the sale was inadequate, and if the court is in this way satisfied that there was a gross discrepancy between the actual value of the property and the price obtained, it may properly vacate the sale and order a resale.[240] But the advance offered must be substantial, not a mere trifle,[241] and the intending purchaser may be required to enter into an agreement with the court (or even to give security) that he will attend the resale and bid at least as much as he has offered.[242]

Applications to vacate such sales are generally made by the creditors of the estate.[243] But they must be reasonably prompt and vigilant, in

1,702. And see Ballentyne v. Smith, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. Ed. 803, where the following instructive remarks were made by Mr. Justice Brewer: "Something may be said on each side of the question; on the one, that a court of equity owes a duty to the creditors seeking its assistance in subjecting property to the payment of debts, to see that the property brings something like its true value in order that, to the extent of that value, the debts secured upon the property may be paid; that it owes them something more than to merely take care that the forms of law are complied with, and that the purchaser is guilty of no fraudulent act; on the other, that it is the right of one bidding in good faith at an open and public sale to have the property for which he bids struck off to him if he be the highest and best bidder; that if he be free from wrong he should not be deprived of the benefit of his bid simply because others do not bid, or because parties interested have done nothing to secure the attendance of those who would likely give for the property something nearer its value; that if the creditors make no effort and are willing to take the chances of a general attendance, they have no right to complain on the ground that the property did not bring what it should have brought. In England, the old rule was that in chancery sales, until confirmation of the master's report, the bidding would be opened upon a mere offer to advance the price 10 per cent; but this rule has been rejected, and now both in England and this country a sale will not be set aside for mere inadequacy of price unless that inadequacy be so gross as to shock the conscience, or unless there be additional circumstances against its fairness. But if there be great inadequacy, slight circumstances of unfairness in the conduct of the party benefited by the sale will be sufficient to justify setting it aside. Graffam v. Burgess, 117 U. S. 191, 6 Sup. Ct. 686, 29 L. Ed. 839. It is difficult to formulate any rule more definite than this, and each case must stand upon its own peculiar facts."

[237] Schuler v. Hassinger, 177 Fed. 119, 100 C. C. A. 539, 24 Am. Bankr. Rep. 184.

[238] Tyson v. Mickle, 2 Gill (Md.) 376; Phelps v. McDonald, 2 MacArthur (D. C.) 375, 16 N. B. R. 217.

[239] In re Ethier, 118 Fed. 107, 9 Am. Bankr. Rep. 160; In re Belden, 120 Fed. 524, 9 Am. Bankr. Rep. 679; Jacobsohn v. Larkey, 245 Fed. 538, 157 C. C. A. 650, L. R. A. 1918C, 1176, 40 Am. Bankr. Rep. 563; Day v. Luna Park Co., 174 Ill. App. 477.

[240] In re Palmer, 13 Fed. 870; In re Collins, 8 Ben. 328, Fed. Cas. No. 3,005.

[241] Sturgiss v. Corbin, 141 Fed. 1, 72 C. C. A. 179, 15 Am. Bankr. Rep. 543.

[242] In re Shea, 126 Fed. 153, 61 C. C. A. 219, 11 Am. Bankr. Rep. 207.

[243] In re Haywood Wagon Co., 219 Fed. 655, 135 C. C. A. 391, 33 Am. Bankr. Rep. 618; In re Prudential Outfitting Co.

order to entitle their petition to favorable consideration, and a creditor who, with full knowledge of the circumstances of a sale, accepts a dividend from the proceeds, and silently allows the purchaser to sell the property, cannot avoid the sale even for fraud and collusion.[244] Nor will this action be taken at the instance of one who is an entire stranger to the proceedings and whose rights, if any, in the property could not be prejudiced by the sale.[245] The special short statute of limitations contained in the bankruptcy act does not apply to proceedings to vacate a sale.[246] And when an order to this effect is made, based on causes for which the purchaser was not in any way responsible, he will be entitled to have his money refunded and also such expenses as he has reasonably and properly incurred in the preservation of the property.[247]

§ 486. **Collateral Impeachment of Sale.**—The validity of a trustee's sale in bankruptcy is not open to inquiry or impeachment in any collateral proceeding, either in a state or federal court,[248] more especially after the lapse of a considerable period of time, during which all parties in interest have acquiesced in the sale,[249] or where the attack upon the sale is based on mere irregularities.[250] But where a bankrupt's liquor license was sold subject to the condition that its transfer to the purchaser must be authorized by the local court having jurisdiction, an inquiry by the court of bankruptcy to ascertain the grounds on which the local court refused to approve the transfer, is not a collateral attack on its order.[251]

(D. C.) 250 Fed. 504, 41 Am. Bankr. Rep. 621.

[244] Hills v. Alden, 2 Hask. 299, Fed. Cas. No. 6,507.

[245] In re Muhlhauser, 121 Fed. 669, 57 C. C. A. 423, 10 Am. Bankr. Rep. 236. A stockholder of a bankrupt corporation, as such, has no standing in the bankruptcy case to require the trustee to answer his petition to set aside a sale of the bankrupt's assets to a reorganization committee. In re Witherbee (C. C. A.) 202 Fed. 896, 30 Am. Bankr. Rep. 314.

[246] Clark v. Clark, 17 How. 315, 15 L. Ed. 77.

[247] In re Troy Woolen Co., 8 Blatchf. 465, 4 N. B. R. 629, Fed. Cas. No. 14,201.

[248] Buckler's Adm'r v. Rogers, 54 S. W. 848, 21 Ky. Law Rep. 1265; Trumbo v. Fulk, 103 Va. 73, 48 S. E. 525; Keller v. Faickney, 42 Tex. Civ. App. 483, 94 S. W. 103; Chilton v. Metcalf, 234 Mo. 27, 136 S. W. 701; Mims v. Swartz, 37 Tex. 13; Steele v. Moody, 53 Ala. 418, 16 N. B. R. 558; Equitable Trust Co. v. Vanderbilt Realty Improvement Co., 155 App. Div. 723, 140 N. Y. Supp. 1008; Thompson v. Sunrise Coal Co.'s Trustee, 181 Ky. 158, 204 S. W. 89; Trahue v. Ash (Tex. Civ. App.) 200 S. W. 415.

[249] Buckler's Adm'r v. Rogers, 54 S. W. 848, 21 Ky. Law Rep. 1265.

[250] Robertson v. Howard, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174, 30 Am. Baukr. Rep. 611; James v. Koy (Tex. Civ. App.) 59 S. W. 295; Herbst v. Bates, 13 Wkly. Law Bul. (Ohio) 565; Smith v. Long, 9 Daly (N. Y.) 429.

[251] In re Miller, 171 Fed. 263, 22 Am. Bankr. Rep. 560.

CHAPTER XXV

PROVABLE DEBTS AND CLAIMS

§ 487. **Statutory Provisions.**—The varieties of debts and claims which are provable in a bankruptcy proceeding are arranged by the statute in five groups or classes, as follows:

1. A fixed liability, evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition, whether then payable or not, with any interest which would have been recoverable at that date, or with a rebate of interest on such claims as were not then payable and did not bear interest.

2. Claims due as costs taxable against an involuntary bankrupt who

was, at the time of the filing of the petition against him, plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice.

3. Claims founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition, in an action to recover a provable debt.

4. Claims founded upon an open account, or upon a contract express or implied.

5. Claims founded upon provable debts reduced to judgment after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.

To this it is added that "unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." [1]

These several subdivisions of the section are not to be regarded as an enumeration of a group of characteristics all of which are essential to a provable claim, but as a classification, each specifying a separate class of provable claims independently of the others; and hence the provision of the first clause, limiting the claims provable thereunder to those which were a fixed liability absolutely owing at the time of the filing of the petition, does not impose the same limitation upon claims which fall within the other classes.[2] In general, it is said, this whole section of the statute should be so construed as to make all debts fairly within its meaning provable debts, in order to effectuate the purpose of the act in relieving insolvent debtors, and any doubt whether a debt is provable, or whether it is an unliquidated demand which may be made provable, should be resolved in favor of its provability.[3] In particular, it may be remarked that the fourth clause, which allows proof of debts founded upon a "contract express or implied," may be given a construction sufficiently broad to include quasi contracts arising upon a conversion of property where the tort has been waived.[4]

§ 488. Who Are Creditors Within the Act.—A creditor is defined by the act as "anyone who owns a demand or claim provable in bankruptcy." This includes the United States as well as any state or municipal corporation.[5] Foreign creditors, as well as domestic, are also en-

[1] Bankruptcy Act 1898, § 63.

[2] In re Smith, 146 Fed. 923, 17 Am. Bankr. Rep. 112.

[3] Dycus v. Brown, 135 Ky. 140, 121 S. W. 1010, 28 L. R. A. (N. S.) 190.

[4] Reynolds v. New York Trust Co., 188 Fed. 611, 110 C. C. A. 409, 26 Am. Bankr. Rep. 698.

[5] Bankruptcy Act 1898, § 57j. And see In re Mansfield, 6 N. B. R. 388, Fed. Cas.

titled to prove their claims and share in the estate.[6] Secured creditors may prove their demands as secured, and receive dividends on so much of the claim as remains unsatisfied after liquidating and applying the security or realizing on it, or they may waive the security and prove their debts as unsecured.[7] A preferred creditor may prove his claim if he will surrender his preference.[8] Also the claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee, and will be allowed in the same manner and upon like terms as the claims of other creditors.[9] And a court of bankruptcy may permit the bankrupt himself, acting in a representative capacity as the administrator of an estate, to prove an equitable debt, arising from a loan of funds borrowed from the estate of his intestate, whether such loan was lawful or not.[10] In proper cases, one to whom the bankrupt had previously made a general assignment for the benefit of his creditors may be permitted to prove a claim,[11] as also a surety for the bankrupt,[12] or a committee representing the bondholders of a bankrupt corporation.[13] The peculiar questions arising out of the bankruptcy of a partnership, and concerning the provability of claims of the partners as against each other and against the firm, have been considered in another place.[14] A corporation may of course be a creditor and prove a claim in bankruptcy; but ordinarily claims are not provable as between two corporations, one of which is merely an agency, branch, or reorganization of the other.[15]

But, to constitute a "creditor," it is always essential that there should be a debt measurable and payable in money, or a claim which is capable of being reduced to this kind of certainty, and also that it should be supported by a consideration or by a clear right of action. This excludes mere accommodation paper not based on any actual consideration,[16] and also the case of one who has dealt with a bankrupt corporation, but has

No. 9,049; In re Wright, 95 Fed. 807, 2 Am. Bankr. Rep. 592. As to proof of claim by a municipal corporation or by its treasurer, see Greil v. Durr, 203 Ala. 644, 84 South. 743.

[6] See Bankruptcy Act 1898, § 65d.

[7] See infra, §§ 561–563.

[8] See infra, §§ 604–607. And see In re Franklin Brewing Co. (D. C.) 265 Fed. 301, 45 Am. Bankr. Rep. 719; In re Dix (D. C.) 267 Fed. 1016, 46 Am. Bankr. Rep. 199.

[9] Bankruptcy Act 1898, § 57m.

[10] Warner v. Spooner, 3 Fed. 890.

[11] In re Rudd, 180 Fed. 312, 25 Am. Bankr. Rep. 35.

[12] Sessler v. Paducah Distilleries Co. (C. C. A.) 168 Fed. 44, 21 Am. Bankr. Rep. 723.

[13] In re Medina Quarry Co., 179 Fed. 929, 24 Am. Bankr. Rep. 769.

[14] See supra, § 130. And see In re Hirth, 189 Fed. 926, 26 Am. Bankr. Rep. 666; In re Dillon, 100 Fed. 627, 4 Am. Bankr. Rep. 63; In re Savage, 16 N. B. R. 368, Fed. Cas. No. 12,381.

[15] See Clere Clothing Co. v. Union Trust & Savings Bank, 224 Fed. 363, 140 C. C. A. 49, 35 Am. Bankr. Rep. 419; In re Georgia Steel Co. (D. C.) 240 Fed. 473, 39 Am. Bankr. Rep. 426; Carroll v. Stern, 223 Fed. 723, 139 C. C. A. 253, 34 Am. Bankr. Rep. 570.

[16] Merchants' & Manufacturers' Nat. Bank of Columbus, Ohio, v. Galbraith, 157 Fed. 208, 84 C. C. A. 656, 19 Am. Bankr. Rep. 319.

agreed to accept shares of its stock in satisfaction of his claim.[17] Again, it is necessary that the consideration should have proceeded from the claimant himself or from some one to whose rights he has succeeded by a clear title.[18] Thus a claim cannot be allowed where it is shown that the money in question was not advanced by the claimant personally, but by a corporation in which he is a stockholder.[19] And further it is necessary to show that the bankrupt received or benefited by the consideration on which the claim is founded. But it is no objection to the allowance of a claim against a bankrupt corporation for money lent that it passed through several hands, where the claimant furnished the money with the intention that it should be a loan to the corporation, and the latter received it and used it as such.[20] And where a new company is organized to take over and carry on the business of a failing corporation, which afterwards becomes bankrupt, one who, being a director in both the old and the new company, takes an active part in organizing the new concern, and subscribes and pays for some of its stock in cash, may be considered as a creditor of the bankrupt corporation to that extent.[21] Nor can a creditor who lent money to the bankrupt be debarred from proving his claim by the fact that he himself borrowed the money from a bank, pledging as collateral the note and security given him by the bankrupt.[22] But one who sells property on credit to a third person, who turns it over to a corporation which does not become a party to the contract of sale, does not thereby become a creditor of the corporation so as to be entitled to prove a claim against its estate in bankruptcy.[23] The rule that one may take advantage of a contract to which he was not a party, but which was made for his benefit between two other persons, is also effective in bankruptcy, but his assent to the agreement must have been made effective before the bankruptcy of the promisor.[24] It is also

[17] Where a bank furnished money or credit with which certain imported wool was purchased in a foreign country, taking bills of lading and trust receipts in its own name, and, when the wool was sold by the importer, became the owner of the account, it alone was entitled to prove the claim against the estate of the purchaser in bankruptcy. Assets Realization Co. v. Sovereign Bank of Canada, 210 Fed. 156, 126 C. C. A. 662.

[18] In re Le Sueur County Co-operative Co., 195 Fed. 926, 27 Am. Bankr. Rep. 882.

[19] In re Watkinson, 143 Fed. 602, 16 Am. Bankr. Rep. 245.

[20] In re American Specialty Co. (C. C. A.) 191 Fed. 807, 27 Am. Bankr. Rep. 463. But one furnishing materials to a subcontractor of a general contractor of the United States, who gave bond in conformity with the act of Congress of Feb. 24, 1905, will be required to pursue the remedy prescribed by that act, and cannot prove a claim under the bankruptcy law against the estate of the bankrupt contractor. In re Hawley, 194 Fed. 751, 28 Am. Bankr. Rep. 58.

[21] In re Holbrook Shoe & Leather Co., 165 Fed. 973, 21 Am. Bankr. Rep. 511.

[22] Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 89 C. C. A. 605, 20 Am. Bankr. Rep. 40.

[23] In re Builders' Lumber Co., 148 Fed. 244, 17 Am. Bankr. Rep. 449.

[24] Blake v. Atlantic Nat. Bank, 33 R. I. 464, 82 Atl. 225, 39 L. R. A. (N. S.) 874.

a rule that a creditor of a bankrupt, who is also his debtor in a larger amount, will not be permitted to prove his claim against the estate so long as his own debt remains unpaid.[25] But on the other hand, where the father of a bankrupt, to whom the bankrupt was indebted, died after his adjudication, the right of the executor to prove the full indebtedness against the estate in bankruptcy is not affected by the fact that the father, by his will, left the bankrupt a share of his estate, from which any indebtedness due from the bankrupt was directed to be deducted.[26]

§ 489. **Estoppel to Prove Claim.**—The ordinary principles of estoppel may apply to a creditor seeking to prove a claim in bankruptcy,[27] and also the rule that a creditor having his choice between two inconsistent remedies must make his election, and cannot pursue both,[28] and the rule that one cannot rescind a contract and recover the original consideration, and at the same time prove a claim upon the contract itself.[29] But a creditor of a bankrupt who, after the bankruptcy, has taken a new promise based on the original debt, is not thereby precluded from maintaining his proof against the estate in bankruptcy and receiving dividends thereon, and at the same time proceeding against the bankrupt on the new obligation, so long as he receives but a single satisfaction of his debt.[30] And the fact that a creditor, prior to the bankruptcy, had begun a suit to set aside a deed as fraudulent does not estop him, on the deter-

[25] In re Gerson, 105 Fed. 893, 5 Am. Bankr. Rep. 850; In re Wiener & Goodman Shoe Co., 96 Fed. 949, 3 Am. Bankr. Rep. 200. On the same principle, a creditor of a bankrupt corporation, who, as a holder of its capital stock, is liable on calls or assessments, cannot participate in the assets of the estate until he has paid or satisfied such assessments. In re Manufacturers' Box & Lumber Co. (D. C.) 251 Fed. 957, 41 Am. Bankr. Rep. 763; In re Caledonia Coal Co. (D. C.) 254 Fed. 742, 43 Am. Bankr. Rep. 93. See Moise v. Scheibel, 245 Fed. 546, 157 C. C. A. 658, 40 Am. Bankr. Rep. 311.

[26] In re Woods (D. C.) 133 Fed. 82, 13 Am. Bankr. Rep. 240.

[27] Sledge v. Denton (Tex. Civ. App.) 147 S. W. 281. Carroll v. Stern, 223 Fed. 723, 139 C. C. A. 253, 34 Am. Bankr. Rep. 570.

[28] Du Vivier & Co. v. Gallice (C. C. A.) 149 Fed. 118, 17 Am. Bankr. Rep. 557. And see In re W. A. Silvernail Co. (D. C.) 218 Fed. 977, 33 Am. Bankr. Rep. 57.

[29] In re Kenyon, 156 Fed. 863, 19 Am. Bankr. Rep. 194; Scott v. Abbott, 160 Fed. 573, 87 C. C. A. 475, 20 Am. Bankr. Rep. 335. And see In re Hirschman, 104 Fed. 69, 4 Am. Bankr. Rep. 715; In re Howard, 100 Fed. 630, 4 Am. Bankr. Rep. 69. But where, prior to the bankruptcy, a claimant sought to replevin the balance of a bill of goods remaining in the bankrupt's possession unsold, in which he was unsuccessful, it was held that he was entitled to file against the bankrupt's estate for his whole claim. In re Venstrom, 205 Fed. 325, 30 Am. Bankr. Rep. 569. And see Boden & Haac v. Lovell, 203 Fed. 234, 30 Am. Bankr. Rep. 353, where certain foreign attachment litigation was held unavailable to sustain an estoppel preventing claimants from asserting claims not involved in such litigation against the bankrupt. Under a lease of machinery providing for redelivery at B., and the payment of certain charges, the lessor's acceptance of the machinery at a different place was held not a release of such charges. In re Desnoyers Shoe Co., 227 Fed. 401, 142 C. C. A. 97, 36 Am. Bankr. Rep. 51.

[30] In re Sweetser, 128 Fed. 165, affirmed Dowse v. Hammond, 130 Fed. 103, 64 C. C. A. 437.

mination of the suit against him, from claiming the benefit of a lien reserved by such deed for his benefit.[31] So where the bankrupt commenced a suit before his bankruptcy, which was tried after the adjudication, and the defendant in that action set up in defense a particular claim as a distinct cause of action, but offered no evidence in support of it, and judgment went in favor of the bankrupt, this does not estop such defendant from proving his claim in the bankruptcy proceedings.[32] And though one named as assignee in a general assignment for the benefit of creditors, which is voided by the bankruptcy of the assignor, has accepted the trust, this does not preclude him from proving a bona fide debt which he has against the bankrupt.[33] So a mere covenant by a creditor not to sue an accommodation acceptor does not prevent such creditor from proving against the drawer's estate in bankruptcy.[34] Again, where the president of a bankrupt corporation had loaned money to it on notes, he is not estopped to claim the allowance thereof against the corporation's estate in bankruptcy because of statements of assets and liabilities made at various times, which did not include the notes, in the absence of any evidence that he had knowledge of their contents, or that credit was extended to the corporation, and the position of creditors changed, on the faith thereof.[35] So, although the bankrupt's bookkeeper prepared a financial statement which was submitted to a bank as a basis for credit, and the statement did not show that the bankrupt was indebted to the bookkeeper for his salary, this does not estop the latter to file a claim for unpaid salary, in the absence of evidence that credit was extended on the faith of the statement.[36] But on the other hand, where one advanced a large sum of money to a corporation on an agreement that he should receive stock in exchange for it when the capital stock of the company should be increased, and in the mean time that he should receive interest and also dividends, and this advance was represented to creditors as an increase of capital, and the lender held himself out as being connected with the business, and the corporation became bankrupt, it was held that the lender was estopped, as to creditors who had relied on the representations, to claim that he was a creditor and not a stockholder.[37] So, where

[31] Maxwell v. McDaniels (C. C. A.) 195 Fed. 426, 27 Am. Bankr. Rep. 692.

[32] In re People's Safe Deposit & Sav. Inst., 10 Ben. 38, 18 N. B. R. 493, Fed. Cas. No. 10,971.

[33] In re Horton, 5 Ben. 562, Fed. Cas. No. 6,707.

[34] Downing v. Traders' Bank, 2 Dill. 136, 11 N. B. R. 371, Fed. Cas. No. 4,046.

[35] Spencer v. Lowe (C. C. A.) 198 Fed. 961, 29 Am. Bankr. Rep. 876. So, the president of a bankrupt corporation, who had advanced money in connection with a composition in a former proceeding, was held not estopped from proving his claim because of representations that the money would be raised outside the assets of the corporation. McKey v. Bruns, 243 Fed. 370, 156 C. C. A. 150, 40 Am. Bankr. Rep. 189.

[36] In re Cox (D. C.) 199 Fed. 952, 29 Am. Bankr. Rep. 456.

[37] In re Desnoyers Shoe Co. (D. C.) 210 Fed. 533, 32 Am. Bankr. Rep. 51.

the only claim filed by a brother of the bankrupt against his estate was based on notes and a mortgage which were clearly fraudulent, he was held bound by such action, and not permitted to prove the claim as one for wages of labor and so entitled to priority.[38]

§ 490. **Fraudulent Conduct Barring Proof of Claim.**—Where a creditor of a bankrupt actively participates or assists him in the execution of a scheme to delay or defraud his other creditors, and in furtherance thereof advances money or incurs expense, the entire transaction is contaminated by the fraud, and the court of bankruptcy will not aid the conspirators by allowing claims for such advances or expenses against the estate.[39] So also, where money is loaned or advances made for the purpose of establishing a fictitious credit for the bankrupt and so enabling him to cheat others.[40] And so where a creditor has attempted to gain an advantage over other creditors by including in his proof fictitious items or exaggerated amounts, or by including fraudulent or illegal and non-provable claims, his proof will not be allowed even to the extent of an honest debt which may be included in it, but will be rejected as an entirety.[41] And the same rule has been applied where a creditor holding collateral security under a pledge, took the opportunity, as soon as a petition in bankruptcy had been filed, to sell the security to himself at a pretended auction at a small fraction of its face value, and without notice to any party in interest.[42] But there is nothing illegal in endeavoring to buy up all the claims against the estate of a bankrupt, for the purpose of staying the bankruptcy proceedings altogether; and if the purchaser fails in this, he should nevertheless be allowed to prove such claims as he has acquired as though he were an original creditor.[43] And

[38] In re Hemstreet, 139 Fed. 958, 14 Am. Bankr. Rep. 823.

[39] Butcher v. Werksman, 204 Fed. 330, 30 Am. Bankr. Rep. 332; In re Friedman, 164 Fed. 131, 21 Am. Bankr. Rep. 213; In re L. M. Alleman Hardware Co., 172 Fed. 611, 22 Am. Bankr. Rep. 871; In re Lansaw, 118 Fed. 365, 9 Am. Bankr. Rep. 167; In re Knox, 98 Fed. 585, 3 Am. Bankr. Rep. 371; In re Hugill, 100 Fed. 616, 3 Am. Bankr. Rep. 686; In re Hatje, 6 Biss. 436, 12 N. B. R. 548, Fed. Cas. No. 6,215. But see In re Medina Quarry Co., 179 Fed. 929, 24 Am. Bankr. Rep. 769. And compare In re L. M. Alleman Hardware Co. (C. C. A.) 181 Fed. 810, 25 Am. Bankr. Rep. 331.

[40] In re Friedman, 164 Fed. 131, 21 Am. Bankr. Rep. 213; In re Royce Dry Goods Co., 133 Fed. 100, 13 Am. Bankr. Rep. 257.

[41] In re Friedman, 164 Fed. 131, 21 Am. Bankr. Rep. 213; In re Flick, 105 Fed. 503, 5 Am. Bankr. Rep. 465; In re Elder, 1 Sawy. 73, 3 N. B. R. 670, Fed. Cas. No. 4,326; Marrett v. Atterbury, 3 Dill. 444, 11 N. B. R. 225, Fed. Cas. No. 9,102.

[42] In re Mertens, 134 Fed. 101, 14 Am. Bankr. Rep. 226. But see Turner v. Metropolitan Trust Co. (C. C. A.) 207 Fed. 495, where a purchase of pledged collateral by the pledgee was held, under the particular circumstances, not to prevent proof against the estate in bankruptcy.

[43] In re Pease, 6 N. B. R. 173, Fed. Cas. No. 10,880; In re Strachan, 3 Biss. 181, Fed. Cas. No. 13,519. So of an agreement by one creditor to advance funds to effect a composition, on condition that his claim should be paid in full. In re Hawks, 204 Fed. 309, 30 Am. Bankr. Rep. 365.

the act of a creditor in withholding from record a chattel mortgage securing his debt, by agreement with the mortgagor, until the latter's bankruptcy, while it may render the mortgage invalid as a lien as against subsequent creditors without notice, does not of itself affect his right to prove his debt in bankruptcy, nor subordinate it to the claims of subsequent creditors.[44] Such fraudulent conduct on the part of a creditor as will forfeit his right to prove against the bankrupt estate may also operate to the disadvantage of others who, though not directly implicated, are still bound by his acts, as in the case of a partner who, though innocent himself, cannot disavow fraudulent acts of his copartner done in the firm name.[45] And where the holder of a note has forfeited his claim against the estate of the bankrupt maker by taking a preference, the guarantors of the note have no right to prove it against the estate, their liability having been discharged by the principal.[46] But it has been ruled in a well-considered case that where a creditor advances money to his debtor, knowing him to be insolvent, but believing that the loan will enable him to regain sufficient prosperity to pay off his debts, the mere fact that the creditor omits to notify the other creditors of the debtor's insolvency does not constitute a breach of duty, or a fraud or deceit on the other creditors, or authorize the disallowance of such creditor's claim against the debtor's estate in bankruptcy. For each creditor of an insolvent debtor is a competitor of all the others, and no fiduciary or confidential relation exists between them; and to constitute such a fraud as will estop a creditor from sharing with others in the distribution of the estate, he must have been guilty of some moral turpitude or breach of duty whereby the other creditors were deceived to their damage.[47]

§ 491. **Nature of Claims Provable in General.**—In general, it may be stated that every debt which is recoverable either at law or in equity is provable in bankruptcy,[48] or that any debt which may be proved by com-

[44] In re Ewald & Brainard, 135 Fed. 168, 14 Am. Bankr. Rep. 267; In re Abell, 198 Fed. 484, 117 C. C. A. 243. But see In re Thweatt, 199 Fed. 319, 29 Am. Bankr. Rep. 84.

[45] Capelle v. Hall, 12 N. B. R. 1, Fed. Cas. No. 2,391.

[46] In re Ayers, 6 Biss. 48, Fed. Cas. No. 685.

[47] Crowder v. Allen-West Commission Co., 213 Fed. 177, 129 C. C. A. 521, 32 Am. Bankr. Rep. 134.

[48] In re Jordan, 2 Fed. 319; In re H. V. Keep Shirt Co., 200 Fed. 80, 28 Am. Bankr. Rep. 765. See In re Hawks, 204 Fed. 309, 30 Am. Bankr. Rep. 365. "Provable" debts and "allowable" debts in bankruptcy are not necessarily equivalent terms. On the distinction, see R. P. Williams & Co. v. United States Fidelity & Guaranty Co., 11 Ga. App. 635, 75 S. E. 1067. Claims which are entitled to priority under the statute (such as claims for wages of labor) are provable and must be proved. But the fact that a father employed his minor son to work as his chief clerk, while the son paid board to his mother, does not establish an emancipation of the son, so as to entitle him to prove a claim for wages against his father's estate. In re Riff, 205 Fed. 406, 30 Am. Bankr. Rep. 504. Compare In re Kanter (D. C.) 215 Fed. 276.

plying with any of the provisions of the statute is provable,[49] and the fact that a claim arises as a consequence of the bankruptcy is sufficient to render it provable as a fixed liability absolutely owing at the date of the petition.[50] A claim against the bankrupt for money loaned is liquidated and provable,[51] and claims upon an "open account" (which is the same thing as an "account current") are specially enumerated by the statute as among the claims which shall be provable.[52] Again, it is no objection to the proof and allowance of a claim that it is of such a character as not to be barred or released by the bankrupt's discharge, as in the case of a debt created by his fraud or created by him while acting in a fiduciary capacity.[53] And a debt evidenced by a note or other writing is provable notwithstanding the fact that it is expressed to be payable in a particular species of currency or in gold coin,[54] or even in labor and merchandise.[55] An attorney may file and prove a claim against the bankrupt for professional services rendered to him before the bankruptcy and in matters not connected therewith, although there was no express contract fixing the amount of his fees,[56] at least where his services conduced to the benefit of the estate or to its more prompt administration, as where they resulted in obtaining a reduction of taxes assessed

[49] Rankin v. Florida, A. & G. C. R. Co., 1 N. B. R. 647, Fed. Cas. No. 11,567. The fact that certain claims may be entitled to payment in priority to the claim of a particular creditor does not affect his right to prove the claim and have it allowed. McKey v. Bruns, 243 Fed. 370, 156 C. C. A. 150, 40 Am. Bankr. Rep. 189.

[50] In re Neff, 157 Fed. 57, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349, 19 Am. Bankr. Rep. 23, 911.

[51] In re Halsey Electric Generator Co. (D. C.) 163 Fed. 118, 20 Am. Bankr. Rep. 738. Where a loan was in fact made to the corporation which is in bankruptcy, the claim is provable against it, though evidenced by the individual notes of its executive officers. Hogin v. Central Nat. Bank, 223 Fed. 325, 138 C. C. A. 587, 35 Am. Bankr. Rep. 81. Where a subscriber for an increase of stock paid the price thereof in advance, under an agreement that such payment should be treated as a loan until the issuance of the stock, and before that the corporation was adjudged bankrupt, the subscriber was entitled to have his claim allowed as a general claim against the bankrupt. Clark v. Hamilton, 217 Fed. 229, 133 C. C. A. 223, L. R. A. 1918E, 750, 33 Am. Bankr. Rep. 198.

[52] In re Stanton, Fed. Cas. No. 13,295. "An open account is one in which some item of the contract is not settled by the parties, whether the account consists of one item or many; or where there have been running or current dealings between the parties, and the account is kept open with the expectation of fresher transactions." Sheppard v. Wilkins, 1 Ala. 62; Goodwin v. Harrison, 6 Ala. 438. An open account, in legal as well as in ordinary language, means an indebtedness subject to future adjustment, and which may be reduced or modified by proof. Nisbet v. Lawson, 1 Ga. 275; Gayle v. Johnston, 72 Ala. 254, 47 Am. Rep. 405; McCamant v. Batsell, 59 Tex. 368; Purvis v. Kroner, 18 Or. 414, 23 Pac. 260.

[53] In re Tebbetts, 5 Law Rep. 259, Fed. Cas. No. 13,817; Bourne v. Maybin, 3 Woods, 724, Fed. Cas. No. 1,700.

[54] In re Whittaker, 4 N. B. R. 160, Fed. Cas. No. 17,598; In re Elder, 1 Sawy. 73, 3 N. B. R. 670, Fed. Cas. No. 4,326.

[55] In re Spot Cash Hooper Co., 188 Fed. 861, 26 Am. Bankr. Rep. 546; McMullin v. Bank of Penn Township, 2 Pa. St. 343.

[56] In re Coney Island Lumber Co., 199 Fed. 803.

against the property or stopping the prosecution of an attachment suit.[57] So a ward may prove his claim against his guardian's estate in bankruptcy, notwithstanding the fact that the accounts of the guardian are in course of settlement in the probate court of the state.[58] The government also, if it holds a claim against a debtor in bankruptcy, may and should file proof of the same.[59] In the case of a bankrupt insurance company, under the former statute, it was held that a claim founded on a covenant to repay part of the premium paid for insurance on cancellation of the policy was provable.[60] And although money advanced to the bankrupt was purely in the form of a bonus, to induce him to erect and operate a manufacturing plant in a given locality, yet on his failure to do so and his ensuing bankruptcy, the amount so paid constitutes a provable claim.[61] Again, although the debt was not originally contracted by the bankrupt, yet if he assumed and agreed to pay it (as in the case of one buying a going business and taking the assets and liabilities together, or buying mortgaged land with an assumption of the mortgage), it will be provable against his estate.[62] So where a sale by an insolvent person, the proceeds of which were used to pay certain creditors in full, was set aside as constructively fraudulent as to other creditors, the vendee has a valid claim against the vendor's trustee in bankruptcy for the amount of the money he paid, less the expenses of setting aside the sale.[63] In those states also where the separate property of a married woman is liable in equity for her business obligations, though under the local law she is not technically a free trader, if she engages in business on her own account, her obligations contracted in the business are provable debts in bankruptcy.[64]

But on the other hand, the amount contributed by a partner to the capital of the partnership cannot, on the bankruptcy of the firm, be proved as a debt entitled to share ratably with the claims of the general creditors.[65] And so, where one induces others to join with him in a pur-

[57] In re Duran Mercantile Co., 199 Fed. 961, 29 Am. Bankr. Rep. 450.

[58] Bourne v. Maybin, 3 Woods, 724, Fed. Cas. No. 1,700.

[59] United States v. Murphy, 11 Biss. 415, 15 Fed. 589.

[60] In re Independent Ins. Co., 2 Low. 187, Fed. Cas. No. 7,019. But see In re Western Ins. Co., 6 Ben. 159, Fed. Cas. No. 17,435.

[61] Sturgiss v. Meurer, 191 Fed. 9, 111 C. C. A. 551, 26 Am. Bankr. Rep. 851.

[62] In re Baumblatt, 153 Fed. 485, 18 Am. Bankr. Rep. 720; Begein v. Brehm, 123 Ind. 160, 23 N. E. 496. But the estate of a bankrupt, who was defrauded of a stock of merchandise by another, but afterwards recovered it by suit, cannot be held liable for debts contracted by such other while conducting the business in his own name. Van Slyke v. Huntington (C. C. A.) 265 Fed. 86, 45 Am. Bankr. Rep. 173.

[63] Barber v. Coit, 144 Fed. 381, 75 C. C. A. 319. 16 Am. Bankr. Rep. 419.

[64] MacDonald v. Tefft-Weller Co., 128 Fed. 381, 63 C. C. A. 123, 65 L. R. A. 106, 11 Am. Bankr. Rep. 800.

[65] In re W. J. Floyd & Co., 156 Fed. 206, 19 Am. Bankr. Rep. 438. And money invested and lost by a creditor of a corporation by subscribing to its capital stock cannot be included in his claim in bankruptcy. In re Franklin Brewing Co.

chase of property, by representations as to its value which prove to be incorrect, but without any express promise to reimburse them for any loss which they may sustain, the law will not raise such a promise by implication, so as to create a liability as on an implied contract provable against his estate in bankruptcy.[66] Owelty of partition is a legal charge on the land, but not created by the contract of the parties but by the law, and therefore is not provable in bankruptcy.[67] And where one institutes a suit against his debtor and against another as garnishee, and the latter goes into bankruptcy before the recovery of any judgment, the creditor has no provable claim against the garnishee's estate.[68] Finally it has been held that a claim for an account of profits against an infringer of a patent-right is not provable against his estate in bankruptcy.[69]

§ 492. **Amount of Claim Provable.**—In order to arrive at the correct amount for which a creditor should be allowed to prove, the court will inquire into the accounts and dealings of the parties, and if necessary reduce the amount of the claim as filed.[70] Thus, on a claim by one member of a syndicate of banking firms against the estate of a bankrupt member, the court will examine into the accounts of all the members, in order to make a definite allowance against the bankrupt's estate.[71] So, where a corporation gave its note to a bank for the indebtedness of a third party, for which it was not responsible, and also for its own debt, the note was invalid in the hands of the bank (having knowledge of the facts) to the extent of the amount of the debt of the third party, and it was held that the bank's claim against the estate of the corporation in bankruptcy must be reduced to the amount which the corporation itself owed when the note was given.[72] So again, where a manufacturer consigned goods to factors, who advanced him their notes to an amount larger than was ultimately realized on the goods, which notes were indorsed by him and discounted, and both parties became bankrupt, and the factors, employing the goods then in their possession, made a composition with their creditors, including the holders of the notes, who

(D. C.) 265 Fed. 301, 45 Am. Bankr. Rep. 719.

[66] Switzer v. Henking, 158 Fed. 784, 86 C. C. A. 140, 15 L. R. A. (N. S.) 1151, 19 Am. Bankr. Rep. 300.

[67] Ex parte Walker, 107 N. C. 340, 12 S. E. 136.

[68] Ex parte Columbian Ins. Co., 2 Low. 5, Fed. Cas. No. 3,037.

[69] In re Boston & F. Iron Works (C. C.) 23 Fed. 880, citing Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975.

[70] A claim by a large stockholder of a bankrupt corporation against the estate for merchandise transferred to it at an agreed valuation may be subject to proof to determine the fair market value of the property, and to reduction accordingly. In re Peerless Shoe Co. (D. C.) 226 Fed. 1020, 36 Am. Bankr. Rep. 71.

[71] In re Cooke, 12 N. B. R. 30, Fed. Cas. No. 3,170.

[72] Mapes v. German Bank of Tilden, 176 Fed. 89, 99 C. C. A. 609, 23 Am. Bankr. Rep. 713.

reserved the right to prove in full against all other parties to them, it was held that such creditors, in proving against the estate of the manufacturer, would not be required to give credit for the full amount received by them on the composition, but would be required to abate their proof by giving credit for the property of such manufacturer so employed by the factors, which might, upon their application, have been applied towards paying their debts.[73]

Again, the amount to be allowed on a claim may depend upon an inquiry into and disclosure of the actual and true consideration.[74] Thus, an indorsee before maturity of a negotiable note, without notice of existing equities, can only prove against the estate of the maker the amount paid therefor.[75] And so, where a mortgage is given to indemnify the mortgagee for his advances, and he loans his acceptances to the mortgagor, and, after the bankruptcy of the latter, buys up the paper at a discount, he can charge against the mortgaged property only what he paid in cash to take up the acceptances.[76] But it has been held that the pledgee of notes held to secure a debt in a smaller amount may prove them against the maker's estate to their full amount, and receive dividends to the extent of his debt.[77] The creditor may also be estopped to claim the full nominal amount of his debt or damage, either by his own previous agreement or by his laches or wrongful conduct. Thus, in a case where the fund to be distributed among the creditors of a bankrupt storage company consisted entirely of the proceeds of insurance on the property of such creditors, burned while in storage, the amount of which had been determined by an agreement between the insurers and the respective owners as to the value of the property of each, it was held that the creditors were bound by such valuations as between themselves, and one cannot be permitted to prove a larger claim.[78] So, where the bankrupt's brokers were carrying stocks on a margin, and, at the commencement of the bankruptcy proceedings, could have sold them at a profit, but carried the stocks until a decline and finally sold them at a loss, all without application to the court, it was held that they could not prove their claim for differences against the estate.[79] And on a

[73] Ex parte Harris, 2 Low. 568, 16 N. B. R. 432, Fed. Cas. No. 6,109.

[74] See Edgar v. Ames, 255 Fed. 835, 167 C. C. A. 163, 42 Am. Bankr. Rep. 697.

[75] In re Shelbourne, 19 N. B. R. 359, Fed. Cas. No. 12,745.

[76] Ex parte Ames, 1 Low. 561, 7 N. B. R. 230, Fed. Cas. No. 323.

[77] Bailey v. Nichols, 2 N. B. R. 478, Fed. Cas. No. 741. See Turner v. Metropolitan Trust Co. of City of New York, 207 Fed. 495, 125 C. C. A. 157, 31 Am. Bankr. Rep. 181.

[78] In re Reliance Storage & Warehouse Co., 105 Fed. 351, 5 Am. Bankr. Rep. 249.

[79] In re Daniels, 6 Biss. 405, Fed. Cas. No. 3,566. So, where brokers made an unauthorized pledge of customers' stock, and the pledgee, upon the brokers' bankruptcy, sold a portion of the stock to satisfy the brokers' indebtedness, the stock not so sold, in ascertaining the amount of the claim of the owner thereof, will be valued as of the day upon which the first sale of similar stock was made on

somewhat similar principle, where the general manager of a trading corporation (who was also a stockholder and director) had been allowed a salary for his services at a fixed monthly rate, but by the mere agreement of the board of directors without any by-law or resolution or entry of record, it was held that he was not entitled to prove a claim against the estate of the corporation in bankruptcy for arrears of salary at the rate so fixed, but only for the reasonable value of his services as determined by the court.[80]

In cases of breach of contract, the amount to be proved and allowed is determined by the ordinary rules relating to the measure of damages.[81] Thus, for a buyer's breach of a contract for the manufacture and sale of certain articles of merchandise, the measure of the seller's damage, on the allowance of his claim against the bankrupt estate of the buyer, is the difference between the cost of manufacture and the contract price, notwithstanding the entire lot of goods were not manufactured or ready for delivery.[82] So, where an agreement indemnifying a contractor's surety, containing an assignment of the contractor's plant on the work in case he should be unable to carry out the contract, was executed more than four months before the contractor became bankrupt and while he was solvent, the amount of the surety's claim against the bankrupt is not the amount which the latter might have paid by reason of his liability on the bonds, independent of the plant so assigned, but the amount of the loss the surety might sustain in completing the contract with such aid as he might gain by taking and using the plant.[83]

§ 493. **Payment or Satisfaction.**—A note which is subject to an offset for a larger amount is not a provable debt in bankruptcy.[84] Nor will a creditor be permitted to prove a claim which he has expressly waived or released to the bankrupt,[85] or which he had previously settled by an accord and compromise, receiving the consideration then agreed on, though less than the amount of the debt,[86] or where he has

the Stock Exchange, where the exchange had been closed because of the war at the time of the filing of the bankruptcy petition, and not opened until more than a month later, during which time the stock had appreciably increased in value. In re J. C. Wilson & Co. (D. C.) 252 Fed. 631, 42 Am. Bankr. Rep. 350.

[80] In re Grubbs-Wiley Grocery Co. (D. C.) 96 Fed. 183, 2 Am. Bankr. Rep. 442.

[81] Where a bankrupt, on full consideration paid before his bankruptcy, had contracted absolutely to pay the claimant $3 per day during the remainder of his life, the mortality tables should be used to determine the claimant's life. In re Miller (D. C.) 225 Fed. 331, 35 Am. Bankr. Rep. 333.

[82] In re Duquesne Incandescent Light Co., 176 Fed. 785, 24 Am. Bankr. Rep. 419; Pratt v. Auto Spring Repairer Co., 196 Fed. 495, 116 C. C. A. 261, 28 Am. Bankr. Rep. 483.

[83] Wood v. United States Fidelity & Guaranty Co., 143 Fed. 424, 16 Am. Bankr. Rep. 21.

[84] In re Ford, 18 N. B. R. 426, Fed. Cas. No. 4,932.

[85] See In re Howard, 100 Fed. 630, 4 Am. Bankr. Rep. 69.

[86] In re Decker, 8 Ben. 81, Fed. Cas.

once adjusted his claim by accepting from the trustee in bankruptcy a surrender of the property in dispute or a quitclaim deed.[87] Similarly, a vendor of goods under a conditional sale to the bankrupt may (if the transaction is not voidable under the bankruptcy law) affirm the sale and enforce a claim on the notes given by the bankrupt, or he may retake the property, but he cannot do both, and if he chooses the latter course, he cannot then prove the notes as a claim against the estate.[88] Neither will proof be permitted upon so much of a claim as has previously been satisfied by a payment in cash, or by a transfer and acceptance of property,[89] or otherwise. But merely taking a note, without any payment on it, does not discharge an original debt having any privileges under the bankruptcy law, and either may be proved.[90] So while the acceptance of shares of stock in a corporation in lieu of payment of a debt may cancel the debt so that it will no longer be provable in bankruptcy, if the creditor expressly releases the debtor from liability,[91] this is not the case if there is no sufficient proof that the creditor ever accepted the stock,[92] or if it was merely given as a substitute for collateral security held by the creditor and is not of value.[93] Again, where a creditor has received a partial payment on his debt under a general assignment for the benefit of creditors, made before the bankruptcy, he cannot prove for the whole of the debt but only for the balance remaining unsatisfied.[94]

No. 3,723; In re Lathrop, 3 Ben. 490, 3 N. B. R. 410, Fed. Cas. No. 8,103.

[87] Kenyon v. Mulert, 184 Fed. 825, 26 Am. Bankr. Rep. 184; In re Davis, 179 Fed. 871, 24 Am. Bankr. Rep. 667.

[88] In re Norton, 181 Fed. 901, 24 Am. Bankr. Rep. 794; In re Heinsfurter, 97 Fed. 198, 3 Am. Bankr. Rep. 113. See Patten's Appeal, 45 Pa. St. 151, 84 Am. Dec. 479. Where, prior to the bankruptcy, the claimant sought to replevin the balance of a bill of goods remaining in the bankrupt's possession unsold, in which he was unsuccessful, he was entitled to file against the bankrupt's estate for the whole claim. In re Venstrom (D. C.) 205 Fed. 325, 30 Am. Bankr. Rep. 569.

[89] In re Carpenter, 179 Fed. 743. See Haas-Baruch & Co. v. Portuondo, 138 Fed. 949, 15 Am. Bankr. Rep. 130. See In re Franklin Brewing Co. (C. C. A.) 272 Fed. 828, 46 Am. Bankr. Rep. 485. Where claimant made advances to the bankrupt to enable her to buy a motor car, and the bankrupt, being unable to repay the advances, delivered the car to claimant, who sold it, the amount received by the claimant from the sale of the car should be credited on the claim. In re Wray, 233 Fed. 418, 147 C. C. A. 354, 37 Am. Bankr. Rep. 28. If a landlord obtains by an action of replevin a part of his rent from the goods of a subtenant upon the premises, his claim against the bankrupt estate of the tenant should be reduced by the amount so received. Rosenblum v. Uber, 256 Fed. 584, 167 C. C. A. 614, 43 Am. Bankr. Rep. 480. The holder of a note indorsed by the bankrupt, not due at the time of the bankruptcy, but which became due before proof of claim, and on which in the mean time a payment was received from the maker, can prove only for the amount due thereon at maturity. In re Shatz, 251 Fed. 351 (D. C.), 41 Am. Bankr. Rep. 576.

[90] In re Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496; Dowse v. Hammond, 130 Fed. 103, 64 C. C. A. 437.

[91] In re Norris (D. C.) 190 Fed. 101, 26 Am. Bankr. Rep. 945.

[92] In re Blumer, 11 Fed. 700.

[93] In re Lorillard, 107 Fed. 677, 46 C. C. A. 553, 5 Am. Bankr. Rep. 602.

[94] In re Folb, 91 Fed. 107, 1 Am. Bankr. Rep. 22; In re Hamilton, 1 Fed. 800.

The case of a creditor whose claim is proved and allowed after the declaration of a dividend is somewhat peculiar. Here the law provides that the proof of such claim shall not affect the dividend so declared, but that such creditor shall receive an equal dividend (if the estate is sufficient) before other creditors receive any further dividends. But where the holder of a note made by a partnership and indorsed by one of the partners, both maker and indorser having been adjudicated bankrupts, proves his claim against the partnership estate after a dividend has been declared and paid to other creditors, his right to a preference in future dividends cannot be considered equivalent to a dividend actually declared in his favor, or to an actual part payment of his note by the maker, and hence he is entitled to prove his claim against the estate of the indorser for the full amount of the note.[95] Generally, however the holder of a note who has received a dividend from the estate in bankruptcy of the maker, can prove only the balance against the estate of the bankrupt indorser.[96] But on the other hand, a creditor whose claim has been partly paid by an accommodation indorser may prove the claim to its full amount without giving the estate the benefit of such part payment.[97] And so, where a creditor has received partial payment of his debt from a surety of the bankrupt, the right to prove the claim for its entire amount, against the estate in bankruptcy, is in the creditor in preference to the surety.[98]

§ 494. **Time of Accrual of Claims.**—The provability of a claim depends upon its status at the time of the filing of the petition in bankruptcy, which is the date when the right of creditors to share in the estate becomes fixed; and any claim which is not then a provable debt, as defined in the act, cannot be proved although it may thereafter come within such definition.[99] And a debt or claim which did not accrue or come into existence until after the filing of the petition is not provable,[100] even though it was for money loaned to the bankrupt to be used

[95] In re Swift, 106 Fed. 65, 5 Am. Bankr. Rep. 415.

[96] In re Howard, 4 N. B. R. 571, Fed. Cas. No. 6,750; In re Pulsifer, 9 Biss. 487, 14 Fed. 247.

[97] In re Noyes Bros., 127 Fed. 286, 62 C. C. A. 218, 11 Am. Bankr. Rep. 506; Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673. But see In re Broich, 7 Biss. 303, 15 N. B. R. 11, Fed. Cas. No. 1,921. See A. S. Coats Shingle Co. v. Chester Snow Log & Shingle Co., 106 Wash. 227, 179 Pac. 862.

[98] In re Heyman, 95 Fed. 800, 2 Am. Bankr. Rep. 651.

[99] Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, 29 Am. Bankr. Rep. 493; Sexton v. Dreyfus, 219 U. S. 339, 31 Sup. Ct. 256, 55 L. Ed. 244, 25 Am. Bankr. Rep. 363; In re American Vacuum Cleaner Co., 192 Fed. 939, 26 Am. Bankr. Rep. 621; Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673; In re Pettingill & Co., 137 Fed. 143, 14 Am. Bankr. Rep. 728.

[100] Colman Co. v. Withoft (C. C. A.) 195 Fed. 250, 28 Am. Bankr. Rep. 328; In re Walker, 176 Fed. 455, 23 Am. Bankr. Rep. 805; In re Reading Hosiery Co., 171 Fed. 195, 22 Am. Bankr. Rep. 562; In re Rome, 162 Fed. 971, 19 Am.

in complying with the terms of a composition agreement.[101] And it is immaterial that the debt accrued or came into existence before any adjudication was made upon the petition, if it did not exist when the petition was filed; for the statute is explicit in fixing the date of filing the petition, and not the date of the adjudication, as the decisive time.[102] An apparent exception to the rule here mentioned, but really only an extension of it, is found in the case where the filing of the petition in bankruptcy itself operates as a breach of an executory contract, because equivalent to a refusal to perform. Here the filing of the petition and the accrual of a claim for damages are exactly contemporaneous, and the creditor may prove his claim for damages as one existing at the time of the filing of the petition.[103] Although the first subdivision of the sixty-third section of the bankruptcy act is the one which defines a provable debt as one "absolutely owing at the time of the filing of the petition," and this language is not repeated in the fourth subdivision, which allows proof of a claim "founded upon an open account or upon a contract express or implied," yet the decisions unanimously hold that the limitation of time contained in the first subdivision must be read into the fourth, the two being in pari materia, and hence a claim founded upon an open account or a contract is not provable in bankruptcy, any more than any other kind of claim, unless it existed at the time of the filing of the petition.[104] Further, a debt to be provable in bankruptcy, must continue to exist in the same condition after as at the time of the commencement of the proceedings; and proof of a claim as indorser upon a note made by the bankrupt will be disallowed where it appears that, after the adjudication of bankruptcy, a new note had been given and the first note taken up.[105] On this principle also, a claim against a bankrupt for work done under a contract after the filing of the

Bankr. Rep. 820; In re Black Diamond Copper Mining Co., 11 Ariz. 415, 95 Pac. 117; In re Riker, 18 N. B. R. 393, Fed. Cas. No. 11,833; In re Merell, 19 Fed. 874; In re Ward, 12 Fed. 325; Phenix Nat. Bank v. Waterbury, 123 App. Div. 453, 108 N. Y. Supp. 391; Hardcastle v. National Clothing Co., 137 Tenn. 64, 191 S. W. 524. On bankruptcy of the debtor, each creditor becomes an equitable cestui que trust in the assets in the ratio which his claim bears to the total amount, and his right to participate may not be diminished by claims arising subsequently to the bankruptcy, his right to participate being determined as of the date of the bankruptcy. In re United Grocery Co. (D. C.) 253 Fed. 267, 41 Am. Bankr. Rep. 824.

[101] Zavelo v. J. S. Reeves & Co., 171 Ala. 401, 54 South. 654.

[102] In re Burka, 104 Fed. 326, 5 Am. Bankr. Rep. 12; In re Merrill, 21 Fed. 120. Compare Spalding v. Dixon, 21 Vt. 45.

[103] In re Swift, 112 Fed. 315, 50 C. C. A. 264, 7 Am. Bankr. Rep. 374.

[104] Colman Co. v. Withoft (C. C. A.) 195 Fed. 250, 28 Am. Bankr. Rep. 328; In re Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270, 24 Am. Bankr. Rep. 588; In re Swift, 112 Fed. 315, 50 C. C. A. 264, 7 Am. Bankr. Rep. 374; In re Adams, 130 Fed. 381, 12 Am. Bankr. Rep. 368; In re Burka, 104 Fed. 326, 5 Am. Bankr. Rep. 12.

[105] In re Montgomery, 3 N. B. R. 426, Fed. Cas. No. 9,730.

petition cannot be proved as a debt against the estate, although the contract was entered into before the commencement of the proceedings, but was then wholly executory.[106]

Judgments recovered against the bankrupt after the filing of the petition, and before consideration of his application for a discharge, may be proved as debts, but only on condition that they are founded on debts provable at the commencement of the proceedings, and even in that case there must be deducted costs incurred and interest accrued after the filing of the petition and up to the time of the entry of judgment.[107]

§ 495. Claims on Contracts and Damages for Breach Thereof.—Claims founded upon an "open account or upon a contract express or implied" are specifically made provable by the bankruptcy act, and this clause is not limited by the provision in an earlier part of the same section that debts may be proved and allowed which are "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing." [108] Hence an account for the balance due for goods sold and delivered is a provable debt,[109] as is also the amount due on a conditional sale of property, assuming that that form of contract is not invalid under the laws of the state,[110] or a fixed sum due for subscriptions to a mercantile agency,[111] or a claim for damages for breach of an appeal bond.[112]

Moreover, a claim for damages for the breach of an executory contract is a claim "founded upon a contract" within the meaning of the statute, and is provable in bankruptcy, equally as in the case where the contract itself is for the payment of a fixed sum.[113] And if the bankrupt,

[106] In re Adams, 130 Fed. 381, 12 Am. Bankr. Rep. 368.

[107] Bankruptcy Act 1898, § 63a, cl. 5. See In re Fitzgerald, 191 Fed. 95, 28 Am. Bankr. Rep. 773; United States v. The Rob Roy, 1 Woods, 42, 13 N. B. R. 235, Fed. Cas. No. 16,179.

[108] In re Lyons Beet Sugar Refining Co. (D. C.) 192 Fed. 445, 27 Am. Bankr. Rep. 610. But compare In re D. C. Clark Shoe Co. (D. C.) 211 Fed. 341, 32 Am. Bankr. Rep. 238. A cause of action sounding either in contract or tort at the election of the holder is a provable claim in bankruptcy. Reinhardt v. Friederich, 58 Ind. App. 421, 108 N. E. 258. A claim on a protested check, which was given to make good an overpayment on an account for goods sold, is a cause of action in contract and provable in bankruptcy. Stewart Petroleum Co. v. Boardman, 264 Fed. 826, 45 Am. Bankr. Rep. 573. Where a bankrupt, on full consideration paid before the bankruptcy, contracted absolutely to pay the claimant $3 a day during the remainder of his life, the claim is fixed and provable. In re Miller (D. C.) 225 Fed. 331, 35 Am. Bankr. Rep. 333.

[109] Standard Sewing Machine Co. v. Kattell, 132 App. Div. 539, 117 N. Y. Supp. 32.

[110] In re Gray, 170 Fed. 638, 21 Am. Bankr. Rep. 375.

[111] In re Glick, 184 Fed. 967, 25 Am. Bankr. Rep. 871.

[112] Coe v. Waters, 16 Colo. App. 311, 64 Pac. 1054.

[113] In re Frederick L. Grant Shoe Co., 130 Fed. 881. 66 C. C. A. 78, 12 Am. Bankr. Rep. 349; In re Adams, 130 Fed. 381, 12 Am. Bankr. Rep. 368; In re Stern, 116 Fed. 604, 54 C. C. A. 60, 8 Am. Bankr. Rep. 569; In re Swift, 112 Fed. 316, 50 C. C. A. 264, 7 Am. Bankr. Rep. 374; Ex

at the time of the bankruptcy, by disenabling himself from performing his part of a particular contract, and by repudiating its obligation, could give to the other party the right to maintain at once a suit in which damages could be assessed at law or in equity, then such other party may prove as a creditor in the bankruptcy proceedings, on the ground that bankruptcy is the equivalent of disenablement and repudiation or is an anticipatory breach of the contract.[114] But this is on the supposition that the claimant is not himself in default, for if he has failed to carry out his own part of the contract he cannot file a claim for damages.[115] And in no case can his claim be allowed for more than the actual damage sustained. Thus, the courts will not allow the creditor to take this means of enforcing a mere penalty,[116] or the collection of a sum named in the contract as liquidated damages in case of default, where it is not shown that the claimant has sustained any actual damage by the bankrupt's breach of the contract.[117] So, in a case where one holding a patent for an invention had granted to a corporation an exclusive license to manufacture the product, and the corporation had thereupon contracted to pay to the patentee a bonus or royalty on the patented articles sold with a guaranty of a minimum number during the year, and the corporation became bankrupt before the end of the year, it was held that the patentee was entitled to prove a claim for the amount of royalty which had accrued up to the time of the bankruptcy at the minimum rate, irrespective of the number of articles actually sold, but that he could not prove a claim for future royalties accruing during the remainder of the term, although he was entitled to prove a claim for damages

parte Pollard, 2 Low. 411, 17 N. B. R. 228, Fed. Cas. No. 11,252; Forest City Steel & Iron Co. v. Detroit & T. S. L. R. Co., 154 Mich. 182, 117 N. W. 645; Lothrop v. Reed, 13 Allen (Mass.) 294. Compare Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 14 Am. Bankr. Rep. 453.

[114] Central Trust Co. of Illinois v. Chicago Auditorium Ass'n, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580, 36 Am. Bankr. Rep. 679; In re Pettingill & Co., 137 Fed. 143, 14 Am. Bankr. Rep. 728; In re Swift, 105 Fed. 493, 5 Am. Bankr. Rep. 335; In re Saxton Furnace Co., 142 Fed. 293, 15 Am. Bankr. Rep. 445; Pratt v. Auto Spring Repairer Co. (C. C. A.) 196 Fed. 495, 28 Am. Bankr. Rep. 483; In re Duquesne Incandescent Light Co., 176 Fed. 785, 24 Am. Bankr. Rep. 419; In re Spittler, 151 Fed. 942, 18 Am. Bankr. Rep. 425; In re Neff, 157 Fed. 57, 84 C. C. A. 561, 19 Am. Bankr. Rep. 911; In re National Wire Corp., 166 Fed. 631, 22 Am. Bankr. Rep. 186; Wood v. Fisk, 156 App. Div. 497, 141 N. Y. Supp. 342. Contra, In re Imperial Brewing Co., 143 Fed. 579, 16 Am. Bankr. Rep. 110; In re Inman & Co., 175 Fed. 312, 23 Am. Bankr. Rep. 566; Board of Commerce of Anu Arbor v. Security Trust Co., 225 Fed. 454, 140 C. C. A. 486, 34 Am. Bankr. Rep. 762; In re Frank E. Scott Transfer Co., 216 Fed. 308, 132 C. C. A. 452. See In re 35% Automobile Supply Co. (D. C.) 247 Fed. 377, 41 Am. Bankr. Rep. 101; In re Leslie & Griffith Co. (D. C.) 230 Fed. 465, 36 Am. Bankr. Rep. 744. See Heyward v. Goldsmith (C. C. A.) 269 Fed. 946, 46 Am. Bankr. Rep. 722.

[115] In re Morgantown Tin Plate Co., 184 Fed. 109, 25 Am. Bankr. Rep. 836.

[116] In re Bevier Wood Pavement Co., 156 Fed. 583, 19 Am. Bankr. Rep. 462.

[117] Northwest Fixture Co. v. Kilbourne & Clark Co., 128 Fed. 256, 62 C. C. A. 638, 11 Am. Bankr. Rep. 725.

for the breach of the contract, to be estimated in view of the fact that, the license having fallen in, he was at liberty to dispose of it again.[118]

The case of the breach of a contract of employment presents somewhat different features. One employed as a salesman, superintendent, manager, secretary, etc., may regard his contract of employment as dissolved by the employer's adjudication in bankruptcy (especially, it is said, in the case where the bankrupt is a corporation or a partnership) and may prove a claim for the unpaid balance of his salary to the time of the filing of the petition,[119] if it was fixed by a valid written contract or other instrument, or otherwise he may claim the reasonable value of his services.[120] But as to the right to prove a claim for so much of the agreed salary as would have been earned and payable (if bankruptcy had not intervened) from the date of the bankruptcy to the end of the stipulated period of employment, the decisions are not altogether in harmony. It has been ruled that the measure of the employé's damages in such a case would be the amount which he would have received under the contract for the remainder of the term fixed, less such amount as he would be able to earn during that time from other sources.[121] But the preponderance of authority is to the effect that the employé cannot prove a claim for any salary beyond the date of the filing of the petition in bankruptcy, on the theory that his expectation of receiving a salary during the remainder of the term, if it can be called a debt or a claim for damages, is no more than a contingent liability, and the present statute has made no provision for the proof or allowance of claims of that character.[122] The rule is substantially the same where the contract required the payment of commissions to a salesman in addition to his salary. Such commissions as were actually earned before the date of bankruptcy constitute a provable debt, but a claim for commissions on sales which possibly or probably might have been made if the contract had continued to its appointed term is too speculative and remote to be available as a provable debt in bankruptcy.[123]

[118] In re Dr. Voorhees Awning Hood Co., 187 Fed. 611.

[119] Ex parte Pollard, 2 Low. 411, 17 N. B. R. 228, Fed. Cas. No. 11,252. See In re B. H. Gladding Co., 120 Fed. 709, 9 Am. Bankr. Rep. 700.

[120] In re Grubbs-Wiley Grocery Co., 96 Fed. 183, 2 Am. Bankr. Rep. 442. And see In re McCarthy Portable Elevator Co., 196 Fed. 247, 28 Am. Bankr. Rep. 45.

[121] In re Silverman, 101 Fed. 219, 4 Am. Bankr. Rep. 83; In re Schultz & Guthrie (D. C.) 235 Fed. 907, 37 Am. Bankr. Rep. 604.

[122] In re Inman & Co., 171 Fed. 185, 22 Am. Bankr. Rep. 524; In re American Vacuum Cleaner Co., 192 Fed. 939, 26 Am. Bankr. Rep. 621; In re Dr. Voorhees Awning Hood Co., 187 Fed. 611; Orr v. Ward, 73 Ill. 318; In re D. Levy & Sons Co., 208 Fed. 479, 31 Am. Bankr. Rep. 25; In re Montague & Gillet (D. C.) 212 Fed. 452, 32 Am. Bankr. Rep. 106.

[123] See Clairemonte v. Napier Motor Co., 11 Cal. App. 265, 104 Pac. 712; In re Silverman, 101 Fed. 219, 4 Am. Bankr. Rep. 83.

§ 496. Promissory Notes; Consideration; Good Faith of Holder.—A promissory note is a provable debt in bankruptcy as being a "fixed liability evidenced by an instrument in writing," and may be proved by the payee or indorsee as the case may be.[124] Notes made by a corporation are provable against its estate in bankruptcy, if duly executed under proper authority and for a legitimate corporate purpose.[125] And a claim on a note may be proven against the estate of the bankrupt indorser.[126] Under former statutes it was held that a note was none the less provable in bankruptcy because it was payable in specific articles on demand,[127] though such a claim would probably now be regarded as an unliquidated demand, and its equivalent in cash would have to be fixed before proving.

But a claim founded on a promissory note will not be allowed where it appears that it was not founded upon a good and valid consideration,[128] and a renewal note, which is not supported by any fresh consideration, is not provable where the original note was without consideration.[129] But a note given by a bankrupt corporation to a stockholder for money borrowed with which to effect a composition, and which was so used, is not without consideration and may be proved as a debt in a second bankruptcy proceeding.[130] Further it is necessary that the claimant offering to prove on the note should be a holder in good faith and for value or at least (in the case of a remote indorsee) that he should prove affirmatively that his immediate indorser was a bona fide holder for value.[131] A person to whom notes are sent for discount, and who fails to pay drafts drawn against the proceeds in favor of an indorser of the notes, cannot prove his claim on the notes against the bankrupt payee of the drafts, for, having failed to pay the drafts, he has no right to retain the notes and is not a holder for value.[132] But where the holder of a note is a corporation, its position is not necessarily prejudiced by bad faith or even illegal conduct on the part of one of its officers in regard to the acquisition of the note where full value was given in cash. Thus, in one of the cases it appeared that the cashier of a national bank had discounted notes for the maker of them, far in excess of the amount

[124] In re Shelbourne, 19 N. B. R. 359, Fed. Cas. No. 12,745.

[125] In re New York Car Wheel Works, 141 Fed. 430, 15 Am. Bankr. Rep. 571. See Moerschel v. O'Bannon, 246 Fed. 887, 159 C. C. A. 159, 40 Am. Bankr. Rep. 786.

[126] In re Bruce, 6 Ben. 515, Fed. Cas. No. 2,044.

[127] Chandler v. Windship, 6 Mass. 310; Barker v. Mann, 4 Metc. (Mass.) 302.

[128] In re Hook, 11 N. B. R. 282, Fed. Cas. No. 6,672.

[129] In re Stanford Clothing Co., 187 Fed. 172, 26 Am. Bankr. Rep. 124; In re Cornwall, 4 N. B. R. 400, Fed. Cas. No. 3,251. See In re New York Car Wheel Works, 139 Fed. 421, 14 Am. Bankr. Rep. 595.

[130] In re C. H. Bennett Shoe Co., 162 Fed. 691, 20 Am. Bankr. Rep. 704.

[131] In re Hopper-Morgan Co., 156 Fed. 525, 19 Am. Bankr. Rep. 518, affirmed 166 Fed. 1020, 91 C. C. A. 37.

[132] In re Howard, 6 N. B. R. 372, Fed. Cas. No. 6,751.

which the bank could legally loan to one person, and beyond the ability of the maker and indorser of the notes to pay, and this was done without the knowledge or consent of the other officers of the bank. A criminal prosecution was instituted against the cashier and he was sentenced to imprisonment for misapplying the funds of the bank, and criminal proceedings against the maker of the notes for aiding him in so doing likewise resulted in a conviction. The bank having become insolvent, its receiver sued on the cashier's bond and recovered judgment for the amount of the penalty of such bond. But it was held that these facts did not affect the validity of the notes, nor the bank's ownership of them, and the receiver might prove the same in bankruptcy against the estate of the indorser.[133] A pledgee in good faith and for value of a promissory note, transferred to him before maturity, may prove it for its full amount against the estate in bankruptcy of the maker, whatever may have been the equities between the maker and the pledgor; but if there are such equities as would prevent the pledgor from proving, then the pledgee can receive in dividends only the amount for which he holds the note in pledge.[134]

§ 497. **Judgments.**—Although a verdict, not followed by the entry of judgment before the institution of bankruptcy proceedings, is not a provable debt,[135] yet a judgment recovered before the filing of the petition in bankruptcy is expressly made provable by the terms of the statute,[136] irrespective of the nature of the cause of action in the suit in which it was rendered, and even though that cause of action would not of itself have constituted a provable claim.[137] Hence, provided the judgment was obtained before the beginning of the bankruptcy proceedings, it will be a provable debt when based on a cause of action for obtaining property by false and fraudulent representations,[138] or where the action was in trover to recover goods purchased by the bankrupt while insolvent, no fraudulent misrepresentations being shown,[139] or where the the cause of action was against a city marshal for paying over attached rents to the attaching creditor after notice of an assignee's claim to them,[140] and proof may be made on a judgment against

[133] In re Edson, 119 Fed. 487, 9 Am. Bankr. Rep. 505.

[134] Ex parte Kelty, 1 Low. 394, Fed. Cas. No. 7,681.

[135] In re Ostrom, 185 Fed. 988, 26 Am. Bankr. Rep. 273; Black v. McClelland, 12 N. B. R. 481, Fed. Cas. No. 1,462.

[136] Johnson v. Joslyn, 45 Wash. 310, 88 Pac. 324; Graham v. Pierson, 6 Hill (N. Y.) 247; People's Nat. Bank v. Maxson, 168 Iowa, 318, 150 N. W. 601.

[137] Howland v. Carson, 28 Ohio St. 625. But compare Turner v. Turner, 108 Fed. 785, 6 Am. Bankr. Rep. 289, holding that a judgment for alimony is not a provable debt, as to which see infra, § 509.

[138] In re Lockwood (D. C.) 240 Fed. 158, 39 Am. Bankr. Rep. 478.

[139] Kreitlein v. Ferger, 238 U. S. 21, 35 Sup. Ct. 685, 59 L. Ed. 1184, 34 Am. Bankr. Rep. 862.

[140] Ulner v. Doran, 167 App. Div. 259, 152 N. Y. Supp. 655.

the bankrupt for injuries to the judgment creditor's property caused by the bankrupt's negligence,[141] or for damages sustained by the creditor in an automobile accident.[142] The same conditions being fulfilled, as to the time of recovery of the judgment, a judgment in an action for a tort, such as fraud, conspiracy, or deceit, is provable in bankruptcy,[143] and so is a judgment for damages for negligence causing death,[144] or for breach of promise of marriage,[145] or a judgment recovered by a woman against her seducer,[146] or one fixing the liability of a stockholder of an insolvent corporation for a contribution equal to the amount of his stock to pay its debts.[147] Further, the judgment is conclusive of the validity and amount of the claim,[148] though it may perhaps be impeached on the ground of fraud or collusion in its procurement or for want of jurisdiction.[149] And its conclusiveness, and its availability as a provable claim, are not impaired by the fact that an appeal is pending or a writ of error with supersedeas of execution.[150] But this effect cannot be attributed to a mere decree nisi which, under the law of the state, is only preliminary and requires a further order to make it final.[151] It has also been held that, for the purpose of proving a claim in bankruptcy, a debt is not so merged in a judgment recovered upon it that the judgment must be proved instead of the debt. Hence where a creditor has a provable claim and has brought suit upon it before the adjudication in bankruptcy, and recovers a judgment after the adjudication and before the debtor's application for discharge, he may prove the original debt, although the judgment was for a less sum than the debt claimed and offered for proof.[152]

As to the effect of a judgment recovered after the commencement

[141] In re Cunningham (D. C.) 253 Fed. 663, 42 Am. Bankr. Rep. 560.

[142] Jefferson Transfer Co. v. Hull, 166 Wis. 438, 166 N. W. 1.

[143] Landgraf v. Griffith, 41 Ind. App. 372, 83 N. E. 1021.

[144] In re Putnam, 193 Fed. 464, 27 Am. Bankr. Rep. 923.

[145] In re Fife, 109 Fed. 880, 6 Am. Bankr. Rep. 258; In re Sidle, 2 N. B. R. 220, Fed. Cas. No. 12,844.

[146] In re McCauley, 101 Fed. 223, 4 Am. Bankr. Rep. 122.

[147] Dight v. Chapman, 44 Or. 265, 75 Pac. 585, 65 L. R. A. 793.

[148] McKinsey v. Harding, 4 N. B. R. 38, Fed. Cas. No. 8,866.

[149] In re Pease, 2 Nat. Bankr. News, 657; In re Phelps, 2 Nat. Bankr. News, 481; In re Van Buren, 19 N. B. R. 149, Fed. Cas. No. 16,833.

[150] In re Leszynsky, 3 Ben. 487, Fed. Cas. No. 8,278; In re Sheehan, 8 N. B. R. 356, Fed. Cas. No. 12,737; In re Berlin Dye Works & Laundry Co. (D. C.) 225 Fed. 683, 34 Am. Bankr. Rep. 823; Moore v. Douglas, 230 Fed. 399, 144 C. C. A. 541, 36 Am. Bankr. Rep. 740.

[151] In re Wiseman, 123 Fed. 185, 10 Am. Bankr. Rep. 545, affirmed Hibberd v. Bailey, 129 Fed. 575, 64 C. C. A. 143, 12 Am. Bankr. Rep. 104.

[152] In re Pinkel, 1 Nat. Bankr. News 138; In re Brown, 5 Ben. 1, 3 N. B. R. 584, Fed. Cas. No. 1,975; In re Crawford, 3 N. B. R. 698, Fed. Cas. No. 3,363; In re Stansfield, 4 Sawy. 334, 16 N. B. R. 268, Fed. Cas. No. 13,294; In re Vickery, 3 N. B. R. 696, Fed. Cas. No. 16,930; Blair v. Carter, 78 Va. 621. And see In re Smith, 176 Fed. 426, 23 Am. Bankr. Rep. 864.

of the bankruptcy proceedings, upon a pre-existing debt, the terms of the act of 1867 were made the subject of various and conflicting decisions by the courts.[153] But the question has been clearly settled by the language of the present statute, which includes among the "debts which may be proved" those which are "founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments."[154] Under this provision, a creditor holding a promissory note, valid and enforceable against the maker at the date of the latter's adjudication in bankruptcy, but against which the statute of limitations has nearly run, may reduce the same to judgment by suit brought in a state court after such adjudication, and the judgment will establish the claim and stop the running of the statute, though it will not give the creditor a lien or priority or enable him to levy on the bankrupt's property.[155] But a judgment so recovered will not be provable in bankruptcy unless the claim or demand in suit was a provable debt at the date of the filing of the petition. Thus, a claim for damages for negligence causing personal injuries is not a provable debt, and it is not made provable by the recovery of a judgment on it after the filing of the petition in bankruptcy.[156] And if the claim (for damages) was not of a provable character, a judgment upon it against the bankrupt in a state court, actually rendered after the bankruptcy, will not be a provable debt, although, by direction of an appellate court, which reversed a judgment in the bankrupt's favor, it was entered nunc pro tunc as of the date of the reversed judgment, which was before the bankruptcy.[157]

It is also a provision of this part of the statute that the judgment, to be provable as a debt, should have been rendered before the consideration of the bankrupt's application for discharge. But it has sometimes been held by the state courts that they may render final judgment against the bankrupt after his discharge, though in this case the

[153] See Black v. McClelland, 12 N. B. R. 481, Fed. Cas. No. 1,462; In re Maybin, 15 N. B. R. 468, Fed. Cas. No. 9,337; In re Stansfield, 4 Sawy. 334, 16 N. B. R. 268, Fed. Cas. No. 13,294; In re Gallison, 2 Low. 72, 5 N. B. R. 353, Fed. Cas. No. 5,203; In re Williams, 2 N. B. R. 229, Fed. Cas. No. 17,705; Randall v. Sutton, 2 Houst. (Del.) 510.

[154] Bankruptcy Act 1898, § 63a, clause 5. See In re McBryde, 99 Fed. 686, 3 Am. Bankr. Rep. 729. Compare Hackett v. Supreme Council A. L. H., 206 Mass. 139, 92 N. E. 133. And see Gordon v. Texas Co., 119 Me. 49, 109 Atl. 368.

[155] In re McBryde, 99 Fed. 686, 3 Am. Bankr. Rep. 729.

[156] In re Crescent Lumber Co., 154 Fed. 724, 19 Am. Bankr. Rep. 112. But see In re Standard Aero Corp. of New York (C. C. A.) 270 Fed. 779, 46 Am. Bankr. Rep. 511.

[157] In re Kroeger Bros. (D. C.) 262 Fed. 463, 45 Am. Bankr. Rep. 135.

judgment merely establishes the amount of the debt or claim, and it should be framed in such limited form as not to involve a judgment in personam, though adequate to enable the creditor to reap the benefit of his proof of claim.[158]

The judgments spoken of in this part of the statute are evidently those recovered against the bankrupt himself. Judgments against the trustee in bankruptcy apparently stand upon a different footing. At least it has been held, in a case where the trustee, eighteen months after the adjudication, brought an action in a state court against a supposed debtor of the estate, but was defeated, and the defendant recovered a judgment on a counterclaim against the bankrupt, that the trustee was liable for the costs of the action, but that the creditor, having filed no claim within the time allowed, could not prove his judgment against the estate.[159]

§ 498. **Equitable Claims and Demands.**—As courts of bankruptcy have jurisdiction in equity as well as at law, equitable claims against a bankrupt are provable if within the purview of the general rules of equity, even though they have no status at law.[160] Thus, in one case, it appeared that the wife of a bankrupt had loaned a large sum of money to a partnership of which her husband was a member. It was argued that she could not file a claim for the money against the estate in bankruptcy, for the reason that, under the local law, a married woman could not make contracts with her husband. But it was held that in equity, and therefore in bankruptcy, a married woman could contract with her husband in relation to her separate estate and even sue him with regard to it, and hence the claim in question, being enforceable in equity was provable in bankruptcy.[161] But a mere claim in equity to rescind a contract is not a "debt" which is provable in bankruptcy.[162]

§ 499. **Contingent Demands and Liabilities.**—The bankruptcy act of 1841 provided for the proving of "uncertain or contingent demands" against the estate of the bankrupt. But it was held that, so long as it

[158] Barry v. New York Holding & Construction Co., 229 Mass. 308, 118 N. E. 639.

[159] In re Havens (D. C.) 182 Fed. 367, 25 Am. Bankr. Rep. 116.

[160] In re Putman, 193 Fed. 464, 27 Am. Bankr. Rep. 923; In re Upson, 123 Fed. 807, 10 Am. Bankr. Rep. 602; Sigsby v. Willis, 3 Ben. 371, 3 N. B. R. 207, Fed. Cas. No. 12,849; In re Blandin, 1 Low. 543, 5 N. B. R. 39, Fed. Cas. No. 1,527; In re Buckhause, 2 Low. 331, 10 N. B. R. 206, Fed. Cas. No. 2,086; In re Coney Island Lumber Co., 199 Fed. 803; Walter v. Atha (C. C. A.) 262 Fed. 75, 45 Am. Bankr. Rep. 150.

[161] In re James, 131 Fed. 401, 65 C. C. A. 385, 1 L. R. A. (N. S.) 321, 12 Am. Bankr. Rep. 573. And see In re Batchelder & Lincoln Co., 122 Fed. 355, 58 C. C. A. 517, 10 Am. Bankr. Rep. 641; In re Jordan & Blake, 2 Fed. 319.

[162] Doggett v. Emerson, 1 Woodb. & M. 195, Fed. Cas. No. 3,962.

remained wholly uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there were no means of removing the uncertainty by calculation, the contract or engagement was not provable.[163] The act of 1867 provided for the proof and allowance of "contingent debts and contingent liabilities," but only in case the contingency should happen before the order for the final dividend.[164] The present statute makes no provision whatever for the proof of contingent claims or demands, and therefore they are not provable.[165] A contingent claim, in this sense, has been defined as one where "all the facts necessary to be shown to establish the bankrupt's liability to the claimant had not occurred before the petition in bankruptcy was filed."[166] Thus, bonds of a corporation which by their terms were payable only out of funds created from the surplus earnings of the company are not provable in bankruptcy against the company, where there never had been any surplus earnings, and such funds had therefore never been created.[167] And in other cases it has been thought to be a claim "the valuation or estimation of which it is substantially impossible to prove," on account of the uncertain or fortuitous elements which might enter into it.[168] But perhaps it is a better definition to say that a "contingent" claim is one as to which it remains uncertain, at the time of the filing of the petition in bankruptcy, whether or not the bankrupt will ever become liable to pay it.[169] If it is certain that he will have to pay the claim, or some proportion of it, though it cannot yet be said when he will have to pay or how much, the claim is "unliquidated" but not contingent. In this view the liability of an indorser of the bankrupt's promissory note, not due at the time of the filing of the petition, is no real exception to the rule against proving contingent demands.[170] On the oth-

[163] Riggin v. Magwire, 15 Wall. 549, 21 L. Ed. 282.

[164] Zimmer v. Schleehauf, 115 Mass. 52, 11 N. B. R. 313.

[165] Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139; In re American Vacuum Cleaner Co., 192 Fed. 939, 26 Am. Bankr. Rep. 621; In re Inman & Co., 171 Fed. 185, 22 Am. Bankr. Rep. 524; In re Wilson, 194 Fed. 564, 27 Am. Bankr. Rep. 867; In re Hartman, 166 Fed. 776, 21 Am. Bankr. Rep. 610; Phenix Nat. Bank v. Waterbury, 123 App. Div. 453, 108 N. Y. Supp. 391; Leader v. Mattingly, 140 Ala. 444, 37 South. 270; Cotting v. Hooper, Lewis & Co., 220 Mass. 273, 107 N. E. 931.

[166] Colman Co. v. Withoft (C. C. A.) 195 Fed. 250, 28 Am. Bankr. Rep. 328. A seller of lumber to an individual, with the understanding that a corporation should take over the lumber, is not entitled, on the corporation's being adjudged a bankrupt, to prove a claim against it for the amount due. In re Lance Lumber Co. (D. C.) 224 Fed. 598.

[167] Synnott v. Tombstone Consol. Mines Co., 208 Fed. 251, 128 C. C. A. 451, 31 Am. Bankr. Rep. 421.

[168] Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139.

[169] In re Mullings Clothing Co., 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918A, 539, 38 Am. Bankr. Rep. 189.

[170] "An apparent exception to the rule that contingent claims may not be proved under section 63a is the case of an indorser of the commercial paper of the bankrupt, not due at the time of the filing of the petition, but whose liability

er hand, the liability of a bankrupt on a guaranty executed by him of the payment by a corporation of dividends at a certain rate on its stock, owned by another, with respect to dividends not due or payable at the time of the filing of the petition in bankruptcy, is so far contingent that a claim based thereon is not a provable debt.[171] And the same rule has been applied to an agreement by the bankrupt to pay an annuity to his divorced wife "during her life or until she remarries."[172] And so of a claim against the bankrupt by his lessee for prospective profits of the business conducted at a stand on the bankrupt's premises, on breach of the lease by the bankrupt.[173] Nor can a claim be proved on a covenant in a lease permitting the lessor, on default, to re-enter and relet the premises at the risk of the lessee, the latter to remain liable for the rent and be credited with the sums actually realized.[174] But a contract liability of the bankrupt, contingent at the time the petition was filed, but liquidated within the year allowed for making proof, is a provable debt.[175]

The mere giving of notes to evidence, or in prepayment of, obligations which are clearly conditional, will not annul the condition or make an otherwise unprovable claim allowable in bankruptcy.[176] But on the other hand, the pendency of proceedings to open a guardian's settlement of accounts does not preclude the former ward from filing as claims against the guardian on his bankruptcy notes which he had given her for the amount which he admitted to be due.[177]

§ 500. **Unliquidated Demands.**—After enumerating five classes of provable debts, the bankruptcy act provides that "unliquidated claims

as indorser thereafter becomes fixed. Moch v. Market Street Bank, 107 Fed. 897, 47 C. C. A. 49, 6 Am. Bankr. Rep. 41; In re Semmer Glass Co., 135 Fed. 77, 67 C. C. A. 551, 14 Am. Bankr. Rep. 25; In re Smith, 146 Fed. 923, 17 Am. Bankr. Rep. 112. But it may be doubted whether the liability of an indorser in that class of cases is in any true sense contingent. The extent of his liability is at all times known, for it is measured by the note itself. Upon the adjudication in bankruptcy it would seem that there is an end to the contingency that the bankrupt himself may pay the note, and that there remains between that date and the maturity of the indorser's liability nothing but a question of time." Colman Co. v. Withoft (C. C. A.) 195 Fed. 250, 28 Am. Bankr. Rep. 328.

[171] In re Pettingill, 137 Fed. 143, 14 Am. Bankr. Rep. 728. Bonds of a corporation which by their terms were payable only out of funds created from the surplus earnings of the company, are not provable in bankruptcy against the company, where there never had been any surplus earnings, and such funds had therefore never been created. Synnott v. Tombstone Consol. Mines Co., 209 Fed. 251.

[172] Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139.

[173] In re Leland, 8 Ben. 254, Fed. Cas. No. 8,233.

[174] Ex parte Lake, 2 Low. 544, 16 N. B. R. 497, Fed. Cas. No. 7,991; Bowditch v. Raymond, 146 Mass. 109, 15 N. E. 285. And see In re Gallacher Coal Co., 205 Fed. 183, 29 Am. Bankr. Rep. 766.

[175] In re James Dunlap Carpet Co., 163 Fed. 541, 20 Am. Bankr. Rep. 882.

[176] In re Wisconsin Engine Co., 234 Fed. 281, 148 C. C. A. 183, 37 Am. Bankr. Rep. 106.

[177] Beaven v. Stuart, 250 Fed. 972, 163 C. C. A. 222, 41 Am. Bankr. Rep. 81.

against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." [178] But it is held that this clause is not to be understood as defining an additional class of debts which shall be provable. It relates merely to procedure, and provides for the liquidation of such of the claims enumerated in the preceding paragraph as may require that process in order to fix their amount. In other words, it covers only such claims as, when liquidated, will be provable debts under the specifications of the preceding paragraph, and does not enlarge the class of provable debts, nor permit the proof of claims for damages for torts not reduced to certainty by judgment.[179]

The difference between a liquidated and an unliquidated claim relates only to the certainty of its amount, not to the certainty of its being due.[180] That is, the term "unliquidated claims" includes demands for which the bankrupt is certainly answerable in some sum, though that sum is not yet ascertained, but not demands for which he may not be liable at all.[181] Thus, a claim for damages for breach of a contract, where the amount of damages is to be ascertained by proof and not by mere calculation, is an unliquidated demand,[182] and so is the liability

[178] Bankruptcy Act 1898, § 63b.

[179] Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 747, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139; In re Southern Steel Co., 183 Fed. 489, 25 Am. Bankr. Rep. 358; In re New York Tunnel Co., 159 Fed. 688, 86 C. C. A. 556, 20 Am. Bankr. Rep. 25; In re Hirschman, 104 Fed. 69, 4 Am. Bankr. Rep. 715; Brown & Adams v. United Button Co., 149 Fed. 48, 79 C. C. A. 70, 17 Am. Bankr. Rep. 565. As to claims for unliquidated damages for torts, not reduced to judgment, see infra, § 514.

Moore v. Douglas, 230 Fed. 399, 144 C. C. A. 541, 36 Am. Bankr. Rep. 740. The claim of an injured employee against his employer, unliquidated and not reduced to judgment until after the employer's adjudication in bankruptcy, is not a provable debt. Eberlein v. Fidelity & Deposit Co. of Maryland, 164 Wis. 242, 159 N. W. 553.

[180] Where a corporation had made an assignment for the benefit of its creditors before the filing of a petition in bankruptcy against one of the stockholders, and the latter's liability for the difference between the amount of his stock subscription and the value of property transferred in payment thereof had ceased to be contingent, although not yet liquidated, since the corporate debts for which a subscription would be a trust fund were then capable of determination, the receiver of the corporation can prove a claim for such liability against the bankrupt's estate. In re Thompson (D. C.) 257 Fed. 140, 42 Am. Bankr. Rep. 142.

[181] In re Wisconsin Engine Co., 234 Fed. 281, 148 C. C. A. 183, 37 Am. Bankr. Rep. 106; Crane v. Eastern Transp. Line, 48 Conn. 361. "We understand by liquidation an amount certain and fixed, either by the act and agreement of the parties or by operation of law—a sum which cannot be changed by the proof—it is so much or nothing—and that the term does not necessarily refer to a writing. An open account is the reverse of this." Nisbet v. Lawson, 1 Ga. 275, 287. A claim under an agreement by a bankrupt to pay an annuity to his divorced wife "during her life or until she remarries" is not a provable debt on account of the substantial impossibility of estimating the value of the contingency of a remarriage. Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139.

[182] In re Erie Lumber Co. (D. C.) 150 Fed. 817, 17 Am. Bankr. Rep. 689. A claim against a bankrupt for breach of promise to marry, on which a suit is pending in a state court, is an unliq-

arising upon a written guaranty to pay the future indebtedness of another person upon an open account,[183] and the liability of a bankrupt broker for stock purchased by him for a customer and converted to his own use, the exact time of the conversion not being shown.[184] So where plaintiff was a partner with defendant in a transaction involving the purchase and sale of a certain commodity, and plaintiff knew, when defendant filed his petition in bankruptcy, that the venture would result in a loss, leaving the defendant indebted to him, though the exact amount was not then known and could not be ascertained until the rest of the stock on hand was disposed of, it was held that plaintiff had an "unliquidated claim" against defendant at the date of the bankruptcy.[185] In this classification also are included losses suffered by a broker in disposing of goods purchased for the bankrupt which he failed or refused to receive,[186] and a claim against a testamentary trustee for negligence and mismanagement.[187] But on the other hand, a claim against the estate of a bankrupt for sums of money obtained by him from the claimants, while in their employment, by means of forged indorsements, pilfering of cash, and inducing them to purchase stocks on false and fictitious orders, cannot be denied allowance, on the ground of its being an unliquidated demand, where the amounts taken from and paid out by the claimants are certain.[188]

When a creditor's claim against the bankrupt is unliquidated in this sense, he cannot at once proceed to make proof of it and have it allowed. He must first make an application to the court to have the claim "liquidated," and it will then be liquidated in such manner as the court shall direct,—or it must be liquidated by suit or in some other manner which the court will allow or accept, without a previous application to it,—and thereafter he may prove the claim in the manner prescribed by law, and secure its allowance for the amount fixed by such liquidation.[189] As the manner of liquidating a claim of this kind is left to the direction of the court, any kind of judicial investigation will be sufficient which results in establishing the validity of the claim and definitely fixing its amount, provided the court will direct or sanction it. Thus, the liquidation may be effected by a hearing before the referee, by a plenary suit

uidated claim, and the court may properly order it liquidated by trial in the state court. In re Martin, 228 Fed. 184, 142 C. C. A. 540, 35 Am. Bankr. Rep. 776.

183 Hargroves v. Cooke, 15 Ga. 321.

184 In re Graff, 117 Fed. 343, 8 Am. Bankr. Rep. 744.

185 Dycus v. Brown, 135 Ky. 140, 121 S. W. 1010, 28 L. R. A. (N. S.) 190.

186 In re Smith, 6 Ben. 187, Fed. Cas. No. 12,975.

187 In re Griffin, 188 Fed. 389.

188 In re Filer, 125 Fed. 261, 5 Am. Bankr. Rep. 835.

189 In re Rubel, 166 Fed. 131, 21 Am. Bankr. Rep. 566; In re Silverman, 101 Fed. 219, 4 Am. Bankr. Rep. 83; In re Heinsfurter, 97 Fed. 198, 3 Am. Bankr. Rep. 113; In re Clough, 2 Ben. 508, 2 N. B. R. 151, Fed. Cas. No. 2,905.

in a court of competent jurisdiction, or by permitting an action pending in any court to proceed to judgment.[190] Hence where an action on an unliquidated claim is pending in a state court when bankruptcy occurs, and the trustee does not apply for a stay but permits the case to go to judgment, the claim is thereby liquidated, and the judgment affords proper proof of the amount of the claim.[191] And where a claim secured by a mortgage on the bankrupt's stock in trade was attacked by the trustee as a preference, and thereupon the creditor sued in a state court to establish the validity of his mortgage, and in that action the mortgage was held to be invalid as a preference, it was held that the creditor's claim was thereby "liquidated," and was provable as an unsecured claim.[192]

§ 501. Assigned Claims.—Where a provable claim against the bankrupt existed at the time the petition was filed, a subsequent assignment of it will carry with it all the rights and remedies which the assignor had, as to participating in the bankruptcy proceedings and receiving a share of the estate.[193] But, except in the case of negotiable paper, the assignee will take the claim in the same condition in which his assignor held it, and will acquire no stronger or higher rights.[194] He may, however, prove the claim for its full amount although he purchased it at a discount,[195] and he may prove the claim and receive dividends on it, notwithstanding that the assignment was intended only as collateral security.[196] But where various creditors have all assigned their claims to a committee, with a view to purchasing the bankrupt's property and selling it for the benefit of the assignors, the right to prove the claims in the bankruptcy is in the committee, and not in the individual creditors.[197] The form by which a claim against a bankrupt is transferred is immaterial, and cannot affect the right of the assignee to prove the claim, provided only that it is sufficient to estop the original holder from asserting any right to it.[198]

[190] In re Buchan's Soap Corp., 169 Fed. 1017, 22 Am. Bankr. Rep. 382; In re Duquesne Incandescent Light Co., 176 Fed. 785, 24 Am. Bankr. Rep. 419; In re United Button Co., 140 Fed. 495, 15 Am. Bankr. Rep. 390.

[191] In re Buchan's Soap Corp., 169 Fed. 1017, 22 Am. Bankr. Rep. 382; Barry v. New York Holding & Construction Co., 229 Mass. 308, 118 N. E. 639.

[192] Powell v. Leavitt (C. C. A.) 150 Fed. 89.

[193] In re Fitzgerald, 191 Fed. 95, 26 Am. Bankr. Rep. 773; In re Breakwater Co. (D. C.) 232 Fed. 375, 36 Am. Bankr. Rep. 752.

[194] In re Wiener & Goodman Shoe Co., 96 Fed. 949, 3 Am. Bankr. Rep. 200; Humphreys v. Blight, 1 Wash. C. C. 44, Fed. Cas. No. 6,870.

[195] In re Houghton, 5 Law Rep. 321, Fed. Cas. No. 6,728.

[196] In re American Specialty Co. (C. C. A.) 191 Fed. 807, 27 Am. Bankr. Rep. 463. Compare In re Eagles, 99 Fed. 695, 3 Am. Bankr. Rep. 733.

[197] In re E. T. Kenney Co., 136 Fed. 451, 14 Am. Bankr. Rep. 611.

[198] In re Miner, 117 Fed. 953, 9 Am. Bankr. Rep. 100.

But proof of an assigned claim may be defeated by evidence of a design to defraud other creditors or to defeat the operation of the bankruptcy act. It is not, indeed, unlawful to buy up claims against an insolvent person for the purpose of preventing or stopping proceedings in bankruptcy against him.[199] And it has even been held that the allowance of a claim, in favor of an assignee who acquired it after the adjudication, but from an innocent and bona fide holder in whose hands it was valid and provable, will not be set aside upon an allegation by other creditors that the assignee bought the claim for the purpose of acquiring a majority interest in the estate, of controlling the bankruptcy proceedings in the interest of the bankrupt and himself, and of hindering and defrauding the other creditors, when it does not appear that such fraudulent purpose has actually been carried out to the injury of other creditors.[200] But where a person intending to go into bankruptcy procured a friend to buy up a large part of his indebtedness at a small fraction of its nominal value, by disseminating false and discouraging statements as to the amount of dividends his estate would pay, it was remarked that no court of bankruptcy would hesitate to hold that claims thus tinctured with fraud should not be proven against the estate.[201] Yet, if the trustee has assets in hand more than sufficient to pay all other claims, debts purchased by agents for the bankrupt may be allowed to the extent of the sums paid therefor by the purchasers.[202]

§ 502. Debts Payable in the Future.—It is no objection to the proof and allowance of a claim that the time fixed for its payment, by the agreement of the parties or by the instrument which evidences it, has not arrived at the date of filing the petition in bankruptcy, provided that it was at that date a "fixed liability" and "absolutely owing."[203] But if the debt was not yet payable, at the commencement of the proceedings, and did not bear interest, the same clause of the statute requires that there shall be a "rebate of interest" upon it, which apparently means that the claim cannot be proved for its full amount, but must be discounted at the legal rate of interest, or that it can be proved only for its "present worth." To take the simplest form of illustration of the general rule, a promissory note made by the bankrupt is a provable debt in bankruptcy, although not due at the time of the filing of the petition but at a future day.[204] So in the case of an ordinary debt, if the debtor

[199] In re Strachan, 3 Biss. 181, Fed. Cas. No. 13,519.

[200] In re Headley, 97 Fed. 765, 3 Am. Bankr. Rep. 272.

[201] In re State Ins. Co., 16 Fed. 756.

[202] In re Lathrop, 5 Ben. 199, 5 N. B. R. 43, Fed. Cas. No. 8,104.

[203] Bankruptcy Act 1898, § 63a. See De Long v. Mechanics & Metals Nat. Bank, 168 App. Div. 525, 153 N. Y. Supp. 1010.

[204] In re Percy Ford Co., 199 Fed. 334, 28 Am. Bankr. Rep. 919.

has procured an extension of time for its payment, and becomes bankrupt, the creditor has a provable claim, even before the expiration of the time agreed on.[205] As to future accruing installments on a contract to pay an annuity, the law is not so clear. But the best present opinion appears to be that a penal bond, executed by a person who is thereafter adjudged a bankrupt, to secure the payment to the obligee of an annuity during life, is an instrument creating a fixed liability absolutely owing at the time of the filing of the petition, payable in the future, and is provable as a debt against the bankrupt's estate for the amount of the penalty stated therein, where the value of the annuity, computed on the life tables, exceeds such penalty.[206]

§ 503. **Interest Accrued and Accruing.**—Where a creditor's claim was "absolutely owing at the time of the filing of the petition" in bankruptcy, his proof of debt may include, and he should be allowed, "any interest thereon which would have been recoverable at that date."[207] And interest in the case of a debt put into judgment before the petition was filed may be proved with the debt.[208] But when the statute speaks of interest "recoverable" at the commencement of the proceedings, it evidently means that interest can be claimed and added to the debt only in cases where the parties have expressly agreed that the debt should bear interest, or where the debt is of such a character that it carries legal interest by force of law without the stipulation of the parties. Hence the creditor must show either a debt entitled to interest by operation of law, or else a mutual agreement of the parties that interest should be charged.[209] The right to claim interest in bankruptcy proceedings may also depend upon the making of a previous demand for payment.[210] And on the other hand, even though the parties may have agreed that no interest should be payable on a loan of money, yet where this stipulation was based on the performance of certain acts on the part

[205] Ecfort v. Greely, 6 N. B. R. 433, Fed. Cas. No. 4,260.

[206] Cobb v. Overman, 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369, 6 Am. Bankr. Rep. 324 (overruling Bray v. Cobb, 100 Fed. 270, 3 Am. Bankr. Rep. 788); Haywood v. Shreve, 44 N. J. Law, 94; Roosevelt v. Mark, 6 Johns. Ch. (N. Y.) 266.

[207] Bankruptcy Act 1898, § 63a. See In re Orne, 1 Ben. 361, 1 N. B. R. 57, Fed. Cas. No. 10,581; J. & S. Ferguson v. Lyle, 267 Fed. 817, 45 Am. Bankr. Rep. 608; In re Mobile Chair Mfg. Co. (D. C.) 245 Fed. 211, 40 Am. Bankr. Rep. 134. The holder of tax certificates on mortgaged property belonging to an estate in bankruptcy is entitled to interest at the ordinary legal rate of 6 per cent. but not to the larger interest required by the local law to be paid on redemption from tax sales. Dayton v. Stanard, 241 U. S. 588, 36 Sup. Ct. 695, 60 L. Ed. 1190, 37 Am. Bankr. Rep. 259; In re Clark Realty Co., 253 Fed. 938, 166 C. C. A. 38, 42 Am. Bankr. Rep. 403.

[208] Ex parte O'Neil, 1 Low. 163, Fed. Cas. No. 10,527.

[209] In re Stevens, 104 Fed. 323, 5 Am. Bankr. Rep. 9. See A. S. Coats Shingle Co. v. Chester Snow Log & Shingle Co., 106 Wash. 227, 179 Pac. 862.

[210] In re North Carolina Car Co., 127 Fed. 178, 11 Am. Bankr. Rep. 488.

of the borrower, his failure to observe the contract may entitle the lender to claim interest as against his estate in bankruptcy.[211] But it is said that interest should not be allowed where the debt is one which would have been barred by the statute of limitations if it had not been saved by a new promise.[212] And if, by the law of the state, the taking of usury causes a forfeiture of all interest, when the debt is put in suit, the same consequence attends the presentation in bankruptcy of a claim on which usury has been exacted.[213]

In the case of all ordinary debts, interest accruing subsequent to the time of the filing of the petition in bankruptcy is not provable.[214] But interest may run on a valid debt secured by a mortgage or other specific lien up to the time of its payment out of the proceeds of a sale of the property.[215] And in the unusual case where an estate in bankruptcy proves to be solvent, that is, where all proved claims are paid in full and there remains a balance in the hands of the trustee, the proving creditors are entitled to an additional allowance of interest, from the date of filing the petition to the date when the last payment on their debts was made, before any part of the surplus shall be returned to the bankrupt.[216]

§ 504. Costs, Expenses, and Collection Fees.—The statute provides for the proof and allowance of a claim for "taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt."[217] This will include costs incurred in an attachment proceeding prior to the filing of the petition in bankruptcy, though the lien of the attachment is dissolved by the adjudication in bankruptcy,[218] more especially, it appears, where the attachment proceedings had the effect of preserving the property for the benefit of the general creditors.[219] So also, costs incurred by a judgment creditor in obtaining the judgment and in defending an appeal therefrom are

[211] In re Fenn, 172 Fed. 620, 22 Am. Bankr. Rep. 833.

[212] In re Reed, 6 Biss. 250, 11 N. B. R. 94, Fed. Cas. No. 11,635.

[213] In re Prescott, 5 Biss. 523, 9 N. B. R. 385, Fed. Cas. No. 11,389.

[214] In re Haake, 2 Sawy. 231, 7 N. B. R. 61, Fed. Cas. No. 5,883; In re Bugbee, 9 N. B. R. 258, Fed. Cas. No. 2,115.

[215] In re Torchia, 185 Fed. 576, 26 Am. Bankr. Rep. 188.

[216] Johnson v. Norris, 190 Fed. 459, 111 C. C. A. 291, 27 Am. Bankr. Rep. 107; In re John Osborn's Sons & Co., 177 Fed. 184, 100 C. C. A. 392, 24 Am. Bankr. Rep. 65; Bromley v. Goodere, 1 Atkyns, 75; Ex parte Mills, 2 Ves. Jr. 295; Clemons v. Clemons, 69 Vt. 545, 38 Atl. 314; In re McAusland (D. C.) 235 Fed. 173, 37 Am. Bankr. Rep. 519.

[217] Bankruptcy Act 1898, § 63a, clause 3. See Ex parte Foster, 2 Story, 131, Fed. Cas. No. 4,960; In re Preston, 5 N. B. R. 293, Fed. Cas. No. 11,393.

[218] In re Allen, 96 Fed. 512, 3 Am. Bankr. Rep. 38; In re Preston, 5 N. B. R. 293, Fed. Cas. No. 11,393; In re Romm (D. C.) 235 Fed. 383, 37 Am. Bankr. Rep. 509. Compare In re Hatje, 6 Biss. 436, 12 N. B. R. 548, Fed. Cas. No. 6,215.

[219] In re Heller, 176 Fed. 656, 23 Am. Bankr. Rep. 792.

provable against the estate of the surety on the appeal bond.[220] And although the "costs" allowable are ordinarily only those taxable under the law of the state where the action was maintained, and must be limited to the amounts fixed by that law, yet it is competent for the parties to a litigation to stipulate for the payment to such officers as a referee or master in chancery, and also to a stenographer, of fees in excess of the statutory rate, and when they have done so, the amount agreed upon may be proved and allowed in bankruptcy.[221] But costs, to be allowable at all, must have been incurred in an action to recover a provable debt, and hence the costs of an attachment laid by the wife of the bankrupt in a libel for divorce are not provable in the bankruptcy.[222] And further, the costs must have been incurred "in good faith." But a creditor who sues, recovers judgment, and levies execution before the filing of the petition in bankruptcy cannot be charged with bad faith merely because he may have known or believed that the debtor was in financial straits when he began his suit.[223] But expenses and disbursements incurred by a creditor in endeavoring to defeat the bankruptcy act and to obtain a preference over other creditors cannot be allowed as a claim against the estate.[224] The question of the allowances to be made to an assignee for the benefit of creditors, including compensation for his own services, when the assignment is avoided by the adjudication of the assignor in bankruptcy, and the property turned over to the trustee, has been considered in an earlier section.[225]

Where the creditor's claim is based upon a note which contains a stipulation for the payment of an attorney's fee, in addition to principal and interest, in case the note is "placed in the hands of an attorney for collection," the right to add the attorney's fee to the amount of the claim, in proving it in bankruptcy will depend upon the concurrence of two things, the maturity of the note and the placing it in an attorney's hands for collection, both before the filing of the petition in bankruptcy. If the note fell due and was so placed for collection, and the bankruptcy of the maker occurred after both these events, then the creditor will be entitled to prove his claim for the stipulated attor-

220 Coe v. Waters, 16 Colo. App. 311, 64 Pac. 1054.

221 In re J. B. Brewster & Co., 180 Fed. 109, 103 C. C. A. 42, 24 Am. Bankr. Rep. 838.

222 In re Foye, 2 Low. 399, Fed. Cas. No. 5,021.

223 In re Harnden, 200 Fed. 172, 29 Am. Bankr. Rep. 504.

224 In re Archenbrown, 8 N. B. R. 429, Fed. Cas. No. 503.

225 Supra, § 444. And see Summers v. Abbott, 122 Fed. 36, 58 C. C. A. 352, 10 Am. Bankr. Rep. 254; Bramble v. Brett, 230 Fed. 385, 144 C. C. A. 527, 36 Am. Bankr. Rep. 526; In re Sobol (D. C.) 230 Fed. 652, 35 Am. Bankr. Rep. 804; Hume v. Myers, 242 Fed. 827, 155 C. C. A. 415, 39 Am. Bankr. Rep. 401.

ney's fee in addition to the face of the note.[226] But if the note did not mature until after the institution of the bankruptcy proceedings, no such fee can be claimed, although it may have been given to an attorney for collection when due.[227] And on the other hand, although the note fell due before the filing of the petition in bankruptcy, yet if it was not placed in the hands of an attorney for collection until after the institution of the bankruptcy proceedings, the claim for an attorney's fee cannot be proved, because not a "fixed liability absolutely owing" at the commencement of the proceedings.[228] Further, where the law of the state regards a stipulation of this kind as merely a contract of indemnity,—that is, as creating a liability for reasonable fees for services rendered, not exceeding the amount stipulated,—a creditor will not be entitled to the allowance of such a fee unless he gives proof of collection services actually rendered and entitling him to indemnification.[229] Nor should an attorney's fee be allowed where the payee of the note, filing it for proof, is himself an attorney.[230] In the case of an attorney's fee stipulated for in a mortgage, its allowance or rejection in bankruptcy will depend upon the wording of the particular instrument.[231] Where the mortgagee proves his claim as a secured creditor, and the property is sold by the trustee in bankruptcy at private sale under orders of the court, a fee for the mortgagee's attorney cannot be claimed where the instrument only stipulated for such a fee in case it became "necessary to forclose" the mortgage "by suit or proceedings in court," [232] but otherwise where it provided for an attorney's fee "in case legal services should become necessary to protect the interests" of the mortgagee.[233] Although a state statute provides that a mortgagee may recover attorneys' fees on foreclosure, provided he will previously give a certain notice of his intention to foreclose, yet such

[226] In re Edens Co., 151 Fed. 940, 18 Am. Bankr. Rep. 643; In re Ledbetter (D. C.) 267 Fed. 893, 45 Am. Bankr. Rep. 677. But see In re Mobile Chair Mfg. Co. (D. C.) 245 Fed. 211.

[227] In re T. H. Thompson Milling Co., 144 Fed. 314, 16 Am. Bankr. Rep. 454; In re Edens Co., 151 Fed. 940, 18 Am. Bankr. Rep. 643; In re Garlington, 115 Fed. 999, 8 Am. Bankr. Rep. 602. And see In re Harris (D. C.) 272 Fed. 351, 47 Am. Bankr. Rep. 40.

[228] In re Keeton, Stell & Co., 126 Fed. 426, 11 Am. Bankr. Rep. 367; In re V. & M. Lumber Co., 182 Fed. 231; In re Gebhard, 140 Fed. 571, 15 Am. Bankr. Rep. 381. Compare Merchants' Bank v. Thomas, 121 Fed. 306, 57 C. C. A. 374, 10 Am. Bankr. Rep. 299.

[229] McCabe v. Patton, 174 Fed. 217, 98 C. C. A. 225, 23 Am. Bankr. Rep. 335.

[230] In re Hersey (D. C.) 171 Fed. 1004, 22 Am. Bankr. Rep. 863.

[231] A claim for attorney's fees under a stipulation in a mortgage which was not due when the petition was filed, and under which no services had been rendered, is not allowable against the bankrupt's estate. British & American Mortgage Co. v. Stuart, 210 Fed. 425, 127 C. C. A. 157, 31 Am. Bankr. Rep. 465.

[232] In re Roche, 101 Fed. 956, 42 C. C. A. 115, 4 Am. Bankr. Rep. 369.

[233] In re Holmes Lumber Co., 189 Fed. 178, 26 Am. Bankr. Rep. 119.

fees do not constitute a provable claim in bankruptcy, where the bankruptcy of the mortgagor intervened after the giving of such notice, but before any foreclosure was had.[234]

As to the allowance of fees to the attorneys of creditors, independently of the agreement of the parties or of any statutory provisions, the rule is that such an allowance may be made on equitable considerations for services from which the estate in bankruptcy has derived benefit, and to the extent only that such services were beneficial in fact.[235] Thus, attorneys who filed a petition in involuntary bankruptcy for creditors, which was defective and insufficient to warrant an adjudication, a second petition presented by other creditors resulting in an adjudication, are not entitled to an allowance of fees from the estate.[236] So, where an adjudication of bankruptcy was made against a corporation which was already in the hands of a receiver appointed by a state court, and the attorneys for the receiver antagonized the bankruptcy proceedings and instigated litigation which delayed and obstructed such proceedings and caused a large amount of expense to the estate, it was held that they were not entitled to the allowance of any fees from the estate, and their belief that they were within their legal rights, and that the state court had prior jurisdiction of the case, was considered immaterial; and it was further held that they could not be allowed compensation for any services which were actually beneficial to the estate, where it appeared that, as a whole, their services cost the estate and the general creditors several times the amount, in increased expenses of administration.[237]

§ 505. Liability of Bankrupt as Indorser, Guarantor, or Surety.—The liability of a bankrupt as an indorser of commercial paper is undoubtedly a debt provable against his estate.[238] And where a note has matured at the time of the filing of the petition, and there have been presentation, demand of payment, and protest, the liability of an in-

[234] In re Weiland, 197 Fed. 116, 28 Am. Bankr. Rep. 620.

[235] In re Zier & Co., 142 Fed. 102, 73 C. C. A. 326, 15 Am. Bankr. Rep. 646. See In re Crave & Martin Co., 183 Fed. 769, 106 C. C. A. 180; In re Duran Mercantile Co., 199 Fed. 961, 29 Am. Bankr. Rep. 450; In re Coney Island Lumber Co., 199 Fed. 803. Where a receiver, appointed by a state court which was without jurisdiction to administer property of the bankrupt, performed valuable services in conserving the property, he may, on petition to the court of bankruptcy, be allowed compensation. State of Missouri v. Angle, 236 Fed. 644, 149 C. C. A. 640, 38 Am. Bankr. Rep. 394.

[236] In re Fischer (C. C. A.) 175 Fed. 531, 23 Am. Bankr. Rep. 427.

[237] In re Zier & Co., 142 Fed. 102, 73 C. C. A. 326, 15 Am. Bankr. Rep. 646; In re M. Zier & Co., 127 Fed. 399, 11 Am. Bankr. Rep. 527.

[238] In re Letchworth, 19 Fed. 873; Hunt v. Taylor, 108 Mass. 508, 4 N. B. R. 683; In re Morse, 11 N. B. R. 482, Fed. Cas. No. 9,853; Ex parte Farnsworth, 1 Low. 497, Fed. Cas. No. 4,672; In re Henry & S. G. Lindeman (D. C.) 238 Fed. 639, 38 Am. Bankr. Rep. 390.

dorser thereon is a "fixed liability absolutely owing," within the meaning of the bankruptcy act.[239] But some of the cases have maintained that no provable claim on an indorsement can be said to have arisen unless dishonor, protest, and notice have preceded the institution of the proceedings in bankruptcy.[240] And in the case of a promissory note payable on demand, and which must therefore be presented for payment within a reasonable time in order to charge the indorser, it has been said that where such a note is not presented nor any demand made within four years, a protest made after that lapse of time does not fix any liability on the indorser, and a claim founded on the note cannot be proved against his estate in bankruptcy.[241] But these views have not the support of the weight of authority. The prevailing opinion is that the liability of a bankrupt indorser of negotiable paper, though it does not become absolute (by dishonor and protest) until after the filing of the petition, is nevertheless a "debt" within the meaning of the statute, which enumerates debts on contract, express or implied, among those provable in bankruptcy; and it may be proved against his estate after such liability has become fixed, if within the time limited for proving claims.[242] And it has even been held that the holder of a note might prove a claim against the estate of the bankrupt indorser, notwithstanding the fact that the note would not be due for more than a year after the adjudication in bankruptcy. "In this case, the claim must of course have been proved within the year, but its liquidation would be delayed until the security was all realized. This is a thing which may occur very frequently in bankruptcy." [243] Even where the note in question is rendered non-negotiable by the insertion of a restrictive provision in regard to the mode of its payment, a proof against the bankrupt as an indorser of it will not be expunged where it is shown that it was negotiated for his sole benefit.[244] But on the other hand, the bankrupt

[239] Whitwell v. Wright, 136 App. Div. 246, 120 N. Y. Supp. 1065.

[240] In re Loder, 4 Ben. 305, 4 N. B. R. 190, Fed. Cas. No. 8,457; In re Schaefer, 104 Fed. 973; Stowell v. Richardson, 3 Allen (Mass.) 64. Compare Ex parte Russell, 16 N. B. R. 476, Fed. Cas. No. 12,148. Notice of nonpayment of a note is not necessary to bind the estate in bankruptcy of an indorser where the estates of the maker and the indorser are both represented by the same trustees. In re T. A. McIntyre & Co., 198 Fed. 579, 28 Am. Bankr. Rep. 459.

[241] In re Crawford, 5 N. B. R. 301, Fed. Cas. No. 3,364.

[242] Moch v. Market Street Nat. Bank, 107 Fed. 897, 47 C. C. A. 49, 6 Am. Bankr. Rep. 11; In re Phillip Semmer Glass Co., 135 Fed. 77, 67 C. C. A. 551, 14 Am. Bankr. Rep. 25; In re Smith, 146 Fed. 923, 17 Am. Bankr. Rep. 112; In re Gerson, 105 Fed. 891, 5 Am. Bankr. Rep. 89; McNell v. Knott, 11 Ga. 142; In re Nickodemus, 3 N. B. R. 230, Fed. Cas. No. 10,254; Manheim v. Loewe, 185 App. Div. 601, 173 N. Y. Supp. 260.

[243] In re Buzzini & Co., 183 Fed. 827.

[244] In re Granger, 8 N. B. R. 30, Fed. Cas. No. 5,684.

cannot be held liable where it is shown that his indorsement on the note was forged and that he never received any benefit from the proceeds of it.[245]

The liability of the bankrupt as a surety on a replevin bond,[246] or on a bond of a guardian,[247] is also a provable claim. And under the act of 1867, which allowed proof of "contingent" claims, a claim was provable against the surety on any bond even before breach of condition.[248] But the present law is not construed as permitting proof of a claim against a surety until there has been an actual forfeiture or breach of condition or failure of performance, or (in the case of an indemnity bond) some actual loss or injury to the obligee.[249] So also in the case of a contract by which the bankrupt assumes the liability of a guarantor. If there is nothing presently due or capable of liquidation at the time of the bankruptcy, and no certainty that anything will ever be due or that any liability will ever arise, no claim can be proved against the bankrupt's estate.[250] It is the same with a contract of indemnity. Hence where, after the dissolution of a partnership, the bankrupt agreed with the claimant, his former partner, to pay the firm debts, which remained as joint obligations of both, the claimant cannot prove the amount of such debts against the estate in bankruptcy where he has paid none of them.[251]

§ 506. Rights of Bankrupt's Surety or Indorser.—A surety on a bond, who has made the payment or discharged the obligation for which the principal was liable, has a provable claim against the latter's estate in bankruptcy.[252] But a merely contingent or possible liability as surety is not provable. In other words, the bankrupt's surety has no provable claim, to be set up in his own name, until he has paid the debt or damages or liquidated the obligation called for by the bond.[253] And a partial

[245] In re Lamon, 171 Fed. 516, 22 Am. Bankr. Rep. 635.

[246] Choate v. Quinichett, 12 Heisk. (Tenn.) 427.

[247] Davis v. McCurdy, 50 Wis. 569, 7 N. W. 665.

[248] Jones v. Knox, 46 Ala. 53, 8 N. B. R. 559, 7 Am. Rep. 583.

[249] Loeser v. Alexander, 176 Fed. 265, 100 C. C. A. 89, 24 Am. Bankr. Rep. 75; Kingman v. Fowle, 5 Allen (Mass.) 133; Corbett v. Woodward, 5 Sawy. 403; Fed. Cas. No. 3,223; Loring v. Kendall, 1 Gray (Mass.) 305.

[250] In re Merrill & Baker, 186 Fed. 312, 108 C. C. A. 390; In re Pettingill & Co., 137 Fed. 143, 14 Am. Bankr. Rep. 728. A note guaranteed by a corporation is provable against its estate in bankruptcy. In re Romadka Bros. Co. (D. C.) 206 Fed. 944.

[251] In re Tassinari (D. C.) 249 Fed. 990, 41 Am. Bankr. Rep. 148.

[252] In re Lyons Beet Sugar Refining Co., 192 Fed. 445, 27 Am. Bankr. Rep. 610; Liddell v. Wiswell, 59 Vt. 365, 8 Atl. 680; In re Halsey W. Kelley & Co., Inc. (D. C.) 215 Fed. 155.

[253] In re Astoroga Paper Co. (D. C.) 234 Fed. 792, 37 Am. Bankr. Rep. 751; Insley v. Garside, 121 Fed. 699, 58 C. C. A. 119, 10 Am. Bankr. Rep. 52; R. P. Williams & Co. v. United States Fidelity & Guaranty Co., 11 Ga. App. 635, 75 S. E. 1067; Hester v. Baldwin, 2 Woods, 433, Fed. Cas. No. 6,438; Steele v. Graves, 68

payment is not sufficient to give him a provable claim pro tanto. Unless and until the debt or claim is paid in full, the right to prove it as a debt in bankruptcy is in the original creditor and not in the surety.[254] But a surety need not necessarily pay in cash. If his individual note is expressly received and accepted in payment, he may then prove against the bankrupt principal.[255] But where the surety holds collateral securities, for his own indemnity, and pays the debt of the principal, he can prove only the difference between the debt and the amount realized on the securities.[256] But the bankruptcy act contains a provision that "whenever a creditor, whose claim against a bankrupt is secured by the individual undertaking of any person fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor."[257] Of this provision it has been said: "No one has any rights under the bankruptcy law outside of what it gives him, and those of a surety are defined by this section, beyond which he cannot go. By it he has the right to prove, in case the principal creditor fails to do so. He does not, indeed, have to discharge the obligation in order to have this privilege, but in case he does do so, in whole or in part, he becomes entitled to that extent to the right of subrogation and, in any event, when he proves the debt, he proves it not in his own name, but in that of the original holder. The particular point to be noticed in the present connection with regard to the position of the surety is that he has only a right to prove in case the principal creditor fails to do so, and the latter cannot be said to fail until he has had an opportunity and passed it by, which can only occur when, by proceedings duly instituted, the estate of the debtor has been drawn into the bankruptcy court to be there administered, and all parties have been called upon to make known

Ala. 21; Ecker v. Bohn, 45 Md. 278, 16 N. B. R. 544. Compare Lipscomb v. Grace, 26 Ark. 231, 7 Am. Rep. 607. On this principle, a guarantor of rent cannot prove the amount of his contingent liability as a claim against the estate in bankruptcy, but may prove in the name of the lessor. In re Baker & Edwards (D. C.) 224 Fed. 611, 35 Am. Bankr. Rep. 469. But it seems that a surety on a bond to dissolve a garnishment, when judgment has been recovered against him subsequent to the bankruptcy, has a provable and allowable claim. Kilpatrick v. United States Fidelity & Guaranty Co., 228 Fed. 587, 143 C. C. A. 109, 37 Am. Bankr. Rep. 36.

[254] In re Heyman (D. C.) 95 Fed. 800, 2 Am. Bankr. Rep. 651; In re Hollister (D. C.) 3 Fed. 452; United States Fidelity & Guaranty Co. v. Carnegie Trust Co., 177 App. Div. 176, 164 N. Y. Supp. 92. See In re Blanchard (D. C.) 253 Fed. 758, 42 Am. Bankr. Rep. 177.

[255] In re Morrill, 2 Sawy. 356, Fed. Cas. No. 9,821.

[256] In re Baldwin, 19 N. B. R. 52, Fed. Cas. No. 796.

[257] Bankruptcy Act 1898, § 57i. See J. S. Farming Co. v. Brannon (C. C. A.) 263 Fed. 891, 45 Am. Bankr. Rep. 425. The filing of his claim by the creditor does not prevent the surety from filing the claim, under this provision of the Bankruptcy Act, where the creditor's claim was withdrawn and he released all right to dividends. Kilpatrick v. United States Fidelity & Guaranty Co., 228 Fed. 587, 143 C. C. A. 109, 37 Am. Bankr. Rep. 36.

their claims. When that has been done, and he neglects to act, the surety, so as not to be prejudiced, may himself prove the debt in his stead. This, so far as I can see, is all the relief given by the act, and, whether adequate or inadequate, it must suffice. It follows from this that, at the outstart, the surety who has not taken up the obligation has no provable claim, and therefore has no standing to petition. It is not provided in the law that at that stage he can intervene, either in his own name or in the name of the creditor, and institute involuntary proceedings. All that he can do is to prove the claim later on if the creditor fails to do so, after somebody else has moved." [258]

On the same principle, an indorser of the bankrupt's paper may prove a claim for the amount, in his own name, against the estate, after he has paid the note, but not before.[259] Though such an indorser may have become absolutely liable to the holder of the note, by due notice of its dishonor, before the filing of the petition in bankruptcy, this does not make him a creditor of the bankrupt.[260] But it was held, under the former statute, that when the holder of a note fails to prove the same against the maker's estate, thus showing that he looks to the indorser alone for payment, the indorser may prove it and receive dividends, though he has not proved the note.[261] And apparently this course might be taken under that section of the present statute which was quoted above as applicable to the case of a surety.[262] Under a state statute providing that, where a party to a negotiable instrument has been adjudged bankrupt, notice may be given either to the party himself or to his trustee, and that notice of dishonor is not necessary where the drawer and drawee are the same person, or to an indorser where he is the person to whom an instrument is presented for payment, where the maker and indorser of

[258] Phillips v. Dreher Shoe Co., 112 Fed. 404, 7 Am. Bankr. Rep. 326. And see Insley v. Garside, 121 Fed. 699, 58 C. C. A. 119, 10 Am. Bankr. Rep. 52; In re Carter, 138 Fed. 846, 15 Am. Bankr. Rep. 126; Rosenthal v. Nove, 175 Mass. 559, 56 N. E. 884, 78 Am. St. Rep. 512.

[259] In re Salvator Brewing Co., 193 Fed. 989, 113 C. C. A. 626, 28 Am. Bankr. Rep. 56; In re Dr. Voorhees Awning Hood Co., 187 Fed. 611; In re Morse, 11 N. B. R. 482, Fed. Cas. No. 9,853; Marks v. Barker, 1 Wash. C. C. 178, Fed. Cas. No. 9,096. See In re Elletson Co., 193 Fed. 84, 28 Am. Bankr. Rep. 434. Where the holder of a note of the bankrupt has proved a claim upon it, and thereafter the indorser pays the note, he becomes subrogated to the rights of the claimant. In re Griffith Stillings Press (D. C.) 244 Fed. 315, 39 Am. Bankr. Rep. 813.

[260] In re Riker, 18 N. B. R. 393, Fed. Cas. No. 11,833.

[261] In re Ellerhorst, 5 N. B. R. 144, Fed. Cas. No. 4,381.

[262] Where the indorsers of notes of the bankrupt paid a portion of the debt and secured their release as indorsers, and the holders of the notes proved the notes for the entire amount against the bankrupt's estate, the indorsers were not entitled to prove the amount paid by them as claims against the estate, since under Bankruptcy Act, § 57i, they were only entitled to receive from the holders any overplus, after crediting dividends received from the bankrupt's estate and the amount paid by the indorsers. In re Manhattan Brush Mfg. Co. (D. C.) 209 Fed. 997, 31 Am. Bankr. Rep. 747.

notes were partners, and were adjudged bankrupts, both as partners and individually, before the notes matured, and the same trustees were appointed for all the estates, it was held that notice of non-payment on the maturity of the notes was not necessary to bind the estate of the indorser.[263]

§ 507. Rights of Creditor Where Several Parties are Liable.—The holder of a claim upon which several parties are personally liable may prove his claim against the estates of any of them who become bankrupt, and may at the same time pursue the others at law, and notwithstanding partial payments after the bankruptcy, received from the non-bankrupts or from the estates of those in bankruptcy, the creditor may recover dividends from each estate in bankruptcy upon the full amount of his claim, as it stood at the time the petition in bankruptcy was filed therein, until, from all sources he has received full payment of his claim.[264] Thus, the holder of a bill of exchange is entitled to prove his debt in bankruptcy against the drawer, the acceptor, and the payee, and to receive dividends from all their estates until his debt is paid in full; and if only one of the parties is in bankruptcy, he may prove his claim against that one, and also proceed against the others at law.[265] So, when the holder of a note proves his debt in bankruptcy against the maker of the note for the full amount thereof, as an unsecured claim, this does not affect or release an indorser from his liability on the note.[266] But the estate of a bankrupt is entitled to the benefit of a partial payment of the debt made, before the bankruptcy, by any of the other parties liable for it, and in this case the creditor can prove against the bankrupt only the unpaid balance of his claim after crediting the payment.[267] An exception to this general rule, however, is found in the case where the maker of a note becomes bankrupt after the holder has received part payment from the indorser. Here, it is said, the creditor should prove a claim in the bankruptcy proceedings for the entire face of the note, be-

[263] In re T. A. McIntyre & Co., 198 Fed. 579, 28 Am. Bankr. Rep. 459.

[264] Board of Com'rs of Shawnee County v. Hurley, 169 Fed. 92, 94 C. C. A. 362, 22 Am. Bankr. Rep. 209; In re Simon, 197 Fed. 105, 28 Am. Bankr. Rep. 611; In re Girvin, 160 Fed. 206, 20 Am. Bankr. Rep. 320; Downing v. Traders' Bank, 2 Dill. 136, 11 N. B. R. 371, Fed. Cas. No. 4,046; In re Hicks, 19 N. B. R. 299, Fed. Cas. No. 6,456; In re Howard, 4 N. B. R. 571, Fed. Cas. No. 6,750. Where two bankrupt estates were liable for a debt due to a bank, the entire claim might be proven against both, and the fact that security not applied to the debt had been given by one bankrupt will not diminish the claim against the other. In re New York Commercial Co., 233 Fed. 906, 147 C. C. A. 580, 36 Am. Bankr. Rep. 769.

[265] In re Babcock, 3 Story, 393, Fed. Cas. No. 696.

[266] Merchants' Nat. Bank v. Comstock, 55 N. Y. 24, 14 Am. Rep. 168, 11 N. B. R. 235.

[267] In re Pulsifer, 14 Fed. 247; Ex parte Harris, 2 Low. 568, 16 N. B. R. 432, Fed. Cas. No. 6,109; In re Weeks, 8 Ben. 265, 13 N. B. R. 263, Fed. Cas. No. 17,349; Sohier v. Loring, 6 Cush. (Mass.) 537.

cause he is in the position of a trustee for the indorser, and if he receives, in dividends, more than enough to satisfy the unpaid balance of his claim, he will hold the surplus for the indorser, who will be entitled to reimbursement.[268] But in other cases, nothing short of actual payment, or a present right to receive a dividend from an estate in bankruptcy, will operate to prevent the creditor from proving in full against the estates of the other persons liable; the fact that one of the debtors, being in bankruptcy, has offered notes for composition payments will not have this effect.[269] So where a creditor, who had sold goods to the bankrupt, for which a third person became surety, afterwards received from the surety, as security, a note of the bankrupt arising upon a separate transaction, it was held that such note, being the property of the surety, did not inure to the bankrupt's interest, but to that of the surety, and was a separate debt, and that the creditor was entitled to prove on both claims.[270] But where a creditor of a bankrupt has a lien on the property of a third party, as part of the security for his debt, he cannot release his lien for a consideration without crediting the amount of the consideration on his claim.[271]

§ 508. Claims of Bankrupt's Wife.—In bankruptcy a wife may be a creditor of her husband, and may prove and sustain a claim against his estate for money which was her separate property, and which she loaned to him, intrusted to his keeping and management, or allowed him to use in his business, if it clearly appears that no gift was intended, but only a loan or trust.[272] And this rule applies notwithstanding the fact that the law of the particular state may not give to husband and wife any right to contract with each other or to sue each other, and for this reason an agreement to repay the wife's money could not be enforced by a suit at law. For in the first place, a proceeding in bankruptcy is not a suit against the bankrupt nor even adverse to him. And secondly, an express or implied undertaking to repay the wife's money, in the case supposed, is a contract which courts of equity will uphold and enforce, and courts of bankruptcy are governed by the principles of

[268] In re Souther, 2 Low, 320, 9 N. B. R. 502, Fed. Cas. No. 13,184; In re Ellerhorst, 5 N. B. R. 144, Fed. Cas. No. 4,381. And see In re Baxter, 18 N. B. R. 497, Fed. Cas. No. 1,120.

[269] In re Hicks, 19 N. B. R. 299, Fed. Cas. No. 6,456.

[270] In re H. V. Keep Shirt Co., 200 Fed. 80, 28 Am. Bankr. Rep. 765.

[271] Seay v. Wilson, 3 McCrary, 121, 9 Fed. 589.

[272] In re Remmerde, 206 Fed. 826, 30 Am. Bankr. Rep. 707; In re Nickerson, 116 Fed. 1003; In re Neiman, 109 Fed. 113; Tucker v. Curtin, 148 Fed. 929, 78 C. C. A. 557, 17 Am. Bankr. Rep. 354; Clark v. Hezekiah, 24 Fed. 663; In re Bigelow, 3 Ben. 198, 2 N. B. R. 556, Fed. Cas. No. 1,398; In re Blandin, 1 Low. 543, 5 N. B. R. 39, Fed. Cas. No. 1,527. The failure of a married woman to register a claim against her husband as her separate property, under the laws of Oregon, does not affect her right to prove the same against his estate in bankruptcy. In re Miner, 117 Fed. 953, 9 Am. Bankr. Rep. 100.

equity, and there is no distinction in such respect between an estate to the wife's separate use, as known to the chancery courts, and a separate estate created by statute.[273] But the wife's claim against her bankrupt husband must be supported, like any other, by a valid consideration, and she cannot prove a claim where she has already received satisfaction of the debt in the form of a conveyance of property,[274] or where she had no valid title to the property placed in her husband's hands, having previously received the same from him as a gift under circumstances which rendered the transfer invalid.[275] And where a wife allows her husband to appropriate the income of her separate estate in the support of the family, this does not create such a debt on his part as is provable in bankruptcy against his estate.[276]

Subject to the foregoing considerations, it may be stated as a general principle that the wife of a bankrupt is entitled to the allowance of a claim for money lent to her husband, which she procured by mortgaging her own realty,[277] or to prove a claim on a note given to her by the bankrupt, regardless of the consideration therefor, if it is not shown that the bankrupt was indebted at the time the note was made.[278] And under the civil law prevailing in Louisiana, a husband's debt to his wife for paraphernal property is provable against him in bankruptcy.[279] As to a wife's claim of payment for services rendered to her husband in his business, as, in the capacity of a clerk, bookkeeper, or the like, the law is not so clear. But apparently a claim may be proved in bankruptcy for the value of such services if the law of the state has removed the disabilities of married women,[280] but not where the common law in this respect still prevails.[281] Under a state statute providing that a wife who is granted a divorce from her husband shall be entitled to one-third of his personal property absolutely, the interest of a wife in the personal property of her husband, after the commencement of an action for divorce, but before decree is not such a claim as is provable against his estate in bankruptcy.[282]

[273] James v. Gray, 131 Fed. 401, 65 C. C. A. 385, 1 L. R. A. (N. S.) 321, 12 Am. Bankr. Rep. 573; In re Hill, 190 Fed. 390, 27 Am. Bankr. Rep. 146; In re Domenig, 128 Fed. 146, 11 Am. Bankr. Rep. 552; In re Nickerson, 116 Fed. 1003. Compare In re Talbot, 110 Fed. 924, 7 Am. Bankr. Rep. 29.

[274] In re Carpenter, 179 Fed. 743.

[275] In re Tucker, 148 Fed. 928, 17 Am. Bankr. Rep. 247.

[276] In re Jones, 6 Biss. 68, 9 N. B. R. 556, Fed. Cas. No. 7,444.

[277] In re Foss, 147 Fed. 790, 17 Am. Bankr. Rep. 439.

[278] In re Kyte, 164 Fed. 302, 21 Am. Bankr. Rep. 110. See In re Chapman, 105 Fed. 901, 5 Am. Bankr. Rep. 570.

[279] Fleitas v. Richardson, 147 U. S. 550, 13 Sup. Ct. 495, 37 L. Ed. 276.

[280] In re Domenig, 128 Fed. 146, 11 Am. Bankr. Rep. 552; In re Cox, 199 Fed. 952, 29 Am. Bankr. Rep. 456.

[281] In re Suckle, 176 Fed. 828, 23 Am. Bankr. Rep. 861; In re Winkels, 132 Fed. 590, 12 Am. Bankr. Rep. 696.

[282] Hawk v. Hawk, 102 Fed. 679, 4 Am. Bankr. Rep. 463.

§ 509. Claims for Alimony.—Notwithstanding some difference of opinion among the earlier cases decided under the present bankruptcy act, the rule is now well settled that alimony awarded to a divorced wife by the decree of a competent court does not constitute a debt or claim which is provable against the estate of the husband in bankruptcy, whether the claim be for arrears remaining unpaid at the date of the bankruptcy or for installments to accrue thereafter.[283] The reasons for this rule are thus explained by the United States Supreme Court: "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require. The decree of the court of one state, indeed, for the present payment of a definite sum of money as alimony is a record which is entitled to full faith and credit in another state, and may therefore be there enforced by suit. But its obligation in that respect does not affect its nature. In other respects, alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife than by a court of a different jurisdiction."[284] But where a wife, after securing a decree of divorce granting alimony, removes into another state, and there sues to recover unpaid arrears of alimony and obtains a judgment, and the

[283] Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009, 5 Am. Bankr. Rep. 829; In re Hubbard, 98 Fed. 710, 3 Am. Bankr. Rep. 528; Turner v. Turner, 108 Fed. 785, 6 Am. Bankr. Rep. 289; In re Shepard, 97 Fed. 187; In re Anderson, 97 Fed. 321, 5 Am. Bankr. Rep. 858; In re Nowell, 99 Fed. 931, 3 Am. Bankr. Rep. 837; In re Smith, 1 Nat. Bankr. News, 471; In re Lawrie, 2 Nat. Bankr. News, 77; In re Garrett, 2 Hughes, 235, 11 N. B. R. 493, Fed. Cas. No. 5,252; In re Lachemeyer, 18 N. B. R. 270, Fed. Cas. No. 7,966; Beach v. Beach, 29 Hun (N. Y.) 181; Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; Welty v. Welty, 96 Ill. App. 141; Maisner v. Maisner, 62 App. Div. 286, 70 N. Y. Supp. 1107; Lemert v. Lemert, 25 Ohio Cir. Ct. Rep. 253; Brown v. Brown, 172 Ky. 754, 189 S. W. 921. Contra, In re Challoner, 98 Fed. 82, 3 Am. Bankr. Rep. 442; In re Houston, 94 Fed. 119, 2 Am. Bankr. Rep. 107; In re Van Orden, 96 Fed. 86, 2 Am. Bankr. Rep. 801; Arrington v. Arrington, 131 N. C. 143, 42 S. E. 554, 92 Am. St. Rep. 769. Proceedings in a state court to enforce a decree awarding alimony, whether for installments past due or those to accrue in the future, against the bankrupt, will not be stayed or enjoined by the court of bankruptcy. Supra, § 189.

[284] Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009, 5 Am. Bankr. Rep. 829.

husband lists the said judgment as an indebtedness in his schedules in bankruptcy, it constitutes a provable debt against his estate.[285]

§ 510. Unpaid Subscriptions to Stock and Stockholder's Statutory Liability.—The liability of a stockholder in a corporation to make good the difference between the face value of stock for which he has subscribed and the amount he has actually paid on it is a debt founded on contract, and is therefore provable against his estate in bankruptcy, at the instance of a judgment creditor of the corporation, although no assessment or call has yet been made by the corporation.[286] As to the last part of this rule, however, it must be admitted that the decisions are not entirely in harmony, as some courts have thought that such a liability could not be regarded as a provable debt until the corporation itself had been required to make the necessary assessment upon its stockholders, so that the extent of the liability of each might be thus determined.[287] But probably this might be dispensed with if it were shown that the corporation was so far insolvent that all the unpaid stock subscriptions, if collected and added to its present assets, would no more than pay the debts.

As to the liability imposed by statute upon the stockholders of certain classes of corporations to be personally answerable for the debts of their company to an extent proportioned to their holdings, even though their stock has been paid in full, it is generally held that this is not such a claim as can be proved in bankruptcy against a stockholder,[288] at least if his personal responsibility remains uncertain and contingent, or the amount for which he may become liable has not been ascertained,[289] but otherwise if it is liquidated and ascertained by a judgment or a decree in equity before the expiration of the time limited for proving debts,[290] or if the receiver of the corporation can certainly determine the amount of it by ascertaining the amount of the assets and

285 In re Williams' Estate, 118 N. Y. Supp. 562.

286 In re Putman, 193 Fed. 464, 27 Am. Bankr. Rep. 923; Carey v. Mayer, 79 Fed. 926, 25 C. C. A. 239; Glenn v. Abell, 39 Fed. 10; Marr v. Bank of West Tennessee, 4 Lea (Tenn.) 578. See In re Watkinson, 143 Fed. 602, 16 Am. Bankr. Rep. 245; In re Franklin Brewing Co. (C. C. A.) 272 Fed. 828, 46 Am. Bankr. 485.

287 Gibson v. Lewis, 11 Phila. (Pa.) 476, 11 N. B. R. 247, Fed. Cas. No. 5,398; Sayre v. Glenn, 87 Ala. 631, 6 South. 45; Glenn v. Howard, 65 Md. 40, 3 Atl. 895. Receivers of an insolvent insurance company cannot prove a claim against the estate of a bankrupt subscriber to the stock of the company, where it does not appear that the subscription is necessary to pay the debts, or that in an equalization between stockholders the bankrupt would be in the debtor class instead of the creditor class. In re Bass (D. C.) 215 Fed. 275.

288 James v. Atlantic Delaine Co., 11 N. B. R. 390, Fed. Cas. No. 7,179; Bristol v. Sanford, 12 Blatchf. 341, 13 N. B. R. 78, Fed. Cas. No. 1,893; Bangs v. Lincoln, 10 Gray (Mass.) 600.

289 Irons v. Manufacturers' Nat. Bank, 27 Fed. 591.

290 Garrett v. Sayles, 1 Fed. 371.

liabilities of the corporation, and thus determining how much will be needed from the stockholders to make up the deficiency of the assets of the corporation.[291]

§ 511. **Debts Created by Bankrupt's Fraud.**—Under the former bankruptcy law, it was held that a debt or liability created by the fraud of the bankrupt could be proved and allowed against his estate, notwithstanding the fact that it would not be released by his discharge, the result being that any dividend received on it would be merely a payment on account, leaving the bankrupt liable for the unpaid balance.[292] But under the present statute, the point is not free from doubt. It is true that the seventeenth section of the act provides that a discharge in bankruptcy shall release a bankrupt from "all of his provable debts, except such as * * * were created by his fraud," thereby implying that debts created by fraud are provable debts. But this must be read in connection with the explicit definitions of provable debts given in the sixty-third section, where there is nothing applicable to fraudulent debts save a provision for the proof of claims "founded upon an open account or upon a contract express or implied." Hence the true rule appears to be that a debt or liability is provable if essentially of a contractual character, though induced by fraud, or if the circumstances were such that the claimant might waive the tort and sue as upon an implied contract.[293] Thus, a claim arising out of the conversion by stockbrokers of shares purchased and held by them on a customer's account is provable on this theory,[294] and creditors in bankruptcy proceedings may invoke the principle that money procured by fraud may be recovered back by proving a demand for money had and received by the bankrupt to their use.[295] So, there is an obligation resting upon a defaulting testamentary trustee, independently of his bond, to restore the value of the assets embezzled, which is of a contractual character, and affords a basis for proof of a claim against his estate in bankruptcy therefor by his successor in the trust.[296] Again, where a bankrupt, who was in the em-

[291] Irons v. Manufacturers' Nat. Bank, 17 Fed. 308.

[292] In re Wright, 2 N. B. R. 41, Fed. Cas. No. 18,070; In re Rosenberg, 3 Ben. 14, 2 N. B. R. 236, Fed. Cas. No. 12,054; In re Rundle, 2 N. B. R. 113, Fed. Cas. No. 12,138; In re Clews, 19 N. B. R. 109, Fed. Cas. No. 2,891; In re Eureka Mfg. Co., 1 Low. 500, Fed. Cas. No. 4,550.

[293] Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, 12 Am. Bankr. Rep. 659; In re Filer, 125 Fed. 261, 5 Am. Bankr. Rep. 835; In re Schwartz, 14 Blatchf. 196, 15 N. B. R. 330, Fed. Cas. No. 12,502.

[294] Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, 12 Am. Bankr. Rep. 659.

[295] In re E. J. Arnold & Co., 133 Fed. 789, 13 Am. Bankr. Rep. 320. But a claim against a bankrupt for money received cannot be based on a check which was secured from the claimant by fraud and indorsed to the bankrupt, who was a bona fide purchaser for value without notice. In re United States Hair Co., 239 Fed. 703, 152 C. C. A. 537.

[296] Clarke v. Rogers, 183 Fed. 518, 106 C. C. A. 64, 26 Am. Bankr. Rep. 413,

ploy of a firm of brokers, caused them to purchase stocks on false and fictitious orders purporting to have been given by customers, such purchases being in fact intended for his own benefit, the firm will have the right to treat him as the principal in the transactions, and to prove the debt against him in bankruptcy, as one for money paid at his request and for his use.[297] For similar reasons, a creditor who advanced money to the bankrupt on the strength of the latter's false and fraudulent representations concerning his credit or resources may prove a claim in bankruptcy for the amount, for though the loan was induced by fraud, there was none the less a contract for its repayment.[298] So where the creditor has by similar means been induced to part with goods, he may affirm the contract and file a claim for the value of the goods, instead of electing to claim for damages sustained by the fraud.[299]

§ 512. Taxes, and Interest and Penalties Thereon.—State and municipal taxes due from a bankrupt do not constitute a claim against his estate to be proved like those of creditors, and the rule that interest will not be allowed on debts after the filing of the petition has no application thereto, but it is the duty of the court of bankruptcy to direct the payment of such taxes, together with such penalties or interest as have accrued thereon under the laws of the state to the time of actual payment.[300] "Under the bankruptcy law, public taxes do not constitute a 'claim' in bankruptcy. It is not necessary for the public authorities to appear in a court of bankruptcy as ordinary claimants. They have no right in the administration as creditors and no voice in the selection of a trustee, and the liability for taxes is in no way affected by the discharge of the bankrupt. On the other hand, the duty of affirmative action rests upon the court of bankruptcy. It is the duty of the trustee to ascertain from the public records the amount due for taxes and bring the matter to the attention of the court, and thereupon it is the duty of the court to order their payment if there are sufficient funds in the estate for that purpose." [301] But taxes which have been actually paid, though irregularly, are not a liability of the estate in this sense nor a provable debt,[302]

affirmed, 228 U. S. 534, 33 Sup. Ct. 587, 57 L. Ed. 953, 30 Am. Bankr. Rep. 39.

[297] In re Filer, 125 Fed. 261, 5 Am. Bankr. Rep. 835.

[298] In re E. J. Arnold & Co., 133 Fed. 789, 13 Am. Bankr. Rep. 320. Compare In re Schuchardt, 8 Ben. 585, 15 N. B. R. 161, Fed. Cas. No. 12,483.

[299] In re Hildebrant, 120 Fed. 992, 10 Am. Bankr. Rep. 184.

[300] In re Kallak, 147 Fed. 276, 17 Am. Bankr. Rep. 414; In re Scheidt Bros., 177 Fed. 599, 23 Am. Bankr. Rep. 778; In re Duryee, 2 Fed. 68; Warren R. Co. v. Belvidere, 35 N. J. Law, 584; Stanard v. Dayton, 220 Fed. 441, 137 C. C. A. 35, 33 Am. Bankr. Rep. 682; In re Wenatchee Heights Orchard Co. (D. C.) 212 Fed. 787, 32 Am. Bankr. Rep. 369; United States v. Brown-Alaska Co., 4 Alaska, 89.

[301] In re Kallak, 147 Fed. 276, 17 Am. Bankr. Rep. 414.

[302] City of Pittsburgh v. South Side Trust Co., 208 Fed. 984, 126 C. C. A. 72, 31 Am. Bankr. Rep. 897; See In re

as where the bankrupt, being a deputy tax collector, has settled with his principal for the taxes on his own property, though the latter remains personally liable for the amount to the municipality,[303] or where the taxes have been deducted from the value of property taken by creditors under attachments valid as against the trustee.[304] It is also to be noted that the provisions for the payment of taxes by the trustee in bankruptcy do not apply to an annual license fee imposed by the state law on corporations, which has been held by the courts of the state not to be a tax, but an arbitrary imposition laid on corporations as a condition of their continued existence; and neither is it a contractual obligation attaching by implication from the inception of the company, so as to be provable as a debt founded on contract, at least against the estate of a corporation becoming bankrupt before the fee for the year is assessed or collectible.[305]

A sale of real estate for delinquent taxes while the estate of the owner is in process of administration in the court of bankruptcy is irregular and invalid, at least if made without leave of the bankruptcy court; but if such a sale is made, the purchaser of the property is entitled to be reimbursed out of the general assets of the bankrupt on the surrender and cancellation of his certificate of purchase.[306]

When a claim for payment of a state tax is presented against an estate in bankruptcy, the court of bankruptcy has power to examine it and revise it, to determine the question of liability; but if the tax claimed is valid under the law of the state, the federal court cannot disallow it as unjust or unlawful.[307]

§ 513. Breaches of Real Covenants.—Under the bankruptcy acts of 1841 and 1867, there were several decisions to the effect that a claim for damages for the breach of covenants in a deed, such as those of warranty of title, of possession, and of quiet enjoyment, and against incumbrances, constituted a provable debt in bankruptcy.[308] This view was, however, controverted by authorities of perhaps quite equal force,[309] and in one of the cases it was pointed out that the covenants in a deed

Gracey (D. C.) 241 Fed. 981, 39 Am. Bankr. Rep. 463.

[303] Moore v. Green, 145 Fed. 480, 76 C. C. A. 250, 16 Am. Bankr. Rep. 607.

[304] Foster v. Inglee, 13 N. B. R. 239, Fed. Cas. No. 4,973.

[305] In re Danville Rolling Mill Co. (D. C.) 121 Fed. 432, 10 Am. Bankr. Rep. 327.

[306] Dayton v. Stanard, 241 U. S. 588, 36 Sup. Ct. 695, 60 L. Ed. 1190, 37 Am. Bankr. Rep. 259; In re Clark Realty Co., 253 Fed. 938, 166 C. C. A. 38, 42 Am. Bankr. Rep. 403.

[307] In re United Five & Ten Cent Store (D. C.) 242 Fed. 1005, 40 Am. Bankr. Rep. 146.

[308] Parker v. Bradford, 45 Iowa, 311; Reed v. Pierce, 36 Me. 455, 58 Am. Dec. 761; Abbott v. Rowan, 33 Ark. 593; Jemison v. Blowers, 5 Barb. (N. Y.) 686.

[309] Riggin v. Magwire, 15 Wall. 549, 21 L. Ed. 232; Murray v. De Rottenham, 6 Johns. Ch. (N. Y.) 52; Burrus v. Wilkinson, 31 Miss. 537; Magwire v. Riggin, 44 Mo. 512. See Bates v. West, 19 Ill. 134; Bailey v. Moore, 21 Ill. 165.

are not in the nature of an obligation to pay a debt, but amount merely to an undertaking to pay to the vendee whatever damages he may sustain by the property being taken from him under adverse claims, or subjected to prior incumbrances. The claim of the creditor, in such a case, it was thought, was purely one of damages, not reducible to any certain or specific amount, and which could not be ascertained but by the verdict of a jury, and hence not provable in bankruptcy.[310]

But since the present statute allows "unliquidated claims" to be proved, after they shall have been liquidated in such manner as the court shall direct, it appears that claims of this character may be provable in bankruptcy, provided, first, that the claimant shall have sustained actual loss or injury (not merely the apprehension of it) and second, that a breach of the covenant occurred before the filing of the petition in bankruptcy. The first point may be illustrated by the case of a sale of personal property which is fraudulent because in contravention of the rights of a prior mortgagee and therefore voidable. This will give the purchaser a right of action against the seller for breach of the implied warranty of title, but he has not a debt provable in bankruptcy against the seller until he has been damnified by losing the property to another.[311] As to the second point, if the breach of covenant occurred before the petition in bankruptcy was filed, then the claimant's damages were at that time capable of being liquidated and so made into a provable claim.[312] But debts, to be provable at all, must have existed at the time of the filing of the petition. And hence, for example, a lessee cannot prove a claim for damages for breach of a covenant for quiet enjoyment in the lease against the estate of his lessor in bankruptcy because of an eviction which did not take place until after the commencement of the proceedings in bankruptcy.[313]

§ 514. Claims for Torts.—Under the terms of the present bankruptcy act, a claim for damages for a tort, not connected with any contractual liability, and not reduced to judgment before the filing of the petition in bankruptcy, is not a provable debt.[314] Such a claim is not made provable by that clause of the act which provides that "unliquidated

[310] Bush v. Cooper, 26 Miss. 599, 59 Am. Dec. 270.

[311] Bennett v. Bartlett, 6 Cush. (Mass.) 225.

[312] Merrill v. Schwartz, 68 Me. 514; Willlams v. Harkins, 55 Ga. 172, 15 N. B. R. 34.

[313] In re Pennewell, 119 Fed. 139, 55 C. C. A. 571, 9 Am. Bankr. Rep. 490.

[314] Schall v. Camors, 251 U. S. 239, 40 Sup. Ct. 135, 64 L. Ed. 247, 44 Am. Bankr. Rep. 547, 45 Am. Bankr. Rep. 599; Brown & Adams v. United Button Co., 149 Fed. 48, 79 C. C. A. 70, 17 Am. Bankr. Rep. 565, affirming In re United Button Co., 140 Fed. 495, 15 Am. Bankr. Rep. 390; In re Bailey, 2 Woods, 222, Fed. Cas. No. 729; Bever v. Swecker, 138 Iowa, 721, 116 N. W. 704; Newman v. Goodard, 20 Hun (N. Y.) 563; Lomax v. Spear, 51 Ala. 532. Provability of claims for torts reduced to judgment before the filing of the petition, see supra, § 497.

claims" may be liquidated in such manner as the court shall direct and may thereafter be proved and allowed; for this relates only to a matter of procedure, and does not enlarge the class of claims provable under the preceding paragraph, and contemplates only the liquidation of claims founded on contracts or on open accounts.[315] Nor are the debts which may be proved in bankruptcy enlarged by the fact that it is assumed in the seventeenth section of the act (regulating the effect of a discharge) that liabilities for torts are provable and therefore released by a discharge, certain specified torts being thereupon excepted from the effect of a discharge. For this section, as originally enacted, referred only to judgments already recovered in actions for torts of the specified kinds, and was therefore not inconsistent with the sixty-third section of the statute, relating to provable debts. And the present want of harmony between the two sections is the result of the amendment of 1903, and therefore, in case of conflict, the sixty-third section, being specifically devoted to the enumeration and description of the classes of provable debts, must control.[316]

In accordance with these rules, a claim for unliquidated damages for negligence resulting in personal injuries is not a provable debt,[317] nor a cause of action for negligence causing the death of a human being,[318] or for negligence or nuisance resulting in injury to goods,[319] or for trespass to land,[320] or for deceit,[321] or for assault and battery and false imprisonment.[322] But in all those cases where the tort could be waived and a recovery had as upon a quasi contract, the claim may be provable, if the amount is definitely fixed, or after being liquidated as the court may direct.[323] On this principle, a claim for the conversion of personal property is a provable debt.[324]

[315] Supra, § 500. And see In re Hutchcraft (D. C.) 247 Fed. 187, 41 Am. Bankr. Rep. 238.

[316] Brown & Adams v. United Button Co., 149 Fed. 48, 79 C. C. A. 70, 1 Am. Bankr. Rep. 565. See Biela v. Urbanczyk, 38 Tex. Civ. App. 213, 85 S. W. 451; Schall v. Camors, 251 U. S. 239, 40 Sup. Ct. 135, 64 L. Ed. 247, 44 Am. Bankr. Rep. 547, 45 Am. Bankr. Rep. 599.

[317] Imbriani v. Anderson, 76 N. H. 491, 84 Atl. 974.

[318] In re New York Tunnel Co., 159 Fed. 688, 86 C. C. A. 556, 20 Am. Bankr. Rep. 25.

[319] Brown & Adams v. United Button Co., 149 Fed. 48, 79 C. C. A. 70, 1 Am. Bankr. Rep. 565; Dusar v. Murgatroyd, 1 Wash. (C. C.) 13, Fed. Cas. No. 4,199.

[320] Weisfield v. Beale, 231 Pa. 39, 79 Atl. 878; Kellogg v. Schuyler, Denio (N. Y.) 73; Gilman v. Cate, 63 N. H. 278.

[321] In re Schuchardt, 8 Ben. 585, 15 N. B. R. 161, Fed. Cas. No. 12,483.

[322] Beers v. Hanlin, 99 Fed. 695, 3 Am. Bankr. Rep. 745; In re Hennocksburgh, 6 Ben. 150, 7 N. B. R. 37, Fed. Cas. No. 6,367.

[323] In re Griffin, 188 Fed. 389; In re Southern Steel Co., 183 Fed. 498, 25 Am. Bankr. Rep. 358; Burgoyne v. McKil-

[324] Pitcairn v. Scully, 252 Pa. 82, 97 Atl. 120; Weaver v. Voils, 68 Ind. 191; Cole v. Roach, 37 Tex. 413, 10 N. B. R. 288. A claim against a bailee for hire for the destruction of the goods bailed, though suable in either contract or tort, may be proved against the estate of the bailee in bankruptcy. Fingold v. Schacter, 223 Mass. 274, 111 N. E. 903.

§ 515. Fines, Penalties, and Forfeitures.—A judgment imposing a fine as a punishment for a crime or misdemeanor or any violation of a state statute is not a debt provable against the estate of the defendant in bankruptcy. Although it comes within the terms of that section of the bankruptcy law which defines provable debts (as being a "fixed liability evidenced by a judgment, absolutely owing"), if literally construed, yet it cannot be supposed to have been the intention of Congress that a discharge in bankruptcy should release a defendant from a fine imposed as a punishment for a criminal offense against the laws either of the United States or of a state, and that section should be construed as applying only to civil liabilities and claims.[325] To hold such a judgment provable as a debt, with the necessary consequence of its being released by the discharge, "would be allowing the national government, through its courts, to grant pardons for crimes committed against a state. A person convicted of manslaughter and sentenced to pay a fine of $1000 would be relieved, by a discharge in bankruptcy, from the punishment affixed by law to his crime. I do not think that the act, while it reasonably admits of any other construction, ought to be construed so as to permit or allow such a consequence." [326] For similar reasons, a judgment or sentence in a bastardy proceeding, condemning the defendant to pay a fixed sum for the maintenance of the child, is not a debt provable in bankruptcy.[327] And the liability of a bankrupt for the statutory penalty for cutting trees, imposed by a state statute, is not a debt founded on an implied contract, such as can be proved against his estate in bankruptcy.[328]

But there is another section of the bankruptcy law applicable, not

lip, 182 Fed. 452, 25 Am. Bankr. Rep. 387; Clingman v. Miller, 160 Fed. 326, 87 C. C. A. 278, 20 Am. Bankr. Rep. 360; In re Filer, 125 Fed. 261, 5 Am. Bankr. Rep. 835; In re Hirschman, 104 Fed. 69, 4 Am. Bankr. Rep. 715; First Nat. Bank of Enosburg Falls v. Bamforth, 90 Vt. 75, 96 Atl. 600; In re Schenderlein (D. C.) 268 Fed. 1018, 46 Am. Bankr. Rep. 128; Stalick v. Slack (C. C. A.) 269 Fed. 123, 46 Am. Bankr. Rep. 385. For an excellent discussion of the whole subject of waiving a tort and suing as upon a quasi contract, see Keener, Quasi Contracts, ch. III, pp. 159–312.

[325] In re Moore, 111 Fed. 145, 6 Am. Bankr. Rep. 590. Contra, In re Alderson, 98 Fed. 588, 3 Am. Bankr. Rep. 544. A fine imposed on the bankrupt by a state court, as a punishment for a civil contempt in disobeying its order, is not a provable debt. People v. Sheriff of Kings County, 206 Fed. 566, 31 Am. Bankr. Rep. 84. See In re Abramson, 210 Fed. 878, 127 C. C. A. 462, 32 Am. Bankr. Rep. 156. A fine adjudged against a corporation on its conviction for using the mails to promote a fraud, under U. S. Crim. Code, § 215, is a "penalty" within the meaning of the Bankruptcy Act, and not provable as a claim in bankruptcy; but the United States is entitled to prove all the costs which it paid or incurred in the prosecution as a pecuniary loss sustained by it. United States v. Birmingham Trust & Savings Co., 258 Fed. 562, 169 C. C. A. 502, 43 Am. Bankr. Rep. 430.

[326] In re Sutherland, Deady, 416, 3 N. B. R. 314, Fed. Cas. No. 13,639, per Deady, J.

[327] In re Baker, 96 Fed. 954, 3 Am. Bankr. Rep. 101; In re Cotton, Fed. Cas. No. 3,269; Hawes v. Cooksey, 13 Ohio, 242; Commonwealth v. Erisman, 21 Pittsb. Leg. J. O. S. (Pa.) 69.

[328] In re Southern Steel Co., 183 Fed. 498, 25 Am. Bankr. Rep. 358.

indeed to fines for criminal offenses, but to penalties and forfeitures incurred in civil cases. It provides that "debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." [329] Primarily this section would seem to apply to penalties imposed, in a fixed sum, without regard to the amount of damage involved, for breaches of contract between private individuals, on the one hand, and governmental or municipal authorities on the other hand, as, for example, a penalty of so many dollars a day for not completing a public work under contract within the time limited. But there are also cases where the mulct, although imposed as a punishment on an offender, is also intended as recompense to the public for injury to its property or revenues, and these cases would also come within the statute. For example, the laws of the United States impose, in certain cases, a "fine" for cutting timber on the public lands, the amount of which is to be "triple the value" of the timber cut. Here, it seems, the government might prove a claim for the whole amount of the penalty, especially if reduced to judgment, but it could be "allowed" only to the extent of the pecuniary loss sustained, that is, the single value of the timber. And the same principle would apply to the fines and penalties imposed under the internal revenue laws for failure to affix the proper stamps to various designated products.[330] Forfeitures are also imposed by the laws of the United States for various causes,—forfeitures of vessels for violations of the navigation laws and the neutrality laws, forfeitures of distilleries and apparatus for fraud in the evasion of the internal revenue laws, forfeitures of goods imported for non-payment of duties. In all such cases, it seems, the test of the applicability of this section of the bankruptcy law must be the sustaining of pecuniary loss by the government.[331] And a

[329] Bankruptcy Act 1898, § 57j.

[330] See In re Rosey, 6 Ben. 507, 8 N. B. R. 509, Fed. Cas. No. 12,066. In this case, under the act of 1867, the government had sued the bankrupt, and recovered a judgment against him, for penalties incurred for several violations of the stamp-tax law, in selling boxes of matches not stamped. The amount of the stamp required in each case was one cent. The amount of the penalty prescribed for each violation of the statute was $50. The judgment was for more than $5,000. The amount of the stamps required on the various boxes in question would have been about one dollar. Now if the "pecuniary loss sustained" was the value of the stamps which should have been affixed, it would follow, under the plain wording of the present statute, that the United States could prove its claim in such a case as this for the amount of the judgment, $5,000, but that the claim could be allowed only to the extent of one dollar. This looks like a legal absurdity, but it is the will of Congress expressed in plain terms.

[331] See In re Vetterlein, 13 Blatchf. 44, 12 N. B. R. 526, Fed. Cas. No. 16,929. In the case, under the bankruptcy act of 1867, before the commencement of the bankruptcy proceedings the United

claim of the United States on a forfeited recognizance for bail in a criminal case has been held to be a "penalty or forfeiture" within the meaning of this provision.[332]

What is here said of the United States government is also true, mutatis mutandis, of the states and of penalties and forfeitures for violations of municipal ordinances. Thus, the provision in question applies to a penalty imposed by the state law on a corporation for failure to report and pay the prescribed fee or bonus to the state on an increase of its capital stock.[333]

It is also necessary, in some cases, to consider the right of an informer to share in the penalty. But generally this is not a matter for the bankruptcy court at all. Where the government has recovered a judgment against the bankrupt for a penalty incurred by a violation of the revenue laws, for example, and has proved its claim as a creditor of the bankrupt, the informer by whose procurement the penal action was prosecuted has no right to come into the bankruptcy court with a petition asking for a summary adjudication of his right to a share of the penalty as against the United States. The court has no jurisdiction to effect such an adjustment in a proceeding in bankruptcy against the debtor. The claim of the informer is not against the bankrupt but against the government, and it must be worked out in the manner prescribed by the revenue laws, and not in a bankruptcy proceeding.[334]

§ 516. Debts Barred by Limitations.—A debt or claim, once valid and which otherwise would be provable in bankruptcy, but which is barred by the statute of limitations of the state in which the bankrupt resides and where the proceeding in bankruptcy is pending, at the time of the filing of the petition, cannot be proved or allowed,[335] notwithstanding the fact that it is not barred under the statute of some other state, as, for example, that in which the creditor resides or that in which both parties lived when the contract was made.[336] And the same rule applies

States brought an action against the bankrupts to recover the value of goods which had been forfeited for violation of the customs revenue laws. After the adjudication, the bankrupts admitted the right of the government to recover and a judgment was rendered. It was held that this was a provable debt.

[332] In re Caponigri, 193 Fed. 291, 27 Am. Bankr. Rep. 513.

[333] Commonwealth v. York Silk Mfg. Co., 192 Fed. 81, 112 C. C. A. 613, 27 Am. Bankr. Rep. 525.

[334] In re Jayne, 28 Fed. 419.

[335] In re Putman, 193 Fed. 464, 27 Am. Bankr. Rep. 923; Nicholas v. Murray, 5 Sawy. 320, 18 N. B. R. 469, Fed. Cas. No. 10,223; In re Doty, 16 N. B. R. 202, Fed. Cas. No. 4,017; In re Kingsley, 1 Low. 216, 1 N. B. R. 329, Fed. Cas. No. 7,819; In re Hardin, 1 Hask. 163, 1 N. B. R. 395, Fed. Cas. No. 6,048; In re Reed, 6 Biss. 250, 11 N. B. R. 94, Fed. Cas. No. 11,635; In re Noeson, 6 Biss. 443, 11 N. B. R. 422, Fed. Cas. No. 10,288; In re Cornwall, 9 Blatchf. 114, 6 N. B. R. 305, Fed. Cas. No. 3,250; Ex parte Dewdney, 15 Ves. 479; Pace's Trustee v. Pace, 162 Ky. 457, 172 S. W. 925; In re Ballantine (D. C.) 232 Fed. 271, 37 Am. Bankr. Rep. 111.

[336] Hargadine-McKittrick Dry Goods Co. v. Hudson, 122 Fed. 232, 58 C. C. A. 596, 10 Am. Bankr. Rep. 225; In re Res-

to a dormant judgment against the bankrupt; that is, a judgment is not a provable debt unless it has been kept alive in such manner as the law of the state prescribes, by suit or scire facias upon it, by the issue or levy of execution, or otherwise according to the local law, within the time limited by that law before the bankruptcy.[337] And the doctrine or rule of adverse possession may be invoked for a like purpose. Thus, an intervener who, with knowledge of facts and without any claim of ownership, allowed the bankrupt to hold exclusive possession of certain residence property and to make improvements, could not, after more than twenty years, contravene the lien of the trustee in behalf of the creditors, for whose debts the property was expressly or impliedly pledged, to his knowledge.[338]

A due and sufficient acknowledgment of a barred debt, or new promise to pay it, though made in contemplation of bankruptcy, is not necessarily a fraud on the other creditors, and will make the debt provable.[339] Thus, a partial payment on a debt barred by limitations will revive it to the extent of making it provable in bankruptcy, though it was made for that very purpose.[340] But if the law of the state makes any particular requirements as to what will be effective to take a note out of the statute of limitations, as that an extension of it must be in writing, signed by the maker, and containing an acknowledgment of the debt, these must be complied with or else the note will not be provable.[341] But if a debtor, within four months before the filing of his petition in bankruptcy, gives a bond and mortgage to a creditor whose claim is outlawed under the state statute of limitations, the bond will revive the debt, even though the mortgage is voidable as a preference.[342] But the mere fact that the bankrupt includes in his schedule of debts a claim already barred by the statute of limitations does not revive it so as to make it a provable claim against his estate, to the prejudice of his other creditors, but it is the duty

ler, 95 Fed. 804, 2 Am. Bankr. Rep. 602; In re Hardin, 1 Hask. 163, 1 N. B. R. 395, Fed. Cas. No. 6,048; In re Kingsley, 1 Low. 216, 1 N. B. R. 329, Fed. Cas. No. 7,819. But see a strong argument to the contrary of this view, in the case of In re Ray, 2 Ben. 53, 1 N. B. R. 203, Fed. Cas. No. 11,589, where it is said that the fact that the debt is barred by the statute of limitations of the state where the debtor resides is not enough to prevent its being proved in bankruptcy, because the effect of a state statute of limitations is merely to prevent the maintenance of a suit on the barred cause of action in the courts of that state; but the bankruptcy law extends throughout the United States, and its operation upon a particular debt or claim cannot be affected by anything less than an equally extensive impossibility of collecting such debt or claim by suit.

[337] In re Rebman, 150 Fed. 759, 80 C. C. A. 594, 17 Am. Bankr. Rep. 767; In re Farmer, 116 Fed. 763, 9 Am. Bankr. Rep. 19; In re Lipman, 94 Fed. 353, 2 Am. Bankr. Rep. 46; In re Morris, Crabbe, 70, Fed. Cas. No. 9,825.

[338] In re Rawlins Mercantile Co. (D. C.) 251 Fed. 164.

[339] In re Blankenship (D. C.) 220 Fed. 395, 33 Am. Bankr. Rep. 756.

[340] In re Banks (D. C.) 207 Fed. 662, 31 Am. Bankr. Rep. 270.

[341] Wood v. Ledgerwood, 210 Fed. 163, 127 C. C. A. 13.

[342] In re Stendts, 1 Nat. Bankr. News, 509.

of the trustee in bankruptcy to oppose the allowance of the claim, on the ground of limitations, in behalf of the creditors in general.[343] But it has been thought that this rule should not be invoked for the benefit of the bankrupt himself where no other creditor could be prejudiced by allowing the claim. If the estate proves sufficient to pay all the expenses of administration and all the other proved and allowed claims, the creditor whose debt was outlawed, but was included in the bankrupt's list of debts, should be entitled to satisfaction out of the surplus, because, as between the bankrupt and himself, the listing of the debt was a sufficient acknowledgment to take it out of the statute.[344] And a debt which was not barred by the statute of limitations at the time when the petition was filed will remain valid against the trustee throughout the bankruptcy proceedings, and will be provable at any time within a year after the adjudication, notwithstanding the whole term fixed by the statute of limitations has expired when the claim is offered for proof, for the institution of bankruptcy proceedings stops the running of the statute.[345]

§ 517. Claims Founded on Illegal or Immoral Consideration.—The bankruptcy act of 1867 expressly forbade the allowance of a claim in bankruptcy which was "founded in illegality." But this is only in affirmance of the common law,[346] since no court will lend its aid to the enforcement of an immoral or illegal contract. And although the present act contains no such express provision, it cannot be doubted that a claim arising on such a contract must be rejected.[347] Thus, a claim for money alleged to be due under a stock-gambling transaction, or other form of wagering contract, is not provable in bankruptcy,[348] although money placed in the bankrupt's hands for the purpose of being used in a gambling transaction, since it could be recovered in an action at law,

[343] In re Banks, 207 Fed. 662; In re Resler, 95 Fed. 804, 2 Am. Bankr. Rep. 602; In re Lipman, 94 Fed. 353, 2 Am. Bankr. Rep. 46; In re Wooten, 118 Fed. 670, 9 Am. Bankr. Rep. 247; In re Kingsley, 1 Low. 216, 1 N. B. R. 329, Fed. Cas. No. 7,819; In re Ray, 2 Ben. 53, 1 N. B. R. 203, Fed. Cas. No. 11,589; In re Hardin, 1 Hask. 163, 1 N. B. R. 395, Fed. Cas. No. 6,048. Compare In re Hertzog, 18 N. B. R. 526, Fed. Cas. No. 6,433.

[344] In re Currier, 192 Fed. 695, 27 Am. Bankr. Rep. 597.

[345] In re McKinney, 15 Fed. 912; In re Graves, 9 Fed. 816; In re Wright, 6 Biss. 317, Fed. Cas. No. 18,068; In re Maybin, 15 N. B. R. 468, Fed. Cas. No. 9,337; Wofford v. Unger, 53 Tex. 634; Minot v. Thacher, 7 Metc. (Mass.) 348, 41 Am. Dec. 444.

[346] In re Pittock, 2 Sawy. 416, 8 N. B. R. 78, Fed. Cas. No. 11,189.

[347] Forsyth v. Woods, 11 Wall. 484, 20 L. Ed. 207; Bailey v. Milner, 1 Abb. U. S. 261, 1 N. B. R. 419, Fed. Cas. No. 740; Buckner v. Street, 1 Dill. 248, 7 N. B. R. 255, Fed. Cas. No. 2,098. A claim, the consideration for which was illicit sexual relations, is not provable. In re Wray, 233 Fed. 418, 147 C. C. A. 354, 37 Am. Bankr. Rep. 28.

[348] In re Ætna Cotton Mills, 171 Fed. 994, 22 Am. Bankr. Rep. 629; Hill v. Levy, 98 Fed. 94, 3 Am. Bankr. Rep. 374; In re Chandler, 9 N. B. R. 514, Fed. Cas. No. 2,590; In re Green, 7 Biss. 338, 15 N. B. R. 198, Fed. Cas. No. 5,751.

may likewise support a claim in bankruptcy.[349] And even if a contract to purchase stock was originally invalid as a gambling transaction on margins, in violation of a state statute, still the illegality cannot be asserted by the broker's trustee in bankruptcy against a claim by the purchaser, where the contract was executed by the broker purchasing the stock, and where he disposed of it without the claimant's knowledge or consent, and misappropriated the proceeds.[350] On similar principles, a claim founded upon a sale of intoxicating liquors, illegal and void under the laws of the state where made, is not provable in bankruptcy.[351] But a note which was given in part for a valid consideration, and in part for a consideration against public policy, if the two portions are distinguishable, may be proven in bankruptcy for so much as was originally valid.[352] Where the laws of the state provide for the forfeiture of the entire debt where it is tainted with usury, so that the creditor could not recover any portion of it by action in a state court, no part of such debt will be provable in bankruptcy, [353] and notes given by the bankrupt for the excess or bonus over the legal interest are not provable.[354] But if the statute merely provides for the forfeiture of all interest reserved, in case of usury, this will not prevent the proof and allowance of the principal sum.[355] But not every violation of a statute will necessarily render the party's debt or claim unenforceable in bankruptcy. The federal courts have always observed the distinction between acts mala in se and those merely mala prohibita, and it is a well settled rule that when a statute imposes specific penalties for its violation, the act concerned not being malum in se, and the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the intention of the lawmakers to render such contracts illegal and unenforceable.[356] This is the view which has been taken in bank-

[349] Streeter v. Lowe, 184 Fed. 263, 106 C. C. A. 405, 25 Am. Bankr. Rep. 774; In re E. J. Arnold & Co., 138 Fed. 789, 13 Am. Bankr. Rep. 320; Ex parte Young, 6 Biss. 53, Fed. Cas. No. 18,145.

[350] In re Dorr, 186 Fed. 276, 108 C. C. A. 322, 26 Am. Bankr. Rep. 408. And see In re Norris, 190 Fed. 101, 26 Am. Bankr. Rep. 945.

[351] Jacobs v. Ballantine Breweries Co., 193 Fed. 393, 113 C. C. A. 389, 27 Am. Bankr. Rep. 918; In re Town, 8 N. B. R. 38, Fed. Cas. No. 14,111; In re Paddock, 6 N. B. R. 132, Fed. Cas. No. 10,657. See Black, Intox. Liq. § 249. But a claim for the price of spirituous liquors lawfully sold in New York to a citizen of Maine, who intended them for sale in Maine in violation of law, is provable in bankruptcy in Maine, though it could not be recovered in the courts of that state. In re Murray, 1 Hask. 267, 3 N. B. R. 765, Fed. Cas. No. 9,954. And see Thompson, Belden & Co. v. Leisy Brewing Co., 249 Fed. 462, 161 C. C. A. 420, 41 Am. Bankr. Rep. 682.

[352] Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 355, 58 C. C. A. 517, 10 Am. Bankr. Rep. 641.

[353] In re Pittock, 2 Sawy. 416, 8 N. B. R. 78, Fed. Cas. No. 11,189.

[354] Shaffer v. Fritchery, 4 N. B. R. 548, Fed. Cas. No. 12,697.

[355] National Exchange Bank v. Moore, 2 Bond, 170, 1 N. B. R. 470, Fed. Cas. No. 10,041.

[356] See In re Wylly (D. C.) 210 Fed. 954, 32 Am. Bankr. Rep. 145.

ruptcy of a statute providing that no property transported by a carrier shall be delivered except on surrender and cancellation of the bills of lading.[357] On the other hand, corporate bonds issued to a promoter, in violation of a state statute, are voluntary obligations not enforceable in bankruptcy to the prejudice of other actual creditors.[358]

§ 518. Ultra Vires and Unlawful Contracts of Corporations.—As a general rule, a claim is not provable in bankruptcy where either the bankrupt or the creditor is a corporation and the contract or transaction out of which the claim arose was beyond the lawful powers of the corporation. Thus, a corporation has no power to purchase its own stock, where the transaction will render it insolvent and so operate as a fraud on its creditors, and if this is done, notes given by it for the purchase price are invalid and cannot be proved against its estate in bankruptcy, at least in the hands of the selling stockholder.[359] So, a company chartered for the purpose of buying and selling building materials has no power to bind itself as guarantor for the performance of a building contract by another, and such a contract, being ultra vires and void, affords no basis for a claim against its estate in bankruptcy.[360] So where a savings bank, in violation of its charter, and the laws of the state, discounts notes of the bankrupt, neither the notes nor a claim for money loaned thereon can be proved.[361] The same rule applies where the charter of a manufacturing corporation limits the amount of indebtedness which it may lawfully incur to one-half the amount of its paid-up capital stock; debts contracted in excess of this limit are not provable.[362] And so, a claim cannot be proved in bankruptcy against a corporation on a note which it gave to cover the indebtedness of a third party, for which it was in no way responsible,[363] or on notes which were authorized by the stockholders, but which were issued by the managing officer direct to his personal creditors as collateral security for a prior indebtedness of his own.[364]

[357] In re T. H. Bunch Co., 180 Fed. 519.

[358] In re Wyoming Valley Ice Co., 153 Fed. 787.

[359] In re S. P. Smith Lumber Co., 132 Fed. 618, 13 Am. Bankr. Rep. 123, affirmed, Menefee v. Phelan, 140 Fed. 988, 72 C. C. A. 682; Keith v. Kilmer (C. C. A.) 261 Fed. 733, 9 A. L. R. 1287, 44 Am. Bankr. Rep. 304.

[360] In re S. P. Smith Lumber Co., 132 Fed. 620, 13 Am. Bankr. Rep. 118.

[361] In re Jaycox, 12 Blatchf. 209, 13 N. B. R. 122, Fed. Cas. No. 7,237. But the fact that a bank which lent money to a manufacturing corporation, taking secured notes therefor, made an ultra vires agreement to accept a share of the net profits of the business, but from which it received nothing, does not debar it from proving its notes against the corporation in bankruptcy. In re Machine Metals Producers Co., 251 Fed. 280, 163 C. C. A. 436, 41 Am. Bankr. Rep. 505.

[362] Cunningham v. German Insurance Bank, 101 Fed. 977, 4 Am. Bankr. Rep. 363.

[363] Mapes v. German Bank, 176 Fed. 89, 99 C. C. A. 609, 23 Am. Bankr. Rep. 713.

[364] American Woodworking Machinery Co. v. Norment (C. C. A.) 157 Fed. 801, 19 Am. Bankr. Rep. 679.

Again, where the law of a state forbids all foreign corporations to do business within its limits until they have complied with certain requisites (such as appointing a resident agent upon whom process may be served, or the like) a foreign corporation which has not complied with the statute has no power to make contracts or to bring suits within the state. Consequently a contract made by the corporation, under such circumstances, with a citizen of the state is illegal, and is not provable against the estate of such citizen in bankruptcy. As the bankrupt himself might have avoided it, his trustee may object to its being proved.[365] But the holder of special stock of a corporation, which was illegally issued, may prove against the estate of the corporation in insolvency (and presumably also in bankruptcy) a claim for the amount paid by him for the stock, deducting any dividends received, although he did not rescind the contract before the insolvency.[366]

§ 519. Landlord's Rights and Remedies.—Upon the bankruptcy of a tenant, his possession of the leased premises becomes the possession of the court of bankruptcy, and thereafter the rights and claims of the landlord must be worked out through the bankruptcy proceedings, and not by independent action.[367] So also the right of the bankrupt tenant to remove machinery or other fixtures from the building passes to his trustee in bankruptcy.[368] The landlord may prove a claim in bankruptcy for rent accrued up to the commencement of the proceedings, if he has a written lease or a valid oral agreement, or even an implied promise to pay rent,[369] and he may claim his rent out of the proceeds of goods which were specifically liable for it while on the demised premises and which have been sold by the trustee in bankruptcy,[370] or out of money paid to the tenant in eminent domain proceedings on the basis of his obligation to pay rent.[371] So also, the landlord may prove a claim for rent accruing during a period when the premises stood vacant, having been surrendered by the tenant, the latter having agreed to account for the rent until they were relet,[372] and where the original tenant assigned the lease or sublet the premises, the landlord, having agreed to the transfer, may prove his claim in bankruptcy against the estate of the assignee or sub-

[365] In re Comstock, 3 Sawy. 218, 11 N. B. R. 169, Fed. Cas. No. 3,078; In re Montello Brick Works, 174 Fed. 498, 23 Am. Bankr. Rep. 375; In re Springfield Realty Co. (D. C.) 257 Fed. 785, 44 Am. Bankr. Rep. 105.

[366] Reed v. Boston Machine Co., 141 Mass. 454, 5 N. E. 852.

[367] In re Steadman, 8 N. B. R. 319, Fed. Cas. No. 13,330.

[368] In re Breck, 8 Ben. 93, 12 N. B. R. 215, Fed. Cas. No. 1,822.

[369] In re Miller, 132 Fed. 414, 13 Am. Bankr. Rep. 87; In re Sherwoods, 210 Fed. 754, 127 C. C. A. 304, Ann. Cas. 1916A, 940, 31 Am. Bankr. Rep. 769; In re Mullings Clothing Co. (D. C.) 230 Fed. 681, 37 Am. Bankr. Rep. 166.

[370] In re Bowne, 12 N. B. R. 529, Fed. Cas. No. 1,741.

[371] In re Clancy, 10 N. B. R. 215, Fed. Cas. No. 2,782.

[372] In re Bruce, 6 Ben. 515, Fed. Cas. No. 2,044.

lessee.[373] It is also competent for a landlord to require the tenant to pay current taxes on the leased premises, and municipal assessments, and water rates, and to stipulate that they shall constitute a part of the rent reserved, and when this is done, he may include the amount thereof, remaining unpaid at the date of the bankruptcy, in his claim against the estate of the bankrupt tenant.[374] But a state statute providing that, where a tenant unlawfully withholds possession of rented premises from his landlord, judgment shall go against such tenant "for double the rent reserved or stipulated to be paid," relates merely to the measure of the amount for which the tenant shall be liable, and does not characterize the landlord's demand for double rent during the period of unlawful detention as a debt springing out of the original contractual relation; and hence such demand, not arising ex contractu, is not provable in bankruptcy.[375] So again, where a lease provided that the tenant might make alterations in the premises, he agreeing to restore the property at the expiration of the lease to its former condition, and before the end of the term the tenant became bankrupt, and the landlord resumed possession of the premises and leased them to the trustee in bankruptcy, afterwards seeking to prove a claim against the estate for the estimated cost of restoring the property, it was held that the claim was not provable, as the clause in the lease contemplated the expiration of the lease by its own terms, and not by re-entry by the landlord.[376]

§ 520. Same; Landlord's Lien.—The general principles governing landlords' liens, in the bankruptcy of the tenant, have been discussed in an earlier section.[377] It remains to be stated that a landlord to whom rent is due for the use of the premises by the bankrupt will not be required to bring an action in a state court for the establishment of his lien, as provided by the state statute, as a condition precedent to the assertion of his rights against the bankrupt's property in the hands of

[373] Witherow v. South Side Trust Co., 181 Fed. 753; Wylie v. Smith, 2 Woods, 673, Fed. No. 18,110.

[374] Ellis v. Rafferty, 199 Fed. 80, 117 C. C. A. 592, 29 Am. Bankr. Rep. 192; McCann v. Evans, 185 Fed. 93, 107 C. C. A. 313, 26 Am. Bankr. Rep. 47; In re Criblier (D. C.) 184 Fed. 338, 25 Am. Bankr. Rep. 765. Where a lease required the bankrupt lessee to pay taxes two months after they became a lien on the premises, taxes which were assessed and became a lien prior to the tenant's bankruptcy were provable as a claim against the estate, though they were not in fact payable until after the adjudication. In re Sherwoods, 210 Fed. 754, 127 C. C. A. 304, Ann. Cas. 1916A, 940, 31 Am. Bankr. Rep. 769. It seems that a landlord's claim for taxes and water rents which the tenant was bound to pay may be a provable debt though, at the time of the adjudication in bankruptcy, the amount had not been fixed by assessment. In re Spies-Alper Co. (D. C.) 231 Fed. 535, 36 Am. Bankr. Rep. 470.

[375] Hamilton v. McCroskey, 112 Ga. 651, 37 S. E. 859.

[376] In re Arnstein, 101 Fed. 706, 4 Am. Bankr. Rep. 246. And see In re O'Malley & Glynn, 191 Fed. 999, 27 Am. Bankr. Rep. 143.

[377] Supra, § 373.

the trustee, but he may at once prove his debt and be heard in the court of bankruptcy in support of his claim to priority of payment.[378] But under the laws of some of the states, a landlord who takes from his tenant a mortgage on the personalty used or kept on the demised premises, covering not only arrears of rent but also other debts, is deemed to have waived his statutory lien on such property for rent due, and he will not be entitled to enforce such a lien against the property in the hands of the tenant's trustee in bankruptcy.[379] Up to the time of the commencement of the proceedings in bankruptcy, the landlord may enforce his lien by distress, if allowed by the laws of the state, and the security thus acquired is not invalidated by the adjudication of the tenant in bankruptcy, though within four months thereafter.[380] But upon the filing of the petition in bankruptcy, the whole estate comes into the constructive custody and possession of the bankruptcy court, and thereafter the landlord will not be permitted to seize the goods on a distress warrant, but must proceed against the trustee in bankruptcy.[381]

§ 521. **Same; Rent to Accrue After Adjudication.**—A landlord cannot maintain a claim in bankruptcy against the estate of his tenant for any rent accruing or to accrue under the terms of the lease after the commencement of the proceedings in bankruptcy.[382] And it is im-

[378] In re Byrne, 97 Fed. 762, 3 Am. Bankr. Rep. 268.

[379] In re Wolf, 98 Fed. 74, 3 Am. Bankr. Rep. 558. See Lontos v. Coppard, 246 Fed. 803, 159 C. C. A. 105, 40 Am. Bankr. Rep. 575.

[380] Marshall v. Knox, 16 Wall. 551, 21 L. Ed. 481; Goodwin v. Sharkey, 80 Pa. St. 149, 15 N. B. R. 526.

[381] In re Bishop, 153 Fed. 304, 18 Am. Bankr. Rep. 635; Buckey v. Snouffer, 10 Md. 149, 69 Am. Dec. 129; Noe v. Gibson, 7 Paige (N. Y.) 513.

[382] In re H. M. Lasker Co., 251 Fed. 53, 163 C. C. A. 303, 42 Am. Bankr. Rep. 234; In re Mullings Clothing Co., 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918A, 539, 38 Am. Bankr. Rep. 189; In re Gallacher Coal Co., 205 Fed. 183, 29 Am. Bankr. Rep. 766; South Side Trust Co. v. Watson, 200 Fed. 50, 118 C. C. A. 278, 29 Am. Bankr. Rep. 446; In re Abrams, 200 Fed. 1005, 29 Am. Bankr. Rep. 590; In re Scruggs, 205 Fed. 673, 31 Am. Bankr. Rep. 94; In re Quaker Drug Co., 204 Fed. 689, 30 Am. Bankr. Rep. 398; Colman Co. v. Withoft (C. C. A.) 195 Fed. 250, 28 Am. Bankr. Rep. 328; In re Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270, 24 Am. Bankr. Rep. 588; In re Rubel, 166 Fed. 131, 21 Am. Bankr. Rep. 566; Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719, 14 Am. Bankr. Rep. 453; In re Roth & Appel, 174 Fed. 64, 22 Am. Bankr. Rep. 504; In re Hays, Foster & Ward Co., 117 Fed. 879, 9 Am. Bankr. Rep. 144; Atkins v. Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118, 5 Am. Bankr. Rep. 313; In re Mahler, 105 Fed. 428, 5 Am. Bankr. Rep. 453; In re Arnstein, 101 Fed. 706, 4 Am. Bankr. Rep. 246; Bray v. Cobb, 100 Fed. 270, 3 Am. Bankr. Rep. 788; In re Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206; Treadwell v. Marden, 123 Mass. 390, 25 Am. Rep. 108; Scott v. Demarest, 75 Misc. Rep. 289, 135 N. Y. Supp. 264; Kamioner v. Balkind, 93 Misc. Rep. 458, 158 N. Y. Supp. 310. As to special rules under the statutory law of Pennsylvania, see Rosenblum v. Uber, 256 Fed. 584, 167 C. C. A. 614, 43 Am. Bankr. Rep. 480.

material that the tenant may have given notes for the installments of rent to accrue in the future; they cannot be proved as debts against his estate.[383] As to the effect of a covenant in the lease that, on default in the payment of any installment of rent, the rent for the entire term shall at once become due and payable, there is more doubt. But it has been held that the bankruptcy of the lessee, while so in default, will give the landlord a right to prove a claim for the entire rent so far as it is definitely fixed by the terms of the lease,[384] though he must take the position of an ordinary general creditor, and will not be entitled to priority of payment,[385] but that if the tenant is not in default at the time of his bankruptcy, the filing of the petition will not cause the rent for the whole term to become exigible or mature notes given for future installments.[386] And a provision in the lease that, in case the tenant shall be adjudicated a bankrupt, the lessor may re-enter and terminate the lease, and that the lessee will then pay to the lessor "as damages" a sum representing the difference between the rental value of the premises and the rent reserved for the residue of the term, does not create a liability which can be proved as a debt against the estate.[387] So a state statute giving to the lessor a lien on the tenant's property on the premises, to secure the payment of one year's rent due or to become due, does not entitle the landlord, when the tenant becomes bankrupt during the term, to priority of payment out of his estate for a year's rent from the date of the adjudication.[388]

[383] Atkins v. Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118, 5 Am. Bankr. Rep. 313; In re Hays, Foster & Ward Co., 117 Fed. 879, 9 Am. Bankr. Rep. 144.

[384] In re Pittsburg Drug Co., 164 Fed. 482, 20 Am. Bankr. Rep. 227. Unaccrued rent under a lease of a store service apparatus may be provable in bankruptcy, where the apparatus was required to be specially adapted to the premises and could not be used again to advantage, and the parties have so provided in their contract. In re Caswell-Massey Co. (D. C.) 208 Fed. 571, 31 Am. Bankr. Rep. 426.

[385] In re Cronson, 1 Nat. Bankr. News, 474.

[386] Atkins v. Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118, 5 Am. Bankr. Rep. 313; In re Miller Bros. Grocery Co., 219 Fed. 851, 135 C. C. A. 521, L. R. A. 1916B, 1099, Ann. Cas. 1916A, 946, 33 Am. Bankr. Rep. 704. Where a lease to a bankrupt of a store service system for a term of 10 years provided that, on breach by the lessee or its bankruptcy, the lessor might enter and take possession of the property, which it did after the bankruptcy, a further provision that in such case the rent for the entire term should immediately become due and payable was held to create a penalty, and a claim therefor against the bankrupt estate was disallowed. In re Merwin & Willoughby Co. (D. C.) 206 Fed. 116, 30 Am. Bankr. Rep. 485.

[387] Slocum v. Soliday, 183 Fed. 410, 106 C. C. A. 56, 25 Am. Bankr. Rep. 460; In re Rhoads, 2 Nat. Bankr. News, 179. Compare In re Goldstein, 1 Nat. Bankr. News, 422. See In re Merwin & Willoughby Co., 206 Fed. 116, 30 Am. Bankr. Rep. 485.

[388] In re Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206.

§ 522. Same; Occupation and Use of Premises by Trustee.—Where there is a leasehold estate among the assets of the bankrupt, the trustee may accept it if it is salable and has a money value, but he is not bound to do so unless it appears to be for the interest of the creditors.[389] If he accepts the term, for the purpose of realizing its value as an asset, he is bound by the covenants of the lease, including that for the payment of rent at the stipulated rate.[390] But there must be some positive and unequivocal act of acceptance by the trustee before he will be held liable on the lease,[391] and he does not accept the premises and become responsible for the rent merely by leaving some goods there,[392] and occupation of the leased premises by the trustee independently of the lease, where he pays for such occupation, is not evidence of an election to accept the lease.[393]

But if the trustee, without accepting or assuming the lease (or holding over after the expiration of the bankrupt's term), continues to occupy and use the demised premises for purposes connected with the administration of the estate, the landlord will be entitled to compensation for the reasonable value of the use of the premises by the trustee, from the date of the filing of the petition in bankruptcy until the possession is surrendered to him.[394] In ordinary circumstances, this may be fairly measured by the rent which the bankrupt was paying, and compensation to the lessor will be allowed at the rate of the rent reserved in the lease, if this appears fair and reasonable to the court.[395] But this is not always the case. If the trustee continues to occupy and use the premises only for the purpose of storing the goods of the bankrupt therein until they can be sold, he should pay rent to the landlord only to the extent to which the estate in bankruptcy has been benefited by the use of the premises. That is, the landlord cannot recover the

389 White v. Griffing, 44 Conn. 437. And see, supra, § 307.

390 Ex parte Faxon, 1 Low. 404, 4 N. B. R. 32, Fed. Cas. No. 4,704; White v. Griffing, 44 Conn. 437.

391 In re Washburn, 11 N. B. R. 66, Fed. Cas. No. 17,211.

392 In re Yeaton, 1 Low. 420, Fed. Cas. No. 18,133.

393 In re Ten Eyck, 7 N. B. R. 26, Fed. Cas. No. 13,829.

394 In re Abrams, 200 Fed. 1005, 29 Am. Bankr. Rep. 590; In re Hunter, 151 Fed. 904, 18 Am. Bankr. Rep. 477; In re Hinckel Brewing Co., 123 Fed. 942, 10 Am. Bankr. Rep. 484; Bray v. Cobb, 100 Fed. 270, 3 Am. Bankr. Rep. 788; In re Chambers, 98 Fed. 865, 3 Am. Bankr. Rep. 537; In re Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730; In re McGrath, 5 Ben. 183, 5 N. B. R. 254, Fed. Cas. No. 8,808; In re Walton, 1 N. B. R. 557, Fed. Cas. No. 17,131; In re Ives, 18 N. B. R. 28, Fed. Cas. No. 7,116; In re Metz, 6 Ben. 571, Fed. Cas. No. 9,509; In re Croney, 8 Ben. 64, Fed. Cas. No. 3,411; In re Hamburger, 12 N. B. R. 277, Fed. Cas. No. 5,975; In re Hufnagel, 12 N. B. R. 554, Fed. Cas. No. 6,837. And see supra, §§ 211, 307.

395 In re Breck, 8 Ben. 93, 12 N. B. R. 215, Fed. Cas. No. 1,822; In re Appold, 6 Phila. (Pa.) 469, 1 N. B. R. 621, Fed. Cas. No. 499; In re Cronson, 1 Nat. Bankr. News, 474.

amount which would be a proper rental for the premises if used as a place of business by a merchant in trade, but only what they were worth as a mere store-house.[396] And even to this extent, the trustee is chargeable only for the time he actually used the place,[397] and if he surrenders the keys immediately after he receives them, he incurs no liability for rent which accrued before he took possession.[398] And in a case where the premises had been used by the bankrupt for the purpose of storing his goods, under a lease, and the trustee knew nothing of the lease until two or three months after his appointment, when he was applied to for the rent, whereupon he denied his liability and removed the goods, it was held that, as he had not accepted the lease and in fact derived no benefit from the premises, he was not liable to the landlord for any sum.[399]

Whatever may be the sum to which the landlord is entitled for the use of his premises by the trustee, he is not required to prove it as a debt in the bankruptcy proceedings and share with other creditors. It should be settled by the court, paid as a part of the expenses of administering the estate, and entered as a credit item on the trustee's accounts.[400] And if the trustee has no cash in hand with which to pay the landlord's charges, he may be ordered to sell sufficient personal property for that purpose, and this will take precedence of the bankrupt's claim to have his exemptions set apart out of such personalty.[401]

§ 523. Same; Damages for Breach of Contract or Covenant.—The rule stated in a preceding section,[402] that a landlord cannot maintain a claim in bankruptcy against the estate of his tenant for any rent accruing or to accrue after the commencement of the proceedings in bankruptcy, has sometimes worked hardship, and landlords of bankrupt tenants have attempted to prove a claim for the rent which would have accrued under the lease during the remainder of the term, on the theory that such a sum was recoverable as damages for the tenant's breach of his contract or covenant to pay the stipulated rent. But such claims

396 In re Fowler, 8 Ben. 421, Fed. Cas. No. 4,997; In re Lucius Hart Mfg. Co., 17 N. B. R. 459, Fed. Cas. No. 8,592; In re Wheeler, 18 N. B. R. 385, Fed. Cas. No. 17,490; In re Dunham, Fed. Cas. No. 4,145.

397 In re Merrifield, 3 N. B. R. 98, Fed. Cas. No. 9,465. See Longstreth v. Pennock, 9 Phila. (Pa.) 394, 7 N. B. R. 449, Fed. Cas. No. 8,488.

398 In re Criblier, 184 Fed. 338, 25 Am. Bankr. Rep. 765.

399 In re Washburn, 11 N. B. R. 66, Fed. Cas. No. 17,211.

400 In re Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206; In re Butler, 3 Pittsb. (Pa.) 369, 6 N. B. R. 501, Fed. Cas. No. 2,236; In re Webb, 6 N. B. R. 302, Fed. Cas. No. 17,315; In re Rose, 3 N. B. R. 265, Fed. Cas. No. 12,043; In re Hoagland, 18 N. B. R. 530, Fed. Cas. No. 6,545.

401 In re Grimes, 96 Fed. 529, 2 Am. Bankr. Rep. 730.

402 Supra, § 521.

have generally been disallowed.[403] And the same rule is applied where the lease contains an express covenant that, upon the bankruptcy of the lessee, the lessor may terminate the lease and re-enter, and that the lessee shall thereupon be liable for all loss and damage sustained by the lessor on account of the premises remaining unlet or being let for the remainder of the term for a less rent than that reserved in the lease. A claim for the breach of such a covenant does not constitute a "fixed liability absolutely owing at the time of the filing of the petition in bankruptcy," but the liability is altogether contingent, because of the uncertainty as to whether the lessor will re-enter and terminate the lease, and, if he does, whether there will be any loss, and its amount; nor is such a claim provable as a debt "founded upon express contract," under the clause of the statute relating thereto, because this cannot be construed as permitting the proof of claims which are contingent both as to liability and amount at the commencement of the proceedings.[404] And for similar reasons it has been held that a claim for damages against a lessee for abandoning the premises, a dwelling house, so that it was wrongfully entered, and burned and destroyed, is not a provable claim in bankruptcy proceedings.[405]

In the case of the lease of machinery or similar property, the lessor may be entitled to prove a claim for damages for having it thrown back on his hands by the bankruptcy of the lessee. If such a lease provides, for instance, that it shall be terminated upon the bankruptcy of the lessee, and the lessee covenants to pay to the lessor, on breach or termination of the lease, certain sums to cover the cost of transportation of the machinery back to the lessor, an allowance for depreciation, and the expense of repairing it for the use of another lessee, these items will be provable as a claim against the estate of the lessee in bankruptcy.[406] But it has been held that a claim of the lessor of a coal

[403] In re Leslie & Griffith Co. (D. C.) 230 Fed. 465, 36 Am. Bankr. Rep. 744; Ratshesky v. Whiting, 251 Fed. 268, 163 C. C. A. 424, 41 Am. Bankr. Rep. 640; Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 14 Am. Bankr. Rep. 453; In re Arnstein, 101 Fed. 706, 4 Am. Bankr. Rep. 246; Ex parte Houghton, 1 Low. 554, Fed. Cas. No. 6,725; In re Croney, 8 Ben. 64, Fed. Cas. No. 3,411; In re Hufnagel, 12 N. B. R. 554, Fed. Cas. No. 6,837. Compare In re Caloris Mfg. Co., 179 Fed. 722, 24 Am. Bankr. Rep. 609; In re Mullings Clothing Co., 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918A, 539, 38 Am. Bankr. Rep. 189. And see In re Mullings Clothing Co. (D. C.) 252 Fed. 667, 41 Am. Bankr. Rep. 756.

[404] In re Shaffer (D. C.) 124 Fed. 111, 10 Am. Bankr. Rep. 633; In re Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270, 24 Am. Bankr. Rep. 588; In re Ells (D. C.) 98 Fed. 967, 3 Am. Bankr. Rep. 564.

[405] Winfree v. Jones, 104 Va. 39, 51 S. E. 153, 1 L. R. A. (N. S.) 201.

[406] In re Desnoyers Shoe Co., 227 Fed. 401, 142 C. C. A. 97, 36 Am. Bankr. Rep. 51; In re D. C. Clark Shoe Co. (D. C.) 211 Fed. 341, 32 Am. Bankr. Rep. 238. Contra, see In re Jorolemon-Oliver Co., 213 Fed. 625, 130 C. C. A. 217.

mine for the cost of pumping the mine after abandonment of the lease, due to the bankruptcy of the lessee, in view of stipulations in the lease, was for a contingent liability, dependent on continuance of the term, and therefore not provable against the estate.[407]

[407] In re Gallacher Coal Co. (D. C.) 205 Fed. 183, 29 Am. Bankr. Rep. 766.

CHAPTER XXVI

PROOF AND ALLOWANCE OF CLAIMS

§ 524. Necessity of Proof.—There are certain things which a creditor of a bankrupt may do without proving his claim. He may, for example, procure an order for the examination of the bankrupt, when he desires by this means to discover whether it will be worth his while to prove his claim.[1] But if the creditor wishes to participate in the distribution of the bankrupt's estate, through and by means of the bankruptcy proceedings, it is absolutely necessary that he should establish his status and the validity and amount of his claim in the manner which the act prescribes.[2] A secured creditor, it is true, may prefer to rely upon his security and avoid the bankruptcy proceedings altogether, and he will not generally be interfered with by the court unless there is reason to think that something might be realized on the security for the benefit of the general creditors, if it were foreclosed by the trustee in bankruptcy.[3] And there are certain privileged claims which need not

[1] In re Jehu, 94 Fed. 638, 2 Am. Bankr. Rep. 498; In re Walker, 96 Fed. 550, 3 Am. Bankr. Rep. 35.

[2] In re Dunn Hardware & Furniture Co., 132 Fed. 719, 13 Am. Bankr. Rep. 147; In re Kligerman (D. C.) 219 Fed. 758, 33 Am. Bankr. Rep. 608. Where all things necessary to bring a proposed composition before the court for confirmation have been done, the court cannot as a matter of law refuse confirmation on the objection of creditors whose claims, though mentioned in the schedules, have not been proved or allowed. In re French, 181 Fed. 583.

[3] Infra, § 566. And see In re Goldsmith, 118 Fed. 763, 9 Am. Bankr. Rep. 419; In re North Star Ice & Coal Co. (D. C.) 252 Fed. 301, 42 Am. Bankr. Rep. 76; In re Old Oregon Mfg. Co. (D. C.) 236 Fed. 804, 38 Am. Bankr. Rep. 409. A landlord, having a lien or charge for the

be proved, such as taxes. Of taxes it has been said: "The bankruptcy act evidently does not contemplate that they shall be proved like an ordinary debt, providing, as it does, that they shall be paid by the trustee on the order of the court, and that he shall have credit in his accounts upon filing the receipts of the proper officers therefor." [4] And while the lien of a judgment is not lost by failure to prove the claim in bankruptcy,[5] yet a judgment creditor cannot share in the distribution of the estate without doing so.[6]

And where formal proof of the debt is imperative, nothing can avail as a substitute for it. Thus, the finding, in a decree of adjudication in involuntary bankruptcy, that the petitioning creditor has a valid and provable claim to a certain amount, is not conclusive upon the trustee and creditors, so as to dispense with proof of the debt of that creditor, or to preclude questioning his right to participate in the distribution of the estate.[7] And a voluntary litigation against the trustee of a claim against the estate, resulting in a judgment against the trustee, does not create a preferred debt which can be enforced directly against the estate, but its only effect is to liquidate the claim, and the judgment must be proved.[8] Again, the statement of a debt in the schedule of the bankrupt is not a proof of it; it may be stated in fraud and may not exist, or the bankrupt may have made payments upon it or have counterclaims against it. The debt must be proved by the oath of the creditor as the law directs.[9] Furthermore, a creditor who proves his debt in bankruptcy must do so absolutely and according to the directions of the statute and the rules of the court; he will not be allowed to interpose any protest, qualification, or reservation.[10] It should be added that the ordinary proceedings upon the proof and allowance of the demands presented by creditors are a part of the entire proceeding in bankruptcy, and are not to be regarded as so many separate suits at law or in equity.[11]

rent due him on the property of his tenant at the time of the latter's bankruptcy, but the amount of which has not been adjudicated, must, in order to preserve his priority, establish his claim by proof, the same as other creditors. In re Hayward, 130 Fed. 720, 12 Am. Bankr. Rep. 264.

[4] In re Prince & Walter, 131 Fed. 546, 12 Am. Bankr. Rep. 675; In re Harvey, 122 Fed. 745, 10 Am. Bankr. Rep. 567; Paine v. Archer, 233 Fed. 259, 147 C. C. A. 265, 37 Am. Bankr. Rep. 454.

[5] Cottrell v. Pierson, 12 Fed. 805.

[6] In re Rosenberg, 144 Fed. 442, 16 Am. Bankr. Rep. 465. Where a defendant in a judgment is adjudicated a bankrupt, and the plaintiff, with knowledge of the bankruptcy proceedings, fails to prove his judgment therein, he cannot afterwards set off his judgment against a judgment which the bankrupt had recovered against him prior to the bankruptcy proceedings. Shoemaker v. Hurwitz, 56 Pa. Super. Ct. 632.

[7] In re Harper, 175 Fed. 412, 23 Am. Bankr. Rep. 918; In re Cleveland Ins. Co., 22 Fed. 200.

[8] In re Havens, 182 Fed. 367, 25 Am. Bankr. Rep. 116.

[9] In re Davis, 2 N. B. R. 391, Fed. Cas. No. 3,618.

[10] Dutton v. Freeman, 5 Law Rep. 447, Fed. Cas. No. 4,210.

[11] Wiswall v. Campbell, 93 U. S. 347,

§ 525. Effect of Proof.—By proving his claim in bankruptcy a creditor submits the same to the jurisdiction of the court. If he is a nonresident, he will so far accept the jurisdiction of the court over him, by this course, that his obedience to its orders in the bankruptcy proceeding may be enforced by the power of striking out his claim;[12] and if an alien creditor voluntarily appears and proves his claim and receives a dividend thereon, he will be held thereby to have waived the exterritorial immunity from the operation of the bankruptcy law which otherwise would have saved him from the effect of the discharge granted to the bankrupt.[13] Again, the proof of a debt establishes the status of the claimant as a creditor of the bankrupt, connects him with the proceedings, and gives him the right to participate therein to the fullest extent allowed to creditors,[14] so that he may, for example, join in a call for a meeting of creditors,[15] or file charges against the trustee and ask for his removal.[16] Moreover, the proof establishes the validity and provable character of the claim, and its amount, and the right of the creditor to receive dividends thereon, in a manner which will be final and conclusive on all parties, unless an appeal is taken from the allowance of the claim or a motion for its re-examination shall be made and prevail.[17]

The bankruptcy act of 1867 provided that no creditor proving his debt or claim should be allowed to maintain any suit at law or in equity therefor against the bankrupt, but should be deemed to have waived all right of action and suit against him; and it was held that such implied waiver applied to all other courts, as well as the bankruptcy court, and that any suit thereafter commenced by such creditor against the bankrupt should be enjoined.[18] The present statute contains no such provision, although it allows pending suits against the bankrupt to be stayed until the question of his discharge is determined. But unless the creditor is thus controlled by the court, in the interest of the estate as a whole, the doctrine appears to prevail that the filing of a proof of his claim is not a waiver of his right of action on it in another court.[19] Certainly, it

23 L. Ed. 923; Maryman v. S. G. Dreyfus Co., 117 Ark. 17, 174 S. W. 549.

[12] In re Kyler, 2 Ben. 414, 2 N. B. R. 649, Fed. Cas. No. 7,956.

[13] Clay v. Smith, 3 Pet. 411, 7 L. Ed. 723.

[14] See In re Smith, 2 Ben. 113, 1 N. B. R. 243, Fed. Cas. No. 12,971; Dutton v. Freeman, 5 Law Rep. 447, Fed. Cas. No. 4,210; In re Baldwin, 6 Ben. 196, Fed. Cas. No. 795.

[15] In re Back Bay Automobile Co., 158 Fed. 679, 19 Am. Bankr. Rep. 835.

[16] In re Roanoke Furnace Co., 152 Fed. 846, 18 Am. Bankr. Rep. 661.

[17] Sabin v. Larkin-Green Logging Co. (D. C.) 218 Fed. 984, 34 Am. Bankr. Rep. 210. See In re Merrick, 7 N. B. R. 459, Fed. Cas. No. 9,463; American Woolen Co. v. Samuelsohn, 226 N. Y. 61, 123 N. E. 154.

[18] In re Meyers, 2 Ben. 424, Fed. Cas. No. 9,518; Wilson v. Capuro, 41 Cal. 545; Burns v. Buricke (Ky.) 1 S. W. 821.

[19] Bay State Milling Co. v. Susman Feuer Co., 91 Conn. 482, 100 Atl. 19; Beyer v. Sadvoransky, 108 Misc. Rep. 463, 177 N. Y. Supp. 705; In re Buchan's Soap Corp., 169 Fed. 1017, 22 Am. Bankr. Rep. 382; Ringenoldus v. Abresch, 119 Wis.

does not preclude the creditor from proceeding independently against any other person who may be separately liable on the same demand, such as a surety,[20] or another partner in the same firm who is not in bankruptcy;[21] nor will it waive his right to assert and enforce a lien upon particular property,[22] or to claim securities held as collateral,[23] or to pursue an independent remedy given by the state law, as, by the arrest of the debtor in the case of a debt fraudulently contracted.[24] So, if the creditor holds a note containing a waiver of exemptions, his proving the note as an unsecured debt in the bankruptcy proceedings will not debar him from proceeding in a competent court to subject the exempt property to the satisfaction of the demand.[25] As to the specific case of goods obtained by false representations and not paid for, the creditor does not waive his right of action for damages by proving his claim in bankruptcy,[26] but, so far as the bankruptcy proceedings are concerned, he is put to his election either to confirm the sale and assume the position of a creditor for the price or to repudiate the sale and recover the goods; and having made his election, with knowledge of the facts, by proving his claim and voting as a creditor in the bankruptcy proceedings, he is concluded thereby, and cannot afterwards withdraw his claim and demand the goods.[27] On a similar principle, it has been held that where the princi-

410, 96 N. W. 817. See In re E. B. Havens & Co., 186 Fed. 583; Graves v. Neosho Falls Bank, 89 Kan. 179, 131 Pac. 146. Filing a claim in bankruptcy against an agent, without knowledge of an undisclosed principal, does not preclude an action against the latter. Sweeney v. Douglas Copper Co., 149 App. Div. 568, 134 N. Y. Supp. 247. Compare Commercial Bank of Boonville v. Central Nat. Bank (Mo. App.) 203 S. W. 662. After an adjudication of bankruptcy on the voluntary petition of the debtor, creditors who had previously filed an involuntary petition do not lose their right to attack a preferential transfer by filing their claims with the referee. International Silver Co. v. New York Jewelry Co., 233 Fed. 945, 147 C. C. A. 619, 37 Am. Bankr. Rep. 91.

[20] United States v. Schofield Co., 182 Fed. 240; Curtin v. Katchinski, 31 Cal. App. 768, 161 Pac. 764; Tutt v. Fighting Wolf Min. Co. (Mo. App.) 209 S. W. 304.

[21] Robinson v. First Nat. Bank, 98 Tex. 184, 82 S. W. 505.

[22] Coles County v. Haynes & Lyons, 134 Ill. App. 320; Sessler v. Paducah Distilleries Co., 168 Fed. 44, 21 Am. Bankr. Rep. 723; Horton v. Queens County Machinery Corp., 101 Misc. Rep. 31, 166 N. Y. Supp. 662; Joseph Nelson Supply Co. v. Leary, 49 Utah, 493, 164 Pac. 1047. But see Brown v. City Nat. Bank, 72 Misc. Rep. 201, 131 N. Y. Supp. 92.

[23] Thomas v. Taggart, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845, 19 Am. Bankr. Rep. 710. But see First Nat. Bank v. Exchange Nat. Bank, 179 App. Div. 22, 153 N. Y. Supp. 818, 164 N. Y. Supp. 1092.

[24] In re Lewensohn, 104 Fed. 1006, 44 C. C. A. 309, affirming 99 Fed. 73, 3 Am. Bankr. Rep. 594.

[25] In re Loden, 184 Fed. 965, 25 Am. Bankr. Rep. 917; In re Meredith, 144 Fed. 230, 16 Am. Bankr. Rep. 331. See In re Strickland, 167 Fed. 867, 21 Am. Bankr. Rep. 734; Drees v. Armstrong, 180 Iowa, 29, 161 N. W. 40.

[26] Maxwell v. Martin, 130 App. Div. 80, 114 N. Y. Supp. 349; Standard Sewing Mach. Co. v. Alexander, 68 S. C. 506, 47 S. E. 711; Sanger Bros. v. Barrett (Tex. Civ. App.) 221 S. W. 1087; J. K. Orr Shoe Co. v. Upshaw & Powledge, 13 Ga. App. 501, 79 S. E. 362.

[27] Standard Varnish Works v. Haydock, 143 Fed. 318, 74 C. C. A. 456, 16 Am. Bankr. Rep. 286; Lynch v. Bronson (D. C.) 160 Fed. 139, 20 Am. Bankr. Rep.

pal of several joint wrongdoers has become bankrupt, and the creditor has proved his claim as upon an implied contract and received dividends, he cannot thereafter maintain an action in tort against those who assisted the principal in converting the property.[28] But this doctrine is not unquestioned. For instance, in an action against an agent for conversion for the unauthorized investment of plaintiff's funds in certain notes, it was held that the proving of such notes in bankruptcy against the estate of the maker, and the receipt of a dividend thereon, did not estop the plaintiff from proceeding with the action, but especially, in this case, where an order of the court in the case required the proving of the claim and directed that it should be without prejudice.[29] So, where a debtor, in pursuance of a scheme to defraud his creditors, conveyed land, took back a mortgage, and assigned the mortgage, it was considered that a creditor, by filing his proof of claim in the bankruptcy proceeding against the debtor, did not waive his right of action against the assignee of the mortgage for the fraud.[30] In another case, where a creditor of a partnership pledged notes to one of the partners for collection, and that partner, in violation of his agreement to pay the proceeds of the notes to the creditor, used the money to pay off other indebtedness, it was held that the creditor, by accepting a dividend in the bankruptcy proceedings against the partnership, did not waive his right of action against the partner for misappropriation.[31] If the bankrupt does not succeed in his application for a discharge, then a creditor who has proved his claim is remitted, as to any unpaid balance, to his former rights and remedies, and will not be estopped from pursuing any such remedy by the mere fact that he proved his claim and received a dividend in the bankruptcy proceedings.[32] Proof of a claim against a corporation in bankruptcy is not a bar to an action thereon against the stockholders.[33]

409; In re Kaplan & Myers (D. C.) 236 Fed. 260, 37 Am. Bankr. Rep. 630; Edwin Clapp & Son v. Knorr, 106 Kan. 733, 189 Pac. 936. But see, as to reserving a right to reclaim the goods, In re Kaplan & Myers, 241 Fed. 459, 154 C. C. A. 291, 39 Am. Bankr. Rep. 367. And see Smith v. Carukin, 259 Fed. 51, 170 C. C. A. 51, 44 Am. Bankr. Rep. 278.

[28] Shonkweiler v. Harrington, 102 Neb. 710, 169 N. W. 258. And see Werner v. Manson, 107 Misc. Rep. 76, 176 N. Y. Supp. 742.

[29] Parkerson v. Borst (C. C. A.) 264 Fed. 761, 45 Am. Bankr. Rep. 531.

[30] Jasper v. Rozinski, 228 N. Y. 349, 127 N. E. 189.

[31] Beal-Burrow Dry Goods Co. v. Talburt, 139 Ark. 113, 213 S. W. 20.

[32] Frey v. Torrey, 175 N. Y. 501, 67 N. E. 1082; Dingee v. Becker, 9 Phila. (Pa.) 196, 9 N. B. R. 508, Fed. Cas. No. 3,919; Ansonia Brass & Copper Co. v. New Lamp Chimney Co., 53 N. Y. 123, 13 Am. Rep. 476, 10 N. B. R. 355; Hoyt v. Freel, 8 Abb. Prac. N. S. (N. Y.) 220, 4 N. B. R. 131; Valente v. Cosentino, 218 Mass. 125, 105 N. E. 551. But one whose claim has been proved against the estate of a bankrupt, and afterwards expunged, cannot thereafter prosecute it in a state court. Pease v. Bennett, 17 N. H. 124.

[33] Chamberlin v. Huguenot Mfg. Co., 118 Mass. 532; Shellington v. Howland, 53 N. Y. 371; Hall v. Robertson, 213 Ill. App. 147. But see Swofford Bros. Dry Goods Co. v. Owen, 37 Okl. 616, 133 Pac. 193, L. R. A. 1916C, 189.

§ 526. Time of Making Proof.—The statute declares that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or, if they are liquidated by litigation, and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment; provided that the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer." [34] The cases cited in the margin will illustrate the meaning of the phrase "liquidated by litigation" in the above provision.[35] Specifically, it is held that the term "litigation" is not limited to proceedings having for their object only the ascertainment of the amount due on the claim, but includes as well proceedings to ascertain the kind and character or validity of the claim,[36] and hence applies to a case where the creditor has claimed to hold security, and has litigated that question and been defeated, and thereafter attempts to prove as a general creditor.[37] In any case, therefore, where the creditor has a suit pending which will determine the validity, nature, and amount of his claim, he has the right to wait until the end of the litigation and then prove his claim, though more than a year from the date of the adjudication may then have elapsed.[38] In the words limiting the right of proof to a year after the "adjudication," this term, as elsewhere defined in the statute, means the date of the entry of a decree that the defendant is a bankrupt, or, if such decree is appealed from, then the date when such

[34] Bankruptcy Act 1898, § 57n. Under this provision, claims liquidated by litigation can be filed no later than one year and ninety days after the adjudication. In re Edelen, 248 Fed. 580, 40 Am. Bankr. Rep. 834. A creditor is not chargeable with laches in proving his claim, where it is presented within the year allowed by the statute, unless the rights of others have been prejudiced by his delay. In re Dunlap Carpet Co. (D. C.) 206 Fed. 726, 30 Am. Bankr. Rep. 664. Failure of a landlord to present a claim for a lien for rent under Rev. Stat. Tex. art. 5490, until more than 30 days after the adjudication of the tenant as a bankrupt does not defeat his right. Lontos v. Coppard, 246 Fed. 803, 159 C. C. A. 105, 40 Am. Bankr. Rep. 575.

[35] In re Clover Creamery Ass'n, 176 Fed. 907; 100 C. C. A. 377, 23 Am. Bankr. Rep. 884; Powell v. Leavitt, 150 Fed. 89, 80 C. C. A. 43; In re Lyons Beet Sugar Refining Co., 192 Fed. 445, 27 Am. Bankr. Rep. 610; In re Clark, 176 Fed. 955, 24 Am. Bankr. Rep. 388; In re Coventry Evans Furniture Co., 171 Fed. 673, 22 Am. Bankr. Rep. 623; In re Fagan, 140 Fed. 758, 15 Am. Bankr. Rep. 520; In re E. O. Thompson's Sons, 123 Fed. 174, 10 Am. Bankr. Rep. 581; In re Landis, 156 Fed. 318, 19 Am. Bankr. Rep. 420; Moore v. Simms, 257 Fed. 540, 168 C. C. A. 524, 44 Am. Bankr. Rep. 19.

[36] In re Standard Telephone & Electric Co., 186 Fed. 586, 26 Am. Bankr. Rep. 601.

[37] In re Salvator Brewing Co., 188 Fed. 522, 26 Am. Bankr. Rep. 21; First Nat. Bank v. Cameron, 209 Fed. 611, 126 C. C. A. 433, 31 Am. Bankr. Rep. 209, 695.

[38] In re Baird, 154 Fed. 215, 18 Am. Bankr. Rep. 655; In re Keyes, 160 Fed. 763, 20 Am. Bankr. Rep. 183; Powell v. Leavitt, 150 Fed. 89, 80 C. C. A. 43; In re Salvator Brewing Co., 193 Fed. 989, 113 C. C. A. 626, 28 Am. Bankr. Rep. 56; In re Venstrom, 205 Fed. 325, 30 Am. Bankr. Rep. 569; Platt v. Ives, 86 Conn. 690, 86 Atl. 579; In re Louis J. Bergdoll Motor Co., 233 Fed. 410, 147 C. C. A. 346, 37 Bankr. Rep. 501.

decree is finally confirmed.[39] This includes not only the case where an appeal from a decree of adjudication is "affirmed," but also where such an appeal is dismissed.[40] If the debt of the particular creditor was not scheduled in time for proof and allowance, it will not be affected by the discharge of the bankrupt, except when the creditor had notice or actual knowledge of the proceedings in bankruptcy.[41]

The generally accepted rule is that the bar of the statute, as to the time for proving claims, is absolute and prohibitive; that a creditor cannot be permitted under any circumstances whatever to come in for the purpose of making proof after the end of the year (except as specially stated in the statute), but forfeits all right in that behalf by delay; and that the court has no discretionary power to permit the filing of proofs after the end of the year, either nunc pro tunc or otherwise.[42] This rule is applied so strictly that it is held to make no difference that the particular claim was not scheduled and that the creditor had no notice of the proceedings,[43] or that, during the statutory year, the creditor was asserting and litigating the validity of a preference, and was thereby prevented from making his proof,[44] or that a composition had been effected,[45] or that the failure to make proof in due time was caused solely by accident and mistake,[46] or because the creditor was misled and omitted to prove his claim in consequence of the fraudulent concealment of assets by the bankrupt, who listed no property.[47] And a claim cannot be allowed, after the end of the year, under the guise

[39] Bankruptcy Act 1898, § 1, clause 2. Where an adjudication in bankruptcy was vacated and the proceedings dismissed, but the order of vacation was reversed on appeal, and pursuant to mandate the adjudication and proceedings were reinstated, it was held that the court had power to allow a year thereafter for filing claims. In re Malkan (D. C.) 265 Fed. 867, 45 Am. Bankr. Rep. 86.

[40] In re Lee, 171 Fed. 266, 22 Am. Bankr. Rep. 820.

[41] Bankruptcy Act 1898, § 17.

[42] In re Ingalls Bros., 137 Fed. 517, 70 C. C. A. 101, 13 Am. Bankr. Rep. 512; In re Blond, 188 Fed. 452; In re Peck, 168 Fed. 48, 21 Am. Bankr. Rep. 707; In re Hawk, 114 Fed. 916, 52 C. C. A. 536, 8 Am. Bankr. Rep. 71; Bray v. Cobb, 100 Fed. 270, 3 Am. Bankr. Rep. 788; In re Co-operative Knitting Mills, 202 Fed. 1016, 30 Am. Bankr. Rep. 181; In re Knosco, 208 Fed. 201; In re Thompson, 227 Fed. 981, 142 C. C. A. 439, 36 Am. Bankr. Rep. 190; In re Trion Mfg. Co. (D. C.) 224 Fed. 521, 35 Am. Bankr. Rep. 480; In re McCarthy Portable Elevator Co. (D. C.) 205 Fed. 986, 30 Am. Bankr. Rep. 247.

[43] Santa Rosa Bank v. White, 139 Cal. 703, 73 Pac. 577; In re Muskoka Lumber Co., 127 Fed. 886, 11 Am. Bankr. Rep. 761.

[44] In re Leibowitz, 108 Fed. 617, 6 Am. Bankr. Rep. 268; In re Kemper, 142 Fed. 210, 15 Am. Bankr. Rep. 675; In re Rhodes, 105 Fed. 231, 5 Am. Bankr. Rep. 197.

[45] In re Brown, 123 Fed. 336, 10 Am. Bankr. Rep. 588; In re Bickmore Shoe Co. (D. C.) 263 Fed. 926, 45 Am. Bankr. Rep. 24.

[46] In re Sanderson, 160 Fed. 278, 20 Am. Bankr. Rep. 396.

[47] In re Meyer, 181 Fed. 904, 25 Am. Bankr. Rep. 44; In re Peck, 161 Fed. 762, 20 Am. Bankr. Rep. 629; Chapman v. Whitsett, 236 Fed. 873, 150 C. C. A. 135, 38 Am. Bankr. Rep. 424.

of an amendment or substitute for a prior claim, filed in due time but afterwards withdrawn.[48]

But this severe rule has been felt to work hardship in numerous cases, and the courts have often attempted to mitigate it in favor of creditors who were not to blame for the delay. Thus, it has been held that the statute should not be so construed as to prevent proof of a valid claim after the expiration of the year, where objection is not made by any other creditor or by the trustee, but by the bankrupt alone, and the delay was caused by the latter's own fraud.[49] So where the peculiar circumstances of the case rendered it impossible to file the claim for proof within the limited time.[50] And it has been thought that where a preferred creditor is compelled to surrender a voidable preference, he should thereafter be allowed to prove his claim before the estate is finally settled, though more than a year after the adjudication.[51] And in a case where the bankruptcy court ordered a sale of the bankrupt's estate, on condition that the purchaser should pay to each unsecured creditor a specified per cent of his claim, and the purchaser paid the money to the receiver, who turned it over to the trustee, who declared a dividend to the unsecured creditors, but excluding one creditor on the ground that he had failed to prove his claim within the statutory time, it was held that the court must permit the filing nunc pro tunc of an amended formal proof of the claim.[52] Further, this limitation of time is not binding on the United States as a creditor,[53] nor does it apply to a claim of ownership of property adverse to the bankrupt and to his estate.[54] And as to specific claims to funds in the possession of the trustee, it is held that the court of bankruptcy may limit the time for claimants to prove their title to less than a year, provided that notice is given to them and a reasonable length of time accorded.[55]

The present bankruptcy statute also declares that if any creditors do not make proof of their claims until after dividends have been de-

[48] In re E. O. Thompson's Sons, 123 Fed. 174, 10 Am. Bankr. Rep. 581. But a claim the proof of which was defective because it lacked a statement of the official character of the officer signing the jurat, and was returned to the creditor's attorney for correction, was held properly allowed, though not redelivered to the referee for two years. In re Haskell (D. C.) 228 Fed. 819, 36 Am. Bankr. Rep. 428.

[49] In re Towne, 122 Fed. 313, 10 Am. Bankr. Rep. 284.

[50] In re Fagan, 140 Fed. 758, 15 Am. Bankr. Rep. 520.

[51] In re Otto F. Lange Co., 170 Fed. 114, 22 Am. Bankr. Rep. 414.

[52] In re Basha (C. C. A.) 200 Fed. 951, 29 Am. Bankr. Rep. 225.

[53] In re Stoever, 127 Fed. 394, 11 Am. Bankr. Rep. 345; United States v. Birmingham Trust & Savings Co., 258 Fed. 562, 169 C. C. A. 502, 43 Am. Bankr. Rep. 430.

[54] Nauman Co. v. Bradshaw, 193 Fed. 350, 113 C. C. A. 274, 27 Am. Bankr. Rep. 565.

[55] In re T. A. McIntyre & Co., 176 Fed. 552, 100 C. C. A. 140, 24 Am. Bankr. Rep. 4; In re Lathrop, Haskins & Co., 223 Fed. 912, 139 C. C. A. 392, 34 Am. Bankr. Rep. 739.

cleared and paid to the others, the right of such others shall not be affected thereby, but the late proving creditors are to receive dividends equal in amount to those already received by the other creditors, if the estate amounts to so much, before such other creditors are paid any further dividends.[56] The law plainly intends that the first proof of claims shall ordinarily take place at the first meeting of creditors. But it is held that creditors are entitled to prove their claims before the day of such first meeting, so as to make themselves parties to the proceeding and be entitled to an order for the examination of the bankrupt.[57] The presentation and delivery of proof of a claim to the trustee in bankruptcy, within the limited time, is a sufficient filing of it.[58] And where a creditor prosecutes a suit or petition against the trustee, and recovers judgment, his claim is so far before the court that it may be considered as "proved" for the purpose of saving the bar of the statute.[59] So, a claim duly proved within the year may be increased after that time where it is made necessary by a requirement that the creditor shall return preferences received as a condition to its allowance.[60] And where a claim against a bankrupt's estate was originally filed within the year, but was disallowed, and subsequent proceedings showed that it should have been filed for a larger amount, it was held that the amendment filed after the year had expired was not barred by the one-year limitation.[61] This limitation is restricted, according to its spirit and purpose, to claims which existed as such at the time of the adjudication, that is, claims which were then available against the bankrupt himself. It does not apply to expenses or liabilities incurred by the receiver or the trustee after the adjudication, such, for example, as a landlord's claim for rent of premises while they were occupied by the trustee.[62]

§ 527. **Persons Authorized to Prove.**—Any person being the lawful owner of a claim against the bankrupt may prove it against his estate, and the fact that another has previously filed a claim as a creditor on the same account does not prejudice his right to offer proof of it.[63] Where various claims of the same general order have been pooled or placed in the hands of a committee or a trustee, they may be proved

[56] William Openhym & Sons v. Blake, 157 Fed. 536, 19 Am. Bankr. Rep. 639; Bankruptcy Act 1898, § 65c. See In re Coulter (D. C.) 206 Fed. 906, 30 Am. Bankr. Rep. 75.

[57] In re Patterson, 1 Ben. 448, 1 N. B. R. 100, Fed. Cas. No. 10,814.

[58] J. B. Orcutt Co. v. Green, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. Ed. 390, 17 Am. Bankr. Rep. 72; Orinoco Iron Co. v. Metzel, 230 Fed. 40, 144 C. C. A. 338, 36 Am. Bankr. Rep. 247.

[59] Buckingham v. Estes, 128 Fed. 584, 63 C. C. A. 20; In re Strobel, 163 Fed. 787, 20 Am. Bankr. Rep. 884.

[60] In re Shiebler, 165 Fed. 363, 21 Am. Bankr. Rep. 309.

[61] In re Hamilton Automobile Co., 209 Fed. 596, 126 C. C. A. 418, 31 Am. Bankr. Rep. 205.

[62] In re Green (D. C.) 231 Fed. 253, 36 Am. Bankr. Rep. 188.

[63] In re James Dunlap Carpet Co., 171 Fed. 532, 22 Am. Bankr. Rep. 788; In re Dunlap Carpet Co., 206 Fed. 726, 30 Am. Bankr. Rep. 664.

by such representative,[64] but the fact that a series of bonds issued by the bankrupt corporation are secured by a mortgage to a trustee does not exclude the right of individual bondholders to prove their several claims.[65] Where the creditor has become bankrupt, his trustee in bankruptcy is the proper person to prove the claim against the debtor's estate.[66] There are also cases where two or more creditors may join as provants or petitioners, as where joint indorsers of the bankrupt's note have taken it up, each advancing half the necessary funds.[67] There is no reason why a county or other municipal corporation should not file and prove a claim against an estate in bankruptcy.[68] But a creditor whose claim is one for unliquidated damages should first make application to the court to direct the manner in which it shall be liquidated, and when that is done, he may file and prove his claim.[69]

In case the creditor is a partnership, either of the partners may prove the claim in the manner provided by law. It is only necessary that the deposition proving the debt should contain a sworn statement that the deponent is a member of the firm, with such slight changes of phraseology as are rendered necessary by the circumstances.[70] When the debt is due to a corporation, the rule is that "the deposition shall be made by the treasurer, or if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer." [71] But it is held, on the broad general principle that any person who is authorized to give an acquittance of a debt is entitled to prove that debt in bankruptcy, that a receiver appointed to take charge of a corporation upon its dissolution, or upon proceedings in bankruptcy or insolvency against it, in either a state or federal court, may properly make proof of a debt due to such corporation from a bankrupt debtor.[72] The fact that the

[64] In re Salvator Brewing Co., 188 Fed. 522, 26 Am. Bankr. Rep. 21; In re E. T. Kenney Co., 136 Fed. 451, 14 Am. Bankr. Rep. 611.

[65] Mackay v. Randolph Macon Coal Co., 178 Fed. 881, 102 C. C. A. 115, 24 Am. Bankr. Rep. 719. See In re A. J. Ellis, Inc., 252 Fed. 483, 164 C. C. A. 399, 42 Am. Bankr. Rep. 387.

[66] Bankruptcy Act 1898, § 57m.

[67] In re Farmers' Supply Co., 170 Fed. 502, 22 Am. Bankr. Rep. 460.

[68] In re Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496.

[69] In re Silverman, 101 Fed. 219, 4 Am. Bankr. Rep. 83.

[70] General Order No. 21, clause 1; Form No. 24. Where a partnership is in bankruptcy, the firm may prove against an individual partner and vice versa. Bankruptcy Act 1898, § 5g.

[71] General Order No. 21, clause 1. This order was amended, Nov. 1, 1915, by adding this provision: "If the treasurer or corresponding officer is not within the district wherein the bankruptcy proceedings are pending, the deposition may be made by some officer or agent of the corporation having knowledge of the facts." As to proof by the president of a corporation, who performs the ordinary duties of a treasurer, see In re Eisenberg (D. C.) 251 Fed. 427, 40 Am. Bankr. Rep. 864.

[72] Ex parte Norwood, 3 Biss. 504, Fed. Cas. No. 10,364; In re Republic Ins. Co., 8 N. B. R. 197, Fed. Cas. No. 11,705; In re Baxter, 18 N. B. R. 560, Fed. Cas. No. 1,121; Dight v. Chapman, 44 Or. 265, 75 Pac. 585, 65 L. R. A. 793.

president of a corporation has ceased to be a stockholder cannot be raised as an objection to proof of a claim by him in favor of the corporation against his estate in bankruptcy.[73] If the claim to be proved is due to a state, the proof should be made by the state treasurer or by some officer holding a relation to the state government similar to that which a treasurer or cashier bears to a business corporation of which he is such officer.[74] Proof of claim for wages of labor due to a minor is properly made by his father, at least if there is nothing to show emancipation.[75] And one of two or more executors may sign and verify a claim on behalf of the estate.[76]

§ 528. **Proof by Agent or Attorney.**—The present bankruptcy act provides that a proof of claim shall be "signed by a creditor"; but then, another clause provides that the term "creditor" may include "his duly authorized agent, attorney, or proxy."[77] And although the official form (No. 35) provided for the proof of a claim by agent or attorney requires the deponent to state the reason why the deposition "can not" be made by the claimant in person, yet the General Order (No. 21) which is of higher authority than the form, is fully satisfied if the deposition sets forth the reason why it "is not" made by the claimant in person. Upon the whole, therefore, we conclude that if there is any good reason for the proof being made by an agent or attorney it may be so made, notwithstanding it would not have been entirely impossible for the claimant to make the proof in person.[78] Thus, as held in some of the cases under the former statute, where the creditor himself has no personal knowledge of the facts respecting the debt, proof may be made by an agent who has had exclusive charge and control of the same, and who has personal knowledge of all the facts required to be sworn to in making the proof.[79] Authority to prove a debt in bankruptcy proceedings in behalf of the creditor may be conferred by a formal power of attorney, which must be "proved and acknowledged before a referee, or a United States commissioner or a notary public."[80] But if the creditor, at the time of making

[73] In re Morgan, 8 Ben. 186, Fed. Cas. No. 9,797.

[74] In re Corn Exchange Bank, 15 N. B. R. 216, Fed. Cas. No. 3,243.

[75] In re Haskell (D. C.) 228 Fed. 819, 36 Am. Bankr. Rep. 428.

[76] In re Schaffner (C. C. A.) 267 Fed. 977, 45 Am. Bankr. Rep. 681.

[77] Compare Bankruptcy Act 1898, § 57, with Id., § 1, cl. 9.

[78] While the statute allows proof of claim to be made by an agent, it is not contemplated that proof of claim can be so made when the principal is present and able to file his own proof. And a claim will be disallowed where the proof is made by an agent as the principal, without disclosing the agency, for it is in that case false. In re Collins (D. C.) 235 Fed. 937, 37 Am. Bankr. Rep. 692.

[79] In re Watrous, 14 N. B. R. 258, Fed. Cas. No. 12,270.

[80] General Order No. 21, par. 5. Under the former statute, a power of attorney to prove a debt in bankruptcy was not required to be acknowledged. In re Barnes, 1 Low. 560, Fed. Cas. No. 1,012; In re South Boston Iron Co., 4 Cliff. 343, Fed. Cas. No. 13,183. An attorney in fact may prepare and present

the power of attorney, is in a foreign country, the instrument may be acknowledged before a United States consul in such country.[81] It is also held that a power of attorney duly executed to either of three persons as substitutes, but acknowledged before one of them, though void as to that one, may lawfully be executed by either of the other two.[82]

Guardians, executors, administrators, and all other persons acting in a representative capacity, may make proof in bankruptcy of the claims of the persons or estates represented by them.[83] But it seems that the bankrupt himself cannot act as the trustee or representative of a creditor in proving the latter's claim against his own estate and securing its allowance.[84] But while the attorney for the bankrupt should not be permitted to appear in the proceedings as attorney for a creditor also, yet, in the absence of a rule of court on the subject, a claim duly proved against the bankrupt's estate should not be rejected merely because filed for the creditor by the bankrupt's attorney, it being apparent that the attorney acted in entire good faith.[85]

§ 529. **Proof by Assignee of Claim.**—The assignee of a nonnegotiable chose in action may prove it against the estate of the debtor in bankruptcy upon his own deposition, and it is not necessary to the sufficiency of the proof that the deposition of the assignor should be added, if the assignment was made before the commencement of the proceedings in bankruptcy, although, in that case, the deposition should show the name of the original creditor.[86] Under the provision of the law which requires the proof of debt to set forth the "consideration" of the claim, it is necessary, in the case of a simple chose in action, or a contract for the payment of money not negotiable, in the hands of an assignee or purchaser of the same, that the proof should state the consideration upon which it rested as between the original parties, and

a proof of claim, but only for one particular creditor; that is, he may not engage in what is practically the business of an attorney at law by collecting and managing large numbers of claims. In re H. E. Ploof Machinery Co. (D. C.) 243 Fed. 421, 38 Am. Bankr. Rep. 795.

[81] In re Sugenheimer, 91 Fed. 744, 1 Am. Bankr. Rep. 425. This is in view of the fact that section 20 of the bankruptcy law provides that oaths required by the act may be administered by "diplomatic or consular officers of the United States in any foreign country."

[82] In re Sugenheimer, 91 Fed. 744, 1 Am. Bankr. Rep. 425.

[83] In re Republic Ins. Co., 8 N. B. R. 197, Fed. Cas. No. 11,705.

[84] In re Mitteldorfer, Chase, 276, 3 N. B. R. 39, Fed. Cas. No. 9,674.

[85] In re Kimball, 100 Fed. 777, 4 Am. Bankr. Rep. 144.

[86] In re McCarthy Portable Elevator Co., 205 Fed. 986, 30 Am. Bankr. Rep. 247; Ex parte Davenport, 1 Low. 384, 3 N. B. R. 312, Fed. Cas. No. 3,586; In re Kenny (D. C.) 269 Fed. 54, 46 Am. Bankr. Rep. 214. The fact that certain creditors have made a champertous agreement with a third party for the collection of their debts from the bankrupt furnishes no ground for the disallowance of such claims, on petition of a creditor. In re Lathrop, 3 Ben. 490, 3 N. B. R. 410, Fed. Cas. No. 8,103.

not merely the consideration upon which it passed to the present holder. But negotiable paper, acquired in good faith before maturity, may be proved against the estate of the maker in bankruptcy by an indorsee upon showing a valid consideration paid by him; and such showing, in such a case, will be held to be a compliance with the requirement of the statute, and it will not be required of the holder to show that, as between the maker of the paper and its original payee, there was a good and valid consideration, or what that consideration was.[87]

Even after the commencement of proceedings in bankruptcy against a debtor, claims against him may be assigned and transferred. There is nothing in the statute or its policy to restrain the negotiability of debts. On the contrary the law recognizes this as something that will take place and makes provision for proof accordingly.[88] And where, after the filing of a petition in bankruptcy by or against the debtor, a creditor transfers or assigns his debt to another, the debt is to be proved by the person who is the owner of it at the time of making proof; but in this case, the deposition of the owner must be "supported" by a deposition of the person who was the owner at the time of the commencement of the proceedings, setting forth the true consideration of the debt and the particulars as to its being secured or unsecured, and the language of the form prescribed for the proof of debts will have to be modified to suit the circumstances of the case.[89] It is held that the receiver of the property of a creditor is an "assignee" of the debts due to such creditor, and may prove the debt in bankruptcy in the manner contemplated for proof by a conventional assignee.[90] But a mere agent holding negotiable paper, not as owner or indorsee, but simply for his principal, cannot prove it except in the name and for the benefit of the real owner, and not at all when the owner is in a situation to make the proof for himself.[91]

§ 530. Proof by Persons Contingently Liable for Bankrupt.—The bankruptcy law provides that "whenever a creditor, whose claim against

[87] In re Lake Superior Ship-Canal, R. & I. Co., 10 N. B. R. 76, Fed. Cas. No. 7,998.

[88] In re Murdock, 1 Low. 362, Fed. Cas. No. 9,939. And see In re Sweetser (D. C.) 131 Fed. 567. Where assignment is made of a claim which has already been proved and allowed in the bankruptcy proceedings, it is neither necessary nor proper for the assignee to make a fresh proof of it in his own name; and this is true, even though the assignor questions the fact or validity of the assignment. In re Breakwater Co. (D. C.) 232 Fed. 375, 36 Am. Bankr. Rep. 752; In re Louis J. Bergdoll Motor Co. (D. C.) 230 Fed. 248, 36 Am. Bankr. Rep. 265. The allowance by the referee of the transfer of a claim against the bankrupt estate is binding upon other creditors, who might have opposed it, whether they did so or not. In re Sweetser (D. C.) 240 Fed. 167.

[89] In re McCarthy Portable Elevator Co. (D. C.) 205 Fed. 986, 30 Am. Bankr. Rep. 247; In re Murdock, 1 Low. 362, Fed. Cas. No. 9,939; In re Ford, 18 N. B. R. 426, Fed. Cas. No. 4,932; General Order No. 21, clause 3.

[90] In re Mills, 17 N. B. R. 472, Fed. Cas. No. 9,612

[91] In re Saunders, 2 Low. 444, 13 N. B. R. 164, Fed. Cas. No. 12,371.

a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor." And in execution of this provision, the General Orders in bankruptcy provide that "the claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable, but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish pro tanto the original debt.[92]

§ 531. **Form and Sufficiency of Deposition.**—The bankruptcy act provides that "proof of claims shall consist of a statement under oath, in writing, signed by a creditor, setting forth his claim, the consideration therefor, and whether any, and, if so, what, securities are held therefor, and whether any, and, if so, what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor." To this the general orders in bankruptcy add the requirement that the proof shall be made by a "deposition" which shall be correctly entitled in the court and in the cause; and the officially prescribed forms contain precedents for proofs of claims in various circumstances.[93] Depositions to prove claims must contain the averments and the particular details required by the statute, and must be made by the party authorized, and conform substantially to the official forms.[94] Thus, a claim is not duly proved unless it appears from the deposition that a debt exists which the creditor has a present right to have paid out of the bank-

[92] Bankruptcy Act 1898, § 57i; General Order No. 21, cl. 4. A creditor whose claim is secured by the liability of a co-debtor of the bankrupt, or one who is a guarantor or surety for him, is not obliged, by anything in the law, to prove his claim and proceed in the bankruptcy proceedings. If he chooses, he may rely wholly upon the secondary liability, neglecting the bankrupt's estate, and the liability of the guarantor or surety will not be affected by the bankrupt's discharge. But if the creditor takes this course, the act very justly gives to the person contingently or secondarily liable for the bankrupt a right to prove the claim in the name of the creditor, and to pay it wholly or in part, with the right of subrogation. If, then, he thinks the bankrupt's estate may be made to pay a part of the claim, this is the course for him to pursue, for he will thus indemnify himself, to the extent of the dividends received, though remaining liable to the creditor for the unpaid balance. See In re Levy, 2 Ben. 169, 1 N. B. R. 327, Fed. Cas. No. 8,297.

[93] Bankruptcy Act 1898, § 57; General Order No. 2; Forms Nos. 31–37. The word "deposition," as here used, is not to be understood as requiring the same sort of desposition by which the testimony of a witness is taken. The requirements, both of the act and the general order, are satisfied by a paper prepared by the creditor himself or by his attorney, containing all that is necessary, in the form of an affidavit. See In re Merrick, 7 N. B. R. 459, Fed. Cas. No. 9,463.

[94] In re Port Huron Dry Dock Co., 14 N. B. R. 253, Fed. Cas. No. 11,293. Though a proof of debt fails to state one of the essential facts required by good

rupt's estate.[95] But it is not the duty of the refereee in bankruptcy to examine claims filed further than to discover whether or not the deposition contains the formal requisites prescribed by the statute, the general order, and the forms.[96] But an allegation on information and belief, on a vital point in a proof of claim in bankruptcy, is not sufficient as proof of such allegation.[97] And the absence of a date to the creditor's proof of claim is a fatal defect.[98]

As to the particular averments of the deposition, it is, in the first place, strictly required and imperatively necessary that it should state whether the claim is secured or unsecured; and if the creditor has a lien on property to secure it, he must disclose its particular character, so that it can be identified, and, if necessary, liquidated by the trustee in bankruptcy.[99] It is also necessary to set forth the fact and the particulars of any partial payments which may have been made upon the claim.[100] And it is indispensable that the consideration for the claim, and the particulars of the consideration, should be duly and adequately stated in the deposition.[101] The statements in regard to the consideration must be sufficiently full and specific to enable other creditors to pursue proper and legitimate inquiries as to the fairness and legality of the claim; if too meagre or general to serve this purpose, they will be held inadequate, and the proof of debt will be expunged, unless leave is given to amend.[102]

pleading, yet if it complies apparently with the forms in bankruptcy and the orders and the statute itself, it is the duty of the referee to allow it. In re Ankeny, 1 Nat. Bankr. News, 511. The fact that, at the head of a proof of claim, the title of the court is not given as required by the general order and form, is not sufficient to vitiate the proof so far as to prevent the creditor from participating in the creditors' meeting. In re Blue Ridge Packing Co., 125 Fed. 619, 11 Am. Bankr. Rep. 36. A proof of claim need not observe all the formalities required in ordinary pleadings. Kelsey v. Munson, 198 Fed. 841, 117 C. C. A. 483, 28 Am. Bankr. Rep. 520.

[95] In re Walton, Deady, 510, Fed. Cas. No. 17,129. As to proof of claim against bankrupt partnership and the individual partners, see Adams v. Brown, 226 Fed. 688, 141 C. C. A. 444, 35 Am. Bankr. Rep. 302; In re Collins (D. C.) 215 Fed. 247.

[96] In re Ankeny, 1 Nat. Bankr. News, 511. The referee has power to require a bill of particulars of an item in the claim, whether liquidated or unliquidated, and the matter is within his judicial discretion. In re Henry Siegel Co., 223 Fed. 368, 35 Am. Bankr. Rep. 128.

[97] In re United Wireless Telegraph Co., 201 Fed. 445, 29 Am. Bankr. Rep. 848.

[98] In re Blue Ridge Packing Co., 125 Fed. 619, 11 Am. Bankr. Rep. 36.

[99] Cunningham v. Cady, 13 N. B. R. 525, Fed. Cas. No. 3,480; In re Bridgman, 1 N. B. R. 312, Fed. Cas. No. 1,866; Emerine v. Tarault, 219 Fed. 68, 134 C. C. A. 606, 34 Am. Bankr. Rep. 55.

[100] In re Girvin, 160 Fed. 197, 20 Am. Bankr. Rep. 490.

[101] In re Elder, 1 Sawy. 73, 3 N. B. R. 670, Fed. Cas. No. 4,326. A claim for legal services rendered to the bankrupt is insufficient if it does not show the nature of the services, their value, or the time consumed. In re Hudson Porcelain Co. (D. C.) 225 Fed. 325, 35 Am. Bankr. Rep. 18. Where a creditor holds more than one note against the bankrupt they should be proved as a single claim. Frederick v. Citizens' Nat. Bank, 231 Fed. 667, 145 C. C. A. 553, 37 Am. Bankr. Rep. 22.

[102] In re United Wireless Telegraph Co., 201 Fed. 445, 29 Am. Bankr. Rep. 848; In re Goble Boat Co., 190 Fed. 92, 27 Am. Bankr. Rep. 48; In re Griffin,

A proof of debt on a promissory note is not sufficient although it sets out the note in full, unless it also states what was the consideration and whether any payments have been made thereon.[103] But this rule does not apply to a debt which has been reduced to judgment; that is to say, it is not necessary in proving on the judgment to recite or describe the consideration of the original debt, as that is now merged in the judgment.[104] In the case of an open account, the rules provide that the deposition "shall state when the debt became or will become due; and if it consists of items maturing at different dates, the average due date shall be stated, in default of which it shall not be necessary to compute interest on it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon." [105]

"Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim." [106] A judgment is not an "instrument of writing" within the meaning of this provision.[107] Consequently if the creditor's claim is founded on a judgment, it will not be necessary for him to file with the proof of the claim a transcript of the judgment, but the deposition should contain a brief recital of the judgment, such as will enable other parties interested to identify it and to consult the record of it in the court where rendered. When, therefore, the creditor held a promissory note made by the bankrupt and has already recovered a judgment upon it, if he proves his claim on the note, it must be filed with the deposition, but if he proves a claim on the judgment, instead of the note, the note need not be produced, because it is merged in the judgment as a debt of a higher order, and the judgment need not be set out in full in the deposition, nor accompany it, because it is not an "instrument of

188 Fed. 389; In re Watertown Paper Co., 169 Fed. 252, 94 C. C. A. 528, 22 Am. Bankr. Rep. 190; In re Coventry Evans Furniture Co., 166 Fed. 516, 22 Am. Bankr. Rep. 272; In re Morris, 154 Fed. 211, 18 Am. Bankr. Rep. 828; In re Blue Ridge Packing Co., 125 Fed. 619, 11 Am. Bankr. Rep. 36; In re Stevens, 107 Fed. 243, 5 Am. Bankr. Rep. 806; In re Scott, 93 Fed. 418, 1 Am. Bankr. Rep. 553.

[103] In re Loder, 4 Ben. 125, 3 N. B. R. 655, Fed. Cas. No. 8,456.

[104] In re Mott, Fed. Cas. No. 9,878b.

[105] General Order No. 21, clause 1.

[106] Bankruptcy Act 1898, § 57a. But see Kelsey v. Munson (C. C. A.) 198 Fed. 841, 28 Am. Bankr. Rep. 520, holding that all the formalities required in ordinary pleadings do not apply to proofs in bankruptcy, and that a failure to file a written instrument upon which a claim is founded does not raise a presumption against the existence of the writing. Where claimant had made various loans to the bankrupt, giving him a check for the amount in each instance, the items cannot be deemed founded on an instrument in writing, in such sense as to necessitate setting forth the various checks in the proof of claim. In re Keller (D. C.) 252 Fed. 942, 42 Am. Bankr. Rep. 601.

[107] This is shown not only by the con-

writing."[108] If a promissory note of the bankrupt was made payable in coin, the holder, in proving his debt in the bankruptcy, should set forth that fact in his deposition, and the demand should be entered upon the books of the trustee as payable in the stipulated currency.[109] In proving a claim founded upon a note in which only the initials of the Christian names are given, the full names must appear.[110] Finally, it should be observed that the creditor, in making out his proof of claim, will do well to add his proper address, in order that notices thereafter mailed may duly reach him, for these notices are to be sent to the creditors by mail "to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors."[111]

§ 532. **Acknowledgment of Deposition.**—Depositions in support of claims filed in bankruptcy must be verified. The following provision of the statute is applicable to this matter: "Oaths required by this act, except upon hearings in court, may be administered by (1) referees, (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken, and (3) diplomatic or consular officers of the United States in any foreign country."[112] A notary public is authorized to administer the oath to a proof of claim, and such oath is sufficiently authenticated, prima facie, by what purport to be the notary's official signature and seal, although made in a different state from that in which the proceedings are pending, and without regard to the special requirements of the statutes of either state.[113] And it has been held that it is not a valid objection to the proof of a claim that the officer taking the acknowledgment was the creditor's own attorney.[114]

§ 533. **Receiving and Filing Proofs.**—The mere execution and acknowledgment of a proof of claim is not sufficient to establish the status

text, but further by the distinction which the act makes in the section relating to provable debts (§ 63) where it speaks of a "fixed liability evidenced by a judgment or an instrument in writing." Under a statute providing that, where a pleading is founded on any "written instrument," the original thereof or a copy must be filed with the pleading, it is held that a judgment is not a written instrument. Lytle v. Lytle, 37 Ind. 281.

[108] In re Knoepfel, 1 Ben. 398, 1 N. B. R. 70, Fed. Cas. No. 7,892. See In re Jaycox, 7 N. B. R. 303, Fed. Cas. No. 7,240; In re Haskell (D. C.) 228 Fed. 819, 36 Am. Bankr. Rep. 428.

[109] In re Elder, 1 Sawy. 73, 3 N. B. R. 670, Fed. Cas. No. 4,326.

[110] In re Valentine, 4 Biss. 317, 12 N. B. R. 389, Fed. Cas. No. 16,812.

[111] Bankruptcy Act 1898, § 58a.

[112] Bankruptcy Act 1898, § 20. In regard to acknowledging the deposition in a foreign country, see also In re Lynch, 16 N. B. R. 38, Fed. Cas. No. 8,635.

[113] In re Pancoast, 129 Fed. 643, 12 Am. Bankr. Rep. 275. See In re Nebe, 11 N. B. R. 289, Fed. Cas. No. 10073; In re McKibben, 12 N. B. R. 97, Fed. Cas. No. 8,859.

[114] In re Kimball, 100 Fed. 777, 4 Am. Bankr. Rep. 144. Compare In re Nebe, 11 N. B. R. 289, Fed. Cas. No. 10,073; In re Keyser, 9 Ben. 224, Fed. Cas. No. 7,748.

of the creditor. It is further necessary that the claim, thus proved, should be filed or presented in the bankruptcy proceeding.[115] This is ordinarily done by the creditor in person, or by his attorney or some one else authorized to act for him. The bankrupt's attorney should not be employed for this purpose. He cannot properly represent any creditor. But the mere fact that he filed a claim for a creditor will not be sufficient to justify its rejection if the claim was duly proved and it appears that he acted in entire good faith.[116] The practice in regard to the filing and custody of proofs of claims is to be learned from several provisions of the statute and the general orders. First, "claims, after being proved, may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee if the case has been referred."[117] Again, "proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with referee or with the clerk."[118] The claimant may hand his proof to the trustee, if one has been appointed, but "proofs of debt received by any trustee shall be delivered to the referee to whom the case is referred."[119] And the handing of a verified claim to an employé of the trustee in the latter's office does not constitute a filing of the claim, where it was not in fact filed and it does not appear in what capacity the person with whom it was left was employed by the trustee.[120] And a trustee in bankruptcy cannot file with himself his proof of his own claim against the bankrupt estate, nor will the delivery of such claim to his attorney, to be filed with the referee be deemed the equivalent of a delivery to such referee.[121] Finally, it is provided that "the referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors."[122] From these various provisions it appears that the referee in bankruptcy is the proper person to receive the proofs of debts; that, if they are filed in the clerk's office, they must be transmitted to the referee; that the referee is to retain the custody of the depositions until the termination of the case; and that it devolves upon the trustee to call on the referee and procure a list of the proved claims.

[115] In re French, 181 Fed. 583, 25 Am. Bankr. Rep. 77.

[116] In re Kimball, 100 Fed. 777, 4 Am. Bankr. Rep. 144.

[117] Bankruptcy Act 1898, § 57c.

[118] General Order No. 20.

[119] General Order No. 21. As to the authority of the Supreme Court to make this order, see J. B. Orcutt Co. v. Green, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. Ed. 390, 17 Am. Bankr. Rep. 72.

[120] In re Lathrop, Haskins & Co., 197 Fed. 164, 116 C. C. A. 601, 28 Am. Bankr. Rep. 756.

[121] J. B. Orcutt Co. v. Green, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. Ed. 390, 17 Am. Bankr. Rep. 72.

[122] General Order No. 24.

The referee will not generally refuse to receive a proof of debt which appears on its face to have been taken before a proper officer and to be correct in form and substance.[123] But the statute is not satisfied by the creditor's merely swearing to the validity of his claim. A creditor who, after making a deposition to prove his debt, retains possession of the deposition, and does not allow it to go upon the files, cannot be considered as a creditor who has proved his debt.[124] On the other hand, a creditor cannot be prejudiced by the loss from the files of his proof of debt; he will still be entitled to receive the notices provided for by the act.[125]

§ 534. Allowance or Disallowance of Proved Claims.—The bankruptcy law provides that "claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."[126] Undoubtedly the word "court," as here used, includes the referee, especially as another part of the act provides that, at the first meeting of creditors, "the judge or referee shall preside and may allow or disallow the claims of creditors there presented."[127] The first meeting of creditors here spoken of means the first meeting after the adjudication, and claims cannot be allowed without a meeting of the creditors.[128] It should be observed that the "proof" and the "allowance" of claims are separate and distinct steps, so that, for instance, if a claim is duly proved and filed within the year granted for that purpose, it is enough to take it out of the statutory limitation, and its allowance or disallowance may come later.[129] And further, the filing of a proved claim does not necessarily constitute an allowance thereof, since, until a direct or indirect order of allowance is made, objections may properly be filed.[130] But a proof of debt, made in the mode re-

[123] In re Merrick, 7 N. B. R. 459, Fed. Cas. No. 9,463; In re Ankeny, 1 Nat. Bankr. News, 511. See In re Loder, 4 Ben. 125, 3 N. B. R. 655, Fed. Cas. No. 8,456. The referee has no right to refuse to file a claim presented, on the ground of its informality. In re Drexel Hill Motor Co. (D. C.) 270 Fed. 673, 46 Am. Bankr. Rep. 411.

[124] In re Sheppard, 1 N. B. R. 439, Fed. Cas. No. 12,753.

[125] In re Friedlob, 19 N. B. R. 122, Fed. Cas. No. 5,118.

[126] Bankruptcy Act 1898, § 57d. See In re James Dunlap Carpet Co., 171 Fed. 532, 22 Am. Bankr. Rep. 788; Keith v. Kilmer (C. C. A.) 272 Fed. 643, 47 Am. Bankr. Rep. 92.

[127] Bankruptcy Act 1898, § 55b. See Clendening v. Red River Valley Nat. Bank, 12 N. D. 51, 94 N. W. 901.

[128] In re Back Bay Automobile Co., 158 Fed. 679, 19 Am. Bankr. Rep. 835.

[129] In re J. M. Mertens & Co., 147 Fed. 177, 77 C. C. A. 473, 16 Am. Bankr. Rep. 825.

[130] In re Two Rivers Woodenware Co., 199 Fed. 877, 118 C. C. A. 325, 29 Am. Bankr. Rep. 518.

quired by the statute, and conforming on its face to all the requirements of the act and the general orders, makes a prima facie case, though it is subject to objection and counter proof, and will entitle the creditor to have his debt allowed as an established claim against the estate, unless objections are interposed.[131] In the latter case, the jurisdiction of the court to hear and determine the claim and objections is undoubted, as the voluntary appearance of the creditor for the purpose of filing his claim places it within the control of the court.[132] But if the claim is rejected, on the ground that the creditor holds security for it, the court has then no jurisdiction to value the security and enter a decree against the creditor for the excess of its value over the debt.[133] It should further be noticed that there is nothing in the act which makes a proof of claim an entirety, which the court must either accept in full or reject altogether. If part of the claim is found to be valid, and part must be rejected for want of proper proof or other reasons, the referee may allow the claim the extent that it is valid, and it is not necessary to order it to be amended and resworn.[134]

In allowing or disallowing claims against an estate in bankruptcy, the court is bound by the established rules of law and equity, and cannot arbitrarily exercise its power to allow or reject a claim.[135] But an order either allowing or rejecting a claim is an adjudication of all the issues properly before the court for its determination and binding upon all who have been made parties to the proceeding in bankruptcy, and therefore it cannot be impeached or questioned collaterally.[136] It should, however, be adequately recorded. It has been ruled that a mere minute showing the disallowance of a claim by a referee in bankruptcy

[131] In re J. M. Mertens & Co., 147 Fed. 177, 77 C. C. A. 473, 16 Am. Bankr. Rep. 825; In re Saunders, 2 Low. 444, 13 N. B. R. 164, Fed. Cas. No. 12,371; In re Colman, 2 N. B. R. 562, Fed. Cas. No. 3,021; In re Ankeny, 1 Nat. Bankr. News, 511; International Agr. Corp. v. Carry, 240 Fed. 101, 153 C. C. A. 137, 38 Am. Bankr. Rep. 753.

[132] In re Jackson Brick & Tile Co., 189 Fed. 636, 26 Am. Bankr. Rep. 915; In re L'Hommedieu, 146 Fed. 708, 77 C. C. A. 134, 16 Am. Bankr. Rep. 850.

[133] Fitch v. Richardson, 147 Fed. 197, 77 C. C. A. 423, 16 Am. Bankr. Rep. 835.

[134] In re Goldstein, 199 Fed. 665, 29 Am. Bankr. Rep. 301; Streeter v. Lowe, 184 Fed. 263, 106 C. C. A. 405, 25 Am. Bankr. Rep. 774; In re T. L. Kelly Dry Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528. In re Louis J. Bergdoll Motor Co. (D. C.) 229 Fed. 262; Reynolds v. Hourigan, 254 Fed. 690, 166 C. C. A. 188, 43 Am. Bankr. Rep. 75. See In re Perlmutter (D. C.) 256 Fed. 860, 42 Am. Bankr. Rep. 725.

[135] In re Springfield Realty Co. (D. C.) 257 Fed. 785, 44 Am. Bankr. Rep. 105.

[136] Carr v. Barnes, 138 Mo. App. 264, 120 S. W. 705; Spencer Commercial Club v. Bartmess, 70 Ind. App. 294, 123 N. E. 435. See Skilton v. Codington, 105 App. Div. 617, 93 N. Y. Supp. 460. The disallowance of a claim in bankruptcy for usury is available to a prior purchaser as res judicata of the claim of the holder of a mortgage antedating such purchase and given to secure the usurious debt. De Watteville v. Sims, 44 Okl. 708, 146 Pac. 224.

is not a record of a judgment and is not admissible in evidence to show the final disposition of the claim.[137] And an order of allowance, in so far as concerns its binding effect on the trustee and the other creditors, does not amount to an adjudication that the particular creditor has not previously received an illegal or voidable preference, that question not being necessarily involved in it.[138]

§ 535. **Postponement of Proofs.**—The bankruptcy act of 1867 contained a provision to the effect that "when a claim is presented for proof before the election of an assignee, and the judge or register entertains doubts of its validity or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen."[139] Although the present act is not so explicit on this point, still it does provide that claims duly proved shall be allowed upon presentation, unless "their consideration be continued for cause by the court upon its own motion."[140] The interpretation put upon the act of 1867 was that it rested in the discretion and judgment of the court or register to postpone the proof of a claim whenever he deemed it questionable or of doubtful validity, either in respect to its consideration or the right of the particular creditor to prove it, or on the ground of its being voidable under the act as a preference or otherwise; and this was to be done with a view to the investigation by the trustee, when appointed, of the claim in question, and the effect of postponing proofs was to prevent such claims from being voted upon in the election of a trustee.[141] The corresponding provision of the present act, it is said, intends that, if objection to a claim is interposed, or if the court is not satisfied with the prima facie case made out by the claimant's sworn statement, the claim shall not be accepted as proved until the objection has been disposed of, or until the court is convinced, by testimony or otherwise, of the validity of the claim.[142]

When a review by the judge of the action of the referee in such

[137] Hall v. Robertson, 213 Ill. App. 147. But compare De Watteville v. Sims, 44 Okl. 708, 146 Pac. 224.

[138] Stearns Salt & Lumber Co. v. Hammond, 217 Fed. 559, 133 C. C. A. 411, 33 Am. Bankr. Rep. 484; Buder v. Columbia Distilling Co., 96 Mo. App. 558, 70 S. W. 508; Utah Ass'n of Credit Men v. Boyle Furniture Co., 39 Utah, 518, 117 Pac. 800. Compare Clendening v. Red River Valley Nat. Bank, 12 N. D. 51, 94 N. W. 901.

[139] Rev. Stat. U. S. § 5083, being § 23 of the act of 1867.

[140] Bankruptcy Act 1898, § 57d.

[141] In re Stevens, 4 Ben. 513, 4 N. B. R. 367, Fed. Cas. No. 13,391; In re Jacoby, Fed. Cas. No. 7,166; In re Bartusch, 9 N. B. R. 478, Fed. Cas. No. 1,086; In re Jones, 2 N. B. R. 59, Fed. Cas. No. 7,447; In re Frank, 5 Ben. 164, 5 N. B. R. 194, Fed. Cas. No. 5,050.

[142] In re Sumner, 101 Fed. 224, 4 Am. Bankr. Rep. 123; In re Dreeben, 101 Fed. 110, 4 Am. Bankr. Rep. 146.

cases is sought, the better practice on behalf of the creditors who object to such postponement of their claims is to have the objection noted, obtain a stay of proceedings, and have the case certified, before any further action is taken before the referee, for if no objection is made at the time, and the trustee is appointed and enters upon his duties, the court will not interfere.[143] When the claim of a creditor, at the first meeting, is postponed by the referee, and again presented after the election of a trustee, the proof of claim must be treated in all respects as if it had not been before tendered; that is, such action does not cast upon the creditor the necessity of producing evidence in support of its validity, or of taking any other affirmative action not required in ordinary cases for the proof of a debt.[144]

§ 536. Objections to Claims; Who May Object.—The bankruptcy act provides that objections to the allowance of a claim offered for proof by a creditor of the bankrupt may be made by "parties in interest."[145] This vague phrase, so frequently used in the act, may probably, in this connection, include the bankrupt himself. If he should prove to be solvent (which may happen, and occasionally does happen, in a case of voluntary bankruptcy), any surplus of the estate remaining after paying creditors and the cost of the proceeding will belong to the bankrupt. Further, it is to his "interest" in the popular if not the legal sense that his creditors should receive as large a dividend as may be. Moreover, the act makes it the duty of the bankrupt to "examine the correctness of all proofs of claims filed against his estate," and "in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee."[146] This seems to contemplate that the objections should be made by the trustee on information to be furnished by the bankrupt. But if false claims are offered for allowance at or before the first meeting of creditors, and therefore before a trustee has been appointed, it is more consonant to the general purpose and policy of the act that the bankrupt should object to their allowance than that he should allow them to be proved and afterwards advise the trustee of their fraudulent character, as, in that

143 In re Jackson, 7 Biss. 280, 14 N. B. R. 449, Fed. Cas. No. 7,123.

144 In re Herrmann, 4 Ben. 126, 3 N. B. R. 649, Fed. Cas. No. 6,425.

145 Bankruptcy Act 1898, § 57d.

146 Bankruptcy Act 1898, § 7, clauses 3 and 7. Where the bankrupt is a corporation, and its stockholders are the only persons who would be injuriously affected by the allowance of a contested claim, since its allowance would necessitate an assessment upon them, they are "parties in interest" and entitled to object to the claim. Rosenbaum v. Dutton, 203 Fed. 838, 122 C. C. A. 156, 30 Am. Bankr. Rep. 155.

case, the only remedy of the trustee would be to move for their reconsideration and expunction.[147]

As to other "parties in interest," it is clear that the trustee himself, as the representative of all the creditors, is authorized to contest the allowance of any claim filed against the estate.[148] And if he neglects or refuses to take this action, in regard to any claim alleged to be fraudulent, false, or exaggerated, creditors who have proved their debts may personally intervene and oppose its allowance.[149] And the general trend of the decisions is to the effect that any creditor may proceed on his own initiative to object to the allowance of a claim offered by another, and is not required to present his objections through the trustee, or to show that the latter has been asked to act and has refused,[150] provided, however, that the contesting creditor shall first have proved his own claim and secured its allowance.[151] But an objecting creditor cannot further contest the claim of another creditor after a decision on its validity by the court. Proceedings to review such decision must be taken by the trustee by appeal.[152] And the creditor at whose instance the trustee contests the claim of another creditor is liable to the latter for costs where the claim is allowed.[153] It should be added that the right to contest claims does not belong to those who are merely debtors or alleged debtors of the bankrupt.[154]

§ 537. Same; Manner and Form of Objections.—Under the bankruptcy act of 1867, it was held that objections to the proof of a claim

147 See In re Ankeny, 100 Fed. 614, 4 Am. Bankr. Rep. 72; In re Torchia, 185 Fed. 576, 26 Am. Bankr. Rep. 188. But compare Trabue v. Ash (Tex. Civ. App.) 200 S. W. 415.

148 Atkins v. Wilcox, 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118, 5 Am. Bankr. Rep. 313; In re Two Rivers Woodenware Co., 199 Fed. 877, 118 C. C. A. 325, 29 Am. Bankr. Rep. 439. But where the validity of a claim is conceded, and the only dispute is between two persons about the ownership of it, the controversy concerns them alone, and the trustee, as the representative of the other creditors, has no interest. In re Dunlap Carpet Co., 206 Fed. 726, 30 Am. Bankr. Rep. 664.

149 First Nat. Bank v. Cooper, 20 Wall. 171, 22 L. Ed. 273; In re Knox Automobile Co. (D. C.) 229 Fed. 241.

150 In re Canton Iron & Steel Co., 197 Fed. 767, 28 Am. Bankr. Rep. 791; In re Hatem, 161 Fed. 895, 20 Am. Bankr. Rep. 470; In re Wyoming Valley Ice Co., 153 Fed. 787; In re Joseph, 2 Woods, 390, Fed. Cas. No. 7,532; In re Overton, 5 N. B. R. 366, Fed. Cas. No. 10,625. Compare In re Randall, 1 Sawy. 56, Fed. Cas. No. 11,552.

151 Dressel v. North State Lumber Co., 119 Fed. 531, 9 Am. Bankr. Rep. 541; First Nat. Bank v. Cooper, 20 Wall. 171, 22 L. Ed. 273. Claimants whose claims have been disallowed cannot object to the payment of dividends to creditors whose claims are uncontested. In re Stringer (D. C.) 244 Fed. 629, 40 Am. Bankr. Rep. 474.

152 In re Troy Woolen Co., 9 Blatchf. 191, Fed. Cas. No. 14,202. A creditor cannot object to the allowance of claims of other creditors where he did not move to expunge them and took no exception to the decision of the referee allowing them. In re Collins (D. C.) 235 Fed. 937, 37 Am. Bankr. Rep. 692.

153 In re Troy Woolen Co., 8 N. B. R. 412, Fed. Cas. No. 14,203.

154 In re Sully, 152 Fed. 619, 81 C. C. A. 609, 18 Am. Bankr. Rep. 123.

must be made by written allegations, which should specify with reasonable certainty the particular grounds of objection.[155] Though the present statute contains no positive requirement to this effect (the act merely providing that claims duly proved shall be allowed "unless objection to their allowance shall be made by parties in interest") it is unquestionably good practice to file the objections in this form, and the later decisions so recommend, with the further statement that the allegations should be sufficiently explicit to indicate to the claimant the nature and character of the objections.[156] But no particular form for the objections has been prescribed, the matter resting very largely in the discretion of the referee, and it is not necessary, nor even proper, that they should take the shape of a formal pleading.[157] Nor is the statement of objections required to be under oath.[158] And it is within the discretion of the referee to permit a merely oral statement on the part of the objecting creditor, provided it is definite and to the point.[159] But it is held that creditors who desire to contest the allowance of a claim must make their objections on their own behalf, and they cannot become parties to the issue merely by formally adopting objections filed by the bankrupt, nor have they any standing to contest such claim on an appeal taken from the decision of the court by the trustee, in which they did not join.[160]

§ 538. Same; Grounds of Objection.—As to the grounds on which objection may be made to a claim offered for proof, it is clear that it may be contested for fraud, illegality,[161] or want of consideration;[162] also for being fictitious or exaggerated; or because it is not of a nature to be provable under the bankruptcy law; or because it has been paid or discharged, wholly or in part, or is barred by the statute of limitations;[163] or because the proving creditor has received a preference which he has not surrendered,[164] or a security which he has not mentioned; or because of defects in the form or manner of the proof.[165]

155 In re Walton, Deady, 442, Fed. Cas. No. 17,128.

156 Spencer v. Lowe, 198 Fed. 961, 117 C. C. A. 497, 29 Am. Bankr. Rep. 876; In re Royce Dry Goods Co., 133 Fed. 100, 13 Am. Bankr. Rep. 257.

157 Orr v. Park, 183 Fed. 683, 106 C. C. A. 33, 25 Am. Bankr. Rep. 544; In re Carter, 138 Fed. 846, 15 Am. Bankr. Rep. 126.

158 In re Wooten, 118 Fed. 670, 9 Am. Bankr. Rep. 247.

159 In re Cannon, 133 Fed. 837, 14 Am. Bankr. Rep. 114; Embry v. Bennett, 162 Fed. 139, 20 Am. Bankr. Rep. 651.

160 Ayres v. Cone, 138 Fed. 778, 71 C. C. A. 144, 14 Am. Bankr. Rep. 739.

161 In re Fenn, 172 Fed. 620, 22 Am. Bankr. Rep. 833.

162 In re Romadka Bros. Co. (D. C.) 206 Fed. 944.

163 In re John J. Lafferty & Bro., 122 Fed. 558, 10 Am. Bankr. Rep. 290; Pace's Trustee v. Pace, 162 Ky. 457, 172 S. W. 925. Compare In re Gibson, 4 Ind. T. 498, 69 S. W. 974, 4 Ann. Cas. 938.

164 Stern v. Louisville Trust Co., 112 Fed. 501, 50 C. C. A. 367, 7 Am. Bankr. Rep. 305.

165 Where a claim was allowed

But a mere informality in the proof will not cause the rejection of the claim when the creditor, under examination, has testified positively to facts which establish its validity.[166] And the fact that one presenting a claim against the bankrupt is closely related to him, while it will justify a rigid scrutiny of the claim, will not alone warrant its rejection.[167]

When a judgment debt is offered for proof, the petition of the bankrupt having been filed after the rendition of the judgment, it may be objected to by the trustee or by other creditors on the ground of fraud or irregularity, including fraudulent preference; for they, not being parties or privies to the judgment, are not precluded from attacking it collaterally.[168] For similar reasons, the trustee is not bound by a mere settlement or accounting, not followed by payment or transfer of property, between the bankrupt and a creditor, but he may show that it was erroneous or fraudulent.[169] And so also the trustee may set up usury as a defense to the claim of a creditor.[170] But as against a negotiable note made by the bankrupt, the trustee can avail himself only of such defenses as were available to the maker, not including collateral issues between the indorsers subsequent to delivery.[171]

§ 539. Same; Contest and Determination.—The law intends that contests of this character shall be promptly disposed of. It declares that "objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit."[172] Hence if objection is made to the allowance of a claim presented at a meeting of the creditors, the question of

against a bankrupt firm and the bankrupt estate of an individual partner, the trustee was estopped after four years to object that the claim was insufficient in form to justify its allowance against the partner's estate. In re Collins (D. C.) 215 Fed. 247.

[166] McKinsey v. Harding, 4 N. B. R. 38, Fed. Cas. No. 8,866.

[167] Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 89 C. C. A. 605, 20 Am. Bankr. Rep. 40.

[168] Chandler v. Thompson, 120 Fed. 940, 57 C. C. A. 230; Ex parte O'Neil, 1 Low. 163, 1 N. B. R. 677, Fed. Cas. No. 10,527; Bourne v. Maybin, 3 Woods, 724, Fed. Cas. No. 1,700; In re Continental Engine Co., 234 Fed. 58, 148 C. C. A. 74, 37 Am. Bankr. Rep. 102; In re Stucky Trucking & Rigging Co. (D. C.) 243 Fed. 287, 38 Am. Bankr. Rep. 690. Compare Stilwell v. Walker, 17 N. B. R. 569, Fed. Cas. No. 13,451.

[169] In re Comstock, 3 Sawy. 620, 12 N. B. R. 110, Fed. Cas. No. 3,079. Where a claim against a bankrupt corporation was based on the theory that it had assumed payment of a mortgage, but it appeared that there had been no such assumption, the claimant cannot sustain his claim on a different theory. In re Amsdell-Kirchner Brewing Co. (D. C.) 240 Fed. 492.

[170] In re Stern, 144 Fed. 956, 76 C. C. A. 10, 16 Am. Bankr. Rep. 510 (reversing In re Worth, 130 Fed. 927, 12 Am. Bankr. Rep. 566); In re Moore, Fed. Cas. No. 9,752; Bromley v. Smith, 2 Biss. 511, 5 N. B. R. 152, Fed. Cas. No. 1,922; Loganville Banking Co. v. Forrester, 17 Ga. App. 246, 87 S. E. 694.

[171] In re Schwarz, 200 Fed. 309, 29 Am. Bankr. Rep. 700.

[172] Bankruptcy Act 1898, § 57f.

its allowance should be heard as soon as feasible, and if the court is not satisfied with the weight of the evidence, the hearing may be adjourned to a future time.[173] A creditor presenting his claim for proof and allowance against the estate of the bankrupt, which is contested by the trustee, is not entitled to demand a trial by jury.[174] Proceedings in bankruptcy being of equitable cognizance, the seventh amendment to the Constitution of the United States does not apply thereto, and no act of Congress at present in force authorizes trial by jury in such cases.[175] Such contests are intended to be heard and determined by the referee, and he has full jurisdiction over them.[176] And it is not necessary that he should adhere to any prescribed order of proof.[177]

Where the trustee objects to the allowance of a claim on the ground that the claimant has received an unlawful preference, and the referee, on hearing, decides that such is the case, his judgment disallowing the claim is res judicata on the question of the preference, and the creditor cannot litigate the question again in a plenary action by the trustee to recover the preference.[178]

§ 540. Same; Burden of Proof and Evidence.—The burden of proof is on one claiming to be a creditor of a bankrupt and presenting a demand against his estate.[179] But he sustains the burden in the first instance, and makes out a prima facie case, when he files a proof of his claim, sufficient in form and substance, and duly verified by his affidavit, as required by the statute, as such proof is regarded rather as a deposition than as a pleading.[180] Thereupon the burden is shifted to the objecting creditor or creditors, or the trustee as the representative of all the creditors, and they are required to rebut the claimant's prima facie case by evidence having a probative value at least equal to his

[173] In re Eagles (D. C.) 99 Fed. 695, 3 Am. Bankr. Rep. 733.

[174] But the claimant is entitled to notice of the objections and an opportunity to be heard. But where he appears before the referee and files a response to the referee's objection to his claim, this amounts to a waiver of notice of the objection which should have been given him, and cures all defects therein. Davenport Sav. Bank v. Chicago, R. I. & P. R. Co., 176 Iowa, 745, 158 N. W. 737.

[175] In re Christensen (D. C.) 101 Fed. 243, 4 Am. Bankr. Rep. 99.

[176] In re Schwarz (D. C.) 200 Fed. 309, 29 Am. Bankr. Rep. 700; McCulloch v. Davenport Sav. Bank (D. C.) 226 Fed. 309, 35 Am. Bankr. Rep. 765.

[177] In re Montgomery (D. C.) 185 Fed. 955, 25 Am. Bankr. Rep. 431.

[178] Lincoln v. People's Nat. Bank (D. C.) 260 Fed. 422, 44 Am. Bankr. Rep. 381; Ullman, Stern & Krausse v. Coppard, 246 Fed. 124, 158 C. C. A. 350, 40 Am. Bankr. Rep. 426; Davenport Sav. Bank v. Chicago, R. I. & P. R. Co., 176 Iowa, 745, 158 N. W. 737.

[179] In re Graves (D. C.) 182 Fed. 443, 25 Am. Bankr. Rep. 372; In re Hopper-Morgan Co. (D. C.) 156 Fed. 533, 19 Am. Bankr. Rep. 539.

[180] Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584, 15 Am. Bankr. Rep. 326; In re United Wireless Telegraph Co., 201 Fed. 445, 29 Am. Bankr. Rep. 848; In re Schwarz, 200 Fed. 309, 29 Am. Bankr. Rep. 700; In re Montgomery, 185 Fed. 955, 25 Am. Bankr. Rep. 431; In re Baumhauer, 179 Fed. 966, 24 Am. Bankr. Rep. 750; In re James Dunlap Carpet Co., 171 Fed. 532, 22 Am. Bankr. Rep. 788; In re Jones,

affidavit.[181] Likewise, where the claim is for damages for breach of a contract, and the claimant has sufficiently established the elements of his case, the burden is on objecting creditors to show any circumstances in reduction or mitigation of damages.[182] But in order to support the claimant's demand and warrant its allowance the proof of claim must conform to the requirements of the law and be fair on its face. It is not self-proving if insufficient in form, or if its recitals are contradictory and irreconcilable, or if the facts alleged are improbable and suspicious.[183] And it is a rule that if the claimant does not choose to rely on the presumption of correctness of his claim raised by the formal proof of it, but elects to offer additional evidence, and such evidence is insufficient to establish his case or contradicts the allegations of his petition, he must abide by the result, and be taken to have waived the advantage of the position which he originally occupied.[184]

When objection is made to a proof of claim, the proving creditor may be summoned as a witness and be questioned (in the nature of cross-examination) by the trustee or the objecting creditors, concerning his claim and its particulars; and if he fails to appear and submit to such examination, he will be taken to have admitted the objections to his claim, and the same will be rejected.[185] But testimony of the bank-

151 Fed. 108, 18 Am. Bankr. Rep. 206; In re Castle Braid Co., 145 Fed. 224, 17 Am. Bankr. Rep. 143; In re Carter, 138 Fed. 846, 15 Am. Bankr. Rep. 126; In re Dresser, 135 Fed. 495, 68 C. C. A. 207, 13 Am. Bankr. Rep. 747; In re Wooten, 118 Fed. 670, 9 Am. Bankr. Rep. 247; In re Shaw, 109 Fed. 780, 6 Am. Bankr. Rep. 499; In re Sumner, 101 Fed. 224, 4 Am. Bankr. Rep. 123; Flower v. Commercial Trust Co., 223 Fed. 318, 138 C. C. A. 580, 35 Am. Bankr. Rep. 74; Moore v. Crandall, 205 Fed. 689, 124 C. C. A. 11, 30 Am. Bankr. Rep. 517; In re Arthur E. Pratt Co. (D. C.) 252 Fed. 917, 42 Am. Bankr. Rep. 406; In re Welborne (D. C.) 266 Fed. 385; Board of Commerce of Ann Arbor v. Security Trust Co., 225 Fed. 454, 140 C. C. A. 486, 34 Am. Bankr. Rep. 762.

[181] In re Harper, 175 Fed. 412, 23 Am. Bankr. Rep. 918; In re Carter, 138 Fed. 846, 15 Am. Bankr. Rep. 126; In re Sanger, 169 Fed. 722, 22 Am. Bankr. Rep. 145; In re Pfaffinger, 154 Fed. 523, 18 Am. Bankr. Rep. 807; In re Coventry Evans Furniture Co., 166 Fed. 516, 22 Am. Bankr. Rep. 272; West v. W. A. McLaughlin & Co.'s Trustee, 162 Fed. 124, 20 Am. Bankr. Rep. 654; In re Canton Iron & Steel Co., 197 Fed. 767, 28 Am. Bankr. Rep. 791. Compare Mason v. St. Albans Furniture Co., 149 Fed. 898, 17 Am. Bankr. Rep. 868; In re Hull (D. C.) 224 Fed. 796, 34 Am. Bankr. Rep. 447; In re O'Gara & Maguire (D. C.) 259 Fed. 935, 44 Am. Bankr. Rep. 49; Britton v. Union Inv. Co. (C. C. A.) 262 Fed. 111, 44 Am. Bankr. Rep. 531.

[182] In re Duquesne Incandescent Light Co., 176 Fed. 785, 24 Am. Bankr. Rep. 419.

[183] In re Goble Boat Co., 190 Fed. 92, 27 Am. Bankr. Rep. 48; Orr v. Park, 183 Fed. 683, 106 C. C. A. 33, 25 Am. Baukr. Rep. 544; In re Shaw, 112 Fed. 947, 7 Am. Bankr. Rep. 458; In re Hudson Porcelain Co. (D. C.) 225 Fed. 325, 35 Am. Bankr. Rep. 18. Failure to file a written instrument which is the basis of a claim against the bankrupt's estate, as required by the statute, does not raise a presumption against the existence of the writing. In re Dresser, 135 Fed. 495, 68 C. C. A. 207, 13 Am. Bankr. Rep. 747.

[184] In re Greenfield, 193 Fed. 98, 27 Am. Bankr. Rep. 427; In re T. A. McIntyre & Co., 174 Fed. 627, 98 C. C. A. 381, 24 Am. Bankr. Rep. 1; In re McAusland (D. C.) 235 Fed. 173, 37 Am. Bankr. Rep. 519.

[185] Baumhauer v. Austin, 186 Fed. 260, 108 C. C. A. 306, 26 Am. Bankr. Rep.

rupt or other witnesses taken before the referee in other issues in the bankruptcy proceedings, to which the claimant was not a party and when he was not present, cannot be used against him.[186] If it becomes necessary to take the evidence of witnesses at a distance, the act provides that, when depositions are to be taken in opposition to the allowance of a claim, notice shall be served upon the claimant and filed with the referee.[187] Upon questions of evidence arising upon the proof of debts, the laws of the United States must govern, and not those of the state in which the court may be sitting. This rule was applied in a case where the bankrupt was dead, and it was held that the proving creditor was a competent witness in his own favor to prove the contract out of which his claim arose; for under Rev. Stat. U. S. § 858, a witness cannot be excluded on account of interest except in actions by or against executors, administrators, or guardians, and a proceeding in bankruptcy is in rem and not against the executor of a deceased bankrupt.[188] Under the same rule and the same provision of the Revised Statutes, it is held that, where a contest is made as to a claim offered to be proved against the estate of a bankrupt by his wife, she is a competent witness in her own behalf.[189] But a judgment recovered by the creditor in a state court is not conclusive evidence either of the existence or the amount of his claim, when he seeks to prove it in the bankruptcy proceedings, at least where the trustee was not a party to the suit.[190] And the general rule of law that a party can only recover on the cause of action alleged in his pleading applies to claims presented in bankruptcy, and a claimant who has filed a statement of his demand under oath, as required by the statute, cannot sustain it by evidence of an indebtedness arising in a different manner from that stated.[191] As in other cases, the evidence may be circumstantial on questions of motive, intent, good faith, and the like,[192] and the claimant, if put to his defense, must show all the elements of a valid and enforceable demand, just as on the trial of an issue in a plenary suit,[193] and if he and the bankrupt

385; In re Sumner, 101 Fed. 224, 4 Am. Bankr. Rep. 123; In re Lount, 11 N. B. R. 315, Fed. Cas. No. 8,543.

[186] In re Keller, 109 Fed. 118, 6 Am. Bankr. Rep. 334; In re Hersey, 171 Fed. 1004, 22 Am. Bankr. Rep. 863; In re National Boat & Engine Co. (D. C.) 216 Fed. 208, 33 Am. Bankr. Rep. 154.

[187] Bankruptcy Act 1898, § 21c.

[188] In re Merrill, 9 Ben. 165, 16 N. B. R. 35, Fed. Cas. No. 9,466. Conversely, the bankrupt is a competent witness where a claim against his estate is contested, though the creditor is dead and the claim is presented by his executor, In re Moore, Fed. Cas. No. 9,752.

[189] In re Richards, 17 N. B. R. 562, Fed. Cas. No. 11,770; In re Bean, 14 N. B. R. 182, Fed. Cas. No. 1,166. Compare In re Bechtel, Fed. Cas. No. 1,204.

[190] In re Freeman, 117 Fed. 680, 9 Am. Bankr. Rep. 68; Bourne v. Maybin, 3 Woods, 724, Fed. Cas. No. 1,700.

[191] In re Lansaw, 118 Fed. 365, 9 Am. Bankr. Rep. 167; Orr v. Park, 183 Fed. 683, 106 C. C. A. 33, 25 Am. Bankr. Rep. 544.

[192] In re Friedman, 164 Fed. 131, 21 Am. Bankr. Rep. 213; In re Herman, 207 Fed. 594.

[193] Farnsworth v. Union Trust & Deposit Co., 211 Fed. 912, 128 C. C. A.

are the only witnesses and they squarely contradict each other, circumstances tending to corroborate the one or the other will turn the scale.[194] Where the claimant is the wife, child, or other near relative of the bankrupt, the experience of the courts has taught them that the claim must be closely and carefully scrutinized, though it is also to be remembered that the honest or dishonest character of such a claim is not to be determined by the mere fact of relationship.[195]

The referee should of his own motion consider the credibility of the witnesses and of their testimony, and he is not obliged to allow the claim even if the evidence in its support is uncontradicted.[196] The court retains considerable control over the proceedings in these cases, and if the evidence offered by a claimant is not sufficient to establish his claim, it is in the discretion of the court to direct or allow the taking of additional proof, even after the referee or master has made his report.[197]

§ 541. **Amendment and Withdrawal of Proofs.**—Proofs of debt may always be amended, if application is made in proper time, in respect to the correction of clerical errors, the supplying of omissions, or to remedy technical defects in the proofs in matters of form, and when the proof is amended so as to comply with the law, it will relate back to the original filing, unless the rights of others have in the mean time intervened.[198] On this point, it has been said: "The court undoubtedly possesses the power, in its discretion, to allow proofs of debt to be

290; Central State Bank v. McFarlan, 257 Fed. 535, 168 C. C. A. 519, 44 Am. Bankr. Rep. 1; In re Maiman (D. C.) 256 Fed. 127, 43 Am. Bankr. Rep. 507; In re Rosenthal & Lehman (D. C.) 120 Fed. 848, 9 Am. Bankr. Rep. 626; In re Banks (D. C.) 207 Fed. 662, 31 Am. Bankr. Rep. 270. Where a claimant relies on certificates of indebtedness issued by a building and loan association, and it appears that they were fraudulently issued and that the association received no consideration, the purchaser must show that he was a purchaser in good faith and for value. In re German Savings & Loan Ass'n, 253 Fed. 722, 165 C. C. A. 316, 42 Am. Bankr. Rep. 559. An attorney who makes a claim against the estate of a bankrupt corporation for legal services must clearly establish the value of his services. In re United States Molybdenum Co. (D. C.) 255 Fed. 790, 43 Am. Bankr. Rep. 401.

[194] In re Kaldenberg (D. C.) 105 Fed. 232, 5 Am. Bankr. Rep. 6.

[195] Walter v. Atha (C. C. A.) 262 Fed. 75, 45 Am. Bankr. Rep. 150; In re Crumling (D. C.) 214 Fed. 503, 32 Am. Bankr. Rep. 656; In re Kanter (D. C.) 215 Fed. 276.

[196] In re Cannon (D. C.) 133 Fed. 837, 14 Am. Bankr. Rep. 114.

[197] In re J. C. Wilson & Co. (D. C.) 252 Fed. 631, 42 Am. Bankr. Rep. 350.

[198] In re New York Commercial Co., 233 Fed. 906, 147 C. C. A. 580, 36 Am. Bankr. Rep. 769; In re Ballantine (D. C.) 232 Fed. 271, 37 Am. Bankr. Rep. 111; In re Soltmann (D. C.) 238 Fed. 241, 38 Am. Bankr. Rep. 270; In re A. J. Ellis, Inc., 252 Fed. 483, 164 C. C. A. 399, 42 Am. Bankr. Rep. 387. In re Myers, 99 Fed. 691, 3 Am. Bankr. Rep. 760; In re Salvator Brewing Co., 193 Fed. 989, 113 C. C. A. 626, 28 Am. Bankr. Rep. 56; In re Medina Quarry Co., 179 Fed. 929, 24 Am. Bankr. Rep. 769; In re Stevens, 107 Fed. 243, 5 Am. Bankr. Rep. 806; In re Maybin, 15 N. B. R. 468, Fed. Cas. No. 9,337; In re Myrick, 3 N. B. R. 156, Fed. Cas. No. 10,000; In re Montgomery, 3 N. B. R. 423, Fed. Cas. No. 9,729; In re Lowerre, 1 Ben. 406, 1 N. B. R. 74, Fed. Cas. No. 8,577. In re Basha (C. C. A.) 200 Fed. 951, 29 Am. Bankr. Rep. 225.

amended, and in cases of mistake or ignorance, whether of fact or of law, will generally exercise that power in the absence of fraud, and when all parties can be placed in the same situation they would have been in if the error had not occurred, and where justice seems to demand that it should be done. But where the proceeding is in any manner tainted by fraud, or where the creditor has gained any permanent advantage by the omission, or the estate has been permanently injured thereby, the creditor guilty of such omission will be left where his own act has placed him."[199] Thus if a creditor, in proving his claim, has illegally increased the amount of it, or if a portion of the consideration is good and a portion illegal, he will not be allowed, on the detection of the fraud, to separate the good from the bad and amend his proof, or have it allowed for the valid portion only, for his fraud taints the whole.[200] So, where a claim of lien under a mortgage has been declared fraudulent, the claimant is not entitled to amend so as to prove his claim as a general claim against the estate.[201] Neither is it permissible, under the guise of an amendment, to introduce a wholly new and different claim against the bankrupt.[202]

An amended proof of claim against a bankrupt's estate, filed more than a year after the adjudication, may be substituted for the original proof when the latter was defective, irregular, or otherwise insufficient, notwithstanding the provision of the act limiting the time for original filing of proofs.[203] But this rule is subject to two conditions. In the first place, it cannot be invoked for the purpose of enabling the creditor to set up an entirely new and separate claim.[204] But this does not apply to a change in the form or statement of the claim, the actual contract or consideration remaining the same.

[199] In re Parkes, 10 N. B. R. 82, Fed. Cas. No. 10,754.

[200] In re Elder, 1 Sawy. 73, Fed. Cas. No. 4,326.

[201] In re Vogt (D. C.) 188 Fed. 764. But see Seligman v. Gray, 227 Fed. 417, 142 C. C. A. 113, 35 Am. Bankr. Rep. 516, 36 Am. Bankr. Rep. 894.

[202] In re Miners' Brewing Co. (D. C.) 162 Fed. 327, 20 Am. Bankr. Rep. 717; In re Montgomery, 3 N. B. R. 430, Fed. Cas. No. 9,731.

[203] Hutchinson v. Otis, Wilcox & Co., 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, 10 Am. Bankr. Rep. 135; In re Keller (D. C.) 252 Fed. 942, 42 Am. Bankr. Rep. 601; In re Schaffner (C. C. A.) 267 Fed. 977, 45 Am. Bankr. Rep. 681; In re Drexel Hill Motor Co. (D. C.) 270 Fed. 673, 46 Am. Bankr. Rep. 411; In re Roeber, 127 Fed. 122, 62 C. C. A. 122, 11 Am. Bankr. Rep. 464; Hutchinson v. Otis, 115 Fed. 937, 53 C. C. A. 419, 8 Am. Bankr. Rep. 382; In re Salvator Brewing Co., 188 Fed. 522, 26 Am. Bankr. Rep. 21; In re Standard Telephone & Electric Co., 186 Fed. 586, 26 Am. Bankr. Rep. 601; In re Kessler, 184 Fed. 51, 25 Am. Bankr. Rep. 512; In re Fisk & Robinson, 185 Fed. 974; In re McCarthy Portable Elevator Co., 205 Fed. 986, 30 Am. Bankr. Rep. 247. But compare In re Amsdell-Kirschner Brewing Co. (D. C.) 243 Fed. 783, 40 Am. Bankr. Rep. 284; In re Booth (D. C.) 216 Fed. 575, 33 Am. Bankr. Rep. 183; In re Moebius (D. C.) 116 Fed. 47, 8 Am. Bankr. Rep. 590.

[204] In re McCallum & McCallum (D. C.) 127 Fed. 768, 11 Am. Bankr. Rep. 447; In re Stevens (D. C.) 107 Fed. 243, 5 Am. Bankr. Rep. 806.

Thus, where a creditor filed a claim in the form of a book account, an amended claim, based on promissory notes of the bankrupt, may be treated as an amendment of the original claim, and the court may permit it to be filed after the expiration of the year, where it is shown that the notes were given in settlement of the account, but were not shown by the creditor's books, and that the original claim was based on the account, rather than the notes, through mere inattention or because the creditor did not realize that it would make any difference as to the form of proof.[205] So, where the creditor originally filed on a note and the claim was disallowed because it carried usurious interest, he was allowed to amend his proof by substituting therefor a claim for money fraudulently obtained by the bankrupt and received to the claimant's use.[206] In the second place, the original proof must contain a sufficient statement of the claim to support an amendment, or there must have been a sufficient "filing" of it to justify such action.[207] But as to this, the courts are quite liberal. Thus, for example, though a claim was not formally filed within the year, but an assignment of it was executed and filed with the referee, it was held that this might be treated as sufficiently presenting the claim to permit an amendment after the year.[208] So a paper filed by a creditor, denominated an "application for the sale of collateral," and containing all the statements essential to a formal proof of claim, may be used as the foundation for an amendment after the expiration of the year.[209] And again, where the trustee circulated a paper among the creditors for their signatures, containing a proposal for a settlement, each creditor to state on it the amount of his claim, and it was signed by all and returned and filed with the referee within a year after the adjudication, it was held to constitute a sufficient claim to be amendable, after the end of the year, by a creditor who signed it in the belief that a proof of his claim was not required, but without whose assent the settlement could not have been effected.[210] Further, a court of bankruptcy may allow an amended proof, filed with the trustee's consent, to be substituted for the defective original proof, although the trustee has an appeal pending from the decree of the court permitting the creditor to prove his claim.[211]

[205] Brown v. O'Connell, 200 Fed. 229, 118 C. C. A. 415, 29 Am. Bankr. Rep. 653.

[206] In re Robinson (D. C.) 136 Fed. 994, 14 Am. Bankr. Rep. 626.

[207] In re Thompson, 227 Fed. 981, 142 C. C. A. 439, 36 Am. Bankr. Rep. 190; In re Drexel Hill Motor Co. (D. C.) 270 Fed. 673, 46 Am. Bankr. Rep. 411.

[208] Bennett v. American Credit Indemnity Co., 159 Fed. 624, 86 C. C. A. 614, 20 Am. Bankr. Rep. 258.

[209] In re Faulkner, 161 Fed. 900, 20 Am. Bankr. Rep. 542. Compare In re Basha, 193 Fed. 151, 27 Am. Bankr. Rep. 435.

[210] In re Fairlamb, 199 Fed. 278, 28 Am. Bankr. Rep. 515.

[211] Hutchinson v. Otis, Wilcox & Co., 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, 10 Am. Bankr. Rep. 135.

The power of allowing amendments is not infrequently appealed to in behalf of secured creditors; and it is well settled that where a creditor of this class has proved his claim as unsecured, but this has been done through inadvertence or mistake or ignorance of his rights, it is in the discretion of the court to allow him to amend his proof so as to state the facts correctly, even after the lapse of a year from the adjudication, provided this will not operate to the prejudice of any other creditor, or provided all parties can be restored to their original positions.[212] And it is not an insuperable objection to the allowance of such an amendment that the creditor has already received a dividend on his claim as unsecured, for it can be made a condition of the leave granted to him to amend that he shall refund to the trustee the sum so received as a dividend.[213] On similar principles, where a bankrupt had money on deposit in a bank and was indebted to the bank on promissory notes for a larger sum, and the cashier of the bank made proof against the bankrupt's estate for the entire sum of the notes, omitting, through mistake or forgetfulness, to offset the amount of the deposit, it was held that the bank should be permitted to amend its proof so as to retain the amount of the deposit, credit the same on the notes, and prove a claim for the balance.[214]

In regard to allowing a creditor who has proved his claim to withdraw the same entirely, so as to put himself outside the bankruptcy proceedings, the authorities are not so harmonious. Some of the cases hold that the withdrawal of a proof of debt cannot be permitted after the same has been filed in the case and allowed,[215] and especially after leave has been granted to the creditor to amend his proof.[216] But on the other hand, there are decisions sustaining the principle that a creditor who has proved his claim in the bankruptcy may be permitted to withdraw the same, if it was made under a mistake of fact or law, pro-

[212] Maxwell v. McDaniels (C. C. A.) 195 Fed. 426, 27 Am. Bankr. Rep. 692; Lontos v. Coppard, 246 Fed. 803, 159 C. C. A. 105, 40 Am. Bankr. Rep. 575; In re James Carothers & Co., 182 Fed. 501; In re Wilder, 101 Fed. 104; In re Falls City Shirt Mfg. Co., 98 Fed. 592, 3 Am. Bankr. Rep. 437; In re Clark, 5 N. B. R. 255, Fed. Cas. No. 2,806; In re Parkes, 10 N. B. R. 82, Fed. Cas. No. 10,754; In re Hubbard, 1 Low. 190, 1 N. B. R. 679, Fed. Cas. No. 6,813; In re Jaycox, 8 N. B. R. 241, Fed. Cas. No. 7,242; Ex parte Harwood, Crabbe, 496, Fed. Cas. No. 6,185; Ex parte Lapsley, Fed. Cas. No. 8,083; In re Hope Min. Co., 1 Sawy. 710, Fed. Cas. No. 6,681; In re Baxter, 12 Fed. 72. But see In re E. B. Havens & Co., 186 Fed. 583.

[213] In re Parkes, 10 N. B. R. 82, Fed. Cas. No. 10,754; In re Baxter, 12 Fed. 72.

[214] In re Myers, 99 Fed. 691, 3 Am. Bankr. Rep. 760.

[215] In re McIntosh, 2 N. B. R. 506, Fed. Cas. No. 8,826; In re Emison, 2 N. B. R. 595, Fed. Cas. No. 4,459; In re Lowerre, 1 Ben. 406, 1 N. B. R. 74, Fed. Cas. No. 8,577. But a creditor who has proved a claim on a note may withdraw the note, by the permission of the court, on leaving a copy on file. In re Loden, 184 Fed. 965, 25 Am. Bankr. Rep. 917.

[216] In re Hallie, 7 Ben. 182, Fed. Cas. No. 5,960.

vided neither the bankrupt nor the other creditors who have proved will be injured thereby.[217] Thus a creditor who was in fact deprived of his property through the fraudulent acts of the bankrupt, of which the creditor was ignorant and which he only discovers on the examination of the bankrupt, after he has proved his claim as a general creditor, is not then estopped to withdraw his claim and demand the return of his property.[218] But the court will not grant leave to withdraw a proof merely for the purpose of allowing the creditor to continue an arrest of the bankrupt which was made before the commencement of the proceedings in bankruptcy.[219]

§ 542. Re-Examination of Claims and Expunging.—The bankruptcy act provides that "claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed." [220] And the general orders, in execution of the foregoing provision, declare that "when the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged, or diminished, the referee may order accordingly." [221]

[217] In re Hubbard, 1 Low. 190, 1 N. B. R. 679, Fed. Cas. No. 6,813; American Sav. Bank & Trust Co. v. Munson, 93 Wash. 78, 159 Pac. 1195.

[218] In re Stewart, 178 Fed. 463, 24 Am. Bankr. Rep. 474.

[219] In re Wiener, 14 N. B. R. 218, Fed. Cas. No. 17,620.

[220] Bankruptcy Act 1898, § 57k. Also jurisdiction to "reconsider allowed or disallowed claims, and allow or disallow them," is given to the courts of bankruptcy by § 2, clause 2. But this does not apply to claims against the estate for expenses of administration, such as the charges and expenses shown on the account of a receiver appointed to take charge of the bankrupt's estate. In re Reliance Storage & Warehouse Co., 100 Fed. 619, 4 Am. Bankr. Rep. 49. Nor does it apply to fixed liens on the real estate of the bankrupt. Hawthorne v. Hendrie & Bolthoff Mfg. & Supply Co., 50 Colo. 342, 116 Pac. 122.

[221] General Order No. 21, clause 6. See International Agr. Corp. v. Cary, 240 Fed. 101, 153 C. C. A. 137, 38 Am. Bankr. Rep. 753. Under the corresponding provisions of the act of 1867 and the rules in bankruptcy, the order for the re-examination of a claim, or for reducing or expunging it, could be made only by the judge of the court of bankruptcy; this jurisdiction was not conceded to the register, unless, perhaps, in cases where no objection was interposed by the creditor. See Comstock v. Wheeler, 2 N. B. R. 561, Fed. Cas. No. 3,084; In re Loring, Holmes, 483, Fed. Cas. No. 8,512; In re Muldauer, 8 Ben. 127, Fed. Cas. No. 9,906; In re Aspinwall, 7 Ben. 154, Fed. Cas. No. 590. But an order for the re-examination of claims made by a register without objection cannot be revoked by him upon its return. Idem.

In bankruptcy proceedings, the court's power to reconsider and revise its orders and decrees does not expire with the term at which they were made,[222] and reconsideration of a claim should be allowed as a general rule when asked by the trustee at any time before the estate has been closed, that being the only limitation prescribed by the statute. Yet parties in interest (that is, the trustee or other creditors) may certainly lose their right to move for the expunging of an allowed claim when they have acquiesced in it for such a length of time as to be justly chargeable with laches.[223] But a delay of a year or even more, no other facts appearing, and where no dividend has been declared, cannot be said to constitute by itself such laches as to bar the re-examination of a claim.[224] And while it would be an abuse of discretion for the court to set aside an order allowing a claim and to grant a rehearing, for the sole purpose of extending the time within which an appeal may be taken, yet such an order, like all others, is within the control of the court, and may, in its sound discretion, be set aside for good cause shown, even after the expiration of the time allowed for appeal.[225]

It is the policy of the act to do equal and exact justice between the estate of the bankrupt and the creditors. The court has ample power to investigate a claim at any stage of the proceedings, before the final closing of the estate, and to make any correction that equity and justice demand,—not only to reduce the amount of the claim if it is found to have been allowed for too large a sum, but also to increase it if, through inadvertence or mistake, it is less than by right it should be, or to allow the proofs to stand for any sum which, upon examination, is found to be actually due.[226] Consequently, when a trustee in bankruptcy is not

[222] In re Keyes, 160 Fed. 763, 20 Am. Bankr. Rep. 183.

[223] In re Pittsburg Lead & Zinc Co., 198 Fed. 316, 28 Am. Bankr. Rep. 880; In re Hinckel Brewing Co., 123 Fed. 942, 10 Am. Bankr. Rep. 484; In re Hamilton Furniture Co., 116 Fed. 115, 8 Am. Bankr. Rep. 588; In re Effinger, 184 Fed. 724, 25 Am. Bankr. Rep. 924; In re Merwin & Willoughby Co. (D. C.) 208 Fed. 293, 31 Am. Bankr. Rep. 385; In re Williams (D. C.) 224 Fed. 984, 35 Am. Bankr. Rep. 459.

[224] In re Globe Laundry, 198 Fed. 365, 28 Am. Bankr. Rep. 831; In re Caledonia Coal Co. (D. C.) 254 Fed. 742, 43 Am. Bankr. Rep. 93.

[225] West v. W. A. McLaughlin & Co.'s Trustee, 162 Fed. 124, 20 Am. Bankr. Rep. 654.

[226] In re W. A. Paterson Co., 186 Fed. 629, 108 C. C. A. 493, 34 L. R. A. (N. S.) 31, 25 Am. Bankr. Rep. 855; In re Montgomery, 3 N. B. R. 423, Fed. Cas. No. 9,730; In re New Brunswick Carpet Co., 4 Fed. 514; Courtney v. Fidelity Trust Co., 219 Fed. 57, 134 C. C. A. 595, 33 Am. Bankr. Rep. 400. See In re United Grocery Co. (D. C.) 253 Fed. 267, 41 Am. Bankr. Rep. 824. But on motion to expunge a proof of debt and establish a set-off, a personal judgment cannot be rendered against the creditor for money in his hands. In re Forbes, 5 Biss. 510, Fed. Cas. No. 4,922; In re Peacock, 178 Fed. 851, 24 Am. Bankr. Rep. 159. Where a referee's order disallowing claims in bankruptcy on the sole ground that the claims were not offered for proof within the time required was sustained on a petition for review, and shortly afterwards the Circuit Court of Appeals in another case so construed the bankruptcy act that such claims would not have

satisfied of the legality or correctness of any claim which has been proved and allowed against the estate, or desires to contest such claim in respect either to its validity or amount, the proper practice is for him to move to have it re-examined, under the provisions of the general order, and proceed as therein directed.[227] And in the first place, the proceeding should be begun by the filing of a petition by the trustee, which should be distinct and specific. But it is said that it need not allege facts which, if proved, would defeat the claim, but only facts which constitute a sufficient cause for the re-examination of it which is demanded.[228] And if the petition is faulty in this respect, the proper method of objecting to it is by motion for a more specific statement, not by motion to strike out parts of the petition.[229] The creditor whose claim is in contest should file an answer; and if he fails to do so, and does not seek or obtain an extension of the time for answering, it will be a proper case for the entry of a decree against him pro confesso, carrying the ordinary incidents and consequences of such a decree.[230]

The general order, it will be noticed, gives the right of moving for the reconsideration of a claim to the "trustee or any creditor."[231] Although the corresponding general rule under the act of 1867 was worded in the same way, it was held that a petition for the re-examination of a proved and allowed claim might be presented by the bankrupt himself, as well as by the trustee or a creditor.[232] And in view of the purpose and policy of this provision of the act, and bearing in mind that the general order, though narrower than the statute, cannot operate as a restriction upon it, there seems good reason to hold that a petition by the bankrupt himself asking for a review of a proved claim ought not to be rejected.[233] As between the trustee and the general creditors of the estate, it has been held that the trustee alone is vested with the right to

been barred, the claimants were held entitled to a rehearing, although no appeal was claimed. In re Keyes, 160 Fed. 763, 20 Am. Bankr. Rep. 183.

[227] In re Firemen's Ins. Co., 3 Biss. 462, 8 N. B. R. 123, Fed. Cas. No. 4,796. See In re Brown (D. C.) 228 Fed. 533, 35 Am. Bankr. Rep. 826.

[228] In re George Watkinson & Co., 130 Fed. 218, 12 Am. Bankr. Rep. 370; In re Ankeny, 100 Fed. 614, 4 Am. Bankr. Rep. 72.

[229] In re Ankeny, 100 Fed. 614, 4 Am. Bankr. Rep. 72.

[230] In re Docker-Foster Co., 123 Fed. 190, 10 Am. Bankr. Rep. 584; In re Lewis, Eck & Co., 153 Fed. 495, 18 Am. Bankr. Rep. 657.

[231] In the bankruptcy of a partnership, where a claim has been proved and allowed against the individual estate of a partner, the referee has jurisdiction and power, on his own motion, to disallow the claim, and then reallow it against the firm estate. Cary v. International Agr. Corp. (C. C.) 243 Fed. 475, 38 Am. Bankr. Rep. 590.

[232] In re Pease, 29 Fed. 593.

[233] In re Ankeny, 100 Fed. 614, 4 Am. Bankr. Rep. 72. Compare In re Columbia Iron Works, 142 Fed. 234, 14 Am. Bankr. Rep. 526. If the bankrupt can be estopped from disputing the validity of a claim against his estate, or from applying to have it expunged after it has been proved, by reason of his having included it in his sworn schedule of debts, no such estoppel can be claimed in favor of a purchaser of the claim who was informed by the bankrupt, before purchas-

move for the reconsideration of a claim which has been allowed, that the provision authorizing "any creditor" to do so is meant to apply only to the case where a trustee has not yet been appointed, and that, after the appointment of a trustee, such a proceeding may not be instituted by a creditor without the concurrence of the trustee.[234] Hence if any creditor is dissatisfied with the allowance of another creditor's claim, his proper course is to demand of the trustee that the latter shall move for its reconsideration. But if the trustee refuses to do so, then the creditor may apply to the court for an order requiring the trustee so to move, or for permission for the objecting creditor to move in his own name.[235] And where it appears that a claim has been properly disallowed on objections made and conducted by the creditors in their own names, who voluntarily assumed liability for costs and expenses, the order of disallowance will not be disturbed on the theory that the trustee was the only proper person to attack the claim.[236] And the right to have a claim re-examined should not be denied to creditors who clearly have an interest therein because they seek such re-examination chiefly or solely in the interest of a third party.[237]

Any objection to a claim which would have been ground for refusing to allow it will be ground for expunging it on motion. If found to be exaggerated in amount, or illegal as to a severable portion, it may be reduced in amount. But if the claim as made is disproved in form and substance, it should be wholly expunged.[238] It may be stricken out on proof that the creditor had received a fraudulent preference which had not been surrendered, whereby he was disabled from proving any part of his debt,[239] or on account of an accomplished purpose of hindering and defrauding other creditors,[240] or because, after the proof and allowance of a debt founded on a judgment, the court in which such judgment was rendered has set it aside,[241] or when the claim is shown to have been barred by the statute of limitations at the time the petition in bankruptcy was filed.[242]

ing, that the seller of the claim had no valid claim against the estate. In re Pease, 29 Fed. 593.

[234] In re Sully, 142 Fed. 895, 15 Am. Bankr. Rep. 304; In re Lewensohn, 121 Fed. 538, 57 C. C. A. 600, 9 Am. Bankr. Rep. 368. But see In re Collins, 235 Fed. 937, 37 Am. Bankr. Rep. 692.

[235] In re Mexico Hardware Co., 197 Fed. 650, 28 Am. Bankr. Rep. 736; In re Stern, 144 Fed. 956, 76 C. C. A. 10, 16 Am. Bankr. Rep. 510.

[236] In re Canton Iron & Steel Co., 197 Fed. 767, 28 Am. Bankr. Rep. 791.

[237] In re Sully, 152 Fed. 619, 81 C. C. A. 609, 18 Am. Bankr. Rep. 123.

[238] In re Mead, 14 Fed. 287.

[239] In re Headley, 97 Fed. 765, 3 Am. Bankr. Rep. 272; In re Leland, 14 Blatchf. 240, 16 N. B. R. 505, Fed. Cas. No. 8,235.

[240] In re Headley, 97 Fed. 765, 3 Am. Bankr. Rep. 272.

[241] In re Bruce, 6 Ben. 515, Fed. Cas. No. 2,044.

[242] In re Lipman, 94 Fed. 353, 2 Am. Bankr. Rep. 46.

The burden of showing that a creditor's claim, duly proven according to the provisions of the statute, is founded in mistake or fraud, or otherwise is not a valid claim against the estate, rests upon the trustee or the creditor moving to have it expunged. In proving the claim as the law provides, the creditor makes a prima facie case in favor of it. The proof is not conclusive. It may be attacked. But the person who attacks it must assume the burden of proof, for the claimant is entitled to stand upon his own deposition until overcome by countervailing evidence.[243] This evidence, however, may be extracted from the creditor himself. He will be ordered to appear for examination concerning the nature and particulars of his claim, and if he does not obey, or refuses to answer questions, it is at his peril. Even though he lives in another state, this is no obstacle to the order for his appearance. For, by proving his claim, he subjects himself to the jurisdiction of the court and is thereafter bound to obey all lawful orders touching his debt. If he disobeys the order to appear and be examined, the court can deprive him of the benefit of the act by expunging his claim.[244] If the testimony of the bankrupt is desired on a motion to expunge a proved claim, it may be obtained by summoning him as a witness.[245] The referee is required to give due notice to the creditor whose claim is challenged of the time fixed for hearing the petition,[246] but there is nothing requiring him to give notice to either party of his findings and decision on the petition. That becomes a matter of record, of which a creditor who has proved a claim is bound to take notice, the same as he would, if he were a party to a suit, of the final action or judgment of the court in such suit.[247]

As against collateral attack, an order of a court of bankruptcy expunging one's claim for the list of proved and allowed claims, and excluding it from participation in the distribution, is conclusive upon the facts and issues involved.[248] And where a referee in bankruptcy makes an order expunging a claim by a creditor against the bankrupt, because the creditor had received a preference in excess of the claim, such order is res judicata as to the fact of the preference.[249] But the effect of expunging a claim, and thereby excluding the creditor from participation

[243] In re Frazin (C. C. A.) 201 Fed. 86, 29 Am. Bankr. Rep. 214; In re Pittsburg Lead & Zinc Co., 198 Fed. 316, 28 Am. Bankr. Rep. 880; In re Howard, 100 Fed. 630, 4 Am. Bankr. Rep. 69; In re Felter, 7 Fed. 904; In re Robinson, 8 Ben. 406, 14 N. B. R. 130, Fed. Cas. No. 11,938; Canby v. McLear, 13 N. B. R. 22, Fed. Cas. No. 2,378; In re Elk Valley Coal Mining Co. (D. C.) 210 Fed. 386, 31 Am. Bankr. Rep. 545.

[244] In re George Watkinson & Co., 130 Fed. 218, 12 Am. Bankr. Rep. 370; Laffoon v. Ives, 159 Fed. 861, 87 C. C. A. 41, 20 Am. Bankr. Rep. 174; In re Kyler, 2 Ben. 414, 2 N. B. R. 649, Fed. Cas. No. 7,956.

[245] Canby v. McLear, 13 N. B. R. 22, Fed. Cas. No. 2,378.

[246] In re Stoever, 105 Fed. 355, 5 Am. Bankr. Rep. 250.

[247] In re Pease, 29 Fed. 593.

[248] John Nix & Co. v. Andrews, 88 N. J. Law, 721, 96 Atl. 1012.

[249] Hartranft v. Ives, 64 Pa. Super. Ct. 338.

in the bankruptcy proceedings, is to remit him to such remedies as he may have outside the bankruptcy, and thus set him free to reduce his claim to judgment and subject to its payment such property of the bankrupt as has not been absorbed by the bankruptcy proceedings.[250]

§ 543. Review of Referee's Proceedings by Judge.—Under the former bankruptcy law it was held that the register had power to pass upon the question of the regularity and formality of the proofs, but when any question of law or fact was raised in respect to the claim, he was obliged to certify the same to the judge for decision.[251] But under the present law, the referee not only has jurisdiction in the first instance to hear objections to the proof of claims, and pass upon the question of allowing or disallowing them, but also to entertain and decide motions for their reconsideration or expunction. And the only remedy to obtain a review of his decision on such a motion lies in the court of bankruptcy.[252] And a person dissatisfied must file a petition for a review of the referee's order.[253] The matter cannot be brought into the district court for review by filing exceptions in that court.[254] Further, a person desiring a review of the order must present his petition within the time limited therefor by any rule of the court,[255] and even if no such rule applies, he must act with reasonable promptness, or he will be subject to the imputation of laches and may for that reason be barred of all relief.[256]

On such a petition for review, the burden of proof is on those who object to the referee's decision and desire its reversal.[257] And since the referee is vested with a large measure of discretion, his decision on any

[250] Andrews v. John Nix & Co., 246 U. S. 273, 38 Sup. Ct. 249, 62 L. Ed. 711, 41 Am. Bankr. Rep. 260.

[251] In re Bogert, 2 N. B. R. 435, Fed. Cas. No. 1,598; In re Clark, 6 N. B. R. 202, Fed. Cas. No. 2,808.

[252] Clendening v. Red River Valley Nat. Bank, 12 N. D. 51, 94 N. W. 901. As to procedure on finding referee's decision wrong, and remand of case for rehearing, see Moore v. Crandall (C. C. A.) 205 Fed. 689, 30 Am. Bankr. Rep. 517.

[253] In re Russell, 105 Fed. 501, 5 Am. Bankr. Rep. 566; In re Wood, 248 Fed. 246, 160 C. C. A. 324, 40 Am. Bankr. Rep. 810; Irwin v. Maple, 252 Fed. 10, 164 C. C. A. 122, 41 Am. Bankr. Rep. 532. Compare In re John A Baker Notion Co., 180 Fed. 922, 24 Am. Bankr. Rep. 808. Ordinarily a general creditor may not prosecute before the bankruptcy court a petition for review of the allowauce of the claim of another creditor; only the trustee may do so. In re Mexico Hardware Co., 197 Fed. 650, 28 Am. Bankr. Rep. 736.

[254] In re Hawley, 116 Fed. 428, 8 Am. Bankr. Rep. 632. Where, after disallowing a claim, but before perfecting findings, the referee in bankruptcy died, it is proper for the district judge to direct the whole matter to be certified to him, so that it can be tried de novo. In re Wray, 233 Fed. 418, 147 C. C. A. 354, 37 Am. Bankr. Rep. 28.

[255] In re T. M. Lesher & Son, 176 Fed. 650, 25 Am. Bankr. Rep. 218; In re L. & R. Wister & Co., 237 Fed. 793, 151 C. C. A. 35, 38 Am. Bankr. Rep. 215.

[256] In re Nichols, 166 Fed. 603, 22 Am. Bankr. Rep. 216; Cary v. International Agr. Corp. (D. C.) 243 Fed. 475, 38 Am. Bankr. Rep. 590.

[257] In re Williams, 120 Fed. 542, 9 Am. Bankr. Rep. 731; In re Pittsburgh Lead & Zinc Co., 198 Fed. 316, 28 Am. Bankr. Rep. 880.

matter of fact or evidence will be entitled to at least the weight accorded to the verdict of a jury, and will not be reversed by the court unless plainly unsupported by the evidence or otherwise palpably erroneous.[258] The court, however, may of course reverse and remand if satisfied that the referee was in error. But where, in his decision to reject a claim, he ignored material legal evidence, it would not be proper for the court to allow the claim, in addition to reversing the decision of the referee; the proper procedure is to remand the claim to the referee for a new hearing.[259]

[258] Baumhauer v. Austin, 186 Fed. 260, 108 C. C. A. 306, 26 Am. Bankr. Rep. 385; In re Schwarz, 200 Fed. 309, 29 Am. Bankr. Rep. 700; In re Montgomery, 185 Fed. 955, 25 Am. Bankr. Rep. 431; In re Levin, 173 Fed. 119, 21 Am. Bankr. Rep. 665; In re Carter, 138 Fed. 846, 15 Am. Bankr. Rep. 126; In re Grant, 118 Fed. 73, 9 Am. Bankr. Rep. 93; In re Stout, 109 Fed. 794, 6 Am. Bankr. Rep. 505; In re Rider, 96 Fed. 811, 3 Am. Bankr. Rep. 192; In re Charles R. Partridge Lumber Co. (D. C.) 215 Fed. 973, 33 Am. Bankr. Rep. 537; In re New York & Philadelphia Package Co. (D. C.) 225 Fed. 219, 35 Am. Bankr. Rep. 94; In re Miller (D. C.) 225 Fed. 331, 35 Am. Bankr. Rep. 333; In re La Jolla Lumber & Mill Co. (D. C.) 243 Fed. 1004, 40 Am. Bankr. Rep. 273; In re Schilling (D. C.) 251 Fed. 972; In re Anderson (D. C.) 252 Fed. 272, 41 Am. Bankr. Rep. 731; In re Caledonia Coal Co. (D. C.) 254 Fed. 742, 43 Am. Bankr. Rep. 93; In re Petersen (D. C.) 252 Fed. 846, 40 Am. Bankr. Rep. 637.

[259] Moore v. Crandall, 205 Fed. 689, 124 C. C. A. 11, 30 Am. Bankr. Rep. 517.

CHAPTER XXVII

SET-OFF OF MUTUAL DEBTS

§ 544. Right of Set-Off in General.—The bankruptcy act provides that "in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid," provided, however, that the creditor's claim is of a nature to be provable under the act and was not purchased with a view to its use as a set-off.[1] "Stating an account" consists in the allowance or disallowance of the several claims or items, computing or striking a balance as due from one party to the other, and the agreement of the parties, express or implied, as to the correctness of such balance and the fact of its being due. If there is a disagreement between the trustee and the creditor as to the allowance of items in the mutual account, or the validity of claims, or as to the amount of the balance due, the trustee may apply to the court for leave to arbitrate or compromise the controversy,[2] or the court itself might settle the question in a summary manner or direct a suit to be brought.[3]

This provision, however, is permissive rather than mandatory,[4] and does not enlarge the doctrine of set-off and cannot be invoked in cases where the general principles of legal or equitable set-off would not authorize it.[5] The matter, moreover, is largely within the control of the

[1] Bankruptcy Act 1898, § 68. The object of this provision of the act is to give to the bankruptcy court the right to apply the principles of set-off to mutual credits when its action is invoked for that purpose. Cumberland Glass Mfg. Co. v. De Witt, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042, 34 Am. Bankr. Rep. 723.

[2] Bankruptcy Act 1898, §§ 26, 27. Where a claim as originally filed recited that there was no counterclaim or offset to it, but it appeared that the bankrupt had a claim and a lien against property of the claimant, it was held that the claim might be amended so as to require a set-off against that of the claimant and the extinguishment of the lien. In re Progressive Wallpaper Corp. (D. C.) 240 Fed. 807, 39 Am. Bankr. Rep. 557.

[3] See In re Barnes Gear Co. (C. C. A.) 265 Fed. 597, 45 Am. Bankr. Rep. 468.

[4] In re Kyte (D. C.) 182 Fed. 166, 25 Am. Bankr. Rep. 337; Lehigh Valley Coal Sales Co. v. Maguire, 251 Fed. 581, 163 C. C. A. 575, 42 Am. Bankr. Rep. 319.

[5] Wagner v. Citizens' Bank & Trust

court of bankruptcy, its discretion in these cases being governed by the principles of equity. Thus, it may disallow a claim of a set-off against the bankrupt, when its allowance would work injustice,[6] and on the other hand, it may order a set-off where injustice would otherwise result, though an action at law could not be maintained on the claim in question.[7] Thus, where a debtor of the bankrupt who had a claim against the latter which the law would allow him to offset, mistook his legal rights in the matter and acted on incompetent advice, to the effect that the bankruptcy law would prevent any set-off, and therefore paid the entire amount of his debt to the trustee in bankruptcy, it was held that he was entitled to a return of the money so paid by him.[8] But a claim cannot be used in this way where the transaction out of which it arose was fraudulent.[9] But it must be remarked that, although the allowance of a set-off enables the particular creditor to obtain payment in full of his claim, while other creditors are only partially paid, and thus he becomes a preferred creditor, yet it is a preference growing out of the business relations of the parties as they stood at the time, and not one contrived between them, and therefore it is not obnoxious to the act.[10]

The claim proposed as a set-off, whether brought forward by the trustee or the creditor, must be in the nature of a debt or a credit. For this reason, a perfectly gratuitous expenditure of money with no expectation of repayment (as by a father for the support and education of his children) cannot be made the subject of a set-off.[11] And a payment on a note given by an insolvent to close up an existing account with a

Co., 122 Tenn. 164, 122 S. W. 245, 28 L. R. A. (N. S.) 484, 135 Am. St. Rep. 869, 19 Ann. Cas. 483; Morris v. Windsor Trust Co., 213 N. Y. 27, 106 N. E. 753, Ann. Cas. 1916C, 972; Planters' Oil Co. v. Gresham (Tex. Civ. App.) 202 S. W. 145. See In re Colwell Lead Co. (D. C.) 241 Fed. 922, 39 Am. Bankr. Rep. 228.

[6] Hitchcock v. Rollo, 3 Biss. 276, Fed. Cas. No. 6,535.

[7] Wyckoff v. Williams, 136 App. Div. 495, 121 N. Y. Supp. 189.

[8] In re Farmers' & Mechanics' Bank (D. C.) 13 Fed. 361.

[9] McKay v. Weager (Sup.) 134 N. Y. Supp. 66. A bank which, as pledgee, had wrongfully sold property of the bankrupts at private sale for the amount of its lien, but afterwards received the profit from resales by the purchaser, which it held as its own, was held estopped, on an accounting to the trustee, to apply such sum on unsecured indebtedness of the bankrupts. Howard v. Mechanics' Bank (D. C.) 262 Fed. 699, 45 Am. Bankr. Rep. 112. Where the trustee in bankruptcy sues for the recovery of certain commissions which had been paid to the defendant in the character of a factor acting for the corporation in its business, on the ground that the factor had made secret payments out of his commissions to the president of the corporation, in violation of the penal law of the state, the factor cannot offset claims which he holds against the corporation. Palmer v. Doull Miller Co. (D. C.) 233 Fed. 309.

[10] Drake v. Rollo, 3 Biss. 273, Fed. Cas. No. 4,066. Compare In re White, 177 Fed. 194, 101 C. C. A. 364, 24 Am. Bankr. Rep. 197.

[11] Embry v. Bennett, 162 Fed. 139, 89 C. C. A. 163, 20 Am. Bankr. Rep. 651. And so of a payment made by a surety of the bankrupt, in exoneration of a default or defalcation of the bankrupt, but which the surety was under no legal obligation to make, his liability as surety having been already terminated by circumstances which he might have dis-

creditor, made within four months of the filing of his petition in bankruptcy, cannot be treated as a set-off against a new debt afterwards created by him with the same creditor, when he seeks to prove the latter in the bankruptcy proceedings.[12] So also, a creditor proving a claim against the bankrupt on an open account cannot be subjected to a set-off which would reduce or extinguish it, merely because he applied funds sent to him by the bankrupt to the satisfaction of another claim (which was secured by mortgage) instead of applying them, as the debtor directed, to the open account.[13] On similar principles, it is held that a contingent obligation or liability cannot be set off against a debt absolutely owing to the bankrupt,[14] nor a claim for unliquidated damages for a tort or a breach of contract.[15] So, a judgment obtained by a trustee in bankruptcy for a penalty incurred by the violation of a state statute against usury cannot be set off against a claim of the judgment debtor against the bankrupt estate.[16] And money or property held or due under a trust must be employed or applied according to the terms of the trust, and cannot be made the subject of a set-off as against the private debt or obligation of the trustee.[17]

But subject to these qualifications and restrictions, the set-off allowed by the statute is not confined to pecuniary demands, but embraces such claims as may or must give rise to or result in a "debt," as, for instance, where a creditor has goods of the bankrupt in his hands, which could be reached only by a suit at law or in equity.[18] So a creditor of the bankrupt who has in his possession, at the time of the bank-

covered on proper inquiry. In re Hallock (D. C.) 226 Fed. 821, 36 Am. Bankr. Rep. 92.

[12] In re Seay, 113 Fed. 969, 7 Am. Bankr. Rep. 700; In re Abraham Steers Lumber Co., 112 Fed. 406, 50 C. C. A. 310, 7 Am. Bankr. Rep. 332.

[13] Stewart v. Hopkins, 30 Ohio St. 502.

[14] Abbott v. Hicks, 7 Scott, 715; In re American Paper Co., 246 Fed. 790, 159 C. C. A. 92, 41 Am. Bankr. Rep. 141.

[15] Rose v. Sims, 1 Barn. & Ad. 521; In re Becker Bros., 139 Fed. 366, 15 Am. Bankr. Rep. 228; Pindel v. Holgate, 221 Fed. 342, 137 C. C. A. 158, 34 Am. Bankr. Rep. 600; In re Barnes Gear Co. (D. C.) 251 Fed. 764, 42 Am. Bankr. Rep. 325; Custard v. McNary, 85 W. Va. 516, 102 S. E. 216. Compare In re Harper (D. C.) 175 Fed. 412, 23 Am. Bankr. Rep. 918. The rule is otherwise if damages for a tort or breach of contract have been liquidated. Marcus Shipping Ass'n v. Barnes, 169 Iowa, 377, 151 N. W. 525. In the bankruptcy of a stockbroker, who had been purchasing stock for customers where the number of shares he had on hand at the time of the bankruptcy was less than required to satisfy the demands of the customers, any customer who is indebted to the broker may set off his indebtedness against the shares not recoverable. In re H. B. Hollins & Co. (D. C.) 212 Fed. 317.

[16] Wilson v. National Bank of Rolla (C. C.) 1 McCrary, 538, 3 Fed. 391.

[17] Western Tie & Timber Co. v. Brown, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571, 13 Am. Bankr. Rep. 447; Libby v. Hopkins, 104 U. S. 303, 26 L. Ed. 769; In re Davis, 119 Fed. 950, 9 Am. Bankr. Rep. 670; Scammon v. Kimball, 5 Biss. 431, Fed. Cas. No. 12,435; In re Troy Woolen Co., 8 N. B. R. 412, Fed. Cas. No. 14,203; In re Lane, 2 Low. 305, 13 N. B. R. 43, Fed. Cas. No. 8,043.

[18] Murray v. Riggs, 15 Johns. (N. Y.) 571; In re W. & A. Bacon Co. (D. C.) 261 Fed. 109, 44 Am. Bankr. Rep.

ruptcy, goods consigned to him by the bankrupt for sale, may sell the goods and, as against a claim for the proceeds, set off his claim against the bankrupt.[19] The value of property converted by the bankrupt may also be set off, [20] and so, perhaps, may a claim for breach of a contract, where the amount which would be recoverable is fixed and certain.[21] Thus, a claim for loss under an insurance policy may be set off by the insured against his indebtedness to the company.[22] And where a landlord received a specified sum from the tenant for an extension of the lease for a definite period, but the lessee obtained no benefit from the extension because of his bankruptcy during the original term, in proceedings to establish claims for rent and for damages to the leased premises, the lessor must account to the estate for the sum so received.[23] A creditor having two distinct debts, and holding property in pledge for one of them, with power of sale existing at the date of the bankruptcy, may apply the surplus proceeds after paying the first debt to the discharge of the second.[24] In partnership cases, the right of set-off cannot be so applied as to run counter to the cardinal rule that firm assets are for firm creditors and the separate estates of the partners for their individual creditors. But as between the partners themselves, claims arising out of independent dealings may be offset against demands growing out of the partnership affairs.[25]

§ 545. **Meaning of Mutual Debts and Mutual Credits.**—In order that debts may be set off under this provision of the bankruptcy law, they must be mutual and must be in the same right.[26] By the term "mutual

196. Claims due the bankrupt against mortgagees who took possession of the property under an invalid foreclosure may be set off against claims of the mortgagees. Roger v. J. B. Levert Co., 237 Fed. 737, 150 C. C. A. 491, 38 Am. Bankr. Rep. 240.

19 Goodrich v. Dobson, 43 Conn. 576, Fed. Cas. No. 18,297.

20 McCabe v. Winship, 17 N. B. R. 113, Fed. Cas. No. 8,668.

21 See In re Wheeler, 2 Low. 252, Fed. Cas. No. 17,488; In re Manneschmidt, 202 Fed. 815; Clifford v. Oak Valley Mills Co. (D. C.) 229 Fed. 851, 36 Am. Bankr. Rep. 867; In re Pottier & Stymus Co. (C. C. A.) 262 Fed. 955, 44 Am. Bankr. Rep. 469; Wolins v. Wilmerding, 102 Misc. Rep. 667, 169 N. Y. Supp. 594; In re Barnes Gear Co. (D. C.) 259 Fed. 320, 44 Am. Bankr. Rep. 275.

22 Drake v. Rollo, 3 Biss. 273, 4 N. B. R. 689, Fed. Cas. No. 4,066.

23 In re Abrams, 200 Fed. 1005, 29 Am. Bankr. Rep. 590.

24 Ex parte Whiting, 2 Low. 472, 14 N. B. R. 307, Fed. Cas. No. 17,573; In re McVay, 13 Fed. 443; In re Searles, 200 Fed. 893, 29 Am. Bankr. Rep. 635.

25 In re Voetter, 4 Fed. 632; Warren v. Burnham, 32 Fed. 579.

26 In re Howe Mfg. Co. (D. C.) 193 Fed. 524, 27 Am. Bankr. Rep. 477. See In re American Paper Co. (D. C.) 243 Fed. 753, 40 Am. Bankr. Rep. 121. Trust funds are not applicable by way of set-off against a debt of the bankrupt to the person in charge of such funds, since the relation is fiduciary in the one instance and personal in the other. Alvord v. Ryan, 212 Fed. 83, 128 C. C. A. 539, 32 Am. Bankr. Rep. 1. A debt owing from a bankrupt partnership to a creditor and one owing from the creditor to an individual partner are not "mutual debts" which may be set off against each other. In re Neaderthal, 225 Fed. 38, 140 C. C. A. 364, 34 Am. Bankr. Rep. 542.

credit," as used in the rule under which courts of equity allow set-off in cases of mutual credit, we are to understand a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on and trusting to such debt as a means of discharging it.[27] But the term "mutual credits" in the bankruptcy law is more comprehensive than the same term as used in the equity rule or in statutes relating to the subject of set-off. The term "credit" is synonymous with "trust," and the trust or credit need not be of money on both sides. Where the creditor has goods or choses of action of the bankrupt put in his hands before the bankruptcy, by a valid contract, by the terms of which the deposit will result in a debt, as, if they are deposited for sale or collection, the case of mutual credits has arisen within the meaning of the bankruptcy law.[28] Thus, where there is a debt due on one side, and on the other a delivery of property with directions to turn it into money, the property thus delivered constitutes a "credit" within the meaning of the statute.[29] But where a bankrupt had deposited chattels with a bailee for the purpose of having certain work done upon them, and the trustee sought to recover them in an action of trover, it was held that the defendant was not entitled to retain them for his general balance for such work done by him for the bankrupt previously to the bankruptcy, for this was not a case of mutual credits.[30] So, in an action by the trustee in bankruptcy of an insolvent corporation, which carried on a livery stable, for board of defendant's horses, the latter cannot offset his personal claims against the former owner of the stable, who had conducted the business in the same name adopted by the corporation, and afterwards managed the business, since, whatever equities the defendant may have against such former owner, he has no counterclaim against the trustee.[31] Again, where a claim against a bankrupt insurance company for loss under its policies has been assigned, after notice of insolvency, the assignee cannot set it off against his previous indebtedness to the company, the debts and credits not being "mutual" within the meaning of the law.[32] So, where the trustee of a bankrupt corporation is prose-

[27] King v. King, 9 N. J. Eq. 44.

[28] Ex parte Caylus, 1 Low. 550, Fed. Cas. No. 2,534; Marks v. Barker, 1 Wash. C. C. 178, Fed. Cas. No. 9,096; Rose v. Hart, 8 Taunt. 499. And see Walther v. Williams Mercantile Co., 169 Fed. 270, 94 C. C. A. 546, 22 Am. Bankr. Rep. 328.

[29] Goodrich v. Dobson, 43 Conn. 576, Fed. Cas. No. 18,297. A customer of a bankrupt stockbroker is entitled to a set-off equal to the value of stock converted, and may have the value of the stock fixed as of the date of the bankruptcy. In re J. F. Pierson, Jr., & Co. (D. C.) 225 Fed. 889, 35 Am. Bankr. Rep. 213.

[30] Rose v. Hart, 8 Taunt. 499; Birdwood v. Raphael, 5 Price, 593.

[31] Davis v. Lohsen, 34 Misc. Rep. 769, 68 N. Y. Supp. 795.

[32] Hitchcock v. Rollo, 3 Biss. 276, 4 N. B. R. 690, Fed. Cas. No. 6,535. And see, as to assigned claims, Moulton v. Perkins, 116 Me. 218, 100 Atl. 1020. But compare Standard Engineering & Const. Co. v. Smyser-Royer Co., 68 Pa. Super. Ct. 437.

cuting an action against another corporation for goods sold, a creditor of the bankrupt cannot have the value of the property credited on his claim against the bankrupt, and have the action dismissed, on the contention that the goods were bought by him from the bankrupt and sold by him to the other corporation, when it appears that he was an officer of the bankrupt corporation and in charge of its sales, and at the same time an officer and agent of the purchasing corporation.[33] In another case, it appeared that a claimant ordered materials from a corporation, but another corporation which became bankrupt, intending to charge the same to the claimant, furnished the materials. The claimant, before changing his position or suffering any loss, learned of the facts and insisted on receiving the materials from the bankrupt. It was held that the claimant made himself a debtor to the bankrupt without any right to offset against the shipment any claim he had against the other corporation.[34]

§ 546. Time of Accrual of Debts or Claims.—To entitle a person to a set-off against the estate of a bankrupt, his debt or demand must be a provable one, and therefore must have been in existence at the commencement of the proceeding in bankruptcy,[35] and further, if he was not the original holder of the claim, he must have acquired it before the filing of the petition in bankruptcy.[36] Thus, for example, the mutual accounts between a bankrupt and his bank of deposit are closed by operation of law at the time when the petition in bankruptcy is filed, and no right of set-off exists in the bank as to deposits made after that time, even though neither party knew of the filing of the petition when the deposit was made.[37] So, a creditor of a bankrupt cannot obtain a preference of his debt by purchasing the property of the bankrupt through the intervention of an agent, and tendering the notes of the bankrupt in payment for the same; and in an action by the trustee to recover the value of such property, the creditor cannot set off the notes of the bankrupt.[38] But if a debt or claim constitutes a fixed and definite liability at the time of the bankruptcy, it is a provable debt, although the time for its payment has not yet arrived. Hence a debt not yet due may be set off against a debt due immediately, if it is of a provable nature.[39]

[33] In re Fort Wayne Electric Corp., 95 Fed. 264, 2 Am. Bankr. Rep. 503.

[34] In re Belleview Pipe & Foundry Co., 189 Fed. 169.

[35] Shepherd v. Turner, 3 McCord (S. C.) 249, 15 Am. Dec. 631; Smith v. Brinkerhoff, 2 Edm. Sel. Cas. (N. Y.) 369; Moore v. Third Nat. Bank, 41 Pa. Super. Ct. 497; Bramham v. Lanier Bros., 138 Tenn. 702, 200 S. W. 830.

[36] Smith v. Brinkerhoff, 8 Barb. (N. Y.) 519; Ogden v. Cowley, 2 Johns. (N. Y.) 274.

[37] In re Michaelis & Lindeman, 196 Fed. 718.

[38] Fleming v. Andrews, 9 Biss. 348, 3 Fed. 632.

[39] Ex parte Prescot, 1 Atk. 230; Ex parte Wagstaff, 13 Ves. 65; In re City Bank, 6 N. B. R. 71, Fed. Cas. No. 2,742.

Thus, notes made by the bankrupt, though not due at the time of the bankruptcy, may be used as a set-off in an action against the holder by the trustee in bankruptcy.[40] And an indorser or surety who pays the debt of his principal after the latter's bankruptcy, may claim the benefit of it as a set-off, provided his contract of indorsement or suretyship was made before the filing of the petition.[41]

§ 547. **Claims Purchased With a View to Set-Off.**—The bankruptcy act provides that "a set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."[42] The rule was substantially the same under the act of 1867, the question turning upon the person's knowledge or notice of the fact of insolvency, or, in the case of involuntary bankruptcy, of the commission of an act of bankruptcy.[43] If this particular fact is drawn in issue, the burden is on the party claiming the right of set-off to show that he had no notice or knowledge of the insolvency of the party with whom he was dealing, and consequently no intention of using the claim in question as a set-off in the latter's bankruptcy.[44] Though this clause of the statute speaks only of claims "purchased by or transferred to" the debtor of the bankrupt, it is held that, where an indorser of the bankrupt's paper takes it up within four months prior to the bankruptcy, knowing that the bankrupt is insolvent, and for the purpose of setting it off against his debt to the bankrupt, the statute applies, and it cannot be so used.[45]

§ 548. **Claims Already Filed or Proved.**—Proving his claim in the bankruptcy proceedings is a waiver by the creditor of all right of action or suit against the bankrupt in respect of such claim. Hence, where the creditor proved his claim, but omitted to credit the bankrupt with a debt due to him from the creditor, and the trustee sued for such debt, it was held that the creditor could not offer the claim already proved, by way of set-off to that suit; for his doing so would be equivalent to the prosecution of an original suit for its amount, the right to which he had

[40] Frank v. Mercantile Nat. Bank, 182 N. Y. 264, 74 N. E. 841, 108 Am. St. Rep. 805.

[41] Marks v. Barker, 1 Wash. C. C. 178, Fed. Cas. No. 9,096; In re Dillon, 100 Fed. 627, 4 Am. Bankr. Rep. 63. But compare Ex parte Hale, 3 Ves. 304.

[42] Bankruptcy Act 1898, § 68b.

[43] See Mattocks v. Lovering, 3 Fed. 212; Rollins v. Twitchell, 2 Hask. 66, 14 N. B. R. 201, Fed. Cas. No. 12,027; Mattox v. Cady, Fed. Cas. No. 9,301; Hovey v. Home Ins. Co., 10 N. B. R. 224, Fed. Cas. No. 6,743.

[44] In re Shults, 135 Fed. 623, 14 Am. Bankr. Rep. 378.

[45] Mason v. National Herkimer County Bank, 172 Fed. 529, 22 Am. Bankr. Rep. 733.

waived.[46] But there is also a decision to the effect that a creditor who has proved his claim in the bankruptcy proceedings may withdraw the same and plead it as a set-off in a suit brought against him by the trustee, and that if he is not allowed thus to plead the claim, and judgment goes against him in the trustee's suit, the court of bankruptcy, having full power over such a judgment, is bound by the statute to set off against it the claim of the creditor at its proper value.[47]

§ 549. **Joint Debts and Credits.**—Under the bankruptcy law of 1867 it was held that, where one of two joint debtors becomes bankrupt, the creditor may set off the debt against his separate indebtedness to the bankrupt.[48] But generally the courts adhered to the rule that a set-off is enforced in equity only when there are mutual debts or credits, or where there exists some equitable consideration or agreement between the parties which would render it unjust not to allow a set-off. Hence, where a bankrupt owed a debt to two persons jointly, and held a joint note given by one of them and a third person, it was held that the two claims were not subject to set-off under the bankruptcy act, being neither mutual debts or credits.[49] So, it is now held that a solvent partnership which is indebted to a bankrupt cannot set off against such indebtedness a claim due from the bankrupt estate to one of the partners,[50] and a claim on promissory notes of a partner cannot be set off against a judgment in behalf of the firm, the debts not being in the same right.[51] So where five persons, only one of whom was solvent, had a joint claim against the estate of a bankrupt, and each of them had severally become liable to the trustee in bankruptcy, the amounts of such liabilities aggregating more than the claim, but it did not appear that the joint liability and the separate debts grew out of the same transaction, or that either formed the inducement or consideration for the other, it was held that there could be no set-off of such claims.[52] In the case of a person jointly liable with the bankrupt and who is also his creditor, the right may depend on whether or not the common creditor proves his claim. Thus, where the bankrupt and a person who was indebted to him were jointly liable on a promissory note to a bank, and the bank proved its claim on the note, and thereafter the bankrupt's

[46] Brown v. Farmers' Bank of Kentucky, 6 Bush (Ky.) 198; Russell v. Owen, 61 Mo. 185, 15 N. B. R. 322.

[47] Harmanson v. Bain, 1 Hughes, 391, Fed. Cas. No. 6,073.

[48] In re Carrier, 39 Fed. 193. And see Cosgrove v. Cosby, 86 Ind. 511; Tucker v. Oxley, 5 Cranch, 34, 3 L. Ed. 29.

[49] Gray v. Rollo, 18 Wall. 629, 21 L. Ed. 927.

[50] In re Shults, 132 Fed. 573, 13 Am. Bankr. Rep. 84.

[51] In re T. M. Lesher & Son, 176 Fed. 650, 25 Am. Bankr. Rep. 218; In re Neaderthal, 225 Fed. 38, 140 C. C. A. 364, 34 Am. Bankr. Rep. 542.

[52] In re Crystal Spring Bottling Co., 100 Fed. 265, 4 Am. Bankr. Rep. 55.

debtor took up the note, it was held that the latter could not set off against his indebtedness to the estate the moiety of the note which the bankrupt should have paid, but that, on paying his debt to the trustee, he should be subrogated to the rights of the bank as to that moiety, and entitled to receive such dividends as should be declared thereon.[53] On the other hand, where a debtor of the bankrupt paid a debt to a creditor on which he was jointly liable with the bankrupt, and the creditor to whom the payment was made had received a preference, which he had not surrendered, and therefore was not entitled to prove his claim in the bankruptcy, it was held that the debtor paying the claim was not entitled to set off the payment against his debt to the bankrupt by virtue of his right of subrogation to the rights of the creditor, since he succeeded to the creditor's disabilities as well as to his rights, but that the claim of such debtor was a "mutual credit," within the meaning of the bankruptcy act, and on that ground he was entitled to have the same set off against the claim of the bankrupt's estate against him.[54] Where part of a claim accrued to the bankrupt himself before the bankruptcy, but the remainder to his trustee after the bankruptcy, one desiring to set off a claim in his own favor must show against which portion of the trustee's claim, if any, it is available by way of set-off.[55]

§ 550. Set-Off Against Deposit Account in Bank.—A general deposit account in a bank subject to check becomes, upon the bankruptcy of the depositor, a security for, and a payment pro tanto of, his liabilities to the bank, by the operation of the law of mutual credits.[56] Hence where a bankrupt is indebted to a bank, on promissory notes or otherwise, in which he also has a balance to the credit of his general deposit account, the bank is entitled to have the one claim set off against the other, and to account to the trustee in bankruptcy only for the balance of the money on deposit after satisfying its own claims, or, if those claims exceed the amount of the bankrupt's balance, then to prove its claim for the remainder.[57] And this rule is not affected by the fact that

[53] In re Bingham, 94 Fed. 796, 2 Am. Bankr. Rep. 223.

[54] Morgan v. Wordell, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33.

[55] Howard v. Magazine & Book Co., 147 App. Div. 335, 131 N. Y. Supp. 916.

[56] Hough v. First Nat. Bank, 4 Biss. 349, Fed. Cas. No. 6,721; Ex parte Howard Nat. Bank, 2 Low. 487, 16 N. B. R. 420, Fed. Cas. No. 6,764.

[57] New York County Nat. Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, 11 Am. Bankr. Rep. 42; Scammon v. Kimball, 92 U. S. 362, 23 L. Ed. 483; In re Myers, 99 Fed. 691, 3 Am. Bankr. Rep. 760; In re Little, 110 Fed. 621, 6 Am. Bankr. Rep. 681; In re Meyer, 107 Fed. 86, 5 Am. Bankr. Rep. 593; In re Kalter, 2 Nat. Bankr. News, 264; In re Petrie, 5 Ben. 110, 7 N. B. R. 332, Fed. Cas. No. 11,040; Blair v. Allen, 3 Dill. 101, Fed. Cas. No. 1,483; Booth v. Prete, 81 Conn. 636, 71 Atl. 938, 20 L. R. A. (N. S.) 863, 15 Ann. Cas. 306; Steinhardt v. National Park Bank, 120 App. Div. 255, 105 N. Y. Supp. 23; Whitaker v. Crowder State Bank, 26 Okl. 786, 110 Pac. 776; West v. Bank of Lahoma, 16 Okl. 328, 85 Pac. 469; Toof v. City Nat. Bank, 206 Fed. 250, 124 C. C. A. 118, 30 Am. Bankr. Rep. 79; In re Wright-Dana Hardware Co., 212 Fed. 397, 129 C. C. A.

the debt to the bank, if fixed and absolute, was not due at the date of the bankruptcy,[58] as in the case of notes of the bankrupt which were discounted by the bank prior to the filing of the petition, whether matured or unmatured at the date of the adjudication in bankruptcy,[59] or where the bankrupt's liability was as an indorser of a note held by the bank, though that liability did not become absolute until after the filing of the petition.[60] And it appears that, even though the deposit account may have been transferred on the books of the bank to an assignee for creditors or a receiver, or even to the trustee in bankruptcy, yet if there has been no actual payment of the money nor any change of possession, it is not too late to claim the right of set-off.[61] And in one case it was held that where a bank, holding a note of the bankrupt and also having funds of his on deposit sufficient to satisfy it, paid over the entire fund to the trustee in bankruptcy, through oversight, without first satisfying the note, it was entitled to recover the amount of the note from the trustee in a court of equity, without first offering to satisfy the note or bringing it into court for cancellation.[62] On the same principle, if a bank, after the commencement of proceedings in bankruptcy, collects money on drafts deposited with it by the bankrupt before that time, it may apply the money towards the payment of a note of the bankrupt held by it.[63] And a firm note to a bank, assumed by an insolvent partner on the dissolution of the firm, becomes his individual indebtedness, so that such debt and the amount due to him as a depositor, independent of any partnership consideration, become mutual debts within the meaning of the bankruptcy law.[64]

73, 31 Am. Bankr. Rep. 816; Wilson v. Citizens' Trust Co. (D. C.) 233 Fed. 697, 37 Am. Bankr. Rep. 86; In re Friedman (D. C.) 241 Fed. 603, 39 Am. Bankr. Rep. 777; Chisholm v. First Nat. Bank, 269 Ill. 110, 109 N. E. 657; Conquest v. Broadway Nat. Bank, 134 Tenn. 17, 183 S. W. 160; Dunlap v. Seattle Nat. Bank, 93 Wash. 568, 161 Pac. 364; Bennett v. North Philadelphia Trust Co., 66 Pa. Super. Ct. 261; Wrenn v. Citizens' Nat. Bank (Conn.) 114 Atl. 120; In re Cross (C. C. A.) 273 Fed. 39, 46 Am. Bankr. Rep. 727.

[58] Germania Savings Bank & Trust Co. v. Loeb, 188 Fed. 285, 110 C. C. A. 263, 26 Am. Bankr. Rep. 238; In re Radley Steel Const. Co. (D. C.) 212 Fed. 462; De Long v. Mechanics & Metals Nat. Bank, 168 App. Div. 525, 153 N. Y. Supp. 1010; Shields v. John Shields Const. Co., 83 N. J. Eq. 21, 89 Atl. 1022.

[59] Frank v. Mercantile Nat. Bank, 100 App. Div. 449, 91 N. Y. Supp. 488, affirmed, 182 N. Y. 264, 74 N. E. 841, 108 Am. St. Rep. 805.

[60] In re Philip Semmer Glass Co., 135 Fed. 77, 67 C. C. A. 551, 14 Am. Bankr. Rep. 25.

[61] In re Myers, 99 Fed. 691, 3 Am. Bankr. Rep. 760. But compare Pearsall v. Nassau Nat. Bank, 74 App. Div. 89, 77 N. Y. Supp. 11.

[62] Union Nat. Bank v. McKey, 102 Fed. 662, 42 C. C. A. 583.

[63] In re Farnsworth, 5 Biss. 223, 14 N. B. R. 148, Fed. Cas. No. 4,673. And see In re Northrup, 152 Fed. 763, 18 Am. Bankr. Rep. 335. But compare Continental & Commereial Trust & Savings Bank v. Chicago Title & Trust Co., 199 Fed. 704, 118 C. C. A. 142.

[64] Hooks v. Gila Valley Bank & Trust Co., 12 Ariz. 315, 100 Pac. 806.

But a liability as indorser, where the principal is solvent, cannot be set off against a bank deposit by the indorser on his bankruptcy.[65] And where deposits are made and accepted for a special purpose, the relation of the bank and the depositor is not that of debtor and creditor, but the bank becomes the bailee of the depositor, or holds the fund under a species of trust, and in this event it cannot set off its own claims against the depositor in his bankruptcy.[66] It was so held in a case where the money was deposited under an agreement that the bankrupt should use it to pay salary checks and pay-roll checks and for certain other specified purposes,[67] and also in a case where the bank received a deposit from a customer merely for safe-keeping, the money to be ultimately appropriated for the benefit of his creditors, and the bank knew him to be insolvent.[68] So, where the treasurer of a town deposited money in a bank which failed, and town warrants paid with the bank's money were in the hands of the bank at the time of its bankruptcy, and the trustee in bankruptcy obtained the warrants, it was held that, although the town was liable to him on the warrants, no right to set-off could exist in favor of the treasurer and the sureties on his bond.[69] Again, a bank has no right to a set-off as to deposits made by the bankrupt after the actual filing of a petition against him, although neither party knew that it had been filed.[70] And where a bank claims a set-off against the claim of the bankrupt's trustee for money on deposit, its claim arising out of the bankrupt's alleged conversion of certain property of which the bank was the real owner, the claim can be adjudicated only in a plenary suit, and cannot be reached by a summary order.[71]

The converse of the main rule stated above is equally true. That is, on the bankruptcy of a bank or banker, a depositor, having a balance to the credit of his deposit account, is entitled to set off the same against a note on which he is indebted to the bank.[72]

§ 551. Unpaid Stock Subscriptions.—As the capital stock of a corporation (and more especially unpaid subscriptions thereto) constitutes a trust fund for the benefit of the general creditors of the corporation, it follows that a stockholder indebted to a bankrupt corporation for un-

[65] Ex parte Howard Nat. Bank, 2 Low. 487, 16 N. B. R. 420, Fed. Cas. No. 6,764.

[66] Farmers' & Merchants' State Bank v. Park, 209 Fed. 613, 126 C. C. A. 607, 31 Am. Bankr. Rep. 696.

[67] Continental & Commercial Trust & Sav. Bank v. Chicago Title & Trust Co., 118 C. C. A. 142, 199 Fed. 704.

[68] Lynam v. Belfast Nat. Bank, 98 Me. 448, 57 Atl. 799.

[69] Town of Cicero v. Grisko, 240 Ill. 220, 88 N. E. 478.

[70] In re Michaelis & Lindeman, 196 Fed. 718.

[71] In re Boston-Cerrillos Mines Corporation, 206 Fed. 794, 30 Am. Bankr. Rep. 739.

[72] In re Shults, 132 Fed. 573, 13 Am. Bankr. Rep. 84; Winslow v. Bliss, 3 Lans. (N. Y.) 220; Mandel v. Koerner (Mun. Ct. N. Y.) 149 N. Y. Supp. 455.

paid shares of stock cannot set off against such liability a debt due to him from the corporation. The debts are not in reality mutual, and to allow such a set-off would enable the stockholder to turn his fiduciary relation to his own benefit and the detriment of the creditors.[73] Thus, where the trustee of a bankrupt insurance company sues a stockholder for the unpaid balance of his subscription to its capital, the latter cannot set off a claim against the company for a loss under its policy.[74] And the fact that stockholders of a bankrupt corporation are also bondholders, and as such entitled to share in the distribution of the estate, does not entitle them to set off their claims as such in a suit against them by the trustee in bankruptcy to recover unpaid subscriptions.[75] But the trustee of a bankrupt corporation may interpose as a set-off against the claim of a stockholder a claim against him for the difference between the value of property turned over by him in payment for his stock and the nominal value of the stock, and the court, in the interest of creditors, will scrutinize with care the integrity and fairness of the transaction.[76]

§ 552. **Set-Off by or Against Trustee.**—A trustee in bankruptcy, substituted as defendant in a suit begun against the bankrupt, in replevin by the plaintiff, claiming under a transfer from the bankrupt, can set up as a counterclaim his right to avoid the transfer under the Bankruptcy Act.[77] But a trustee who has paid a note of the bankrupt cannot set off the amount thereof against the claim of an accommodation maker or indorser of the note.[78] As to the right of set-off or counterclaim against the trustee, it is held that he has no other or greater rights than the bankrupt had when he became bankrupt; and hence when a third person had at that time a right as against the bankrupt to a credit, he is entitled to assert such right in a suit against him by the trustee,[79] and for the purpose of a set-off in such a suit, it is immaterial that the creditor has not proved his claim in bankruptcy, or that the year allowed for that purpose has expired.[80] So a party against whom a judg-

[73] Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731; Scammon v. Kimball, 92 U. S. 362, 23 L. Ed. 483; Scammon v. Kimball, 5 Biss. 431, 8 N. B. R. 337, Fed. Cas. No. 12,435; In re Howe Mfg. Co., 193 Fed. 524, 27 Am. Bankr. Rep. 477; Kiskadden v. Steinle, 203 Fed. 375, 121 C. C. A. 559, 29 Am. Bankr. Rep. 346; Boatmen's Bank v. Laws, 257 Fed. 299, 168 C. C. A. 383, 43 Am. Bankr. Rep. 683; In re La Jolla Lumber & Mill Co. (D. C.) 243 Fed. 1004, 40 Am. Bankr. Rep. 273; Whaley v. King, 141 Tenn. 1, 206 S. W. 31; Cochran v. Monteith (Tex. Civ. App.) 221 S. W. 1055.

[74] Scammon v. Kimball, 5 Biss. 431, 8 N. B. R. 337, Fed. Cas. No. 12,435.

[75] Babbitt v. Read, 173 Fed. 712, 23 Am. Bankr. Rep. 254.

[76] In re Royce Dry Goods Co., 133 Fed. 100, 13 Am. Bankr. Rep. 257.

[77] Gleason v. Bush, 166 App. Div. 865, 152 N. Y. Supp. 54.

[78] In re Jules Bouy & Co. (D. C.) 244 Fed. 896, 38 Am. Bankr. Rep. 784.

[79] Wasey v. Whitcomb, 167 Mich. 58, 132 N. W. 572.

[80] Norfolk & W. Ry. Co. v. Graham, 145 Fed. 809, 76 C. C. A. 385, 16 Am.

ment has been rendered in favor of the trustee may, by proper proceedings in equity, be allowed to offset against the same a claim allowed in his favor against the bankrupt.[81] The opinion has also been advanced that the provision of the statute in relation to the set-off of mutual debts or credits is broad enough to include a liability on the part of a creditor which has accrued to a trustee in bankruptcy as such, though not to the bankrupt himself, when the creditor's claim and such liability are mutual.[82] But in an action by a trustee in bankruptcy to recover the price of certain live stock, where defendant set up as a counterclaim a demand for services rendered by him in keeping the stock before and after the time when the trustee acquired title thereto, it was held that so much of the claim as related to services rendered before the plaintiff acquired title was not a valid claim against the estate, and could not be allowed as a counterclaim, but otherwise as to so much of the claim as related to services rendered after the plaintiff acquired title to the property.[83] And so a claim based on a breach of contract by a bankrupt after the bankruptcy is not available as a counterclaim against a claim for services or materials supplied by the trustee in bankruptcy, while continuing a contract partly performed by the bankrupt, because of want of mutuality, though the claim is available as against any claim of the bankrupt set up by the trustee.[84] But a corporation which had made advances to the bankrupt to enable him to continue in the business of manufacturing staves, under an agreement that it should purchase his entire output, and which paid the full purchase price in advance, has an equitable lien superior to the rights of other creditors, even though the legal title to the property remained in the bankrupt; and hence, where the trustee adopted the contract and continued manufacturing staves under the same arrangement, the corporation cannot, at a later date, be required to pay for all of the staves turned over to it, without deduction for the advances made.[85]

§ 553. Suit to Recover Preference.—In a suit by a trustee in bankruptcy to recover an unlawful preference, the creditor will not be allowed to set off the debt in respect to which the preferential transfer of property or payment was made,[86] nor will he be entitled to credit for

Bankr. Rep. 610; Wagner v. Burnham, 224 Pa. St. 586, 73 Atl. 990.

[81] Tootle-Weakley Millinery Co. v. Billingsley, 74 Neb. 531, 105 N. W. 85.

[82] In re Crystal Spring Bottling Co., 100 Fed. 265, 4 Am. Bankr. Rep. 55.

[83] Moran v. Bogert, 3 Hun (N. Y.) 603, 14 N. B. R. 393.

[84] Howard v. Magazine & Book Co., 147 App. Div. 335, 131 N. Y. Supp. 916.

[85] Greif Bros. Cooperage Co. v. Mullinix (C. C. A.) 264 Fed. 391, 45 Am. Bankr. Rep. 265.

[86] Western Tie & Timber Co. v. Brown, 129 Fed. 728, 64 C. C. A. 256, 12 Am. Bankr. Rep. 111; Moody v. Chicago Title & Trust Co., 138 Ill. App. 233; Harris v. Second Nat. Bank, 110 Tenn. 239, 75 S. W. 1053; Schmidt v. Bank of Commerce, 15 N. Mex. 470, 110 Pac. 613, 33

services rendered or disbursements made in caring for or disposing of the property in question.[87] So a court of equity, in a suit by the trustee in bankruptcy to recover a preference, will not entertain a cross-bill for the recovery by the defendant of the amount of the dividend to which he claims to be entitled from the bankrupt estate, but will require him to prove his claim in the bankruptcy court, though it may permit him, on the giving of security, to retain in his hands sufficient of the amount which the complainant is entitled to recover to cover his dividend in case his claim shall be allowed.[88] Nor is this rule confined to cases in which the trustee is forced to bring suit in order to avoid the preference. It is likewise applicable where he opposes the allowance of a claim filed by a creditor, on the ground that the creditor has received a preference which he has not surrendered.[89]

L. R. A. (N. S.) 558; State Bank of Clearwater v. Ingram, 237 Fed. 76, 150 C. C. A. 278, 38 Am. Bankr. Rep. 447.

[87] Ommen v. Tallcott, 175 Fed. 261, 23 Am. Bankr. Rep. 572.

[88] Ommen v. Tallcott, 175 Fed. 259, 23 Am. Bankr. Rep. 570.

[89] In re Christensen, 101 Fed. 802, 4 Am. Bankr. Rep. 202.

CHAPTER XXVIII

SECURED CREDITORS

§ 554. Who Are Secured Creditors.—A secured creditor is defined by the bankruptcy act of 1898 as "a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other person secondarily liable for the bankrupt has such security upon the bankrupt's assets."[1] To come within this definition, therefore, the creditor must either hold security against the property of the bankrupt himself, or be secured by the individual obligation of another who holds such security.[2] The latter part of the definition is important; for it was held under the former bankruptcy law that a creditor was not to be treated as "secured" merely because a surety or guarantor of the debt was protected by a lien on the bankrupt's property.[3] And to constitute a lien or security, within the meaning of the act, there must be a security additional to the personal obligation of the debtor.[4] Thus, a

[1] Bankruptcy Act 1898, § 1, cl. 23.

[2] Gorman v. Wright, 136 Fed. 164, 69 C. C. A. 76, 14 Am. Bankr. Rep. 135. And see In re Russell Falls Co. (D. C.) 249 Fed. 260, 41 Am. Bankr. Rep. 448. A "secured" creditor is one who directly holds as security for his debt property which would otherwise swell the assets of the bankrupt estate, or indirectly holds like property through having the debt obligation of another person who himself holds such property. In re Shatz (D. C.) 251 Fed. 351, 41 Am. Bankr. Rep. 576.

[3] In re Lloyd, 15 N. B. R. 257, Fed. Cas. No. 8,429. But compare In re Jaycox, 8 N. B. R. 241, Fed. Cas. No. 7,242.

[4] Shoemaker v. National Mechanics' Bank, 1 Hughes, 101, Fed. Cas. No. 12,801. As to the preferential right of a subcontractor to the balance of the money due the contractor from the principal,

banker has no lien upon the moneys of a depositor for any separate debt which the depositor may owe to him, and the mere fact that he holds such moneys on deposit at the time of the bankruptcy does not make him a secured creditor.[5] Further, although there may be an additional or collateral security, this does not make the creditor a secured creditor, unless the person furnishing it has a lien on assets of the bankrupt. Thus, where a firm is dissolved and one of the partners assumes payment of all the debts, this makes him a principal debtor and the other partner a surety, but it does not follow that a creditor of the partnership becomes a secured creditor.[6] So, where the bankrupt had bought goods on credit, and payment was guaranteed to the seller by a third person, the creditor is not "secured," unless the guarantor has taken security from the bankrupt.[7] So a mere promise by a subsequent purchaser of property subject to a mechanic's lien, in consideration of forbearance, to pay the demand secured by the lien, is not "collateral security" and does not discharge the lien.[8] Again, it is necessary that the security should attach to the bankrupt's "property" or "assets"; that is, there must be a lien upon property which would otherwise go into the general fund or be available for the claims of general creditors,[9] and a creditor holding security on property which never belonged to the bankrupt may prove his whole debt without first disposing of the security.[10]

But subject to these conditions, the term "security," as used in the bankruptcy act, will include every interest or right attached to or which is a charge upon specific property, or which entitles the owner thereof to be paid out of specific property, whether legal or equitable, absolute or contingent.[11] Thus, where the by-laws of a corporation provide that it shall have a lien on the stock of any shareholder for his indebtedness to the corporation, and an indebted stockholder becomes bankrupt, the corporation is a secured creditor.[12] Taxes, particularly those assessed by municipalities, may or may not attach to real property as liens, according to the local law, and upon this will depend the position of the state or municipality as a secured or unsecured creditor.[13] Again, it is im-

see Baker Lumber Co. v. A. A. Clark Co., 53 Utah, 336, 178 Pac. 764.

[5] In re Warner, 5 N. B. R. 414, Fed. Cas. No. 17,177; In re Weeks, 8 Ben. 265, 13 N. B. R. 263, Fed. Cas. No. 17,349.

[6] Schmitt v. Greenberg, 58 Misc. Rep. 570, 109 N. Y. Supp. 881.

[7] In re Anderson, 7 Biss. 233, 12 N. B. R. 502, Fed. Cas. No. 350. And see United States Fidelity & Guaranty Co. v. Carnegie Trust Co., 177 App. Div. 176, 164 N. Y. Supp. 92.

[8] Mervin v. Sherman, 9 Iowa, 331.

[9] In re Spades, 6 Biss. 448, 13 N. B. R. 72, Fed. Cas. No. 13,196.

[10] In re Dunkerson, 4 Biss. 253, 12 N. B. R. 413, Fed. Cas. No. 4,157. A bank holding the note of a third person, secured by a pledge of stock which does not belong to the bankrupt, the latter being liable thereon as an indorser, may prove its claim against the bankrupt's estate without surrendering the stock. In re Thompson, 208 Fed. 207.

[11] Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494, 507.

[12] In re Morrison, 10 N. B. R. 105, Fed. Cas. No. 9,839.

[13] See In re Harvey, 122 Fed. 745, 10 Am. Bankr. Rep. 567.

portant to notice that, when property or securities are delivered to a creditor, it may be the intention and understanding of the parties that a payment and discharge of the debt shall be effected, rather than the creation of a lien, and of course, in the former case, the creditor cannot present himself in the guise of a secured creditor, though he may have been disappointed in the value of the property turned over to him.[14] And it is not permissible for the bankrupt himself, after receiving his discharge, to purchase and take an assignment to himself of debts against his own estate in bankruptcy secured by liens, and collect the same for his own use out of assets in the hands of his trustee, to the exclusion of subsequent lien holders. His purchase of his own debt operates to extinguish the debt, and this rule is not affected by the fact of his having been discharged, because the discharge does not destroy or extinguish the debt, though it bars the remedy for its recovery.[15]

§ 555. Same; Mortgagees.—The holder of a mortgage on real or personal property of the bankrupt is a secured creditor,[16] though the mortgage was not made by the bankrupt himself, but by his predecessor in the title,[17] and though it covers after-acquired property as well as that in possession at the time.[18] So, the joint note of a husband and wife secured by a deed of trust on the wife's property should be allowed as a secured claim against the estate of the husband in bankruptcy, although the wife may have died leaving heirs.[19] But it is doubtful whether a mortgage on exempt property of the bankrupt puts the mortgagee in the position of a secured creditor. Probably, however, it should be so held, since it would give him an inequitable advantage if he were allowed to realize on his security and at the same time compete with unsecured creditors.[20] Equitable mortgages, as well as legal, may come

[14] In re Black Diamond Copper Min. Co., 11 Ariz. 415, 95 Pac. 117.

[15] In re Burton (D. C.) 29 Fed. 637.

[16] Krugmeier v. Hackett, 134 Wis. 57, 113 N. W. 1103. Bondholders of a bankrupt corporation are not precluded from proving their debts as secured because of their omission to record the deed of trust securing the bonds. In re Charles Town Light & Power Co. (D. C.) 199 Fed. 846, 29 Am. Bankr. Rep. 721. A secured creditor who took the legal title to land mortgaged to secure pledged bonds, is still a pledgee or mortgagee, and only entitled to prove the excess above the security. In re J. G. Reichard & Bro. (D. C.) 230 Fed. 525.

[17] McKay v. Hamill, 185 Fed. 11, 107 C. C. A. 115, 26 Am. Bankr. Rep. 164. See In re Altenheim, 1 Ben. 431, Fed. Cas. No. 268.

[18] Barnard v. Norwich & W. R. Co., 4 Cliff. 351, 14 N. B. R. 469, Fed. Cas. No. 1,007. See In re Baker, 1 Hask. 593, Fed. Cas. No. 762. Mortgagees, until they assert their rights in the rents by proceedings to sequester them, cannot assert any rights as against the trustee in bankruptcy of the mortgagor to rents collected before such assertion, though the rents were included in the mortgage. In re Clark Realty Co., 234 Fed. 576, 148 C. C. A. 342, 37 Am. Bankr. Rep. 129.

[19] In re Hartel, 7 N. B. R. 559, Fed. Cas. No. 6,157.

[20] See In re Lantzenheimer, 124 Fed. 716, 10 Am. Bankr. Rep. 720; Fenley v. Poor, 121 Fed. 739, 58 C. C. A. 21, 10 Am.

within this rule. Thus, if no state law forbids, a vendee under a contract for the purchase of land, who has recorded his bond for a deed and paid the purchase money, is entitled, on the bankruptcy of the vendor without having conveyed, to prove his claim as one secured by an equitable lien on the land.[21] And so, where money is loaned or advanced under an agreement that it is to be used to discharge an incumbrance on the borrower's property, and the lender is to have a first lien to secure its repayment, and the money is so used, the lender may be subrogated to the rights of the incumbrancer whose debt was paid, against the borrower's trustee in bankruptcy.[22]

§ 556. Same; Judgment Creditors.—Ownership of a judgment against the bankrupt will constitute the creditor a "secured creditor," within the meaning of the act, provided there is property of the bankrupt upon which the judgment may attach, or has attached, as a lien.[23] But not so if the law of the state confines the lien of judgments to real property and the estate of the particular bankrupt consists wholly of personalty.[24] And in any case, where the creditor claims the rights of a secured creditor by virtue of an alleged judgment lien on the property of the estate, the burden is on him to show that he has done everything required by statute to make his judgment attach as a lien.[25] Now at common law, a judgment does not by itself constitute a lien on property of the defendant, either real or personal, nor is a lien created by the issuing of a writ of fieri facias upon such judgment; nothing but a levy upon specific property will produce that effect.[26] And when this rule is in force in the state where the proceedings are pending and where the debtor's property is situated, the docketing of a judgment against him, or the issuance of a writ thereon, will not create such a lien as will be respected and enforced by the court of bankruptcy.[27] So, where a judgment recovered before a justice of the peace is not a lien on land until docketed in the superior court, this step must have been taken before the bankruptcy, or the judgment will not constitute a security within the meaning of the bankruptcy law.[28] And the same is true of a judgment which has been allowed to become dormant, unless the statute of limitations is applicable only in favor of subsequent purchasers and judg-

Bankr. Rep. 377. Compare In re Bailey, 176 Fed. 990, 24 Am. Bankr. Rep. 201.

[21] In re Peasley, 137 Fed. 190, 14 Am. Bankr. Rep. 496.

[22] In re Lee, 182 Fed. 579, 25 Am. Bankr. Rep. 436; Dewey v. Kelton, 18 N. B. R. 217, Fed. Cas. No. 3,850.

[23] In re Cale, 182 Fed. 439, 25 Am. Bankr. Rep. 367; Guardians of Poor v. Ovens, L. R. 8 Ex. 37. See American Woolen Co. v. Maaget, 86 Conn. 234, 85 Atl. 583.

[24] In re Erwin, 3 N. B. R. 580, Fed. Cas. No. 4,524.

[25] In re Wood, 95 Fed. 946, 2 Am. Bankr. Rep. 695.

[26] 1 Black, Judgm. §§ 397, 398.

[27] In re McIntosh, 2 N. B. R. 506, Fed. Cas. No. 8,826.

[28] In re Wood, 95 Fed. 946, 2 Am. Bankr. Rep. 695.

ment creditors, in which case, not being available in favor of the judgment debtor, it cannot be set up in favor of his trustee in bankruptcy,[29] or unless the dormant judgment has been duly revived.[30] Nor does a judgment creditor acquire a lien, which will be protected under the bankruptcy law, by commencing proceedings supplementary to execution; for until the appointment of a receiver, his right is not a lien.[31] And the same is true (at least in some states) of a judgment creditor who attacks an alleged fraudulent conveyance, but does not procure a decree setting it aside until after the bankruptcy of the debtor.[32] And it must not be understood that the creditor, even if his judgment lien is perfect, will have the right to issue and levy an execution and cause a sale of the property, after it has passed into the control of the trustee in bankruptcy. While he has the advantageous position of a secured creditor, he will not be allowed to interfere, at will, with property in the custody of the bankruptcy court.[33] But one whose judgment is a lien on property which had been sold and conveyed by the bankrupt in good faith before the bankruptcy is differently situated. He may claim and secure in the bankruptcy proceedings his portion of the estate of the bankrupt, in virtue of the debt evidenced by his judgment, without accounting or giving credit for anything on account of the lien.[34] Under the bankruptcy act of 1841, it was held that a power of attorney to confess judgment was a "security" within the meaning of that statute,[35] but it is not probable that it would be so held under the narrower terms of the present law.

§ 557. Same; Pledgees, Assignees, and Holders of Collateral.—One holding specific personal property in pledge, as a means of enforcing the payment of a debt, is a secured creditor within the bankruptcy act,[36] and so also where the pledge is of any of those various forms of intangible property which are commonly known in the business world under the general description of "collateral," such as bonds or stock of corporations, mortgages, notes, and other marketable securities.[37] The same principle applies also to one who holds a policy of insurance on the life

[29] In re Huddell, 47 Fed. 207.

[30] Appeal of Bucknor (Pa.) 4 Atl. 738.

[31] In re Wheeler, 18 N. B. R. 385, Fed. Cas. No. 17,490.

[32] In re Estes, 5 Fed. 60.

[33] Pennington v. Sale, 1 N. B. R. 572, Fed. Cas. No. 10,939; Davis v. Anderson, 6 N. B. R. 145, Fed. Cas. No. 3,623; Russel v. McCord, 2 Flip. 139, 17 N. B. R. 508, Fed. Cas. No. 12,157.

[34] McAden v. Keen, 30 Gratt. (Va.) 400.

[35] Buckingham v. McLean, 13 How. 151, 14 L. Ed. 91.

[36] In re Peebles, 2 Hughes, 394, 13 N. B. R. 149, Fed. Cas. No. 10,902.

[37] In re McVay, 13 Fed. 443; Dayton Nat. Bank v. Merchants' Nat. Bank, 37 Ohio St. 208; Mitchell v. Roberts, 17 Fed. 776; Dumont v. Fry, 14 Fed. 293. "Any species of property or thing in action, which is capable of assignment, may be pledged as collateral security for the payment of a debt, by the delivery or assignment of such property. All forms of negotiable paper, such as promissory notes, bonds, and other evidences of debt may be pledged as collateral security.

of his debtor as collateral security for his debt.[38] And an assignment of a lease running to the debtor may constitute the creditor a secured creditor,[39] and so of the transfer of an order drawn on a third person,[40] or an assignment of money to become due under a contract.[41] But the holder of a warehouseman's receipt which is attached to a note executed to the warehouseman, as collateral security, is not a secured creditor in the bankruptcy of the warehouseman.[42] There may also be circumstances in which a court of bankruptcy—in view of its equitable powers and duties—would recognize a merely equitable assignment as putting the assignee in the position of a secured creditor. But it has been held that the holder of a protested draft, drawn by a bankrupt bank, is not entitled to priority of payment over other creditors of the bank, merely because the drawee (another bank) may have had funds of the drawer in its hands at the time it refused to accept the draft. "If it were assumed or conceded that under any circumstances such a draft can amount to an equitable assignment in favor of the payee of that amount of the drawer's funds in the hands of the drawee, such a principle cannot be applied where it would contravene the purpose of the bankruptcy act." [43]

§ 558. Same; Holders of Notes.—A promissory note is not a security for the payment of a debt, but only an evidence of the debt.[44] And although it may be indorsed, this does not make the claim a secured one,[45] unless, under the terms of the statute, the indorser holds a security on the property of the bankrupt. But the opinion has been advanced that a creditor who holds a note of the bankrupt containing a waiver of exemptions is in the position of a secured creditor, since his

Other evidences of debt, negotiable or quasi-negotiable, may be pledged in accordance with the usuages or customs of the commercial world, or pursuant to statutory enactments. Thus, by custom or usage, where statutory enactments do not prohibit it, corporate stock, mortgages securing promissory notes, and warehouse receipts or bills of lading may be pledged as collateral security." Colebrooke, Collat. Sec. (2d Ed.) § 2a.

[38] Burlingham v. Crouse, 181 Fed. 479, 24 Am. Bankr. Rep. 632; In re Mertens, 134 Fed. 101, 14 Am. Bankr. Rep. 226; In re Newland, 6 Ben. 342, 7 N. B. R. 477, Fed. Cas. No. 10,170; In re Shoenberger, Fed. Cas. No. 12,802.

[39] Fitch v. Richardson, 147 Fed. 197, 77 C. C. A. 423, 16 Am. Bankr. Rep. 835.

[40] In re Hines, 144 Fed. 54, 16 Am. Bankr. Rep. 495.

[41] In re De Long Furniture Co., 188 Fed. 686, 26 Am. Bankr. Rep. 469.

[42] State v. Federal Union Surety Co., 156 Mo. App. 603, 137 S. W. 613.

[43] Bank of Commerce v. Russell, 2 Dill. 215, Fed. Cas. No. 884.

[44] United States Trust Co. v. Brady, 20 Barb. (N. Y.) 119.

[45] In re Broich, 7 Biss. 303, 15 N. B. R. 11, Fed. Cas. No. 1,921. A creditor holding the bankrupt's indorsed note for part of his claim is not therefore a "secured" creditor, and he is entitled to a dividend on the full claim though the indorser paid the note after the proofs of claim were filed. Young v. Gordon, 219 Fed. 168, 135 C. C. A. 66.

right to resort to the exempt property is in the nature of a security, if not a lien.[46]

§ 559. Effect of Additional Security or Claim Against Third Person.—The bankruptcy act provides that "the liability of a person who is a co-debtor with, or guarantor, or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."[47] And it is a general rule that if a creditor of the bankrupt holds security in the form of any obligation of a third person whether it be a mortgage or pledge of property, an indorsement, or a contract of suretyship or guaranty, provided only that the third person does not hold countersecurity, the creditor may prove his debt in the bankruptcy without surrendering the security, and may, notwithstanding such proof, proceed to enforce his security against such third person, provided, however, that he does not take, under the bankruptcy and the security, more than the full amount of his debt.[48] The reason is that the enforcement of the security in this case does not diminish the estate of the bankrupt to which the general or unsecured creditors must look for satisfaction, and moreover, the court of bankruptcy would have no authority to interfere between the creditor and the third person, the latter being a stranger to the bankruptcy proceedings.[49] So, if a judgment is recovered against two co-defendants, and execution thereon is levied on the property of one of them, and the other is adjudged bankrupt, the judgment creditor may prove his claim against the bankrupt as unsecured.[50] And a creditor of a bankrupt partnership is not required to apply securities in his hands, which are the individual property of one of the partners upon his claim against the partnership estate.[51] The rule is the same where the creditor is additionally secured by the undertaking of a third person to guaranty the performance of the bankrupt's contract

[46] In re Meredith, 144 Fed. 230, 16 Am. Bankr. Rep. 331.

[47] Bankruptcy Act 1898, § 16.

[48] In re Babcock, 3 Story, 393, Fed. Cas. No. 696; In re Thomas, 8 Biss. 139, 17 N. B. R. 54, Fed. Cas. No. 13,886; In re Beaver Knitting Mills, 154 Fed. 320, 83 C. C. A. 240, 18 Am. Bankr. Rep. 528; In re Otto F. Lange Co., 170 Fed. 114, 22 Am. Bankr. Rep. 414; In re Kinne, 5 Fed. 59; In re Sauthoff, 7 Biss. 167, 14 N. B. R. 364, Fed. Cas. No. 12,379; In re Myer, 14 N. Mex. 246, 89 Pac. 246. Where a creditor whose claim against the bankrupt was secured by a chattel mortgage on property of the bankrupt's wife, made full disclosure as to his security in the bankruptcy proceedings, and the bankrupt in effect denied any interest in the mortgaged property, the proving of the claim against the bankrupt and the receipt of a dividend thereon did not constitute a waiver of the mortgage. P. Ballantine & Sons v. Fenn, 88 Vt. 166, 92 Atl. 3.

[49] In re Thomas, 8 Biss. 139, 17 N. B. R. 54, Fed. Cas. No. 13,886.

[50] In re Headley, 97 Fed. 765, 3 Am. Bankr. Rep. 272.

[51] In re Mertens, 144 Fed. 818, 75 C. C. A. 548, 15 Am. Bankr. Rep. 362. A corporation which proves an unsecured claim against a bankrupt partnership, of which one of its stockholders is a member, does not thereby waive any lien it may have on the stock of that partner. Bank of Searcy v. Merchants' Grocer Co., 123 Ark. 403, 185 S. W. 806.

or to be surety for him. The creditor loses none of his rights or remedies against the surety by proving his debt in the bankruptcy proceedings and participating in the distribution of the estate.[52] And the surety upon a promissory note is liable in an action on the note, although the principal has been adjudged a bankrupt and the note has been filed by the payee in the bankruptcy proceedings.[53] And on the other hand, where the bankrupt was indorser on a note, and his liability has become fixed and absolute, the creditor holding the note may prove its full amount against him, notwithstanding the primary liability of the maker of the note, and even though he holds a mortgage on the latter's property, to secure it, which has not been foreclosed and which he does not surrender.[54] And where both the maker and indorser of a note are in bankruptcy, the holder may prove the amount of the note as a claim against each, and receive dividends from both estates, up to the full amount of his debt.[55] But a creditor holding a note of the bankrupt, and, as collateral security therefor, another note on which the bankrupt is also liable, is not entitled to prove his claim against the estate in bankruptcy for both, but only for the amount of the actual indebtedness to him.[56] But in all these cases, the person who is secondarily liable for the bankrupt has an interest and an equity to have the estate of the bankrupt applied as far as it will go towards the satisfaction of the debt. Thus, where a mortgage was made by the bankrupt to secure the mortgagee as a surety for him, it was held that the mortgagee was not entitled to be paid personally the amounts of the debts for which he was surety out of the bankrupt's estate, but was entitled to have such debts paid to the creditors out of the proceeds of the mortgaged property, and to be released from his liability as surety.[57]

§ 560. **Joinder in Petition and Rights at Creditors' Meetings.**—Secured creditors may join in a petition in involuntary bankruptcy, but in making up the required jurisdictional amount ($500), such creditors are to be counted only to the extent of the excess of the claim over the value of the security held for it.[58] Under the act of 1867, it was held that the act of a secured creditor in joining in the petition without any

[52] In re Levy, 2 Ben. 169, 1 N. B. R. 327, Fed. Cas. No. 8,297; Gorman v. Wright, 136 Fed. 164, 69 C. C. A. 76, 14 Am. Bankr. Rep. 135; Vette v. J. S. Merrell Drug Co., 137 Mo. App. 229, 117 S. W. 666.

[53] Gregg v. Wilson, 50 Ind. 490, 15 N. B. R. 142.

[54] In re Cram, 1 Hask. 89, 1 N. B. R. 504, Fed. Cas. No. 3,343; Gorman v. Wright, 136 Fed. 164, 69 C. C. A. 76, 14 Am. Bankr. Rep. 135.

[55] National Mt. Wollaston Bank v. Porter, 122 Mass. 308.

[56] First Nat. Bank v. Eason, 149 Fed. 204, 79 C. C. A. 162, 17 Am. Bankr. Rep. 593.

[57] In re Randolph, 187 Fed. 186, 26 Am. Bankr. Rep. 623.

[58] Bankruptcy Act 1898, § 59b. Further as to the right of secured creditors to join in the petition for adjudication in bankruptcy, see supra, § 153.

mention of the security which he held amounted to a waiver of it.[59] But this was on the theory that under the terms of that statute, only unsecured creditors had the privilege of petitioning in bankruptcy, whereas the present act directly contemplates the joinder of secured creditors, by providing that they may be counted only to the extent that the security is deficient. It is also the right of secured creditors to vote at creditors' meetings, and they may be counted in computing the number and amount of creditors required for any action, but only when the amount of their claims exceeds the value of the security, and then only for such excess.[60] It is also provided that "claims of secured creditors may be allowed, to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities, but shall be allowed for such sums only as shall to the courts seem to be owing over and above the value of their securities." [61] Where a partnership creditor holds securities on both the property of the partnership and the individual property of one of the partners (the firm and all its members being in bankruptcy together), the value of the security on the individual property of the partner need not be deducted in ascertaining the voting power of the creditor, but only the value of the security on the firm property.[62] But a mortgage creditor who, after the adjudication, sells the mortgaged premises, and himself becomes the purchaser, cannot vote on the deficiency as an unsecured creditor.[63]

§ 561. **Proof of Claim as Secured.**—Proof of claim by a secured creditor differs from that to be made by an unsecured creditor only in that the former must specify "what securities are held therefor." [64] If a creditor in this position wishes to participate in the bankruptcy proceedings at all, he must make himself a party by filing a proof of his claim, according to the requirements of the statute, disclosing the particular nature of the security which he holds.[65] But it is to be noted that a creditor is "secured" only when he holds a security on property of the bankrupt, or when a person secondarily liable for the bankrupt, in respect to the debt in question, holds such security on the bankrupt's assets. Hence when the creditor holds a mortgage or pledge on property belonging to a third person (the latter not having counter-security) he

[59] In re Bloss, 4 N. B. R. 147, Fed. Cas. No. 1,562; In re Broich, 7 Biss. 303, 15 N. B. R. 11, Fed. Cas. No. 1,921; In re Bear, 5 Fed. 53.

[60] Bankruptcy Act 1898, § 56b. And see supra, §§ 277, 288.

[61] Bankruptcy Act 1898, § 57e.

[62] In re Coe, Powers & Co., 1 Nat. Bankr. News, 294.

[63] In re Hunt, 17 N. B. R. 205, Fed. Cas. No. 6,884.

[64] Bankruptcy Act 1898, § 57a. For the manner of proving a secured debt, in person or by agent, see Official Forms Nos. 32 and 36.

[65] In re Bridgman, 1 N. B. R. 312, Fed. Cas. No. 1,866.

is not bound to disclose or mention it in his proof of debt.[66] When a creditor thus proves his debt as secured, he does not waive, abandon, or surrender the security, or in any way relinquish or prejudice his rights under it. On the contrary, this is the proper method of claiming and preserving his security.[67] "It is well settled that a creditor holding security for a debt does not in any manner prejudice his claim to the security he holds by proving his debt as a debt with security, and setting out in his proof the particulars of the security and its estimated value. He does not, by such a form of proof, release his security, and prove his debt as an unsecured debt. On the contrary, such a form of proof insists on and maintains the security."[68] And moreover, as an adjudication of bankruptcy brings the assets of the bankrupt into the custody of the court of bankruptcy for administration, a creditor of the bankrupt having a lien on such property, at that time, is not bound to follow the course of procedure prescribed by the state statute under which the lien arises, requiring certain action to be taken within a limited time for its preservation, but only to prove his claim as the bankruptcy law directs.[69] But if any other creditor is interested in objecting to the claim of the proving creditor to an alleged security, or avers that the lien claimed is invalid under the laws of the state or is a voidable preference, or otherwise should not be allowed, it is within the jurisdiction of the court of bankruptcy or the referee (and it is the proper practice) to determine whether the claim is a secured or an unsecured claim, so far as concerns its allowance as such, though such a determination will not have the effect to deprive the creditor of his lien, if he has one, for that question can be decided only in a proper action or proceeding brought by the trustee in bankruptcy, and not on a summary hearing.[70] But the claim of a broader lien than the facts warrant will not affect the actual lien of the creditor.[71] And where a mortgage is made in good faith, prior to the commencement of the proceedings against the mortgagor, a mistake

[66] Merchants' & Farmers' State Bank v. Sheridan, 156 Ill. App. 25. And see supra, § 560.

[67] In re Medina Quarry Co., 179 Fed. 929, 24 Am. Bankr. Rep. 769; Bucknam v. Dunn, 2 Hask. 215, 16 N. B. R. 470, Fed. Cas. No. 2,096; In re Bolton, 2 Ben. 189, 1 N. B. R. 370, Fed. Cas. No. 1,614; Kohout v. Chaloupka, 69 Neb. 677, 96 N. W. 173; Bassett v. Thackara, 72 N. J. Law, 81, 60 Atl. 39. A creditor of a bankrupt corporation whose debt is secured by a valid pledge of its mortgage bonds is not required to prove his claim as a general creditor to entitle him to have his bonds participate in the mortgage fund. Butterfield v. Woodman, 223 Fed. 956, 139 C. C. A. 436, 34 Am. Bankr. Rep. 510.

[68] In re Grinnell, 7 Ben. 42, 9 N. B. R. 29, Fed. Cas. No. 5,830.

[69] In re Falls City Shirt Mfg. Co., 98 Fed. 592, 3 Am. Bankr. Rep. 437.

[70] In re Quinn, 165 Fed. 144, 21 Am. Bankr. Rep. 264; In re Cramond, 145 Fed. 966, 17 Am. Bankr. Rep. 22; In re Braselton, 169 Fed. 960, 22 Am. Bankr. Rep. 419; In re Harrison, 2 Nat. Bankr. News, 541.

[71] McKinsey v. Harding, 4 N. B. R. 38, Fed. Cas. No. 8,866.

in the description of the premises in such mortgage may be corrected as against the trustee in bankruptcy to the same extent as would have been allowed against the mortgagor.[72] But where a mortgage given by the bankrupt secures a certain note only, and not an open account, an agreement that the account should also be covered by the mortgage cannot be implied.[73] Finally, it must be remembered that mortgagees who prove their debts in the bankruptcy proceedings become creditors of the mortgagor's general estate only for the balance of the debt remaining after deducting the value of the mortgaged property.[74]

§ 562. Waiver of Security and Proof of Debt as Unsecured.—A secured creditor will not be allowed to prove his entire claim against the estate in bankruptcy without surrendering or abandoning the security.[75] But on the other hand, he cannot be required, at the instance of other creditors, to rely upon his security and prove only for the deficiency, if any. He has the option to prove his debt as unsecured.[76] The latter course, entitling him to share with others in the distribution of the general estate, may be advantageous to him, and will be permitted, if his lien is not such as can be enforced against other creditors, for want of record or otherwise,[77] or even after its validity has been attacked or decided adversely to him.[78] But if the creditor has accepted a conveyance of property in lieu of his secured claim, it is then too late for him to prove his claim in the bankruptcy proceedings or have the value of his security determined.[79] It is also a general rule that if a creditor proves the whole amount of his claim, and particularly if he accepts a dividend thereon, it places him on a par with all the general creditors, and is deemed a waiver and relinquishment of any security which he may

[72] Schultze v. Bolting, 8 Biss. 174, 17 N. B. R. 167, Fed. Cas. No. 12,489.

[73] In re Johnson, 125 Fed. 838, 11 Am. Bankr. Rep. 138.

[74] McHenry v. Société Française, 95 U. S. 58, 24 L. Ed. 370; In re Little, 110 Fed. 621, 6 Am. Bankr. Rep. 681.

[75] In re Norris, 2 Hask. 74, Fed. Cas. No. 10,303; In re Jaycox, 8 N. B. R. 241, Fed. Cas. No. 7,240; In re Granger, 8 N. B. R. 30, Fed. Cas. No. 5,684; In re High, 3 N. B. R. 191, Fed. Cas. No. 6,473; In re Holbrook, 2 Low. 259, Fed. Cas. No. 6,588.

[76] In re Little, 110 Fed. 621, 6 Am. Bankr. Rep. 681; Stewart-Noble Drug Co. v. Bishop-Babcock-Becker Co., 62 Colo. 197, 162 Pac. 159; In re Interborough Realty Co., 223 Fed. 646, 139 C. C. A. 300, 34 Am. Bankr. Rep. 541.

[77] Post v. Berry, 175 Fed. 564, 23 Am. Bankr. Rep. 699; In re Burlage Bros., 169 Fed. 1006, 22 Am. Bankr. Rep. 410.

[78] McAleer v. People's Bank, 202 Ala. 256, 80 South. 94; In re Vogt (D. C.) 188 Fed. 764; In re Moyer (D. C.) 97 Fed. 324.

[79] In re M. I. Hibbler Mach. Supply Co. (D. C.) 192 Fed. 741, 27 Am. Bankr. Rep. 612. See Beal-Burrow Dry Goods Co. v. Talburt, 139 Ark. 113, 213 S. W. 20. Where plaintiff had a negotiated note given it by defendant and sent him a check with the notation "To be used in part renewal of note," proving up in bankruptcy the note, which had not been taken up as directed, did not extinguish plaintiff's claim for the amount of the check. R. S. Howard Co. v. International Bank of St. Louis, 198 Mo. App. 284, 200 S. W. 91.

have held.[80] But a creditor cannot be deprived of the benefit of a lien by the unauthorized filing of his claim as an unsecured debt.[81] And there is no presumption on appeal that he intentionally omitted to disclose the existence of his security, and thereby waived it.[82] Nor will such a waiver be inferred from doubtful or inexplicit terms in the statement of proof. Thus, if the proof shows that the debt in question has been reduced to judgment and that the judgment is in force, but omits to state that the judgment is a lien upon real estate (such being the fact) it does not amount to a proof of the debt as unsecured with a consequent waiver of the lien.[83] If the trustee in bankruptcy does not choose to take advantage of such a waiver of security, probably the other creditors may insist upon it, but not a subsequent mortgagee who has not proved his debt in the bankruptcy proceedings,[84] and certainly not the bankrupt himself.[85] And if the holder of a note, the indorser of which is secured by a mortgage, proves the note as unsecured, the mortgage is not thereby extinguished, but the trustee in bankruptcy will be subrogated to the rights of the holder.[86]

§ 563. Same; Amendment of Proof to Claim Security.—If a secured creditor proves his claim as unsecured, but does so through mistake or inadvertence or ignorance of his legal rights, and without being aware of the effect which such a course may have as a waiver or abandonment of his security, he should not be compelled to forego the benefit of the security and participate as a general creditor, but it is in the discretion of the court to permit him to withdraw his proof and rely upon the security, or to amend the proof by stating the fact and the particulars of the security, and this permission will ordinarily be granted where

[80] In re Burr Mfg. & Supply Co., 217 Fed. 16, 133 C. C. A. 126; United States Trust Co. v. Gordon, 216 Fed. 929, 133 C. C. A. 117, 33 Am. Bankr. Rep. 300; In re Luber (D. C.) 261 Fed. 221, 44 Am. Bankr. Rep. 292; First Nat. Bank of Waterloo v. Exchange Nat. Bank, 179 App. Div. 22, 153 N. Y. Supp. 818, 164 N. Y. Supp. 1092; In re Fisk & Robinson, 185 Fed. 974; White v. Crawford, 9 Fed. 371; In re Spring, 2 Nat. Bankr. News, 509; Merchants' Nat. Bank v. Comstock, 55 N. Y. 24, 14 Am. Rep. 168, 11 N. B. R. 235; Jones v. Hawkins, 60 Ga. 52; Heard v. Jones, 56 Ga. 271, 15 N. B. R. 402; Shorten v. Booth, 32 La. Ann. 397; In re Meyers, 2 Ben. 424, 1 N. B. R. 581, Fed. Cas. No. 9,518; Wallace v. Conrad, 3 Brewst. (Pa.) 329, 3 N. B. R. 41; Ex parte Morris, 2 Low. 424, 16 N. B. R. 572, Fed. Cas. No. 9,823. Compare McAlpin v. Lee, 57 Ga. 281; Johnson v. Worden, 47 Vt. 457, 13 N. B. R. 335. But where a creditor having an aggregate claim, made up of several items, for one or more of which, but not all, he has a lien on assets of the estate in bankruptcy, receives a dividend on the whole amount of his claim, this does not estop him from afterwards asserting the lien. Brown Bros. Co. v. Smith Bros. Co. (D. C.) 231 Fed. 475, 37 Am. Bankr. Rep. 30.

[81] In re Bear (D. C.) 8 Fed. 429.

[82] Hatch v. Seeley, 37 Iowa, 493, 13 N. B. R. 380.

[83] Sedgwick v. Stewart, 9 Ben. 433, Fed. Cas. No. 12,625.

[84] Cook v. Farrington, 104 Mass. 212.

[85] Starks v. Curd, 88 Ky. 164, 10 S. W. 419.

[86] Hiscock v. Jaycox, 12 N. B. R. 507, Fed. Cas. No. 6,531.

no fraud appears and no one else will be prejudiced in his rights.[87] But the rule is more strict when the proceedings have advanced so far that a dividend has been declared and the creditor has received his share of it. Here it is said that an amendment will be allowed only in case of mistake or ignorance, and in the absence of all fraud, and where all persons can be placed in statu quo, and the creditor seeking to amend must refund a proportional part of the dividend, and pay the costs of his application.[88]

§ 564. Settling Value of Security.—"The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance." [89] This statutory rule applies where a creditor claims a lien on property which has been set apart to the bankrupt as exempt.[90] Jurisdiction is vested in the bankruptcy court to liquidate liens on the bankrupt's estate, and to determine, in the exercise of a sound discretion, in what manner disputes as to the value of securities shall be settled.[91] And if a

[87] In re Weaver, 144 Fed. 229, 16 Am. Bankr. Rep. 265; In re Wilder, 101 Fed. 104; In re Falls City Shirt Mfg. Co., 98 Fed. 592, 3 Am. Bankr. Rep. 437; In re Friedman, 1 Nat. Bankr. News, 208; In re Richard, 94 Fed. 633, 2 Am. Bankr. Rep. 506; In re Bear, 8 Fed. 429; In re Van Buren, 2 Fed. 643; In re Brand, 2 Hughes, 334, 3 N. B. R. 324, Fed. Cas. No. 1,809; Ex parte Harwood, Crabbe, 496, Fed. Cas. No. 6,185; In re McConnell, 9 N. B. R. 387, Fed. Cas. No. 8,712; Ex parte Lapsley, Fed. Cas. No. 8,083; Phillips v. Bowdoin, 52 Ga. 544, 14 N. B. R. 43; Britton v. Thomas, 238 Fed. 125, 151 C. C. A. 201, 38 Am. Bankr. Rep. 499.

[88] In re Parkes, 10 N. B. R. 82, Fed. Cas. No. 10,754; In re Kaufman, 8 Ben. 394, Fed. Cas. No. 7,626.

[89] Bankruptcy Act 1898, § 57h. Officers of a corporation who were sureties for it, and who paid the obligation and received the bonds which had been given as collateral security therefor, can claim on the bonds, in the bankruptcy of the corporation, only the amount paid by them, and not the face value of the bonds, the latter sum being much greater. Sauve v. Fleschutz, 219 Fed. 542, 135 C. C. A. 310, 34 Am. Bankr. Rep. 49. But see In re Anger Baking Co., 228 Fed. 181, 142 C. C. A. 537, 36 Am. Bankr. Rep. 261, holding that a pledgee of notes of a bankrupt may prove for their full amount, although the debt secured is less, where that is necessary to cover his claim. And where indorsers of the bankrupt's notes paid them, they are entitled to prove, as against the bankrupt's estate, the face value of the notes, regardless of any amount they may have received on foreclosure of a security mortgage, applying the proceeds on the balance of the claim. In re Astoroga Paper Co. (D. C.) 234 Fed. 792, 37 Am. Bankr. Rep. 751. The value of collateral deposited by a bankrupt to secure a note is the amount realized from the sale of such collateral, where the creditor has disposed of it, and not the value of the collateral at the time of the filing of the petition in bankruptcy, where that was much less. In re Isaacs, 246 Fed. 820, 159 C. C. A. 122, 40 Am. Bankr. Rep. 468.

[90] In re Little (D. C.) 110 Fed. 621, 6 Am. Bankr. Rep. 681.

[91] In re Addison, 3 Hughes, 430, Fed. Cas. No. 76; In re Winn, 1 N. B. R. 499, Fed. Cas. No. 17,876.

creditor voluntarily appears in the court of bankruptcy and asks the aid of the court for the enforcement of a lien which he claims on the bankrupt's property, the court thereby acquires jurisdiction to proceed and dispose of the whole matter in a summary way.[92] The intention of the statute seems to be that, if the creditor does not desire to foreclose his lien or realize on the security held, and the trustee does not deem it advantageous for the estate to take the matter out of his hands and force a foreclosure, they shall endeavor to agree upon a valuation of the security, and may, if the court so directs, submit the matter to arbitration. But if they cannot agree, the creditor has the right to have the valuation fixed by litigation before the referee.[93] Or if the trustee has received or collected securities pledged, the court may, on petition of the pledgee, direct the trustee to apply the proceeds for the benefit of the pledgee.[94] Or if the parties have agreed on a valuation of the security, and thereafter new facts are developed or occur, which show the valuation to have been erroneous, the court may order a new valuation to be made, if such a course is manifestly in furtherance of justice and the rights of the parties in interest.[95] Ordinarily, no steps will be taken towards compelling the valuation and application of a security until a trustee of the estate has been appointed, since the general creditors are to be represented by that officer, and it may be important for him to exercise his judgment as to the best manner of dealing with the situation.[96] Much may depend, in such cases, upon the sound discretion of the trustee. But his duty is only to the general or unsecured creditors. Hence if a particular piece of property will be wholly absorbed in satisfying an established first lien on it, the trustee is under no duty to ascertain the validity of subsequent liens.[97] But if it becomes necessary for him to carry the matter into the courts, he may file a bill against all incumbrancers, with the object of ascertaining the validity, priority, and amount of their several claims.[98] And in one case, where the creditor relied on the lien of a judgment, but it was represented to the trustee that the bankrupt was insane at the time of the service of process in the suit and at the date of the judgment, it was held that this, if true, was matter of fact which would render the judgment erroneous, and that the trustee should go into the court where it was rendered and sue out a writ of error coram nobis.[99]

[92] In re Worthington, 14 N. B. R. 388, Fed. Cas. No. 18,052.

[93] In re Davison, 179 Fed. 750, 24 Am. Bankr. Rep. 460.

[94] In re Wiley, 4 Biss. 171, Fed. Cas. No. 17,655.

[95] In re Newland, 7 Ben. 63, 9 N. B. R. 62, Fed. Cas. No. 10,171.

[96] In re Grinnell, 7 Ben. 42, 9 N. B. R. 29, Fed. Cas. No. 5,830.

[97] Mattocks v. Farrington, 2 Hask. 331, Fed. Cas. No. 9,298.

[98] McLean v. Lafayette Bank, 3 McLean, 415, Fed. Cas. No. 8,886.

[99] McKinsey v. Harding, 4 N. B. R. 38, Fed. Cas. No. 8,866.

The manner of valuing and applying the security must depend in many cases on the particular circumstances present, the object being always to effect exact justice as between the secured creditor, on the one hand, and the body of unsecured creditors on the other hand. For instance, in one case it appeared that the creditor, after the adjudication of his debtor in bankruptcy, took out a policy of insurance on the life of the debtor as security for the debt, and paid all the premiums with his own money. He also proved his debt in bankruptcy and received dividends thereon. The bankrupt died prior to the declaration of the last dividend, and the insurance company paid the creditor in full the original amount of the debt. It was held that the creditor must pay to the trustee in bankruptcy the whole amount received from the insurance company over the sum sufficient, with the dividends and payments previously made, to pay the debt in full, but that he was entitled also to deduct the amount of premiums paid by him, with interest from the time of payment.[100]

In regard to the costs and expenses of realizing on securities, the creditor should not ordinarily be charged with more than he would have had to expend if he had effected a foreclosure independently of the bankruptcy proceedings. But on the other hand, the estate in bankruptcy should not be burdened with expense where it gains no corresponding advantage. Thus, where a mortgage creditor attempted to foreclose his mortgage in a state court, but without leave of the bankruptcy court and without joining the trustee, and the proceeding was held invalid, it was considered that attorneys' commissions and costs stipulated to be paid on foreclosure should not be allowed.[101] But a mortgagee in possession is not chargeable with any part of the costs in bankruptcy, nor with the expenses of the sale of any of the property other than that on which his mortgage was a valid lien.[102]

§ 565. Claim for Deficiency and for Interest and Costs.—If the security held by a lien creditor is valued by agreement between himself and the trustee, or under the direction of the court, but the valuation is less than the amount of his debt or claim,—or if the lien is foreclosed or the security otherwise realized, and results in a deficiency,—the creditor, in either case, will be entitled to prove a claim in the bankruptcy proceedings for such deficiency or unsatisfied balance,[103] al-

[100] In re Newland, 7 Ben. 63, 9 N. B. R. 62, Fed. Cas. No. 10,171.

[101] In re Devore, 16 N. B. R. 56, Fed. Cas. No. 3,847.

[102] In re Eldridge, 2 Biss. 362, 4 N. B. R. 498, Fed. Cas. No. 4,330.

[103] McHenry v. Société Française, 95 U. S. 58, 24 L. Ed. 370; In re Rudd, 180 Fed. 312, 25 Am. Bankr. Rep. 35; In re Ball, 123 Fed. 164, 10 Am. Bankr. Rep. 564; In re Linforth, 87 Fed. 386; In re Letchworth, 18 Fed. 822; In re Winn, 1 N. B. R. 499, Fed. Cas. No. 17,876; In re Bolton, 2 Ben. 189, 1 N. B.

though, quoad hoc, he will not be entitled to any preference or advantage over other creditors, but simply to take his proportionate share out of the bankrupt's general assets.[104] Further, if a mortgagee forecloses within a year after the adjudication in bankruptcy, he cannot prove his claim for a deficiency after the expiration of such year, as he had the right to prove it in the first instance as a secured claim.[105] And as to his right to obtain and enforce a deficiency decree in the foreclosure proceeding, that right will be suspended pending the bankrupt's application for a discharge, and will be lost if the discharge is granted.[106] If the property is sold on foreclosure proceedings and is bid in by the lien creditor for a merely nominal sum, with no competing bid against him, or, according to some of the authorities, if his successful bid is less than the amount due, the actual value of the property may be inquired into, and he will be allowed to prove a claim, as on a deficiency, only for the difference between the amount of his original debt and the value so ascertained.[107] And some of the cases rule that a mortgagee cannot be permitted to come upon the estate for any deficiency where he proceeded to foreclose in a state court without obtaining leave of the bankruptcy court and without making the trustee a party, as this amounts to an election on his part to rely wholly on his security and stay out of the bankruptcy.[108] But other cases hold that such a claim may be allowed in

R. 370, Fed. Cas. No. 1,614; In re Grant, Fed. Cas. No. 5,690; Ex parte Dalby, 1 Low. 431, 3 N. B. R. 731, Fed. Cas. No. 3,540; In re Ruehle, 2 N. B. R. 577, Fed. Cas. No. 12,113; Watkins v. Worthington, 2 Bland. (Md.) 509; In re Clark Realty Co., 253 Fed. 938, 166 C. C. A. 38, 42 Am. Bankr. Rep. 403; In re Progressive Wall Paper Corp. (D. C.) 224 Fed. 143; In re McAusland (D. C.) 235 Fed. 173, 37 Am. Bankr. Rep. 519; In re Bash (D. C.) 245 Fed. 808, 40 Am. Bankr. Rep. 341. A creditor of a bankrupt corporation holding its notes secured by its mortgage bonds as collateral, after realizing from the mortgaged property, cannot prove against the general estate both the balance due on the notes and the balance due on the bonds, but is entitled to dividends only on the amount of the actual indebtedness to him. In re Battle Island Paper Co. (D. C.) 259 Fed. 921, 44 Am. Bankr Rep. 240.

[104] In re Snedaker (Utah) 4 N. B. R. 168.

[105] In re Sampter, 170 Fed. 938, 96 C. C. A. 98, 22 Am. Bankr. Rep. 357.

[106] Scott v. Ellery, 142 U. S. 381, 12 Sup. Ct. 233, 35 L. Ed. 1050.

[107] In re Dix, 176 Fed. 582, 23 Am. Bankr. Rep. 889; In re Graves, 182 Fed. 443, 25 Am. Bankr. Rep. 372; In re Woods, 7 Fed. 665. In the case last cited, it was said that the amount of the proceeds of a subsequent sale of the property by the creditor is no test of the actual value of the property and should not be credited as such to the bankrupt, in the absence of an agreement between the parties that the creditor should sell the property and apply the proceeds towards the satisfaction of the debt. Upon a claim for the balance of a secured debt after sale of the security, the court of bankruptcy, in the absence of a legal rule in the state making the sum for which the property is bought in at a public sale conclusive of its value, is bound to consider the question of value on an allegation that the price realized at such a sale was inadequate. In re McAusland (D. C.) 235 Fed. 173, 37 Am. Bankr. Rep. 519.

[108] In re Soltmann, 249 Fed. 455, 161 C. C. A. 413, 41 Am. Bankr. Rep. 42; In re A. J. Ellis, Inc. (D. C.) 242 Fed. 156, 39 Am. Bankr. Rep. 265; In re Astoroga Paper Co. (D. C.) 234 Fed. 792, 37 Am. Bankr. Rep. 751; In re Miller, 19 N. B.

the discretion of the court.[109] And in a case where a mortgage creditor obtained permission of the bankruptcy court to foreclose his mortgage in a state court, but upon condition of waiving any personal claim for deficiency, but the creditor, for good reasons and without laches, failed to prosecute his suit to judgment, it was held that he was not bound, as by an election, to rely solely on the mortgaged property, but he might be subsequently admitted as a creditor against the estate on account of the same debt.[110]

It is also held by some of the decisions that the mortgagee of property of a bankrupt is equitably entitled to have the rents and profits of the property, collected by the trustee in bankruptcy, applied on the interest on his debt, if the security itself is insufficient,[111] particularly if he has secured an equitable lien on the rents by bill in equity and the appointment of a receiver after default.[112] But this is not undisputed, and certain other cases maintain that the mortgagee in such a case is not entitled to the rents unless, in addition to showing the insufficiency of his security, he actually intercepts and receives them.[113]

As to interest on the mortgage or other secured debt, it will ordinarily stop with the filing of the petition in bankruptcy, as debts accruing after that time are not provable in bankruptcy. Hence a secured creditor who sells the security after the filing of the petition, and finds the proceeds insufficient to pay the whole amount of his claim, is not entitled to apply such proceeds first to interest accrued since the filing of the petition, and then to the principal debt, and then prove a claim for the balance.[114] But in the exceptional case where an estate in bankruptcy is amply sufficient for the purpose, a mortgagee may be allowed full interest on his debt.[115] As to costs and fees, where these are stipulated in the mortgage to be paid in case of foreclosure by proceedings in court, they may be allowed when the security is realized on in the manner specified, but not where the property covered is sold by the trustee in bankruptcy at private sale under order of the court.[116]

R. 78, Fed. Cas. No. 9,555; In re Herrick, 17 N. B. R. 335, Fed. Cas. No. 6,421.

[109] In re Moller, 14 Blatchf. 207, Fed. Cas. No. 9,700.

[110] In re Linforth, 87 Fed. 386.

[111] In re Industrial Cold Storage & Ice Co., 163 Fed. 390, 20 Am. Bankr. Rep. 904. And see In re Bennett, 2 Hughes, 156, 12 N. B. R. 257, Fed. Cas. No. 1,313; Bindseil v. Liberty Trust Co., 248 Fed. 112, 160 C. C. A. 252, 41 Am. Bankr. Rep. 454.

[112] In re Snedaker (Utah) 4 N. B. R. 168.

[113] Foster v. Rhodes, 10 N. B. R. 523, Fed. Cas. No. 4,981; In re Hollenfeltz, 94 Fed. 629, 2 Am. Bankr. Rep. 499.

[114] Sexton v. Dreyfus, 219 U. S. 339, 31 Sup. Ct. 256, 55 L. Ed. 244, 25 Am. Bankr. Rep. 363, reversing In re Kessler, 180 Fed. 979, 103 C. C. A. 582, 24 Am. Bankr. Rep. 287, which affirmed In re Kessler & Co., 171 Fed. 751, 22 Am. Bankr. Rep. 606.

[115] Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, 22 Am. Bankr. Rep. 1.

[116] In re Roche (C. C. A.) 101 Fed. 956, 4 Am. Bankr. Rep. 369. And see

§ 566. Right to Rely on Security and Disregard Bankruptcy.—According to the great preponderance of authority, a secured creditor may, if he so chooses, rely entirely upon his security, refrain from proving his debt or making himself in any way a party to the proceedings in bankruptcy, and in effect disregard those proceedings altogether. It is true that he may be brought in by rule or petition, at the instance of the trustee in bankruptcy or the court, and submit his security and have its value determined, if there is reason to believe that the property affected may be of greater value than the amount of his claim. But so far as it depends on the creditor's own initiative, he is not bound to file a proof of debt or take any notice of the proceedings.[117] If he has no occasion to apply to the bankruptcy court for aid in the enforcement of his lien, he may rely upon his security and omit to prove his claim, and by so doing he will lose nothing but his right to participate in the distribution of the general estate of the bankrupt.[118] "A secured creditor can resort to one of three remedies. 1. He may rely upon his security. 2. He may abandon it and prove the whole debt as unsecured, or, 3, he may be admitted only as a creditor for the balance remaining after the deduction of the value of the security. If he takes either of the two courses last named, he must of course prove his debt. But suppose he chooses to rely upon his security, there is no positive provision nor is there anything in the policy of the bankruptcy law requiring proof of the debt, unless he seeks the aid of the bankruptcy court to enforce his lien."[119] And if the creditor is in physical possession of personal property or collaterals pledged to him by the bankrupt, or chattels covered by a chattel mortgage, he cannot be compelled to surender the possession to the trustee in bankruptcy without satisfaction of his debt.[120]

There are, however, some decisions to the contrary of these propositions. It has occasionally been held that creditors secured by mort-

Gugel v. New Orleans Nat. Bank, 239 Fed. 676, 152 C. C. A. 510, 39 Am. Bankr. Rep. 160.

117 Yeatman v. New Orleans Sav. Inst., 95 U. S. 764, 24 L. Ed. 589; Ward v. First Nat. Bank (C. C. A.) 202 Fed. 609, 29 Am. Bankr. Rep. 312; In re Barber, 97 Fed. 547, 3 Am. Bankr. Rep. 306; Courtney v. Fidelity Trust Co., 219 Fed. 57, 134 C. C. A. 595, 33 Am. Bankr. Rep. 400; In re Haake, 2 Sawy. 231, 7 N. B. R. 61, Fed. Cas. No. 5,883; Jones v. Lellyet, 39 Ga. 64; Spilman v. Johnson. 27 Gratt. (Va.) 33, 16 N. B. R. 145; Selfridge v. Gill, 4 Mass. 95. As to the effect of bankruptcy on existing liens in general, see supra, §§ 363–391.

118 Cottrell v. Pierson, 2 McCrary, 390, 12 Fed. 805.

119 Wicks v. Perkins, 1 Woods, 383, 13 N. B. R. 280, Fed. Cas. No. 17,615.

120 Yeatman v. New Orleans Sav. Inst., 95 U. S. 764, 24 L. Ed. 589; Cadmus v. Beman, Fed. Cas. No. 2,281; In re Buntrock Clothing Co., 92 Fed. 886, 1 Am. Bankr. Rep. 454; Dallas v. Flues, 8 Phila. 150, Fed. Cas. No. 3,544.

gage, judgment, or otherwise, must prove their debts, or else they will be barred of the right to collect the same and lose the benefit of their securities.[121] And a few decisions have insisted on the right of the trustee in bankruptcy to require and demand the surrender of personal property or collaterals held by a creditor as security.[122] While these views cannot be admitted as correct, yet much must depend upon the activity and discretion of the trustee in bankruptcy. It was well said by a learned referee in bankruptcy that it is the duty of the trustee to investigate property held by creditors as security or on which they claim liens, to determine its value and find out how and by what right it is held by them, and to determine whether there is any interest in the property which may be obtained for the general creditors. And although a creditor who holds collateral security which is of less value than the amount of his debt, may not offer to prove his claim in the bankruptcy proceedings, and may disclaim all intention of taking any part therein, yet he may be ordered to appear and produce the evidences of his debt and give an account of the amount, kind, and value of the securities held by him.[123] Yet it must be remembered that "an assignee in bankruptcy represents the general or unsecured creditors, and his duties relate chiefly to their interests. He is in no respect the agent or representative of secured creditors who do not prove their claims. He need not take measures for the sale of incumbered property unless the value of the property is greater than the incumbrance. He has nothing to do with the disputes of secured creditors among themselves, unless it becomes necessary for him to interfere in order to settle their rights in the general estate, or to determine whether there is an excess of property over what is required for the purposes of the security. He cannot enforce contracts between creditors, except so far as they may directly or indirectly affect the fund he is to get into his hands for distribution under the law." [124]

But the court of bankruptcy always has jurisdiction, if the interests of the creditors at large are involved, to determine questions of liens on the property of the bankrupt or their validity or amount, and this jurisdiction may be invoked by the secured creditor himself, though

[121] Davis v. Anderson, 6 N. B. R. 145. Fed. Cas. No. 3,623; In re Davis, 2 N. B. R. 391, Fed. Cas. No. 3,618.

[122] In re Cobb, 96 Fed. 821, 3 Am. Bankr. Rep. 129; In re Huddleston, 1 Nat. Bankr. News, 214. See, as an extreme exponent of this view, the case of Phelps v. Sellick, 8 N. B. R. 390, Fed. Cas. No. 11,079.

[123] In re Coffin, 1 Nat. Bankr. News, 507.

[124] Dudley v. Easton, 104 U. S. 99, 26 L. Ed. 668.

he has not proved his debt.[125] And it cannot be said that the secured creditor has such an absolute right to disregard the proceedings in bankruptcy that he can proceed to enforce the security by the aid of the state courts without being interfered with by the trustee or the court of bankruptcy. If he brings a suit in a state court, after the commencement of the bankruptcy proceedings, to foreclose a mortgage or enforce any other lien, not having proved his debt or otherwise participated in the proceedings in bankruptcy, he may be enjoined from proceeding further with his suit, and such injunction may issue in a case where the trustee alleges that the mortgage or other security was fraudulent and void.[126] But still, if he takes this course under circumstances which appeared to justify it at the time, and it does not appear that other creditors were injured, it is the authority and discretion of the bankruptcy court to ratify and confirm a sale so made, as if leave to make it had first been obtained.[127]

Since the statute vests the trustee in bankruptcy with title to the bankrupt's property "as of the date when he was adjudged a bankrupt," it is held that, until that date, a lienor or pledgee is at liberty to make any disposition of or perfect any title to the property which the nature of the lien permits, and where he has converted the security into money pursuant to his contract rights, he may prove the unsatisfied balance of his claim.[128] It remains to be stated that, if the creditor relies on his security and omits to prove his claim in the bankruptcy, a discharge granted to the bankrupt will not be a bar or defense to any proceedings to enforce the lien, but will preclude the creditor from setting up any claim for a deficiency.[129]

§ 567. Foreclosure by Secured Creditor Independently of Bankruptcy.—A mortgagee or other lien creditor may prosecute a suit in a state court for the establishment and enforcement of his lien without regard to the pendency of proceedings in bankruptcy against the debtor, provided that he has not made himself a party to those proceedings and subjected himself to the jurisdiction of the court of bankruptcy by prov-

[125] In re High, 3 N. B. R. 191, Fed. Cas. No. 6,473.

[126] Markson v. Heaney, 1 Dill. 497, 4 N. B. R. 510, Fed. Cas. No. 9,098; In re Snedaker (Utah) 3 N. B. R. 629; In re Brooks, 91 Fed. 508, 1 Am. Bankr. Rep. 531; In re Grinnell, 7 Ben. 42, 9 N. B. R. 29, Fed. Cas. No. 5,830. See Barstow v. Peckham, 5 N. B. R. 72, Fed. Cas. No. 1,064.

[127] Bradley v. Adams Exp. Co., 3 Fed. 895.

[128] In re Mertens, 144 Fed. 818, 75 C. C. A. 548, 15 Am. Bankr. Rep. 362.

[129] Dixon v. Barnum, 3 Hughes, 207, Fed. Cas. No. 3,928; Pease v. Ritchie, 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566; Cohn v. Colby, 57 How. Prac. (N. Y.) 168; Barnett v. Salyers (Ky.) 12 S. W. 303; Kinloch v. Savage, Speer, Eq. (S. C.) 464.

ing his claim or otherwise, and provided that no action is taken by the trustee in bankruptcy to interfere with such suit, nor any order to that effect issued by the bankruptcy court.[130] And particularly if foreclosure proceedings have proceeded in a state court so far as the rendition of a judgment or decree before any adjudication in bankruptcy is made, the whole matter is then within the exclusive jurisdiction of the state court, and the execution of the decree will not be stayed or enjoined.[131] There is, however, an interval during which it would be unsafe for the creditor to proceed in this manner, and during which other creditors would have good ground for applying to the bankruptcy court to stay his hand. This is the time which elapses between the adjudication in bankruptcy and the appointment of a trustee. Since that officer, when appointed, will be under the duty of investigating the security and the property which it is alleged to cover, and of determining whether there is any equity which can be made available for the general creditors, a sale made before he is qualified will be at least voidable as against him.[132] And some of the cases hold that the trustee will not be barred or in any way affected by a decree of foreclosure if he was not joined as a party in the suit in which it was rendered, since he succeeds in title to the equity of redemption of the bankrupt.[133] And since all property of the bankrupt is at least constructively in the possession of the trustee, a chattel mortgagee cannot take possession of the property covered, after the appointment of the trustee, unless it be with the consent of the latter. Possession so taken is not lawful and cannot be retained against the demand of the trustee for the surrender of the

[130] Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136; In re Roseberry, 8 Biss. 112, 16 N. B. R. 340, Fed. Cas. No. 12,052; Sedgwick v. Grinnell, 9 Ben. 429, Fed. Cas. No. 12,612; In re Davis, 1 Sawy. 260, 4 N. B. R. 715, Fed. Cas. No. 3,620; In re Smith, 2 Ben. 432, 1 N. B. R. 599, Fed. Cas. No. 12,973; Swope v. Arnold, 5 N. B. R. 148, Fed. Cas. No. 13,702; Yeadon v. Planters' & Mechanics' Bank, Fed. Cas. No. 18,130; Brown v. Gibbons, 37 Iowa, 654, 13 N. B. R. 407; Hayes v. Dickinson, 9 Hun (N. Y.) 277, 15 N. B. R. 350; Barber v. Terrell, 54 Ga. 146; Cumming v. Clegg, 52 Ga. 605, 14 N. B. R. 49; Winship v. Phillips, 52 Ga. 593, 14 N. B. R. 50; Hall v. Bliss, 118 Mass. 554, 19 Am. Rep. 476, 14 N. B. R. 329; Hatcher v. Jones, 53 Ga. 208, 14 N. B. R. 387; Biddle's Appeal, 68 Pa. St. 13, 9 N. B. R. 144; Green v. Arbuthnot, 4 Wkly. Notes Cas. (Pa.) 357. Further as to foreclosure and sale by secured creditor, see, supra, §§ 387, 390. Contra, see In re Wynne, Chase, 227, 4 N. B. R. 23, Fed. Cas. No. 18,117; Ex parte Taylor, 1 Hughes, 617, 16 N. B. R. 40, Fed. Cas. No. 13,773; Blum v. Ellis, 73 N. C. 293, 13 N. B. R. 345; In re Gerdes, 2 Nat. Bankr. News, 131; Stewart-Noble Drug Co. v. Bishop-Babcock-Becker Co., 62 Colo. 197, 162 Pac. 159.

[131] In re Gerdes, 102 Fed. 318, 4 Am. Bankr. Rep. 346; In re Holloway, 93 Fed. 638, 1 Am. Bankr. Rep. 659. See Callagan v. American Trust & Savings Bank, 196 Ill. App. 102.

[132] In re Brooks, 91 Fed. 508, 1 Am. Bankr. Rep. 531; Taylor v. Robertson, 21 Fed. 209.

[133] Barron v. Newberry, 1 Biss. 149, Fed. Cas. No. 1,056; Townshend v. Thomson, 60 N. Y. Super. Ct. 454, 18 N. Y. Supp. 870; Griffin v. Hodshire, 119 Ind. 235, 21 N. E. 741.

property.[134] But the adjudication is no bar to an ejectment by a mortgagee against a third person, not connected with the trustee in bankruptcy, even though such suit is brought without permission of the court of bankruptcy, where the trustee never assumed possession of nor intermeddled with the estate affected.[135] And in general, if the trustee is satisfied that the secured creditor's claim is valid and that the property covered is of no greater value than will be sufficient to pay it, he may abandon the property to the creditor;[136] and when this is done it is perfectly permissible for the creditor to proceed as if no proceeding in bankruptcy were pending, and for a state court to take and exercise jurisdiction without regard to such proceeding;[137] and such abandonment may be presumed when the trustee takes no steps to bring the property within the jurisdiction of the court of bankruptcy for administration,[138] or when he permits a pending foreclosure suit to proceed without objection or intervention.[139] As for the court of bankruptcy, it will, in general, interfere with the creditor's proceedings only where the interests of the general creditors will be materially affected or where there is controversy as to the validity of the alleged lien.[140] In the absence of such circumstances, it may permit the creditor to proceed in his own way and allow him to make a sale of the property.[141] But still, even in such a case, if any fraud is discoverable in the sale, the bankruptcy court will not hesitate to interfere, as was done in a case where a pledgee of valuable collateral sold it to himself at a pretended auction sale for about one-sixth its nominal value, after the filing of a petition in bankruptcy against the pledgor, and without any other authority than the contract of pledge, and without notice to the pledgor or any other party in interest.[142] And where the mortgagee of property has proved his debt in the bankruptcy proceedings, and the court of

[134] In re Gutman, 114 Fed. 1009, 8 Am. Bankr. Rep. 252; In re Rosenberg, 3 Ben. 366, 3 N. B. R. 130, Fed. Cas. No. 12,055; Hutchings v. Muzzy Iron Works, 8 N. B. R. 458, Fed. Cas. No. 6,952.

[135] Eyster v. Gaff, 2 Colo. 228.

[136] Second Nat. Bank v. National State Bank, 10 Bush (Ky.) 367; In re Moller, 8 Ben. 526, Fed. Cas. No. 9,699.

[137] Stoddard v. Locke, 43 Vt. 574, 5 Am. Rep. 308, 9 N. B. R. 71; Second Nat. Bank v. National State Bank, 10 Bush (Ky.) 367.

[138] Crowe v. Reid, 57 Ala. 281.

[139] In re Stansfield, 4 Sawy. 334, 16 N. B. R. 268, Fed. Cas. No. 13,294.

[140] Goddard v. Weaver, 1 Woods, 257, 6 N. B. R. 440, Fed. Cas. No. 5,495. And see Bean v. Parker, 89 Vt. 532, 96 Atl. 17. Whether the administration of a mortgaged stock of merchandise should be left to the state court, which had taken jurisdiction, or be brought into the bankruptcy proceedings, is for the determination of the judge of the bankruptcy court. Bank of Dillon v. Murchison, 213 Fed. 147, 129 C. C. A. 499, 31 Am. Bankr. Rep. 740.

[141] In re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815; In re Grinnell, 7 Ben. 42, 9 N. B. R. 29, Fed. Cas. No. 5,830; In re Sacchi, 10 Blatchf. 29, 6 N. B. R. 497, Fed. Cas. No. 12,200.

[142] In re Mertens, 134 Fed. 101, 14 Am. Bankr. Rep. 226.

bankruptcy has made an order for the sale of the property, in a proceeding to which he was a party, he cannot then go into a state court and sue for foreclosure.[143]

Where the security takes the form of a deed of trust in the nature of a mortgage, the rights of the secured creditor (beneficiary) are not materially different from those of the mortgagee in a common-law mortgage. There is some authority for the doctrine that a power of sale given in a mortgage is not a power coupled with an interest, and therefore is revoked by the bankruptcy of the mortgagor, as it would be by his death.[144] But this cannot be the case with a deed of trust by which the legal title is vested in one or more trustees for the benefit of the lawful holder of the obligation secured, since in this case nothing comes within the scope of the bankruptcy proceedings but the grantor's reversionary or equitable title.[145]

Where, prior to the commencement of the proceedings in bankruptcy, a receiver is appointed in an action in a state court to foreclose a mortgage, property in his possession cannot be taken by the trustee in bankruptcy without discharging the mortgage debt.[146] But after the appointment of the trustee, a receiver will not be appointed for the bankrupt's mortgaged land, as the trustee is clothed with like functions as a receiver.[147]

§ 568. Same; Obtaining Permission of Bankruptcy Court.—Under the bankruptcy act of 1867, there were numerous decisions to the effect that, after the commencement of the proceedings in bankruptcy, a creditor secured by a mortgage or deed of trust, or a pledge or a mechanic's lien, or holding an execution, could not proceed to enforce his security by sale of the property without the permission of the bankruptcy court first obtained, and that a sale made without such leave was voidable and would be set aside on a proper application.[148] And at least one decision under the present statute has been rendered to the same effect.[149] Fur-

[143] Levy v. Haake, 53 Cal. 267.

[144] Lockett v. Hoge, 9 N. B. R. 167, Fed. Cas. No. 8,444. And see Morris v. Davidson, 49 Ga. 361, 11 N. B. R. 454.

[145] McGready v. Harris, 54 Mo. 137, 9 N. B. R. 135. See In re Davis, 2 N. B. R. 391, Fed. Cas. No. 3,618.

[146] Davis v. Railroad Co., 1 Woods, 661, 13 N. B. R. 258, Fed. Cas. No. 3,648.

[147] In re Bennett, 2 Hughes, 156, 12 N. B. R. 257, Fed. Cas. No. 1,313.

[148] Smith v. Kehr, 2 Dill, 50, 7 N. B. R. 97, Fed. Cas. No. 13,071; In re Cook, 3 Biss. 116, Fed. Cas. No. 3,151; In re McGilton, 3 Biss. 144, 7 N. B. R. 294, Fed. Cas. No. 8,798; Lee v. Franklin Avenue German Sav. Inst., 3 N. B. R. 218, Fed. Cas. No. 8,188; Phelps v. Sellick, 8 N. B. R. 390, Fed. Cas. No. 11,079; Dooley v. Virginia Fire & Marine Ins. Co., 2 Hughes, 482, Fed. Cas. No. 3,998; The Skylark, 4 Biss. 388, Fed. Cas. No. 12,929; Stemmons v. Burford, 39 Tex. 352; In re Needham, Fed. Cas. No. 10,081a; Société d'Epargnes v. McHenry, 49 Cal. 351. Contra, In re Grinnell, 7 Ben. 42, 9 N. B. R. 29, Fed. Cas. No. 5,830; In re Moller, 14 Blatchf. 207, Fed. Cas. No. 9,700.

[149] In re Emslie (C. C. A.) 102 Fed. 291, 4 Am. Bankr. Rep. 126.

ther, it was held that, in order to entitle a mortgagee to apply for leave to foreclose in another court, he must first prove his debt, and his petition for leave must fully describe his debt, its nature and amount, and the property affected, the other incumbrances, if any, and the actual value of the property; and if the value of the property was greater than the incumbrances, the petition must make it appear that the rights of the creditor could not be fully protected by a sale made by the trustee in bankruptcy,[150] and the creditor must notify the trustee of his application, failing which it should be dismissed.[151] But the Supreme Court refused to accept or sanction this doctrine, and held that the lienor was entitled to perfect his title and enforce his rights as though no proceeding in bankruptcy had been commenced, and without first applying to the bankruptcy court for leave,[152] and the best modern decisions accord with this last view.[153]

§ 569. Same; Authority of Bankruptcy Court to Stay or Enjoin Proceedings.—The court of bankruptcy has jurisdiction to "assume the entire administration of the estate of the debtor, to determine all questions touching the existence of liens thereon, and to ascertain and settle the amount of such liens, and make provision for the liquidation and settlement thereof; and as incidental to this, it has ample power to restrain a claimant of such lien from proceeding elsewhere to enforce his lien."[154] And it is generally proper so to enjoin the secured creditor when the value of the property exceeds the amount secured by the mortgage or other lien, or where the validity or amount of the lien is disputed, or there is danger that the property may be sacrificed, or where the course taken by the secured creditor would be prejudicial to the interests of the general body of creditors.[155] And where there is no

[150] In re Sabin, 9 N. B. R. 383, Fed. Cas. No. 12,193.

[151] In re Frizelle, 5 N. B. R. 122, Fed. Cas. No. 5,133.

[152] Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136.

[153] In re Mertens, 144 Fed. 818, 75 C. C. A. 548, 15 Am. Bankr. Rep. 362.

[154] In re Clark, 9 Blatchf. 372, 6 N. B. R. 403, Fed. Cas. No. 2,801.

[155] In re San Gabriel Sanatorium Co. (C. C. A.) 102 Fed. 310, 4 Am. Bankr. Rep. 197; In re Pittelkow, 92 Fed. 901. 1 Am. Bankr. Rep. 479; In re Snedaker (Utah) 3 N. B. R. 629; In re Iron Mountain Co., 9 Blatchf. 320, 4 N. B. R. 645, Fed. Cas. No. 7,065; The Skylark, 4 Biss. 388, Fed. Cas. No. 12,929; McLean v. Lafayette Bank, 3 McLean, 185, Fed. Cas. No. 8,885; Platt v. Dickenson, Fed. Cas. No. 11,216a; In re Kerosene Oil Co., 3 Ben. 35, 2 N. B. R. 528, Fed. Cas. No. 7,725; In re Hanna, 4 Ben. 469, 4 N. B. R. 411, Fed. Cas. No. 6,026; Getz v. First Nat. Bank, Fed. Cas. No. 5,374; In re New York Kerosene Oil Co., 3 N. B. R. 125, Fed. Cas. No. 10,206; Foster v. Ames, 1 Low. 313, 2 N. B. R. 455, Fed. Cas. No. 4,965; In re Brinkman, 7 N. B. R. 421, Fed. Cas. No. 1,884; Whitman v. Butler, 8 N. B. R. 487, Fed. Cas. No. 17,579; Markson v. Heaney, 1 Dill, 497. 4 N. B. R. 510, Fed. Cas. No. 9,098; McKay v. Funk, 37 Iowa, 661, 13 N. B. R. 334; Markson v. Haney, 47 Ind. 31, 12 N. B. R. 484.

dispute as to the title to the property but only a question as to the enforcement of a lien upon it, a formal or plenary proceeding is not necessary, but the petition to enjoin the creditor from foreclosing may be heard and determined in a summary manner.[156] But courts of bankruptcy will be chary of interfering with a creditor who is proceeding to enforce an admittedly valid lien in the manner ordinarily appropriate for that purpose. The drastic step of enjoining him will be taken only when it is necessary to protect an equity of the bankrupt or to prevent a sacrifice of, or serious injury to, the interests of the creditors at large.[157] Hence, if it is clearly shown that the property affected is of no value beyond the admitted incumbrances upon it, so that there is nothing to be gained for the general creditors, an injunction will be refused, or, if issued, will be dissolved.[158] And a trustee in bankruptcy cannot have an injunction against a foreclosure in a state court of a mortgage against the bankrupt, where he appeared and permitted the proceedings to advance to a final adjudication, and no injury is done thereby to the estate of the bankrupt.[159]

§ 570. Redemption of Property by Trustee.—A trustee in bankruptcy is vested with such an interest in the mortgaged real estate of the bankrupt as entitles him to pay off the mortgage debt and have the mortgage assigned to himself or to a person designated by him, although it is not in process of foreclosure, where it is shown that such a course will be for the benefit of the estate, by enabling him to sell the property to better advantage; and the court of bankruptcy has jurisdiction, on his petition, to compel the mortgagee to accept payment and execute the assignment.[160] The procedure for this purpose has been prescribed as follows: "Whenever it may be deemed for the benefit of an estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property real or personal, ... the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor, and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why

[156] In re Clark, 9 Blatchf. 372, 6 N. B. R. 403, Fed. Cas. No. 2,801.

[157] In re Davis, 8 N. B. R. 167, Fed. Cas. No. 3,619; Blake v. Francis-Valentine Co., 89 Fed. 691, 1 Am. Bankr. Rep. 372; Pennington v. Sale, 1 N. B. R. 572, Fed. Cas. No. 10,939; In re Wilbur, 1 Ben. 527, 3 N. B. R. 276, Fed. Cas. No. 17,633.

[158] In re O'Malley, Fed. Cas. No. 10,507a; In re Iron Mountain Co., 9 Blatchf. 320, 4 N. B. R. 645, Fed. Cas. No. 7,065; McLean v. Rockey, 3 McLean, 235, Fed. Cas. No. 8,891.

[159] Augustine v. McFarland, 13 N. B. R. 7, Fed. Cas. No. 648.

[160] In re Bacon, 132 Fed. 157, 12 Am. Bankr. Rep. 730; In re Straub, 158 Fed.

an order should not be passed by the court upon the petition authorizing such act on the part of the trustee." [161] Where payment of an alleged specific lien is made by a bankrupt's trustee after notice to all creditors and without objection, a general judgment creditor claiming a prior lien cannot thereafter object, the rule being that lien creditors who are not prompt and persistent in asserting their rights may lose them.[162]

§ 571. Sale of Property by order of Bankruptcy Court.—The court of bankruptcy has jurisdiction and power to dispose of incumbered property of the bankrupt in any manner deemed best for the interests of all concerned. It may order such property to be sold by the trustee in bankruptcy, and may direct the sale to be made subject to a particular lien, admitted to be valid, or free of all liens and incumbrances, and in the latter case the proceeds of the sale will be brought into court for distribution to those entitled, and any valid lien will be transferred from the property to the fund in court.[163] And this action may be taken not only at the instance of the trustee in bankruptcy, but the lien creditor himself may petition the court to take charge of the property and order its sale, or for leave to conduct the sale himself, in either case first proving his debt and making at least a prima facie showing as to the validity and priority of his lien.[164] An order of the bankruptcy court so made will oust the jurisdiction of the state courts to foreclose the lien in the ordinary way.[165] But it can only be justified by the existence of an equity in the property which can be made available for the general creditors. And hence, if it is quite clear that the property is not worth anything more than the amount of the mortgage or other incumbrance upon it, the court will not order its sale, but will leave the creditor to deal with it in his own way.[166] If, however, a sale has been ordered and made and the proceeds brought into court, all questions concerning the right of the creditor to payment out of the fund, or the amount to which he is entitled, must be determined by the bankruptcy

375, 19 Am. Bankr. Rep. 808; Foster v. Ames, 1 Low. 313, 2 N. B. R. 455, Fed. Cas. No. 4,965. And see supra, § 305.

[161] General Order in Bankruptcy, No. 28.

[162] In re Torchia, 185 Fed. 576, 26 Am. Bankr. Rep. 188.

[163] In re Booth, 96 Fed. 943, 2 Am. Bankr. Rep. 770; In re Pittelkow, 92 Fed. 901, 1 Am. Bankr. Rep. 479; In re Schnepf, 2 Ben. 72, 1 N. B. R. 190, Fed. Cas. No. 12,471; In re Bowie, 1 N. B. R. 628, Fed. Cas. No. 1,728; In re Hambright, 2 N. B. R. 498, Fed. Cas. No. 5,973; Davis v. Anderson, 6 N. B. R. 145, Fed. Cas. No. 3,623; In re Salmons, 2 N. B. R. 56, Fed. Cas. No. 12,268; Second Nat. Bank v. National State Bank, 10 Bush (Ky.) 367, 11 N. B. R. 49. And see supra, §§ 470, 471.

[164] In re Stewart, 1 N. B. R. 278, Fed. Cas. No. 13,418; In re Bigelow, 2 Ben. 480, 1 N. B. R. 632, Fed. Cas. No. 1,396.

[165] In re Devore, 16 N. B. R. 56, Fed. Cas. No. 3,847.

[166] In re Lambert, 2 N. B. R. 426, Fed. Cas. No. 8,026; Foster v. Ames, 1 Low. 313, 2 N. B. R. 455, Fed. Cas. No. 4,965.

court on a petition for distribution, not by a suit at law.[167] And if the property does not bring as much as the amount of the lien, the creditor is not entitled to be paid in full out of the estate as holding a privileged debt; in other words, he cannot come upon the general funds of the estate for the deficiency in the character of a lien creditor, though he may prove a claim for such deficiency as a general or unsecured creditor.[168] And even ahead of the claim of the lien creditor, the proper costs and expenses of the sale must be paid out of the proceeds.[169]

§ 572. Marshalling Assets.—As among the various secured creditors of a bankrupt, the general equitable principle of marshalling securities will be applied, so that a creditor having security on two or more funds or properties will be required to exhaust that on which his lien stands alone, before proceeding against that on which other creditors beside himself have liens.[170] Thus, where a creditor held several judgment notes against a debtor and also some mortgages and two insurance policies as collateral, and caused judgment to be entered on the notes and execution issued thereon, and shortly afterwards a petition was filed against the debtor and he was adjudged bankrupt, it was held that the court had power so to marshal the assets as to require such creditor to foreclose a mortgage before resorting to the general fund.[171] But where the purchaser of a tract of land gave a mortgage back covering the entire property and afterwards divided it into lots, and sold some of them, and others remained on his hands at the time of his adjudication in bankruptcy, and these were sold by the trustee in bankruptcy discharged of incumbrances, thus displacing the lien of a second mortgage which covered these lots only, it was held that the fund belonged to the first mortgagee and not to the second. The second mortgagee attempted to invoke the equitable principle that where several pieces of real estate, subject to a common incumbrance, are successively aliened, they are liable for the incumbrance in the inverse order of alienation. But the court said that there was here but one fund for distribution, and on that the senior mortgage was unquestionably the prior lien, and that the junior mortgagee must seek subrogation and indemnity in another proceeding.[172]

[167] In re Masterson, 4 N. B. R. 553, Fed. Cas. No. 9,268.

[168] In re Purcell, 2 Ben. 485, 2 N. B. R. 22, Fed. Cas. No. 11,469.

[169] In re Baughman, 163 Fed. 669, 20 Am. Bankr. Rep. 81; In re Ellerhorst, 2 Sawy. 219, 7 N. B. R. 49, Fed. Cas. No. 4,380; In re Dumont, 4 N. B. R. 17, Fed. Cas. No. 4,127.

[170] In re Sauthoff, 7 Biss. 167, 14 N. B. R. 364, Fed. Cas. No. 12,379; In re Bowler, 2 Hughes, 319, Fed. Cas. No. 1,735; McLean v. Lafayette Bank, 4 McLean, 430, Fed. Cas. No. 8,889. And see In re Thompson (D. C.) 208 Fed. 207, 31 Am. Bankr. Rep. 236.

[171] In re Sauthoff, 7 Biss. 167, 14 N. B. R. 364, Fed. Cas. No. 12,379.

[172] In re Carothers, 12 Fed. 692.

CHAPTER XXIX

PREFERENCES AND PREFERRED CREDITORS

§ 573. Preferences at Common Law.—At common law, and except as expressly forbidden by statute, an insolvent debtor has the right to prefer one creditor over others by a payment, transfer, or pledge of

property which will satisfy that creditor in full or to a greater extent than other creditors; and although such a preference may be inherently unjust, and may prevent other creditors from collecting their debts, yet it is not fraudulent or voidable if made in satisfaction of a real debt, and in good faith, with no secret arrangement for the debtor's own benefit.[1] It follows, therefore, that a preference is not voidable when made before the enactment of the bankruptcy law,[2] nor in any case unless brought plainly within the express terms of that statute. Hence payments made to the government by a United States revenue collector, within four months prior to his being adjudged a bankrupt, though actually intended to give a preference, are not within the statute; for, aside from the fact that the United States is probably not included in the term "creditor," preferential payments to the government are not expressly forbidden by the act, and the government is not bound unless expressly named.[3]

§ 574. Preferences Under Bankruptcy Act.—Preferences are defined, and provision is made for their recovery or avoidance, in two subsections of the bankruptcy act of 1898, the first of which was amended in 1903, and the second, after having been also amended in 1903, was materially changed by a further amendment in 1910. The former now reads as follows: "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required." The amendment of 1903 consisted substantially in adding to the original provision the above clause as to making the four months' period run from the recording or regis-

[1] In re Terrill, 100 Fed. 778, 4 Am. Bankr. Rep. 145; Voorhees v. Blanton, 83 Fed. 234; Cary & Moen Co. v. McKey, 40 Fed. 858; Strauss v. Abrahams, 32 Fed. 310; Means v. Montgomery, 23 Fed. 421; Smith v. Craft, 11 Biss. 340, 12 Fed. 856; Bean v. Brookmire, 1 Dill. 25, 4 N. B. R. 196, Fed. Cas. No. 1,168; Forsaith v. Merritt, 1 Low. 336, 3 N. B. R. 48, Fed. Cas. No. 4,946; Hislop v. Hoover, 68 N. C. 141; Hafner v. Irwin, 1 Ired. (23 N. C.) 490. A preference under the Bankruptcy Act differs from a fraudulent transfer at common law, in that the former is only malum prohibitum, while the latter malum in se. Richardson v. Germania Bank (C. C. A.) 263 Fed. 320, 45 Am. Bankr. Rep. 351.

[2] In re Terrill, 100 Fed. 778, 4 Am. Bankr. Rep. 145.

[3] Tiffany v. Morrison, 3 Colo. 43, 18 N. B. R. 365. But see Parker v. Sherman, 212 Fed. 917, 129 C. C. A. 437.

tering of the transfer. As to this, the amendatory act was held not to be retrospective.[4] The second subsection, as now in force, declares that "if a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person, or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."[5] Where a mortgage, or any other transfer, was executed by the bankrupt to a creditor subsequent to June 25, 1910, the question whether it was a voidable preference is governed by the section above quoted as amended on that date.[6]

The bankruptcy act does not prohibit or annul all transfers of property by an insolvent debtor, but only those which are made under the special conditions and circumstances which it sets forth.[7] And a conveyance or security given to a creditor, made and operating as a preference, may even be an act of bankruptcy and yet be valid to the extent that the property or security transferred cannot be wrenched from the creditor by the trustee in bankruptcy.[8] Further, as has previously been pointed out, there is a very material difference between a fraudulent transfer and a preferential transfer.[9] And if a given transfer of property was not fraudulent in fact, the question whether it is voidable as a

[4] Murphy v. W. T. Murphy & Co., 126 Iowa, 57, 101 N. W. 486.

[5] Bankruptcy Act 1898, § 60; a, b, as amended by Act Cong. Feb. 3, 1903 (32 Stat. 797), and Act Cong. June 25, 1910, 36 Stat. 838. This, like other provisions of the Bankruptcy Act, is for carrying out its main purpose of securing to creditors the bankrupt's entire property. Corey v. Blackwell Lumber Co., 24 Idaho, 642, 135 Pac. 742. It is of the essence of a preference that it enables the creditor to obtain a greater percentage of his debt than other creditors "of the same class." This refers to the four classes of creditors specified in § 64, namely, tax creditors, creditors for wages, creditors entitled by law to priority, and general creditors; and secured general creditors are in the same class as unsecured creditors. In re Star Spring Bed Co. (D. C.) 257 Fed. 176, 43 Am. Bankr. Rep. 328.

[6] Ogden v. Reddish (D. C.) 200 Fed. 977, 29 Am. Bankr. Rep. 531.

[7] Andrews v. Kellogg, 41 Colo. 35, 92 Pac. 222; Godwin v. Murchison Nat. Bank, 145 N. C. 320, 59 S. E. 154, 17 L. R. A. (N. S.) 935; In re Chicago Car Equipment Co., 211 Fed. 638, 128 C. C. A. 142, 31 Am. Bankr. Rep. 617.

[8] Ashby v. Steere, 2 Woodb. & M. 347, Fed. Cas. No. 576.

[9] Supra, § 453. And see Van Iderstine v. National Discount Co., 174 Fed. 518, 98 C. C. A. 300, 23 Am. Bankr. Rep. 345; Studebaker Bros. Mfg. Co. v. Elsey-Hemphill Carriage Co., 152 Mo. App. 401, 133 S. W. 412.

preference must be determined entirely in accordance with the express provisions of the statute.[10] And if a trustee in bankruptcy sues to set aside a transfer, alleging it to have been given as an illegal preference, he cannot recover on showing that the conveyance was void at common law or under the law of the state.[11]

§ 575. Essentials of a Voidable Preference.—The following elements of a voidable preference are enumerated by the statute: First, there must have been either an act of the debtor in procuring or suffering a judgment to be entered against him or making a "transfer" of any of his property, taking that term in the very wide sense in which it is defined by the bankruptcy act. Second, the debtor must have been insolvent either at the time of the transfer, or of its recording, or of the entry of the judgment. Third, these things must have concurred within four months before the filing of the petition in bankruptcy, or after the filing and before the adjudication. Fourth, the judgment or transfer must operate as a preference, that is, enable the creditor to obtain a greater percentage of his debt than other creditors of the same class. Fifth, the person receiving it or to be benefited by it (or his agent acting in the transaction) must have had reasonable cause to believe that the enforcement of the judgment or transfer would effect a preference. These various elements will be separately discussed in the following sections of this chapter. But at present it is necessary to remark that all of them must be present or concur in order to give the trustee in bankruptcy the right to recover the payment or property or avoid the transfer as a preference.[12] Further, it is necessary that the transfer or giving of se-

[10] In re Armstrong, 145 Fed. 202, 16 Am. Bankr. Rep. 583; Sheppard-Strassheim Co. v. Black, 211 Fed. 643, 128 C. C. A. 147, 33 Am. Bankr. Rep. 574.

[11] Cragin v. Carmichael, 2 Dill. 519, 11 N. B. R. 511, Fed. Cas. No. 3,319.

[12] First Nat. Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542; Grandison v. National Bank of Commerce, 231 Fed. 800, 145 C. C. A. 620, 36 Am. Bankr. Rep. 438; Smith v. Powers (D. C.) 255 Fed. 582, 43 Am. Bankr. Rep. 303; Hagar v. Watt (D. C.) 232 Fed. 373, 36 Am. Bankr. Rep. 370; Mayes v. Palmer, 208 Fed. 97, 125 C. C. A. 325, 31 Am. Bankr. Rep. 225; In re Starkweather & Albert (D. C.) 206 Fed. 797, 30 Am. Bankr. Rep. 743; Sparks v. Marsh (D. C.) 177 Fed. 739, 24 Am. Bankr. Rep. 280; In re Gesas, 146 Fed. 734, 77 C. C. A. 291, 16 Am. Bankr. Rep. 872; Morgan v. First Nat. Bank, 145 Fed. 466, 76 C. C. A. 236, 16 Am. Bankr. Rep. 639; Rubenstein v. Lottow, 223 Mass. 227, 111 N. E. 973; Abele v. Beacon Trust Co., 228 Mass. 438, 117 N. E. 833; Craig v. Sharp (Mo. App.) 219 S. W. 95; Newman v. Tootle-Campbell Dry Goods Co., 174 Mo. App. 528, 160 S. W. 825; Ernest Wolff Mfg. Co. v. Battreal Shoe Co., 192 Mo. App. 113, 180 S. W. 396; Corey v. Blackwell Lumber Co., 24 Idaho, 642, 135 Pac. 742; Cauthorn v. Burley State Bank, 26 Idaho, 532, 144 Pac. 1108; Soule v. First Nat. Bank, 26 Idaho, 66, 140 Pac. 1098; Baden v. Bertenshaw, 68 Kan. 32, 74 Pac. 639; Summerville v. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243; Whitwell v. Wright, 115 N. Y. Supp. 48; Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955; M. Kahn & Bro. v. Bledsoe, 22 Okl. 666, 98 Pac. 921; Stewart v. Hoffman, 31 Mont. 184, 77 Pac. 689, 81 Pac. 3; Locke v. Winning, 3 Mass. 325. The giving of a preference must be the act of the bank-

curity should be actual and in such form as to be effective if not avoided in the bankruptcy proceedings. A mere intent to give or to gain a preference is nothing at all if not accomplished by the execution of the purpose.[13] It is essential that the creditor should actually receive some portion of the bankrupt's property or assets. And though the bankrupt may have made a transfer of property, intending that the creditor should receive it and thereby be preferred, this is not enough if the creditor does not receive the property.[14] So, a creditor who has never accepted a deed of trust or mortgage which would give him a preference may disclaim all interest in it and prove his debt as unsecured.[15] And a preference cannot be created by an attempted conveyance which was originally and remains a mere and absolute nullity.[16]

Again, it must be noted that the preference must be created by the act or procurement of the debtor, not by the creditor's assertion of an existing legal right or remedy. Thus, the act of one who simply retakes the possession of property of his own which is in the possession of the bankrupt does not make him a preferred creditor.[17] And this applies to the reclamation of property originally placed in the bankrupt's hands under a contract of conditional sale reserving title in the seller until payment.[18] And so, an unpaid vendor of goods who exercises the right of stoppage in transitu does not thereby gain a preference, though it be with the consent of the debtor, for the latter cannot be considered as active in the creation of a preference merely because he assents to what he could not lawfully prevent.[19]

Next, it is essential to a preferential transfer that the bankrupt should have turned over to the creditor some portion of his own property, so that his available estate is thereby diminished.[20] And the property transferred must have been of such a nature that his creditors would have the right to subject it to the satisfaction of their claims.[21]

rupt himself. Where a receiver in bankruptcy deposits money in a checking account with a bank to which the bankrupt was indebted, and which afterwards closes its doors, this is not the giving of a preference. In re United Grocery Co. (D. C.) 253 Fed. 267, 41 Am. Bankr. Rep. 824.

[13] In re Bousfield & Poole Mfg. Co., 16 N. B. R. 489, Fed. Cas. No. 1,703.

[14] Aiello v. Crampton, 201 Fed. 891, 120 C. C. A. 189, 29 Am. Bankr. Rep. 1; Engel v. Union Square Bank, 182 N. Y. 544, 75 N. E. 1129.

[15] In re Saunders, 2 Low. 444, Fed. Cas. No. 12,371.

[16] Rosenbluth v. De Forest & Hotchkiss Co., 85 Conn. 40, 81 Atl. 955.

[17] In re Wright-Dana Hardware Co., 205 Fed. 335, 30 Am. Bankr. Rep. 582.

[18] In re Farmers' Co-operative Co., 202 Fed. 1005, 30 Am. Bankr. Rep. 187; In re Anson Mercantile Co., 203 Fed. 870; In re Levin, 173 Fed. 119, 21 Am. Bankr. Rep. 665.

[19] In re Foot, 11 Blatchf. 530, 11 N. B. R. 153, Fed. Cas. No. 4,907.

[20] Mason v. National Herkimer County Bank, 172 Fed. 529, 22 Am. Bankr. Rep. 733; In re Grocers' Banking Co. (D. C.) 266 Fed. 900, 46 Am. Bankr. Rep. 150; In re Schwab (D. C.) 258 Fed. 772, 44 Am. Bankr. Rep. 185; O'Connell v. City of Worcester, 225 Mass. 159, 114 N. E. 201.

[21] In re Leech, 171 Fed. 622, 96 C. C. A. 424, 22 Am. Bankr. Rep. 599.

Hence the transfer of an exempt homestead does not come within the denunciation of the act though every other element of a preference be present, except in so far as its value may exceed the statutory limit of the exemption.[22] And an assignment (as security for a loan) of something which does not constitute legal "property" but is no more than a mere revocable license or privilege, as, a newspaper agency or route, does not constitute a preference.[23] And mere fictitious book entries, though made through collusion between the creditor and the bankrupt, for the purpose of deceiving others, but which do not succeed in such purpose and do not affect the rights of other creditors, do not constitute a preference.[24] And so of the mere giving of an indorsed note by the bankrupt, as the advantage secured by the creditor is not out of the bankrupt's estate.[25] But on the other hand, it is immaterial to whom the transfer is made, if it is meant to pay the claim of one creditor in preference to others;[26] and a transfer by a bankrupt indirectly or through a third person may constitute a preference, if made with this purpose and intent.[27] And the making of the preference and incurring its penalty are independent of any actual fraud,[28] and the result is the same whether or not the transfer is fraudulent at common law, or under the statute of fraudulent conveyances, or otherwise.[29] And the mere failure to record a deed or mortgage given as security until after the bankruptcy of the grantor does not constitute the same an unlawful preference.[30]

But there must have been a real antecedent debt or claim of the creditor to be satisfied. It is held that a contract between a bank making loans from day to day to a stockbroker and the broker, which stipulates that the day loans shall be used specifically for the release of the broker's pledged securities, that their proceeds or the proceeds of substituted securities shall be immediately deposited in the bank in repayment of the loan, and that the broker shall actually take up the pledged securities and deliver them to purchasers against payment of the price, does not create a voidable preference by the broker. For "the loan and repayment the same day should be regarded as one transaction, the fact

[22] First Nat. Bank v. Lanz, 202 Fed. 117, 29 Am. Bankr. Rep. 247; First Nat. Bank of Cleveland v. Orten, 43 Okl. 325, 142 Pac. 1096.

[23] In re Martin, 200 Fed. 940, 29 Am. Bankr. Rep. 623.

[24] In re Steam Vehicle Co., 121 Fed. 939, 10 Am. Bankr. Rep. 385.

[25] Dalrymple v. Hillenbrand, 62 N. Y. 5, 20 Am. Rep. 438.

[26] Bank of Wayne v. Gold, 146 App. Div. 296, 130 N. Y. Supp. 942.

[27] In re Harrison Bros., 202 Fed. 244; Wickwire v. Webster City Sav. Bank, 153 Iowa, 225, 133 N. W. 100; First Nat. Bank v. Blackburn, 256 Fed. 527, 167 C. C. A. 599, 43 Am. Bankr. Rep. 680.

[28] Wright v. Cotten, 140 N. C. 1, 52 S. E. 141.

[29] Webb's Trustee v. Lynchburg Shoe Co., 107 Va. 807, 60 S. E. 130; Williams v. German-American Trust Co., 219 Fed. 507, 135 C. C. A. 257, 33 Am. Bankr. Rep. 600.

[30] In re McIntosh, 150 Fed. 546, 80 C. C. A. 250, 18 Am. Bankr. Rep. 169; In re Sola e Hijo (C. C. A.) 261 Fed. 822, 44 Am. Bankr. Rep. 372.

that they were not literally contemporaneous being a necessary result of the nature of the business." [31] And it is essential that the effect of the preference should enable the creditor to obtain a larger proportion of his total claim than goes to other creditors of the same class.[32] Hence there is no preference if the creditor accepts only that part of his debt to which he would be entitled if all the property liable to the debtor's debts should be apportioned among his creditors.[33] But the test is this actual receiving of a larger percentage than other creditors; it is not whether or not, in view of the obligation of sureties to pay the claim, the payment actually benefited the preferred creditor.[34] And a payment is none the less a preference because some other creditors have also obtained larger payments on their claims than they would have been entitled to in the bankruptcy proceedings.[35] But if all the creditors consented to a discrimination in the payment of claims,[36] or if they all joined in the arrangement by which the transfer was made, no one can raise the objection that an unlawful preference was created, though one creditor did secure more than his share.[37] And if there is a surplus of the estate after paying all the other creditors, the preferred creditor is entitled to what he has secured, for, as between the bankrupt and himself, the preference is not voidable.[38]

§ 576. Transferee as "Creditor" or "Person Benefited."—A transfer or security, to amount to a preference, must have been given to a

[31] Ernst v. Mechanics' & Metals Nat. Bank, 201 Fed. 664, 120 C. C. A. 92, 29 Am. Bankr. Rep. 289. But the bank obtains a preference, voidable on the subsequent bankruptcy of the brokers, where after their suspension, it receives securities to make good the brokers' obligation to the bank, with notice in terms that it is thereby receiving a preference and that the brokers are going into bankruptcy. National City Bank v. Hotchkiss, 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 115, 31 Am. Bankr. Rep. 291.

[32] Grandison v. National Bank of Commerce, 231 Fed. 800, 145 C. C. A. 620, 36 Am. Bankr. Rep. 438; John S. Brittain Dry Goods Co. v. Bertenshaw, 68 Kan. 734, 75 Pac. 1027; Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119. Whether a payment effects a preference depends on its effect at the time when made, and not upon what other creditors receive on the final settlement. Slayton v. Drown, 93 Vt. 290, 107 Atl. 307. A preference by a bankrupt made within four months of his bankruptcy may be unlawful though only sufficient to pay a part of the indebtedness for which it is given. William Schuette & Co. v. Swank, 265 Pa. 576, 109 Atl. 531.

[33] Herzberg v. Riddle, 171 Ala. 368, 54 South. 635.

[34] Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673; In re Star Spring Bed Co., 243 Fed. 957, 40 Am. Bankr. Rep. 1. A transfer of property, having all the essential elements of a preference, is voidable although the creditor received only an indirect benefit by the satisfaction of an obligation for which he was liable as a guarantor or otherwise. Smith v. Coury (D. C.) 247 Fed. 168, 41 Am. Bankr. Rep. 219.

[35] In re Jacob Y. Shantz & Son Co. (D. C.) 205 Fed. 425, 30 Am. Bankr. Rep. 552; In re Mayo Contracting Co., 157 Fed. 469, 19 Am. Bankr. Rep. 551.

[36] Curran v. Munger, 6 N. B. R. 33, Fed. Cas. No. 3,487.

[37] Judson v. Courier Co., 8 Fed. 422.

[38] In re McGuire, 8 Ben. 452, Fed. Cas. No. 8,813.

"creditor" or "person to be benefited thereby." Nothing is within the purview of this provision except with reference to debts which may be proved for a dividend, but, on the other hand, anything which may be proved is within its purview.[39] It is therefore not necessary that the creditor's claim should be presently due, it is sufficient if it exists as a fixed liability,[40] and a creditor who receives property in settlement of a claim not yet matured may be chargeable with accepting a preference.[41] Again, it is immaterial that the creditor may be an officer of the bankrupt corporation.[42] But a bankrupt who pays money to the creditors of his wife does not give a preference, although the effect is to reduce the percentage which would otherwise be paid to his own creditors.[43] So a person who has contracted to purchase property from the bankrupt and has made an advance payment thereon is not a "creditor" in any proper sense and the deduction of the amount of such advance from the price when payment was made on delivery is not the receiving of a preference.[44] The same is true of persons who may have a cause of action to

[39] Clarke v. Rogers, 183 Fed. 518, 106 C. C. A. 64, 26 Am. Bankr. Rep. 413. And see Bailey v. Baker Ice Mach. Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275, 35 Am. Bankr. Rep. 814; In re Webb Co. (D. C.) 224 Fed. 258, 34 Am. Bankr. Rep. 785; Bridgeton Nat. Bank v. Way, 253 Fed. 731, 165 C. C. A. 325. A bank which has discounted notes of third persons made payable to the bankrupt and indorsed by him is a general creditor of the bankrupt, as respects the question of receiving a preference. In re Star Spring Bed Co. (C. C. A.) 265 Fed. 133, 45 Am. Bankr. Rep. 650. Though the bankrupt may have obtained money from another person by fraud, the latter has a claim against him provable in the bankruptcy proceedings and therefore is a creditor. Watchmaker v. Barnes, 259 Fed. 783, 170 C. C. A. 583, 43 Am. Bankr. Rep. 632. But the provision as to preferences has no application to owners of property, who have no claim against a bankrupt contractor, on account of possible liens by a preferred subcontractor. Jump v. Bernier, 221 Mass. 241, 108 N. E. 1027. And where a corporation, at a time when it was solvent and a going concern, declared and paid dividends to its stockholders, which were received by them in ignorance of the fact that they were really paid out of the capital stock, the trustee, in the corporation's subsequent bankruptcy, cannot recover such dividends. Carlisle v. Ottley, 143 Ga. 797, 85 S. E. 1010, L. R. A. 1917C, 395, Ann. Cas. 1917A, 573.

[40] Moody v. Chicago Title & Trust Co., 138 Ill. App. 233; Burpee v. First Nat. Bank, 5 Biss. 405, 9 N. B. R. 314, Fed. Cas. No. 2,185; Bean v. Brookmire, 1 Dill. 25, 4 N. B. R. 196, Fed. Cas. No. 1,168. Extension of credit to a bankrupt for the price of stocks which were sold to it for cash will constitute the seller a general creditor, and render a mortgage given to secure the price a voidable preference. Security Trust & Sav. Bank v. Wm. R. Staats Co., 233 Fed. 514, 147 C. C. A. 400, 37 Am. Bankr. Rep. 547.

[41] Mathews v. Riggs, 80 Me. 107, 13 Atl. 48.

[42] Cooper v. Miller (C. C. A.) 203 Fed. 383, 30 Am. Bankr. Rep. 194. Where the owner of all the stock of a trading corporation, when it was indebted and within four months before the filing of a petition in bankruptcy against it, transferred the greater part of its bank deposit, which constituted practically its only asset, to himself in payment of alleged claims, the transaction constituted a preference. Boston West Africa Trading Co. v. Quaker City Morocco Co. (C. C. A.) 261 Fed. 665, 44 Am. Bankr. Rep. 315.

[43] In re Kayser, 177 Fed. 383, 100 C. C. A. 615, 24 Am. Bankr. Rep. 174.

[44] Templeton v. Kehler, 173 Fed. 575, 23 Am. Bankr. Rep. 41. But a husband's

charge the debtor with a statutory liability for the debts of a corporation.[45] And where one partner sells to the other his entire interest in the property of the firm, the transferee is not a creditor, and the transaction is not impeachable as a preference.[46] Again, where the bankrupt feloniously or fraudulently got possession of personal property which was in the custody of a warehouseman as bailee of the owner, and, on being discovered, settled with the warehouseman by turning over money, property, or securities, this does not constitute the giving of a preference, because the warehouseman was not a creditor of the bankrupt.[47] As to the meaning of the phrase "person to be benefited thereby," it is held that a transaction which has the purpose and effect of exonerating or releasing a surety for the bankrupt "benefits" the latter within the meaning of the statute.[48] And so, a transfer of property by an insolvent debtor by means of which a note given by himself and a surety is paid, and the transferee, who had obligated himself to indemnify the surety against loss thereon, is released from his liability, is one by which such transferee is benefited.[49]

To constitute a preference, it is further necessary that the preferred creditor should be placed in position to collect a greater percentage of his claim than "any other creditor of the same class." If all the creditors of the same class are equally interested in and benefited by the transaction in question, there is no preference.[50] And it is said that the test of the classification of creditors is the percentage of their claims which they are entitled to draw out of the estate of the bankrupt. If they are entitled to receive the same percentage, they are in the same class, but if different percentages, in different classes.[51] And the fact that a debt owing by an insolvent is secured does not prevent a transfer of property by the insolvent to pay it from being preferential as to creditors not secured.[52] At least, creditors whose claims are secured by indorsement or guaranty of one or more third persons are in the same class

breach of agreement to convey to his wife land purchased with her money, the title being taken in his own name, will make her a creditor, so that a conveyance in derogation of the rights of other creditors will operate as a preference. In re Kean (D. C.) 237 Fed. 682, 38 Am. Bankr. Rep. 628.

45 Cookingham v. Ferguson, 8 Blatchf. 488, 4 N. B. R. 635, Fed. Cas. No. 3,182.

46 In re Rudnick, 102 Fed. 750, 4 Am. Bankr. Rep. 531.

47 Keystone Warehouse Co. v. Bissell, 203 Fed. 652, 30 Am. Bankr. Rep. 213.

48 In re Sanderson, 149 Fed. 273, 17 Am. Bankr. Rep. 871. And the rule is the same as to the accommodation indorser of the bankrupt's note. Goldman v. Cohen (C. C. A.) 261 Fed. 672, 44 Am. Bankr. Rep. 318.

49 Huntington v. Baskerville, 192 Fed. 813, 113 C. C. A. 137, 27 Am. Bankr. Rep. 219.

50 Gill v. Bell's Knitting Mills, 128 App. Div. 691, 113 N. Y. Supp. 90.

51 Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673.

52 Horstman v. Little (Tex. Civ. App.) 88 S. W. 286.

as those whose claims are not so secured.[53] But strictly speaking, there are only two general classes of creditors, first, those who have priority and who are to be paid in full, and second, creditors who are entitled to equal dividends after the claims entitled to priority have been paid.[54] Hence, for instance, payments made by a bankrupt to a clerk within three months prior to the filing of the petition, in the absence of specific application to other debts, are to be applied in payment of the wages earned by the clerk during that time, but such payments, up to the amount of wages so earned, do not constitute a preference which must be surrendered before the clerk can prove his claim for the remainder due him, unless the bankrupt's assets are insufficient to pay all the priority claims.[55]

§ 577. Same; Guarantors, Sureties, and Indorsers.—A guarantor or surety for the bankrupt, or an indorser of his notes, or the accommodation maker of a note for his use and benefit, is a "creditor" within the meaning of the bankruptcy act, and if he receives money or security or collateral from the bankrupt to meet the obligation when it shall mature, or to secure himself against loss, under such circumstances as would constitute it a preference in other cases, he is to be treated as a preferred creditor, and must surrender his preference before being admitted to prove his debt, or may be required to surrender it at the suit of the trustee.[56] Thus, where an agreement for the indemnification of a contractor's surety assigned to the latter all the contractor's plant in the event of the contractor's being unable to complete the undertaking, and the contractor subsequently abandoned the contract and was adjudged bankrupt, the surety became a creditor from the date of the abandon-

[53] Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673. See In re Harpke, 116 Fed. 295, 54 C. C. A. 97, 8 Am. Bankr. Rep. 535.

[54] Livingstone v. Heineman, 120 Fed. 786, 57 C. C. A. 154, 10 Am. Bankr. Rep. 39.

[55] In re Flick, 105 Fed. 503, 5 Am. Bankr. Rep. 465.

[56] Cohen v. Goldman, 250 Fed. 599, 162 C. C. A. 615, 42 Am. Bankr. Rep. 85; Chapman v. Hunt (D. C.) 248 Fed. 160, 41 Am. Bankr. Rep. 482; Smith v. Coury (D. C.) 247 Fed. 168, 41 Am. Bankr. Rep. 219; Lazarus v. Eagan, 206 Fed. 518, 30 Am. Bankr. Rep. 207; Paper v. Stern (C. C. A.) 198 Fed. 642, 28 Am. Bankr. Rep. 592; Kobusch v. Hand, 156 Fed. 660, 84 C. C. A. 372, 19 Am. Bankr. Rep. 379; Stern v. Paper, 183 Fed. 228, 25 Am. Bankr. Rep. 451; Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 87 C. C. A. 521, 20 Am. Bankr. Rep. 349; In re Christopher Bailey & Son, 166 Fed. 982, 21 Am. Bankr. Rep. 911; Swarts v. Siegel, 117 Fed. 13, 54 C. C. A. 399, 8 Am. Bankr. Rep. 689; Crandall v. Coats, 133 Fed. 965, 13 Am. Bankr. Rep. 712; Thomas v. Woodbury, 1 Hask. 559, Fed. Cas. No. 13,916; Smith v. Little, 5 Biss. 490, 9 N. B. R. 111, Fed. Cas. No. 13,072; Scammon v. Cole, 3 Cliff. 472, 5 N. B. R. 257, Fed. Cas. No. 12,432; Ahl v. Thorner, 2 Bond, 287, 3 N. B. R. 118, Fed. Cas. No. 103; Sill v. Solberg, 10 Biss. 252, 6 Fed. 468; Goldberg v. Harlan, 33 Ind. App. 465, 67 N. E. 707; Bank of Wayne v. Gold, 146 App. Div. 296, 130 N. Y. Supp. 942; Platt v. Ives, 86 Conn. 690, 86 Atl. 579; M. Kahn & Bro. v. Bledsoe, 22 Okl. 666, 98 Pac. 921; Horstman v. Little (Tex. Civ. App.) 88 S. W. 286. Compare Horton v. Bamford, 79 N. J. Eq. 356, 81 Atl. 761.

ment of the contract, within the provisions of the statute relating to preferences, although the amount of the surety's claim depended on contingencies and was not liquidated.[57] So a surety for the bankrupt who has discharged the debt, either before or after the bankruptcy, is subrogated to the rights of the creditor, but is also affected by any preference received by the creditor before payment, which inheres in the claim.[58] But where an indorser receives from the maker of the note an amount sufficient to pay a part thereof, and loans him the balance required to pay it, he will not be chargeable with taking a preference beyond the amount actually paid to him by the maker.[59] On the same principle, a creditor who receives the debtor's note or check, indorses it, and procures it to be discounted at a bank, remains a creditor within the meaning of the bankruptcy act, and the payment of the note or check to the bank after the debtor's insolvency and within four months prior to his bankruptcy, constitutes a preferential transfer of property to the indorser, which will debar him from the allowance of any claim in his favor, unless the amount so paid is first surrendered.[60] Likewise, the payment to a bank by an insolvent, within four months prior to his bankruptcy, of notes given to third persons, but which have been indorsed to and are owned by the bank, constitutes a preference given to the bank, which it must surrender before proving a claim against the estate.[61] But a note discounted by a bank without knowledge of the insolvency of the maker and in due course of business, by crediting the payee with the amount of the discount, which note in the hands of the payee and indorser would not be provable against the maker's estate in bankruptcy until certain preferences received were surrendered, is provable by the bank as a bona fide holder.[62]

§ 578. **Nature and Form of Transaction.**—Whether or not a given transaction amounts to a preference is to be determined by its effect in giving an undue advantage to the particular creditor, rather than by its form, for the court will look to the result and not to the way in which

[57] Wood v. United States Fidelity & Guaranty Co., 143 Fed. 424, 16 Am. Bankr. Rep. 21.

[58] Livingston v. Heineman, 120 Fed. 786, 57 C. C. A. 154, 10 Am. Bankr. Rep. 39; In re Schmechel Cloak & Suit Co., 104 Fed. 64, 4 Am. Bankr. Rep. 719. But see In re New, 116 Fed. 116, 8 Am. Bankr. Rep. 566.

[59] Thomas v. Woodbury, 1 Hask. 559, Fed. Cas. No. 13,916.

[60] Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673; In re Lyon, 121 Fed. 723, 58 C. C. A. 143, 10 Am. Bankr. Rep. 25; In re Meyer, 115 Fed. 997, 8 Am. Bankr. Rep. 598; In re Waterbury Furniture Co., 114 Fed. 255, 8 Am. Bankr. Rep. 79. But see In re Bullock, 116 Fed. 667, 8 Am. Bankr. Rep. 646; Thomas v. Woodbury, 1 Hask. 559, Fed. Cas. No. 13,916.

[61] In re George M. Hill Co., 130 Fed. 315, 64 C. C. A. 561, 66 L. R. A. 68, 12 Am. Bankr. Rep. 221.

[62] In re Levi, 121 Fed. 198, 9 Am. Bankr. Rep. 176; In re Wyly, 116 Fed. 38, 8 Am. Bankr. Rep. 604.

it is accomplished.[63] In regard to "transfers" of property, this word is to be taken in the very broad sense assigned to it in the first section of the bankruptcy law, where it is declared that it shall include "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." Hence, if the other conditions are present, any form of mortgage or other lien which is meant to give to one or more creditors an undue advantage over others, will be a voidable preference,[64] including a chattel mortgage,[65] or a deed of trust in the nature of a mortgage,[66] or an unrecorded bill of sale of furniture and fixtures given by a tenant as security for past-due rent,[67] or a bill of sale of property to a creditor who has attached it.[68] So, an assignment by an insolvent trader of his stock, book accounts, and other assets to one of his creditors, the latter in return agreeing to assume and pay certain debts, is a preference if it enables that creditor to secure his own debt in full or in a larger proportion than other creditors.[69] The same is true of the assignment of a policy of life insurance,[70] or of a claim against a fire insurance company for a loss under its policy.[71] And where a mortgage is given on property under circumstances such as to render it a voidable preference, and insurance is taken out on the mort-

[63] Rogers v. Fidelity Sav. Bank & Loan Co., 172 Fed. 735, 23 Am. Bankr. Rep. 1; In re C. J. McDonald & Sons, 178 Fed. 487, 24 Am. Bankr. Rep. 446. A transaction by which a bankrupt changed its indebtedness to a bank, so that it matured at an earlier date, and assigned collateral, the proceeds of which the bank at such earlier date applied on the indebtedness, was held to have effected a voidable preference. Fifth Nat. Bank v. Lyttle, 250 Fed. 361, 162 C. C. A. 431, 41 Am. Bankr. Rep. 370. A provision of law in Porto Rico gives a preferential status to debts when authenticated by acknowledgment before a notary. When this device is resorted to, with reference to a promissory note, by a creditor and an insolvent debtor within four months of his bankruptcy, to defeat the bankruptcy law, it must fail, as an attempt to create a preference. In re Vidal, 233 Fed. 733, 147 C. C. A. 499, 36 Am. Bankr. Rep. 783.

[64] In re Hawkins (D. C.) 243 Fed. 792, 40 Am. Bankr. Rep. 271; McLean v. Lafayette Bank, 3 McLean, 185, Fed. Cas. No. 8,885. A contract of conditional sale, by which the seller is allowed to retake possession of the goods in case of the buyer's default or bankruptcy, is not an unlawful preference, as the bankrupt buyer does not transfer any property or secure any antecedent debt. John Deere Plow Co. v. Edgar Farmer Store Co. (Wis.) 143 N. W. 194; Big Four Implement Co. v. Wright, 207 Fed. 535, 31 Am. Bankr. Rep. 125.

[65] Marsh v. Walters, 220 Fed. 805, 136 C. C. A. 409, 34 Am. Bankr. Rep. 85; In re Hersey (D. C.) 171 Fed. 1004, 22 Am. Bankr. Rep. 863; Matthews v. Westphal (C. C.) 48 Fed. 664, 1 McCrary, 446.

[66] Dean v. Davis, 212 Fed. 88, 128 C. C. A. 658, 31 Am. Bankr. Rep. 808; May v. Le Claire (C. C.) 18 Fed. 164.

[67] In re Eckenroth, Fed. Cas. No. 4,265.

[68] Parsons v. Topliff, 119 Mass. 245, 14 N. B. R. 547.

[69] Grandison v. National Bank of Commerce, 231 Fed. 800, 145 C. C. A. 620, 36 Am. Bankr. Rep. 438; In re Gottlieb & Co. (D. C.) 245 Fed. 139, 40 Am. Bankr. Rep. 247; Bryant v. Wolf, 94 Misc. Rep. 683, 158 N. Y. Supp. 678; Leonard v. Springer, 174 Ill. App. 516; North v. House, 6 N. B. R. 365, Fed. Cas. No. 10,310.

[70] Barnes v. Vetterlein, 16 Fed. 218.

[71] Hanson v. W. L. Blake & Co., 155 Fed. 342, 19 Am. Bankr. Rep. 325.

gaged property in the name of the mortgagor, but at the instance and expense of the mortgagee, and, a loss occurring, the insurance is collected by the mortgagee, being less in amount than the mortgage debt, the insurance contract is no less a preference than the mortgage, and its proceeds are merely a substitute for the mortgage pro tanto, and therefore recoverable by the mortgagor's trustee in bankruptcy.[72] Again, a lease of a manufacturing establishment, made by an insolvent debtor to one of his creditors as part of a fraudulent scheme to place his property within the exclusive control of such creditor, and accepted by the latter with knowledge of the lessor's insolvency, and with an intention of securing to himself an advantage over the other creditors, will be set aside as a preference.[73] A preference is also involved (the other conditions being present) in the sale of a partner's interest in the business to his co-partner and the taking of the latter's notes for the price,[74] and in the act of a creditor in appropriating property in his hands under a claim of a factor's lien,[75] or an alleged vendor's lien,[76] or an agreement between the debtor and creditor enabling the latter to enforce a lien by attachment.[77]

But on the other hand, where an unpaid vendor of merchandise accepts a return thereof, instead of payment, it may be regarded as a rescission of the contract of sale, rather than as a transfer of property.[78] And an insurance effected by an insolvent debtor upon the house he occupies in pursuance of covenants in the lease is not a preference,[79] nor is the surrender of a policy of insurance under a stipulation giving such right, with a return of a part of the premium paid.[80] The same is true of the equitable lien upon funds or property arising from the acceptance of a bill of exchange.[81] And a deed of property executed by the bankrupt in pursuance of a decree of a state court, on a showing that he had misappropriated trust funds which had been finally invested in such

[72] Brown City Sav. Bank v. Windsor, 198 Fed. 28; State Bank of Clearwater v. Ingram, 237 Fed. 76, 150 C. C. A. 278, 38 Am. Bankr. Rep. 447. Compare Sullivan v. Myer, 137 Tenn. 412, 193 S. W. 124.

[73] Carter v. Hobbs, 94 Fed. 108, 2 Am. Bankr. Rep. 224.

[74] Crampton v. Jerkowski, 2 Fed. 489; Mattocks v. Rogers, 1 Hask. 547, Fed. Cas. No. 9,300. And see Off v. Hakes, 142 Fed. 364, 73 C. C. A. 464, 15 Am. Bankr. Rep. 696.

[75] Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286.

[76] In re Klingaman, 101 Fed. 691, 4 Am. Bankr. Rep. 254.

[77] Samson v. Burton, 5 Ben. 325, 4 N. B. R. 1, Fed. Cas. No. 12,285.

[78] In re Aspinwall, 11 Fed. 136. See Ellet-Kendall Shoe Co. v. Martin, 222 Fed. 851, 138 C. C. A. 277, 34 Am. Bankr. Rep. 502. Where a creditor obtains, in good faith, as security, a receipt for coal in the debtor's yard not separated from the common mass, he may take possession after discovering the insolvency of the debtor. Sherman v. Traders' Nat. Bank, 9 Biss. 216, Fed. Cas. No. 12,770.

[79] In re Rosenfeld, 2 N. B. R. 116, Fed. Cas. No. 12,057.

[80] In re Independent Ins. Co., 2 Low. 187, Fed. Cas. No. 7,019.

[81] In re Baxter, 28 Fed. 452.

property in his own name, is not voidable as a preference,[82] though of course it is otherwise in regard to a sale under a decree which was procured by fraud and imposition practiced on the court.[83] In another case it appeared that the bankrupt was a member of a stock exchange, the rules of which provided that, when a member became insolvent, he should assign his seat to be sold, and that the proceeds should be first applied to the payment of his debts to the members of the exchange, to the exclusion of his other creditors, but the purchaser of the seat could not become a member, or enjoy any of the privileges of membership, unless elected by the exchange. On this state of facts, it was held a member who became insolvent, complied with this rule, and was afterwards adjudged a bankrupt, was not guilty of giving a preference to those creditors whose debts were in this manner paid first; for while his incorporeal right to his seat was indeed property, yet it was subject to certain valid conditions and restrictions, including that of payment to members, and would not vest in his trustee in any event until those conditions had been complied with.[84]

It should further be remarked that a preference is none the less voidable because it was given in and as a part of a general assignment for the benefit of creditors, which assignment is annulled by the adjudication in bankruptcy.[85] And where a debtor enters upon a plan of composition and compromise with all his creditors, if one of them secures full payment while the others receive less, it is a preference voidable under the bankruptcy act,[86] as, where the debtor compromises with all of his creditors except one, whom he promises to pay in full on a large extension of time, transferring to him property as security therefor.[87] But where, pursuant to a contemplated compromise settlement of a bankrupt's debts, defendant, a judgment creditor, was paid a stipulated amount to obtain a discharge of his lien, and he received the same in good faith, and it appeared that the settlement would have been completed but that the bankrupt became insane, and it was then abandoned,

[82] In re Myers, 2 Hughes, 230, Fed. Cas. No. 9,984.

[83] Stern v. Louisville Trust Co., 112 Fed. 501, 50 C. C. A. 367, 7 Am. Bankr. Rep. 305. An order in void receivership proceedings whereby the bankrupt's property was transferred to defendant, may, when made within four months of bankruptcy, be vacated as a preference. Jones v. Schaff Bros. Co., 187 Mo. App. 597, 174 S. W. 177.

[84] Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264.

[85] Stern v. Louisville Trust Co., 112 Fed. 501, 50 C. C. A. 367, 7 Am. Bankr. Rep. 305; Wilson v. Taylor, 154 N. C. 211, 70 S. E. 286. But dividends paid by an assignee under an assignment, made within four months prior to bankruptcy, are not preferences which the creditors must surrender before proving their claims. In re Vorck (D. C.) 235 Fed. 655, 38 Am. Bankr. Rep. 203. See supra, §§ 441, 442.

[86] In re Amory, Fed. Cas. No. 336b; Harrison v. McLaren, 10 N. B. R. 244, Fed. Cas. No. 6,139. And see In re Jacob v. Shantz & Son Co., 205 Fed. 425, 30 Am. Bankr. Rep. 552.

[87] Eefort v. Greely, 6 N. B. R. 433, Fed. Cas. No. 4,260.

it was held that the payment so received was not recoverable as a preference.[88] And several creditors may, with the aid of their debtor, conspire to gain an advantage over other creditors, by a voluntary preference, if the means used are not unlawful, and the preference is made more than four months before the bankruptcy of the debtor.[89]

§ 579. Procuring or Suffering Judgment.—By the terms of the present bankruptcy act, a person shall be deemed to have given a preference if, being insolvent, he has "procured or suffered a judgment to be entered against himself." Under the act of 1867, it was an act of preference if the insolvent "procured or suffered any part of his property to be attached, sequestered, or seized on execution." The important difference is that, under the existing statute, it is not necessary that the entry of a judgment should have been followed by the issue or levy of final process; it is sufficient if "the effect of the enforcement of such judgment will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."[90] But so far as concerns the participation of the debtor himself in the transaction, the words of the statute remain the same. He must "procure or suffer" the judgment. And it was laid down by the Supreme Court that something more than passive non-resistance on the part of an insolvent debtor is necessary to invalidate a judgment and levy on his property, when the debt is due and he has no defense. In such case, there is no legal obligation on the debtor to file a petition in bankruptcy to prevent the judgment and levy, and a failure to do so is not sufficient evidence of an intent to give a preference to the judgment creditor or defeat the operation of the bankruptcy law. But very slight circumstances which tend to show the existence of an affirmative desire on the part of the bankrupt to give a preference, may, by giving color to the whole transaction, render the lien voidable as a preference.[91] It is therefore competent for a creditor to institute a suit against an insol-

[88] Templeton v. Woollens, 200 Fed. 257, 29 Am. Bankr. Rep. 208. And see In re Folb, 91 Fed. 107, 1 Am. Bankr. Rep. 22.

[89] Van Kleeck v. Miller, 19 N. B. R. 484, Fed. Cas. No. 16,860.

[90] Bankruptcy Act 1898, § 60a. See Moore v. John H. Smith & Sons, 205 Fed. 431, 30 Am. Bankr. Rep. 413. The amount paid for property sold under execution within four months before the bankruptcy may be recoverable from the execution creditor as a voidable preference. Dreyer v. Kicklighter (D. C.) 228 Fed. 744, 36 Am. Bankr. Rep. 199.

[91] Wilson v. City Bank of St. Paul, 17 Wall. 473, 21 L. Ed. 723; Parsons v. Caswell, 1 Fed. 74; Henkelman v. Smith, 42 Md. 164, 12 N. B. R. 121; Sleek v. Turner, 76 Pa. St. 142, 10 N. B. R. 580; Kemmerer v. Tool, 81 Pa. St. 467, 12 N. B. R. 334; Mason v. Warthens, 7 W. Va. 532, 14 N. B. R. 346. But see Hyde v. Corrigan, 9 N. B. R. 466, Fed. Cas. No. 6,968, distinguishing the doctrine of Wilson v. City Bank, supra, as to "passive non-resistance," on the ground that that rule is applicable only to a case where the debtor is making "an honest struggle to meet his debts and to avoid the breaking up of his business." See also In re Dibblee, 3 Ben. 283, 2 N. B. R. 617, Fed. Cas. No. 3,884.

vent debtor and to obtain judgment and issue execution, and unless the bankrupt does some act by which he has participated in some way in the action of the creditor, the preference thereby acquired is valid as against other creditors, so far as it is affected by this particular part of the statute.[92] "A creditor may pursue his insolvent debtor to judgment and execution, with full knowledge of the insolvency, notwithstanding the provisions of the bankruptcy act, provided the debtor does nothing to aid the pursuit. If there be no collusion between the debtor and the creditor, the ordinary remedies of the law are open to the latter."[93] "The mere existence of a desire on the part of a debtor, however strong such a desire, that a particular creditor may succeed by suit, judgment, execution, and levy, in obtaining a preference over other creditors, so that such preference may be maintained even as against proceedings in bankruptcy which may be subsequently commenced, is not sufficient to establish that the debtor procured or suffered his property to be taken on legal process, with intent to prefer such creditor, if the proceedings of the creditor were the usual proceedings in a suit, unaided by any act of the debtor, either by facilitating the proceedings as to time or method,

[92] In re Runzi, 3 Fed. 790. But compare Golden Hill Distilling Co. v. Logue, 243 Fed. 342, 156 C. C. A. 122, 39 Am. Bankr. Rep. 731. Where notes which had been given to a bankrupt were sold under attachment in another state, no preference resulted where there was no transfer by the bankrupt and he did not procure or suffer the judgment to be rendered. De Friece v. Bryant (D. C.) 232 Fed. 233, 37 Am. Bankr. Rep. 275.

[93] Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568. On the difference in meaning between the two words "procure" and "suffer," the following remarks by Blatchford, J., are instructive: "There is a clearly recognized distinction between procuring and suffering. The act of 6 Geo. IV, ch. 16, § 3, provided that if any trader should 'suffer' himself to be arrested for any debt not due, or 'suffer' himself to be outlawed, or 'procure' himself to be arrested, or his goods, money, or chattels to be attached, sequestered, or taken in execution, he might be brought into bankruptcy. In Gibson v. King, 1 Car. & Marsh. 458, a creditor had brought an action against the bankrupt for a debt, and judgment had been suffered to go by default, and an execution had been issued on it, on which the bankrupt's goods had been taken, and the question arose whether 'suffering' the judgment to go by default in the action, and 'suffering' the goods to be taken on the execution on the judgment, was 'procuring' the goods to be taken in execution, within the statute. The court held that the bankrupt had 'suffered' the goods to be taken in execution, but had not 'procured' them to be so taken. The same view of the distinction between the words in the English act was taken in Gore v. Lloyd, 12 Mees. & W. 463. The distinction there maintained by Baron Alderson was that the bankrupt 'procured' his goods to be taken in execution when the initiation of the proceedings came from him, when he was the person who began to procure, when he caused the thing to be done, in the ordinary sense of the word, but that the signing, reluctantly and under strong pressure from a creditor, of a warrant to confess a judgment, under a stipulation that the warrant should not be unnecessarily put in force, was 'suffering,' and not 'procuring,' goods to be taken in execution which were taken on an execution issued on a judgment entered upon the warrant. 'The English and other decisions as to pressure by a creditor, and as to what it is to 'procure,' have no application to the question of 'suffering.'" In re Black, 2 Ben. 196, 1 N. R R. 353, Fed. Cas. No. 1,457.

or by obstructing other creditors who otherwise would obtain priority." [94]

A debtor does not procure or suffer judgment who merely consents to an amicable action or revival, which gives the creditor no advantage which he could not at once have secured by adversary process,[95] or who merely agrees to give notice to a certain creditor when execution is issued against him and does so notify that creditor.[96] But a judgment by default is prima facie fraudulent and one seeking to retain a preference secured thereby must negative all the circumstances under the statute making such a transfer void.[97] And a judgment obtained by service of process on an absconding debtor who secretly returns within the jurisdiction to permit such service is procured or suffered by him, within the meaning of the statute.[98] So also if the debtor contribute to the rendition of the judgment at an earlier day than, without his aid, it could have been entered,[99] or where a member of an insolvent firm delivers a message at the request of a creditor, though unwillingly, directing an attorney to enter judgment on a judgment note which the firm had previously given,[100] or where the judgment debtor agrees that the sheriff shall place a cashier in charge of his store, and that the proceeds of each day's sales shall be paid over to the sheriff and applied on the execution.[101]

A confession of judgment, or the giving of a warrant of attorney to confess judgment, by an insolvent debtor, with the intention of preferring the particular creditor, may be a voidable preference, and especially where this course is taken for the purpose of enabling that creditor to levy his execution before other creditors can do so.[102] And it has been ruled that a debtor who voluntarily confesses judgment in favor of the creditor, and allows him to issue an execution and to make a levy and sale, resulting in the creditor becoming the purchaser, "transfers" his property within the meaning of the bankruptcy law.[103] And

94 Brown v. Jefferson County Nat. Bank, 19 Blatchf. 315, 9 Fed. 258.

95 Kemmerer v. Tool, 81 Pa. St. 467, 12 N. B. R. 334.

96 Gaskill v. Benton, 8 Fed. 746.

97 In re Binns, 4 Ben. 152. Fed. Cas. No. 1,422.

98 Beattie v. Gardner, 4 Ben. 479, 4 N. B. R. 323, Fed. Cas. No. 1,195.

99 Rogers v. Palmer, 102 U. S. 263, 26 L. Ed. 164.

100 In re Benton, 16 N. B. R. 75, Fed. Cas. No. 1,333.

101 In re Metzger Toy & Novelty Co., 114 Fed. 957, 8 Am. Bankr. Rep. 307.

102 First Nat. Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542; Buchanan v. Smith, 16 Wall. 277, 21 L. Ed. 280; Grant v. National Bank of Auburn (D. C.) 232 Fed. 201, 37 Am. Bankr. Rep. 329; Benjamin v. Chandler, 142 Fed. 217, 15 Am. Bankr. Rep. 439; Haughey v. Albin, 2 Bond. 244, 2 N. B. R. 399, Fed. Cas. No. 6,222; Fitch v. McGie, 2 Biss. 163, 2 N. B. R. 531, Fed. Cas. No. 4,835; Zahm v. Fry, 9 N. B. R. 546, Fed. Cas. No. 18,198; Street v. Dawson, 4 N. B. R. 207, Fed. Cas. No. 13,533.

103 Grant v. National Bank of Auburn, 197 Fed. 581, 28 Am. Bankr. Rep. 712.

the same principles apply in the case of a decree entered by consent.[104] But an order or decree requiring a trustee to pay over money to his successor, made in a proceeding by the cestui que trust to have him removed on the ground of his insolvency, resulting in an adversary decree appointing a new trustee, is not a judgment "procured or suffered" by the insolvent.[105] And the same is true of a judgment which merely confirms an award made more than four months before the bankruptcy of the debtor.[106] And although a judgment by confession may be entered under such circumstances as to make it a voidable preference, yet where it was merely intended as collateral security for the aggregate amount of several existing and valid judgments, its invalidity does not in any way affect the original judgments.[107]

§ 580. Transfers of Property.—The bankruptcy act does not permit an insolvent debtor to transfer any portion of his property in kind to a creditor in settlement of the debt, though it be an honest and valid one, if the effect will be to prefer that creditor over others, and the creditor has reasonable cause to believe that such result will follow.[108] But the term "transfer," as used in the act, includes much more than the turning over of property in settlement of a claim. It is declared to mean "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security."[109] Hence a preferential transfer of property may include a mortgage or any other kind of lien voluntarily created by the debtor,[110] or a deed of land delivered with the understanding that it is not to be recorded but held as security,[111] or a bill of sale of a stock of merchandise,[112] or an order

[104] In re Mayo Contracting Co., 157 Fed. 469, 19 Am. Bankr. Rep. 551.

[105] Fry v. Pennsylvania Trust Co., 195 Pa. St. 343, 46 Atl. 10.

[106] In re Koslowski, 153 Fed. 823, 18 Am. Bankr. Rep. 723.

[107] Vogle v. Lathrop, 4 N. B. R. 439, Fed. Cas. No. 16,985.

[108] Sherman v. Luckhardt, 96 Mo. App. 320, 70 S. W. 388; In re House, Fed. Cas. No. 6,735. A bill of sale of all his property, executed by a person who is adjudicated a bankrupt within four months thereafter, may be set aside as a preference, though it was intended to protect his creditors. In re Einstein (D. C.) 245 Fed. 189, 40 Am. Bankr. Rep. 507.

[109] Bankruptcy Act 1898, § 1, cl. 25. Where an insolvent person, adjudged bankrupt within four months afterwards, assigned accounts receivable to a creditor, who knew he was receiving a preference, the transaction is voidable by the trustee in bankruptcy. McGill v. Commercial Credit Co. (D. C.) 243 Fed. 637, 39 Am. Bankr. Rep. 702.

[110] Coder v. Arts, 152 Fed. 943, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372, 18 Am. Bankr. Rep. 513; MacHenry v. Dwelling Building & Loan Ass'n (D. C.) 259 Fed. 880, 44 Am. Bankr. Rep. 234; In re Ed. W. Wright Lumber Co. (D. C.) 114 Fed. 1011, 8 Am. Bankr. Rep. 345; In re Jones (D. C.) 118 Fed. 673, 9 Am. Bankr. Rep. 262. But the mere filing of an affidavit of renewal of a chattel mortgage within four months prior to bankruptcy of the mortgagor is not a preferential "transfer of property." In re Dagwell (D. C.) 263 Fed. 406, 45 Am. Bankr. Rep. 358.

[111] Ragan v. Donovan, 189 Fed. 138, 26 Am. Bankr. Rep. 311.

[112] W. B. Belknap & Co. v. Lyell, 89 Miss. 197, 42 South. 799. But the record-

drawn by the bankrupt on a third person and accepted by the latter,[113] and an agreement to "transfer" property may be construed as an agreement to "deliver" it.[114] So, where the creditor simply takes possession of property of the debtor, meaning to satisfy his claim out of it, this may constitute a preference,[115] at least where the debtor thereupon gives the creditor a written release.[116] But a preference is not created by the act of a creditor in taking possession of collaterals deposited as security, though within four months before the bankruptcy, where the collateral was set apart years before to secure the debtor's drawing credit.[117] And a sum retained by a corporate creditor, with knowledge of the debtor's insolvency and within four months before his bankruptcy, which sum was due and owing to the bankrupt under an agreement by which the corporation, in paying its employés, was to deduct from their wages the amounts due from them to the bankrupt for supplies furnished by him to them, and was to remit to him the amount so deducted, irrespective of any indebtedness otherwise due by him to the corporation, is not a voidable preference.[118] And the performance of labor by an insolvent debtor for his creditor, for which he is given credit on his indebtedness, is not a transfer of property.[119]

A transfer may constitute a voidable preference under the act although the property is not conveyed directly to the preferred creditor, if the effect of the transaction is to enable him to secure a larger share of the debtor's estate than other creditors of the same class will receive in the bankruptcy.[120] Hence it is sufficient if the transfer is made to a third person for the creditor's benefit,[121] and a debtor cannot escape the effect of giving a preference by passing the conveyance through his wife and having her convey or mortgage it to the creditor.[122] And sim-

ing of a contract of conditional sale under which a bankrupt obtained possession of property is not a transfer of property by him which could be attacked by the trustee as preferential. In re Terrell, 246 Fed. 743, 159 C. C. A. 45, 40 Am. Bankr. Rep. 713.

[113] In re Hines, 144 Fed. 543, 16 Am. Bankr. Rep. 495.

[114] Godwin v. Murchison Nat. Bank, 145 N. C. 320, 59 S. E. 154, 17 L. R. A. (N. S.) 935.

[115] Bailey v. Henderson, 9 Ben. 534, Fed. Cas. No. 737.

[116] Collidge v. Ayers, 76 Vt. 405, 57 Atl. 970.

[117] Sexton v. Kessler & Co., 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995, 28 Am. Bankr. Rep. 85.

[118] Western Tie & Timber Co. v. Brown, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571, 13 Am. Bankr. Rep. 447.

[119] In re Abraham Steers Lumber Co., 110 Fed. 738, 6 Am. Bankr. Rep. 315.

[120] Western Tie & Timber Co. v. Brown, 129 Fed. 728, 64 C. C. A. 256, 12 Am. Bankr. Rep. 111. But see this case on appeal, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571, 13 Am. Bankr. Rep. 447.

[121] National Bank of Newport v. National Herkimer County Bank, 225 U. S. 178, 32 Sup. Ct. 633, 56 L. Ed. 1042, 28 Am. Bankr. Rep. 218. A conveyance of real estate within four months before bankruptcy, made by the bankrupt to a stockholder of a creditor corporation, who held the same for the company, and paid for it with money which was furnished by the company, and received back by it from the bankrupt, is a voidable preference. Golden & Co. v. Loving, 42 App. D. C. 489.

[122] Gibson v. Dobie, 5 Biss. 198, 14 N. B. R. 156. Fed. Cas. No. 5,394.

ilarly a preference is created where the creditor induces and procures a third person to lend money to the bankrupt with which the creditor's claim is to be satisfied, taking a mortgage on the bankrupt's stock in trade as security.[123] It makes no difference who the creditor may be. The officers of a corporation, for instance, may lawfully lend it money, but cannot take a preferential transfer of its property when it is insolvent.[124] As to the property affected by the transfer, it may be said that the act of a foreign creditor in obtaining a lien on property of the debtor in a foreign country may constitute a preference,[125] but since property of the bankrupt which is exempt under the laws of the state will not in any event constitute a part of his estate in bankruptcy for the purpose of distribution among the creditors, a conveyance or incumbrance of exempt property for the benefit of one particular creditor cannot be said to amount to a preference within the meaning of the statute.[126]

§ 581. Same; Transfer of Property in Substitution or Satisfaction of Lien.—No voidable preference is created where a debtor, though insolvent, transfers or surrenders to a creditor property on which the latter already has a valid lien, in satisfaction and discharge of the debt and the lien securing it, or property in substitution for that on which the lien attaches, provided the property is of no greater value than the amount of the lien, so that the debtor's general estate is not thereby depleted.[127] But it is otherwise, of course, if the value of the property transferred or surrendered is in substantial excess of the creditor's claim,[128] or if the

[123] In re Beerman, 112 Fed. 663, 7 Am. Bankr. Rep. 431.

[124] Atherton v. Emerson, 199 Mass. 199, 85 N. E. 530; Moody v. Chicago Title & Trust Co., 126 Ill. App. 68; Cullen v. Veasey, 5 Boyce (Del.) 588, 95 Atl. 655.

[125] In re Pollmann, 156 Fed. 221, 19 Am. Bankr. Rep. 474.

[126] Huntington v. Baskerville, 192 Fed. 813, 113 C. C. A. 137, 27 Am. Bankr. Rep. 219; In re Leech, 171 Fed. 591; Vitzthum v. Large, 162 Fed. 685, 20 Am. Bankr. Rep. 666.

[127] Root Mfg. Co. v. Johnson, 219 Fed. 897, 135 C. C. A. 139, 34 Am. Bankr. Rep. 247; In re Federal Biscuit Co., 214 Fed. 221, 130 C. C. A. 635, 32 Am. Bankr. Rep. 612; Ashuelot Bank v. Frost, 19 Fed. 237; Coxe v. Hale, 10 Blatchf. 56, 8 N. B. R. 562, Fed. Cas. No. 3,310; Catlin v. Hoffman, 2 Sawy. 486, 9 N. B. R. 342, Fed. Cas. No. 2,521; Boothe v. Brooks, 12 N. B. R. 398, Fed. Cas. No. 1,650; Hallack v. Tritch, 17 N. B. R. 293, Fed. Cas. No. 5,956; Eason v. Garrison, 36 Tex. Civ. App. 574, 82 S. W. 800; Posey v. McManis, 28 Tex. Civ. App. 452, 67 S. W. 792; Macdonald v. Ætna Indemnity Co., 90 Conn. 415, 97 Atl. 332; Davis v. Billings, 254 Pa. 574, 99 Atl. 163; Lloyd v. Sichler, 94 Wash. 611, 162 Pac. 979; McKnight v. Shadbolt, 98 Wash. 665, 168 Pac. 473. No preference can be predicated on the fact that the money received from the sale of grain which had been pledged by the bankrupt was not kept physically isolated until paid to the secured creditor, but was deposited in bank with other money of the bankrupt, and a check for the amount immediately given to the creditor. Britton v. Union Inv. Co. (C. C. A.) 262 Fed. 111, 44 Am. Bankr. Rep. 531.

[128] Waring v. Buchanan, 19 N. B. R. 502, Fed. Cas. No. 17,176. But a transfer by a bankrupt to a creditor of property of no more value than such creditor's lien thereon and the amount of the claims of certain other creditors of the bankrupt, which he then pays, by agreement with the bankrupt, is not a preference, though such other claims were un-

transaction puts the creditor in a materially better position with reference to the enforcement of his claim.[129] And to justify a transaction of this kind, there must be an actual and valid lien of some kind, not a mere promise or unexecuted agreement to give security.[130] But if a creditor holds a valid and subsisting lien on the debtor's property, and the equity of redemption therein is released to him under such circumstances as to make it a fraudulent preference, though the conveyance is void, this will not divest the lien, but the parties will be remitted to their original position.[131]

§ 582. Restoration of Specific Property or Funds.—A transfer or surrender of property by an insolvent debtor will not constitute a voidable preference where the person receiving it was actually the owner of the property, and no title was vested in the bankrupt in any such sense that it could have been made available for his general creditors.[132] Thus, where a broker buys stock for a customer on a margin, the title to the stock is in the customer, and not in the broker, the latter holding it merely as a pledgee to secure the advances made by him in the purchase. Hence the customer is not a creditor of the broker, and no preference is created by the transfer of the stock to the customer on the settlement of his account,[133] or by the broker's action in redeeming the stock (already pledged by him) and turning it over to the customer on demand.[134] So, a transfer of realty by an insolvent, though made within four months before his bankruptcy, is not a preference if made in good faith to his

secured. Russell's Trustee v. Mayfield Lumber Co., 158 Ky. 219, 164 S. W. 783.

[129] In re Dibblee, 3 Ben. 283, Fed. Cas. No. 3,884.

[130] Page v. Rogers, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332, 21 Am. Bankr. Rep. 496; Sharp v. Philadelphia Warehouse Co., 19 N. B. R. 378, Fed. Cas. No. 12,709a; Lacy v. Chandler (Tex. Civ. App.) 163 S. W. 328. Payment by an insolvent to one who assumes an indebtedness of the insolvent therefor is a preference; and so also, where one pays an indebtedness of an insolvent on condition that a mortgage in his name, which has been paid, shall remain effective. McKnight v. Shadbolt, 98 Wash. 665, 168 Pac. 473.

[131] Avery v. Hackley, 20 Wall. 407, 22 L. Ed. 385.

[132] Sieg v. Greene, 225 Fed. 955, 141 C. C. A. 79, Ann. Cas. 1917C, 1006, 35 Am. Bankr. Rep. 150; In re Wright-Dana Hardware Co. (D. C.) 205 Fed. 335, 30 Am. Bankr. Rep. 582; Bradley, Clark & Co. v. Benson, 93 Minn. 91, 100 N. W. 670; Sears v. Gilman, 199 Mass. 384, 85 N. E. 466. Compare Smith v. Tostevin, 247 Fed. 102, 159 C. C. A. 320, 41 Am. Bankr. Rep. 212. Where a bank purchased with its own funds silk for certain bankrupts, taking title in its own name, and delivered the silk to the bankrupts under a trust receipt binding the latter to hold the goods or their proceeds for the bank until the price was paid, it was considered that, as the title had never passed to the bankrupts, their agreement while insolvent to return the goods to the bank was not a preference. In re Killian Mfg. Co. (D. C.) 209 Fed. 498.

[133] Robinson v. Roe, 233 Fed. 936, 147 C. C. A. 610, 38 Am. Bankr. Rep. 26; Richardson v. Shaw, 147 Fed. 659, 77 C. C. A. 643, 16 Am. Bankr. Rep. 842; In re Graff (D. C.) 117 Fed. 343, 8 Am. Bankr. Rep. 744.

[134] Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981, 19 Am. Bankr. Rep. 717; Robinson v. Roe, 233 Fed. 936, 147 C. C. A. 610, 38 Am. Bankr. Rep. 26.

wife in replacement of her dotal property alienated by him, and the subject of the transfer does not exceed in value such dotal property.[135] Money, as well as other property, may be subject to this rule.[136] Thus, the return of excessive margins by an insolvent stockbroker to a customer does not constitute a preference.[137] So where money is placed in the hands of one who afterwards becomes bankrupt, but on the agreement that it shall be used for a particular purpose, and it is not so used, but is returned to the owner, this does not create a preference.[138] But it is necessary to distinguish the case where money is delivered to the bankrupt under such circumstances that the person giving it becomes simply a general creditor for the amount. Thus, where it appeared that the defendant in an action to recover a preference had discounted a note for the bankrupt, but discovered the next day that an indorsement on the note was forged and called on the bankrupt to return the money, but the bankrupt was unable to do this, but gave the defendant a postdated check, which the latter accepted, and this check was shortly paid, it was held that this transaction constituted a preference and could not be upheld on the theory that the defendant was merely procuring a return of his money, for, by accepting a postdated check, which was paid from the bankrupt's general funds, he had accepted the position of a general creditor.[139]

So, also, the general rule does not apply where goods have passed to the bankrupt under a contract of sale. It is an unlawful preference if the seller accepts a return of the goods or a part of them in settlement of his claim, unless he has retained title in himself by some lawful reservation or agreement.[140] It has been held, however, that where goods are obtained on credit by an insolvent buyer and by means of false pretenses, the seller's recovery of them before they have been unpacked does not work a preference under the bankruptcy law.[141]

§ 583. **Same; Trust Funds and Moneys Converted or Embezzled.**—Questions often arise as to the creation of a preference where an insol-

[135] Gomila v. Wilcombe, 151 Fed. 470, 81 C. C. A. 268, 18 Am. Bankr. Rep. 143.

[136] Wallerstein v. Gallagher (D. C.) 236 Fed. 602, 38 Am. Bankr. Rep. 287.

[137] Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981, 19 Am. Bankr. Rep. 717.

[138] Sharp v. Simonitsch, 107 Minn. 133, 119 N. W. 790; Dressel v. North State Lumber Co., 119 Fed. 531, 9 Am. Bankr. Rep. 541; In re W. W. Mills Co., 162 Fed. 42, 20 Am. Bankr. Rep. 501.

[139] Watchmaker v. Barnes, 259 Fed. 783, 170 C. C. A. 583, 43 Am. Bankr. Rep. 632.

[140] Benjamin v. Buell (C. C. A.) 268 Fed. 792, 46 Am. Bankr. Rep. 404; Plummer v. Myers, 137 Fed. 660, 14 Am. Bankr. Rep. 805; West v. Fulling, 36 Ind. App. 617, 76 N. E. 325. As to the reclamation by a creditor of property held by the bankrupt under a contract of conditional sale, see John Deere Plow Co. v. Edgar Farmer Store Co., 154 Wis. 490, 143 N. W. 194; In re Bennett (D. C.) 264 Fed. 533. And see, supra, § 358.

[141] Mulroney Mfg. Co. v. Weeks, 185 Iowa, 714, 171 N. W. 36.

vent person has been forced to restore or make good funds which he has stolen or embezzled, or which he has misappropriated to his own use while holding them in the character of a trustee. The general rule is that if the particular fund has been kept separate and apart from the bankrupt's own money, or if it is distinctly traceable into property or other funds into which it has been converted, the owner may follow it and reclaim it from the trustee in bankruptcy, on the theory that it does not constitute any part of the assets in bankruptcy. From this it follows that if the fund (or its avails) is surrendered or restored to the owner before bankruptcy intervenes, it cannot be said to constitute the giving of a preference.[142] But if the person entitled to the fund, having knowledge of the embezzlement or conversion, and of the debtor's insolvency, accepts a payment out of the latter's general funds or a conveyance of property or a security offered, this is an election to treat the misappropriation as creating a debt, and consequently he will stand in no better position than any general creditor.[143] Under these circumstances, therefore, a payment or transfer of property, or the giving of a mortgage or other security, will constitute a voidable preference, supposing the other elements of a preference to be present.[144] And the United States Supreme Court has ruled that, independently of his liability on any bond, there is an obligation of a contractual nature resting upon a defaulting testamentary trustee to restore to the trust estate the value of assets embezzled, and this obligation is a provable debt in bankruptcy. Hence, where one is a trustee in several trusts, and knowing himself to be insolvent, and within four months prior to his bankruptcy, he transfers his own property from himself individually to one of those trusts and to himself in the character of trustee therein, to make good a shortage, and the effect is to enable that trust to recover a larger share of its debt than the others, a voidable preference is given.[145]

§ 584. Giving of Present Consideration; Security for Present Loan or Future Advances.—"An insolvent person may properly make efforts

142 Block v. Rice, 167 Fed. 693, 21 Am. Bankr. Rep. 691; McNaboe v. Columbian Mfg. Co., 153 Fed. 967, 83 C. C. A. 81, 18 Am. Bankr. Rep. 684; Goode v. Elwood Lodge, 160 Ind. 251, 66 N. E. 742. And see supra, § 354.

143 Atherton v. Green, 179 Fed. 806, 103 C. C. A. 298, 24 Am. Bankr. Rep. 650.

144 Clarke v. Rogers, 183 Fed. 518, 106 C. C. A. 64, 26 Am. Bankr. Rep. 413; In re Dorr, 196 Fed. 292, 28 Am. Bankr. Rep. 505; Burgoyne v. McKillip, 182 Fed. 452, 25 Am. Bankr. Rep. 387; In re Kearney, 167 Fed. 995, 21 Am. Bankr. Rep. 721; Smith v. Township of Au Gres, 150 Fed. 257, 17 Am. Bankr. Rep. 745. Where a bankrupt which assigned accounts to defendants converted payments received on such accounts, but defendant could not trace such conversions into other unassigned accounts, it cannot, on the theory of a trust, sustain a subsequent preferential assignment of other accounts. McGill v. Commercial Credit Co. (D. C.) 243 Fed. 637, 39 Am. Bankr. Rep. 702.

145 Clarke v. Rogers, 228 U. S. 534, 33 Sup. Ct. 587, 57 L. Ed. 953, 30 Am. Bankr. Rep. 39.

to extricate himself from his embarrassments, and therefore he may borrow money and give, at the time, security therefor, provided always the transaction be free from fraud in fact and upon the bankruptcy act. And hence it is a settled principle of bankruptcy law, both in England and in this country, that advances made in good faith to a debtor to carry on business, upon security taken at the time, do not violate either the terms or the policy of the bankruptcy act. This is manifestly right, since the power to raise ready money may save the party from bankruptcy and ruin, and since his creditors are not injured nor his estate impaired, because he gets a present equivalent for the debt he creates and the security he gives." [146] In effect, an unlawful preference is created, within the meaning of the act, only when a transfer is made or security given for a pre-existing debt.[147] This the creditor is not allowed to exact, at least if he has reasonable cause to believe that he is securing a preference. But at the time when a debt is created, the creditor has the right to dictate the terms on which he will part with his money or property, and he may therefore demand that he shall first be secured to such an extent as will satisfy him, and with this the bankruptcy act does not interfere.[148] Moreover, the statute expressly provides that "liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act." [149] It is therefore a well-settled rule that a creditor who takes security, though the debtor is insolvent and though his bankruptcy follows within four months, does not receive a preference which is voidable under the act, if the consideration was a loan or advance of money to the bankrupt made at the same time with the giving of the security.[150] So a mortgage made in good faith to secure future sales of

[146] Darby v. Boatmen's Sav. Inst., 1 Dill. 141, Fed. Cas. No. 3,571. Thus, where the directors of an insolvent corporation, in good faith and with the intention of saving the business, borrowed money from a director and a stockholder to meet the most pressing obligations, and executed mortgages on all of the corporate assets to secure the same, it was held, on the subsequent bankruptcy of the corporation, that the mortgages could not be questioned as preferential. In re Lake Chelan Land Co., 257 Fed. 497, 168 C. C. A. 501, 5 A. L. R. 557, 44 Am. Bankr. Rep. 14.

[147] In re Perpall (C. C. A.) 271 Fed. 466, 46 Am. Bankr. Rep. 302; In re Clifford (C. C. A.) 136 Fed. 475, 14 Am. Bankr. Rep. 281; William Schuette & Co. v. Swank, 265 Pa. 576, 109 Atl. 531; In re Busby (D. C.) 124 Fed. 469, 10 Am. Bankr. Rep. 650. Whether a debt, to secure which a lien was created within four months of bankruptcy, was a pre-existing debt must be determined as of the date of the creation of the lien. In re Mossler Co., 239 Fed. 262, 152 C. C. A. 250, 38 Am. Bankr. Rep. 604.

[148] In re Busby (D. C.) 124 Fed. 469. 10 Am. Bankr. Rep. 650.

[149] Bankruptcy Act 1898, § 67d.

[150] Dean v. Davis, 242 U. S. 438, 37 Sup. Ct. 130, 61 L. Ed. 419, 38 Am. Bankr. Rep. 664; Lake View State Bank v. Jones, 242 Fed. 821, 155 C. C. A. 409, 40 Am. Bankr. Rep. 148; Dodge v. Harris, 224 Fed. 434, 140 C. C. A. 128; Withoft v. Andrews (D. C.) 217 Fed. 421, 33 Am. Bankr. Rep. 536; Tiffany v. Boatmen's Sav. Inst., 18 Wall. 375, 21 L. Ed.

goods to the mortgagor is valid to the extent of the advances actually made, and to such extent is not defeated but protected by the bankruptcy act.[151] And where new sales succeed payments, and the net result is to increase the value of the debtor's estate, payments made by an insolvent debtor on a running account are not to be considered preferential.[152] So a mortgage given for money borrowed at the time to pay the purchase price of the property mortgaged, whether or not the same identical money is used to make the payment, is in effect a purchase-money mortgage and entitled to high rank and protection.[153] The same principle applies where the transaction takes the form of a transfer of property, rather than a security. A person may sell or exchange his property, though he is insolvent at the time, if it is done in good faith and with no fraudulent design as against his creditors.[154] And one who takes a conveyance of such property, acting in equal good faith, and who has already advanced the money therefor, or gives a present and adequate consideration for it, is not chargeable with receiving a preference.[155] And either in the case of a security or a conveyance, it is not necessary

868; Lindley v. Ross, 200 Fed. 733, 29 Am. Bankr. Rep. 610; In re Empire Cork Co., 193 Fed. 225; In re Sayed, 185 Fed. 962, 26 Am. Bankr. Rep. 444; Powell v. Gate City Bank, 178 Fed. 609, 102 C. C. A. 55, 24 Am. Bankr. Rep. 316; In re Hersey, 171 Fed. 1004, 22 Am. Bankr. Rep. 863; In re Bartlett, 172 Fed. 679, 22 Am. Bankr. Rep. 891; In re Farmers' Supply Co., 170 Fed. 502, 22 Am. Bankr. Rep. 460; McDonald v. Clearwater Shortline Ry. Co., 164 Fed. 1007, 21 Am. Bankr. Rep. 182; Crim v. Woodford, 136 Fed. 34, 68 C. C. A. 584, 14 Am. Bankr. Rep. 302; Farmers' Bank of Edgefield v. C. D. Carr & Co., 127 Fed. 690, 62 C. C. A. 446, 11 Am. Bankr. Rep. 733; Young v. Upson, 115 Fed. 192, 8 Am. Bankr. Rep. 377; In re Little, 110 Fed. 621, 6 Am. Bankr. Rep. 681; In re Davidson, 109 Fed. 882, 5 Am. Bankr. Rep. 528; In re Wolf, 98 Fed. 84, 3 Am. Bankr. Rep. 555; In re Little River Lumber Co., 92 Fed. 585, 1 Am. Bankr. Rep. 483; Neill v. Barbaree, 135 Ga. 771, 70 S. E. 638; Crooks v. People's Nat. Bank, 34 Misc. Rep. 450, 70 N. Y. Supp. 271; Claridge v. Evans, 137 Wis. 218, 118 N. W. 198, 803, 25 L. R. A. (N. S.) 144; Eason v. Garrison, 36 Tex. Civ. App. 574, 82 S. W. 800; O'Connell v. City of Worcester, 225 Mass. 159, 114 N. E. 201; Dunlap v. Seattle Nat. Bank, 93 Wash. 568, 161 Pac. 364; McNamara v. Farnsworth, 106 Wash. 523, 180 Pac. 466.

[151] Marvin v. Chambers, 12 Blatchf. 495, 13 N. B. R. 77, Fed. Cas. No. 9,179; In re Watkinson, 142 Fed. 782, 16 Am. Bankr. Rep. 38; Peterson v. Nash Bros., 112 Fed. 311, 50 C. C. A. 260, 55 L. R. A. 344, 7 Am. Bankr. Rep. 181.

[152] Joseph Wild & Co. v. Provident Life & Trust Co., 153 Fed. 562, 82 C. C. A. 516, 18 Am. Bankr. Rep. 506.

[153] In re Franklin, 151 Fed. 642, 18 Am. Bankr. Rep. 218.

[154] Blake v. Thwing, 185 Ill. App. 187. Where one who had been fraudulently induced to sell goods on credit, accepted from the buyer, within four months before the latter's bankruptcy, a transfer of accounts in payment for the goods, it was held that the transfer was made in consideration of the release of the right to rescind and recover the goods, and therefore was not a preference. Illinois Parlor Frame Co. v. Goldman, 257 Fed. 300, 168 C. C. A. 384, 43 Am. Bankr. Rep. 287.

[155] Ernst v. Mechanics' & Metals Nat. Bank (C. C. A.) 201 Fed. 664, 29 Am. Bankr. Rep. 289; Mills v. Virginia-Carolina Lumber Co., 164 Fed. 168, 20 Am. Bankr. Rep. 750; In re Rosenfeld, 2 N. B. R. 116, Fed. Cas. No. 12,057; Harrison v. McLaren, 10 N. B. R. 244, Fed. Cas. No. 6,139; Sparhawk v. Richards, 12 N. B. R. 74, Fed. Cas. No. 13,205; Weeks v. Spooner, 142 N. C. 479, 55 S. E. 432. But see Kerr v. Melum, 27 S. D. 208, 130 N. W. 83.

that the transfer and the giving of the consideration should be exactly contemporaneous. For an advance will be considered a present consideration for a conveyance made within a reasonable time thereafter and in pursuance of a prior agreement.[156]

But it is strictly necessary that the whole transaction should be entirely free from fraud. If one lends money to an insolvent debtor (whose bankruptcy follows within four months), and knows at the time that the borrower's purpose is not to use the money in supporting his credit or carrying on his business, but to use it in paying off one of the creditors, thereby giving a preference, the lender is so far affected by the fraudulent purpose that any security given to him for the loan will be voidable at the suit of the trustee in bankruptcy.[157] And it seems that actual knowledge on the part of the lender is not necessary to produce this result, if the circumstances were so unusual and suspicious as to lay upon him the duty of making reasonable inquiries concerning the destination of the money, which inquiries would have enlightened him as to the debtor's purpose.[158] Further, if the consideration for a security or transfer, though contemporaneous with it, was illegal, as being contrary to law, to good morals, or to public policy, it will not support the lien or conveyance.[159]

Where it appears that the transfer or security was given in part to secure a pre-existing debt, and in part to secure a new advance of money made at the same time with it, and there was no actual fraud in the transaction as to the other creditors or upon the bankruptcy act, the creditor will be entitled to enforce his security against the estate of the debtor in bankruptcy to the extent of the money advanced at the time, although it is void as a preference so far as concerns the pre-existing debt.[160] Thus, an increase in a mortgage lien on a bankrupt's property, supported by a new and adequate consideration, and not lessening his estate or impairing in any respect the fund available to pay general creditors, must be sustained, although made within four months prior to

156 Douglass v. Vogeler, 6 Fed. 53; Gattman v. Honea, 12 N. B. R. 493, Fed. Cas. No. 5,271; In re Sutherland Co. (D. C.) 245 Fed. 663, 40 Am. Bankr. Rep. 305.

157 Bucknam v. Goss, 1 Hask. 630, 13 N. B. R. 337, Fed. Cas. No. 2,097; Bryant v. Wolf, 94 Misc. Rep. 683, 158 N. Y. Supp. 678; Sherrill v. Hutson, 187 Ala. 189, 65 South. 538.

158 Ex parte Mendell, 1 Low. 506, 4 N. B. R. 302, Fed. Cas. No. 9,418; Parker v. Sherman, 212 Fed. 917, 129 C. C. A. 437.

159 Sharp v. Philadelphia Warehouse Co., 10 Fed. 379; Adams v. Merchants' Nat. Bank, 9 Biss. 396, 2 Fed. 174.

160 In re Wolf, 98 Fed. 84, 3 Am. Bankr. Rep. 555; In re Cobb, 96 Fed. 821, 3 Am. Bankr. Rep. 129; In re Sanderlin, 109 Fed. 857, 6 Am. Bankr. Rep. 384; In re Hull, 115 Fed. 858, 8 Am. Bankr. Rep. 302; In re Dismal Swamp Contracting Co., 135 Fed. 415, 14 Am. Bankr. Rep. 175; In re First Nat. Bank, 155 Fed. 100, 84 C. C. A. 16, 18 Am. Bankr. Rep. 766; Smith v. Coury (D. C.) 247 Fed. 168, 41 Am. Bankr. Rep. 219. But see Tuttle v. Truax, 1 N. B. R. 601, Fed. Cas. No. 14,277.

his bankruptcy.[161] But the bankruptcy law cannot be evaded by a pretense of advancing an additional consideration which bears no reasonable relation to the existing indebtedness. Thus, an assignment of collateral by an insolvent debtor with intent to give a preference to a creditor who has reasonable grounds to believe that a preference is intended, made a short time before an adjudication of bankruptcy, as security for a pre-existing debt, and also for a small additional loan, is void as to the whole.[162]

§ 585. **Effect of Prior Agreement to Give Security or Make Transfer.**—It has often been ruled that, where an agreement is made or a promise given, at the time when money is loaned or advanced, that a transfer of property shall be made or a security given to the lender, the subsequent execution of the transfer or giving of security does not constitute an illegal preference, though it takes place at a time when the debtor is insolvent and within four months prior to his bankruptcy.[163] But on the other hand, there are important decisions to the effect that a transfer of property to a creditor by an insolvent debtor four months prior to his bankruptcy, which would otherwise constitute a voidable preference, is not deprived of that character by the fact that it was made pursuant to a prior agreement made more than four months before the bankruptcy.[164] The true doctrine appears to be that if the promise or agreement was of such a specific nature and related to such specific property as to give rise to an inchoate or equitable lien (in advance of its execution) then the creation of a specific lien at a later time, in accordance with the prior promise, will not violate the bankruptcy law.[165] But

[161] State Bank of Williamson v. Fish, 120 N. Y. Supp. 365.

[162] Grannis v. Beardsley, Fed. Cas. No. 5,688.

[163] Tomlinson v. Bank of Lexington, 145 Fed. 824, 76 C. C. A. 400, 16 Am. Bankr. Rep. 632; Ryttenberg v. Schefer, 131 Fed. 313, 11 Am. Bankr. Rep. 652; Payne v. Solomon, 14 N. B. R. 162, Fed. Cas. No. 10,856; In re Wood, 5 N. B. R. 421, Fed. Cas. No. 17,937; Burdick v. Jackson, 7 Hun (N. Y.) 488, 15 N. B. R. 318; M. & M. National Bank v. Brady's Bend Iron Co., 8 Phila. (Pa.) 171, 5 N. B. R. 491, Fed. Cas. No. 9,018; Smoot v. Morehouse, 8 Ala. 370, 42 Am. Dec. 644; In re Metropolitan Dairy Co., 224 Fed. 444, 140 C. C. A. 646, 35 Am. Bankr. Rep. 466.

[164] Citizens' Trust Co. v. Tilt, 200 Fed. 410, 118 C. C. A. 562, 29 Am. Bankr. Rep. 906; Lathrop Bank v. Holland, 205 Fed. 143, 30 Am. Bankr. Rep. 62; In re Thomas, 199 Fed. 214, 29 Am. Bankr. Rep. 945; Tilt v. Citizens' Trust Co., 191 Fed. 441, 27 Am. Bankr. Rep. 320; In re Smith 176 Fed. 426, 23 Am. Bankr. Rep. 864; In re Great Western Mfg. Co., 152 Fed. 123, 81 C. C. A. 341, 18 Am. Bankr. Rep. 259; In re Dismal Swamp Contracting Co., 135 Fed. 415, 14 Am. Bankr. Rep. 175; In re Mandel, 127 Fed. 863, affirmed 135 Fed. 1021, 68 C. C. A. 546; In re Ronk, 111 Fed. 154, 7 Am. Bankr. Rep. 31; Second Nat. Bank v. Hunt, 11 Wall. 391, 20 L. Ed. 190; In re Connor, 1 Low. 532, Fed. Cas. No. 3,118; Lloyd v. Strobridge, 16 N. B. R. 197, Fed. Cas. No. 8,435; Chapman v. Hunt, 254 Fed. 768, 166 C. C. A. 214, 42 Am. Bankr. Rep. 509; In re Herman (D. C.) 207 Fed. 594, 31 Am. Bankr. Rep. 243; John Agnew Co. v. Board of Education of City of Paterson, 83 N. J. Eq. 49, 89 Atl. 1046.

[165] Johnson v. Root Mfg. Co., 241 U. S. 160, 36 Sup. Ct. 520, 60 L. Ed. 934,

these conditions are not met by a general parol agreement, entered into when the debt was contracted, not pledging any specific property, but merely that security should be given when required,[166] or if the debtor should become financially embarrassed.[167] So, a mere promise by the debtor, at the time the debt was contracted, to give a mortgage to secure it, but without specifying the nature of the mortgage or the property on which it was to be given, does not create an equitable mortgage, and the execution of a mortgage on a subsequent renewal of the debt, at a time when the debtor is insolvent and within four months before his bankruptcy, constitutes a transfer of property to secure an antecedent debt, and creates a preference.[168] In other words, the prior promise must contemplate the giving of a specific and definite security, not merely "some" security; it must be such an agreement as could be enforced by a bill for specific performance.[169] An agreement that the creditor shall have a general lien on the property of the debtor, a corporation, will not suffice.[170] And an agreement to pledge personal property as security for a debt is not executed where the goods are not delivered to the creditor nor set apart and treated as his property, so that where the creditor takes possession of the property shortly before the filing of a petition in bankruptcy, the transaction is voidable as a preference.[171] And an agreement, while negotiating a loan, to make repayment out of a certain fund, does not create a lien on the fund; and hence when repayment is made out of it within four months before a proceeding in bankruptcy, it will be deemed to be preferential and voidable at the suit of the trustee.[172]

§ 586. Exchange or Substitution of Securities.—An exchange or substitution of one valid security for another does not create an unlawful preference, though occurring when the debtor is insolvent and within

36 Am. Bankr. Rep. 764; Sahin v. Camp, 98 Fed. 974, 3 Am. Bankr. Rep. 578; Stover v. Kennedy, Fed. Cas. No. 13,510. And see Gage Lumber Co. v. McEldowney (C. C. A.) 207 Fed. 255, 30 Am. Bankr. Rep. 251. Where the owner of a mercantile business assigns to a creditor a fire policy to enable him to collect the same and apply it in payment of a prior loan, the assignment is not an unlawful preference, though made within four months of bankruptcy, where it was made pursuant to a prior agreement by which the policy was pledged as security for advances. Hecker v. Commercial State Bank, 35 N. D. 12, 159 N. W. 97.

166 In re Connor, 1 Low. 532, Fed. Cas. No. 3,118; Southwick v. Whipple, 2 Fed. 770.

167 Sebring v. Wellington, 63 App. Div. 498, 71 N. Y. Supp. 788. But compare Stennick v. Jones, 252 Fed. 345, 164 C. C. A. 269.

168 Pollock v. Jones, 124 Fed. 163, 61 C. C. A. 555, 10 Am. Bankr. Rep. 616.

169 In re Jackson Iron Mfg. Co., 15 N. B. R. 438, Fed. Cas. No. 7,153.

170 Mathews v. Hardt, 79 App. Div. 570, 80 N. Y. Supp. 462.

171 In re Sheridan, 98 Fed. 406, 3 Am. Bankr. Rep. 554; In re Arkonia Fabric Mfg. Co., 151 Fed. 914, 18 Am. Bankr. Rep. 470. But compare In re Harvey (D. C.) 212 Fed. 340, 32 Am. Bankr. Rep. 337.

172 Torrance v. Winfield Nat. Bank, 66 Kan. 177, 71 Pac. 235.

four months prior to his bankruptcy, provided the new security is not of greater value than the old and does not put the creditor in better position with reference to enforcing his claim, since, in this case, nothing is taken away from the general creditors of the bankrupt.[173] Within this rule, the giving of a mortgage or pledge is not a preference when it is executed upon a renewal of the debt or loan, which was originally secured by a like mortgage or pledge.[174] Nor is a preference created by the substitution and recording of a mortgage correcting a mistake in a prior unrecorded mortgage,[175] or in place of one not formally executed;[176] nor by the release of pledged property and the taking of a pledge on other property to secure the same debt,[177] or the substitution of different collaterals for those already held by the creditor;[178] nor by the giving of a chattel mortgage in place of a prior valid bill of sale of the same property,[179] or in place of collateral security;[180] nor by a confession of judgment for a debt already secured by a prior valid lien;[181] nor by the substitution of a deed of trust for a mechanic's lien on the same property;[182] nor by a mere change in the form of the obligation

[173] Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235; Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933; Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568; Douglass v. Vogeler, 6 Fed. 53; Brett v. Carter, 2 Low. 458, 14 N. B. R. 301, Fed. Cas. No. 1,844; Albany Exchange Bank v. Johnson, 5 Law Rep. 313, Fed. Cas. No. 133; Sawyer v. Turpin, Holmes, 226, Fed. Cas. No. 12,409; Deland v. Miller & Chaney Bank, 119 Iowa, 368, 93 N. W. 304; Hutchinson v. Murchie, 74 Me. 187. See Oberneier v. Kass, 219 Fed. 529, 135 C. C. A. 279, 34 Am. Bankr. Rep. 37. A preferential assignment of accounts within four months prior to bankruptcy cannot be sustained as a substitution for accounts theretofore assigned, where it appears that the previously assigned accounts had been collected by the bankrupt, with the assignee's consent, before the later assignment. Wolfe v. Bank of Anderson, 238 Fed. 343, 151 C. C. A. 359, 38 Am. Bankr. Rep. 387.

[174] Hagan v. McNeil, 253 Fed. 716, 165 C. C. A. 310, 41 Am. Bankr. Rep. 792; In re Noel (D. C.) 137 Fed. 694, 14 Am. Bankr. Rep. 715; Chattanooga Nat. Bank v. Rome Iron Co. (C. C.) 102 Fed. 755, 4 Am. Bankr. Rep. 441; In re Doran, Fed. Cas. No. 4,000.

[175] Player v. Lippincott, 4 Dill. 124, Fed. Cas. No. 11,223.

[176] Stewart v. Hoffman, 31 Mont. 190, 77 Pac. 689, 81 Pac. 3. The bankruptcy act does not give the trustee a lien prior to the lien of a bank to which a written chattel mortgage was given shortly before bankruptcy, in the place of a previous oral mortgage which was valid under the laws of the state except as against innocent purchasers and lien creditors. Border Nat. Bank v. Coupland, 240 Fed. 355, 153 C. C. A. 281.

[177] Perry v. Booth, 67 App. Div. 235, 73 N. Y. Supp. 216. But see Anniston Iron & Supply Co. v. Anniston Rolling Mill Co. (D. C.) 125 Fed. 974, 11 Am. Bankr. Rep. 200. Where bankrupt conveyed land as security by deed which was not recorded, and within four months before bankruptcy conveyed other land upon surrender of the unrecorded deed and notes evidencing indebtedness, it was not a preference. Marsh v. Leseman, 242 Fed. 484, 155 C. C. A. 260, 40 Am. Bankr. Rep. 97.

[178] In re Reese-Hammond Fire Brick Co., 181 Fed. 641, 25 Am. Bankr. Rep. 323.

[179] Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235. But a chattel mortgage is voidable as a preference, where the prior security was a conditional contract of sale, which was invalid because not recorded. L. A. Becker Co. v. Gill (C. C. A.) 206 Fed. 36, 30 Am. Bankr. Rep. 429.

[180] In re Davidson, 109 Fed. 882, 5 Am. Bankr. Rep. 528.

[181] Reber v. Gundy, 13 Fed. 53.

[182] In re Weaver, 9 N. B. R. 132, Fed. Cas. No. 17,307.

from an account to a note.[183] So, where the bankrupt's debt consists of a sum of money with accumulated interest, some time overdue, secured by a valid mortgage, and the parties have an accounting and compute the amount due to date for both principal and interest, and a new mortgage is given for the sum so ascertained, upon the same property, the old mortgage being canceled, this is not to be regarded as an unlawful preference, though done within the time limited before the debtor's bankruptcy.[184] And a creditor who has obtained a valid lien by execution on property of greater value than the amount of the judgment may receive from the debtor bills receivable, accounts, and cash up to the amount of the execution, without violating the bankruptcy law, if the execution is thereupon released and the judgment satisfied.[185] And a broker who holds stocks of a customer as security for the money advanced in their purchase, does not gain a preference by selling the stocks and applying the proceeds on his claim.[186]

But where a loan of money is simply evidenced by an indorsed promissory note, the substitution for it of a bond and mortgage is not such an exchange of securities as will prevent the mortgage being considered a preference, the other elements being present.[187] And a preference may be created by the substitution of one note for another, where that last given is made by a different party or is indorsed with a better name or matures earlier,[188] or enables the creditor more easily or quickly to obtain judgment and levy on the debtor's property.[189] Still it does not necessarily follow that the new security is voidable to its entire extent. Where a debtor gives a mortgage in exchange or substitution for an existing valid mortgage, but of greater value, it may be voidable by his trustee in bankruptcy, but only as to such excess of value.[190]

§ 587. Payments by Debtor.—Payment of a debt in money is a "transfer" of property within the meaning of the bankruptcy law, and if made under such circumstances as would constitute a preference in the case of a transfer of any other form of property, may be recovered by the debtor's trustee in bankruptcy.[191] It is immaterial in what form

183 O'Connor v. Parker, 23 Mich. 22, 4 N. B. R. 713.

184 Bernhisel v. Firman, 22 Wall. 170, 22 L. Ed. 766. But see In re Jordon, 9 N. B. R. 416, Fed. Cas. No. 7,529; Forbes v. Howe, 102 Mass. 427, 3 Am. Rep. 475.

185 Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568; Livingston v. Bruce, 1 Blatchf. 318, Fed. Cas. No. 8,410.

186 In re Filer, 125 Fed. 261, 5 Am. Bankr. Rep. 835.

187 In re Hirschowitz, 199 Fed. 202, 28 Am. Bankr. Rep. 571; In re Wolf, 98 Fed. 84, 3 Am. Bankr. Rep. 555.

188 McAtee v. Shade, 185 Fed. 442, 26 Am. Bankr. Rep. 151; In re Lane, 2 Low. 333, 10 N. B. R. 135, Fed. Cas. No. 8,044; In re Star Spring Bed Co. (C. C. A.) 265 Fed. 133, 45 Am. Bankr. Rep. 650.

189 Loudon v. First Nat. Bank, 2 Hughes, 420, 15 N. B. R. 476, Fed. Cas. No. 8,525.

190 In re Manning (D. C.) 123 Fed. 181, 10 Am. Bankr. Rep. 500.

191 West Philadelphia Bank v. Dickson, 95 U. S. 180, 24 L. Ed. 407; Pirie v. Chicago Title & Trust Co., 182 U. S.

the payment is made, whether in cash or by a certified check,[192] or by the acceptance of a draft drawn on the debtor by the creditor,[193] or an order on a third person to pay to the creditor money which is due to the debtor,[194] or by giving a lien on property from which the creditor realizes his debt in cash.[195] So, the declaration of a dividend by a corporation, with the understanding that the treasurer's portion of it should be returned to the corporation in settlement of his indebtedness to it, which was done, constitutes a preference recoverable by the treasurer's trustee in bankruptcy.[196] And where creditors of a bankrupt company, with knowledge of its insolvency, placed a representative in charge, and furnished goods on credit to replenish its stock, and would have succeeded in re-establishing the business had not the issuance of execution by another creditor precipitated bankruptcy, it was held that payments made for goods so furnished within four months prior to the adjudication were preferential.[197]

438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814; D. C. Wise Coal Co. v. Small, 225 Fed. 524, 140 C. C. A. 508, 35 Am. Bankr. Rep. 682; Scheuer v. Katzoff (D. C.) 233 Fed. 473, 37 Am. Bankr. Rep. 476; In re Miller (D. C.) 221 Fed. 471, 34 Am. Bankr. Rep. 275; In re W. A. Silvernail Co. (D. C.) 218 Fed. 979, 33 Am. Bankr. Rep. 59; Vollmar v. Plage, 186 Fed. 598, 26 Am. Bankr. Rep. 590; In re Rice, 164 Fed. 514, 21 Am. Bankr. Rep. 211; In re W. W. Mills Co., 162 Fed. 42, 20 Am. Bankr. Rep. 501; Wright v. William Skinner Mfg. Co., 162 Fed. 315, 89 C. C. A. 23, 20 Am. Bankr. Rep. 527; Sargent v. Blake, 160 Fed. 57, 87 C. C. A. 213, 20 Am. Bankr. Rep. 115; Wright v. Sampter, 152 Fed. 196, 18 Am. Bankr. Rep. 355; In re John Morrow & Co., 134 Fed. 686, 13 Am. Bankr. Rep. 392; In re Colton Export & Import Co., 121 Fed. 663, 57 C. C. A. 417, 10 Am. Bankr. Rep. 14; Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673; In re Fixen, 102 Fed. 295, 42 C. C. A. 354, 50 L. R. A. 605, 4 Am. Bankr. Rep. 10; In re Sloan, 102 Fed. 116, 4 Am. Bankr. Rep. 356; In re Christensen, 101 Fed. 802, 4 Am. Bankr. Rep. 202; Strobel & Wilken Co. v. Knost, 99 Fed. 409, 3 Am. Bankr. Rep. 631; In re Ft. Wayne Electric Corp., 99 Fed. 400, 39 C. C. A. 582, 3 Am. Bankr. Rep. 634; In re Conhaim, 97 Fed. 923, 3 Am. Bankr. Rep. 249; In re Ft. Wayne Electric Corp., 96 Fed. 803, 3 Am. Bankr. Rep. 186; In re Baxter, 25 Fed. 700; Metcalf v. Officer, 2 Fed. 640; Paige v. Loring, Holmes, 275, Fed. Cas. No. 10,672; Andrews v. Kellogg, 41 Colo. 35, 92 Pac. 222; Landry v. Andrews, 22 R. I. 597, 48 Atl. 1036; Chism v. Citizens' Bank, 77 Miss. 599, 27 South. 637; Sherman v. Luckhardt, 96 Mo. App. 320, 70 S. W. 388; Wright v. Cotten, 140 N. C. 1, 52 S. E. 141; West v. Bank of Lahoma, 16 Okl. 328, 85 Pac. 469; Rogers v. American Halibut Co., 216 Mass. 227, 103 N. E. 689; Schnetz v. International Harvester Co., 167 Iowa, 634, 149 N. W. 855. Where the bankrupt was accustomed to deposit in a bank checks drawn on other banks, and immediately thereafter to check against such deposits, without waiting to see whether the checks were good, and the bank, which was required by the clearing house to make good worthless checks credited by it, required payments from the bankrupt to protect itself against excessive use of its cash reserves, it was held that there was no indebtedness from the bankrupt to the bank, and such payments were not preferences. Snipes v. Mutual Trust Co. (D. C.) 270 Fed. 318, 46 Am. Bankr. Rep. 546.

[192] Cannon v. James M. Bell Co., 34 Misc. Rep. 734, 70 N. Y. Supp. 1024.

[193] Fox v. Gardner, 21 Wall. 475, 22 L. Ed. 685.

[194] In re The Leader, 190 Fed. 624, 26 Am. Bankr. Rep. 668.

[195] In re Belding, 116 Fed. 1016, 8 Am. Bankr. Rep. 718.

[196] Arthur v. Harrington (D. C.) 211 Fed. 215, 32 Am. Bankr. Rep. 216.

[197] In re Farmers' Store & Supply Co.

Nor does it affect the case that the payment is not made directly into the creditor's own hands, but reaches him through one or more intermediaries, as where the debtor's check passes through several banks and a clearing house and is finally credited to the creditor.[198] So where a creditor of the bankrupt assigns his account to a purchaser of the bankrupt's property, under an arrangement whereby such purchaser pays the claim, the legal effect is to appropriate out of the assets of the bankrupt the amount used in satisfying such claim by the purchaser assuming the liability, and an unlawful preference results therefrom.[199] This is also the case where the paying teller of a bank, claiming to be its creditor, draws his check and pays himself the amount out of the funds on hand, just before the bank closes its doors.[200] And where a bank which acts as agent for another bank for clearing house purposes pays, upon the day of its failure, to the latter, which has knowledge of its insolvency, deposits which have been made on its general account to meet checks in the clearing house, such payment is an illegal preference.[201] And where the president and general manager of a bankrupt corporation acts for it in purchasing certain accounts against it, he can only charge the corporation for the amount actually paid by him for the acounts, and must account to the trustee in bankruptcy for all profits made.[202] And a trustee in bankruptcy is not precluded from recovering, from the payee of a note, money paid by the bankrupt on the note within four months before his adjudication, by reason of the fact that there is a solvent indorser on the note.[203]

But the rule must not be applied with unreasonable strictness. There is no violation of the law against preferences where a debtor turns over money to his wife to be used, and which is in fact used, by her in defraying necessary household and family expenses, though she is also a creditor of his.[204] Nor is the payment of house rent or rent of a store the giving of a preference where there is no intention to cheat other

(D. C.) 214 Fed. 505, 32 Am. Bankr. Rep. 638.

198 In re Lyon, 114 Fed. 326, 7 Am. Bankr. Rep. 412; In re Hunter Arms Co. (D. C.) 226 Fed. 866, 35 Am. Bankr. Rep. 883.

199 Hackney v. Hargreaves Bros., 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Rogers v. Fidelity Sav. Bank & Loan Co., 172 Fed. 735, 23 Am. Bankr. Rep. 1.

200 In re Plant, 148 Fed. 37, 17 Am. Bankr. Rep. 272.

201 Phelan v. Iron Mountain Bank, 4 Dill. 88, 16 N. B. R. 308, Fed. Cas. No. 11,069.

202 Atherton v. Emerson, 199 Mass. 199, 85 N. E. 530.

203 Harris v. Second Nat. Bank, 110 Tenn. 239, 75 S. W. 1053; Bartholow v. Bean, 18 Wall. 635, 21 L. Ed. 866.

204 Neumann v. Blake, 178 Fed. 916, 102 C. C. A. 294, 24 Am. Bankr. Rep. 575. Property bought by the wife of a bankrupt with money saved by her from sums given her by her husband from time to time for household expenses, when he was not indebted, and for which he asked no accounting, cannot be recovered by his trustee for the benefit of his subsequent creditors, but it is otherwise as to money similarly given to her after he became indebted to such creditors. Milkman v. Arthe, 223 Fed. 507, 139 C. C. A. 55, 34 Am. Bankr. Rep. 536.

creditors or to evade the law.[205] And payment of interest in advance to a bank, to secure a renewal of a note held by it, is not giving a preference.[206] So of the payment of the salary of an officer of the bankrupt corporation, provided the amount does not exceed a fair compensation for his services.[207] And so of the payment of accrued interest on a statutory dower in real estate.[208] So, where a debtor, just before filing his voluntary petition in bankruptcy, went to two of his creditors, whose debts were barred by the statute of limitations, and paid each of them one dollar, and did this for the purpose of taking their claims out of the statute, so that they might share with the other creditors in the impending bankruptcy, and they had no knowledge or cause to believe that he meant to give them any advantage other than the revival of their debts, it was held that no preference was created.[209] And where gold dust is deposited in a bank to the credit of the depositor (who afterwards becomes bankrupt), and its value is at once ascertained and the amount entered on the books to his credit, there is no preference given, though the same sum is offset by the bank against an indebtedness to it of the depositor, because the total value of his estate available for creditors is not diminished.[210] But a debt due to a railroad company for freight is not in any way privileged, and to pay it may constitute a preference, if under circumstances which would produce that result in the case of any other creditor.[211] And a payment by insolvent makers to the holder of a note, for the purpose of relieving an indorser, is a preference forbidden by the bankruptcy law.[212]

It is of course unnecessary, to constitute a preference, that the creditor should have been paid in full. The giving and acceptance of a partial payment may be equally within the statute. But a payment by an insolvent debtor of a percentage on claims of a part of his creditors, which does not lessen the percentage which his other creditors will receive, is not a preference nor forbidden by the bankruptcy law.[213]

[205] In re Locke, 1 Low. 293, 2 N. B. R. 382, Fed. Cas. No. 8,439. But where an insolvent debtor, having a leasehold interest in a bakery where he carries on his business, pays the rent due on the same, as a means of enabling himself to continue the business, but with the purpose of defrauding his creditors, by hoarding and secreting the proceeds of the business so continued, and incurring new business debts without paying any old ones, the payment of the rent should be considered as a fraudulent preference under the bankruptcy law. In re Lange, 97 Fed. 107.

[206] In re Kellar, 110 Fed. 348, 6 Am. Bankr. Rep. 621.

[207] Atherton v. Emerson, 199 Mass. 199, 85 N. E. 530.

[208] In re Riddle's Sons, 122 Fed. 559, 10 Am. Bankr. Rep. 204.

[209] In re Banks (D. C.) 207 Fed. 662, 31 Am. Bankr. Rep. 270.

[210] American Bank of Alaska v. Johnson, 245 Fed. 312, 157 C. C. A. 504, 40 Am. Bankr. Rep. 502.

[211] Farrin v. Crawford, 2 N. B. R. 602, Fed. Cas. No. 4,686.

[212] Landry v. Andrews, 22 R. I. 597, 48 Atl. 1036; Arnold v. Knapp, 75 W. Va. 804, 84 S. E. 895.

[213] In re Hapgood, 2 Low. 200, Fed. Cas. No. 6,044.

Payment of a debt by the bankrupt after the filing of the petition in bankruptcy against him is unauthorized, and ordinarily the trustee is entitled to recover the amount paid; but if the debt was one wholly or in part enforceable as against the trustee, it is a proper exercise of discretion for the court to deny such recovery, either in whole or pro tanto.[214]

If the payment was made in total or partial discharge of a valid existing lien on property of the bankrupt, which would not have been disturbed by the bankruptcy proceedings, it cannot be considered a preference, because the assets available for general creditors are not thereby diminished. This has been ruled where the creditor merely held an inchoate lien,[215] and much more where the obligation is in the form of a valid mortgage.[216] But a mortgage or deed of trust never delivered as a subsisting obligation cannot excuse a payment by the mortgagor on the indebtedness covered thereby, which payment otherwise would be invalid as a preference.[217] And a creditor holding security for less than the amount of his claim cannot, if he knows the debtor to be insolvent, obtain a valid preferential payment of the unsecured part of his debt within four months before the adjudication in bankruptcy.[218]

Where insurance was effected on mortgaged property, and the proceeds thereof having been collected, a portion thereof was surrendered to the mortgagor, who had become bankrupt, that it might be repaid to the mortgagee in liquidation of an unsecured debt, it was held that the amount so relinquished at once became the property of the mortgagor, and when repaid constituted a preference.[219]

§ 588. **Payment or Transfer by Third Person.**—A payment received by a creditor of a bankrupt from a third person, which does not come out of the assets of the bankrupt, does not constitute a preference.[220] Thus, where, after the bankrupt had made an assignment for the benefit of his creditors, and just before bankruptcy proceedings were instituted against him, a firm of which he was a member paid an entire claim against him on which the firm was at most only partially liable, it was held that this payment did not constitute a preference.[221] So, payments

[214] Toof v. City Nat. Bank, 206 Fed. 250, 124 C. C. A. 118, 30 Am. Bankr. Rep. 79.

[215] In re Lynn Camp Coal Co., 168 Fed. 998, 22 Am. Bankr. Rep. 60.

[216] Stewart v. Hopkins, 30 Ohio St. 502. But compare Shutts v. First Nat. Bank, 98 Fed. 705, 3 Am. Bankr. Rep. 492.

[217] Page v. Rogers, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332, 21 Am. Bankr. Rep. 496.

[218] Claridge v. Evans, 137 Wis. 218, 118 N. W. 198, 803, 25 L. R. A. (N. S.) 144.

[219] Stearns Salt & Lumber Co. v. Hammond, 217 Fed. 559, 133 C. C. A. 411, 33 Am. Bankr. Rep. 484.

[220] Dressel v. North State Lumber Co., 119 Fed. 531, 9 Am. Bankr. Rep. 541; Mason v. National Herkimer County Bank, 172 Fed. 529, 97 C. C. A. 155, 22 Am. Bankr. Rep. 733; McKay v. Sperry Flour Co., 95 Wash. 209, 163 Pac. 377.

[221] In re Hines, 144 Fed. 543, 16 Am. Bankr. Rep. 495. And see Nestor v.

made by the wife of the bankrupt out of her separate estate in settlement of claims against him, though made within four months before his bankruptcy, are not preferential.[222] And where directors of a corporation borrow money, which is used by the corporation, and thereafter, when the corporation is insolvent, pay the debt with money which they borrow by giving their individual notes, secured by mortgage on their own property, there is no preference given by the corporation.[223] But where an insolvent trader conveys his stock to certain persons who are sureties on his note given to a bank, and the sureties, in consideration of the transfer, agree to pay the debt to the bank, the bank not participating in this arrangement, and not being paid by the sureties out of the proceeds of the property, there is a preference as to the sureties, but not as to the bank.[224] Payment is made by the bankrupt, within the meaning of the provisions of the Act relating to illegal preferences, when it is made under his authority or by his direction by his debtor to his creditor.[225] And in a case where the seller of property was originally entitled to the benefit of insurance placed on the property by the buyer, but this agreement had been superseded by the giving of a chattel mortgage, and afterwards the buyer became insolvent, it was held that a payment of the insurance money to the seller constituted a preference.[226]

§ 589. **Payments to Attorneys For Past or Future Services.**—The bankruptcy act provides that "if a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty, for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate." [227] It is therefore not unlawful for a person who expects to file his voluntary petition in bankruptcy, or expects that creditors will petition against him, to retain an attorney for the purpose of such proceedings, and to pay him in advance a reasonable fee for his services, or transfer property to him in compensation for such services or give him security for the payment of his fee.[228] This

Joseph (C. C. A.) 265 Fed. 246, 46 Am. Bankr. Rep. 5.

[222] Goode v. Elwood Lodge, 160 Ind. 251, 66 N. E. 742.

[223] Keegan v. Hamilton Nat. Bank, 163 Ind. 216, 71 N. E. 647.

[224] Horstman v. Little, 99 Tex. 530, 90 S. W. 1095.

[225] De Forest v. Crane & Ordway Co., 55 Mont. 489, 179 Pac. 291. And see Turnbull v. Potlatch Lumber Co. (Sup.) 181 N. Y. Supp. 56.

[226] Bunday v. Huntington, 224 Fed. 847, 140 C. C. A. 415.

[227] Bankruptcy Act 1898, § 60d. This does not apply to fees paid to an attorney by assignees under a general assignment made by the bankrupt prior to the bankruptcy proceedings. In re Geller (D. C.) 216 Fed. 558.

[228] In re Cummins, 196 Fed. 224, 28

does not constitute the giving of a preference, under the statute, to such attorney,[229] and the transaction will be valid as against the subsequent proceedings in bankruptcy, unless there was a fraudulent purpose to place assets out of the reach of the creditors,[230] or unless some party in interest objects to it and petitions to have the transaction examined by the court, in which case the question of the reasonableness of the fee paid is to be determined and the excess, if any, refunded.[231] But this part of the statute refers only to services rendered to the bankrupt prior to the commencement of the proceedings in bankruptcy.[232] Another section of the statute provides for the payment (as a priority claim) of "one reasonable attorney's fee, for services actually rendered ——— to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases as the court may allow."[233] But both of these provisions of the act refer only to such professional services as are rendered in aid of the bankruptcy proceedings and for the benefit of the creditors, or in the administration and distribution of the bankrupt's estate;[234] and they will not validate a transfer of an insolvent's property to an attorney in consideration of an agreement to negotiate with the creditors of the insolvent for a settlement of his difficulties without resort to the bankruptcy court, nor a payment or transfer of property for services to be performed in defending the bankrupt against anticipated criminal proceedings, which are not brought until after the filing of the petition in bankruptcy.[235] And although, in a case coming within the provisions of the statute, a transfer of property may be equally allowable as a payment of money, yet an agreement that the attorney shall take certain goods in payment for his services, where there is no actual delivery or change of possession, does not constitute a "transfer" of the property, and if the attorney takes possession of the goods after the adjudication, and therefore after they have

Am. Bankr. Rep. 385; Triplett v. Hanley, 1 Dill. 217, Fed. Cas. No. 14,179; Williams v. Pultze, 5 Ohio Dec. 503; Lyon v. Marshall, 11 Barb. (N. Y.) 241; Furth v. Stahl, 205 Pa. St. 439, 55 Atl. 29. Compare In re Evans, 3 N. B. R. 261, Fed. Cas. No. 4,552.

229 Swartz v. Frank, 183 Mo. 438, 82 S. W. 60.

230 Goodrich v. Wilson, 119 Mass. 429, 14 N. B. R. 555.

231 In re Morris, 125 Fed. 841, 11 Am. Bankr. Rep. 145; In re Porter, 253 Fed. 552, 165 C. C. A. 222.

232 Pratt v. Bothe, 130 Fed. 670, 65 C. C. A. 48, 12 Am. Bankr. Rep. 529.

233 Bankruptcy Act 1898, § 64b, 3.

234 A debtor's contract, made three days after a fire, with an attorney to collect the insurance, where the insurers questioned their liability, was a proceeding in the usual course of business, having no necessary relation to bankruptcy; and such contract could not of itself justify the conclusion that it was made "in contemplation of the filing of a petition" in bankruptcy, within the meaning of the Act, although a petition in bankruptcy was actually filed against the debtor five days after the payment to the attorney. Tripp v. Mitschrich, 211 Fed. 424, 128 C. C. A. 96, 31 Am. Bankr. Rep. 662.

235 In re Habegger, 139 Fed. 623, 71 C. C. A. 607, 3 Ann. Cas. 276, 15 Am. Bankr. Rep. 198.

passed ino the custody of the law, he must restore them.[236] As to a payment for legal services rendered in the past, and not relating to the bankruptcy proceedings, it stands on the same footing as a payment to any other creditor, and will be preferential in the same circumstances or under the same conditions,[237] unless the attorney has a lien on a particular fund or an agreement which amounts to an equitable assignment of it.[238]

§ 590. Set-Off or Adjustment of Mutual Accounts.—The bankruptcy law does not prevent parties from adjusting their mutual accounts or exercising a right of set-off which would belong to them even after the institution of bankruptcy proceedings.[239] Thus, the application by a bank of the amount standing to the credit of a depositor in his general account, subject to check, on a note of the depositor or other indebtedness to the bank, does not constitute a voidable preference, though made while the depositor was insolvent and within four months prior to his bankruptcy.[240] But this rule does not apply if the bank knew or had reasonable cause to believe that a preference was intended to be giv-

[236] In re Corbett (D. C.) 104 Fed. 872, 5 Am. Bankr. Rep. 224.

[237] Magee v. Fox, 229 Fed. 395, 143 C. C. A. 515, 36 Am. Bankr. Rep. 161; In re George W. Shiebler & Co. (D. C.) 163 Fed. 545, 20 Am. Bankr. Rep. 777.

[238] In re Coney Island Lumber Co. (D. C.) 199 Fed. 803, 34 Am. Bankr. Rep. 563; Van Slyke v. Huntington (C. C. A.) 265 Fed. 86, 45 Am. Bankr. Rep. 173.

[239] See Gleason v. Bush, 100 Misc. Rep. 608, 166 N. Y. Supp. 321; Putnam v. United States Trust Co., 223 Mass. 199, 111 N. E. 969.

[240] Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co., 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268, 30 Am. Bankr. Rep. 624; Studley v. Boylston Nat. Bank, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313, 30 Am. Bankr. Rep. 161; New York County Nat. Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, 11 Am. Bankr. Rep. 42; In re Cross (C. C. A.) 273 Fed. 39, 46 Am. Bankr. Rep. 727; In re Cross (D. C.) 265 Fed. 769, 45 Am. Bankr. Rep. 695; In re Looschen Piano Case Co. (D. C.) 259 Fed. 931, 43 Am. Bankr. Rep. 733; American Bank of Alaska v. Johnson, 245 Fed. 312, 157 C. C. A. 504, 40 Am. Bankr. Rep. 502; Fourth Nat. Bank of Wichita v. Smith, 240 Fed. 19, 153 C. C. A. 55, 38 Am. Bankr. Rep. 771; American Bank & Trust Co. v. Coppard, 227 Fed. 597, 142 C. C. A. 229, 35 Am. Bankr. Rep. 742; In re Radley Steel Const. Co. (D. C.) 212 Fed. 462; Johnson v. American Bank, 5 Alaska, 145; Chicago Title & Trust Co. v. Federal Trust & Sav. Bank, 192 Fed. 967; In re Wright-Dana Hardware Co., 207 Fed. 636; Tomlinson v. Bank of Lexington, 145 Fed. 824, 76 C. C. A. 400, 16 Am. Bankr. Rep. 632; In re George M. Hill Co., 130 Fed. 315, 64 C. C. A. 561, 66 L. R. A. 68, 12 Am. Bankr. Rep. 221; In re Scherzer, 130 Fed. 631, 12 Am. Bankr. Rep. 451; Robinson v. Wisconsin, M. & F. Ins. Co. Bank, 9 Biss. 117, 18 N. B. R. 243, Fed. Cas. No. 11,969; Habegger v. First Nat. Bank, 94 Minn. 445, 103 N. W. 216, 110 Am. St. Rep. 379; Cox v. First Nat. Bank, 126 La. 88, 52 South. 227; Booth v. Prete, 81 Conn. 636, 71 Atl. 938, 20 L. R. A. (N. S.) 863, 15 Ann. Cas. 306; West v. Bank of Lahoma, 16 Okl. 328, 85 Pac. 469; Conner v. First Nat. Bank (Wash.) 194 Pac. 562; Parker v. First Nat. Bank, 89 Vt. 69, 94 Atl. 1; Putnam v. United States Trust Co., 223 Mass. 199, 111 N. E. 969; Wrenn v. Citizens' Nat. Bank (Conn.) 114 Atl. 120. Contra. In re Kellar, 110 Fed. 348, 6 Am. Bankr. Rep. 621. And see Evans v. National Broadway Bank, 48 Misc. Rep. 248, 96 N. Y. Supp. 789; In re Starkweather & Albert, 206 Fed. 797, 30 Am. Bankr. Rep. 743.

en,[241] or if it appears that there was an intent on the part of the bank to accumulate funds of the bankrupt in its possession for its own ultimate security, or that there was any restriction imposed by it on the bankrupt's withdrawal of such funds, or an appropriation of such funds by the bank towards the payment of its claim,[242] or if the deposit was made for a special purpose and therefore did not create the relation of debtor and creditor, but that of bailor and bailee,[243] or if the claim was assigned with knowledge of insolvency and for the express purpose of being used as a set-off in expected bankruptcy proceedings.[244] And so, where a bank, to which the bankrupt was largely indebted on the day the latter became insolvent, closed its account and credited the balance, including a deposit just made, on the bankrupt's indebtedness to it, such deposit amounted to a payment pro tanto of the loan, and its application an unlawful preference.[245] And where a depositor's debt to the bank exceeds the amount standing to his credit, and he settles by giving the bank a check for the amount of such credit balance and cash for the remainder of the debt, the payment in cash will be a fraudulent preference, though the giving of the check may not.[246] On the same principle it is held that a bank which receives from a clearing house association the proceeds of checks presented for clearing by a member short-

[241] First Nat. Bank of El Centro v. Harper, 254 Fed. 641, 166 C. C. A. 139, 43 Am. Bankr. Rep. 82; In re Fairburn Oil & Fertilizer Co. (D. C.) 240 Fed. 835, 39 Am. Bankr. Rep. 211; Ridge Avenue Bank v. Studheim, 145 Fed. 798, 76 C. C. A. 362, 16 Am. Bankr. Rep. 863; Ernst v. Mechanics' & Metals Nat. Bank, 201 Fed. 664, 120 C. C. A. 92, 29 Am. Bankr. Rep. 289; In re Warner, 5 N. B. R. 414, Fed. Cas. No. 17,177; Knoll v. Commercial Trust Co., 249 Pa. 197, 94 Atl. 750, L. R. A. 1916A, 683, Ann. Cas. 1916C, 988. Payment by a bankrupt of notes held by a bank on which he was indorser, a few days before the bankruptcy and before their maturity, by a check on his deposit in such bank, is not valid as a set-off, but is a voidable preference. Heyman v. Third Nat. Bank (D. C.) 216 Fed. 685. The payment of the proceeds of checks by a bankrupt directly to a bank, with the intention of extinguishing a pre-existing indebtedness (a note owed to the bank) and without having such proceeds credited to his account, is voidable as a preference. Chisholm v. First Nat. Bank, 206 Ill. App. 493.

[242] In re National Lumber Co., 212 Fed. 928, 129 C. C. A. 448; In re Percy Ford Co. (D. C.) 199 Fed. 334, 28 Am. Bankr. Rep. 919; Johnson v. Gratiot County State Bank, 193 Mich. 452, 160 N. W. 544.

[243] Continental & Commercial Trust & Sav. Bank v. Chicago Title & Trust Co. (C. C. A.) 199 Fed. 704. But see this case on appeal, 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268, 30 Am. Bankr. Rep. 624.

[244] In re Shults, 132 Fed. 573, 13 Am. Bankr. Rep. 84.

[245] Ernst v. Mechanics' & Metals Nat. Bank (D. C.) 200 Fed. 295.

[246] Hough v. First Nat. Bank, 4 Biss. 349, Fed. Cas. No. 6,721. And see Farmers' State Bank v. Freeman, 249 Fed. 579, 161 C. C. A. 505, 41 Am. Bankr. Rep. 286. Where a bank, holding its depositor's demand note, on discovering that his financial condition was unsatisfactory, demanded a check for the amount of the deposit, and on receiving it, canceled the note, and took a new note for the amount due, less the deposit, the transaction was held a payment to the bank and a voidable preference, and not an exercise of the right of set-off. In re Cross (D. C.) 265 Fed. 769, 45 Am. Bankr. Rep. 695.

ly before suspending payment, cannot escape liability to account to the estate in bankruptcy of the defaulting member, where the clearing house, in revising the day's clearings because of such suspension, eliminated and returned the checks which had been debited against the defaulting, member, on the theory that, under the doctrine of rescission and following of trust funds, the bank had the right to appropriate any property of the defaulting member and apply it to the reduction of an advance of currency made on that day, especially where such currency was paid out by such defaulting member over its counter to its customers;[247] nor is the transaction any the less a preference because the clearing house, under its rules, might have called on its other members to pay pro rata the amount of the checks drawn upon the defaulting member, and might have treated the credits in favor of the defaulting member as belonging proportionally to the contributing members, since, even under these rules, a check which was the result of the clearings of the previous day would not be entitled to participation.[248] So also, the trustee in bankruptcy can recover the amount of a check given by the bankrupt in good faith before the adjudication in bankruptcy, but which was deposited in a bank other than the one on which it was drawn, and not presented to the drawee bank until after the adjudication.[249]

§ 591. **Partial Payments on Running Accounts.**—The provisions of the bankruptcy act relating to preferences are not so construed as to require a creditor to surrender partial payments received by him on account in the usual course of business where the transactions covered by the account between the parties, taken together, result in increasing the net indebtedness to the creditor and correspondingly increasing the bankrupt's estate.[250] Thus, payments made on an open account, though within four months of the debtor's adjudication in bankruptcy, which are received in good faith and without the creditor having knowledge of the debtor's insolvency, and which are less in amount than the credit sales made by such creditor to the debtor during that period, do not constitute a preference within the meaning of the bankruptcy law.[251] This

[247] Rector v. Commercial Nat. Bank, 200 U. S. 420, 26 Sup. Ct. 294, 50 L. Ed. 533, 15 Am. Bankr. Rep. 347.

[248] Rector v. City Deposit Bank Co., 200 U. S. 405, 26 Sup. Ct. 289, 50 L. Ed. 527, 15 Am. Bankr. Rep. 336.

[249] Edison Electric Illuminating Co. v. Tibbetts, 241 Fed. 468, 154 C. C. A. 300, 39 Am. Bankr. Rep. 640.

[250] In re Dickson, 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349, 7 Am. Bankr. Rep. 186; In re Sagor, 121 Fed. 658, 57 C. C. A. 412, 9 Am. Bankr. Rep. 361; Kimball v. E. A. Rosenham Co., 114 Fed. 85, 52 C. C. A. 33, 7 Am. Bankr. Rep. 718; C. S. Morey Mercantile Co. v. Schiffer, 114 Fed. 447, 52 C. C. A. 249, 7 Am. Bankr. Rep. 670; Butterfield v. Woodman, 223 Fed. 956, 139 C. C. A. 436, 34 Am. Bankr. Rep. 510; Dunlap v. Seattle Nat. Bank, 93 Wash. 568, 161 Pac. 364. Compare In re Arndt, 104 Fed. 234, 4 Am. Bankr. Rep. 773.

[251] Jaquith v. Alden, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717, 9 Am. Bankr. Rep. 773; Yaple v. Dahl-Millikan

rule has been applied in a case involving transactions between a stockbroker (the bankrupt) and a customer. Four months before the adjudication, the broker was indebted to the customer to the extent of $1,550, and afterwards he was employed to purchase and carry stocks on a margin, receiving considerable sums of money from the customer, and paying him considerable, but less, sums as profits on his operations. At the date of the adjudication, the bankrupt owed the customer $6,500. It was held that no injustice would be done in this case by treating the parties simply as debtor and creditor, and as the effect of the whole series of transactions was to increase the net indebtedness to the customer, and presumably to increase the bankrupt's estate, the customer was not in the position of one who had received a voidable preference.[252]

But payments made by an insolvent person to his landlord within four months of his adjudication in bankruptcy, and applied by the landlord, not to rent for the current year, but to rent in arrears, constitute a preference.[253]

§ 592. Time of Giving Preference.—A preference given to a creditor, whether in the form of a payment, transfer of property, or security, is not contrary to the bankruptcy law unless given within four months before the filing of the petition in bankruptcy, or after the filing of the petition and before the adjudication. If it antedates that period, it is not impeachable in the subsequent bankruptcy of the debtor, nor can the creditor be required to surrender it.[254]

Grocery Co., 193 U. S. 526, 24 Sup. Ct. 552, 48 L. Ed. 776, 11 Am. Bankr. Rep. 596; Jaquith v. Alden, 118 Fed. 270, 55 C. C. A. 364, 9 Am. Bankr. Rep. 165.

[252] In re Topliff, 114 Fed. 323, 8 Am. Bankr. Rep. 141. Compare In re Gaylord, 113 Fed. 131, 7 Am. Bankr. Rep. 577.

[253] In re Louis J. Bergdoll Motor Co. (D. C.) 225 Fed. 87, 35 Am. Bankr. Rep. 32.

[254] Atherton v. Beaman (C. C. A.) 264 Fed. 878, 45 Am. Bankr. Rep. 212; In re Baird (D. C.) 245 Fed. 504, 40 Am. Bankr. Rep. 552; In re Martinez (D. C.) 223 Fed. 433, 35 Am. Bankr. Rep. 166; Hagar v. Watt (D. C.) 232 Fed. 373, 36 Am. Bankr. Rep. 370; Sturdivant Bank v. Schade, 195 Fed. 188, 115 C. C. A. 140, 27 Am. Bankr. Rep. 673; Jackson v. Sedgwick, 189 Fed. 508, 26 Am. Bankr. Rep. 836; In re Arden, 188 Fed. 475, 26 Am Bankr. Rep. 684; In re Farrell, 176 Fed. 505, 100 C. C. A. 63, 23 Am. Bankr. Rep. 826; Wood v. United States Fidelity & Guaranty Co., 143 Fed. 424, 16 Am. Bankr. Rep. 21; In re Kindt, 101 Fed. 107, 4 Am. Bankr. Rep. 148; In re Terrill, 100 Fed. 778, 4 Am. Bankr. Rep. 145; In re Wise, 2 Nat. Bankr. News, 151; Maurer v. Frantz, 4 N. B. R. 431; Ashby v. Steere, 2 Woodb. & M. 347, Fed. Cas. No. 576; Pratt v. Christie, 95 App. Div. 282, 88 N. Y. Supp. 585; Joseph v. Raff, 82 App. Div. 47, 81 N. Y. Supp. 546; Brown v. City Nat. Bank, 72 Misc. Rep. 201, 131 N. Y. Supp. 92; McKay v. Weager, 134 N. Y. Supp. 66; Hurlbutt v. Brown, 72 N. H. 235, 55 Atl. 1046; Aretz v. Kloos, 89 Minn. 432, 95 N. W. 216, 769; Hawes v. Bank of Elberton, 124 Ga. 567, 52 S. E. 922; Beatty v. Dudley, 80 Ky. 381; Farmers' Nat. Bank v. Slaton, 180 Ky. 700, 203 S. W. 565; Arbury v. De Niord (Sup.) 152 N. Y. Supp. 763; Tube City Min. & Mill Co. v. Otterson, 16 Ariz. 305, 146 Pac. 203, L. R. A. 1916E, 303. As to the validity of renewals of liens or securities, see Brent v. Simpson, 238 Fed. 285, 151 C. C. A. 301, 38 Am. Bankr. Rep. 813; Stockgrowers' State Bank v. Corker, 220

According to the prevailing opinion, a preference given to a creditor by means of a note or bond with warrant of attorney to confess judgment, is given, not when the note and warrant are executed and delivered, but when the warrant is executed by the entry of a judgment thereon and the levy of an execution on the debtor's property. Hence if judgment is entered on such a warrant within four months before bankruptcy, under circumstances making it fraudulent or preferential, it is not saved by the fact that the warrant may have been given any length of time before.[255] But there are some highly respectable authorities to the contrary.[256] Where the alleged preference consists of the giving of security in the nature of a mortgage, its liability to be avoided in subsequent bankruptcy proceedings may depend upon the date when it was recorded.[257] But aside from this question, it may be stated as a general rule that a mortgage, pledge, or bill of sale of chattels takes effect from the time it is given, rather than from the time when the mortgagee or pledgee takes possession of the goods. Hence if the security was valid when given (at least as between the parties), and was given more than four months before the institution of bankruptcy proceedings against the mortgagor or pledgor, it cannot be assailed as a preference merely because the act of the secured creditor in taking possession occurred within that period, but such act will be considered as relating back to the inception of the lien.[258] Likewise, an agreement to pledge collaterals as security, or to assign a claim against a third person, a particular fund, or the like, may constitute an equitable assignment thereof, and if so, will take effect, so far as regards this provi-

Fed. 614, 136 C. C. A. 222, 34 Am. Bankr. Rep. 392.

[255] In re Moyer, 93 Fed. 188, 1 Am. Bankr. Rep. 577; Hood v. Karner, 8 Phila. (Pa.) 160, 5 N. B. R. 348, Fed. Cas. No. 6,664; Golson v. Niehoff, 2 Biss. 434, 5 N. B. R. 56, Fed. Cas. No. 5,524; In re Lord, 5 N. B. R. 318, Fed. Cas. No. 8,503; Ford v. Keys, Fed. Cas. No. 4,933.

[256] Balfour v. Wheeler, 18 Fed. 893; Field v. Baker, 12 Blatchf. 438, 11 N. B. R. 415, Fed. Cas. No. 4,762; Shimer v. Huber, 14 Phila. (Pa.) 402, 19 N. B. R. 414, Fed. Cas. No. 12,787; Lonergan v. Fenlon, Fed. Cas. No. 8,475.

[257] See infra, § 594. And see In re Cahill (D. C.) 208 Fed. 193, 30 Am. Bankr. Rep. 794.

[258] Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, 13 Am. Bankr. Rep. 437; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956, 14 Am. Bankr. Rep. 74; In re East End Mantel & Tile Co., 202 Fed. 275, 29 Am. Bankr. Rep. 793; First Nat. Bank v. Lanz, 202 Fed. 117, 29 Am. Bankr. Rep. 247; Fisher v. Zollinger, 149 Fed. 54, 79 C. C. A. 76; In re National Valve Co., 140 Fed. 679, 15 Am. Bankr. Rep. 524; In re Rogers & Woodward, 132 Fed. 560, 13 Am. Bankr. Rep. 75; In re Automobile Livery Service Co., 176 Fed. 792, 23 Am. Bankr. Rep. 799; Thompson v. Fairbanks, 75 Vt. 361, 56 Atl. 11, 104 Am. St. Rep. 899; Woods v. Klein, 223 Pa. St. 256, 72 Atl. 523; Christ v. Zehner, 212 Pa. St. 188, 61 Atl. 822; Farnham v. Friedmeyer, 109 Ill. App. 54; Coggan v. Ward, 215 Mass. 13, 102 N. E. 336; Kettenbach v. Walker, 32 Idaho, 544, 186 Pac. 912. But see In re Ball, 123 Fed. 164, 10 Am. Bankr. Rep. 564; Landis v. McDonald, 88 Mo. App. 335; In re Klingaman, 101 Fed. 691, 4 Am. Bankr. Rep. 254.

sion of the bankruptcy law, from the date of the agreement and not from the time of the actual delivery or formal pledge of the subject-matter.[259] But to constitute an equitable assignment within this rule there must be something more than a mere promise to assign upon a future contingency, something, in fact, sufficient to bind the parties in a court of chancery and to justify the application of the rule that equity will regard that as done which ought to have been done.[260] An agreement to give a mortgage, if definite and certain and relating to specific property, will be held in equity as equivalent to an actual mortgage, and may be sustained in the bankruptcy proceedings though actually executed within the four months period.[261] So also, where the mortgage first offered to the creditor was rejected by him because considered defective in form, a subsequent mortgage accepted and delivered will relate back to the former.[262] And where there was a valid transfer of goods by the bankrupt to a creditor in payment of the debt, sufficient to pass title, more than four months before the bankruptcy, the rights of the creditor will not be affected by the fact that the debtor, within the four months, entertaining a doubt as to the validity of the transaction, attempted to perfect it by filing a claim of exemption with reference to the goods transferred and then executing a bill of sale to the creditor.[263] But a transfer of property by a corporation as security for a past indebtedness, within four months prior to

[259] McDonald v. Daskam, 116 Fed. 276, 63 C. C. A. 554, 8 Am. Bankr. Rep. 543; Godwin v. Murchison Nat. Bank, 145 N. C. 320, 59 S. E. 154, 17 L. R. A. (N. S.) 935; Gage Lumber Co. v. McEldowney, 207 Fed. 255, 124 C. C. A. 641, 30 Am. Bankr. Rep. 251; In re Cotton Manufacturers' Sales Co. (D. C.) 209 Fed. 629; Britton v. Union Inv. Co. (C. C. A.) 262 Fed. 111, 44 Am. Bankr. Rep. 531; Wiener v. Union Trust Co. (D. C.) 261 Fed. 709, 44 Am. Bankr. Rep. 610. An agreement made more than four months before bankruptcy, by which a fund was created for the payment of claims against the bankrupt, may create an equitable lien in favor of a claimant, the payment of which within the four months would not operate as a preference. Root Mfg. Co. v. Johnson, 219 Fed. 397, 135 C. C. A. 139, 34 Am. Bankr. Rep. 247.

[260] Grandison v. National Bank of Commerce, 231 Fed. 800, 145 C. C. A. 620, 36 Am. Bankr. Rep. 438; First Nat. Bank v. Yerkes, 238 Fed. 278, 151 C. C. A. 294, 38 Am. Bankr. Rep. 136; Johnston v. Huff, Andrews & Moyler Co., 133 Fed. 704, 66 C. C. A. 534, 13 Am. Bankr. Rep. 287; Long v. Farmers' State Bank, 147 Fed. 360, 77 C. C. A. 538, 9 L. R. A. (N. S.) 585, 17 Am. Bankr. Rep. 103. A lien on part of the raw material used in a factory was held not to support an assignment to the holder of all of the accounts or finished products sold, made within four months prior to bankruptcy of the manufacturer. Merchants' Nat. Bank v. Corr, 221 Fed. 419, 137 C. C. A. 217, 34 Am. Bankr. Rep. 527.

[261] Murray v. Beal, 23 Utah, 548, 65 Pac. 726. Compare Lathrop Bank v. Holland, 205 Fed. 143, 123 C. C. A. 375, 30 Am. Bankr. Rep. 62.

[262] In re Montgomery, 12 N. B. R. 321, Fed. Cas. No. 9,732. But mortgages promised and given more than four months before bankruptcy for a present consideration have been held voidable preferences where they were not acknowledged until within the four months. In re Caslon Press, 229 Fed. 133, 143 C. C. A. 409, 36 Am. Bankr. Rep. 127.

[263] In re Ratliffe (D. C.) 177 Fed. 587.

its bankruptcy, when it was insolvent and the creditor had reason to believe it insolvent, is voidable as a preference, even though such transfer was made in ratification of an unauthorized transfer made by an officer of the corporation before the four months period.[264]

Where the alleged preference is a payment in money, the date is fixed by its receipt by the creditor, rather than by any prior promise or agreement to pay. Thus, where the bankrupt gave his note to a creditor, which he afterwards paid, the preference, if any, is in the payment and not in the giving of the note, and must be considered as having been given at the date of such payment.[265] But where a note of the bankrupt, payable at a bank, was presented to the bank for payment on the day of its maturity, and was duly certified, and subsequently paid by the bank, the time of certification is to be taken as the time of payment, in determining whether the payment was preferential.[266] But the fact that accounts assigned by the bankrupt to a creditor as collateral security more than four months before the bankruptcy are collected within the four months period, does not entitle the trustee to recover such collections as preferences.[267] And where a debtor makes an absolute sale of property, under an agreement that the purchase money shall be applied by the vendee in paying the claims of certain creditors of the seller, the time of giving a preference, if any, is the time when the buyer takes possession of the property, and not the time when he pays those creditors.[268] A secret advantage given by a debtor to one creditor in a composition, made several years prior to the debtor's bankruptcy, cannot be reached and avoided as a preference under the present bankruptcy statute.[269]

§ 593. Same; Time of Filing Petition.—The four months period within which preferences given by a bankrupt may be declared void is to be determined by computing four calendar months backward from the date of the filing of the petition in bankruptcy, and not by comput-

[264] In re W. W. Mills Co., 162 Fed. 42, 20 Am. Bankr. Rep. 501; In re Kansas City Stone & Marble Mfg. Co., 9 N. B. R. 76, Fed. Cas. No. 7,610.

[265] In re Wolf & Levy, 122 Fed. 127, 10 Am. Bankr. Rep. 153.

[266] In re Frazin, 201 Fed. 86, 29 Am. Bankr. Rep. 214.

[267] Lowell v. International Trust Co., 158 Fed. 781, 86 C. C. A. 137, 19 Am. Bankr. Rep. 853; In re Bird, 180 Fed. 229, 25 Am. Bankr. Rep. 24. A garnishment lien cannot be tacked to the lien of an execution issued on a judgment against defendant, and levied upon the indebtedness owing the garnishee, so as to make out the four-month period. Marsh v. Wilson Bros., 124 Minn. 254, 144 N. W. 959.

[268] Fitch v. Bank of Grand Rapids, 146 Wis. 439, 131 N. W. 1095.

[269] Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 355, 58 C. C. A. 517, 10 Am. Bankr. Rep. 641. But compare In re Chaplin, 115 Fed. 162, 8 Am. Bankr. Rep. 121.

ing the time by days.[270] And either the day on which the transfer or payment was made, or the day on which the petition was filed, must be excluded.[271] Amendments to a petition in involuntary bankruptcy filed by a single creditor or by an insufficient number of creditors, whereby other creditors join in the petition and set out their claims, relate back to the original filing of the petition, and do not advance the date of its filing, with reference to reckoning the prohibited period for preferences, though such joinder of creditors was necessary to make it sufficient.[272] But if the petition originally filed was void, as, for instance, because the creditors joining in it were estopped or disqualified to do so, an intervening petition subsequently filed by duly qualified creditors can draw no support from it, and hence payments made more than four months before the filing of the intervening petition, though within four months before the first petition, are not preferential.[273] A transfer of property made on the same day on which the petition in bankruptcy is filed will constitute an unlawful preference, if the other essentials of a preference are present.[274] But under the former statutes, a payment or other disposition of property by the debtor after the filing of the petition was not regarded as a preference, but was held void as an unlawful meddling with property already constructively in the custody of the law.[275] But this point is covered by the present statute, which makes a preference voidable if given "after the filing of the petition and before the adjudication."[276] And it will be observed that "adjudication," with respect to the time, means the date of the entry of a decree that the defendant is a bankrupt, or, if such decree is appealed from, then the date when such decree is finally confirmed.[277]

§ 594. **Same; Time of Recording or Filing Lien.**—The bankruptcy act provides that, "where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."[278] Another provision of the statute, relating

[270] Kelly v. Skaggs, 90 Ill. App. 543. And see Rubenstein v. Lottow, 223 Mass. 227, 111 N. E. 973.

[271] Dutcher v. Wright, 94 U. S. 553, 24 L. Ed. 130; Kelly v. Skaggs, 90 Ill. App. 543; Whitley Grocery Co. v. Roach, 115 Ga. 918, 42 S. E. 282.

[272] First State Bank v. Haswell, 174 Fed. 209, 98 C. C. A. 217, 23 Am. Bankr. Rep. 330; Manning v. Evans, 156 Fed. 106, 19 Am. Bankr. Rep. 217. See Witters v. Sowles, 32 Fed. 758.

[273] Despres v. Galbraith, 213 Fed. 190, 129 C. C. A. 534, 32 Am. Bankr. Rep. 170.

[274] Keller v. Falckney, 42 Tex. Civ. App. 483, 94 S. W. 103; Morse v. Godfrey, 3 Story, 364, Fed. Cas. No. 9,856.

[275] In re Randall, 1 Sawy. 56, Fed. Cas. No. 11,552.

[276] Bankruptcy Act 1898, § 60a.

[277] Bankruptcy Act 1898, § 1, cl. 2.

[278] Bankruptcy Act 1898, § 60a. And see Carey v. Donohue, 209 Fed. 328, 126 C. C. A. 254, 31 Am. Bankr. Rep. 210; In

to the four months period after the commission of an act of bankruptcy within which the petition may be filed, declares that if the act of bankruptcy is the giving of a preference, the time shall not expire until four months after the recording or registering thereof "if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment." [279] But these two provisions are entirely independent and do not in any way limit or control each other.[280] Under the former bankruptcy laws it was held that a chattel mortgage given to secure a creditor more than four months before a petition in bankruptcy was filed, but kept off the record until within the four months, was not a fraudulent preference, for the limitation began to run from the time the security was given, and not from the time when creditors might have notice of it.[281] But it will be perceived that this is distinctly changed by the present statute.

There has been some difficulty in determining when the recording or registering of a transfer is "required by law" within the meaning of this provision. Some cases have held that the word "required" has reference to the character of the instrument of transfer required to be recorded by the state law, rather than to the particular individuals who, by reason of adventitious circumstances, may or may not be affected by an unrecorded instrument,[282] and that a state statute which requires a conveyance or transfer to be recorded in order to be effectual against any class or classes of persons is a law by which such recording is "required," [283] or that a law may "require" a chattel mortgage to be recorded although it does not make an unrecorded mortgage void absolutely and under all circumstances.[284] But there is strong authority in support of the rule that, where the local law is such that failure to file or record a chattel mort-

re Alden (D. C.) 233 Fed. 160, 37 Am. Bankr. Rep. 611.

[279] Bankruptcy Act 1898, § 3b. And see Williams v. German-American Trust Co., 219 Fed. 507, 135 C. C. A. 257, 33 Am. Bankr. Rep. 600; Staples v. Warren, 46 App. D. C. 363.

[280] Little v. Holley-Brooks Hardware Co., 133 Fed. 874, 67 C. C. A. 46, 13 Am. Bankr. Rep. 422. And see Murphy v. W. T. Murphy & Co., 126 Iowa, 57, 101 N. W. 486; Asbury Park Building & Loan Ass'n v. Shepherd (N. J. Eq.) 50 Atl. 65.

[281] Matthews v. Westphal, 1 McCrary, 446, 48 Fed. 664; Gilbert v. Vail, 60 Vt. 261, 14 Atl. 542. And see Miller v. Shriver, 197 Pa. St. 191, 46 Atl. 926; Babbitt v. Kelly, 96 Mo. App. 529, 70 S. W. 384; National Bank of Fredericksburg v. Conway, 1 Hughes, 37, 14 N. B. R. 175, Fed. Cas. No. 10,037; Rogers v. Page, 140 Fed. 596, 72 C. C. A. 164, 15 Am. Bankr. Rep. 502.

[282] First Nat. Bank v. Connett, 142 Fed. 33, 73 C. C. A. 219, 15 Am. Bankr. Rep. 662.

[283] Loeser v. Savings Deposit Bank & Trust Co., 148 Fed. 975, 78 C. C. A. 597, 17 Am. Bankr. Rep. 628; Bowler v. First Nat. Bank, 21 S. D. 449, 113 N. W. 618, 130 Am. St. Rep. 725.

[284] First Nat. Bank v. Connett, 142 Fed. 33, 73 C. C. A. 219, 15 Am. Bankr. Rep. 662.

gage or other such instrument does not affect its validity as between the parties or as against general creditors, but only as against creditors having a lien or subsequent purchasers or incumbrancers in good faith, the mortgage is not one which is "required" to be recorded or filed.[285]

This provision of the statute applies ordinarily to such instruments as deeds of conveyance,[286] deeds of trust in the nature of mortgages,[287] chattel mortgages,[288] and bills of sale of chattels.[289] But it does not apply to the lien given by an oral chattel mortgage,[290] nor to a conveyance of real estate absolute on its face but intended as a security, where the local law prohibits such a deed from being reduced to a mortgage except by a defeasance in writing, signed, sealed, and delivered by the grantor at the same time and recorded within sixty days.[291] And where a contract providing for the execution of a trust deed to secure bonds of a corporation given for advances is not recorded, a trust deed executed pursuant to such contract within four months prior to the institution of bankruptcy proceedings cannot take effect by relation as of the date of the contract in order to sustain the same as against unsecured creditors.[292]

The only effect of the provision concerning the recording or registering of a transfer is to carry forward the four months period within which a recordable transfer, which was in fact preferential, might be attacked as voidable, leaving the question whether or not the transfer constituted a voidable preference to be determined according to the conditions and intentions of the parties at the date when it was actually made; and a

[285] Bailey v. Baker Ice Mach. Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275, 35 Am. Bankr. Rep. 814; Bonner v. First Nat. Bank, 248 Fed. 692, 160 C. C. A. 592, 41 Am. Bankr. Rep. 60; Hoshaw v. Cosgriff, 247 Fed. 22, 159 C. C. A. 240, 40 Am. Bankr. Rep. 694; In re Roberts (D. C.) 227 Fed. 177, 36 Am. Bankr. Rep. 137; Deupree v. Watson, 216 Fed. 483, 132 C. C. A. 543; In re Boyd, 213 Fed. 774, 130 C. C. A. 288, 32 Am. Bankr. Rep. 548; In re Jacobson & Perrill (D. C.) 200 Fed. 812, 29 Am. Bankr. Rep. 603; Rogers v. Page, 140 Fed. 596, 72 C. C. A. 164, 15 Am. Bankr. Rep. 502; Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240, 14 Am. Bankr. Rep. 477; In re Hunt, 139 Fed. 283; In re Chadwick (D. C.) 140 Fed. 674, 15 Am. Bankr. Rep. 528; Wooldridge v. Williams, 5 Alaska, 149; Pew v. Price, 251 Mo. 614, 158 S. W. 338. Compare Loeser v. Savings Deposit Bank & Trust Co., 148 Fed. 975, 78 C. C. A. 597, 17 Am. Bankr. Rep. 628. And see First Nat. Bank v. Connett, 142 Fed. 33, 73 C. C. A. 219, 15 Am. Bankr. Rep. 662; In re Montague, 143 Fed. 428, 16 Am. Bankr. Rep. 18.

[286] Ragan v. Donovan, 189 Fed. 138, 26 Am. Bankr. Rep. 311; In re Cahill, 208 Fed. 193, 30 Am. Bankr. Rep. 794.

[287] Harris v. Exchange Nat. Bank, 4 Dill. 133, 14 N. B. R. 510, Fed. Cas. No. 6,119. And see Marsh v. Leseman, 242 Fed. 484, 155 C. C. A. 260, 40 Am. Bankr. Rep. 97.

[288] In re Mission Fixture & Mantel Co. (D. C.) 180 Fed. 263, 24 Am. Bankr. Rep. 873; First Nat. Bank v. Johnson, 68 Neb. 641, 94 N. W. 837, 4 Ann. Cas. 485.

[289] In re Reynolds, 153 Fed. 295, 18 Am. Bankr. Rep. 666. But see Coggan v. Ward, 215 Mass. 13, 102 N. E. 336.

[290] Mower v. McCarthy, 79 Vt. 142, 64 Atl. 578, 7 L. R. A. (N. S.) 418, 118 Am. St. Rep. 942.

[291] English v. Ross, 140 Fed. 630, 15 Am. Bankr. Rep. 370.

[292] Morgan v. First Nat. Bank, 145 Fed. 466, 76 C. C. A. 236, 16 Am. Bankr. Rep. 639.

transfer which was then made for a present consideration, and was therefore not preferential, does not become so because of delay in recording it; in other words, delay in placing the instrument on the record does not warrant the court in treating it as if made as security for an antecedent debt.[293] And it has been decided by a learned court in an able opinion that this rule is not affected by the amendment of 1910, changing the wording of this section of the statute.[294] It may perhaps be conceded that this is true in the case where a present and adequate consideration was given at the time the transfer was made. But in all other cases the amendment explicitly provides that a transfer shall be voidable as preferential if "at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer," the bankrupt shall be insolvent, and if the transfer shall "then" operate as a preference, and the person receiving it shall "then" have reasonable cause to believe that its enforcement will effect a preference.[295]

§ 595. Insolvency of Debtor.—In order that a judgment rendered against a debtor, or a transfer of property or payment of money made by him, should operate as a voidable preference, it is essential that he should have been insolvent, for if solvent he has the right to give voluntary satisfaction to any one or more of his creditors, leaving the others to their legal remedies.[296] But the amendatory act of 1910 so far changes this

[293] Martin v. Commercial Nat. Bank, 228 Fed. 651, 143 C. C. A. 173, 36 Am. Bankr. Rep. 25; Big Four Implement Co. v. Wright, 207 Fed. 535, 125 C. C. A. 577, 47 L. R. A. (N. S.) 1223, 31 Am. Bankr. Rep. 125. In re Watson, 201 Fed. 962, 30 Am. Bankr. Rep. 871; Debus v. Yates, 193 Fed. 427, 30 Am. Bankr. Rep. 823; In re Jackson Brick & Tile Co., 189 Fed. 636, 26 Am. Bankr. Rep. 915; In re Sturtevant, 188 Fed. 196, 110 C. C. A. 68, 26 Am. Bankr. Rep. 574; Mattley v. Giesler, 187 Fed. 970, 110 C. C. A. 90, 26 Am. Bankr. Rep. 116; In re Sayed, 185 Fed. 962, 26 Am. Bankr. Rep. 444; Seager v. Lamm, 95 Minn. 325, 104 N. W. 1; Bradley, Clark & Co. v. Benson, 93 Minn. 91, 100 N. W. 670; Farnham v. Friedmeyer, 109 Ill. App. 54; Claridge v. Evans, 137 Wis. 218, 118 N. W. 198, 803, 25 L. R. A. (N. S.) 144; Gray & Dudley Hardware Co. v. Guthrie, 200 Ala. 6, 75 South. 318.

[294] In re Watson, 201 Fed. 962, 30 Am. Bankr. Rep. 871. And see Martin v. Commercial Nat. Bank, 228 Fed. 651, 143 C. C. A. 173, 36 Am. Bankr. Rep. 25; Brigman v. Covington, 219 Fed. 500, 135 C. C. A. 250, 33 Am. Bankr. Rep. 644.

[295] Bankruptcy Act 1898, § 60b, as amended by Act Cong. June 25, 1910, 36 Stat. 838. And see In re T. H. Bunch Commission Co. (D. C.) 225 Fed. 243, 35 Am. Bankr. Rep. 526.

[296] Angle v. Bankers' Surety Co., 244 Fed. 401, 157 C. C. A. 27, 41 Am. Bankr. Rep. 90; Stephens v. Union Bank & Trust Co., 250 Fed. 192, 162 C. C. A. 328, 42 Am. Bankr. Rep. 89; In re Kassel, 195 Fed. 492, 115 C. C. A. 402, 28 Am. Bankr. Rep. 233; Coleman v. Decatur Egg Case Co., 186 Fed. 136, 108 C. C. A. 248, 26 Am. Bankr. Rep. 248; In re Sayed, 185 Fed. 962, 26 Am. Bankr. Rep. 444; In re W. W. Mills Co., 162 Fed. 42, 20 Am. Bankr. Rep. 501; In re Wittenberg Veneer & Panel Co., 108 Fed. 593, 6 Am. Bankr. Rep. 271; In re Oregon Bulletin Printing & Publishing Co., 13 N. B. R. 503, Fed. Cas. No. 10,559; Empire State Trust Co. v. William F. Fisher Co., 67 N. J. Eq. 88, 57 Atl. 502; Blyth & Fargo Co. v. Kastor, 17 Wyom. 180, 97 Pac. 921; Northrop v. P. W. Finn Const. Co., 260 Pa. 15, 103 Atl. 544; Keystone Brewing Co. v. Schermer, 241 Pa. 361, 88 Atl. 657.

rule that, in the case of a transfer required by law to be recorded, it is sufficient if the debtor is insolvent either at the time of making the transfer or at the time it is recorded.[297] But it is not necessary in any case that the insolvent condition of the debtor at the time of making the transfer should be perpetuated by the existence of the same debts as compared with the same assets, up to the time the trustee takes action to avoid the conveyance. Continuous insolvency is sufficient, though none of the debts existing at the time of the transfer may remain, if new ones have been contracted in their place.[298] In the case of a partnership, it must be shown that both the firm and the individual partners are insolvent or were insolvent at the time, that is, that the aggregate of the partnership and individual assets is not sufficient to pay the debts.[299]

It is not enough to show that the debtor was financially embarrassed and hard pressed by his creditors. This condition may exist and yet he may be solvent.[300] "Insolvency" must here be understood in the sense given to it by the bankruptcy act itself, that is, "a person shall be deemed insolvent when the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." [301] In making this estimate and comparison, all the property of the debtor which has value must be included, not omitting property exempt under the law of the state, and including property transferred in payment of or as security for a just debt, irrespective of whether or not it constitutes a preference, but not property transferred in fraud

297 Bankruptcy Act 1898, § 60b, as amended by Act Cong. June 25, 1910, 36 Stat. 838. And see McElvain v. Hardesty, 169 Fed. 31, 94 C. C. A. 399, 22 Am. Bankr. Rep. 320.

298 O'Neill v. Kilduff, 81 Conn. 116, 70 Atl. 640. But the insolvency of the debtor at the time of giving an alleged preference is not shown by proof of his insolvency a month later. Wrenn v. Citizens' Nat. Bank (Conn.) 114 Atl. 120.

299 Levor v. Seiter, 34 Misc. Rep. 382, 69 N. Y. Supp. 987; Rodolf v. First Nat. Bank, 30 Okl. 631, 121 Pac. 629, 41 L. R. A. (N. S.) 204. And see supra, § 114.

300 In re Farmers' Supply Co., 170 Fed. 502, 22 Am. Bankr. Rep. 460.

301 Bankruptcy Act 1898, § 1, cl. 15. And see Ogden v. Reddish, 200 Fed. 977, 29 Am. Bankr. Rep. 531; Empire State Trust Co. v. William F. Fisher Co., 67 N. J. Eq. 88, 57 Atl. 502; Des Moines Sav. Bank v. Morgan Jewelry Co., 123 Iowa, 432, 99 N. W. 121; Summerville v. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243; In re Chappell, 113 Fed. 545, 7 Am. Bankr. Rep. 608; Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 87 C. C. A. 521, 20 Am. Bankr. Rep. 349; Paper v. Stern, 198 Fed. 642, 117 C. C. A. 346, 28 Am. Bankr. Rep. 592; Hicks Co. v. Moore (C. C. A.) 261 Fed. 773, 44 Am. Bankr. Rep. 384; William Schuette & Co. v. Schwank, 265 Pa. 576, 109 Atl. 531; Newman v. Tootle-Campbell Dry Goods Co., 174 Mo. App. 528, 160 S. W. 825. Contra, see Simpson v. Western Hardware & Metal Co., 97 Wash. 626, 167 Pac. 113. The test of insolvency is not merely that the debtor may not be able to pay all his debts in money, if all were presented at the given time, but that all his property at a fair valuation would then be insufficient for the purpose. In re Walker Starter Co., 235 Fed. 285, 148 C. C. A. 645, 37 Am. Bankr. Rep. 122; McGill v. Commercial Credit Co. (D. C.) 243 Fed. 637, 39 Am. Bankr. Rep. 702.

of creditors.[302] Property subject to a mortgage must be included if the mortgage is not shown to be fraudulent as against creditors.[303] And accounts against third persons in favor of the debtor are to be reckoned in if they are not shown in any way to be uncollectible.[304] Where the principal asset consists of a plant or property which loses value if not kept in continuous operation,—such as a hotel, a periodical publication, and some kinds of manufacturing establishments,—the value assigned to it in making the estimate must be what it is worth as a going concern and not what it is worth as dead property after bankruptcy has intervened.[305] On the other hand, in adding up the bankrupt's debts, it is proper to include his liability as guarantor of the debt of a third person, the latter being insolvent, though the guaranty was oral and therefore within the statute of frauds.[306]

The trustee in bankruptcy, assailing a judgment or transfer as preferential, must assume the burden of showing the insolvency of the debtor by satisfactory and sufficient evidence; in the absence of this, the transaction cannot be disturbed.[307] The existence of unsatisfied judgments against the debtor does not necessarily prove his insolvency,[308] though the fact that his paper has gone to protest may do so, in connection with other circumstances.[309] Evidence showing that the debtor was not in possession of ready money with which to meet a particular debt, of which he obtained a renewal, falls short of what is required,[310] and the fact that a corporation, engaged in the performance of a contract which required a considerable expenditure before it was entitled to any

302 Utah Ass'n of Credit Men v. Boyle Furniture Co., 39 Utah, 518, 117 Pac. 800.

303 Posey v. McManis, 28 Tex. Civ. App. 452, 67 S. W. 792.

304 Blyth & Fargo Co. v. Kastor, 17 Wyom. 180, 97 Pac. 921.

305 In re Klein, 197 Fed. 241; J. W. Butler Paper Co. v. Goembel, 143 Fed. 295, 74 C. C. A. 433, 16 Am. Bankr. Rep. 26; Chicago Title & Trust Co. v. John A. Roebling's Sons Co., 107 Fed. 71, 5 Am. Bankr. Rep. 368. But this rule does not apply unless the debtor was in fact a going concern at the time of the alleged preference. In re Fred D. Jones Co. (C. C. A.) 268 Fed. 818, 46 Am. Bankr. Rep. 396.

306 Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 87 C. C. A. 521, 20 Am. Bankr. Rep. 349. Debts of the bankrupt's partnership on which he is jointly liable, and whose debts, on its dissolution, he had agreed to pay, are properly added to his personal debts, to ascertain his entire indebtedness. Rubenstein v. Lottow, 223 Mass. 227, 111 N. E. 973.

307 Cleage v. Laidley, 149 Fed. 346, 79 C. C. A. 284, 17 Am. Bankr. Rep. 598; In re Clifford, 136 Fed. 475, 14 Am. Bankr. Rep. 281; In re Alexander, 102 Fed. 464, 4 Am. Bankr. Rep. 376; Evans v. National Broadway Bank, 48 Misc. Rep. 248, 96 N. Y. Supp. 789; Kimball v. Dresser, 98 Me. 519, 57 Atl. 787; Deland v. Miller & Chaney Bank, 119 Iowa, 368, 93 N. W. 304; Capital Nat. Bank v. Wilkerson, 36 Ind. App. 467, 75 N. E. 837; McAleer v. People's Bank, 202 Ala. 256, 80 South. 94. Insolvency may, and in many cases must, be proved by proof of other facts, from which the ultimate fact of insolvency may be presumed or inferred. Rosenberg v. Semple, 257 Fed. 72, 168 C. C. A. 284, 43 Am. Bankr. Rep. 671.

308 Summerville v. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243; Levor v. Seiter, 34 Misc. Rep. 382, 69 N. Y. Supp. 987.

309 In re Louis, 3 Ben. 153, 2 N. B. R. 449, Fed. Cas. No. 8,527.

310 In re Chappell (D. C.) 113 Fed. 545, 7 Am. Bankr. Rep. 608.

payments, arranged with a bank for making overdrafts, is no evidence that it was insolvent.[311]

§ 596. Intention of Debtor.—Under the bankruptcy acts which preceded the present statute it was always held to be an essential element of a voidable preference that the debtor should have intended the transaction to have that effect, that is, that he should have willed and meant to give the particular creditor an advantage over others or a larger share of his debt than they could obtain. And the act of 1898, before the latest amendment, made it a condition to the voidability of a preferential transfer, not exactly that the debtor should have intended to give a preference, but that the person receiving it or to be benefited by it should have had "reasonable cause to believe that it was intended thereby to give a preference." And a majority of the cases decided before 1910 ruled that there could be no voidable preference under the statute unless there was an actual intention (not merely an assumed or attributed intention) on the part of the debtor to give a preference to the creditor receiving it or to be benefited by it.

But all uncertainty on this point was removed by the amendment of 1910, affecting this section of the bankruptcy law,[312] which (aside from the limitation as to time) only requires that the debtor shall be insolvent, that the transfer shall operate as a preference, and that the creditor shall have reasonable cause to believe that the enforcement of the transfer will effect a preference. Since this amendment, therefore, it is not necessary to prove the existence of the debtor's intent to prefer, or the cause for belief on the creditor's part that a preference was intended, or that the debtor knew of his insolvency, the test being whether the creditor had reasonable cause to believe that the bankrupt was then insolvent, and that, in accepting and retaining the transfer, the creditor would receive a larger percentage of his debt than any other creditor of the same class.[313]

311 McDonald v. Clearwater Shortline Ry. Co. (C. C.) 164 Fed. 1007.

312 Act Cong. June 25, 1910, 36 Stat. 838, amending Bankruptcy Act 1898, § 60b.

313 Richardson v. Germania Bank (C. C. A.) 263 Fed. 320, 45 Am. Bankr. Rep. 351; In re Jones (D. C.) 259 Fed. 927, 44 Am. Bankr. Rep. 253; In re Campion (D. C.) 256 Fed. 902, 43 Am. Bankr. Rep. 625; Heyman v. Third Nat. Bank (D. C.) 216 Fed. 685; Covington v. Brigman (D. C.) 210 Fed. 499, 32 Am. Bankr. Rep. 35; In re Herman (D. C.) 207 Fed. 594, 31 Am. Bankr. Rep. 243; In re Harrison Bros. (D. C.) 202 Fed. 243; Abele v. Beacon Trust Co., 228 Mass. 438, 117 N. E. 833; Batchelder v. Home Nat. Bank, 218 Mass. 420, 105 N. E. 1052; Rogers v. American Halibut Co., 216 Mass. 227, 103 N. E. 689; Wilson v. Mitchell-Woodbury Co., 214 Mass. 514, 102 N. E. 119; Patterson v. Baker Grocery Co., 73 Or. 433, 144 Pac. 673. Compare Grandison v. Robertson, 231 Fed. 785, 145 C. C. A. 605, 36 Am. Bankr. Rep. 452; In re Freeman Cotting Coat Co. (D. C.) 212 Fed. 548; Wills v. Venus Silk Glove Mfg. Co., 170 App. Div. 352, 156 N. Y. Supp. 115; People's Bank v. McAleer, 204 Ala. 101, 85 South. 413.

§ 597. Creditor's Knowledge or Reasonable Cause of Belief.—To constitute a voidable preference it is strictly essential that the person receiving it or to be benefited by it, or his agent acting for him in the transaction, should have reasonable cause to believe that a preference will be effected by the enforcement of the judgment, transfer, security, or payment, as the case may be. Failing this, it cannot be recovered from him by the trustee in bankruptcy, nor can he be required to surrender it, notwithstanding that it was given by an insolvent debtor and within four months prior to his bankruptcy, and although it may actually result in the preferred creditor's receiving full satisfaction or a larger proportion of his debt than other creditors receive.[314] But it is im-

[314] Pyle v. Texas Transport & Terminal Co., 238 U. S. 90, 35 Sup. Ct. 667, 59 L. Ed. 1215, 34 Am. Bankr. Rep. 843; Joseph Wild & Co. v. Provident Life & Trust Co., 214 U. S. 292, 29 Sup. Ct. 619, 53 L. Ed. 1003, 22 Am. Bankr. Rep. 109; First Nat. Bank v. Galbraith (C. C. A.) 271 Fed. 687; Frederick v. People's Bank of California, 246 Fed. 84, 158 C. C. A. 310, 40 Am. Bankr. Rep. 746; Watson v. Adams, 242 Fed. 441, 155 C. C. A. 217, 39 Am. Bankr. Rep. 473; Chambers v. Continental Trust Co. (D. C.) 235 Fed. 441, 38 Am. Bankr. Rep. 78; In re French (D. C.) 231 Fed. 255, 37 Am. Bankr. Rep. 289; Rosenthal v. Bronx Nat. Bank (D. C.) 222 Fed. 83, 35 Am. Bankr. Rep. 273; Stockgrowers State Bank v. Corker, 220 Fed. 614, 136 C. C. A. 222, 34 Am. Bankr. Rep. 392; Sheppard-Strassheim Co. v. Black, 211 Fed. 643, 128 C. C. A. 147, 33 Am. Bankr. Rep. 574; L. A. Becker Co. v. Gill, 206 Fed. 36, 124 C. C. A. 170, 30 Am. Bankr. Rep. 429; Mayes v. Palmer, 208 Fed. 97, 125 C. C. A. 325, 31 Am. Bankr. Rep. 225; Reber v. Shulman, 183 Fed. 564, 106 C. C. A. 110, 25 Am. Bankr. Rep 475; Greenhall v. Carnegie Trust Co., 180 Fed. 812, 25 Am. Bankr. Rep. 300; In re Peacock, 178 Fed. 851, 24 Am. Bankr. Rep. 159; Nelson v. Svea Pub. Co., 178 Fed. 136; In re Kullberg, 176 Fed. 585, 23 Am. Bankr. Rep. 758; In re Evans Lumber Co., 176 Fed. 643, 23 Am. Bankr. Rep. 881; In re Neill-Pinckney-Maxwell Co., 170 Fed. 481, 22 Am. Bankr. Rep. 401; In re Burlage Bros., 169 Fed. 1006, 22 Am. Bankr. Rep. 410; Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 89 C. C. A. 605, 20 Am. Bankr. Rep. 919; Irish v. Citizens' Trust Co., 163 Fed. 880, 21 Am. Bankr. Rep. 39; Coder v. Arts, 152 Fed. 943, 82 C. C. A. 91, 18 Am. Bankr. Rep. 513; In re Maher, 144 Fed. 503, 16 Am. Bankr. Rep. 340; McNair v. McIntyre, 113 Fed. 113, 51 C. C. A. 89, 7 Am. Bankr. Rep. 638; In re Dundas, 111 Fed. 500, 7 Am. Bankr. Rep. 129; In re Blair, 102 Fed. 987, 4 Am. Bankr. Rep. 220; In re Eggert, 98 Fed. 843, 3 Am. Bankr. Rep. 541; Levor v. Seiter, 69 App. Div. 33, 74 N. Y. Supp. 499; Capital Nat. Bank v. Wilkerson, 36 Ind. App. 467, 75 N. E. 837; Cullinane v. State Bank, 123 Iowa, 340, 98 N. W. 887; Thompson v. First Nat. Bank, 84 Miss. 54, 36 South. 65; Wilson v. Weighle, 69 N. J. Eq. 561, 62 Atl. 458; Galveston Dry Goods Co. v. Frenkel, 39 Tex. Civ. App. 19, 86 S. W. 949; Johnston v. George D. Witt Shoe Co., 103 Va. 611, 50 S. E. 153; Lampkin v. People's Nat. Bank, 98 Mo. App. 239, 71 S. W. 715; Hawes v. Bank of Elberton, 124 Ga. 567, 52 S. E. 922; Blankenbaker v. Charleston State Bank, 111 Ill. App. 393; North v. Taylor, 61 App. Div. 253, 70 N. Y. Supp. 339; Lewis v. First Nat. Bank, 46 Or. 182, 78 Pac. 990; Townes v. Alexander, 69 S. C. 23, 48 S. E. 214; Gamble v. Elkin, 205 Pa. St. 226, 54 Atl. 782; Johnson v. Anderson, 70 Neb. 233, 97 N. W. 339; Cummings v. Kansas City Wholesale Grocery Co., 123 Mo. App. 9, 99 S. W. 470; Herzberg v. Riddle, 171 Ala. 368, 54 South. 635; Blyth & Fargo Co. v. Kastor, 17 Wyo. 180, 97 Pac. 921; Stuart v. Farmers' Bank, 137 Wis. 66, 117 N. W. 820, 16 Ann. Cas. 821; Brooks v. Bank of Beaver City, 82 Kan. 597, 109 Pac. 409; Maxwell v. Davis Trust Co., 69 W. Va. 276, 71 S. E. 270; Soule v. First Nat. Bank, 26 Idaho, 66, 140 Pac. 1098; Kentucky Bank & Trust Co. v. Pritchett, 44 Okl. 87, 143 Pac. 338; Williams v. Davidson, 104 Wash. 315, 176 Pac. 334, 181 Pac. 874; Liberty Trust Co. v. Haggerty (N. J. Ch.) 113 Atl. 596. As respects the issue of the creditor's having reasonable

portant to notice that the statute does not require that the preferred creditor should have any actual knowledge on the subject of the debtor's insolvency or the result of the transaction in giving a preference, nor even that he should have any actual belief on that point. What he really thinks or believes is entirely immaterial. What the law requires is "reasonable cause to believe," and if this exists it is enough, without regard to the actual state of the creditor's mind or opinion.[315] And the "preference" which a transferee must have reasonable cause to believe will be effected is not the preference or advantage over unsecured creditors necessarily obtained by one who acquires a mortgage or other lien on property, but a preference made and accepted to evade the rule for equal distribution to all creditors of the same class.[316]

As a first and essential requisite the creditor must have reasonable cause to believe that the debtor is insolvent. This is necessarily implied in, and must serve as a foundation for, reasonable cause to believe that a preference will result from the transaction. Without this, there can be no cause, within the limits of reason, for the creditor to suppose that he is gaining a preference, and consequently the transaction will not be voidable though it does actually result in a preference.[317] "As no great-

cause to believe that the bankrupt was insolvent at the time of a payment to the creditor, the latter's subsequent knowledge is not material, and it does not matter what the debtor knew. Wrenn v. Citizens' Nat. Bank (Conn.) 114 Atl. 120.

[315] Toof v. Martin, 13 Wall. 49, 20 L. Ed. 481; Healy v. Wehrung, 229 Fed. 686, 144 C. C. A. 96, 36 Am. Bankr. Rep. 673; In re The Leader, 190 Fed. 624, 26 Am. Bankr. Rep. 668; In re Hines, 144 Fed. 543, 16 Am. Bankr. Rep. 495; Sundheim v. Ridge Avenue Bank, 138 Fed. 951, 15 Am. Bankr. Rep. 132; In re Eggert (C. C. A.) 102 Fed. 735, 4 Am. Bankr. Rep. 449; Graham v. Stark, 3 Ben. 520, 3 N. B. R. 357, Fed. Cas. No. 5,676; Wilson v. Taylor, 154 N. C. 211, 70 S. E. 286; Utah Ass'n of Credit Men v. Boyle Furniture Co., 39 Utah, 518, 117 Pac. 800; Abele v. Beacon Trust Co., 228 Mass. 438, 117 N. E. 833; Underwood v. Winslow, 231 Mass. 595, 121 N. E. 524; Cauthorn v. Burley State Bank, 26 Idaho, 532, 144 Pac. 1108.

[316] In re Chicago Car Equipment Co., 211 Fed. 638, 128 C. C. A. 142, 31 Am. Bankr. Rep. 617. And see In re Edwards (D. C.) 217 Fed. 102, 33 Am. Bankr. Rep. 530; Shuetz v. Walter Boyt Saddlery Co., 166 Iowa, 523, 147 N. W. 897.

[317] Auffmordt v. Rasin, 102 U. S. 620, 26 L. Ed. 262; Bank of Commerce v. Brown, 249 Fed. 37, 161 C. C. A. 97, 40 Am. Bankr. Rep. 591; American Bank of Alaska v. Johnson, 245 Fed. 312, 157 C. C. A. 504, 40 Am. Bankr. Rep. 502; In re Looschen Piano Case Co. (D. C.) 259 Fed. 931, 43 Am. Bankr. Rep. 733; Rosenthal v. Bronx Nat. Bank, 231 Fed. 691, 145 C. C. A. 577, 36 Am. Bankr. Rep. 888; Egner v. Parshelsky Bros., 258 Fed. 238, 169 C. C. A. 304, 44 Am. Bankr. Rep. 175; Smith v. Coury (D. C.) 247 Fed. 168, 41 Am. Bankr. Rep. 219; In re Gottlieb & Co. (D. C.) 245 Fed. 139, 40 Am. Bankr. Rep. 247; In re Rockaway Soda Water Mfg. Co. (D. C.) 226 Fed. 520, 34 Am. Bankr. Rep. 627; City Nat. Bank v. Slocum (C. C. A.) 272 Fed. 11, 47 Am. Bankr. Rep. 47; Kennard v. Behrer (D. C.) 270 Fed. 661, 46 Am. Bankr. Rep. 70; In re Greenberger, 203 Fed. 583, 30 Am. Bankr. Rep. 117; Ogden v. Reddish, 200 Fed. 977, 29 Am. Bankr. Rep. 531; In re Pfaffinger, 154 Fed. 523, 18 Am. Bankr. Rep. 807; Wright v. Sampter, 152 Fed. 196, 18 Am. Bankr. Rep. 355; In re Oliver, 109 Fed. 784, 6 Am. Bankr. Rep. 626; In re Eggert, 98 Fed. 843, 3 Am. Bankr. Rep. 541; Stobaugh v. Mills, 8 N. B. R. 361, Fed. Cas. No. 13,461; Gillenwaters v. Miller, 49 Miss. 150; Pearsall v. Nassau

er percentage could be received under the transaction if the debtor be solvent and all his debts be paid in full, a creditor cannot be said to have reasonable cause to believe the enforcement of the transfer would effect a preference, unless, either at the time the transfer was made or at the time it was recorded, he had reasonable cause to believe that his debtor was then insolvent." [318] As to knowledge of insolvency and the means of acquiring it, it is said that if a creditor knows that a payment to him is made out of a fund which, if the debtor should become bankrupt, would be needed equally by the other creditors, the transaction will constitute a voidable preference, if bankruptcy intervenes within four months.[319] And a managing officer and director of an insolvent corporation will be estopped to plead ignorance of its insolvency when he received a preference.[320] But a banker is entitled to transact business with a customer in the ordinary way, take renewal notes, and receive partial payments, and to assume that the customer is solvent, and is therefore not liable to restore payments when the latter becomes bankrupt.[321] It does not follow that because a creditor knows of the insolvency of a firm, he has any cause to believe in the insolvency of one of the partners who is his individual debtor.[322] But where a creditor of a corporation knows of the insolvency of the corporation, as well as of the insolvency of its controlling stockholders, a note given such creditor by stockholders for the amount of its claim against the corporation constitutes a legal fraud against individual creditors of the stockholders, and is not provable against them individually.[323] Neither the fact that a debtor's accounts are past due, nor the fact of his being financially embarrassed, is suffi-

Nat. Bank, 74 App. Div. 89, 77 N. Y. Supp. 11; Des Moines Sav. Bank v. Morgan Jewelry Co., 123 Iowa, 432, 99 N. W. 121; Wright v. Cotten, 140 N. C. 1, 52 S. E. 141; Evans v. Claridge, 137 Wis. 218, 118 N. W. 198, 803, 25 L. R. A. (N. S.) 144; Shelton v. First Nat. Bank, 31 Okl. 217, 120 Pac. 959; Chicago Title & Trust Co. v. First Nat. Bank, 174 Ill. App. 339; Scott County Milling Co. v. Powers, 112 Miss. 798, 73 South. 792. See William Schuette & Co. v. Swank, 265 Pa. 576. 109 Atl. 531, holding that, where a contractor who, within four months, became a bankrupt, gave a creditor who had furnished lumber for the construction of certain buildings for a coal company an order on the coal company, which it accepted, the validity of the transaction did not turn upon the creditor's personal belief that the contractor was solvent, but upon his reasonable cause to believe that the enforcement of the transfer would effect a preference, such cause depending upon all the circumstances, and not merely upon the debtor's declaration that he was solvent.

[318] In re Sam Z. Lorch & Co. (D. C.) 199 Fed. 944, 28 Am. Bankr. Rep. 784. The time for determining whether the creditor had cause to believe that a payment operates as a preference is the time of payment, and not the time of distribution. W. S. Peck & Co. v. Whitmer, 231 Fed. 893, 146 C. C. A. 89, 36 Am. Bankr. Rep. 722.

[319] Scheuer v. Katzoff (D. C.) 233 Fed. 473, 37 Am. Bankr. Rep. 476.

[320] Arnold v. Knapp, 75 W. Va. 804, 84 S. E. 895.

[321] Grandison v. Robertson (D. C.) 220 Fed. 985, 34 Am. Bankr. Rep. 609.

[322] In re Hull (D. C.) 224 Fed. 796, 34 Am. Bankr. Rep. 447; Jacobs v. Van Sickel (C. C.) 123 Fed. 340, 10 Am. Bankr. Rep. 519.

[323] In re Hawkins (D. C.) 249 Fed. 355, 41 Am. Bankr. Rep. 671.

cient to impeach the good faith of a creditor in taking security, so as to render it voidable as a preference, where there were circumstances which tended to explain such embarrassment upon grounds other than insolvency.[324] But in general it is enough if the creditor had knowledge or information of such facts and circumstances as would be calculated to put a reasonably prudent person on inquiry, and if such inquiry, when followed up, would lead to a knowledge of the debtor's insolvency.[325]

If the creditor knows or has reasonable ground to believe that the debtor is insolvent, then it may be inferred without further proof, that he has also reasonable ground to believe that the enforcement of the judgment or transfer which he takes will effect a preference, such being its natural and inevitable result,[326] at least if the payment, transfer, or security puts him in position to collect the whole amount of his claim. But if the preference alleged consists only in giving to one of the creditors a part of the amount of his claim, then he must have reasonable ground to believe that other creditors will not be able to secure so large a dividend, and even positive knowledge of the debtor's insolvency may not be sufficient to warn him of this. For though the debtor may not be able to pay his debts in full, yet he may be able to pay to all his creditors at least as large a share of their claims as goes to the creditor alleged to have been preferred. And where an offer of compromise is made, creditors are not bound to investigate the debtor's ability to pay the amount offered, and ascertain whether it is his intention to pay it to all creditors alike, but are entitled to believe that the offer is made in good faith and to all the creditors, unless something occurs to put them on inquiry.[327] Thus, where a mercantile company, shortly before its bankruptcy, sent a circular letter to its creditors, in which it stated that its last season's business had not been good and that it was unable to meet its payments; that it was about to make a special sale, to be strongly advertised, for the purpose of paying its bills, and would prorate the receipts from the sale among its creditors; and that it was solvent and hoped to pay in full within thirty days, it was held that creditors receiving such circulars, and

[324] J. W. Butler Paper Co. v. Goembel, 143 Fed. 295, 74 C. C. A. 433, 16 Am. Bankr. Rep. 26.

[325] People's Bank of Mobile v. McAleer, 204 Ala. 101, 85 South. 413.

[326] In re Lynden Mercantile Co., 156 Fed. 713, 19 Am. Bankr. Rep. 444; Graham v. Stark, 3 Ben. 520, 3 N. B. R. 357, Fed. Cas. No. 5,676; In re Hauck, 17 N. B. R. 158, Fed. Cas. No. 6,219; In re Kingsbury, 3 N. B. R. 317, Fed. Cas. No. 7,816; Johnson v. Cohn, 39 Misc. Rep. 189, 79 N. Y. Supp. 139; Hess v. Theodore Hamm Brewing Co., 108 Minn. 22, 121 N. W. 232; Hackney v. Raymond Bros. Clarke Co., 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Bryant v. Wolf, 94 Misc. Rep. 683, 158 N. Y. Supp. 678. But what the statute requires in this respect is reasonable cause on the part of the creditor to believe that a preference "will" result from the transaction; belief or cause to believe that a preference "may" result is not sufficient. Sumner v. Parr (D. C.) 270 Fed. 675, 46 Am. Bankr. Rep. 648.

[327] Smith v. Hewlett Robin Co., 178 Fed. 271, 101 C. C. A. 576, 24 Am. Bankr. Rep. 153.

a few days thereafter small payments on their claims, were not chargeable with reasonable cause to believe that they were intended as a preference, though the debtor was in fact insolvent and did not distribute the proceeds of the sale pro rata.[328] And a sale by a debtor will not be avoided because the purchaser was aware of the intention of the seller to prefer certain of his creditors by the use of the proceeds of the sale.[329] But where a mortgagee of a bankrupt had reasonable cause to believe that the mortgage would "effect a preference," he had reasonable cause to believe that it would "operate as a preference," these phrases, as used in the bankruptcy act, being synonymous.[330]

§ 598. Same; Grounds of Suspicion or Doubt.—To invalidate a payment, transfer, or security, as a preference, it is not enough that the creditor should entertain doubts concerning the solvency of the debtor or the effect of the transaction as preferential, or that he should have cause to regard the debtor's circumstances or the transaction in hand with suspicion. He must have a knowledge of such facts as will carry him beyond this and furnish a reasonable ground to believe that the enforcement of his transfer or security will give him a preference over other creditors.[331] "Suspicion, fear, and facts that arouse suspicion and fear in the mind of the creditor or party to be benefited, but give no reasonable ground for him to believe that a preference is intended by the transfer,

[328] In re Varley & Bauman Clothing Co., 191 Fed. 459, 26 Am. Bankr. Rep. 840. But see Benjamin v. Chandler, 142 Fed. 217, 15 Am. Bankr. Rep. 439.

[329] Van Kleeck v. Miller, 19 N. B. R. 484, Fed. Cas. No. 16,860.

[330] Ogden v. Reddish, 200 Fed. 977, 29 Am. Bankr. Rep. 531.

[331] Stucky v. Masonic Sav. Bank, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640; Grant v. First National Bank, 97 U. S. 80, 24 L. Ed. 971; Richardson v. Germania Bank (C. C. A.) 263 Fed. 320, 45 Am. Bankr. Rep. 351; Cohen v. Tremont Trust Co. (D. C.) 256 Fed. 399, 43 Am. Bankr. Rep. 522; Smith v. Powers (D. C.) 255 Fed. 582, 43 Am. Bankr. Rep. 303; Bank of Commerce v. Brown, 249 Fed. 37, 161 C. C. A. 97, 40 Am. Bankr. Rep. 591; Donohue v. Dykstra (D. C.) 247 Fed. 593, 41 Am. Bankr. Rep. 278; Rosenman v. Coppard, 228 Fed. 114, 142 C. C. A. 520, 35 Am. Bankr. Rep. 786; Nichols v. Elken, 225 Fed. 689, 140 C. C. A. 563, 35 Am. Bankr. Rep. 365; Brookheim v. Greenbaum (D. C.) 225 Fed. 635; Beall v. Bank of Bowden (D. C.) 219 Fed. 316, 34 Am. Bankr. Rep. 186; In re F. M. & S. Q. Carlile, 199 Fed. 612, 29 Am. Bankr. Rep. 373; First Nat. Bank v. Abbott, 165 Fed. 852, 91 C. C. A. 538, 21 Am. Bankr. Rep. 436; Powell v. Gate City Bank, 178 Fed. 609, 102 C. C. A. 55, 24 Am. Bankr. Rep. 316; In re Eggert, 102 Fed. 735, 43 C. C. A. 1, 4 Am. Bankr. Rep. 449; Off v. Hakes, 142 Fed. 364, 73 C. C. A. 464, 15 Am. Bankr. Rep. 696; May v. Le Claire, 18 Fed. 164, Claridge v. Kulmer, 1 Fed. 399; Mackel v. Bartlett, 36 Mont. 7, 91 Pac. 1064; King v. Storer, 75 Me. 62; Farmers' & Mechanics' Bank v. Wilson, 4 Neb. (Unof.) 606, 95 N. W. 609; Suffel v. McCartney Nat. Bank, 127 Wis. 208, 106 N. W. 837, 115 Am. St. Rep. 1004; Sirrine v. Stoner-Marshall Co., 64 S. C. 457, 42 S. E. 432; Gnichtel v. First Nat. Bank (N. J. Eq.) 57 Atl. 508; Stevenson v. Milliken-Tomlinson Co., 99 Me. 320, 59 Atl. 472; Rubenstein v. Lottow, 223 Mass. 227, 111 N. E. 973; Batchelder v. Home Nat. Bank, 218 Mass. 420, 105 N. E. 1052; Craig v. Sharp (Mo. App.) 219 S. W. 98; Newman v. Tootle-Campbell Dry Goods Co., 174 Mo. App. 528, 160 S. W. 825; Dunlap v. Seattle Nat. Bank, 93 Wash. 568, 161 Pac. 364; Mantz v. Capital City State Bank (Iowa) 181 N. W. 3.

do not make such a preference voidable." [332] For example, knowledge of the mere fact that the debtor is not able to pay the creditor's debt in cash may awaken suspicion as to his solvency, but is not of itself reasonable cause to believe that a preference is intended.[333] And so of the fact that the debtor is offering to sell his business,[334] or that he has called his creditors together for the purpose of making terms with them.[335] General reputation or common talk as to the debtor's solvency is not a safe test of the creditor's good faith.[336] Actual knowledge that the debtor is at the time in failing circumstances may be enough to establish the character of the transfer or security as a preference, if he is adjudged bankrupt within four months thereafter.[337] But not so of knowledge, gained from the debtor's statement, that he had previously been financially embarrassed and hard pressed by his creditors, where he afterwards assured the creditor that he had financed his business and was then "all right." [338]

§ 599. Same; Facts Putting on Inquiry; Duty to Investigate.—Where a creditor, about to receive a payment or security from his debtor, has knowledge or notice of facts which would incite a man of ordinary prudence and business intelligence to inquire as to the debtor's solvency and the probable effect of the transaction as a preference, he is bound to prosecute a reasonably diligent inquiry to ascertain the truth; and if he fails to do so, he is chargeable with knowledge of the facts which such an inquiry would have disclosed; and if such ultimate knowledge would give him reasonable cause to believe that the transaction would result in giving him a preference, within the meaning of the bankruptcy law, then he cannot safely accept the payment, transfer, or security, for if the debtor's bankruptcy follows within four months, the transaction will be voidable at the suit of the trustee.[339] In fact, "reasonable cause to be-

[332] Paper v. Stern, 198 Fed. 642, 117 C. C. A. 346, 28 Am. Bankr. Rep. 592.

[333] Andrews v. Kellogg, 41 Colo. 35, 92 Pac. 222.

[334] Taft v. Fourth Nat. Bank, 8 Ohio N. P. 59.

[335] In re Kerr, 2 N. B. R. 388, Fed. Cas. No. 7,728.

[336] Carey v. Donohue, 209 Fed. 328, 126 C. C. A. 254, 31 Am. Bankr. Rep. 210.

[337] Peninsula Bank of Williamsburg v. Wolcott, 232 Fed. 68, 146 C. C. A. 260, Ann. Cas. 1918C, 477, 36 Am. Bankr. Rep. 327.

[338] In re Salmon, 249 Fed. 300, 161 C. C. A. 308, 41 Am. Bankr. Rep. 45.

[339] Toof v. Martin, 13 Wall. 49, 20 L. Ed. 481; In re Star Spring Bed Co. (C. C. A.) 265 Fed. 133, 45 Am. Bankr. Rep. 650; Farmers' State Bank v. Freeman, 249 Fed. 579, 161 C. C. A. 505, 41 Am. Bankr. Rep. 286; National Bank of Bakersfield v. Moore, 247 Fed. 913, 160 C. C. A. 103, 41 Am. Bankr. Rep. 409; Smith v. Coury (D. C.) 247 Fed. 168, 41 Am. Bankr. Rep. 219; In re Sutherland Co. (D. C.) 245 Fed. 663, 40 Am. Bankr. Rep. 305; McGill v. Commercial Credit Co. (D. C.) 243 Fed. 637, 39 Am. Bankr. Rep. 702; In re States Printing Co., 238 Fed. 775, 151 C. C. A. 625, 38 Am. Bankr. Rep. 526; Aronin v. Security Bank of New York, 228 Fed. 888, 143 C. C. A. 286, 36 Am. Bankr. Rep. 17; R. H. Herron Co. v. Moore, 208 Fed. 134, 125 C. C. A. 356, 31 Am. Bankr. Rep. 221; Walters v. Zimmerman (D. C.) 208 Fed. 62, 30 Am. Bankr. Rep. 780; Lowell v. Ashton (D. C.) 272 Fed. 536, 47 Am. Bankr. Rep. 100; Tilt v. Citizens' Trust Co., 191 Fed.

lieve," in the bankruptcy act, covers substantially the same field as "notice" in determining whether a person is a bona fide purchaser of property.[340] Thus, if the creditor knows that the debtor has lost his position because of a defalcation, that his principal indorser is dead, and that his notes are overdue and unpaid, it is sufficient to put him on inquiry,[341] as is also the fact that the creditor holds unpaid protested paper of the bankrupt,[342] or that the debtor, on drawing up the mortgage in question, asked to be allowed to secure other creditors in the same instrument.[343] But mere knowledge that the debtor fails to meet his obligations promptly is not sufficient for this purpose,[344] nor is the fact that there are outstanding and unsatisfied judgments against the debtor,[345] or that he is engaged in a business of a speculative character, and that the creditor does not know of any other property owned by the debtor except his interest in certain contracts.[346] If, however, the creditor knows that the bankrupt has committed forgery, this is a circumstance which would incite a person of ordinary prudence to inquiry as to his condition, and the creditor must be charged with notice of all facts

441, 27 Am. Bankr. Rep. 320; Ragan v. Donovan, 189 Fed. 138, 26 Am. Bankr. Rep. 311; In re Thomas Deutschle & Co., 182 Fed. 435, 25 Am. Bankr. Rep. 348; In re C. J. McDonald & Sons, 178 Fed. 487, 24 Am. Bankr. Rep. 446; Brewster v. Goff Lumber Co., 164 Fed. 124, 21 Am. Bankr. Rep. 106; In re W. W. Mills Co., 162 Fed. 42, 20 Am. Bankr. Rep. 501; In re Tindal, 155 Fed. 456, 18 Am. Bankr. Rep. 773; English v. Ross, 140 Fed. 630, 15 Am. Bankr. Rep. 370; In re Virginia Hardwood Mfg. Co., 139 Fed. 209, 15 Am. Bankr. Rep. 135; In re Eggert, 102 Fed. 735, 43 C. C. A. 1, 4 Am. Bankr. Rep. 449; Capital Nat. Bank v. Wilkerson, 36 Ind. App. 560, 76 N. E. 258; Bardes v. First Nat. Bank, 122 Iowa, 443, 98 N. W. 284; Blyth & Fargo Co. v. Kastor, 17 Wyo. 180, 97 Pac. 921; Wilson v. Taylor, 154 N. C. 211, 70 S. E. 286; Andrews v. Kellogg, 41 Colo. 35, 92 Pac. 222; Whitwell v. Wright, 115 N. Y. Supp. 48; Atherton v. Emerson, 199 Mass. 199, 85 N. E. 530; Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955; Hackney v. Raymond Bros. Clarke Co., 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Walker v. Tenison Bros. Saddlery Co. (Tex. Civ. App.) 94 S. W. 166; Christopherson v. Oleson, 19 S. Dak. 176, 102 N. W. 685; McAleer v. People's Bank, 202 Ala. 256, 80 South. 94; Chisholm v. First Nat. Bank, 176 Ill. App. 382; Russell's Trustee v. Mayfield Lumber Co., 158 Ky. 219, 164 S. W. 783; Jacobs v. Saperstein, 225 Mass. 300, 114 N. E. 360; Craig v. Sharp (Mo. App.) 219 S. W. 95; Walter v. National Fire Ins. Co., 101 Neb. 639, 164 N. W. 569; First Bank of Maysville v. Alexander, 49 Okl. 418, 153 Pac. 646; Utah Ass'n of Creditmen v. Boyle Furniture Co., 43 Utah, 68, 136 Pac. 572; Slayton v. Drown, 93 Vt. 290, 107 Atl. 307.

[340] Stern v. Paper (D. C.) 183 Fed. 228, 25 Am. Bankr. Rep. 451; Bassett v. Evans, 253 Fed. 532, 165 C. C. A. 202, 42 Am. Bankr. Rep. 587.

[341] Sebring v. Wellington, 63 App. Div. 498, 71 N. Y. Supp. 788.

[342] Swan v. Robinson (C. C.) 5 Fed. 287; Conners v. Bucksport Nat. Bank (D. C.) 214 Fed. 847; Grandison v. National Bank of Commerce (D. C.) 220 Fed. 981, 34 Am. Bankr. Rep. 497.

[343] Lloyd v. Strobridge, 16 N. B. R. 197, Fed. Cas. No. 8,435.

[344] Arkansas Nat. Bank v. Sparks, 83 Ark. 324, 103 S. W. 626; Hackney v. Raymond Bros. Clarke Co., 68 Neb. 624, 94 N. W. 822, 99 N. W. 675. And see Sumner v. Parr (D. C.) 270 Fed. 675, 46 Am. Bankr. Rep. 648.

[345] Summerville v. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243.

[346] Curtiss v. Kingman, 159 Fed. 880, 87 C. C. A. 60, 20 Am. Bankr. Rep. 95.

which a reasonably diligent inquiry would have disclosed.[347] This is also the case where the creditor knows not only that the debtor is insolvent but that he has absconded.[348] So, in another case, the debtor was a partner in a firm which was hopelessly insolvent, and a personal creditor of his received from him, in partial payment of notes which were not yet due, merchandise which had been bought entirely on the credit of the firm, as the creditor well knew. Taken in connection with the creditor's otherwise intimate knowledge of the affairs of the firm, this was held such knowledge or notice on his part as to render the payment a voidable preference.[349]

But on the other hand, where a creditor makes adequate inquiry as to his debtor's financial condition, and honestly, though mistakenly, believes that he is solvent, the taking of a security for a debt from him will not constitute a preference.[350] As to the kind of investigation to be conducted by a creditor thus "put on inquiry," his duty is not discharged by inquiries addressed to the debtor alone, at least if any better or more reliable sources of information are open to him.[351] And his intentional avoidance of obvious and reliable sources of information will charge him with the knowledge he could have obtained from them.[352] At the same time, he is not obliged to trace to its ultimate source any information of a suspicious nature which may come to his knowledge,[353] and if the question of the debtor's solvency is so close as to require an inventory and a list of debts to determine it, the failure to use this degree of diligence will not charge the creditor with knowledge.[354] Nor can he be charged with notice of facts which could be learned only from intimate and inaccessible sources, such as the books of the bankrupt, but he is only responsible for such information as could be obtained by open observation and reasonable inquiry.[355] At the same time, if the creditor is permitted to examine the books of the debtor, or does make an independent investigation of his business and affairs, especially through the medium of an expert or accountant, he may claim the benefit of the knowledge so acquired, and if the result is not such as to furnish reasonable ground to believe the debtor insolvent and a preference intended, the creditor will be safe from the attack of the trustee

[347] Watchmaker v. Barnes, 259 Fed. 783, 170 C. C. A. 583, 43 Am. Bankr. Rep. 632.

[348] De Forest v. Crane & Ordway Co., 55 Mont. 489, 179 Pac. 291.

[349] Gooch v. Stone, 257 Fed. 631, 168 C. C. A. 581, 44 Am. Bankr. Rep. 86.

[350] In re Gaylord (D. C.) 225 Fed. 234, 35 Am. Bankr. Rep. 544.

[351] McGirr v. Humphreys Grocery Co. (D. C.) 192 Fed. 55, 26 Am. Bankr. Rep. 518; Singer v. Jacobs (C. C.) 11 Fed. 559.

[352] Pittsburgh Plate Glass Co. v. Edwards, 148 Fed. 377, 78 C. C. A. 191, 17 Am. Bankr. Rep. 447.

[353] Blankenbaker v. Charleston State Bank, 111 Ill. App. 393.

[354] Edwards v. Carondelet Milling Co., 108 Mo. App. 275, 83 S. W. 764.

[355] In re Wolf Co., 164 Fed. 448, 21 Am. Bankr. Rep. 73.

in bankruptcy.[356] So, also, where he inquired about the condition of the debtor corporation, not only from its officers, but also from others who were in position to know, and was assured that it was solvent and that its embarrassment was only temporary.[357] And the rule of constructive notice and diligent inquiry should be applied with due regard to the relative situation of the parties. For instance, it should not be applied with too great severity in the case of a young woman of no business experience whatever dealing with a banker, who was also a relative in whom she had confidence, she being "incapable of comprehending the significance of business facts which would have been more enlightening to men of the business world." [358]

§ 600. Same; Circumstances Constituting Ground for Belief.—What constitutes "reasonable ground to believe" that a debtor is insolvent or intends a preference must depend on the facts and circumstances of each case.[359] And although the general business transactions and condition of the bankrupt, at the time of giving a preference, may not have been sufficient to raise this reasonable ground of belief, yet if the special facts and circumstances passing between the particular parties, and out of which the preference grew, were such as to give a reasonable cause for such belief, the creditor is chargeable with notice.[360] The mere fact that the creditor's claim is past due when a payment is made on it or security given for it, is not alone sufficient to charge him with knowledge that the debtor is insolvent or that a preference will be effected,[361] nor the mere fact that an adjudication in bankruptcy actually follows within four months afterwards,[362] though it is otherwise if the creditor at the time knew that the bankrupt's attorney was then engaged in preparing a petition in bankruptcy.[363] Again, a creditor may know that his debtor is financially embarrassed, and may be insistent in his

356 Stratton v. Lawson, 27 Wash. 310, 67 Pac. 562; Brown v. Guichard, 37 Misc. Rep. 78, 74 N. Y. Supp. 735; Hussey v. Richardson-Roberts Dry Goods Co., 148 Fed. 598, 78 C. C. A. 370, 17 Am. Bankr. Rep. 511; In re Mayo Contracting Co., 157 Fed. 469, 19 Am. Bankr. Rep. 551; In re Bartlett, 172 Fed. 679, 22 Am. Bankr. Rep. 891.

357 In re Wolf Co., 164 Fed. 448, 21 Am. Bankr. Rep. 73.

358 Wright v. Sampter, 152 Fed. 196, 18 Am. Bankr. Rep. 355.

359 Whitwell v. Wright, 136 App. Div. 246, 120 N. Y. Supp. 1065.

360 Alderdice v. State Bank of Virginia, 1 Hughes, 47, 11 N. B. R. 398, Fed. Cas. No. 154. Evidence that the bankrupt had for some considerable time been insolvent, and that a creditor to whom a payment was made within four months of bankruptcy had had a long course of dealings with the bankrupt, was frequently in his place of business, and had opportunity for intimate knowledge of his affairs, will sustain a finding that the creditor knew of the bankrupt's insolvency when the payment was made. Benjamin v. Buell (C. C. A.) 268 Fed. 792, 46 Am. Bankr. Rep. 404.

361 In re Goodhile, 130 Fed. 471, 12 Am. Bankr. Rep. 374; Lyon v. Clark, 129 Mich. 381, 88 N. W. 1046.

362 Laundy v. First Nat. Bank, 66 Kan. 759, 71 Pac. 259.

363 In re Galvin, 2 Nat. Bankr. News, 146.

demands for settlement, and yet he may not have a reasonable cause to believe the debtor insolvent,[364] nor is such reasonable cause to be deduced from the mere fact that the debtor had some time previously compromised with his creditors at forty-five cents on the dollar.[365] But statements by a debtor to the creditor's agent, who was seeking to collect past-due debts for which the debtor had given checks which were dishonored by the banks, that the debtor had not and could not obtain money to pay the debts, that its real estate was mortgaged for all it was worth, and that there were judgments outstanding against it, gave the creditor reasonable cause to believe that the debtor was insolvent, so that he must have known that the enforcement of a chattel mortgage then taken would be a preference.[366] So where a bank, to which the bankrupt transferred accounts the day before the petition in bankruptcy was filed, knew that he had overdrawn his account, and that he had deceived the bank as to securities held by it, and that the transaction was handled for the bankrupt by an attorney, and the bank made haste to enter the transaction on its books and to notify persons concerned that it was the holder by assignment of the transferred accounts, this was held to justify the conclusion that the bank's officers believed the debtor to be insolvent.[367] And the fact that suits are pending against the debtor on claims which he does not dispute, is a very suspicious circumstance, and, if coupled with other facts, may be enough to charge the creditor with notice.[368] And a business man who allows his paper to go to protest, suspends payment, and closes the door of his place of business, proclaims to the world that he is insolvent.[369] So, where the creditor learned that an account which the bankrupt had assigned as security was fictitious, and that his place of business was closed, and that it was rumored that he had absconded, and placed its claim in the hands of its attorney for collection, although it was not due, and the claim was paid shortly before the adjudication in bankruptcy, it was held that the creditor had reasonable cause to believe that a preference was intended by such payment.[370] On the other hand, the mere fact that a creditor demands security for a debt previously unsecured does not show that he has reasonable ground for believing the debtor

[364] Sharpe v. Allender, 170 Fed. 589, 96 C. C. A. 104, 22 Am. Bankr. Rep. 431; Stackhouse v. Holden, 66 App. Div. 423, 73 N. Y. Supp. 203. But see In re Kingsbury, 3 N. B. R. 317, Fed. Cas. No. 7,816; In re Hines, 144 Fed. 543, 16 Am. Bankr. Rep. 495.

[365] Warren v. Tenth Nat. Bank, 5 Ben. 395, Fed. Cas. No. 17,200.

[366] In re Campion (D. C.) 256 Fed. 902, 43 Am. Bankr. Rep. 625.

[367] In re Star Spring Bed Co. (D. C.) 257 Fed. 176, 43 Am. Bankr. Rep. 328.

[368] Crittenden v. Barton, 59 App. Div. 555, 69 N. Y. Supp. 559; Empire State Trust Co. v. William F. Fisher Co., 67 N. J. Eq. 88, 57 Atl. 502.

[369] Markson v. Hobson, 2 Dill. 327, Fed. Cas. No. 9,099; Merchants' Nat. Bank v. Cook, 95 U. S. 342, 24 L. Ed. 412.

[370] Pratt v. Columbia Bank, 157 Fed. 137, 18 Am. Bankr. Rep. 406.

to be insolvent,[371] especially where the security also covers a contemporary loan of money,[372] but the case is altered when, in addition to this, it appears that the security given pledges substantially all of the debtor's unexempt property,[373] or the creditor knows that the property would be insufficient to satisfy the other creditors after paying his own debt.[374] Evidence that the creditor was investigating the financial standing of the bankrupt immediately prior to and continuously up to the time when the transfer was executed is admissible on this point,[375] and it may be shown that he knew that the debtor was hard pressed and without credit, and that he himself had been persistently pressing his own claim for several months.[376] And reasonable cause to believe a debtor insolvent may arise from the fact that he conveyed his residence for the benefit of an insistent creditor, stating at the time that it was his only available resource.[377] Circumstances justifying such a belief may also be found in the fact that the debtor settled with creditors by returning goods bought from them,[378] or that a creditor indirectly bought back goods from the debtor and sold them again at a loss,[379] or accepted for part of his claim goods for which he had no use, or which were not of a kind that he dealt in or employed in his business,[380] or that the money to make a payment was obtained by the sale of the debtor's entire stock in trade, especially if such sale was made secretly or under any suspicious conditions.[381] And where it appears that overdrafts were made by a merchant in collusion with a defaulting teller in the bank, for which a deed of preference was given to the bank just before the bankruptcy of the merchant, the deed is voidable, as such facts constitute reasonable cause for the bank to believe that the debtor was insolvent and that a preference was intended.[382]

§ 601. Imputed Knowledge of Agent or Attorney.—A preference will be voidable if reasonable cause to believe that the debtor is insol-

[371] Perry v. Booth, 80 App. Div. 373, 80 N. Y. Supp. 706; Congleton v. Schreihofer (N. J. Eq.) 54 Atl. 144. But see In re Hickerson, 162 Fed. 345, 20 Am. Bankr. Rep. 682.

[372] Stedman v. Bank of Monroe, 117 Fed. 237, 54 C. C. A. 269, 9 Am. Bankr. Rep. 4.

[373] Coder v. McPherson, 152 Fed. 951, 82 C. C. A. 99, 18 Am. Bankr. Rep. 523; Roberts v. Johnson, 151 Fed. 567, 81 C. C. A. 47, 18 Am. Bankr. Rep. 132.

[374] Robinson v. Tuttle, 2 Hask. 76, Fed. Cas. No. 11,968.

[375] Capital Nat. Bank v. Wilkerson, 36 Ind. App. 550, 76 N. E. 258.

[376] Wright v. William Skinner Mfg. Co., 162 Fed. 315, 89 C. C. A. 23, 20 Am. Bankr. Rep. 527.

[377] Brewster v. Goff, 164 Fed. 127, 21 Am. Bankr. Rep. 239.

[378] In re Andrews, 135 Fed. 599, 14 Am. Bankr. Rep. 247.

[379] Hardy v. Gray, 144 Fed. 922, 75 C. C. A. 562, 16 Am. Bankr. Rep. 387.

[380] In re Christopher Bailey & Son, 166 Fed. 982, 21 Am. Bankr. Rep. 911; Fowler State Bank v. White, 198 Fed. 631, 28 Am. Bankr. Rep. 441.

[381] Thomas v. Adelman, 136 Fed. 973, 14 Am. Bankr. Rep. 510. See Dunlop v. Thomas, 28 Wash. 521, 68 Pac. 909.

[382] Alderdice v. State Bank of Virginia, 1 Hughes, 47, 11 N. B. R. 398, Fed. Cas. No. 154.

vent and a preference intended is brought home either to the creditor himself or to "his agent acting therein" If the agent has knowledge of facts which should have induced such a belief, or of facts which should have put him upon inquiry as to the debtor's financial condition,[383] that knowledge is imputed to the principal and the effect is the same as if he himself had taken part in the transaction being in possession of such information,[384] and it is no defense to the trustee's suit to recover the preference that the creditor had no personal knowledge of the debtor's insolvency.[385] And it is immaterial how or when the agent obtained his knowledge, or that he had confidential relations with the bankrupt, or personal interests which prevented him from disclosing his knowledge to his principal.[386] But the agent must be one acting for the creditor "therein," that is, in the particular transaction by which the preference was created, though a general financial agent may answer this description,[387] but not one who was the clerk or agent of the bankrupt at the time the preference was given and who was not employed by the creditor until afterwards.[388] And it is important to observe that knowledge gained by a sub-agent or an agent of an agent is not imputable to the principal of the original agent. Thus, for example, if the holder of a note sends it to a bank for collection, the bank is his agent, and he is to be charged with whatever knowledge the bank possesses.[389] But where a bank, being the holder of a note, and having no correspondent in the town where the maker lives, sends it to its correspondent in the nearest large city for collection, and the latter sends it to the local bank for collection, although the local bank may know facts about the maker which would render the payment of the note to it a preference under the bankruptcy act, that knowledge is not imputable to the creditor, for the col-

[383] In re Nassau, 140 Fed. 912, 14 Am. Bankr. Rep. 828; Constam v. Haley, 206 Fed. 260, 124 C. C. A. 128. In the case last cited, it is said that, where the holder of a note against a bankrupt is charged with an agent's knowledge of facts indicating the bankrupt's insolvency, such notice is not limited to its effect to convert into preferences payments obtained through the activities of the agent, but extends as well to subsequent payments made by the bankrupt direct to the holder.

[384] Sage v. Wynkoop, 16 N. B. R. 363, Fed. Cas. No. 12,215; Mathews v. Riggs, 80 Me. 107, 13 Atl. 48; In re Cramer & Rogers Grocery Co., 252 Fed. 112, 164 C. C. A. 224, 42 Am. Bankr. Rep. 283; Smith v. Coury (D. C.) 247 Fed. 168, 41 Am. Bankr. Rep. 219.

[385] Plummer v. Myers, 137 Fed. 660, 14 Am. Bankr. Rep. 805.

[386] Campbell v. Balcomb, 183 Fed. 766, 106 C. C. A. 474, 25 Am. Bankr. Rep. 538. But naturally, this rule does not apply where the agent is playing false to both debtor and creditor, as where one acting in the transaction as the agent of the creditor was at the same time business manager of the debtor corporation, and was engaged in a scheme to defraud either the creditor or the corporation or both. Scott County Milling Co. v. Powers, 112 Miss. 798, 73 South. 792.

[387] Wright v. Cotten, 140 N. C. 1, 52 S. E. 141.

[388] Whitson v. Farber Bank, 105 Mo. App. 605, 80 S. W. 327.

[389] Hooker v. Blount, 44 Tex. Civ. App. 162, 97 S. W. 1083.

lecting bank is not its agent.[390] On the same principle, if the creditor sends his claim to a collection agency, and the agency employs an attorney to collect it, and the latter procures a confession of judgment, knowing the debtor to be insolvent, this does not affect the validity of the preference so far as concerns the creditor, the attorney not being his agent.[391] But an attorney at law employed directly by the creditor to take proceedings for the enforcement of the claim, or to effect a settlement with the debtor, is the creditor's "agent," and his knowledge is imputable to the creditor.[392] And it is immaterial that the attorney, unknown to the creditor employing him, has special and peculiar facilities for acquiring information, as, by being the professional adviser of the debtor also. So long as the disclosure of the knowledge acquired would not involve a breach of professional confidence, the creditor is chargeable with it.[393] In the case of a corporation which is a creditor, the knowledge of any of its principal officers will be imputed to the corporation itself,[394] but not knowledge possessed by an officer who resigned before the giving of the alleged preference, though he is also the principal stockholder of the bankrupt corporation.[395] And conversely, a person will be held to have notice as an individual of what he does as the president of a corporation.[396] It appears that this rule applies also to public or municipal corporations. Thus, it is held that knowledge possessed by a township trustee as to the insolvency of his brother, a defaulting township treasurer, is imputable to the township itself.[397] In the case of a banking corporation, either the president or the cashier may be re-

[390] Balcomb v. Old Nat. Bank, 201 Fed. 679, 29 Am. Bankr. Rep. 329.

[391] Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392.

[392] Rogers v. Palmer, 102 U. S. 263, 26 L. Ed. 464; Wight v. Muxlow, 8 Ben. 52, Fed. Cas. No. 17,629; Vogle v. Lathrop, 3 Pittsb. 268, 4 N. B. R. 439, Fed. Cas. No. 16,985; Mayer v. Hermann, 10 Blatchf. 256, Fed. Cas. No. 9,344; Hewitt v. Boston Straw Board Co., 214 Mass. 260, 101 N. E. 424.

[393] Brown v. Jefferson County Nat. Bank, 19 Blatchf. 315, 9 Fed. 258; Farmers' State Bank v. Freeman, 249 Fed. 579, 161 C. C. A. 505, 41 Am. Bankr. Rep. 286.

[394] Farmers' Bank of Edgefield v. C. D. Carr & Co., 127 Fed. 690, 62 C. C. A. 446, 11 Am. Bankr. Rep. 733; In re W. A. Silvernail Co. (D. C.) 218 Fed. 979, 33 Am. Bankr. Rep. 59; Patterson v. Baker Grocery, Co., 73 Or. 433, 144 Pac. 673. This rule was applied in a case where the treasurer of a corporation, who had supplied practically all of its capital, and who had been led to believe that a claim against the corporation was unfounded, though other corporate officers knew it to be well founded, paid over to himself on his own claims almost all of the corporate assets. It was held that such payment was preferential, since the corporation was charged with the knowledge of all of its officers. In re Boston-West Africa Trading Co. (D. C.) 255 Fed. 924, 43 Am. Bankr. Rep. 382. But where the bankrupt was treasurer of a corporation, the fact that he knew himself to be insolvent at the time he made a payment on his indebtedness to the corporation did not charge it with knowledge of such fact. Arthur v. Harrington (D. C.) 211 Fed. 215, 32 Am. Bankr. Rep. 216.

[395] Benner v. Blumauer-Frank Drug Co. (D. C.) 198 Fed. 362, 28 Am. Bankr. Rep. 798.

[396] Lancaster v. Collins (C. C.) 7 Fed. 338.

[397] Painter v. Napoleon Tp., 190 Fed. 637, 26 Am. Bankr. Rep. 324.

garded as the "agent" of the bank, so that if either has knowledge of circumstances which would furnish reasonable ground to believe that the debtor of the bank was insolvent and that a preference would result from any payment, transfer, or security given to the bank, then the preference so given will be voidable.[398]

§ 602. Solicitation, Coercion, or Threats by Creditor.—Under former bankruptcy statutes, where an "intention" on the part of the debtor to give a preference was essential to its consummation, it was often argued, and sometimes held, that this implied a willingness or disposition on his part to place the preferred creditor in an advantageous position, or the voluntary selection of one or more creditors to be favored above the rest.[399] But this doctrine did not prevail. It was held by the great majority of the decisions that a preference was none the less a preference because it was not yielded voluntarily, but was wrung from the debtor by urgent solicitation, threats of prosecution, fear of exposure and disgrace, or any other form of coercion or pressure.[400] And these decisions will naturally be applicable under the present bankruptcy act, since it makes no reference to the debtor's intention or to any influence brought to bear upon him.

§ 603. Preference of Partnership or Individual Creditors.—The purpose of the bankruptcy act with reference to the joint assets of a bankrupt partnership is that they shall be first applied, in good faith, to the payment of partnership debts, and that the individual property of the several partners shall first be applied in payment of their separate debts; and any scheme or device resorted to by persons contemplating bankruptcy for the purpose of charging partnership assets with individual debts, or vice versa, is in violation of the act and will be frustrated by the court, the law being administered in such a manner as to pre-

[398] Nisbit v. Macon Bank & Trust Co., 12 Fed. 686, 4 Woods, 464; Crooks v. People's Nat. Bank, 72 App. Div. 331, 76 N. Y. Supp. 92, 495; Collett v. Bronx Nat. Bank, 205 Fed. 370, 123 C. C. A. 392.

[399] Ashby v. Steere, 2 Woodb. & M. 347, Fed. Cas. No. 576. This was also once the rule in England. "If such a preference to a particular creditor be not given voluntarily, but from an apprehension of legal process, it is not fraudulent, and cannot afterwards be vacated." 2 Blackst. Comm. 478, note, citing Thompson v. Freeman, 1 Durn. & E. 155.

[400] First Nat. Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542; Strain v. Gourdin, 2 Woods, 380, 11 N. B. R. 156, Fed. Cas. No. 13,521; Van Kleeck v. Thurber, Fed. Cas. No. 16,861; Campbell v. Traders' Nat. Bank, 2 Biss. 423, 3 N. B. R. 498, Fed. Cas. No. 2,370; In re Amory & Leeds, Fed. Cas. No. 336c; Atkinson v. Farmers' Bank, Crabbe, 529, Fed. Cas. No. 609; Rison v. Knapp, 1 Dill. 186, 4 N. B. R. 349, Fed. Cas. No. 11,861; Foster v. Hackley, 2 N. B. R. 406, Fed. Cas. No. 4,971; Wilson v. Brinkman, 2 N. B. R. 468, Fed. Cas. No. 17,794; Graham v. Stark, 3 Ben. 520, 3 N. B. R. 357, Fed. Cas. No. 5,676.

vent preferences and secure the equitable distribution of the estate.[401] Hence if a creditor of a firm, knowing the firm to be insolvent, takes a mortgage on the individual property of one of the partners, it is an unlawful preference.[402] And the rule is the same if a member of the firm, owing a private debt, gives the firm's note for it, or his own note indorsed by the firm.[403] But on the other hand, a mortgage given by a partner on his individual property to secure his individual debt is not voidable as a preference in the subsequent bankruptcy of the firm,[404] or at least, the creditors of the firm will have no standing to object to it and seek its vacation.[405] And so, a mortgage given by a partnership on its property is not affected by subsequent bankruptcy proceedings against one of the partners alone.[406] But it may be remarked that, in a suit by a trustee in bankruptcy of a partnership to recover payments made to a creditor as a preference, it must be shown that both the firm and the partners individually were insolvent when the payment was made.[407] As to transactions between the partners themselves, it is held that where one partner sells to his co-partner his entire interest in the property of the firm, the transfer cannot be impeached as a preference, since the transferee is not a creditor, and the effect of the transfer is a loss to all the creditors of the firm alike.[408]

Where the bankrupt obtained credit after he became for the second time a sole trader, by buying out his partner, those extending credit, though they acted in ignorance of the dissolution, will not be presumed to have extended credit solely to the firm and to be merely firm creditors, because of their option to hold the withdrawing partner, where such presumption would preclude the trustee in bankruptcy

[401] In re Jones, 100 Fed. 781. And see Johnson v. Hanley-Hoye Co., 188 Fed. 752, 26 Am. Bankr. Rep. 748.

[402] Mayes v. Palmer (C. C. A.) 208 Fed. 97; In re Parker, 6 Sawy. 248, 11 Fed. 397; Pollock v. Jones, 124 Fed. 163, 61 C. C. A. 555; Ft. Pitt Coal & Coke Co. v. Diser, 239 Fed. 443, 152 C. C. A. 321, 38 Am. Bankr. Rep. 566. Compare Sargent v. Blake, 160 Fed. 57, 87 C. C. A. 213, 17 L. R. A. (N. S.) 1040, 15 Ann. Cas. 58, A partner's individual indorsement of the firm's notes, while the firm is insolvent, will give the payee a voidable preference. In re Frazer (D. C.) 221 Fed. 83, 34 Am. Bankr. Rep. 467.

[403] In re Jones, 100 Fed. 781, 4 Am. Bankr. Rep. 141. But if a note so indorsed is paid by the firm, and the individual partner becomes bankrupt (but not the firm) his creditors cannot object to the payment as a preference, because the payee has not received any of the property of the bankrupt. Catchings v. Chatham Nat. Bank, 180 Fed. 103, 103 C. C. A. 601, 24 Am. Bankr. Rep. 843.

[404] Hewitt v. Northrup, 9 Hun (N. Y.) 543, 16 N. B. R. 27, affirmed 75 N. Y. 506.

[405] In re Lehigh Lumber Co., 101 Fed. 216, 4 Am. Bankr. Rep. 221.

[406] In re Sanderlin, 109 Fed. 857, 6 Am. Bankr. Rep. 384; Rubenstein v. Lottow, 220 Mass. 156, 107 N. E. 718.

[407] Tumlin v. Bryan, 165 Fed. 166, 21 Am. Bankr. Rep. 319; Worrell v. Whitney, 179 Fed. 1014, 24 Am. Bankr. Rep. 749; Forsaith v. Merritt, 1 Low. 336, 3 N. B. R. 48, Fed. Cas. No. 4,946. See Anderson v. Stayton State Bank, 82 Or. 357, 159 Pac. 1033.

[408] In re Rudnick, 102 Fed. 750, 4 Am. Bankr. Rep. 531; Barnes v. Vetterlein, 16 Fed. 759.

from recovering as preferential a payment made by the bankrupt to an old individual creditor after dissolution of the firm, on the theory that there were no other creditors of the same class as the one to whom payment was made.[409]

§ 604. Rights of Preferred Creditor as to Proving Claim.—The provision of the statute (§ 57g) is that claims of creditors who have received voidable preferences "shall not be allowed unless such creditors shall surrender such preferences." This is not a penal requirement in such sense that it must be construed strictly.[410] And it applies only to transactions which constitute preferences within the meaning of the other provisions of the act, where preferences are defined and declared to be voidable.[411] But as the law stood originally, this clause contained no limitation as to time, and hence the claim of a preferred creditor could not be allowed without a surrender of the preference, though it was given more than four months before the beginning of the bankruptcy proceedings.[412] This, however, was changed by the amendment of 1903. If, therefore, a creditor files proof of his claim and asks its allowance, and it is opposed on the ground of his having received a preference, and this is found to be the fact, allowance of the claim will be refused or withheld until he shall surrender the preference,[413] and the referee has jurisdiction to determine whether or not a preference has been received when the creditor offers to prove his claim as an unsecured debt.[414] Or if the claim has been proved and allowed, and it is afterwards discovered that the creditor had been preferred, the claim may be expunged on motion of the trustee and at the cost of the creditor.[415] The statute is imperative that the preference must be surrendered before the claim can be allowed. A creditor who has received partial satisfaction of his debt, by means of a preference, cannot retain it and prove a claim for the unsatisfied balance. The amount of the preference cannot be treated as a set-off, either to reduce the amount of his claim, or against the dividend to be received thereon, but the amount must be surrendered

[409] Wartell v. Moore (C. C. A.) 261 Fed. 762, 44 Am. Bankr. Rep. 624.

[410] Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814.

[411] In re Peacock, 178 Fed. 851, 24 Am. Bankr. Rep. 159.

[412] In re Busby, 124 Fed. 469, 10 Am. Bankr. Rep. 650; In re Abraham Steers Lumber Co., 112 Fed. 406, 50 C. C. A. 310, 7 Am. Bankr. Rep. 332.

[413] In re Flynn & Co., 126 Fed. 422, 11 Am. Bankr. Rep. 318; In re Graff, 117 Fed. 343, 8 Am. Bankr. Rep. 744; In re Keller, 109 Fed. 118, 6 Am. Bankr. Rep. 334; In re Hoffman, 2 Nat. Bankr. News, 554; Cookingham v. Morgan, 7 Blatchf. 480, 5 N. B. R. 16, Fed. Cas. No. 3,183; Bingham v. Richmond, 6 N. B. R. 127, Fed. Cas. No. 1,415.

[414] In re Keystone Press, 203 Fed. 710, 29 Am. Bankr. Rep. 715.

[415] In re Forsyth, 7 N. B. R. 174, Fed. Cas. No. 4,948; In re Wise, 2 Nat. Bankr. News, 151.

to the trustee.[416] And a creditor having both a claim entitled to priority and a common claim cannot so apply a preferential payment received as to reduce or extinguish the common claim and then prove the priority claim in full.[417]

But if the creditor will surrender his preference, all taint of fraud arising out of it is removed and he is restored to an equality with all other creditors, and may then prove his entire claim as unsecured.[418] In fact, a creditor in this position has his option either to make the surrender and take his place in the ranks of the unsecured creditors, or to retain and rely upon the preference received.[419] In the latter case, he is open to the attack of the trustee, for it is not necessary to the trustee's right of action to avoid an alleged preference that the creditor should have come into the bankruptcy proceedings in any way.[420] But if no proceeding for that purpose is brought, or if the trustee's attack fails, the creditor remains entirely outside of the bankruptcy proceedings, so far as concerns the claim affected by the preference. And even if he comes into the court of bankruptcy to claim a fund which has been paid into court subject to the rights of conflicting claimants, yet if he does not seek to prove his claim as a general creditor, the fund must be paid over to him intact, on his title to it being decided, and without deducting a preference which he had received.[421]

If allowance of the claim is opposed on this ground, it is incumbent upon the trustee to show the actual receipt by the creditor of money, goods, or other property or security which, if retained, will diminish the assets available for general creditors and give the preferred creditor an advantage over the rest.[422] But if the property preferentially transferred was a note of a third person, the creditor must be charged with the face value of it, without regard to the amount he actually realized

[416] In re Chaplin, 115 Fed. 162, 8 Am. Bankr. Rep. 121; In re Sumner, 101 Fed. 224, 4 Am. Bankr. Rep. 123; In re Colton Export & Import Co., 115 Fed. 158, 8 Am. Bankr. Rep. 257; In re Keller, 109 Fed. 306, 6 Am. Bankr. Rep. 487; Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 355, 58 C. C. A. 517, 10 Am. Bankr. Rep. 641.

[417] In re Henry C. King Co., 113 Fed. 110, 7 Am. Bankr. Rep. 619.

[418] In re Richard, 94 Fed. 633, 2 Am. Bankr. Rep. 506; In re Israel, 4 Dill. 501, Fed. Cas. No. 7,112; In re Huntenberg, 153 Fed. 768, 18 Am. Bankr. Rep. 697; In re Nathan, 2 Nat. Bankr. News, 611. The lien of a mortgage given by a bankrupt, which is voidable as a preference, is in effect discharged by the bankruptcy for all purposes. Petition of Rouse, 208 Fed. 881, 126 C. C. A. 90, L. R. A. 1915B, 148, 31 Am. Bankr. Rep. 115.

[419] In re Privett, 132 Fed. 592, 13 Am. Bankr. Rep. 151.

[420] In re Nathan, 2 Nat. Bankr. News, 611.

[421] In re West Norfolk Lumber Co., 112 Fed. 759, 7 Am. Bankr. Rep. 648. A claim by a chattel mortgagee to the proceeds of a sale of the mortgaged property is not such a claim as will be disallowed until the surrender of an illegal preference. In re Johnson (D. C.) 224 Fed. 180.

[422] In re Hickey, 112 Fed. 287, 7 Am. Bankr. Rep. 282; In re George M. Hill Co., 130 Fed. 315, 64 C. C. A. 561, 66 L. R. A. 68, 12 Am. Bankr. Rep. 221; In re Christensen, 2 Nat. Bankr. News, 695.

on it.[423] But the return of unsalable goods to the unpaid vendor of them, under an agreement that they may be exchanged for new and salable stock, does not constitute the giving of a preference such that he must account for their value before being allowed to prove his claim.[424]

If the bankrupt's estate proves sufficient to pay in full the claims of all unpreferred creditors, and leave a surplus, then a creditor who had received a preference, and had been excluded from participation in the division of the estate in bankruptcy because of his refusal to surrender it, will be entitled, as against the bankrupt, to share in such surplus.[425]

§ 605. Same; Creditor's Knowledge of Intent to Prefer.—As the bankruptcy act of 1898 stood originally, it simply provided that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." (Section 57g.) And it was held that any advantage gained by the creditor which was in the nature of a preference must be surrendered, irrespective of the intention of the debtor in the transaction or the creditor's knowledge of it, and though the preference was given in the usual course of business and innocently received by the creditor. In other words, though the creditor could not be forced to yield up the payment, property, or security received, at the suit of the trustee in bankruptcy, unless it could be shown that he took it with reasonable cause to believe that the debtor was insolvent and that a preference was intended or would result, yet no such knowledge or reasonable cause of belief need be shown as a ground for disallowing his claim when offered for proof. If there was a preference, it must be surrendered, and nothing else was necessary.[426] But this was changed by the amendatory act of 1903, which provides that "the claims of creditors who have received preferences, voidable under section sixty,

[423] In re Chaplin, 115 Fed. 162, 8 Am. Bankr. Rep. 121.

[424] In re Nicholas, 122 Fed. 299, 10 Am. Bankr. Rep. 291.

[425] In re Morton, 118 Fed. 908, 9 Am. Bankr. Rep. 508.

[426] Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814; In re Abraham Steers Lumber Co., 112 Fed. 406, 50 C. C. A. 310, 7 Am. Bankr. Rep. 332; In re Dickson, 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349, 7 Am. Bankr. Rep. 186; Mills v. Lewis, 110 Fed. 512, 49 C. C. A. 131, 6 Am. Bankr. Rep. 612; In re Keller, 109 Fed. 118, 6 Am. Bankr. Rep. 334; In re Bashline, 109 Fed. 965, 6 Am. Bankr. Rep. 194; In re Seckler, 106 Fed. 484, 5 Am. Bankr. Rep. 579; In re Flick, 105 Fed. 503, 5 Am. Bankr. Rep. 465; In re Alexander, 102 Fed. 464, 4 Am. Bankr. Rep. 376; In re Fixen, 102 Fed. 295, 42 C. C. A. 354, 50 L. R. A. 605, 4 Am. Bankr. Rep. 10; In re Sloan, 102 Fed. 116, 4 Am. Bankr. Rep. 356; Strobel & Wilken Co. v. Knost, 99 Fed. 409, 3 Am. Bankr. Rep. 631; In re Fort Wayne Electric Corp., 99 Fed. 400, 39 C. C. A. 582, 3 Am. Bankr. Rep. 634; In re Conhaim, 97 Fed. 923, 3 Am. Bankr. Rep. 249; In re Jourdan, 2 Nat. Bankr. News, 581; In re Wise, 2 Nat. Bankr. News, 151; Harris v. Second Nat. Bank, 110 Tenn. 239, 75 S. W. 1053.

subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances."[427] And it is now held that the claim of a creditor cannot be disallowed or expunged after proof, unless it is shown that the preference would be voidable in a suit by the trustee, that is, it must be shown that the bankrupt was insolvent at the time and that the creditor had reasonable cause to believe that the enforcement of the transfer, payment, or security would effect a preference.[428] But if a given payment received by a creditor without knowledge of insolvency need not be surrendered before proof, not being a preference within the bankruptcy act because the result of the whole transaction was to increase the net indebtedness to the creditor, the same payment, received with knowledge of insolvency, is not a preference and need not be surrendered.[429]

§ 606. Same; What Constitutes "Surrender" of Preference.—There have been many decisions to the effect that a "surrender" of a preference, to entitle the creditor to have his claim allowed, must be voluntary, that is, not forced or compulsory, but following upon the mere demand of the trustee; that if the creditor chose to abide the issue of adversary proceedings against him, the allowance of his claim as well as the retention of the preference must depend upon the result; and that it was too late to make a surrender, within the meaning of the act, after the trustee had begun a suit for the avoidance of the preference, or at any rate after the recovery of a judgment therein.[430] But the Supreme Court of the United States has established a different rule at least in cases where the transaction is not tainted by actual fraud. It has ruled that a

[427] Act Cong. Feb. 5, 1903, 32 Stat. 797, amending Bankruptcy Act 1898, § 57g.

[428] In re Frazin, 201 Fed. 86, 29 Am. Bankr. Rep. 214; In re Sam Z. Lorch & Co., 199 Fed. 944, 28 Am. Bankr. Rep. 784; Hardy v. Gray, 144 Fed. 922, 75 C. C. A. 562, 16 Am. Bankr. Rep. 387; In re Bloch, 142 Fed. 674, 74 C. C. A. 250, 15 Am. Bankr. Rep. 748; In re Oppenheimer, 140 Fed. 51, 15 Am. Bankr. Rep. 267; In re Pettingill & Co., 135 Fed. 218; In re Ratliff, 107 Fed. 80, 5 Am. Bankr. Rep. 713.

[429] In re Henry C. King Co., 113 Fed. 110, 7 Am. Bankr. Rep. 619.

[430] In re Greth, 112 Fed. 978, 7 Am. Bankr. Rep. 598; In re Owings, 109 Fed. 623, 6 Am. Bankr. Rep. 454; In re Israel, 4 Dill. 501, Fed. Cas. No. 7,112; In re Davidson, 4 Ben. 10, 3 N. B. R. 418, Fed. Cas. No. 3,599; In re Richter's Estate, 1 Dill. 544, 4 N. B. R. 221, Fed. Cas. No. 11,803; In re Tonkin, 4 N. B. R. 52, Fed. Cas. No. 14,094; In re Ayers, 6 Biss. 48, Fed. Cas. No. 685; In re Leland, 7 Ben. 156, 9 N. B. R. 209, Fed. Cas. No. 8,230; In re Montgomery, 3 N. B. R. 374, Fed. Cas. No. 9,728; In re Stephens, 3 Biss. 187, 6 N. B. R. 533, Fed. Cas. No. 13,365; In re Graves, 9 Fed. 816; In re Drummond, 4 Biss. 149, Fed. Cas. No. 4,094; Phelps v. Sterns, 4 N. B. R. 34, Fed. Cas. No. 11,080; In re Scott, 4 N. B. R. 414, Fed. Cas. No. 12,518; In re Forsyth, 7 N. B. R. 174, Fed. Cas. No. 4,928; In re Cramer, 13 N. B. R. 225, Fed. Cas. No. 3,345; Burr v. Hopkins, 6 Biss. 345, 12 N. B. R. 211, Fed. Cas. No. 2,192; In re Riorden, 14 N. B. R. 332, Fed. Cas. No. 11,852.

creditor who has in good faith received a preference, which is voidable under the bankruptcy law only because given within four months prior to the filing of the petition, and who has in good faith retained the preference until deprived thereof by the judgment of a court in a suit by the trustee, may still prove the debt so voidably preferred, notwithstanding the statutory provision concerning the "surrender" of preferences.[431]

As to the manner of making the surrender, it naturally depends on the character of the preference given. If it was a payment of money, the sum must be paid over to the trustee in bankruptcy, and an offer by the creditor to allow the amount of the preference to be deducted from any dividend payable to him on his claim is not sufficient.[432] As to reimbursing the estate for the costs of legal proceedings, it may or may not be equitable to require this according to the circumstances of the case.[433] But on the other hand, when a conveyance of land is surrendered as having been preferential, the creditor is entitled to be reimbursed for money expended in paying off incumbrances on the property.[434] Where the property transferred was a note of a third person, the statute is satisfied by a return of the note itself, and the trustee cannot refuse to receive it and demand its face value in cash.[435] But the surrender of a chose in action must be completed by such indorsements or other forms of assignment as may be necessary to pass title.[436] A written waiver of

[431] Keppel v. Tiffin Sav. Bank, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790, 13 Am. Bankr. Rep. 552; Page v. Rogers, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332, 21 Am. Bankr. Rep. 496; Streeter v. Jefferson County Nat. Bank, 147 U. S. 36, 13 Sup. Ct. 236, 37 L. Ed. 68; State Bank of Clearwater v. Ingram, 237 Fed. 76, 150 C. C. A. 278, 38 Am. Bankr. Rep. 447; In re Louis J. Bergdoll Motor Co., 233 Fed. 410, 147 C. C. A. 346, 37 Am. Bankr. Rep. 501; Union Central Life Ins. Co. v. Drake, 214 Fed. 536, 131 C. C. A. 82, 32 Am. Bankr. Rep. 252; In re Cahill (D. C.) 208 Fed. 193, 30 Am. Bankr. Rep. 794; In re Hamilton Automobile Co., 209 Fed. 596, 126 C. C. A. 418, 31 Am. Bankr. Rep. 205. In re Elletson Co., 193 Fed. 84, 28 Am. Bankr. Rep. 434; In re John A. Baker Notion Co., 180 Fed. 922, 24 Am. Bankr. Rep. 808; In re Clark, 176 Fed. 955, 24 Am. Bankr. Rep. 388; In re Otto F. Lange Co., 170 Fed. 114, 22 Am. Bankr. Rep. 414; In re Baker, 2 Nat. Bankr. News, 195; In re Newcomer, 18 N. B. R. 85, Fed. Cas. No. 10,148; In re Cadwell, 17 Fed. 693; In re Currier, 2 Low. 436, 13 N. B. R. 68, Fed. Cas. No. 3,492.

[432] In re Flick (D. C.) 105 Fed. 503, 5 Am. Bankr. Rep. 465. But where a creditor has received a preference in money which is less than the amount of his claim, the court, instead of requiring the repayment thereof, may properly permit proof of the creditor's claim, and provide by its final decree for the deduction of the amount of the preference, with interest, from the dividend due such creditor. In re Wright-Dana Hardware Co., 212 Fed. 397, 129 C. C. A. 73, 31 Am. Bankr. Rep. 816. And where the trustee in bankruptcy holds money belonging to a creditor who has received a voidable preference, the two sums may be offset and the balance only paid to the trustee as a condition of allowing the creditor's claim. In re French (D. C.) 231 Fed. 255, 37 Am. Bankr. Rep. 289.

[433] In re Moyer (D. C.) 97 Fed. 324.

[434] Crandall v. Coats (D. C.) 133 Fed. 965, 13 Am. Bankr. Rep. 712.

[435] Dickinson v. Security Bank of Richmond, 110 Fed. 353, 49 C. C. A. 84, 6 Am. Bankr. Rep. 551.

[436] Traders' Ins. Co. v. Mann, 118 Ga. 381, 45 S. E. 426.

a lien may be a sufficient surrender of it,[437] but not a mere admission on the part of the creditor that the security given is voidable as having been in fraud of creditors,[438] though it appears that a specific surrender of a mortgage may not be necessary where the lien was cut off by the foreclosure of a prior mortgage before the creditor filed his proof of claim.[439] If the creditor has instituted proceedings in a state court to establish or enforce a lien, they must be abandoned or dismissed as a part of the surrender of his preference.[440]

The surrender of a preference must be made to the trustee in bankruptcy, and not to the bankrupt or to any other person,[441] and pending the appointment and qualification of a trustee, the proof of debt must be postponed, and the preferred creditor cannot vote in the election for trustee.[442] Ordinarily it is intended that the surrender shall be made by the creditor himself. But where the preference consisted in a deed of trust in the nature of a mortgage, it is sufficient if the trustee therein surrenders the property covered.[443] Where the question of preference has been contested, and decided by the referee in bankruptcy adversely to the creditor, the referee should fix a reasonable time within which the creditor may surrender his preference and have his claim allowed.[444] And where the creditor, on demand of the trustee in bankruptcy, has promised and agreed to pay over to him the amount of a preferential payment received by him, which promise he afterwards fulfills, he is not debarred from having his proof of claim allowed by the fact that, for the convenience of counsel, the actual payment of the money was delayed for a few days beyond the close of a year after the adjudication in bankruptcy.[445]

§ 607. Same; Separate or Independent Claims.—According to the preponderance of authority, the provision of the bankruptcy act relating to the surrender of preferences, as a condition to the allowance of claims, is aimed at the preferred creditor, rather than the particular debt sought to be proved; and the sum total of the bankrupt's indebtedness to that creditor at the time the preference was given is affected by it, no matter what may be the nature and number of the items of that indebtedness, so that, although the preference was given in discharge of or as security for

[437] In re Bolinger, 108 Fed. 374, 6 Am. Bankr. Rep. 171.

[438] In re Leeman, 1 Nat. Bankr. News, 331.

[439] In re Stendts, 1 Nat. Bankr. News, 509.

[440] In re Heinsfurter, 97 Fed. 198, 3 Am. Bankr. Rep. 113; Buckingham v. Schuylkill Plush & Silk Co., 38 Misc. Rep. 305, 77 N. Y. Supp. 857.

[441] In re Bailey, 176 Fed. 990, 24 Am. Bankr. Rep. 201; In re Currier, 2 Low. 436, 13 N. B. R. 68, Fed. Cas. No. 3,492.

[442] In re Parham, 17 N. B. R. 300, Fed. Cas. No. 10,712.

[443] In re Clarke, 2 Hughes, 405, 10 N. B. R. 21, Fed. Cas. No. 2,843.

[444] In re Oppenheimer, 140 Fed. 51, 15 Am. Bankr. Rep. 267.

[445] Hutchinson v. Otis, Wilcox & Co., 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179, 10 Am. Bankr. Rep. 135.

one particular debt, yet the creditor cannot be allowed to prove a claim upon any other debt, existing at that time, however separate and distinct, unless he will surrender the preference.[446] And a creditor having several claims against the same debtor, who receives a payment on account without special appropriation, under circumstances making it a preference, cannot apply the payment to the extinguishment of some of the claims, and then prove the others as unsecured.[447] And the same principle applies where part of the original indebtedness has been transferred or assigned by the creditor to a third person; no part of it can be allowed as a claim against the estate in bankruptcy until the preference has been surrendered.[448] But this applies only to the state of the accounts between the parties at the time the preference was given. A creditor who has received a preference is not thereby debarred from proving a claim in bankruptcy on a separate and new debt created after the giving of the preference, and to which the preference could have no relation.[449] But where notes given by a debtor to close an account are still held by the creditor and unpaid at the time a further indebtedness on account is contracted, both the notes and the account will constitute the indebtedness then due, and a payment of the notes thereafter, when the debtor is insolvent and within four months prior to his bankruptcy, will con-

[446] In re Mayo Contracting Co., 157 Fed. 469, 19 Am. Bankr. Rep. 551; Dunn v. Gans, 129 Fed. 750, 64 C. C. A. 278, 12 Am. Bankr. Rep. 316; In re Delling, 124 Fed. 852, 10 Am. Bankr. Rep. 688; Livingstone v. Heineman, 120 Fed. 786, 57 C. C. A. 154, 10 Am. Bankr. Rep. 39; In re E. O. Thompson's Sons, 121 Fed. 607; In re Lyon, 121 Fed. 723, 58 C. C. A. 143, 10 Am. Bankr. Rep. 25; Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673; In re Dickson, 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349, 7 Am. Bankr. Rep. 186; In re Rogers Milling Co., 102 Fed. 687, 4 Am. Bankr. Rep. 540; In re Teslow, 104 Fed. 229, 4 Am. Bankr. Rep. 757; In re Flick, 105 Fed. 503, 5 Am. Bankr. Rep. 465; In re Gillette, 104 Fed. 769, 5 Am. Bankr. Rep. 119; In re Conhaim, 97 Fed. 923, 3 Am. Bankr. Rep. 249; In re Beswick, 2 Nat. Bankr. News, 808; In re Myers, 2 Nat. Bankr. News, 765; In re Richter, 1 Dill. 544, 4 N. B. R. 221, Fed. Cas. No. 11,803; In re Kingsbury, 3 N. B. R. 317, Fed. Cas. No. 7,816; In re Barnes, Fed. Cas. No. 1,013; State Nat. Bank v. Monroe Cotton Press Co., 39 La. Ann. 834, 2 South. 605. Contra, In re Hurst, 188 Fed. 707, 26 Am. Bankr. Rep. 781; In re Wise, 2 Nat. Bankr. News, 151; In re Comstock, 3 Sawy. 320, 12 N. B. R. 110, Fed. Cas. No. 3,079; Whiston v. Smith, 2 Low. 101, Fed. Cas. No. 17,523; In re Stephens, 3 Biss. 187, 6 N. B. R. 533, Fed. Cas. No. 13,365; Corbett v. Woodward, 5 Sawy. 403, Fed. Cas. No. 3,223; Cramton v. Tarbell, Fed. Cas. No. 3,349.

[447] Kimball v. E. A. Rosenbam Co., 114 Fed. 85, 52 C. C. A. 33, 7 Am. Bankr. Rep. 718; C. S. Morey Mercantile Co. v. Schiffer, 114 Fed. 447, 52 C. C. A. 249, 7 Am. Bankr. Rep. 670; Dunn v. Gans, 129 Fed. 750, 64 C. C. A. 278, 12 Am. Bankr. Rep. 316; In re Conhaim, 97 Fed. 923, 3 Am. Bankr. Rep. 249; In re Kingsbury, 3 N. B. R. 317, Fed. Cas. No. 7,816; Stearns Salt & Lumber Co. v. Hammond, 217 Fed. 559, 133 C. C. A. 411, 33 Am. Bankr. Rep. 484.

[448] Swarts v. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 387, 8 Am. Bankr. Rep. 673.

[449] In re Wolf & Levy, 122 Fed. 127, 10 Am. Bankr. Rep. 153; In re Abraham Steers Lumber Co., 112 Fed. 406, 50 C. C. A. 310, 7 Am. Bankr. Rep. 332; In re Weissner, 115 Fed. 421, 8 Am. Bankr. Rep. 177; In re Jourdan, 2 Nat. Bankr. News, 581; In re Arnold, 2 N. B. R. 160, Fed. Cas. No. 551.

stitute the giving of a preference, which must be surrendered before the account can be proved and allowed.[450]

§ 608. **Proceedings to Recover Preference; Jurisdiction.**—When a creditor who is alleged to have received a preference submits himself to the jurisdiction of the court of bankruptcy, the question of his rights and liabilities may be determined summarily.[451] But the trustee cannot require a creditor in this situation, who has not in any way become a party to the bankruptcy proceedings, to appear before the referee and litigate the question of preference, but he must proceed by plenary suit against the creditor in a proper court.[452] The federal district court has jurisdiction of an action at law for this purpose.[453] And indeed it is expressly provided by statute that "for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."[454] And an action by a trustee against a creditor to recover an alleged preference, begun by summons and complaint, is an action at law within the jurisdiction of the bankruptcy court, notwithstanding an allegation in the complaint of the conversion of the property by the creditor.[455] And the federal court is not prevented from taking jurisdiction by the fact that the alleged preference consisted of a confessed judgment, under which there has been a levy and sale and a distribution of the proceeds to lien creditors.[456] But if the proceeds of a sale remain in the custody of the state court, the proper course for the trustee is to file an intervening petition, asking that such proceeds should be ordered delivered over to him,[457] and in any case the fund, if recovered, must be turned over to the bankruptcy court and administered by it as a part of the bankrupt's estate.[458]

§ 609. **Same; Right of Action.**—Since a trustee in bankruptcy represents the whole body of creditors, and not merely lien claimants or the bankrupt, it is his right and duty to contest the validity of any conveyance, mortgage, payment, or other transfer of property by which one

[450] In re Jones, 123 Fed. 128, 10 Am. Bankr. Rep. 513; In re Meyer, 115 Fed. 997, 8 Am. Bankr. Rep. 598.

[451] In re Black, 2 Ben. 196, 1 N. B. R. 353, Fed. Cas. No. 1,457. And see Giveen v. Smith, 1 Hask. 358, Fed. Cas. No. 5,467.

[452] In re Keystone Press, 203 Fed. 710, 29 Am. Bankr. Rep. 715; In re F. M. & S. Q. Carlile, 199 Fed. 612, 29 Am. Bankr. Rep. 373.

[453] Kraver v. Abrahams, 203 Fed. 782, 29 Am. Bankr. Rep. 365; Fenlon v. Lonergan, 29 Pa. St. 471; In re Mallory, 1 Sawy. 88, 6 N. B. R. 22, Fed. Cas. No. 8,991.

[454] Bankruptcy Act 1898, § 60b, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797, and Act Cong. June 25, 1910, 36 Stat. 838. And see supra, §§ 410, 414.

[455] Grant v. National Bank of Auburn, 197 Fed. 581, 28 Am. Bankr. Rep. 712.

[456] First Nat. Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542.

[457] Bear v. Chase (C. C. A.) 99 Fed. 920, 3 Am. Bankr. Rep. 746.

[458] Lovell v. Latham & Co., 186 Fed. 602, 26 Am. Bankr. Rep. 599.

creditor has obtained a preference over others, and he is the only proper party to bring the necessary action;[459] it cannot be brought by another creditor, certainly not by one who has not made himself a party to the bankruptcy proceedings.[460] The proper defendant in such an action is the party receiving the alleged preference or who is to be benefited by it,[461] and it is immaterial that such party is a municipal corporation.[462] Nor is it necessary to the trustee's right of action that the creditor should have actually received money or property. A preference, voidable at the suit of the trustee, is equally given by the creation of a security, or by a release of the debtor's equity or right of redemption,[463] or by a transfer of a claim against a third person, which is credited upon the price of the bankrupt's stock in trade when bought by the preferred creditor.[464] And where the trustee, alleging that a sale by the bankrupt just prior to his adjudication was fraudulent, brings an action against the purchaser for the value of the goods, and receives money in settlement of such claim, he is not thereby precluded from following the money received by the bankrupt for the goods into the hands of preferred creditors.[465] A previous demand for the return or surrender of a preference is not a condition precedent to the trustee's right to sue for its recovery or annulment.[466]

§ 610. Same; Form of Action or Proceeding.—Where a trustee in bankruptcy seeks to recover a preference, but without showing the need of an injunction or discovery or accounting, or of specific performance or the reformation or cancellation of any instrument, but merely asks a decree for the amount of the preference, he has an adequate remedy at law.[467] But if it is necessary to his case that he should avoid a conveyance, transfer, or incumbrance apparently good, or a judgment valid

459 In re Metzger, 2 N. B. R. 355, Fed. Cas. No. 9,510; Balfour v. Wheeler, 15 Fed. 229. If he sues in a state court, it is of course necessary for the trustee to allege and show his official status, which may be done by the record of the bankruptcy proceedings. Anderson v. Stayton State Bank, 82 Or. 357, 159 Pac. 1033.

460 Smith v. Brainerd, 37 Minn. 479, 35 N. W. 271.

461 Gray v. Brunold, 140 Cal. 615, 74 Pac. 303.

462 Painter v. Napoleon Tp., 156 Fed. 289, 19 Am. Bankr. Rep. 412.

463 Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955.

464 Hackney v. Raymond Bros. Clarke Co., 68 Neb. 624, 94 N. W. 822, 99 N. W. 675.

465 Lampkin v. People's Nat. Bank, 98 Mo. App. 239, 71 S. W. 715.

466 Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 27 Sup. Ct. 391, 51 L. Ed. 596, 17 Am. Bankr. Rep. 675; McCulloch v. Davenport Sav. Bank (D. C.) 226 Fed. 309, 35 Am. Bankr. Rep. 765; Boonville Nat. Bank v. Blakey, 166 Ind. 427, 76 N. E. 529; Capital Nat. Bank v. Wilkerson, 36 Ind. App. 467, 75 N. E. 837; Chicago Title & Trust Co. v. Moody, 233 Ill. 634, 84 N. E. 656; Bowler v. First Nat. Bank, 21 S. D. 449, 113 N. W. 618, 130 Am. St. Rep. 725.

467 Detroit Trust Co. v. Old Nat. Bank, 155 Mich. 61, 118 N. W. 729; Boonville Nat. Bank v. Blakey, 166 Ind. 427, 76 N. E. 529; Allen v. Gray, 201 N. Y. 504, 94 N. E. 652, Ann. Cas. 1912B, 123. Equity has no jurisdiction of a bill by a trustee in bankruptcy to recover

on its face, his proper course is to sue in equity, and it is none the less an equitable action because the ultimate relief sought is a money judgment.[468] And at any rate, a trustee's suit to recover a prohibited preference is analogous to a suit by a judgment creditor to set aside a fraudulent conveyance, and hence its maintenance as a suit in equity is not objectionable on the ground of the existence of an adequate remedy at law.[469] But where a suit in equity is brought by a trustee to avoid an alleged preferential transfer, and to recover a fund to be administered by the bankruptcy court, one claiming a lien on the fund if recovered cannot intervene and enforce such lien by cross-bill, for the rule is that the subject-matter of a cross-bill must be a defense to the original bill, or essentially connected with and necessary to a complete determination of the original suit.[470] Where the action is maintained in the bankruptcy court, it must be a plenary suit, and not a mere summary hearing, unless the defendant will consent; but if he is properly brought into court, it is competent for him to waive an objection of this kind, and in that case the issue may be determined in any appropriate form of proceeding.[471]

§ 611. **Same; Pleading.**—In the trustee's bill or complaint to avoid or recover a preference, it is not necessary to allege facts sufficient to constitute a cause of action to set aside a fraudulent conveyance of real estate, all that is necessary being sufficient allegations of a preference given by an insolvent within four months of the filing of the petition in bankruptcy.[472] The plaintiff must naturally show his own capacity to sue, and this is done by alleging the filing of the petition in bankruptcy, the adjudication of the bankrupt, and the appointment and qualification of the plaintiff as trustee, together with an allegation of demand and re-

an alleged preference, consisting of a payment of money only. First State Bank of Milliken v. Spencer, 219 Fed. 503, 135 C. C. A. 253, 33 Am. Bankr. Rep. 594.

[468] Dyer v. Kratzenstein, 103 App. Div. 404, 92 N. Y. Supp. 1012; Lesser v. Bradford Realty Co., 116 App. Div. 212, 101 N. Y. Supp. 571; Andrews v. Mather, 134 Ala. 358, 32 South. 738; In re Swenk, 9 Fed. 643. And see supra, § 401.

[469] Pond v. New York Nat. Exch. Bank, 124 Fed. 992, 10 Am. Bankr. Rep. 343; Johnson v. Hanley, 188 Fed. 752, 26 Am. Bankr. Rep. 748; Goodenow v. Milliken, 1 Hask. 348, Fed. Cas. No. 5,535; Houghton v. Stiner, 92 App. Div. 171, 87 N. Y. Supp. 10. Contra, Baden v. Bertenshaw, 68 Kan. 32, 74 Pac. 639; Brock & Spight v. Oliver, 149 Ala. 93, 43 South. 357.

[470] Lovell v. Latham & Co., 186 Fed. 602, 26 Am. Bankr. Rep. 599.

[471] In re Noel, 137 Fed. 694, 14 Am. Bankr. Rep. 715; In re Ulrich, 3 Ben. 355, 3 N. B. R. 133, Fed. Cas. No. 14,327. And see supra, § 403.

[472] Marion State Bank v. Gossett, 175 Ind. 211, 93 N. E. 996; Lesser v. Bradford Realty Co., 116 App. Div. 212, 101 N. Y. Supp. 571; Benson v. Johnson, 85 Or. 677, 165 Pac. 1001, 167 Pac. 1014; Williams v. German-American Trust Co., 219 Fed. 507, 135 C. C. A. 257, 33 Am. Bankr. Rep. 600; Wilson v. Citizens' Trust Co. (D. C.) 233 Fed. 697, 37 Am. Bankr. Rep. 86. And see Collett v. Adams, 249 U. S. 545, 39 Sup. Ct. 372, 63 L. Ed. 764, 43 Am. Bankr. Rep. 496.

fusal of surrender of the preference.[473] Aside from this, the four essential allegations of the complaint are (1) that the bankrupt was insolvent when the alleged preference was given; (2) that it was within four months prior to the bankruptcy; (3) that the effect of the enforcement of the judgment or transfer will be to enable the defendant to obtain a greater percentage of his debt than any other creditor of the same class; (4) that defendant had reasonable ground to believe that a preference would result from the transaction. The omission of any one of these allegations will render the complaint demurrable.[474] The allegation of the debtor's insolvency must be specific; it is not sufficient to state that he was in failing circumstances and unable to meet his debts in full.[475] And it is necessary to show, explicitly or by necessary allegation, that the payment was made or property transferred out of the estate of the bankrupt.[476] As to the allegation that the preference, if permitted to stand, will enable the defendant to obtain a larger percentage of his claim than other creditors of the same class, this is strictly necessary.[477] To show this, it is probably necessary to insert allegations disclosing the existence of other creditors,—general unsecured creditors who are entitled to participate in the distribution of the estate.[478] And it has been held that the bill is demurrable if it fails to allege that there are not sufficient assets to pay all the creditors who have filed claims against the estate,[479] or that if the complaint alleges that the schedules of the bankrupt show a certain amount of unsecured claims, it must also show the amount of preferred and secured claims.[480] But later and perhaps better considered decisions are to the effect that the trustee need not allege that the assets of the estate are not sufficient to pay the creditors in full,[481] or even that any creditor has filed a claim in the bankruptcy proceeding or any fact showing the necessity for recov-

[473] Lesser v. Bradford Realty Co., 116 App. Div. 212, 101 N. Y. Supp. 571; Capital Nat. Bank v. Wilkerson, 36 Ind. App. 467, 75 N. E. 837. But see supra, § 609, as to the necessity of demand before suit.

[474] Painter v. Napoleon Tp., 156 Fed. 289, 19 Am. Bankr. Rep. 412; Ferguson v. Lederer, Strauss & Co., 128 Iowa, 286, 103 N. W. 794.

[475] Martin v. Bigelow, 36 Misc. Rep. 298, 73 N. Y. Supp. 443; McNeel v. Folk, 75 W. Va. 57, 83 S. E. 192.

[476] Richter v. Nimmo, 63 App. Div. 422, 71 N. Y. Supp. 501.

[477] Schreyer v. Citizens' Nat. Bank, 74 App. Div. 478, 77 N. Y. Supp. 494; West v. Bank of Lahoma, 16 Okl. 329, 85 Pac. 469; Lesser v. Bradford Realty Co., 116 App. Div. 212, 101 N. Y. Supp. 571; Crooks v. People's Nat. Bank, 46 App. Div. 335, 61 N. Y. Supp. 604.

[478] Gering v. Leyda, 186 Fed. 110, 108 C. C. A. 222, 26 Am. Bankr. Rep. 137. It is not necessary to allege the identity of the existing creditors with those who were creditors at the time of the alleged preferential transfer. Minnesota & Ontario Power Co. v. Losey, 260 Fed. 689, 171 C. C. A. 427, 44 Am. Bankr. Rep. 395.

[479] Lesser v. Bradford Realty Co., 47 Misc. Rep. 463, 95 N. Y. Supp. 933.

[480] Grant v. National Bank of Auburn, 197 Fed. 581, 28 Am. Bankr. Rep. 712.

[481] Kraver v. Abrahams, 203 Fed. 782, 29 Am. Bankr. Rep. 365; Sherwood v. Holbrook, 98 Misc. Rep. 668, 163 N. Y. Supp. 326.

ering the alleged preference.[482] And the value of the debtor's property and the extent of his indebtedness need not be set out, as these are matters of evidence.[483] It is strictly necessary to aver that the defendant had reasonable cause to believe that the enforcement of the judgment or transfer would result in giving him a preference,[484] but not to state why he had such cause of belief or the evidence of it.[485] It is not sufficient to allege that the transaction in question was fraudulent, or that there was a fraudulent intent on the part of the debtor or of the creditor; this kind of allegation cannot take the place of specific statements of the insolvency of the debtor and of the effect of the transaction as a preference.[486] But on the other hand, if all the elements of a voidable preference are pleaded, no allegation of fraud is needed, as the statute does not require the presence of any other fraud than such as is implied in the particular kind of transactions which it denounces as preferential.[487] In an action at law by a trustee in bankruptcy to recover a preference, the complaint is not demurrable merely because it demands judgment for too large a sum.[488]

§ 612. Same; Defenses.—Ignorance of the law is no defense to a creditor who is sued for the recovery of an illegal preference,[489] nor a decree of a land court granting registration of title to the property in question under the conveyance assailed as preferential, at least if the defendant is not a bona fide purchaser taking in reliance on the registered title,[490] nor can the preferred creditor resist the trustee's action on the ground that he has expended money in the custody and care of the property in question, his claim for compensation being one which must be presented for allowance against the estate in bankruptcy.[491] But he may defend on the ground that his taking of the property was merely in pursuance of his rescission of a contract by which he had sold it to the bankrupt,[492] or he may escape liability by repudiating all

[482] Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955.

[483] Crooks v. People's Nat. Bank, 46 App. Div. 335, 61 N. Y. Supp. 604.

[484] Greene v. Montana Brewing Co., 29 Mont. 380, 72 Pac. 751; Johnson v. Anderson, 70 Neb. 233, 97 N. W. 339; Peck v. Connell, 21 Pa. Super. Ct. 22; Hoshaw v. Cosgriff, 247 Fed. 22, 159 C. C. A. 240, 40 Am. Bankr. Rep. 694; Watson v. Adams, 242 Fed. 441, 155 C. C. A. 217, 39 Am. Bankr. Rep. 473; Johnson v. American Bank, 5 Alaska, 145.

[485] Crooks v. People's Nat. Bank, 46 App. Div. 335, 61 N. Y. Supp. 604.

[486] In re Leech, 171 Fed. 622, 96 C. C. A. 424, 22 Am. Bankr. Rep. 599; Severin v. Robinson, 27 Ind. App. 55, 60 N. E. 966; Hallack v. Tritch, 17 N. B. R. 293, Fed. Cas. No. 5,956.

[487] Chism v. Bank of Friars Point (Miss.) 27 South. 610; Thompson v. First Nat. Bank, 84 Miss. 54, 36 South. 65.

[488] Grant v. National Bank of Auburn, 197 Fed. 581, 28 Am. Bankr. Rep. 712.

[489] Martin v. Toof, 1 Dill. 203, 4 N. B. R. 488, Fed. Cas. No. 9,167.

[490] Morris v. Small, 160 Fed. 142, 20 Am. Bankr. Rep. 138.

[491] In re Nechamkus, 155 Fed. 867, 19 Am. Bankr. Rep. 189.

[492] Blyth & Fargo Co. v. Kastor, 17 Wyo. 180, 97 Pac. 921.

claim to the property or its proceeds,[493] or he may show that the payment or transfer was not received from the bankrupt, but from a third person.[494]

§ 613. Same; Set-Off of Amount of New Credit.—The bankruptcy act provides that "if a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind, for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."[495] This, it is held, entitles such a creditor to a deduction of the amount of the new credit from a preference which he is required to surrender before proving his claim, and is not limited in its application to cases where the trustee sues to recover the preference.[496] But there was, at one time, much discussion as to whether the provision quoted applied to preferences received innocently and in good faith and without knowledge of the debtor's insolvency, the current doctrine being that a creditor must surrender even a preference so received, before his claim could be allowed, though it would not be voidable at the suit of the trustee.[497] But the necessity for determining this point no longer exists, since the amendment of 1903 provides that the surrender of preferences before the allowance of claims shall include only such preferences as are subject to be set aside or recovered by the trustee.[498] But it is the intention of the provision relating to set-off that the preference shall have been given in settlement and discharge of an existing debt, and that a new and unconnected transfer of property on credit shall have ensued.[499] Hence where

[493] Giveen v. Smith, 1 Hask. 296, Fed. Cas. No. 5,466.

[494] North v. Taylor, 61 App. Div. 253, 70 N. Y. Supp. 339.

[495] Bankruptcy Act 1898, § 60c.

[496] Kahn v. Cone Export & Commission Co., 115 Fed. 290, 53 C. C. A. 92, 8 Am. Bankr. Rep. 157; Gans v. Ellison, 114 Fed. 734, 52 C. C. A. 366, 8 Am. Bankr. Rep. 153; McKey v. Lee, 105 Fed. 923, 45 C. C. A. 127, 5 Am. Bankr. Rep. 267; Peterson v. Nash Bros., 112 Fed. 311, 50 C. C. A. 260, 55 L. R. A. 344, 7 Am. Bankr. Rep. 181; In re Southern Overalls Mfg. Co., 111 Fed. 518, 6 Am. Bankr. Rep. 633; In re Ryan, 105 Fed. 760, 5 Am. Bankr. Rep. 396; In re Seckler, 106 Fed. 484, 5 Am. Bankr. Rep. 579; In re Soldosky, 111 Fed. 511, 7 Am. Bankr. Rep. 123. Contra, see In re Keller, 109 Fed. 118, 6 Am. Bankr. Rep. 334; In re Christensen, 101 Fed. 802, 4 Am. Bankr. Rep. 202; In re Abraham Steers Lumber Co., 110 Fed. 738, 6 Am. Bankr. Rep. 315.

[497] See C. S. Morey Mercantile Co. v. Schiffer, 114 Fed. 447, 52 C. C. A. 249, 7 Am. Bankr. Rep. 670; In re Oliver, 109 Fed. 784, 6 Am. Bankr. Rep. 626; In re Ratliff, 107 Fed. 80, 5 Am. Bankr. Rep. 713; In re Thompson, 112 Fed. 651, 7 Am. Bankr. Rep. 214; In re Jones, 123 Fed. 128, 10 Am. Bankr. Rep. 513.

[498] Bankruptcy Act 1898, § 57g, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797.

[499] In re John Morrow & Co., 134 Fed. 686, 13 Am. Bankr. Rep. 392; In re Bailey, 110 Fed. 928, 7 Am. Bankr. Rep. 26. Deposits in bank by an insolvent custom-

preferential payments have been made on an account for goods sold, and the trustee demands their surrender before the creditor's claim shall be allowed, the latter cannot set off the unpaid balance.[500] Further, it is necessary that the property for which the credit was given should have been acquired by the bankrupt from the preferred creditor himself,[501] but not that it should remain a part of the debtor's estate until his adjudication in bankruptcy, or that it should be used in payment of preferred debts.[502] But the creditor claiming this right of set-off must allege and show all the facts essential to entitle him to it, the same as if he sought to maintain a separate action on his claim.[503]

§ 614. Same; Burden of Proof and Evidence.—In an action to set aside or recover a transfer, incumbrance, or payment, alleged to constitute an unlawful preference, the burden of proof is on the trustee in bankruptcy to establish the existence of each of the statutory elements of a voidable preference.[504] To show the fact that the bankruptcy law has become applicable to the transaction in question, by reason of the debtor's having been adjudged bankrupt as of a certain date, a properly certified copy of the adjudication of bankruptcy is admissible.[505]

er after the bank's cashier had forbidden the payment of checks against the deposit, and very shortly before the filing of a petition in involuntary bankruptcy against the customer, constitute a voidable preference, and cannot be allowed by way of set-off against the customer's debt to the bank. Mechanics' & Metals Nat. Bank v. Ernst, 231 U. S. 60, 34 Sup. Ct. 22, 58 L. Ed. 121, 31 Am. Bankr. Rep. 302. And see Chisholm v. First Nat. Bank, 269 Ill. 110, 109 N. E. 657; In re United Grocery Co. (D. C.) 253 Fed. 267, 41 Am. Bankr. Rep. 824.

500 In re Christensen (D. C.) 101 Fed. 802, 4 Am. Bankr. Rep. 202; Rotan Grocery Co. v. West, 246 Fed. 685, 158 C. C. A. 641, 41 Am. Bankr. Rep. 153; In re Ryan (D. C.) 105 Fed. 760, 5 Am. Bankr. Rep. 396.

501 Carleton Dry Goods Co. v. Rogers, 120 Fed. 14, 57 C. C. A. 34, 9 Am. Bankr. Rep. 787.

502 Kaufman v. Tredway, 195 U. S. 271, 25 Sup. Ct. 33, 49 L. Ed. 190, 12 Am. Bankr. Rep. 682.

503 In re Oliver (D. C.) 109 Fed. 784, 6 Am. Bankr. Rep. 626.

504 Turner v. Schaeffer, 249 Fed. 654, 161 C. C. A. 564, 40 Am. Bankr. Rep. 829; W. S. Peck & Co. v. Whitmer, 231 Fed. 893, 146 C. C. A. 89, 36 Am. Bankr. Rep. 722; Carey v. Donohue, 209 Fed. 328, 126 C. C. A. 254, 31 Am. Bankr. Rep. 210; Mayes v. Palmer, 208 Fed. 97, 125 C. C. A. 325, 31 Am. Bankr. Rep. 225; Northern Neck State Bank v. Smith, 205 Fed. 894, 124 C. C. A. 207, 30 Am. Bankr. Rep. 527; In re Dorr, 196 Fed. 292, 28 Am. Bankr. Rep. 505; Kimmerle v. Farr (C. C. A.) 189 Fed. 295, 26 Am. Bankr. Rep. 818; Brown v. Streicher, 177 Fed. 473, 24 Am. Bankr. Rep. 267; Crane v. Penny, 2 Fed. 187; Parsons v. Topliff, 119 Mass. 245, 14 N. B. R. 547; Burnham v. Ft. Dodge Grocery Co., 144 Iowa, 577, 123 N. W. 220; Getman v. Second Nat. Bank, 89 N. Y. 136; Starbuck v. Gebo, 48 Misc. Rep. 333, 96 N. Y. Supp. 781; Keith v. Gettysburg Nat. Bank, 23 Pa. Super. Ct. 14; Wickwire v. Webster City Sav. Bank, 153 Iowa, 225, 133 N. W. 100; Hackney v. First Nat. Bank, 68 Neb. 588, 94 N. W. 805, 98 N. W. 412; McDonough v. Cohen, 90 Conn. 469, 97 Atl. 861; Kentucky Bank & Trust Co. v. Pritchett, 44 Okl. 87, 143 Pac. 338. It is not incumbent upon the trustee to prove the existence of other creditors or indebtedness in order to defeat a mortgage, made within four months before the bankruptcy, and which operates as a preference. Pierre Banking & Trust Co. v. Winkler, 39 S. D. 454, 165 N. W. 2.

505 Calkins v. Farmers' & Mechanics' Bank, 99 Mo. App. 509, 73 S. W. 1098;

And it is proper to show that the defendant's attorney was present when the bankruptcy proceedings were had, as showing notice thereof.[506] But the fact that the particular transaction on which the trustee's suit is based was alleged as an act of bankruptcy in the petition in bankruptcy, and that the adjudication was based on it, is not conclusive proof against the defendant that it constituted an illegal preference, because the issues in the two proceedings are not the same.[507] But on the other hand, a decree of a state court adverse to the creditor, in a suit between the trustee and himself, is a conclusive estoppel upon the creditor if he seeks afterwards to prove his claim in the bankruptcy proceedings.[508]

One thing absolutely essential to constitute a voidable preference is that the debtor should have been insolvent at the time it was given, and the trustee has the burden of proving this fact.[509] The mere fact that the debtor was afterwards adjudged bankrupt raises no presumption that he was insolvent at any given time within four months prior to the filing of the petition.[510] And the giving of a confession of judgment does not of itself raise a presumption of insolvency.[511] But the verified schedules of the bankrupt, containing a presumptively complete list of his assets and liabilities, are admissible in evidence on the question

Whitson v. Farber Bank, 105 Mo. App. 605, 80 S. W. 327.

506 Calkins v. Farmers' & Mechanics' Bank, 99 Mo. App. 509, 73 S. W. 1098.

507 Hussey v. Richardson-Roberts Dry Goods Co., 148 Fed. 598, 78 C. C. A. 370, 17 Am. Bankr. Rep. 511; In re Dunkle, 7 N. B. R. 72, Fed. Cas. No. 4,160. And see supra, § 182.

508 In re Dakin, 19 N. B. R. 181, Fed. Cas. No. 3,539. A judgment of the referee in bankruptcy, disallowing, on objections by the trustee, a claim against the bankrupt's estate, on the ground that the claimant had received a preference, is admissible in evidence in a subsequent suit by the trustee to recover the preference. Ullman, Stern & Krausse v. Coppard, 246 Fed. 124, 158 C. C. A. 350, 40 Am. Bankr. Rep. 426.

509 In re F. M. & S. Q. Carlile, 199 Fed. 612, 29 Am. Bankr. Rep. 373; In re Arkonia Fabric Mfg. Co., 151 Fed. 914, 18 Am. Bankr. Rep. 470; Edwards v. Carondelet Milling Co., 108 Mo. App. 275, 83 S. W. 764; J. W. Crancer & Co. v. Wade, 26 Okl. 757, 110 Pac. 778; McGill v. Commercial Credit Co. (D. C.) 243 Fed. 637, 39 Am. Bankr. Rep. 702; In re Gaylord (D. C.) 225 Fed. 234, 35 Am. Bankr. Rep. 544; Anderson v. Stayton State Bank, 82 Or. 357, 159 Pac. 1033; Simpson v. Western Hardware & Metal Co., 97 Wash. 626, 167 Pac. 113. But in an action by the trustee to recover money paid by the bankrupt prior to his adjudication in alleged satisfaction of a debt, where the question at issue is whether any such debt existed in fact, it is not necessary to show that there were unsatisfied creditors at the time the payment was made, or at the time of bringing suit or of the trial. Breckons v. Snyder, 211 Pa. St. 176, 60 Atl. 575.

510 In re Chappell, 113 Fed. 545, 7 Am. Bankr. Rep. 608; Swartz v. Frank, 183 Mo. 438, 82 S. W. 60. But where the undisputed facts established that the bankrupt was insolvent to a large extent at the time of the bankruptcy, even disregarding his contingent obligations, there is prima facie proof that he was insolvent at the time of making the transfer a month before, where there was no going business which substantially affected the situation in so short a time. In re Dix (D. C.) 267 Fed. 1016, 46 Am. Bankr. Rep. 199.

511 In re Dibblee, 3 Ben. 283, 2 N. B. R. 617, Fed. Cas. No. 3,884.

of his insolvency at the time of the transaction in suit, at least if it occurred not very long before the bankruptcy and without opportunity for any great change in either property or debts.[512] And the bankrupt's books of account are competent evidence on this issue, to which either party may have recourse, and while their showing as to the debtor's solvency or insolvency is not conclusive, yet it is ordinarily important evidence and entitled to much weight.[513] The bankrupt may also be called as a witness in the trustee's suit, and his testimony may be received concerning his financial condition at the date in question; and if the giving of a preference excites a suspicion of collusion between the bankrupt and the preferred creditor, or of a desire on the part of the former to aid and shield the latter, this only goes to the bankrupt's credibility, not his competency.[514] And it is proper and permissible for the trustee in bankruptcy to testify as to the value of the assets of the bankrupt coming into his hands, the amount of debts proved, the amount he realized at a sale at auction of the bankrupt's assets, and other like matters, as all these matters have a tendency to show the bankrupt's solvency or insolvency at the time of the alleged preference, although of course they must be considered in connection with any changes in his financial condition which may be shown to have occurred in the interval.[515] And where the validity of a mortgage is in issue, it is proper to show that, on the day following its execution, the mortgagor made a voluntary conveyance to his son of substantially all his property.[516]

If the intention of the debtor to give a preference is still necessary to justify its avoidance at the suit of the trustee, under the law as it stands at present,[517] the burden of establishing this fact is on the trus-

[512] In re Mandel, 135 Fed. 1021, 68 C. C. A. 546; Lynch v. Bronson, 80 Conn. 566, 69 Atl. 538; Summerville v. Stockton Milling Co., 142 Cal. 530, 76 Pac. 243; Hackney v. Raymond Bros., 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Utah Ass'n of Credit Men v. Boyle Furniture Co., 39 Utah, 518, 117 Pac. 800. But see, contra, Halbert v. Pranke, 91 Minn. 204, 97 N. W. 976; Hibbs v. Marpe, 84 Minn. 10, 86 N. W. 612; Batchelder v. Home Nat. Bank, 218 Mass. 420, 105 N. E. 1052; Johnson v. Gratiot County State Bank, 193 Mich. 452, 160 N. W. 544.

[513] Ernst v. Mechanics' & Metals Nat. Bank, 200 Fed. 295; In re Docker Foster Co., 123 Fed. 190, 10 Am. Bankr. Rep. 584; Utah Ass'n of Credit Men v. Boyle Furniture Co., 39 Utah, 518, 117 Pac. 800; Grandison v. National Bank of Commerce (D. C.) 220 Fed. 981, 34 Am. Bankr. Rep. 497.

[514] Supplee v. Hall, 75 Conn. 17, 52 Atl. 407, 96 Am. St. Rep. 188; Blyth & Fargo Co. v. Kastor, 17 Wyo. 180, 97 Pac. 921; Otis v. Hadley, 112 Mass. 100.

[515] Ridge Ave. Bank v. Studheim, 145 Fed. 798, 76 C. C. A. 362, 16 Am. Bankr. Rep. 863; Capital Nat. Bank v. Wilkerson, 36 Ind. App. 467, 75 N. E. 827; Lynch v. Bronson, 80 Conn. 566, 69 Atl. 538; Coolidge v. Ayers, 77 Vt. 448, 61 Atl. 40; In re Star Spring Bed Co. (D. C.) 257 Fed. 176, 43 Am. Bankr. Rep. 328. But see Cullinane v. State Bank, 123 Iowa, 340, 98 N. W. 887.

[516] Supplee v. Hall, 75 Conn. 17, 52 Atl. 407, 96 Am. St. Rep. 188.

[517] Supra, § 590.

tee.[518] But it may be proved by circumstantial evidence, all the circumstances which go to show the intent being considered,[519] together with the declarations of the bankrupt at and prior to the time of the transaction in question.[520] And failure of the defendant to produce the testimony of the bankrupt or of the creditor alleged to have been preferred, is held to be strongly corroborative of such evidence in the case as tends to show an intent to prefer.[521] But the testimony of the parties to an alleged preferential transaction as to their intention is entitled to but little weight as against proof of the transaction itself.[522] And indeed many of the cases sustain the doctrine that, if the natural and inevitable result of the payment or transfer is to give a preference, the intention of the debtor in that behalf need not be proved but will be conclusively presumed.[523]

The trustee must also assume the burden of proving that the person receiving the alleged preference or to be benefited by it, or his agent acting for him in the transaction had "reasonable cause to believe that the enforcement of the judgment or transfer would effect a preference;" this is absolutely essential and there can be no recovery without it.[524] But the obligation is sufficiently met by showing facts and

[518] Debus v. Yates, 193 Fed. 427, 30 Am. Bankr. Rep. 823; Stevens v. Oscar Holway Co., 156 Fed. 90, 19 Am. Bankr. Rep. 399; Whitwell v. Wright, 136 App. Div. 246, 120 N. Y. Supp. 1065; Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955.

[519] Little v. Alexander, 21 Wall. 500, 22 L. Ed. 625; Atherton v. Emerson, 199 Mass. 199, 85 N. E. 530; Wills v. Venus Silk Glove Mfg. Co., 170 App. Div. 352, 156 N. Y. Supp. 115.

[520] Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286.

[521] Darling v. Townsend, 5 Fed. 176.

[522] Oxford Iron Co. v. Slafter, 13 Blatchf. 455, 14 N. B. R. 380, Fed. Cas. No. 10,637.

[523] First Nat. Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542; Lazarus v. Eagen (D. C.) 206 Fed. 518, 30 Am. Bankr. Rep. 287; Kimmerle v. Farr, 189 Fed. 295, 111 C. C. A. 27, 26 Am. Bankr. Rep. 818; Brewster v. Goff Lumber Co., 164 Fed. 124, 21 Am. Bankr. Rep. 106; In re McLam, 97 Fed. 922, 3 Am. Bankr. Rep. 245; Galveston Dry Goods Co. v. Frenkel (Tex. Civ. App.) 103 S. W. 224; Blyth & Fargo Co. v. Kastor, 17 Wyo. 180, 97 Pac. 921; Ecker v. McAllister, 45 Md. 290; Utah Ass'n of Credit Men v. Boyle Furniture Co., 43 Utah, 523, 136 Pac. 572.

[524] Barbour v. Priest, 103 U. S. 293, 26 L. Ed. 478; Kaufman v. Tredway, 195 U. S. 271, 25 Sup. Ct. 33, 49 L. Ed. 190, 12 Am. Bankr. Rep. 682; City Nat. Bank v. Slocum (C. C. A.) 272 Fed. 11, 47 Am. Bankr. Rep. 47; Marshall v. Nevins, 242 Fed. 476, 155 C. C. A. 252, 40 Am. Bankr. Rep. 85; Baxter v. Ord, 239 Fed. 503, 152 C. C. A. 381, 39 Am. Bankr. Rep. 273; In re Campion (D. C.) 256 Fed. 902, 43 Am. Bankr. Rep. 625; Clifford v. Morrill (D. C.) 230 Fed. 190, 36 Am. Bankr. Rep. 805; Ogden v. Reddish, 200 Fed. 977, 29 Am. Bankr. Rep. 531; Tilt v. Citizens' Trust Co., 191 Fed. 441, 27 Am. Bankr. Rep. 320; Alexander v. Redmond, 180 Fed. 92, 103 C. C. A. 446, 24 Am. Bankr. Rep. 620; In re Houghton Web Co., 185 Fed. 213, 26 Am. Bankr. Rep. 202; Reber v. Louis Shulman & Bro., 179 Fed. 574, 24 Am. Bankr. Rep. 782; Sparks v. Marsh, 177 Fed. 739, 24 Am. Bankr. Rep. 280; McElvain v. Hardesty, 169 Fed. 31, 94 C. C. A. 399, 22 Am. Bankr. Rep. 320; Getts v. Janesville Wholesale Grocery Co., 163 Fed. 417, 21 Am. Bankr. Rep. 5; Calhoun County Bank v. Cain, 152 Fed. 983, 82 C. C. A. 114, 18 Am. Bankr. Rep. 509; Parker v.

circumstances with respect to the debtor's financial condition such as would put an ordinarily prudent man on inquiry, which would have disclosed the debtor's insolvency and the consequent fact that the transfer would effect a preference.[525] The existence of this reasonable cause of belief may be shown by circumstantial evidence,[526] and indeed the test of the sufficiency of the evidence to warrant the submission of the question to the jury does not rest on the assertions of either party as to his intent or belief, but on inferences which may fairly arise from the facts in evidence.[527] And such cause of belief is not shown by circumstantial evidence, where the circumstances are as consistent with the theory of innocence and good faith on the part of the creditor as with the theory of a fraudulent purpose.[528] But proof that the bankrupt, while insolvent, paid or secured the defendant creditor in full, without making adequate compensation to his other creditors, raises a presumption that the defendant knew that he was being preferred and that the debtor was insolvent, and casts upon him the burden of showing the contrary.[529]

It is likewise necessary, in order to establish a voidable preference, to show that the preferred creditor actually received as a result of the transaction a greater percentage of his debt than that payable to the other creditors.[530] And the burden is on the trustee, if the matter is involved in any doubt, to show that the transaction took place

Black, 151 Fed. 18, 80 C. C. A. 484, 18 Am. Bankr. Rep. 15; Harder v. Clark, 66 Misc. Rep. 584, 123 N. Y. Supp. 1102; Matthews v. Joannes Bros. Co., 156 Mich. 663, 121 N. W. 272; Couturie v. Crespie (Tex. Civ. App.) 134 S. W. 257; Whitwell v. Wright, 115 N. Y. Supp. 48; Atherton v. Emerson, 199 Mass. 199, 85 N. E. 530; Lynch v. Bronson, 80 Conn. 566, 69 Atl. 538; Andrews v. Kellogg, 41 Colo. 35, 92 Pac. 222; Arkansas Nat. Bank v. Sparks, 83 Ark. 324, 103 S. W. 626; Walker v. Tenison Bros. Saddlery Co. (Tex. Civ. App.) 94 S. W. 166; Blyth & Fargo Co. v. Kastor, 17 Wyo. 180, 97 Pac. 921; Alter v. Clark, 193 Fed. 153; Galbraith v. Whitaker, 119 Minn. 447, 138 N. W. 772, 43 L. R. A. (N. S.) 427; Hewitt v. Boston Straw Board Co., 214 Mass. 260, 101 N. E. 424; Burnes v. Epstein, 201 Fed. 393; Mantz v. Capital City State Bank (Iowa) 181 N. W. 3; McDonough v. Cohen, 90 Conn. 469, 97 Atl. 861; Soule v. First Nat. Bank, 26 Idaho, 66, 140 Pac. 1098; Continental & Commercial Trust & Savings Bank v. Breen & Kennedy, 188 Ill. App. 467; Craig v. Sharp (Mo. App.) 219 S. W. 98; Brown v. First State Bank (Tex. Civ. App.) 199 S. W. 895; Slayton v. Drown, 93 Vt. 290, 107 Atl. 307. But one claiming to be a purchaser for value and in good faith of property transferred by a preferential conveyance, has the burden of showing the payment of value. Watson v. Adams, 242 Fed. 441, 155 C. C. A. 217, 39 Am. Bankr. Rep. 473.

525 Capital Nat. Bank v. Wilkerson, 36 Ind. App. 467, 75 N. E. 837.

526 In re Baker, 14 N. B. R. 433, Fed. Cas. No. 763.

527 Hamilton Nat. Bank v. Balcomb, 177 Fed. 155, 100 C. C. A. 575, 24 Am. Bankr. Rep. 338.

528 Burnham v. Ft. Dodge Grocery Co., 144 Iowa, 577, 123 N. W. 220.

529 Stobaugh v. Mills, 8 N. B. R. 361, Fed. Cas. No. 13,461; Crawford v. Rumpf, 205 Pa. St. 154, 54 Atl. 709.

530 Engel v. Union Square Bank, 182 N. Y. 544, 75 N. E. 1129; Gering v. Leyda, 186 Fed. 110, 108 C. C. A. 222, 26 Am. Bankr. Rep. 137.

within four months prior to the filing of the petition in bankruptcy,[531] that the relation of debtor and creditor then subsisted between the parties, and not a trust relation or other situation which would take the case out of the statute,[532] and that the transaction was not a mere exchange or substitution of securities.[533]

§ 615. Same; Trial.—The rules governing the trial of an action to avoid an illegal preference do not differ materially from those prevailing in an ordinary action or suit. Disputed issues of fact must be submitted to the jury, if there is sufficient evidence to warrant or require it, and not taken from them by binding instructions.[534] Thus, the question whether or not the defendant had "reasonable cause to believe" that a preference would result from the transaction in question or from the enforcement of the security obtained by him is a question of fact, and ordinarily he has the right to have the jury pass upon and decide it.[535] But where the undisputed facts unmistakably show the existence of such reasonable cause of belief, it is not error to direct a verdict,[536] and on the other hand, where there is no evidence in the case from which the jury could draw the conclusion that he had such reasonable cause to believe that a preference would result, binding instructions in favor of the defendant are not improper.[537] The instructions on matters of law, such as the meaning of "insolvency," the nature of a voidable preference, what constitutes reasonable cause to believe a preference was intended, and the like, must be framed with careful regard to the language of the statute and its accepted interpretation.[538] But a

[531] Allen v. Gray, 63 Misc. Rep. 219, 115 N. Y. Supp. 928.

[532] Ferguson v. Bauernfeind, 140 Wis. 42, 121 N. W. 647.

[533] State Bank of Williamson v. Fish, 120 N. Y. Supp. 365.

[534] Clingman v. Miller, 160 Fed. 326, 87 C. C. A. 278, 20 Am. Bankr. Rep. 360; Utah Ass'n of Credit Men v. Boyle Furniture Co., 39 Utah, 518, 117 Pac. 800; Blake v. Third Nat. Bank, 219 Mo. 644, 118 S. W. 641.

[535] Coleman v. Decatur Egg Case Co., 186 Fed. 136, 108 C. C. A. 248, 26 Am. Bankr. Rep. 248; Wetstein v. Franciscus, 133 Fed. 900, 67 C. C. A. 62, 13 Am. Bankr. Rep. 326; Ridge Ave. Bank v. Studheim, 145 Fed. 798, 76 C. C. A. 362, 16 Am. Bankr. Rep. 863; Andrews v. Kellogg, 41 Colo. 35, 92 Pac. 222; Brown v. Pelonsky, 210 Mass. 502, 96 N. E. 1102; Hastings v. Fithian, 71 N. J. Law, 311, 60 Atl. 350; Marden v. Sugden, 71 N. H. 274, 52 Atl. 74; Jackman v. Eau Claire Nat. Bank, 125 Wis. 465, 104 N. W. 98, 115 Am. St. Rep. 955; Upson v. Mt. Morris Bank, 103 App. Div. 367, 92 N. Y. Supp. 1101; Hackney v. Raymond Bros. Clarke Co., 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Landis v. McDonald, 88 Mo. App. 335; Harmon v. Walker, 131 Mich. 540, 91 N. W. 1025; Deland v. Miller & Chaney Bank, 119 Iowa, 368, 93 N. W. 304; Jacobs v. Saperstein, 225 Mass. 300, 114 N. E. 360; McAleer v. People's Bank, 202 Ala. 256, 80 South. 94.

[536] Shale v. Farmers' Bank of Morrill, 82 Kan. 649, 109 Pac. 408; Christopherson v. Oleson, 19 S. D. 176, 102 N. W. 685.

[537] Keith v. Gettysburg Nat. Bank, 23 Pa. Super. Ct. 14; Waite v. Citizens' State Bank, 178 Iowa, 1331, 160 N. W. 919; Keith v. Simpson, 24 Ga. App. 270, 100 S. E. 649; Brittan v. Buerger Commission Co., 168 Wis. 590, 170 N. W. 947.

[538] Lynch v. Bronson, 80 Conn. 566, 69

charge in regard to the defendant's having "ground to believe" a preference was intended, instead of "cause to believe," in the language of the statute, is not objectionable,[539] and where the trustee's suit proceeds purely on the ground of the defendant's having received an unlawful preference, a request to charge on the elements of a fraudulent conveyance is properly refused.[540]

§ 616. Same; Measure of Damages or Recovery.—Where the trustee in bankruptcy succeeds in obtaining judgment for the restoration or avoidance of an unlawful preference, the amount of his recovery or the measure of damages will depend on the nature of the transaction out of which the preference arose. If it was a payment of money, he is entitled to a judgment for an equal amount.[541] If it consisted of a transfer of personal property, he is entitled to a return of the specific property if it still remains in the creditor's hands.[542] But where he left the disposition of securities transferred by the bankrupt to a bank to the absolute discretion of the bank, the proceeds if sold to stand in the place of the securities, the trustee, entitled to avoid the transfer as a preference under the bankruptcy act, is only entitled to a return of the securities and an accounting as to any dividends or interest collected in the meantime; he cannot hold the bank liable for a depreciation in the market value of the securities.[543] If the property transferred to the preferred creditor has been sold by him, or it is otherwise out of his power to return it, the trustee is entitled to a judgment for its value.[544] And where the bankrupt had given two mortgages on his stock of goods, both preferential, and the first mortgagee took possession, sold enough to pay his claim, and turned over the rest to the second mortgagee, and was then sued by the trustee in bankruptcy and

Atl. 538; Galveston Dry Goods Co. v. Frenkel (Tex. Civ. App.) 103 S. W. 224; Johnston v. George D. Witt Shoe Co., 103 Va. 611, 50 S. E. 153; Wilkinson v. Anderson-Taylor Co., 28 Utah, 346, 79 Pac. 46; Forbes v. Howe, 102 Mass. 427, 3 Am. Rep. 475; Blyth & Fargo Co. v. Kastor, 17 Wyo. 180, 97 Pac. 921; Chisholm v. First Nat. Bank, 269 Ill. 110, 109 N. E. 657; People's Bank of Mobile v. McAleer, 204 Ala. 101, 85 South. 413.

539 Edwards v. Carondelet Milling Co., 108 Mo. App. 275, 83 S. W. 764.

540 Johnston v. George D. Witt Shoe Co., 103 Va. 611, 50 S. E. 153.

541 Jones v. Kinney, 5 Ben. 259, 4 N. B. R. 649, Fed. Cas. No. 7,473.

542 Cookingham v. Morgan, 7 Blatchf. 480, 5 N. B. R. 16, Fed. Cas. No. 3,183; Claridge v. Kulmer, 1 Fed. 399; Golden & Co. v. Loving, 42 App. D. C. 489.

543 National City Bank v. Hotchkiss, 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 115, 31 Am. Bankr. Rep. 291, affirming Ernst v. Mechanics' & Metals Nat. Bank, 201 Fed. 664, 120 C. C. A. 92, 29 Am. Bankr. Rep. 289.

544 McElvain v. Hardesty, 169 Fed. 31, 94 C. C. A. 399, 22 Am. Bankr. Rep. 320; Andrews v. Kellogg, 41 Colo. 35, 92 Pac. 222; Claridge v. Kulmer, 1 Fed. 399; Cookingham v. Morgan, 7 Blatchf. 480, 5 N. B. R. 16, Fed. Cas. No. 3,183; Drummond v. Smith, 118 N. Y. Supp. 718; Covington v. Brigman (D. C.) 210 Fed. 499, 32 Am. Bankr. Rep. 35.

his mortgage held void as a preference, it was held that he was liable for the value of the entire stock, and not merely for the value of the goods sold while the stock was in his possession.[545] If the preference consisted in a sale of the bankrupt's property to a creditor for less than half its value, but the amount received by the bankrupt has been turned over to the trustee, the latter is entitled to recover from the preferred creditor the difference between the amount so received and the value of the property.[546] For the purposes of a judgment in such cases, the value of the property preferentially transferred is to be taken as its actual market value at the time of the transfer, and not the sum which it brought on a sale of it by the preferred creditor or under process issued at his suit.[547] But if it appears that he sold the property to as good advantage as the trustee could have done, the creditor should not be held to account for more than he received.[548] And if the parties, at the trial, stipulate the market value of the property at the time of the transfer, the sum so fixed will be the measure of the defendant's liability.[549] And if the preference consisted in a judgment procured or suffered by the bankrupt, under which the creditor issued execution and sold property, he must restore the amount received on the judgment, but he may be allowed credit for the actual expenses of the sale, but not including the officer's fees.[550] The preferred creditor should also be charged with interest, but only from the time when demand was made on him for the surrender of the preference, as, after that time, he holds the property or fund as a trustee ex maleficio,[551] or, according to some of the authorities, only from the commencement of the action.[552] In the case where the money or property preferentially transferred would have been more than sufficient to pay in full all the remaining creditors of the bankrupt, only so much may be recovered by the trustee as is necessary for that purpose and for the costs and expenses of the bankruptcy proceedings.[553]

[545] Whitson v. Farber Bank, 105 Mo. App. 605, 80 S. W. 327.

[546] Stern v. Louisville Trust Co., 112 Fed. 501, 50 C. C. A. 367, 7 Am. Bankr. Rep. 305.

[547] First Nat. Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542.

[548] Allen v. McMannes, 156 Fed. 615, 19 Am. Bankr. Rep. 276.

[549] Gering v. Leyda, 186 Fed. 110, 108 C. C. A. 222, 26 Am. Bankr. Rep. 137.

[550] Sedgwick v. Millward, 5 N. B. R. 347, Fed. Cas. No. 12,618. Grant v. National Bank of Auburn (D. C.) 232 Fed. 201, 37 Am. Bankr. Rep. 329; Anderson v. Stayton State Bank, 82 Or. 357, 159 Pac. 1033.

[551] Benjamin v. Chandler, 142 Fed. 217, 15 Am. Bankr. Rep. 439; Ommen v. Talcott, 175 Fed. 261, 23 Am. Bankr. Rep. 572; Cookingham v. Morgan, 7 Blatchf. 480, 5 N. B. R. 16, Fed. Cas. No. 3,183; Utah Ass'n of Credit Men v. Boyle Furniture Co., 43 Utah, 523, 136 Pac. 572.

[552] Capital Nat. Bank v. Wilkerson, 36 Ind. App. 467, 75 N. E. 837.

[553] Rogers v. Page, 140 Fed. 596, 72 C. C. A. 164, 15 Am. Bankr. Rep. 502.

Where the suit is brought and judgment recovered in the bankruptcy court, the bill containing a prayer for general relief, the court is not limited to the entry of a money judgment against the preferred creditor, but may issue an order commanding him to pay the amount of the judgment to the trustee in bankruptcy, and may commit him for contempt until compliance.[554] And the defendant is not entitled to have judgment withheld until he has proved his claim and a dividend in his favor has been declared, and to have the amount thereof deducted from the judgment.[555] The court of bankruptcy, possessing the full powers of a court of equity, may also enforce equities of the defendant as against any other creditor who would be entitled otherwise to share in the recovery.[556] On the other hand, the dismissal of a bill by the trustee to set aside an alleged fraudulent preference, where the construction of the statute was doubtful, should be without costs.[557] The right to dower in land revives, where a conveyance of such land is set aside as an illegal preference under the bankruptcy law, or is surrendered by the preferred creditor.[558] Where one who has received a preference from a bankrupt becomes himself a bankrupt, the preference cannot be collected in full from his estate as a priority claim, either in the usual course of proceedings or on a composition.[559]

[554] In re Plant, 148 Fed. 37, 17 Am. Bankr. Rep. 272. See Ward v. Central Trust Co. (C. C. A.) 261 Fed. 344, 44 Am. Bankr. Rep. 323.

[555] Templeton v. Kehler, 173 Fed. 574, 23 Am. Bankr. Rep. 39. See Minnesota & Ontario Power Co. v. Losey, 260 Fed. 689, 171 C. C. A. 427, 44 Am. Bankr. Rep. 395.

[556] Allen v. McMannes, 156 Fed. 615, 19 Am. Bankr. Rep. 276.

[557] Collins v. Gray, 8 Blatchf. 483, 4 N. B. R. 631, Fed. Cas. No. 3,013.

[558] In re Detert, 11 N. B. R. 293, Fed. Cas. No. 3,829.

[559] In re Alpert (D. C.) 237 Fed. 295, 38 Am. Bankr. Rep. 459.

CHAPTER XXX

DEBTS ENTITLED TO PRIORITY

§ 617. Statutory Provisions.—The bankruptcy act of 1898, after providing for the payment of taxes in advance of the payment of any dividends to creditors, describes, as follows, the classes of debts which shall have priority and which shall be paid in full, and the order of their payment:

1. The actual and necessary cost of preserving the estate subsequent to filing the petition.

2. The filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery.

3. The cost of administration, including the fees and mileage payable to witnesses, and a reasonable attorney's fee for professional services rendered to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties prescribed by the act, and to the bankrupt in voluntary cases as the court may allow.

4. Wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant. And this clause was amended by the act of June 15, 1906 (34 Stat. 267), so as to include "traveling or city salesmen."

5. Debts owing to any person who, by the laws of the states or the United States, is entitled to priority.

This part of the statute was not repealed or in any way altered or affected by the amendatory act of June 25, 1910 (36 Stat. 838), which gives to the trustee in bankruptcy the rights of a creditor holding a lien.[1] And the section relating to priorities does not merely prescribe the order of distribution of assets after satisfaction of liens against the property, but it creates prior liens to the extent stated in favor of the classes of debts specified, and is enforceable without reference to state statutes relating to the same subject.[2] But it is not to be extended by an over liberal construction. It is contrary to the general policy of the bankruptcy law, to distribute the estate equally among all the creditors; and "a statute that takes from one creditor to pay another must be strictly construed and carefully administered by the courts." [3]

It has already been explained that creditors holding valid liens on specific property of the bankrupt, which liens are not divested or disturbed by the proceedings in bankruptcy, are entitled to satisfaction out of the property affected, or out of its proceeds if sold by the trustee, only the balance, if any, going into the general fund for distribution among unsecured creditors.[4] But the claims enumerated in the sixty-fourth section of the statute, and described as "debts to have priority," stand upon a different footing altogether. They do not take precedence of valid lien claims, but they have a position of privilege or preference as against all other unsecured debts, and are entitled to payment in full, in their relative rank and order, out of the general assets of the estate, in advance of the payment of any dividends to the general creditors.

§ 618. **General Rights of Creditors Entitled to Priority.**—A creditor entitled to priority under this section of the Bankruptcy Act should prove his claim in that character, except as to claims for taxes, which, as we have seen, are not required to be proved.[5] But if a creditor files his claim as a general claim and has it allowed in that character and receives a dividend on it, this does not necessarily estop him from afterwards asserting his right to preferential payment if there is nothing to show that the trustee or the other creditors have been prejudiced by the delay.[6] And if a creditor is entitled to priority for his claim, but only up to a certain amount (as, for instance, the $300 payable to a clerk

[1] In re Lausman (D. C.) 183 Fed. 647, 25 Am. Bankr. Rep. 186.

[2] In re McDavid Lumber Co. (D. C.) 190 Fed. 97, 27 Am. Bankr. Rep. 39.

[3] In re Nounnan & Co. (Utah) 7 N. B. R. 15. And see L. E. Waterman Co. v. Kline, 234 Fed. 891, 148 C. C. A. 489, 37 Am. Bankr. Rep. 252.

[4] Supra, Chapter XX, §§ 363–391. And see In re American Product Co., 224 Fed. 401, 140 C. C. A. 87, 35 Am. Bankr. Rep. 54: In re Octave Mining Co. (D. C.) 212 Fed. 457; Macy v. Roedenback, 227 Fed. 346, 142 C. C. A. 42, L. R. A. 1916C, 12, 36 Am. Bankr. Rep. 31; In re Nicol (D C.) 221 Fed. 82, 34 Am. Bankr. Rep. 465.

[5] Supra, § 524.

[6] Wuerpel v. Commercial Germania Trust & Savings Bank, 238 Fed. 269,

or servant) he should prove his claim for a preference to that amount, and prove the balance as a general or unsecured creditor.[7] A creditor entitled to priority is not allowed to participate in creditors' meetings or to vote at such meetings, except in so far as the amount of his claim may exceed the "value of such priority."[8] For instance, a clerk having a claim for wages earned within three months prior to the commencement of the proceedings, but amounting to more than three hundred dollars, should be allowed to vote only on the excess. If, however, a priority creditor does vote his whole claim at a creditors' meeting in the election of a trustee, this will not amount to a waiver of his right of priority, and will not estop him from claiming the same, at least where no other creditor is shown to have been prejudiced.[9] And taking the debtor's note does not discharge an original debt entitled to priority nor prevent the creditor from claiming his privilege.[10] It is also provided that the money necessary to pay all debts which have priority shall be deposited according to the directions of the court, before the court can consider the confirmation of a composition.[11] And where a bankrupt, having been discharged by performance of a composition agreement, promises one of his creditors to pay the full amount of his debt, and the debtor is again adjudged a bankrupt, there is no equity requiring such creditor to be postponed to others who have become creditors since the first bankruptcy proceedings on the faith of the former discharge.[12]

§ 619. **Relative Rank of Priority Claims.**—Claims entitled to priority of payment by this section of the statute do not outrank claims secured by valid liens. A mortgage or other lien given and accepted in good faith and for a present consideration, and which is not voidable as a preference or otherwise in fraud of the act, is recognized in the bankruptcy proceedings and its enforcement permitted as against the specific property to which it attaches. That property cannot be taken from the secured creditor and distributed among the claims entitled to priority. Their right of priority applies only to the general assets of the estate, and is a right of priority as against general or unsecured creditors. This is shown by the language of the statute, which gives priority to certain claims "except as herein provided," and which declares that valid liens "shall not be affected by this act."[13]

151 C. C. A. 285, 38 Am. Bankr. Rep. 223.

[7] In re Crawford Wollen Co. (D. C.) 218 Fed. 951, 34 Am. Bankr. Rep. 223; In re Floyd & Bohr Co. (D. C.) 200 Fed. 1016, 29 Am. Bankr. Rep. 149.

[8] Bankruptcy Act 1898, § 56b; Id. § 57e.

[9] In re Ashland Steel Co., 168 Fed. 679, 94 C. C. A. 165, 21 Am. Bankr. Rep. 834.

[10] In re Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496.

[11] Bankruptcy Act 1898, § 12b.

[12] In re Merriman, 44 Conn. 587, Fed. Cas. No. 9,479.

[13] City of Richmond v. Bird, 249 U. S.

Further, as between the different classes of debts to which the statute gives priority, they do not all stand upon an equal footing, but have a relative rank and priority according to the order of their enumeration in the statute. For the law not only specifies the debts which shall have priority, but the "order of payment."[14] Hence if there is not enough money to satisfy all the priority claims, they are not to share pro rata, but be discharged in full in their order.[15] Thus, claims for wages, being enumerated in the fourth clause of the section, will take precedence over claims enumerated in the fifth clause, that is, "debts owing to any person who, by the laws of the states or the United States, is entitled to priority." Hence such labor claims must be paid in full in preference to a landlord's statutory lien for rent of the premises in which the bankrupt's business was carried on,[16] and even in preference to debts or claims due to the United States.[17] So, the actual and necessary cost of preserving the bankrupt's estate subsequent to filing the petition, which is an expense necessary to enable the court to exercise its jurisdiction is entitled to priority of payment over taxes due to the state.[18] And

174, 39 Sup. Ct. 186, 63 L. Ed. 543, 43 Am. Bankr. Rep. 260; Polk County, Iowa, v. Burns, 247 Fed. 399, 159 C. C. A. 453, 40 Am. Bankr. Rep. 727; In re North Star Ice & Coal Co. (D. C.) 252 Fed. 301, 42 Am. Bankr. Rep. 76; In re City Trust Co., 121 Fed. 706, 58 C. C. A. 126, 10 Am. Bankr. Rep. 231; In re Yoke Vitrified Brick Co,, 180 Fed. 235, 25 Am. Bankr. Rep. 18; In re Proudfoot, 173 Fed. 733, 23 Am. Bankr. Rep. 106; In re Cramond, 145 Fed. 966, 17 Am. Bankr. Rep. 22; In re Frock, 1 Nat. Bankr. News, 214; In re McConnell, 9 N. B. R. 387, Fed. Cas. No. 8,712. Contra, see In re Blackstaff Engineering Co., 200 Fed. 1019, 29 Am. Bankr. Rep. 663; In re Erie Lumber Co., 150 Fed. 817, 17 Am. Bankr. Rep. 689; In re Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235. But two of the three decisions last cited were rendered by the same judge, and in none of the three was any attention paid to the authorities opposed to their views.

[14] Bankruptcy Act 1898, § 64b.

[15] But see In re Grignard Lithographing Co. (D. C.) 158 Fed. 557, 19 Am. Bankr. Rep. 743, holding that, where the estate of the bankrupt is insufficient to pay in full the claims entitled to priority, the court may, where equity requires it, scale a claim which would ordinarily be entitled to priority over others. And it is in the power of the court to marshal claims and assets in such manner as to secure the payment of priority claims of two different classes, where, if this were not done, only one would be satisfied in full. In re Gerrow (D. C.) 233 Fed. 845, 37 Am. Bankr. Rep. 14.

[16] In re Woulfe & Co., 239 Fed. 128, 152 C. C. A. 170, 39 Am. Bankr. Rep. 91; In re Byrne (D. C.) 97 Fed. 762, 3 Am. Bankr. Rep. 268; Contra, see Lott v. Salsbury, 237 Fed. 191, 150 C. C. A. 337, 37 Am. Bankr. Rep. 796. But the lien of a landlord who had distrained property of the lessee before the bankruptcy proceedings were begun is superior to the claims of wage-earners. In re Mock (D. C.) 228 Fed. 94, 35 Am. Bankr. Rep. 9. And where wage-earners had priority as to two funds realized from the bankrupt's assets, while the landlord had priority as to only one, and the two claims exceeded the amount of the funds, it was adjudged that the claims of the wage-earners should first be satisfied out of the fund as to which the landlord had no lien. In re Gerrow (D. C.) 233 Fed. 845, 37 Am. Bankr. Rep. 14.

[17] Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706, 27 Am. Bankr. Rep. 873.

[18] State of New Jersey v. Lovell, 179 Fed. 321, 102 C. C. A. 505, 24 Am. Bankr. Rep. 562; In re Hosmer (D. C.) 233 Fed.

even among claims enumerated in the same class, there may be circumstances to give one a preference over others. Thus, where a state statute creates a lien in favor of employés performing labor in the manufacture of lumber, but provides that the debt or claim shall not remain a lien on the product, unless a statement thereof is filed within thirty days and an action begun within three months, holders of such claims, perfected according to the statute, against the estate of the employer in bankruptcy, are entitled to payment in full out of the proceeds of the property affected, in preference to claims for labor of the same kind which have not been preserved as the statute directs, and this although both classes of claims are equally claims for "wages" within the bankruptcy law.[19]

§ 620. Assignment of Priority Claims.—A claim which is accorded priority by the bankruptcy law itself, such as a claim for wages, or one which is given priority by the laws of the state, does not lose its right to be satisfied in full in advance of distribution to general creditors by the fact of its having been assigned to a third person before the commencement of the proceedings in bankruptcy,[20] or after the filing of the petition.[21] For the preference or priority is given to the debt, not to the person of the creditor; to the claim, and not to the claimant. And whereas the statute speaks of debts for wages "due to" workmen, clerks, etc., it is satisfied if the debt was originally so due, and does not mean that it must continue to be so due until bankruptcy proceedings are begun or until the claim is proved and allowed.[22] Thus, the fact that a large number of laborers holding claims for labor performed for the bankrupt assigned such claims to two of their number, who were also laborers and who held claims of their own, in order to save costs in prosecuting suits against the bankrupt to recover such wages, the assignees agreeing to account to their assignors for the amounts due each when collected, does not deprive the claims so assigned of their

318, 37 Am. Bankr. Rep. 464; In re Oxley (D. C.) 204 Fed. 826, 30 Am. Bankr. Rep. 406.

[19] In re Kerby-Dennis Co., 95 Fed. 116, 36 C. C. A. 677, 2 Am. Bankr. Rep. 402.

[20] Shropshire, Woodliff & Co. v. Bush, 204 U. S. 186, 27 Sup. Ct. 178, 51 L. Ed. 436, 17 Am. Bankr. Rep. 77; In re Bennett, 153 Fed. 673, 82 C. C A. 531, 18 Am. Bankr. Rep. 847; In re Fuller & Bennett, 152 Fed. 538, 18 Am. Bankr. Rep. 443; In re Brown, 4 Ben. 142, 3 N. B. R. 720, Fed. Cas. No. 1,974. But see In re Westlund, 99 Fed. 399, 3 Am. Bankr. Rep. 646.

[21] In re Campbell, 102 Fed 686, 4 Am. Bankr. Rep. 535.

[22] Shropshire, Woodliff & Co. v. Bush, 204 U. S. 186, 27 Sup. Ct. 178, 51 L. Ed. 436, 17 Am. Bankr. Rep. 77; In re Dutcher, 213 Fed. 908, 32 Am. Bankr. Rep. 545. It has been held that one who cashes checks given by a bankrupt to his workmen for wages is entitled to preference as an assignee of the claims for wages, since the checks, unpaid, did not discharge the debts for which they were given. In re Stultz Bros., 226 Fed. 989, 34 Am. Bankr. Rep. 783. But on the other hand, claimants who held undated time checks issued by the bankrupt to laborers for their wages, for which the claimants had given goods in exchange, under an arrangement with the bankrupt, without an assignment or contract with the laborers, were held not

right to priority.[23] But where one holding an assignment of claims for wages exchanges them with the bankrupt for the latter's note or other obligation, this operates as a novation of the wage claims and extinguishes the right of priority given to them by the statute.[24]

§ 621. **Priority of Taxes.**—The trustee in bankruptcy is directed by the statute to "pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality, in advance of the payment of dividends to creditors."[25] A state need not prove its claim in bankruptcy in order to recover taxes due to it on property of the bankrupt,[26] but a claim for taxes due either to the United States or to a state is entitled to priority over all other priority claims,[27] even over the trustee's commissions and his necessary expenses.[28] And it is immaterial that, through the negligence of the officers charged with the collection of taxes, they have accumulated until the aggregate amount with interest will absorb all or a large part of the estate.[29] Since the statute makes no distinction, it is held that taxes are entitled to priority of payment whether they were assessed before the commencement of the bankruptcy proceedings or during their pendency.[30] And it makes no difference that the taxes in question were levied on property which never passed into the hands of the trustee in bankruptcy,[31] or upon the exempt property of the bankrupt.[32] And the priority right of a county or municipality in respect to taxes due to it is

subrogated to the laborers' right to priority. In re McGowin Lumber Co. (D. C.) 223 Fed. 553, 35 Am. Bankr. Rep. 57. And see Bell v. Arledge, 219 Fed. 675, 135 C. C. A. 347; J. C. Stewart & Co. v. McLeod, 222 Fed. 253, 138 C. C. A. 75, 34 Am. Bankr. Rep. 414.

[23] In re Harmon, 128 Fed. 170, 11 Am. Bankr. Rep. 64.

[24] In re Fuller & Bennett, 152 Fed. 538, 18 Am. Bankr. Rep. 443.

[25] Bankruptcy Act 1898, § 64a.

[26] Stokes v. State, 46 Ga. 412, 12 Am. Rep. 588. That a trustee in bankruptcy who fails to pay a claim of the United States for customs duties may become personally liable therefor, see Walkof v. Fox, 90 Misc. Rep. 338, 153 N. Y. Supp. 27.

[27] In re Brand, 2 Hughes, 334, 3 N. B. R. 324, Fed. Cas. No. 1,809. But the provision of the statute giving priority to taxes applies only to general assets, and not to property subject to a valid lien, the taxes not having become a lien on that property. In re Hosmer (D. C.) 233 Fed. 318, 37 Am. Bankr. Rep. 464. Compare Delahunt v. Oklahoma County, 226 Fed. 31, 141 C. C. A. 139, 35 Am. Bankr. Rep. 157. Hence a city's unsecured claim for taxes due to it, which is not given any superior right by the local laws, does not come in ahead of a valid lien, such, for instance, as the lien of a landlord acquired by the levy of a distress warrant. City of Richmond v. Bird, 249 U. S. 174, 39 Sup. Ct. 186, 63 L. Ed. 543, 43 Am. Bankr. Rep. 260, affirming Bird v. City of Richmond, 240 Fed. 545, 153 C. C. A. 349, 39 Am. Bankr. Rep. 1.

[28] In re Weiss, 159 Fed. 295, 20 Am. Bankr. Rep. 247. But compare Polk County, Iowa, v. Burns, 247 Fed. 399, 159 C. C. A. 453, 40 Am. Bankr. Rep. 727.

[29] In re Weissman, 178 Fed. 115, 24 Am. Bankr. Rep. 150.

[30] In re Prince & Walter, 131 Fed. 546, 12 Am. Bankr. Rep. 675; In re Flynn, 134 Fed. 145, 13 Am. Bankr. Rep. 720.

[31] City of Chattanooga v. Hill, 139 Fed. 600, 71 C. C. A. 584, 15 Am. Bankr. Rep. 195; City of Waco v. Bryan, 127 Fed. 79, 62 C. C. A. 79, 11 Am. Bankr. Rep. 481.

[32] In re Tilden, 91 Fed. 500, 1 Am.

not lost by the fact that the property assessed has been struck off to it at a tax sale for want of other bidders,[33] or for less than the amount due as taxes, as it will be entitled, in the latter case, at least to priority of payment of the balance due.[34]

Under the bankruptcy act of 1867, it was held that a debt due for taxes from a bankrupt to a state other than that in which the bankruptcy proceedings were pending was not entitled to a preference.[35] But this was because that statute gave priority to "all debts due to the state in which the proceedings in bankruptcy are pending and all taxes and assessments made under the laws thereof." The absence of such a provision in the present statute would seem to indicate that it was not the intention of Congress to restrict the priority of taxes to those due to the bankrupt's home state. The fact that the word "state" is used in the singular number in this sentence of the bankruptcy law need not affect this interpretation, since the same thing is true of the following words "county, district, or municipality." Evidently the sentence should be read as if it referred to taxes due "to the United States or to any state, county, district, or municipality." It should be observed, however, that if there is any statute of limitations applicable to the tax in question, such as a municipal tax, it may be invoked by the trustee in bankruptcy as a protection against being required to pay the tax.[36] And further, this provision of the bankruptcy law is to be construed in accordance with equitable principles, such as that of the marshaling of assets; and where taxes due to a county are a lien on property of the bankrupt, the greater portion of which has been taken to satisfy a mortgage, leaving no more than enough to pay the costs and expenses of administration, it is within the power of the court to require the county to resort to the mortgaged property.[37]

The claim of a state or municipality for taxes is against the owner of the property on which the tax is assessed. Where the bankrupt is not the owner of such property, but a lessee of it, the state or municipality cannot come upon his estate in bankruptcy with a preferential claim for payment of the taxes, though he covenanted in the lease to pay all taxes assessed upon the property. For such a covenant is not made for the benefit of the state or municipality and cannot be enforced by it. It simply creates a debt in favor of the owner of the property.[38]

Bankr. Rep. 300; In re Baker, 1 Nat. Bankr. News, 212.

[33] Hecox v. Teller County (C. C. A.) 198 Fed. 634, 28 Am. Bankr. Rep. 525.

[34] In re Stalker, 123 Fed. 961, 10 Am. Bankr. Rep. 709.

[35] In re Ambler, 8 Ben. 176, Fed. Cas. No. 271. But as to the present statute, see New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, 17 Am. Bankr. Rep. 63.

[36] In re Stalker, 123 Fed. 961, 10 Am. Bankr. Rep. 709.

[37] In re Oxley, 204 Fed. 826, 30 Am. Bankr. Rep. 406.

[38] In re Broom, 123 Fed. 639, 10 Am.

And if the owner pays the taxes, which the bankrupt lessee had covenanted to pay, he may prove a claim therefor as a general creditor in the bankruptcy proceedings, but is not entitled to be subrogated to the rights of the state or municipality so as to occupy the position of a creditor entitled to priority.[39] Further, where the bankrupt had been county tax collector, his indebtedness to the county for taxes collected and not accounted for, or for taxes which should have been collected and for which he is liable under the laws of the state, is not a debt for "taxes legally due and owing by the bankrupt" to the county, and therefore is not entitled to priority.[40]

A sale of the land by the trustee in bankruptcy does not divest the lien of the state for taxes due upon it, even though the sale was made free of incumbrances.[41] But in that case the taxes are to be paid by the purchaser at the sale, rather than out of the funds of the estate in bankruptcy, at least if the amount realized is not more than enough to discharge liens;[42] and the purchaser, paying the taxes, is not subrogated to the rights of the taxing power so as to claim priority.[43]

The same section of the bankruptcy law provides that, "in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court," that is, the court of bankruptcy in which the proceedings are pending. This applies to taxes due to the United States; and the trustee in bankruptcy may resist such a tax, and have the accuracy or justice of the claim therefor determined by the bankruptcy court, and he is not obliged to take the course of first paying the tax claimed and then filing a claim for a refund.[44] In general, where the claim of a state or municipality against a bankrupt for unpaid taxes is supported by sworn valuations which appear neither unjust nor illegal, the claim must be allowed as a priority claim, without reference to the hardship it may work on general creditors.[45] But the court of bankruptcy is to inquire into all such matters, and it is not limited to such defenses or objections as the bankrupt himself might have

Bankr. Rep. 427; In re Siegel-Hillman Dry Goods Co., 2 Nat. Bankr. News, 856.

[39] Cooper Grocery Co. v. Bryan, 127 Fed. 815, 62 C. C. A. 495, 11 Am. Bankr. Rep. 734; In re Parker, 6 Ben. 286, Fed. Cas. No. 10,719.

[40] In re Waller, 142 Fed. 883, 15 Am. Bankr. Rep. 753.

[41] Stokes v. State, 46 Ga. 412, 12 Am. Rep. 588, 9 N. B. R. 191; Mesker v. Koch, 76 Ind. 68; Meeks v. Whatley, 48 Miss. 337, 10 N. B. R. 498. Compare In re Stalker, 123 Fed. 961, 10 Am. Bankr. Rep. 709.

[42] In re Brinker, 128 Fed. 634, 12 Am. Bankr. Rep. 122; In re Conhaim, 100 Fed. 268, 4 Am. Bankr. Rep. 58; In re Veitch, 101 Fed. 251, 4 Am. Bankr. Rep. 112. See In re Harvey, 122 Fed. 745, 10 Am. Bankr. Rep. 567.

[43] In re M. I. Hibbler Machine Supply Co. (D. C.) 192 Fed. 741, 27 Am. Bankr. Rep. 612.

[44] In re W. P. Williams Oil Corporation (D. C.) 265 Fed. 401, 45 Am. Bankr. Rep. 278. In re General Film Corporation (C. C. A.) 274 Fed. 903.

[45] In re Bushnell (D. C.) 215 Fed. 651, 33 Am. Bankr. Rep. 47.

raised against the tax. So, for instance, the state's claim for a tax should not be allowed where it was based upon the bankrupt's false and padded return, when, if the real facts had been disclosed, no assessment could properly have been made.[46] And the findings or determinations of state officers in fixing the amount of an annual license or franchise tax on a corporation are not conclusive on the court of bankruptcy, which may independently review the amount and legality of the tax.[47] And the court may refuse to allow a claim for personal taxes on the ground that the property supposed to be taxed did not actually exist.[48]

§ 622. Same; What Taxes Included.—The provision of the bankruptcy act requiring the trustee to pay all taxes legally due and owing by the bankrupt intends that, while the estate is in the hands of the trustee, his custody of it shall not operate as a bar to the collection of taxes which would be collectible under the law if the property had remained in the possession and control of the bankrupt himself.[49] Hence the funds of the estate in the hands of the trustee are subject to state and local taxation in that taxing district where the values might have been assessed for taxation if the bankruptcy had not supervened, and on proper application the court will order the payment of such taxes by the trustee, as coming within the spirit, if not the letter, of the bankruptcy act.[50] In effect, the word "tax," as used in this part of the law, is not employed in any restricted sense, but broadly, so as to include all obligations imposed by the state and general governments under their respective taxing or police powers for governmental or public purposes; and hence it will include a license fee or tax imposed on the privilege of carrying on certain lines of business supposed to require regulation under the police power, such as dealing in intoxicating liquors or cigarettes.[51] The term will also include an annual license fee or franchise tax imposed on a corporation by the state which granted its charter, though it does no business and has no property in that state.[52] But a bonus required by the state law to be paid to the state by any corporation on increasing its

[46] In re E. C. Fisher Corp. (D. C.) 229 Fed. 316, 36 Am. Bankr. Rep. 509.

[47] In re Heffron (D. C.) 216 Fed. 642, 33 Am. Bankr. Rep. 443; In re Simcox, Inc. (D. C.) 243 Fed. 479, 40 Am. Bankr. Rep. 195; New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, 17 Am. Bankr. Rep. 63.

[48] In re Otto Fruend Arnold Yeast Co. (D. C.) 178 Fed. 305, 24 Am. Bankr. Rep. 458.

[49] In re Conhaim (D. C.) 100 Fed. 268, 4 Am. Bankr. Rep. 58; Compare In re Booth, 14 N. B. R. 232, Fed. Cas. No. 1,645.

[50] In re Sims (D. C.) 118 Fed. 356, 9 Am. Bankr. Rep. 162.

[51] In re Otto F. Lange Co., 159 Fed. 586, 20 Am. Bankr. Rep. 478. But see In re Ott, 95 Fed. 274, 2 Am. Bankr. Rep. 637.

[52] New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, 17 Am. Bankr. Rep. 63; In re Halsey Electric Generator Co., 175 Fed. 825, 23 Am. Bankr. Rep. 401.

capital stock, is not a tax.[53] And an obligation imposed by state statute on corporations doing business within the state to collect from resident holders of its bonds or other obligations the state tax on such bonds, by the process of having the treasurer of the corporation withhold the amount of such tax from the interest due the bondholders, is not a tax on the corporation, though it is liable to the state therefor, and hence is not entitled to priority of payment out of the estate of the corporation in bankruptcy.[54] It is also held that water rents due to a municipality, which are levied annually on property as a tax is levied and made a lien in like manner, are "taxes" within the meaning of the bankruptcy law.[55] And it appears that the same is true of assessments levied for local improvements, at least if the law of the particular state, as interpreted by its courts, regards and treats them as taxes and gives the same remedies for their enforcement.[56] But an assessment levied on an employer of labor under the workmen's compensation act of a state is not a "tax" entitled to priority of payment.[57] Where interest accrues on delinquent taxes, and the law is such that the eventual payment of the taxes with the accrued interest is equivalent to their payment at the appointed time, the interest is a part of the tax and therefore entitled to priority of payment. But a penalty imposed for the nonpayment of the tax when due is not a part of the tax and not entitled to priority; and the fact that a statute requiring payment of an additional sum if the tax is not paid when due calls such sum "interest" is not conclusive on the bankruptcy court that it is not a penalty.[58]

§ 623. **Costs and Expenses of Administration.**—Priority is given to "the actual and necessary cost of preserving the estate subsequent to filing the petition." And even where property of the estate is turned over to the admiralty court to be sold for the satisfaction of maritime liens, the proceeds of the sale are subject to the payment of the necessary costs incurred by the bankruptcy court in preserving the property until it was so turned over.[59] The costs or expenses here intended are such as accrue in connection with the custody and preservation of the property in the interval between the filing of the petition and the ap-

[53] Commonwealth of Pennsylvania v. York Silk Mfg. Co., 192 Fed. 81, 112 C. C. A. 613, 27 Am. Bankr. Rep. 525.

[54] In re York Silk Mfg. Co., 188 Fed. 735, 26 Am. Bankr. Rep. 650; In re Wyoming Valley Ice Co., 145 Fed. 267, 16 Am. Bankr. Rep. 594.

[55] In re Industrial Cold Storage & Ice Co., 163 Fed. 390, 20 Am. Bankr. Rep. 804; In re Moller, 14 Blatchf. 207, Fed. Cas. No. 9,700. But compare In re Hills, 221 Fed. 260, 137 C. C. A. 150, 34 Am. Bankr. Rep. 43.

[56] In re Stalker, 123 Fed. 961, 10 Am. Bankr. Rep. 709.

[57] In re Farrell (D. C.) 211 Fed. 212, 32 Am. Bankr. Rep. 212.

[58] In re Ashland Emery & Corundum Co. (D. C.) 229 Fed. 829, 36 Am. Bankr. Rep. 194. And see supra, § 512.

[59] In re Hughes, 170 Fed. 809, 22 Am. Bankr. Rep. 303.

pointment of a trustee. After the trustee takes charge, similar expenses will be classed as "costs of administration." Among them may be included the expense of storage of the property and the pay of a watchman or keeper,[60] and rent of the store or other building occupied by the bankrupt as his place of business,[61] though not the rent of such portion of the building as he occupies as a residence.[62] And an expert employed by the bankrupt, after the commencement of the proceedings and before the adjudication, with the consent of the creditors, to make certain surveys, and calculations having an important bearing on the collection of the bankrupt's claims against third persons, and who renders services which inure largely to the benefit of the creditors, may have a preferred claim for his compensation.[63] But one who has paid the premium on a policy of fire insurance held by him under a pledge, and which is afterwards assigned to the receiver of the assured in bankruptcy, is not entitled to a preference for the payment of such claim, and the payment of the same by the receiver is not authorized.[64]

Next in order of priority are the filing fees paid by creditors in involuntary cases; and to this the amendatory act of 1903 added a provision that when property transferred or concealed by the bankrupt is recovered for the benefit of the estate by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery shall likewise have priority. This, however, was not retroactive and did not apply to bankruptcy proceedings begun before its enactment.[65] The fees paid by voluntary bankrupts on filing their papers are naturally not returnable to them, but it has been held that a person advancing money to the bankrupt to pay the fees, has a first lien on the estate for its repayment.[66] The "costs of administration" are next entitled to satisfaction, and these will include the commissions of the referee and trustee,[67] and ordinary and necessary expenses incurred in caring for and collecting the estate of the bankrupt, but not usually the cost of continuing the bankrupt's business,[68] nor expenditures made by the receiver or trustee, for the sole benefit of general creditors, in carrying out con-

[60] In re Allen, 96 Fed. 512, 3 Am. Bankr. Rep. 38; In re Mitchell, 212 Fed. 932, 129 C. C. A. 452.

[61] Supra, §§ 211, 307, 522.

[62] In re Hersey, 171 Fed. 1001, 22 Am. Bankr. Rep. 860.

[63] In re Nounnan & Orr, 1 Utah, 44.

[64] In re Hamilton, 102 Fed. 683, 4 Am. Bankr. Rep. 543.

[65] In re Felson (D. C.) 139 Fed. 275, 15 Am. Bankr. Rep. 185. Creditors contributing to the expense of litigation by the trustee are not generally entitled to preferential payment from the fund recovered, beyond repayment of their expense contributions. In re Butcher (D. C.) 266 Fed. 239, 45 Am. Bankr. Rep. 300.

[66] Whiston v. Smith, 2 Low. 101, Fed. Cas. No. 17,523.

[67] In re Cramond, 145 Fed. 966, 17 Am. Bankr. Rep. 22.

[68] In re Bourlier Cornice & Roofing Co., 133 Fed. 958, 13 Am. Bankr. Rep. 585. See Searle v. Mechanics' Loan & Trust Co., 249 Fed. 942, 161 C. C. A. 213, 41 Am. Bankr. Rep. 786.

tracts of the bankrupt which were thought to be profitable.[69] And it is important to observe that the costs which are given priority are costs incurred in the bankruptcy proceedings itself or in connection with it. A claim for taxable costs incurred by a creditor in good faith before the filing of the petition in an action to recover a provable debt, is a claim which may be proved and allowed in the bankruptcy proceedings, but it is not a debt entitled to priority of payment,[70] unless there is some provision of the local law under which such costs may claim a preference.[71] But an assignee for the benefit of creditors, whose functions are superseded by the institution of bankruptcy proceedings against the assignor, has a lien on the assets and a preferred claim for his necessary disbursements and for the reasonable value of his services and those of his counsel, in so far as such services increased or benefited the estate of the bankrupt.[72]

As to the position of secured creditors, the better opinion is that the holder of a lien on specific property of the bankrupt, the validity of which is not disputed, is entitled to payment in full from the proceeds of the property, when it is sold by the trustee, with interest to the time of payment, and cannot be required to contribute anything to the general expenses of the bankruptcy proceeding.[73] But a secured creditor who makes use of the bankruptcy court and its officers to realize on his security may be required to contribute his proportion to the costs of the proceedings, and especially for the preservation of the property during their pendency, where there is not sufficient unincumbered estate for the purpose.[74]

§ 624. **Receivers' Certificates.**—The amount of an issue of receiver's certificates authorized by a court of bankruptcy, to raise the money required for the care and preservation of the property of the estate, rep-

[69] In re Bourlier Cornice & Roofing Co., 133 Fed. 958, 13 Am. Bankr. Rep. 585.

[70] In re The Copper King, 143 Fed. 649, 16 Am. Bankr. Rep. 148; In re Daniels, 110 Fed. 745, 6 Am. Bankr. Rep. 699; In re Beaver Coal Co., 107 Fed. 98, 5 Am. Bankr. Rep. 787; In re Allen, 96 Fed. 512, 3 Am. Bankr. Rep. 38.

[71] In re Daniels, 110 Fed. 745, 6 Am. Bankr. Rep. 699; In re Lewis, 99 Fed. 935, 4 Am. Bankr. Rep. 51.

[72] Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. Rep. 1; In re Chase, 124 Fed. 753, 59 C. C. A. 629. Compare Stearns v. Flick, 103 Fed. 919, 4 Am. Bankr. Rep. 723; In re Peter Paul Book Co., 104 Fed. 786, 5 Am. Bankr. Rep. 105. See, supra, § 444. As to compensation of a receiver appointed by a state court, see In re J. H. Alison Lumber Co., 137 Fed. 643, 14 Am. Bankr. Rep. 78. And see Paine v. Archer, 233 Fed. 259, 147 C. C. A. 265, 37 Am. Bankr. Rep. 454; Hume v. Myers, 242 Fed. 827, 155 C. C. A. 415, 39 Am. Bankr. Rep. 401; In re Cooper (D. C.) 243 Fed. 797, 40 Am. Bankr. Rep. 17.

[73] In re Allert, 173 Fed. 691, 23 Am. Bankr. Rep. 101; In re Clark Coal & Coke Co., 173 Fed. 658, 23 Am. Bankr. Rep. 273. But see In re Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235; Loving v. Moore, 37 App. D. C. 214.

[74] In re J. H. Alison Lumber Co. (D. C.) 137 Fed. 643, 14 Am. Bankr. Rep. 78.

resents an expenditure for the benefit of all parties in interest, and such certificates are entitled to priority of payment out of the proceeds of such property.[75] The same is true of certificates issued by the receiver to raise money for the purpose of carrying on the business of the bankrupt.[76] But in a case of this kind, it appeared that the receiver had been authorized to borrow the sum of $10,000, and began by borrowing half of that amount, for which he issued certificates. These were purchased by a company which was the surety on the bankrupt's bond guaranteeing the performance of the contracts which the receiver expected to complete. He also incurred other indebtedness of the same character, for which no certificates were issued, to an amount in excess of the authorized limit, all of which was done with the knowledge of the surety company, to which the receiver paid $1,000 on account of the certificates which it held. It was held that the holders of the debts incurred by the receiver, for which no certificates were issued, to the amount of $6,000, were entitled to participate in the bankrupt's assets in the hands of the receiver on the same footing with the remaining $4,000 of the certificates.[77]

§ 625. **Attorney's Claim for Services.**—Under the bankruptcy law of 1867, an attorney's claim for legal services rendered to the bankrupt in preparing the petition and schedules, and for advice in relation thereto, was not a privileged or priority debt.[78] But this is changed by the present statute, which includes among the "costs of administration," as entitled to priority, "one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow."[79] The attorney of a voluntary bankrupt may therefore claim priority for his fee, though the amount of it is to be fixed by the court. But he will be held to have waived this right of priority if he makes the mistake of including

[75] In re Alaska Fishing & Development Co. (D. C.) 167 Fed. 875, 21 Am. Bankr. Rep. 685.

[76] Where it was to the interest of secured creditors, who held liens on the property of the bankrupt, that the plant should be put into successful operation, and they acquiesced in the appointment of a receiver and in the sale of the property by the trustee free from their liens, receiver's certificates, lawfully issued, are entitled to priority in payment out of the proceeds of the property, even over the liens of the secured creditors. In re Veler, 249 Fed. 633, 161 C. C. A. 543, 41 Am. Bankr. Rep. 736.

[77] In re Restein (D. C.) 162 Fed. 986, 20 Am. Bankr. Rep. 832.

[78] In re Hirschberg, 2 Ben. 466, Fed. Cas. No. 6,530; In re Jaycox, 7 N. B. R. 140, Fed. Cas. No. 7,239.

[79] Bankruptcy Act 1898, § 64b. For professional services rendered before the bankruptcy, an attorney is merely a general creditor, entitled to no priority, though he may have a charging lien on the papers in his hands. Kraus v. Century Gas & Electric Fixture Co., 161 App. Div. 916, 145 N. Y. Supp. 1086.

his fee in the bankrupt's list of debts as an unsecured claim.[80] And it may be proper for the court, in its discretion, to reject such claim altogether, as was done in a case where the purchaser of property subject to a mortgage, while a foreclosure suit was pending in a state court, filed his voluntary petition in bankruptcy, with the manifest intention of acting adversely to the interests of the mortgagee.[81] As for the compensation of attorneys employed by the trustee in bankruptcy, it is held that this is properly included in the "costs of administration," although the statute does not so specify, the allowance of a fee to the attorney for "the petitioning creditors" not being exclusive of the right to allow a priority claim to the attorneys for the trustee.[82] Thus, where an attorney is retained by the trustee in a suit to recover a voidable or fraudulent preference made by the bankrupt, his reasonable fee should be allowed as a part of the expenses of administration and accorded priority of payment.[83]

§ 626. **Wages of Workmen, Clerks, and Servants.**—Priority is given by the bankruptcy act to "wages due to workmen, clerks, or servants, which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant."[84] A claimant who comes within the statute does not lose his right of priority by reason of the fact that, within four months before the bankruptcy and while the employer was insolvent, he recovered a judgment against him for the wages due.[85] And the claim of a father for the wages due to his minor son, employed by the bankrupt, is entitled to the same priority.[86] But a claim for wages for an unexpired term of employment, the employé having been wrongfully discharged, is not entitled to priority, because in reality the demand is for damages for breach of the contract, and not for "wages which have been earned," etc.[87] And where, by agreement, a clerk permits his employer to retain a certain portion of his wages each week to form a fund which is to be

[80] In re Morris, 125 Fed. 841, 11 Am. Bankr. Rep. 145.

[81] Liddon & Bro. v. Smith, 135 Fed. 43, 67 C. C. A. 517, 14 Am. Bankr. Rep. 204.

[82] In re Standard Fuller's Earth Co., 186 Fed. 578, 26 Am. Bankr. Rep. 562; In re Grignard Lithographing Co., 158 Fed. 557, 19 Am. Bankr. Rep. 743.

[83] Page v. Rogers, 149 Fed. 194, 79 C. C. A. 153, 17 Am. Bankr. Rep. 854.

[84] Bankruptcy Act 1898, § 64b, cl. 4. See In re Little Elk Logging Co. (D. C.) 218 Fed. 142, 33 Am. Bankr. Rep. 592. Where the trustee was authorized to continue under the bankrupt's contract and to borrow money, the lender to have a lien subject only to the costs of administration, laborers and materialmen were held entitled to priority. In re John W. Farley & Co., 227 Fed. 378, 142 C. C. A. 74, 36 Am. Bankr. Rep. 88.

[85] In re Haskell (D. C.) 228 Fed. 819, 36 Am. Bankr. Rep. 428; In re Anson (D. C.) 101 Fed. 608, 4 Am. Bankr. Rep. 231. But see In re Burton Bros. Mfg. Co. (D. C.) 134 Fed. 157, 14 Am. Bankr. Rep. 218.

[86] In re Harthorn, 4 N. B. R. 103, Fed. Cas. No. 6,162.

[87] In re Schultz & Guthrie (D. C.) 235 Fed. 907, 37 Am. Bankr. Rep. 604; In re Pevear, 17 N. B. R. 461, Fed. Cas. No. 11,053.

paid to the clerk or used for his benefit later, and the employer becomes bankrupt, the clerk cannot claim priority for the sums so retained during the preceding three months as "wages," because the fund has become, by the contract between the parties, a debt of a different class.[88] And orders for goods, drawn by a manufacturing company in favor of its employés, are not preferred claims in the hands of the drawees against the estate of the company in bankruptcy.[89]

As to the terms "workmen," "clerks," and "servants," these must be understood in their ordinary and popular signification, as they are not terms of art.[90] A workman is a laborer, mechanic, or operative. He is distinguished from a "servant" in the nature of his employment, and from a "clerk" in that his labor is manual or mechanical, rather than intellectual. He is also an artisan or craftsman, as distinguished from those who direct, superintend, or employ the labor of others. Thus, a civil engineer employed on the construction of a railroad is not a workman or laborer,[91] nor a carter or teamster, in so far as concerns the services of his team.[92] One employed as a salesman in a store or shop is a "clerk" within the meaning of the statute,[93] and so is a bookkeeper,[94] and one employed for a temporary service in adjusting the books and accounts of the bankrupt.[95] As to "servants," it has been held under analogous statutes that this word embraces only those who in common parlance are called servants, that is, "hirelings who make a part of a man's family, employed for money, to assist in the economy of the family or in matters connected with it." [96] "A servant is one who is engaged not merely in doing work or services for another, but who is in his service, usually upon or about the premises or property of his employer, and subject to his direction and control therein, and who is generally liable to be dismissed." [97] Yet the courts have striven to carry out the obvious purpose of the bankruptcy law to give special protection to those who are dependent on their daily earnings, and in so doing have given a

[88] In re Caledonia Coal Co. (D. C.) 254 Fed. 742, 43 Am. Bankr. Rep. 93; In re Flick (D. C.) 105 Fed. 503, 5 Am. Bankr. Rep. 465.

[89] In re Erie Rolling Mill Co. (D. C.) 1 Fed. 585.

[90] That the compensation of an employee of the bankrupt was more than $1,500 a year, so that he is not within the definition of a "wage earner" in another part of the statute, does not of itself prevent him from claiming priority as a workman, clerk or servant. In re Schultz & Guthrie (D. C.) 235 Fed. 907, 37 Am. Bankr. Rep. 604.

[91] Pennsylvania & D. R. Co. v. Leuffer, 84 Pa. St. 168, 24 Am. Rep. 189. On the same principle, the claim of a mining engineer for unpaid salary is not entitled to priority. In re Gay & Sturgis (D. C.) 233 Fed. 604, 36 Am. Bankr. Rep. 350.

[92] Spruks v. Lackawanna Dairy Co., 189 Fed. 287, 26 Am. Bankr. Rep. 554.

[93] In re Flick, 105 Fed. 503, 5 Am. Bankr. Rep. 465.

[94] In re Baumblatt, 156 Fed. 422, 19 Am. Bankr. Rep. 500.

[95] Ex parte Rockett, 2 Low. 522, 15 N. B. R. 95, Fed. Cas. No. 11,977.

[96] Boniface v. Scott, 3 Serg. & R. (Pa.) 351.

[97] Heygood v. State, 59 Ala. 49; Morgan v. Bowman, 22 Mo. 538.

very elastic construction to this term. Thus, it is held that musicians employed at regular wages to play in a theater, restaurant, roof garden, or other such place, are "servants" for the purpose of this statute.[98] And so likewise, there are decisions that persons who are engaged as conductors or other employés on railroad trains come within the definition of "servants."[99] But "wages" is the reward paid for labor. And while it is none the less wages because the labor is paid for by the piece, yet compensation for labor is not wages where payment is by the job, nor where it consists of the profits derived from the labor of others, and this, though the claimant himself takes part in the work.[100] Therefore one who undertakes the performance of a definite piece of work, not under a contract for his personal labor or service, but under a contract for the performance of the work, is not a "workman," but a contractor, and the compensation due him is not "wages," though he may put his own hand to the work.[101]

Neither of the terms employed in this section of the bankruptcy act can properly be made to include one who is in general charge and command of a business, or of a branch of it, or an officer of a corporation such as the president, secretary, treasurer, or general manager. Persons in this class of employment are not "workmen, clerks, or servants," and arrears of salary due to them cannot be described as wages.[102] Nor is the rule altered by the fact that such a person may occasionally or incidentally perform services of a clerical or mechanical or menial character.[103] Regard is to be had to the general character and scope of his du-

[98] In re Caldwell, 164 Fed. 515, 21 Am. Bankr. Rep. 236. But compare In re All Star Feature Corp. (D. C.) 231 Fed. 251, 36 Am. Bankr. Rep. 655, in which it was held that an actress, contracting to fill a four-week's engagement at a high salary, was not classifiable as a workman or servant.

[99] Heygood v. State, 59 Ala. 49; Conant v. Van Schaick, 24 Barb. (N. Y.) 87.

[100] In re Thomas Deutschle & Co., 182 Fed. 430, 25 Am. Bankr. Rep. 343.

[101] In re Thomas Deutschle & Co. 182 Fed. 430, 25 Am. Bankr. Rep. 343; In re Quackenbush (D. C.) 259 Fed. 599, 43 Am. Bankr. Rep. 699; In re Footville Condensed Milk Co. (D. C.) 237 Fed. 136, 38 Am. Bankr. Rep. 472; Campfield v. Lang, 25 Fed. 128; In re Rose, 1 Nat. Bankr. News, 212; New Orleans & N. E. R. Co. v. Reese, 61 Miss. 581.

[102] Keyes v. Davie, 231 Fed. 688, 145 C. C. A. 574, 36 Am. Bankr. Rep. 884; In re Metropolitan Jewelry Co. (D. C.) 216 Fed. 384; Arnold v. Knapp, 75 W. Va. 804, 84 S. E. 895; In re Bonk (D. C.) 270 Fed. 657, 46 Am. Bankr. Rep. 503; In re Crown Point Brush Co., 200 Fed. 882, 29 Am. Bankr. Rep. 638; In re Albert O. Brown & Co., 171 Fed. 281, 22 Am. Bankr. Rep. 496; In re Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154; In re Grubbs Wiley Grocery Co., 96 Fed. 183, 2 Am. Bankr. Rep. 442; Wells v. Southern Minnesota Ry. Co., 1 Fed. 270; Coffin v. Reynolds, 37 N. Y. 640. Where five workingmen organized a corporation, each paying in a sum of money, and one of them acted as treasurer and director, in addition to working in the shop, it was considered that his claim for compensation as such treasurer was not entitled to priority over the general creditors of the corporation. In re Boston French Range Co. (D. C.) 235 Fed. 916, 37 Am. Bankr. Rep. 508.

[103] Wintermote v. MacLafferty, 233 Fed. 95, 147 C. C. A. 165, 37 Am. Bankr. Rep. 425; In re Eagle Ice & Coal Co. (D. C.) 241 Fed. 393, 39 Am. Bankr. Rep. 184; In re Continental Paint Co. (D. C.) 250 Fed. 189, 34 Am. Bankr. Rep. 282.

ties, as defined by the rules or by-laws of the company or the contract under which he serves. Thus, the fact that the manager of a branch store of the bankrupt, in addition to his duties as manager, sold goods, kept the store clean, and kept the accounts, does not make him a workman or clerk or servant, so as to entitle him to priority.[104] On the other hand, a bookkeeper, employed as such and working in that capacity up to the time of the bankruptcy of his employer, a corporation, is entitled to priority notwithstanding the fact that he had been elected treasurer of the company, in place of one who resigned, and held that office for some time, where he received no salary as treasurer, and did nothing in that office except to sign checks when directed to do so by the president of the company.[105] And the steward of a bankrupt corporation operating a restaurant was held entitled to priority of payment of his wages, though he was also a director and officer of the company, where his acts and functions in the latter capacity were purely formal.[106]

A state statute cannot enlarge the class of persons to whom the bankruptcy law gives priority in the character of "workmen, clerks, or servants." Though a person not a workman, clerk, or servant might come under the description of "employé," or similar comprehensive term, in a state statute giving priority of payment, this would not entitle him to priority in bankruptcy. For the clause specifically relating to labor claims is not affected or enlarged by that relating to claims entitled to priority under the laws of a state.[107]

The wife and children of the bankrupt are not to be excluded from the class of creditors entitled to priority of payment, merely on account of the relationship, if they have rendered services to the bankrupt, such as

See Emerson v. Castor, 236 Fed. 29, 149 C. C. A. 239, 37 Am. Bankr. Rep. 719. But a claim for salary was held entitled to priority where the claimant, although he was the superintendent of a shop, having authority to hire and discharge men, subject to the control of the general manager, did the same kind of work as the other men in the shop. Blessing v. Blanchard, 223 Fed. 35, 138 C. C. A. 399, Ann. Cas. 1916B, 341, 35 Am. Bankr. Rep. 135.

[104] In re Greenberger (D. C.) 203 Fed. 583, 30 Am. Bankr. Rep. 117.

[105] In re H. O. Roberts Co. (D. C.) 193 Fed. 294, 27 Am. Bankr. Rep. 437. And see In re Capital Paint Co. (D. C.) 239 Fed. 424.

[106] In re Swain Co. (D. C.) 194 Fed. 749, 28 Am. Bankr. Rep. 66.

[107] In re Crown Point Brush Co., 200 Fed. 882, 29 Am. Bankr. Rep. 638; In re Slomka, 122 Fed. 630, 58 C. C. A. 322, 9 Am. Bankr. Rep. 635; In re Shaw, 109 Fed. 782, 6 Am. Bankr. Rep. 501; In re Reiser, 2 Nat. Bankr. News, 859. But compare In re City Trust Co., 121 Fed. 706, 58 C. C. A. 126, 10 Am. Bankr. Rep. 231; In re Kerby-Denis Co., 94 Fed. 818, 2 Am. Bankr. Rep. 218. But see In re Western Condensed Milk Co., 261 Fed. 62, 171 C. C. A. 658, 44 Am. Bankr. Rep. 558. In this case it was held that claims of laborers, filed and allowed as preferred debts by a state court under the state law against a corporation under receivership, were entitled to priority on the subsequent bankruptcy of the corporation, as debts given priority by the laws of the state, although the services were rendered more than three months prior to the bankruptcy.

would be rendered by any other "workman, clerk, or servant," within three months prior to the bankruptcy.[108]

§ 627. **Same; Traveling Salesmen.**—The courts held at first that a traveling salesman or "drummer" was not a workman nor a clerk or servant of his employer within the meaning of those terms as used in the bankruptcy act, and was therefore not entitled to priority of payment,[109] and that when he sold goods on a commission, his earnings could not be described as "wages." [110] But this clause of the statute was amended in 1906, by incorporating the words "traveling or city salesmen," so that, at present, priority is given to "wages due to workmen, clerks, traveling or city salesmen, or servants." [111] This amendment, however, was not retroactive.[112] The doctrine now prevails that compensation payable in the form of commissions on the price of goods sold is to be treated as "wages." [113] And a salesman comes within the meaning of the statute, when the principal and important part of his employment, to which all else is subordinate, is the selling of goods or soliciting orders for goods. Thus a person of whom this is true is none the less a salesman and entitled to priority in that character, because it is a part of his duty to see to the installation of the goods produced and sold by his employer,[114] or because he exercises his own discretion as to when and where he shall travel and maintains an office in a city at his own expense,[115] or because he is placed in charge of a branch office, where the office itself and his work in it is subordinate and auxiliary to his work as traveling salesman.[116]

§ 628. **Same; Limitation of Three Months.**—Priority is given by the statute to wages only when "earned within three months before the date of the commencement of proceedings." Hence, although a claim may clearly be of such a character as to come within the statute, yet if

[108] In re Strauch (D. C.) 208 Fed. 842, 31 Am. Bankr. Rep. 36; In re Starr (D. C.) 232 Fed. 416, 36 Am. Bankr. Rep. 426; In re Davidson (D. C.) 233 Fed. 462, 37 Am. Bankr. Rep. 480.

[109] In re Scanlan, 97 Fed. 26, 3 Am. Bankr. Rep. 202; In re Greenewald, 99 Fed. 705, 3 Am. Bankr. Rep. 696. But see Gravatt v. State, 25 Ohio St. 162.

[110] In re Mayer, 101 Fed. 227, 4 Am. Bankr. Rep. 119.

[111] Act Cong. June 15, 1906, 34 Stat. 267, amending Bankruptcy Act 1898, § 64b.

[112] In re Photo Electrotype Engraving Co., 155 Fed. 684, 19 Am. Bankr. Rep. 94.

[113] In re Dexter, 158 Fed. 788; In re Fink, 163 Fed. 135, 20 Am. Bankr. Rep. 897; In re New England Thread Co., 154 Fed. 742, 18 Am. Bankr. Rep. 840; In re National Marble & Granite Co., 206 Fed. 185, 31 Am. Bankr. Rep. 80. But partners who sold goods for the bankrupt on a commission basis, maintaining their own office, and not being bound to devote any particular amount of their time to selling the bankrupt's property, are not "traveling salesmen." In re Kominers (D. C.) 252 Fed. 183, 40 Am. Bankr. Rep. 431.

[114] In re Roebuck Weather Strip & Wire Screen Co., 180 Fed. 497, 24 Am. Bankr. Rep. 532.

[115] In re Dexter, 158 Fed. 788.

[116] In re Gay, 188 Fed. 392.

the wages were earned more than three months before the commencement of the proceedings, it is not entitled to priority,[117] and the creditor must allege in his statement of claim, or show by proof, that the debt accrued within the period limited,[118] and if only a part of it accrued within that time, then he is entitled to priority only as to that part.[119] But a creditor having a claim for wages much exceeding the statutory limit of $300, and running back to a time much more than three months prior to the bankruptcy, and who receives payments on account at various times, is not required to credit payments within the last three months so as to reduce wages earned within that period, but is entitled to credit all the payments to the earlier items of the account, leaving $300 earned within the last three months, for which he is entitled to a preference.[120] Wages earned in the interval between the filing of the petition and the adjudication are not within the protection of the statute,[121] but where a laborer is continued in his employment by the receiver in bankruptcy, who carries on the business for a time, his wages earned under the receivership will be given priority.[122] Primarily, however, the statute relates to wages which are owing at the time of the bankruptcy, although they may not be then "due" in the sense of being immediately payable, and which have accrued within three months. It was not the purpose of this clause to make a distinction between wages due which have been earned and wages due which have not been earned, or to determine the wage earner's right by an inquiry into the amount of work done during the period of employment. The purpose is merely to limit priority to wages which have accrued within three months. The fact that during the three months, clerks of the bankrupt were given vacations with pay, such pay to be withheld until the end of the year, during which time the employer became bankrupt does not deprive the clerks of the right to priority for such pay.[123] Finally, wages of workmen, clerks, or servants which have been earned more than three months before the commencement of the proceedings in bankruptcy are not entitled to priority merely because the law of the particular state may grant priority to such claims for a longer period or without any limitation as to the time of their accrual. For this clause of the bankruptcy act is entirely distinct from that which relates to persons entitled to priority under the laws of the state, deals exclusively with the matter to which it relates, and is not enlarged or in any way affected by the later clause.[124]

[117] In re Huntenberg, 153 Fed. 768, 18 Am. Bankr. Rep. 697.

[118] In re Dunn. 181 Fed. 701, 25 Am. Bankr. Rep. 103.

[119] In re Burton Bros. Mfg. Co., 134 Fed. 157, 14 Am. Bankr. Rep. 218.

[120] In re Van Wert Mach. Co., 186 Fed. 607, 26 Am. Bankr. Rep. 597.

[121] In re Waties, 39 Fed. 264.

[122] In re Erie Lumber Co., 150 Fed. 817, 17 Am. Bankr. Rep. 689.

[123] In re B. H. Gladding Co., 120 Fed. 709, 9 Am. Bankr. Rep. 700.

[124] In re Slomka, 122 Fed. 630, 58 C. C. A. 322, 9 Am. Bankr. Rep. 635; In re Rouse, Hazard & Co., 91 Fed. 96, 33 C.

§ 629. **Same; Advance of Money to Pay Labor Claims.**—The provision of the bankruptcy act giving priority to the claims of workmen, clerks, and servants is for the benefit of the wage earner alone, and does not entitle a third person to priority, on the principle of subrogation or otherwise, who has advanced to the bankrupt money with which to pay the wages of his operatives or servants and which has been used for that purpose.[125] Thus, in one of the cases it appeared that a bankrupt corporation gave to its employés orders on a third person for goods and charged the same against the current wages of the men. The third person filled such orders and charged the amount to the corporation, which paid the same from time to time, either in cash or by note or credit on its books. Under the local statute, the employés were entitled to laborers' liens on the property of the corporation for wages earned within three months prior to the bankruptcy. It was held that no right of subrogation to such liens arose in favor of the claimant, the third person mentioned, from such transactions, nor any right to the priority given to labor claims by the bankruptcy act, and that such subrogation would not be accorded them where it appeared that, if it were, the estate would not be sufficient to pay the preferred claims in full.[126] But under the law of Massachusetts, laborers working on a state building have an equitable lien on funds remaining in the hands of the state's officers, which is superior to any interest of the contractor's trustee in bankruptcy.[127]

§ 630. **Claims of United States.**—There is some doubt whether claims of the United States government against a bankrupt would be entitled to priority of payment under the description of "debts owing to any person who by the laws of the states or the United States is entitled to priority," as it is not altogether clear that it was meant to include the United States as a "person."[128] But at any rate, this provision is in pari materia with earlier acts of Congress, now embodied in the Revised Statutes,[129] providing for priority of debts due to the United

C. A. 356, 1 Am. Bankr. Rep. 234; In re Marshall Paper Co., 1 Nat. Bankr. News, 294; In re Union Planing Mill Co., 2 Nat. Bankr. News, 384. But compare In re Lawler, 110 Fed. 135, 6 Am. Bankr. Rep. 184.

[125] Bell v. Arledge, 192 Fed. 837, 113 C. C. A. 161, 27 Am. Bankr. Rep. 773; United Surety Co. v. Iowa Mfg. Co., 179 Fed. 55, 102 C. C. A. 623, 24 Am. Bankr. Rep. 726; In re St. Louis Ice Mfg. & Storage Co., 147 Fed. 752, 17 Am. Bankr. Rep. 194; In re North Carolina Car Co., 127 Fed. 178, 11 Am. Bankr. Rep. 488; In re Paulson, Fed. Cas. No. 10,849.

[126] J. P. Browder & Co. v. Hill, 136 Fed. 821, 69 C. C. A. 499, 14 Am. Bankr. Rep. 619.

[127] Burr v. Commonwealth, 212 Mass. 534, 99 N. E. 323.

[128] See Beaston v. Farmers' Bank of Delaware, 12 Pet. 102, 9 L. Ed. 1017; Title Guaranty & Surety Co. v. Guarantee Title & Trust Co., 174 Fed. 385, 98 C. C. A. 603, 23 Am. Bankr. Rep. 340.

[129] "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the excutors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied;

States in cases of insolvency and requiring every assignee or other person first to pay the debts of the United States.[130] And under former bankruptcy acts it was held that the general government, not being specifically named in such statutes, was not bound by them, and therefore was not compelled to proceed against a bankrupt debtor under and in accordance with such acts, but was entitled to an allowance of its full claim out of the estate in bankruptcy, without regard to the rights of other creditors.[131] But the Supreme Court has held that this right of priority in favor of the United States no longer exists under the bankruptcy act of 1898, so far as regards labor claims, but that, since the section of the act relating to priority claims not only specifies such claims but also prescribes the order of their payment, and since, in that enumerated order, labor claims are named before "debts entitled to priority under the laws of the United States," it follows that labor claims must be paid in full before payment of any debt due to the United States, except for taxes.[132] Presumably the same doctrine should be applied to the other classes of claims accorded priority by the statute, such as the costs and expenses of administration, including the compensation of trustees, referees, and receivers, and these items should be paid in full before the claims of the United States.[133]

But after these preferred claims have been satisfied, or in cases where the costs and expenses of administration have been paid and no labor claims exist, the contest will be between the United States and the general creditors of the estate; and there is no reason why the provisions of the Revised Statutes should not here apply. In such cases it is said that the priority of the United States extends to all classes of debts and to all the debtor's estate which comes to the hands of his assignee or trustee. The latter becomes a trustee for the United States and where he has notice of the debt due to the government, he cannot escape personal liability for the amount of it, to the extent of the value

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. 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." Rev. Stat. U. S. §§ 3466, 3467.

[130] In re Stoever, 127 Fed. 394, 11 Am. Bankr. Rep. 345; Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513.

[131] In re Huddell, 47 Fed. 206; Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513; Mott v. Maris, 2 Wash. C. C. 196, Fed. Cas. No. 9,880; United States v. Fisher, 2 Cranch, 358, 2 L. Ed. 304.

[132] Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706, 27 Am. Bankr. Rep. 873.

[133] See, as to taxes, In re Jacobson (C. C. A.) 263 Fed. 883, 45 Am. Bankr. Rep. 1.

of the assets coming to his hands, if he fails to provide for it before making distribution to other creditors. And even the judgment of a court of competent jurisdiction, directing such distribution, will afford the trustee no justification, in such a case, where it does not appear that the United States was made a party to the proceeding in which such judgment was rendered. And further, the United States, by omitting to prove its claim in the bankruptcy proceedings until after such distribution is made, does not lose its right to proceed against the trustee personally, as the doctrines of waiver, laches, and estoppel cannot be invoked against the sovereign.[134] A claim founded upon the indorsement of a bill of exchange, of which the government is the holder, is thus entitled to priority,[135] and so is a claim for breach of condition of a bond given under the internal revenue laws,[136] or for a penalty incurred by a violation of those laws.[137] And the government is entitled to priority of payment out of the estate of the bankrupt debtor whether he is principal or surety, or solely or jointly liable with others,[138] and though the debt was contracted by a foreigner in a foreign country.[139] So also, a claim of the United States for customs duties on goods imported by the bankrupt is entitled to priority.[140] And under the Act of Congress placing the railroads under federal control during the war, the twelfth section of which declared that moneys derived from the operation of the railroads should be the property of the United States, unpaid freight charges on shipments made during the period of federal control are federal property, and the claim therefor is entitled to priority in a bankruptcy proceeding.[141] But the United States Shipping Board Emergency Fleet Corporation, incorporated under the general corporation laws of the District of Columbia, is not entitled to priority of payment of a debt due to it from a bankrupt with whom the corporation made a contract as a principal, and not as an agent of the United States Government, on the theory that the debt was one due to the United States, for the claimant having been incorporated as a private corporation, it is not divested of that character by the fact that the Government owns its stock.[141½]

But this right of priority is not in the nature of a lien, but only a preferential right of payment out of the general estate, so that the gov-

[134] United States v. Barnes, 31 Fed. 705.

[135] United States v. Fisher, 2 Cranch, 358, 2 L. Ed. 304.

[136] In re Webb, 2 N. B. R. 614, Fed. Cas. No. 17,313.

[137] In re Rosey, 6 Ben. 507, 8 N. B. R. 509, Fed. Cas. No. 12,066.

[138] Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513.

[139] Harrison v. Sterry, 5 Cranch, 289, 3 L. Ed. 104.

[140] In re Rosenthal Bros. (D. C.) 235 Fed. 315, 38 Am. Bankr. Rep. 1.

[141] In re E. J. Hibner Oil Co. (C. C. A.) 264 Fed. 667, 45 Am. Bankr. Rep. 380.

[141½] In re Eastern Shore Shipbuilding Corp. (C. C. A.) 274 Fed. 893.

ernment has no right of preference over the holders of valid liens.[142] It is said, however, that the government is not bound by the general equity rule for marshaling assets, nor by any rule prescribed by the bankruptcy law in conformity thereto, any further than as that rule is founded, in the particular case, on the liens of the several parties inter sese.[143] And hence the government may enforce its right of priority without first exhausting securities which it may hold.[144] And the United States is not bound by the rule for the division of an estate as between partnership and separate creditors; that is, though the claim of the government is against an individual partner, it is entitled to priority of payment out of the partnership funds, and vice versa.[145]

It was held under former bankruptcy statutes that the United States was under no obligation whatever to prove its claim in the bankruptcy proceedings, and that the omission to do so did not affect its right to priority.[146] But it is probably otherwise under the present statute, especially in view of the fact that the section bearing the general title "Proof and allowance of claims" includes the following: "Debts owing to the United States as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." [147]

The principle of subrogation may in some cases entitle a third person to succeed to and claim that right of priority which is given to the United States. This was allowed in a recent case to a surety for the bankrupt on a bond executed to the United States, who had paid a judgment recovered against him on the bond.[148] And the same rule has been applied in a case of a surety who has paid money for a bankrupt in discharge of a customs duty bond,[149] and of one purchasing im-

[142] United States v. Hooe, 3 Cranch, 73, 2 L. Ed. 370; United States v. Mechanics' Bank, Gilp. 51, Fed. Cas. No. 15,756; The Thomas Scattergood, Gilp. 1, Fed. Cas. No. 11,106; United States v. Griswold, 7 Sawy. 296, 8 Fed. 496.

[143] In re Strassburger, 4 Woods, 557, Fed. Cas. No. 13,526.

[144] United States v. Lewis, Fed. Cas. No. 15,595, affirmed 92 U. S. 618, 23 L. Ed. 513.

[145] United States v. Lewis, Fed. Cas. No. 15,595, affirmed 92 U. S. 618, 23 L. Ed. 513; In re Strassburger, 4 Woods, 557, Fed. Cas. No. 13,526.

[146] Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513; Harrison v. Sterry, 5 Cranch, 289, 3 L. Ed. 104; In re Bousfield & Poole Mfg. Co., 17 N. B. R. 153, Fed. Cas. No. 1,704.

[147] Bankruptcy Act 1898, § 57j.

[148] Title Guaranty & Surety Co. v. Guarantee Title & Trust Co., 174 Fed. 385, 98 C. C. A. 603, 23 Am. Bankr. Rep. 340. This case was reversed on appeal (224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706, 27 Am. Bankr. Rep. 873), but only so far as regards the priority of a claim of this kind over labor claims. See also In re P. McGarry & Son, 240 Fed. 400, 153 C. C. A. 326, 39 Am. Bankr. Rep. 224; United States v. National Surety Co. (C. C. A.) 262 Fed. 62, 44 Am. Bankr. Rep. 525; In re Scofield Co., 215 Fed. 45, 131 C. C. A. 353.

[149] Kerr v. Hamilton, 1 Cranch, C. C.

ported goods, and who was compelled, in order to obtain possession of them, to pay the duties which the importer should have paid,[150] and likewise in favor of an internal revenue officer paying to the government the amount of a dishonored check received by him from a debtor to the government.[151]

§ 631. **Claims of State or Municipality.**—A state is a "person" within the meaning of that provision of the bankruptcy act which gives priority to "debts owing to any person who by the laws of the states or the United States is entitled to priority," and hence is a preferred claimant against a bankrupt if its own laws so provide.[152] And if the insolvency law of the state makes the municipal corporations of the state preferred creditors of an insolvent, a county having a claim against a bankrupt is entitled to priority of payment out of his estate,[153] but not unless some state law so provides.[154] And if the state law regulating assignments for creditors or the administration of insolvents' estates declares that it shall be for the equal and common benefit of all creditors, and supersedes the common-law rule that debts due the crown were entitled to priority as against general creditors, the state itself can claim no priority in bankruptcy proceedings against its debtor.[155] But assuming the state to be entitled to priority, this right will attach to a claim upon a contract for the hire of convict labor,[156] and for the price of goods made in the state prison and sold to the bankrupt, or any other property of the state so sold,[157] and a judgment rendered in favor of the state against a surety on a bail bond given for the appearance of a person under indictment for a crime.[158] But the state has no claim to priority against a bankrupt bank in which the warden of a penitentiary had de-

546, Fed. Cas. No. 7,731. But see Pollock v. Pratt, 2 Wash. C. C. 490, Fed. Cas. No. 11,256.

150 In re Kirkland, 2 Hughes, 208, 14 N. B. R. 139, Fed. Cas. No. 7,843.

151 In re McBride, 19 N. B. R. 452, Fed. Cas. No. 8,662. But see Wilkinson v. Babbitt, 4 Dill. 207, Fed. Cas. No. 17,668.

152 In re Western Implement Co., 166 Fed. 576, 22 Am. Bankr. Rep. 167. The law of Alabama does not give priority to a debt due to the state from an insolvent debtor, or a decedent, except for taxes, and a contract debt due to the state from a bankrupt is therefore not entitled to priority. State of Alabama v. Martin, 256 Fed. 313, 167 C. C. A. 661, 43 Am. Bankr. Rep. 450.

153 In re Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496; In re Wright, 95 Fed. 807, 2 Am. Bankr. Rep. 592.

154 In re Waller, 142 Fed. 883, 15 Am. Bankr. Rep. 753; In re Manistee Watch Co., 197 Fed. 455, 28 Am. Bankr. Rep. 316.

155 In re Devlin, 180 Fed. 170, 24 Am. Bankr. Rep. 863.

156 In re Worcester County, 102 Fed. 808, 42 C. C. A. 637, 4 Am. Bankr. Rep. 496; In re Dodge, 4 Dill. 532, Fed. Cas. No. 3,949; In re Southwestern Car Co., 9 Biss. 76, 19 N. B. R. 404, Fed. Cas. No. 13,192.

157 In re Mercer, 171 Fed. 81, 96 C. C. A. 185, 22 Am. Bankr. Rep. 413; In re Mellor, 10 Ben. 58, 17 N. B. R. 402, Fed. Cas. No. 9,401.

158 In re Chamberlin, 9 Ben. 149, 17 N. B. R. 49, Fed. Cas. No. 2,580.

posited funds in his own name, as he is liable to the state on his bond.[159] It should also be observed that this preferential right of a state or its municipalities is subject to the provision of the bankruptcy act that "debts owing to the United States, a state, a county, a district, or a municipality, as a penalty or forfeiture, shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." [160]

§ 632. Claims Entitled to Priority Under State Laws.—While a state law could not, of its own force, grant or determine priorities of payment in the distribution of a bankrupt's estate, yet that clause of the national bankruptcy law which accords priority to "debts owing to any person who, by the laws of the states or the United States, is entitled to priority" adopts the law of the state for this purpose and makes it applicable as federal law in determining the question of priorities.[161] And the controlling principle is that the creditor shall be allowed the same priority under the bankruptcy act as he would have had under the state law governing the distribution of the estates of insolvent debtors, if that law had not been superseded by the bankruptcy act.[162] For a state insolvency law, though its operation upon insolvents is suspended while the national bankruptcy law is in force, still remains a "law of the state" within the meaning of this clause.[163] And a creditor may claim a right of priority in payment which the law of the state gives him, though he does not set up such claim until more than a year after the adjudication in bankruptcy, when the question of the distribution of assets first arises.[164] But this provision does not operate to place all preferred debts of this class upon a plane of equality; but liens created by the laws of the state will attach to the property of a bankrupt in the hands

159 In re Corn Exchange Bank, 7 Biss. 400, 15 N. B. R. 431, Fed. Cas. No. 3,242.

160 Bankruptcy Act 1898, § 57j.

161 Central Trust Co. of Illinois v. George Lueders & Co., 221 Fed. 829, 137 C. C. A. 387, 34 Am. Bankr. Rep. 61; In re Bennett, 153 Fed. 673, 82 C. C. A. 531, 18 Am. Bankr. Rep. 320, 847; And see In re Leflys, 229 Fed. 695, 144 C. C. A. 105, 36 Am. Bankr. Rep. 306; McDermott v. Tolt Land Co., 101 Wash. 114, 172 Pac. 207; In re New Galt House Co. (D. C.) 199 Fed. 533; Bean v. Orr, 182 Fed. 599, 105 C. C. A. 137, 25 Am. Bankr. Rep. 400; In re Bazemore (D. C.) 189 Fed. 236, 26 Am. Bankr. Rep. 494. In this clause of the Bankruptcy Act, the word "state" is broad enough to include Porto Rico, so that a person who is entitled to priority under the laws of Porto Rico is entitled to priority in bankruptcy. In re Vidal, 233 Fed. 733, 147 C. C. A. 499, 36 Am. Bankr. Rep. 783. Compare Gandia & Stubbe v. Cadierno, 233 Fed. 739, 147 C. C. A. 505, 36 Am. Bankr. Rep. 789.

162 In re Jones, 151 Fed. 108, 18 Am. Bankr. Rep. 206.

163 In re Wright, 95 Fed. 807, 2 Am. Bankr. Rep. 592.

164 In re Ashland Steel Co., 168 Fed. 679, 94 C. C. A. 165, 21 Am. Bankr. Rep. 834.

of his trustee in the same relative rank and order in which they are fixed by the state statutes.[165] As an example of a priority right given by state law, we may cite the case of a statute providing that persons who shall have furnished materials or supplies for the carrying on of the business of any manufacturing company shall have a lien on its property and effects involved in the business, superior to any mortgage or other incumbrance thereon.[166] So the laws of some states give a preferential right of payment to the holders of mechanics' liens, and this will be recognized and enforced in bankruptcy.[167] And where the civil law prevails, community property is primarily a fund for the payment of community debts, and will be so applied in bankruptcy, the law postponing the claim of an antenuptial creditor.[168] In some states also, the statutes give a preference to debts due from an insolvent person in the character of a guardian, to his ward, which will furnish the rule for distribution in bankruptcy.[169] And if the local law gives priority to the legal costs and expenses of an attachment suit against an insolvent, as is the case in several states, such items will be accorded a like priority in bankruptcy proceedings.[170] But the right of antecedent creditors, under the laws of the particular state, to set aside a conveyance made by their debtor without consideration, as being in fraud of their claims, but which, by the same law, is valid as to subsequent creditors or purchasers, is not a debt which is given priority by the state law so as to be entitled to priority in bankruptcy.[171]

§ 633. **Landlord's Claim for Rent.**—In several states, the local law gives priority of payment to the claim of a landlord for rent due and unpaid, in case of the insolvency of the tenant or where an execution is levied on his goods, usually, however, with the limitation that such claim is enforceable only against leviable or distrainable property on the demised premises, and only for rent accrued within a limited period, as, one year. Such a law will be applicable in bankruptcy proceedings

165 In re Falls City Shirt Mfg. Co., 98 Fed. 592, 3 Am. Bankr. Rep. 437.

166 In re Bennett, 153 Fed. 673, 82 C. C. A. 531, 18 Am. Bankr. Rep. 847. And see In re Rheinstrom & Sons Co. (D. C.) 207 Fed. 119; Louisville Woolen Mills Co. v. Johnson, 228 Fed. 606, 143 C. C. A. 128, 37 Am. Bankr. Rep. 67.

167 In re Clark Coal & Coke Co., 173 Fed. 658, 23 Am. Bankr. Rep. 273. See In re Cramond, 145 Fed. 966, 17 Am. Bankr. Rep. 22; In re Fowble (D. C.) 213 Fed. 676; Interstate Contracting & Supply Co. v. Belleville Sav. Bank, 197 Ill. App. 30.

168 In re Chavez (C. C. A.) 149 Fed. 73, 17 Am. Bankr. Rep. 641.

169 In re Crow, 116 Fed. 110, 7 Am. Bankr. Rep. 545. Compare In re Jones, 151 Fed. 108, 18 Am. Bankr. Rep. 206.

170 In re Amoratis, 178 Fed. 919, 102 C. C. A. 297; In re Iroquois Mach. Co., 166 Fed. 629, 22 Am. Bankr. Rep. 183; In re Goldberg & Bros., 144 Fed. 566; In re Lewis, 99 Fed. 935, 4 Am. Bankr. Rep. 51. But compare In re The Copper King, 143 Fed. 649, 16 Am. Bankr. Rep. 148.

171 Globe Bank & Trust Co. of Paducah v. Martin, 236 U. S. 288, 35 Sup. Ct. 377, 59 L. Ed. 583, 34 Am. Bankr. Rep. 162.

against the tenant, and the lessor will be entitled to claim the priority which the local law gives him.[172] And he is not required to bring an action in a state court for the establishment of his lien, or to levy on the property, but may at once prove his debt and be heard in the court of bankruptcy in support of his claim to priority,[173] unless the local statute requires him to levy a distress as a condition precedent to claiming a lien.[174] But where the landlord permits the receiver or trustee in bankruptcy to make a sale in bulk of the entire equipment of the bankrupt's business, including some assets which would be subject to his claim for rent and some which would not, making no objection and interposing no claim, he cannot ask the court to apportion the proceeds of the sale so as to give him priority of payment out of any part of the fund.[175] And where the state law limits the right of priority to such rent as may be due for not more than one year last past, the landlord cannot gain a preferred right to more than a year's rent by distraining on the property after the adjudication in bankruptcy, though before the appointment of a trustee.[176] Further, it is the generally accepted doctrine that priority can be given only to such rent as is past due at the date of the adjudication, which fixes the rights of priority creditors as well as others, so that the landlord can gain no advantage from a provision in the lease (or even in the state statute) that the rent for the entire unexpired portion of the term shall become due and payable upon the bankruptcy of the tenant.[177] But where the bankrupt occupied a part of the

[172] Longstreth v. Pennock, 20 Wall. 575, 22 L. Ed. 451; In re Bayley, 177 Fed. 522, 22 Am. Bankr. Rep. 249; In re Burns, 175 Fed. 633, 23 Am. Bankr. Rep. 640; In re V. D. L. Co., 175 Fed. 635, 23 Am. Bankr. Rep. 643; In re West Side Paper Co., 159 Fed. 241, 20 Am. Bankr. Rep. 289; In re Morris, 159 Fed. 591, 19 Am. Bankr. Rep. 781; In re Bishop, 153 Fed. 304, 18 Am. Bankr. Rep. 635; In re Renda, 149 Fed. 614, 17 Am. Bankr. Rep. 521; In re Grovenstein-Bishop Co. (D. C.) 223 Fed. 878, 35 Am. Bankr. Rep. 114; In re Mt. Winans Lumber Co. (D. C.) 228 Fed. 831, 36 Am. Bankr. Rep. 263. A debt for rent stands like any other debt before the court of bankruptcy, without preference or priority, unless made preferential by some state or federal law. Slayton v. Drown, 93 Vt. 290, 107 Atl. 307.

[173] In re Byrne (D. C.) 97 Fed. 762, 3 Am. Bankr. Rep. 268; In re Pittsburg Drug Co. (D. C.) 164 Fed. 482, 20 Am. Bankr. Rep. 227.

[174] In re Chaudron & Peyton, 180 Fed. 841, 24 Am. Bankr. Rep. 811; In re Southern Co. of Baltimore City, 180 Fed. 838; In re Gerrow (D. C.) 233 Fed. 845, 37 Am. Bankr. Rep. 14. See In re Braus (D. C.) 233 Fed. 835, 37 Am. Bankr. Rep. 594; In re Cole Jewelry Co. (D. C.) 243 Fed. 790, 40 Am. Bankr. Rep. 234.

[175] In re McFadgen, 156 Fed. 715, 19 Am. Bankr. Rep. 481. And see Rosenblum v. Uber, 256 Fed. 584, 167 C. C. A. 614, 43 Am. Bankr. Rep. 480. But see, as to a sale made without notice to the landlord, In re Federal Biscuit Co., 218 Fed. 753, 134 C. C. A. 431, 33 Am. Bankr. Rep. 273.

[176] In re Duble, 117 Fed. 794, 9 Am. Bankr. Rep. 121.

[177] In re Abrams, 200 Fed. 1005, 29 Am. Bankr. Rep. 590; Wilson v. Pennsylvania Trust Co., 114 Fed. 742, 52 C. C. A. 374, 8 Am. Bankr. Rep. 169; In re Jefferson, 93 Fed. 948, 2 Am. Bankr. Rep. 206; In re Winfield Mfg. Co., 149 Fed. 185, 15 Am. Bankr. Rep. 257. Compare In re Keith-Gara Co., 203 Fed. 585, 29 Am. Bankr. Rep. 466, affirmed in Ludlow v. Pugh, 213 Fed. 450, 130 C.

leased premises as a storeroom, and the remainder for living quarters, the landlord will have a preferred claim on the goods in the storeroom for the amount due as rent for the entire premises.[178] But these laws are applied with a reasonable measure of strictness. And if the statute gives the landlord a preferential claim on goods and chattels of the tenant "liable to distress," he cannot claim priority of payment out of the proceeds of the bankrupt's liquor license sold by the trustee.[179] And the claim will be restricted to rent properly so called, and will not be allowed to include the amount of an unpaid city water tax,[180] or a sum which the landlord was compelled to pay to discharge a lien for repairs made by the municipal health department.[181] And the bankruptcy law does not entitle a landlord's claim to priority over all other claims whatever, but only over those not specified in the bankruptcy act as being higher in rank or right.[182] But where there was an agreement between the bankrupt and his landlord that the counter indebtedness of the landlord to the bankrupt should be applied, as it arose, to indebtedness of the bankrupt to the landlord other than rent, it will be so applied in the bankruptcy proceedings, although the result will be to create a claim for rent, entitled to priority, larger than would otherwise be the case.[183] Where the receiver or the trustee in bankruptcy continues to occupy the premises leased by the bankrupt, the rent for the period of such occupation is payable as part of the cost of administration, and is treated as a priority debt to that extent.[184]

§ 634. **Trust Creditors and Claimants of Trust Funds.**—The right of a creditor to recover or reclaim property of his which was held by the bankrupt in trust for him, or to receive payment in full out of trust funds in the hands of the trustee in bankruptcy, does not depend upon the insolvency laws of the states or laws giving priority to favored claims.[185] In fact, it is not a question of priority at all, but of the right of the owner of property or money to reclaim it. A trust creditor of a bankrupt is not entitled to any preference over the general creditors

C. A. 96. And see In re Quality Shoe Shop (D. C.) 212 Fed. 321, 34 Am. Bankr. Rep. 196.

178 In re Hersey, 171 Fed. 1001, 22 Am. Bankr. Rep. 860.

179 In re Myers, 102 Fed. 869, 4 Am. Bankr. Rep. 536.

180 In re Family Laundry Co., 193 Fed. 297, 27 Am. Bankr. Rep. 517. As to taxes in general, see In re Spies-Alpher Co. (D. C.) 231 Fed. 535, 36 Am. Bankr. Rep. 470; In re William A. Harris Steam Engine Co. (D. C.) 225 Fed. 609, 34 Am. Bankr. Rep. 835.

181 In re Schomacker Piano Forte Mfg. Co., 163 Fed. 413, 20 Am. Bankr. Rep. 899.

182 In re Consumers' Coffee Co., 151 Fed. 933, 18 Am. Bankr. Rep. 500.

183 In re Bell Engraving Co. (D. C.) 214 Fed. 510.

184 In re Mullings Clothing Co. (D. C.) 230 Fed. 681, 37 Am. Bankr. Rep. 166. And see, supra, §§ 211, 307, 522.

185 Smith v. Mottley, 150 Fed. 266, 80 C. C. A. 154, 17 Am. Bankr. Rep. 863.

merely because of the character of his claim. But he is entitled to satisfaction of his claim if he can show that the trust fund, or property into which it was converted, came into the hands of the trustee in bankruptcy and increased the assets of the estate, even though the property cannot be exactly identified.[186] But first, the trust must be distinctly established, and a contract or transaction which merely creates the relation of debtor and creditor between the parties, without impressing a trust on any fund or property, will not be sufficient to support a claim to payment in full.[187] But subject to this condition, the general rule may apply to special deposits in a bank or trust company.[188] And where a bankrupt concealed money from his trustee, with which he purchased a stock of merchandise and conducted business in the name of another, debts contracted in the name of such other in the course of the business are entitled to priority of payment from the proceeds of the property.[189] And so, the payment of a dividend, by the receiver of a state court appointed for an insolvent partnership in a suit by one partner for dissolution, to such creditors as presented their claims, within four months prior to the bankruptcy of the partnership, operates as a voidable preference as against other creditors, who were without notice and did not participate, and entitles them, on proving their claims in bankruptcy, to payment of an equal percentage thereon before any further dividends are paid.[190]

[186] Cox v. New England Equitable Ins. Co., 247 Fed. 955, 160 C. C. A. 655, 40 Am. Bankr. Rep. 793; Zenor v. McFarland, 238 Fed. 721, 151 C. C. A. 571, 38 Am. Bankr. Rep. 510; Johnson v. Bixby, 252 Fed. 103, 164 C. C. A. 215, 1 A. L. R. 660, 42 Am. Bankr. Rep. 396; In re Stringer (D. C.) 230 Fed. 177, 37 Am. Bankr. Rep. 44; In re Hawley Down Draft Furnace Co. (D. C.) 256 Fed. 555, 43 Am. Bankr. Rep. 338; In re Brunsing, Tolle & Postel, 169 Fed. 668, 22 Am. Bankr. Rep. 129; In re J. M. Acheson Co., 170 Fed. 427, 95 C. C. A. 597, 22 Am. Bankr. Rep. 338; In re Smith, Thorndyke & Brown Co., 159 Fed. 268, 20 Am. Bankr. Rep. 312; Smith v. Mottley, 150 Fed. 266, 80 C. C. A. 154, 17 Am. Bankr. Rep. 863; In re North Carolina Car Co., 127 Fed. 178, 11 Am. Bankr. Rep. 488; John Deere Plow Co. v. McDavid, 137 Fed. 802, 70 C. C. A. 422; In re Tracy, 185 Fed. 844; In re Gaskill, 130 Fed. 235, 12 Am. Bankr. Rep. 251. For the rule that trust funds held by the bankrupt are not assets of his estate, and concerning the remedies of trust creditors, see supra, § 354. That the restoration of trust funds or property held in trust is not the giving of a preference, see supra, § 582.

[187] In re Meyer (D. C.) 106 Fed. 828, 5 Am. Bankr. Rep. 596; Smith v. Mottley, 150 Fed. 266, 80 C. C. A. 154, 17 Am. Bankr. Rep. 863; Block v. Shaw, 78 Ark. 511, 95 S. W. 806. Where a bankrupt, at the time of purchasing certain materials from the claimant on cash terms, intended to pay promptly, and reasonably expected to be able to do so, the seller was not entitled to a preference on the theory that the purchase was fraudulent. Cincinnati Ry. Supply Co. v. Hartlieb, 214 Fed. 177, 130 C. C. A. 525.

[188] Riley v. Pope, 186 Fed. 857, 26 Am. Bankr. Rep. 618; In re Smart, 136 Fed. 974, 14 Am. Bankr. Rep. 672; Binghampton Trust Co. v. Gregory, 148 App. Div. 520, 132 N. Y. Supp. 950; In re Smith, Thorndyke & Brown Co., 170 Fed. 900, 96 C. C. A. 76, 22 Am. Bankr. Rep. 350. And see supra, § 355.

[189] In re Offricht (D. C.) 260 Fed. 682, 43 Am. Bankr. Rep. 345.

[190] Farnsworth v. Union Trust & Deposit Co. (C. C. A.) 272 Fed. 92, 46 Am. Bankr. Rep. 447.

CHAPTER XXXI

DIVIDENDS

§ 635. Meaning of "Dividend" in Bankruptcy.—A "dividend" is the distributive share payable to a creditor out of an estate in bankruptcy or insolvency. But the word has a somewhat more restricted meaning as used in that section of the bankruptcy act which provides that "dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured."[1] Here the term is held to apply only to payments made on the claims of the general and unsecured creditors, and not to disbursements by the trustee in discharge of taxes, claims entitled to priority, or valid liens, and not to the claims of secured creditors at all, except in so far as the amount of the claim may exceed the value of the security.[2] Upon the filing of a petition in bankruptcy, "there vests in each creditor as a cestui que trust an equitable estate in such a part of the property of the bankrupt as the amount of his provable claim at that time bears to the entire amount of the provable claims against the estate,"[3] or rather, perhaps, there vests in the creditor an undivided interest in the estate, measured by the ratio between the amount of his claim and the entire amount of claims, and when this interest is ascertained and is satisfied by the act of the trustee in paying to the creditor, in one or more payments, as the law directs, the sum to which he is entitled proportionally with other cred-

[1] Bankruptcy Act 1898, § 65a. Although the fund for distribution was raised by a sale of the entire assets of the bankrupt, under the sanction of the court, to a purchaser whose offer was to pay priority and preferred claims in full and 20 per cent. on the claims of unsecured creditors, still the dividend of 20 per cent. can be declared and paid only to those creditors whose claims have been duly filed and allowed. In re Schloss (D. C.) 257 Fed. 876, 44 Am. Bankr. Rep. 64.

[2] Hawthorne v. Hendrie & Bolthoff Mfg. & Supply Co., 50 Colo. 342, 116 Pac. 122; In re Utt, 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383; In re Hinckel Brewing Co., 124 Fed. 702, 10 Am. Bankr. Rep. 692; In re Mammoth Pine Lumber Co., 116 Fed. 731, 8 Am. Bankr. Rep. 651; In re Gardner, 103 Fed. 922, 4 Am. Bankr. Rep. 420; In re Ft. Wayne Electric Corp., 94 Fed. 109, 1 Am. Bankr. Rep. 706. Compare In re Barber, 97 Fed. 547, 3 Am. Bankr. Rep. 306.

[3] Board of County Com'rs of Shawnee County v. Hurley, 169 Fed. 92, 94 C. C. A. 362, 22 Am. Bankr. Rep. 209.

itors of the same class, each of such payments constitutes a "dividend" in bankruptcy. If the creditor's claim is of such a nature as to be barred by the bankrupt's discharge, and if the discharge is granted, the dividends so received will be in full satisfaction of the claim. But if the creditor had an action pending on his claim at the time of the adjudication in bankruptcy, and the debtor fails to obtain a discharge, then dividends in the bankruptcy proceedings received by the plaintiff will merely reduce his cause of action pro tanto.[4]

§ 636. Funds for Distribution as Dividends.—The funds available for dividends in bankruptcy are such as result from the recovery and reduction to cash of the assets of the bankrupt, in so far as the same are subject to the claims of general creditors. These two things must concur; the fund must arise from property of the bankrupt, and it must be distributable to general creditors. Thus, if the bankrupt misappropriated trust funds in his hands, and the money has come into the possession of the trustee, the defrauded cestui que trust may follow and reclaim the fund by appropriate proceedings; but it is on the theory of its being his property and not a part of the estate in bankruptcy.[5] But one acquiescing in an order of the court for the sale of his own property and property of the bankrupt in one lot, and who thereafter prays for preference in payment out of the proceeds of the sale, is estopped from receiving a larger proportion of such proceeds than the ratio which the value of his property bore to the value of the lot sold at the time of the sale.[6] Money contributed by relatives and friends of the bankrupt, to increase his estate, under an agreement with creditors, may constitute a fund for dividends, but not where its payment was induced by a bargain which was contrary to law or to public policy, such as an agreement not to prosecute the bankrupt criminally.[7] Where property incumbered with a valid lien is sold, and more is realized than is required to satisfy the lien, the surplus will be available for creditors. But if the bankrupt had a right to compel contribution from a person jointly interested with him in the property, the claim of creditors to be subrogated to this right can only be considered and determined in ancillary proceedings instituted for that purpose.[8]

Where property or its value is recovered by the trustee in bankruptcy by means of a suit to vacate a fraudulent conveyance or a voidable preference, or to dissolve attachment or other liens which are not pre-

[4] American Woolen Co. v. Maaget, 86 Conn. 234, 85 Atl. 583.

[5] In re Wilkes-Barre Furniture Mfg. Co., 130 Fed. 796, 12 Am. Bankr. Rep. 472.

[6] In re Great Western Mfg. Co., 152 Fed. 123, 81 C. C. A. 341, 18 Am. Bankr. Rep. 259.

[7] In re Rosenblatt, 153 Fed. 335, 18 Am. Bankr. Rep. 663.

[8] In re Straub, 158 Fed. 375, 19 Am. Bankr. Rep. 808.

served in bankruptcy, the proceeds constitute a fund available for dividends, that is, for distribution among all the general creditors proportionally, and are not for the benefit of those alone who began an attack on the fraudulent transaction or who held provable claims at that time.[9]

In partnership cases, the fund primarily available for dividends to the firm creditors will arise only out of partnership assets, while that available for the individual creditors will be produced from the separate estates of the partners.[10] But where a person buys up claims against a bankrupt partnership, and agrees to pay any amount in excess of five per cent. of the claims received from the estate of the partnership, a dividend on the partnership claims is received from the bankrupt estate of the partnership, though the funds therefor were derived from the estate in bankruptcy of one of the partners, and though the assets of that partner were not formally transferred to the assets of the firm estate; for the only way in which a firm creditor could share in the surplus of a partner's estate is by its transfer, actual or constructive, to the partnership estate, and hence a constructive transfer by operation of law must be held to have been made.[11]

Claims in bankruptcy may be postponed, or made subordinate in the distribution of dividends to the claims of all other creditors or of certain classes of creditors, when such was the agreement of the parties, or on principles of estoppel or as the result of fraudulent conduct making it inequitable that such claims should share equally with others.[12] This rule may be applied, for instance, where a mortgage has been purposely or fraudulently withheld from record.[13]

§ 637. **Time for Declaration of Dividends.**—On this point the provision of the statute is as follows: "The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in

[9] In re Martin, 193 Fed. 841, 113 C. C. A. 627, 27 Am. Bankr. Rep. 545; In re Kohler, 159 Fed. 871, 87 C. C. A. 51, 20 Am. Bankr. Rep. 89; Treseder v. Burgor, 130 Wis. 201, 109 N. W. 957. A creditor who surrenders a preference which he has received and thereafter files and proves his claim as a general unsecured claim is entitled to share in the dividend, and is not postponed to creditors as to whom the preference was originally voidable. L. A. Becker Co. v. Gill, 206 Fed. 36, 124 C. C. A. 170, 30 Am. Bankr. Rep. 429. See Wells v. Lincoln, 214 Fed. 227, 130 C. C. A. 641, 32 Am. Bankr. Rep. 620.

[10] Bankruptcy Act 1898, § 5f.

[11] Frame v. Attermeier, 147 Wis. 485, 133 N. W. 603.

[12] See In re Cloverdale Creamery Co., 249 Fed. 194, 161 C. C. A. 230, 41 Am. Bankr. Rep. 643; In re Wenatchee Heights Orchard Co. (D. C.) 209 Fed. 84, 31 Am. Bankr. Rep. 550; In re George C. Bruns Co., 256 Fed. 840, 168 C. C. A. 186, 43 Am. Bankr. Rep. 282; Edgar v. Ames, 255 Fed. 835, 167 C. C. A. 163, 42 Am. Bankr. Rep. 697; Courtney v. Croxton, 239 Fed. 247, 152 C. C. A. 235, 38 Am. Bankr. Rep. 560.

[13] See Hicks v. Second Nat. Bank, 224 Fed. 53, 139 C. C. A. 615; Hollenbeck v. Louden, 35 S. Dak. 320, 152 N. W. 116; Martin v. Commercial Nat. Bank of Macon, 228 Fed. 651, 143 C. C. A. 173, 36 Am. Bankr. Rep. 25; Fourth Nat. Bank v. Willingham, 213 Fed. 219, 129 C. C. A. 563, 32 Am. Bankr. Rep. 159.

excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed, equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more, and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: Provided, that the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, that the final dividend shall not be declared within three months after the first dividend shall be declared."[14] When all the known assets of the bankrupt have been collected and reduced to money, and the estate is ready to be closed, a final dividend may be declared at any time after the expiration of three months from the declaration of the first dividend.[15] And this may be done notwithstanding the fact that the period of one year from the date of the adjudication, within which time creditors may prove their claims, has not yet expired, and creditors proving thereafter will only be entitled to subsequently discovered assets and unclaimed dividends.[16]

§ 638. Proceedings for Declaration and Payment of Dividends.—Dividends are to be declared by the referee, and it is also made his duty to furnish to the trustee a dividend sheet showing the dividend declared and to whom payable.[17] And creditors must have the statutory ten days' notice by mail of the declaration and time of payment of all dividends.[18] But the declaration and payment of a dividend may be stayed by the court, when a motion is pending to expunge certain claims, the allowance or disallowance of which will materially affect the result and the amount of the shares of other creditors.[19] The distribution of the bankrupt's estate is strictly governed by these provisions of the statute,[20] and it is irregular and unsafe to proceed in any other manner or to neglect anything which the act requires to be done. Thus, for example, an order entered by consent of all known creditors, in proceedings against an insolvent corporation, for the settlement of the estate and distribution

[14] Bankruptcy Act 1898, § 65b, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797.

[15] In re Bell Piano Co., 155 Fed. 272, 18 Am. Bankr. Rep. 183; In re Eldred, 155 Fed. 686, 19 Am. Bankr. Rep. 52; In re Mills, 7 Ben. 452, 11 N. B. R. 117, Fed. Cas. No. 9,610.

[16] In re Stein, 94 Fed. 124, 1 Am. Bankr. Rep. 662.

[17] Bankruptcy Act 1898, § 39a. But if it is proposed to declare dividends oftener or in smaller proportions than the act directs, the power to do this is given to the "judge" only. Id., § 65b. And this word, as used in the act, does not include the referee. Id., § 1, cl. 16.

[18] Bankruptcy Act 1898, § 58a (5).

[19] In re Jaycox, 7 N. B. R. 303, Fed. Cas. No. 7,240.

[20] In re York Silk Mfg. Co., 188 Fed. 735, 26 Am. Bankr. Rep. 650.

of the proceeds as therein provided, but not in accordance with any express provision of the bankruptcy act, must be held subject to the rights of any unknown creditors who may appear within the time allowed by law and present their claims.[21] So where a trustee in bankruptcy has paid to a lien creditor of the bankrupt his distributive share of the estate. but without any order or warrant of the referee or the court so to do, and the court afterwards determines that such creditor's attorney is entitled to a lien on the fund for his services in securing its allowance, the money must be regarded as still in the hands of the trustee, and he will be required to satisfy the claim of the attorney.[22]

The statute requires that dividends shall be of an "equal per centum," which means that each of the creditors entitled to participate in the dividend shall receive a percentage of his total claim equal to the percentage awarded to all the other participating creditors.[23] But this does not prevent the court from exercising its equitable powers in deciding who shall be entitled to participate in the dividend, or to what extent his claim shall be allowed.[24] Thus, it is competent to postpone the claim of one creditor to that of another, when the fraudulent conduct of the one, as compared with the innocence and good faith of the other, demands that such a course should be taken.[25] But an alleged indebtedness from one creditor of the bankrupt to another, growing out of transactions not connected with the bankruptcy proceedings, cannot be litigated in such proceedings or adjusted in the distribution of dividends.[26] But the trustee in bankruptcy cannot be permitted to make a profit out of his trust; and where he has purchased a claim against the estate for less than its face value, dividends will be allowed thereon only to the extent of the amount he actually paid for it, with interest, and even though he has transferred the claim to another.[27]

§ 639. **Reopening and Setting Aside Order.**—A motion to reopen or vacate an order for a dividend may be made by any person interested, on proper papers and notice, and on the showing of a sufficient

[21] In re Lockwood, 104 Fed. 794, 4 Am. Bankr. Rep. 731.

[22] In re Rude, 101 Fed. 805, 4 Am. Bankr. Rep. 319.

[23] The rate of the dividend to be distributed among the creditors depends upon the amount of the proved claims, the amount of the assets, and the fixing of the rate of distribution by the court of bankruptcy. Bausman v. Mead, 182 Ill. App. 35.

[24] See Searle v. Mechanics' Loan & Trust Co., 249 Fed. 942, 162 C. C. A. 140, 41 Am. Bankr. Rep. 786.

[25] In re Paris Modes Co., 196 Fed. 357, 116 C. C. A. 177, 28 Am. Bankr. Rep. 470; In re La Jolla Lumber & Mill Co. (D. C.) 243 Fed. 1004, 40 Am. Bankr. Rep. 273. That one creditor of a bankrupt had orally promised another creditor of the same class that his claim should be paid does not estop the former from receiving dividends equally with the latter. Moise v. Scheibel, 245 Fed. 546, 157 C. C. A. 658, 40 Am. Bankr. Rep. 311.

[26] In re Girard Glazed Kid Co., 136 Fed. 511, 14 Am. Bankr. Rep. 485.

[27] In re Sweetser, 157 Fed. 567.

case, the referee and trustee will be forbidden to take steps for the payment of the dividend until the further orders of the court.[28] But it must be remembered that an order for a dividend, when made pursuant to proper notice and filed in court, becomes virtually a judgment of the court, and cannot be disturbed except for some error committed by the referee and apparent from his memoranda and papers on file in the case.[29] And after a dividend has been not only declared but actually paid out to the creditors entitled, it cannot be set aside, notwithstanding the fact that it was erroneously made so large as not to leave sufficient money in the trustee's hands for an equal dividend to creditors afterwards perfecting their proofs, in addition to the costs of administration.[30] The correctness of an order declaring a dividend is to be determined with reference to the time when it was made, and if it was proper at that time, the subsequent filing of further claims does not afford ground for subjecting it to review. So the question whether an order declaring a dividend, which was right when made, shall be revoked because of the subsequent filing of a new and large claim, is a matter within the discretion of the referee, the exercise of which is not reviewable, except so far as it may proceed on erroneous principles of law.[31]

§ 640. **Payment of Dividends.**—Dividends are required to be paid by the trustee in bankruptcy within ten days after they are declared by the referee,[32] and trustees may "disburse money only by check or draft on the depositories in which it has been deposited."[33] Checks issued by a trustee in payment of dividends, if made payable to attorneys, should designate them as such, and they must also, in compliance with the rules, state the account on which they are drawn, to constitute proper vouchers corresponding with the dividend sheet. Checks payable to persons whose names do not appear on the dividend sheet, or which do not show what claims are covered thereby, or the authority of the payee to receive them, will not be approved as proper vouchers.[34] The trustee may withhold the payment of a dividend, if its declaration, so far as regards the particular claim concerned, was unauthorized,[35] or if the creditor is also a debtor to the bankrupt firm or a member of it,

[28] In re New York Mail S. S. Co., 3 N. B. R. 280, Fed. Cas. No. 10,212.

[29] In re Smith, 15 N. B. R. 97, Fed. Cas. No. 12,989.

[30] In re Scott, 96 Fed. 607, 2 Am. Bankr. Rep. 324; In re Smith, 15 N. B. R. 97, Fed. Cas. No. 12,989.

[31] In re Henry Siegel Co. (D. C.) 216 Fed. 943.

[32] Bankruptcy Act 1898, § 47a, cl. 9.

[33] Bankruptcy Act 1898, § 47a, cl. 4.

[34] In re Carr, 116 Fed. 556, 8 Am. Bankr. Rep. 635.

[35] In re Herrick, 13 N. B. R. 312, Fed. Cas. No. 6,420.

his dividend check may be withheld until the determination of a suit by the trustee to recover the debt.[36] On the other hand, if the trustee withholds payment of a dividend without a sufficient legal reason, the creditor may have an order requiring him to pay it,[37] and any court of general jurisdiction, including a state court, has jurisdiction of an action against the trustee to recover a dividend declared and which the trustee has fraudulently converted to his own use.[38] A dividend declared but unpaid may be assigned, and the assignee may take the like steps to enforce its payment.[39] But a dividend declared and due to a particular creditor, but not yet paid to him, cannot be attached or garnished in the hands of the trustee.[40] But a creditor of the creditor, claiming a specific lien on the fund, may assert his rights in the court of bankruptcy, or if he has a suit pending in a state court, that court may appoint a receiver who will represent him in the bankruptcy proceeding and receive the money coming to the defendant as a dividend, and then account to the court appointing him for the same.[41]

§ 641. Recovery of Dividends Paid on Rejected Claims.—Where a dividend has been paid on an allowed claim, and afterwards the claim is reconsidered and rejected, in whole or in part, the trustee may recover from the creditor the amount of the dividend so paid or a proportional part.[42] For the purposes of such recovery a plenary suit is not necessary, at least where the creditor has contested the reconsideration and rejection of his claim, as he thereby submits himself to the jurisdiction of the bankruptcy court, and in such a case it may simply make an order requiring him to pay to the trustee in bankruptcy a designated amount.[43] And prior to a direct or indirect order of allowance of a claim, it is not necessary for the trustee to move for a reconsideration of the claim, as the statute directs, in order to recover dividends paid.[44]

On similar principles, where the claim of the creditor is based on a

[36] Atkinson v. Kellogg, 10 N. B. R. 535, Fed. Cas. No. 613.

[37] In re Augusta Pottery Co., 163 Fed. 1011, 21 Am. Bankr. Rep. 64.

[38] Berford v. Barnes, 45 Hun (N. Y.) 253.

[39] Rockland Sav. Bank v. Alden, 103 Me. 230, 68 Atl. 863, 14 L. R. A. (N. S.) 1220, 13 Ann. Cas. 806. See Stires v. First Nat. Bank, 83 Neb. 193, 119 N. W. 258.

[40] In re Hollander, 181 Fed. 1019, 25 Am. Bankr. Rep. 48; In re Argonaut Shoe Co., 187 Fed. 784, 109 C. C. A. 632, 26 Am. Bankr. Rep. 584; Cowart v. W. E. Caldwell Co., 134 Ga. 544, 68 S. E. 500, 30 L. R. A. (N. S.) 720; In re Bridgman, 2 N. B. R. 252, Fed. Cas. No. 1,867; Gilbert v. Quimby, 1 Fed. 111; In re Chisholm, 4 Fed. 526; In re American Electric Telephone Co., 211 Fed. 88, 127 C. C. A. 512, 31 Am. Bankr. Rep. 612.

[41] In re Hollander, 181 Fed. 1019, 25 Am. Bankr. Rep. 48; Jackson v. Miller, 9 N. B. R. 143.

[42] Bankruptcy Act 1898, § 57*l*.

[43] Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814.

[44] In re Two Rivers Woodenware Co., 199 Fed. 877, 118 C. C. A. 325, 29 Am. Bankr. Rep. 518.

judgment which he has recovered against the bankrupt in a state court, and it is allowed, and the creditor's dividend paid to him, but afterwards the judgment is reversed on appeal, the trustee may recover the sum so paid as a dividend.[45]

§ 642. Claims Proved After Dividend.—"The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors, if the estate equals so much, before such other creditors are paid any further dividends."[46] It is probably proper for the trustee, in reporting funds to the referee for the declaration of a dividend, to reserve funds sufficient in amount for a like dividend upon claims which are still under consideration, or which are known to exist and will probably be proved and allowed. But a claim entitled to priority of payment out of such funds as may be on hand when it is presented, does not lose this right merely because it was not presented until after the declaration and payment of a first dividend. And where the trustee reserves money sufficient to pay a like dividend on claims which had previously been disallowed for want of sufficient proof, but with leave to the creditors to amend, the latter have no lien on the money so reserved, nor is the referee bound to distribute it to them; so that if, thereafter, a claim for an attorney's fee is presented, which is entitled to priority of payment as part of the costs of administration, it must be paid out of such reserved fund, in preference to the general creditors.[47] And where all the assets of the estate have been collected and reduced to money and a final dividend declared, any creditor who has not then proved his claim is debarred from participating in the fund,[48] though he may still have his share if any other assets should be discovered later, or if any dividends remain unclaimed.

§ 643. Interest on Dividends.—A trustee in bankruptcy is not bound to pay interest upon dividends which may be declared upon debts which have been fairly and reasonably disputed, from the time that like dividends were declared upon undisputed debts.[49] But where the payment

[45] Nelson v. Heckscher, 219 Fed. 679, 135 C. C. A. 351, 33 Am. Bankr. Rep. 514.

[46] Bankruptcy Act 1898, § 65c.

[47] In re Scott, 96 Fed. 607, 2 Am. Bankr. Rep. 324.

[48] In re Bell Piano Co., 155 Fed. 272, 18 Am. Bankr. Rep. 183; In re Miller, Fed. Cas. No. 9,556; In re Coulter, 206 Fed. 906, 30 Am. Bankr. Rep. 75.

[49] Hersey v. Fosdick (C. C.) 20 Fed. 44.

of a dividend to a particular creditor has been withheld, in consequence of delays attributable to the trustee or to other creditors, interest should be allowed from the time it became payable; and this interest will be reckoned at the rate of legal interest in the state, where the trustee has not applied to have the money set aside or invested pending an investigation or re-examination of the claim; and where, upon appeal from an order allowing interest at seven per cent. upon a creditor's dividend, the creditor procures an order directing the trustee to deposit the money with a trust company pending the appeal, it does not constitute a waiver of his right to full interest, but is merely a change of investment by the trustee for the greater security of the creditor.[50]

§ 644. Unclaimed Dividends.—The bankruptcy act provides that "dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court. Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full, the balance shall be paid to the bankrupt: Provided, that in case unclaimed dividends belong to minors, such minors may have one year after arriving at majority to claim such dividends."[51] The object of inserting this provision in the statute has been thus explained: "To those familiar with the incidents following the administration of the bankruptcy act of 1867, the purpose of the provisions of said section 66 is quite obvious. It occurred under that act, elsewhere, no doubt, as in this district, that dividends declared in favor of general creditors of the bankrupt, which were covered into the court registry or depository remained uncalled for by the distributees for a great number of years, and this fund in some of the depositories was quite large. As this fund had not for so long a period been called for by the designated distributees, the question arose as to whether or not the courts ought not to hold that this seemingly abandoned fund, in equity, should either be distributed pro rata among the creditors who had not been paid in full, or returned to the bankrupt. But the better opinion seemed to be that such a contingency was a casus omissus of the bankruptcy act,

[50] In re Kitzinger, 19 N. B. R. 307. Fed. Cas. No. 7,863.

[51] Bankruptcy Act 1898, § 66. If the state in which the proceedings are held and in which the property is situated desires to set up a claim to unclaimed dividends in bankruptcy, as property escheated under its laws, it may of course intervene for that purpose in its own name and by its proper officers; but such a contention cannot be set up by the trustee in bankruptcy in opposition to an order directing him to pay the unclaimed dividends into court for dis-

which section 66 of the act of 1898 sought to remedy."[52] It was held that unclaimed dividends on the bankrupt's estate would not be awarded to his administrator, after many years, when opposed by creditors whose claims had not been paid in full.[53]

tribution among the other creditors. In re Orona Mfg. Co. (D. C.) 269 Fed. 855, 46 Am. Bankr. Rep. 300.

[52] In re Fielding (D. C.) 96 Fed. 890, 3 Am. Bankr. Rep. 135.

[53] In re Blight, Fed. Cas. No. 1,540.

CHAPTER XXXII

COMPOSITIONS

§ 645. Nature of Composition in Bankruptcy.—A composition in bankruptcy is an arrangement by which the bankrupt's assets are collected and distributed by direct dealing between the bankrupt and the creditors without the intervention of a trustee. It is at once a settlement and a discharge,[1] and is in the nature of an accord and satisfaction.[2] Unlike a composition with creditors made extra-judicially and as at common law, a composition in bankruptcy binds all the creditors, as well those not joining as those who agree to it, and operates as a discharge of all the debts which would be released by a discharge granted in the ordinary way. The theory of a composition is that the cash value of the bankrupt's estate is substantially divided among the creditors in proportion to their respective claims.[3] "To enforce a distribution of a bankrupt's property among his creditors, upon a basis of equality, and to relieve him from further liability for his debts, are the fundamental objects of the bankruptcy law, and it provides two methods of effectuating these objects. In one, the assets are administered and ratably dis-

[1] In re Ullman (D. C.) 180 Fed. 944, 24 Am. Bankr. Rep. 755. A "composition" is a proceeding under which a bankrupt may settle with his creditors, if the majority agree, by the payment of a lump sum, to be distributed ratably among the general creditors, and such sum as may be necessary to pay priority claims and the costs of the proceeding. American Improvement Co. v. Lilienthal (Cal. App.) 184 Pac. 692. An order approving an agreement for the settlement of claims and distribution of the assets of a corporation, which had been duly adjudged a bankrupt, whereby the corporation was permitted to continue in business, the trustee having realized large profits while conducting its business, is in the nature of a composition. In re O'Gara Coal Co., 260 Fed. 742, 171 C. C. A. 480, 44 Am. Bankr. Rep. 206.

[2] Harrison v. Gamble, 69 Mich. 96, 36 N. W. 682.

[3] In re Lissburger, 2 Fed. 153.

tributed by an assignee [trustee] selected by the creditors, and the bankrupt is discharged only by the special order of the court; in the other, the bankrupt and his creditors deal directly with each other, by compounding the debts at a fixed rate, which composition, when approved by the court and carried into effect, operates as a discharge of the bankrupt without any formal order by the court. But as alternative and equally available means of accomplishing the same general results, they are constituent parts of the system of bankruptcy, and are alike within the scope and designation of bankruptcy proceedings."[4] "The provisions which authorize a composition are highly beneficial to creditors. They allow the majority, under proper circumstances, to close the bankruptcy proceedings without waiting the often slow processes of official administration, and they offer an incentive to the bankrupt to co-operate by putting it out of the power of a single creditor, or a minority of creditors, to defeat his discharge. In the absence of any expressed restrictions in the law, it should not be held that any act or omission of a bankrupt can operate to prejudice the creditors from entering into a composition whenever they deem it best to do so."[5] The court of bankruptcy may enjoin creditors from harassing the debtor by proceedings at law, while his composition proceeding is pending, except as to proceedings to enforce a valid security.[6]

§ 646. **Right to Offer Composition.**—The proposition for a composition must proceed from the bankrupt. Creditors have not the right to take the initiative in this matter, though no doubt they may informally advise or prompt the bankrupt to offer them terms. Corporations as well as natural persons may avail themselves of this provision of the statute,[7] and one member of a firm which has been adjudged bankrupt may submit an offer of composition to the firm creditors and his individual creditors,[8] and the refusal or neglect of one of the partners in a bankrupt firm to sign a proposition for composition, unless fraudulent, will not render the proceedings invalid as against the other partners, though he will be deprived of all benefit of it.[9] Under the former bankruptcy law, it was held that a written proposition from the bankrupt to

[4] Smith v. Morganstern, 2 Fed. 674; In re Bickmore Shoe Co. (D. C.) 263 Fed. 926, 45 Am. Bankr. Rep. 24.

[5] In re Joseph, 23 Blatchf. 237, 24 Fed. 137. But see In re Rider, 96 Fed. 808, 3 Am. Bankr. Rep. 178, where it is said that the provisions of the bankruptcy act prescribing the requisites of a composition are to be strictly construed as against those who seek by this means to deprive non-assenting creditors of their right to have the debtor's property administered upon and distributed in the ordinary course of bankruptcy proceedings.

[6] In re Hinsdale, 9 Ben. 91, 16 N. B. R. 550, Fed. Cas. No. 6,526.

[7] In re Weber Furniture Co., 13 N. B. R. 529, Fed. Cas. No. 17,330.

[8] Pool v. McDonald, 15 N. B. R. 560, Fed. Cas. No. 11,268.

[9] In re Henry, 9 Ben. 449, 17 N. B. R. 463, Fed. Cas. No. 6,370.

the creditors was not necessary to lay the foundation for the acceptance or rejection by them of the terms offered.[10] But to authorize any step to be taken for the offer and acceptance of a composition, there must first be a pending case in bankruptcy.[11] And until 1910, the debtor was not entitled to offer a composition to his creditors until after there had been an adjudication of bankruptcy entered in his case.[12] In the year mentioned, however, the bankruptcy statute was amended so as to allow an alleged bankrupt to offer terms of composition "either before or after adjudication," and if the offer is made before an adjudication, then "action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed." [13]

Under the act of 1867, the doctrine prevailed that a composition was not a discharge or had not the effect of a discharge; but that it was a payment and satisfaction of debts with the assent of the creditors. And consequently it was held that dissenting creditors could not defeat a proposed composition on grounds which would be sufficient to prevent the bankrupt's discharge. And even the fact that his application for discharge had already been heard and refused was no ground for denying the approval of a composition.[14] But the present statute explicitly authorizes the judge to confirm a composition only if he "is satisfied that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge." [15] And it is the evident purpose of this provision not to allow a bankrupt to obtain a release from the unpaid balance of his debts, by means of a composition, if he is not entitled to the same benefit by means of a discharge obtained in the ordinary way.

It is also a prerequisite to the bankrupt's right to offer terms of composition that he shall have been examined in open court or at a meeting of his creditors, and that he shall have filed in the court the required schedule of his property and list of his creditors.[16] The propriety of this requirement is obvious when it is considered that in no other way

[10] In re Haskell, 11 N. B. R. 164, Fed. Cas. No. 6,192.

[11] In re Reiman, 7 Ben. 455, 11 N. B. R. 21, Fed. Cas. No. 11,673.

[12] In re Back Bay Automobile Co., 158 Fed. 679, 19 Am. Bankr. Rep. 835. See In re Van Auken, 14 N. B. R. 425, Fed. Cas. No. 16,828.

[13] Bankruptcy Act 1898, § 12a, as amended by Act Cong. June 25, 1910, 36 Stat. 838. The fact that the bankrupt has already received his discharge in due course and that a dividend has been paid will not prevent an offer of composition. In re Spiller (D. C.) 230 Fed. 490, 36 Am. Bankr. Rep. 399.

[14] In re Odell, 9 Ben. 247, 16 N. B. R. 501, Fed. Cas. No. 10,427; Leo v. Joseph, 56 Hun, 644, 9 N. Y. Supp. 612; In re Joseph, 23 Blatchf. 237, 24 Fed. 137; In re Haskell, 11 N. B. R. 164, Fed. Cas. No. 6,192; In re Troth, 19 N. B. R. 253; Fed. Cas. No. 14,188.

[15] Bankruptcy Act 1898, § 12d.

[16] Bankruptcy Act 1898, § 12a. And see In re Back Bay Automobile Co., 158 Fed. 679, 19 Am. Bankr. Rep. 835; In re Berler Shoe Co. (D. C.) 246 Fed. 1018, 40 Am. Bankr. Rep. 470.

could the creditors obtain the necessary information concerning the debtor's assets and debts, to enable them to decide intelligently on the terms offered. But the proceeding will not be vitiated by a statement in the bankrupt's schedule that the value of his real estate is unknown,[17] or by an innocent mistake in stating the amount due to a particular creditor.[18] If a trustee in bankruptcy has not been appointed before the offer of a composition, none will be appointed after its acceptance by the creditors, since his services are not needed. But in that case, the bankrupt himself stands in the place of a trustee, so far as regards such matters as the set-off of mutual debts.[19]

§ 647. Examination of Bankrupt.—As already stated, terms of composition cannot be offered by the bankrupt or considered by creditors until after the bankrupt "has been examined in open court or at a meeting of his creditors." The phrase "in open court" refers to proceedings before the referee.[20] The examination here contemplated is not an examination of the bankrupt as a witness on the issues of insolvency and the commission of acts of bankruptcy charged, but the examination to which the bankrupt is required to submit when present at the first meeting of his creditors, and hence should be confined to an examination into his resources and liabilities.[21] And the referee has no authority to require any other person than the bankrupt to testify.[22] The debtor himself may be required to attend and testify at an adjourned meeting of the creditors, but he may be excused from so doing if he presents a satisfactory reason therefor and it is accepted by a sufficient vote of the creditors.[23] The minority creditors may insist upon the examination of the bankrupt although the majority are willing to take a vote on the proposition offered without any examination,[24] and where creditors conducting the examination of the bankrupt in an apparently earnest opposition to the composition suddenly cease, without discernible cause, it is proper for the referee to allow another creditor to take up and continue the examination.[25] The refusal of the referee to proceed with the examination until his fees are paid or secured is not

[17] In re Welles, 18 N. B. R. 525, Fed. Cas. No. 17,377.

[18] Ex parte Trafton, 2 Low. 505, 14 N. B. R. 507, Fed. Cas. No. 14,133.

[19] Ex parte Howard Nat. Bank, 2 Low. 487, 16 N. B. R. 420, Fed. Cas. No. 6,764.

[20] In re Bloodworth-Stembridge Co., 178 Fed. 372, 24 Am. Bankr. Rep. 156.

[21] In re Back Bay Automobile Co., 158 Fed. 679, 19 Am. Bankr. Rep. 835; In re Proby, 17 N. B. R. 175, Fed. Cas. No. 11,439. As to examinations of the bankrupt in general, their scope, protection against self-crimination, etc., see supra, §§ 262–271.

[22] In re Dobbins, 18 N. B. R. 268, Fed. Cas. No. 3,943.

[23] In re Tifft, 17 N. B. R. 502, Fed. Cas. No. 14,029.

[24] In re Little, 19 N. B. R. 234, Fed. Cas. No. 8,392.

[25] In re Vanderhoef, Fed. Cas. No. 16,840.

ground of opposition to the recording of a resolution accepting the composition.[26]

§ 648. **Offer of Terms.**—The statute provides that the "consideration" to be paid by the bankrupt to his creditors, together with the "money" necessary to pay debts entitled to priority and the costs of administration, shall be deposited in such place as shall be designated by the judge.[27] But the "consideration" to be paid to the creditors, especially as shown by its contrast with the word "money," does not necessarily mean cash. It may be something equivalent to money, or that will be ultimately convertible into money within a reasonable time, and hence will include any reasonably safe securities, or indorsed promissory notes.[28] But the personal notes of the bankrupt, not indorsed and not secured in any way, will not constitute a consideration which the court will feel bound to approve.[29] And if a creditor dissents and objects, the court will not sanction a composition where the alleged "consideration" is preferred stock in a corporation which the bankrupt has organized for the purpose of continuing his business, and it does not appear that the stock represents any value except the supposed good will of the business, and the effect would be to leave the bankrupt in control of the business and the creditors, in the capacity of stockholders, liable for the corporate debts.[30]

Neither is it necessary that the consideration of the composition should be immediately payable. The question as to the time for its payment is one for the creditors to settle, and their judgment will not be reversed except for valid reasons.[31] Hence it is ordinarily no sufficient objection to the confirmation of a composition that it is payable in installments, secured by notes.[32] A composition agreement to pay more that the estate is able to pay, where the balance is made up by the

[26] In re Tifft, 18 N. B. R. 227, Fed. Cas. No. 14,033.

[27] Bankruptcy Act 1898, § 12b. The terms offered must be in accordance with the law, and the money put up must be for ratable distribution among the creditors entitled. A proposal for composition under which the bankrupt agrees to pay to a certain creditor a sum expended in investigating the bankrupt's financial condition, in addition to his pro rata share, cannot be confirmed. In re M. & H. Gordon (D. C.) 245 Fed. 905, 40 Am. Bankr. Rep. 301.

[28] In re Hurst, 1 Flip. 462, Fed. Cas. No. 6,925; In re Reiman, 7 Ben. 455, Fed. Cas. No. 11,673. If nothing fraudulent enters into the transaction, the money for a composition may be raised by turning over property to a third person who will advance the needed sum. Greil v. Durr, 203 Ala. 644, 84 South. 743. But a bankrupt who has stolen or fraudulently received a sum of money belonging to another cannot retain the amount and schedule the claim as a debt and thereupon effect a composition. In re Alpert (D. C.) 237 Fed. 295, 38 Am. Bankr. Rep. 459.

[29] In re Janeway, 8 Ben. 267, Fed. Cas. No. 7,207; In re Langdon, 2 Low. 387, Fed. Cas. No. 8,058.

[30] In re Woodend, 133 Fed. 593, 12 Am. Bankr. Rep. 768.

[31] In re Wilson, 18 N. B. R. 300, Fed. Cas. No. 17,785.

[32] In re Wilson, 16 Blatchf. 112, Fed. Cas. No. 17,781; In re McNab & H. Mfg.

relatives or friends of the bankrupt, is not evidence of fraud.[33] But a contract by a bank to advance the money to pay a composition made by a bankrupt, in part consideration for which it was to receive payment of its own debt in full, is illegal.[34]

It seems also that a composition may take the form of ratifying an assignment for the benefit of creditors made by the bankrupt under the state statute,[35] or may include the adjustment of controversies which a trustee in bankruptcy would have been authorized to compromise,[36] or may be conditioned upon the surrender of all the bankrupt's property to him and the discontinuance of all pending suits.[37] And generally, the bankruptcy law does not provide or imply that compositions, though informal or even preferential, shall be void as between the parties.[38] Thus, a composition may be effected under an agreement for the bankrupt to turn over his entire property and estate to a person who has been selected by the creditors to act as a trustee in their behalf, in carrying out the details of the composition.[39]

The bankrupt will be required to abide by his proposition, and he will not be given permission to withdraw an offer of composition after its acceptance by a majority of the creditors and after an application to confirm, as the Act does not authorize any such procedure.[40] So the bankrupt will not be permitted to trade with his creditors, by increasing an offer of composition after he finds that his first offer was rejected as insufficient; but if he made an insufficient offer of composition in good faith and without opportunity to examine and appraise the available property, he may be allowed to amend his offer.[41] And where there is a fatal defect in the proceedings, but it appears that a majority of the creditors are willing to accept the offer made, the court will reject the offer but at the same time permit the bankrupt to make a new offer.[42]

§ 649. Acceptance by Creditors.—The official forms prescribed for proceedings in bankruptcy include a petition, to be filed by the bankrupt, for calling a meeting of creditors to consider his proposal for a composition, in which he is to state the terms offered and that he verily

Co., 18 N. B. R. 388, Fed. Cas. No. 8,906; In re Wronkow, 15 Blatchf. 38, 18 N. B. R. 81, Fed. Cas. No. 18,105.

[33] In re Snelling, 19 N. B. R. 120, Fed. Cas. No. 13,140.

[34] McCormick v. Solinsky, 152 Fed. 984, 82 C. C. A. 134, 18 Am. Bankr. Rep. 540.

[35] In re Dumahaut, 15 Blatchf. 20, Fed. Cas. No. 4,124.

[36] In re Linderman, 166 Fed. 593, 22 Am. Bankr. Rep. 131.

[37] In re Cavan, 19 N. B. R. 303, Fed. Cas. No. 2,528.

[38] In re Black Diamond Copper Min. Co., 11 Ariz. 415, 95 Pac. 117.

[39] Guaranty Trust Co. of New York v. McCabe, 250 Fed. 699, 163 C. C. A. 31.

[40] In re Agree (D. C.) 247 Fed. 590, 40 Am. Bankr. Rep. 773.

[41] In re Cockshaw (D. C.) 220 Fed. 239, 34 Am. Bankr. Rep. 278.

[42] In re Kinnane Co. (D. C.) 217 Fed. 488, 33 Am. Bankr. Rep. 243.

believes that they will be accepted by a majority in number and value of the creditors.[43] This follows the practice under the former bankruptcy act, which required that the creditors should be called upon to assemble in meeting for the purpose of considering an offer of composition, and should vote upon a formal resolution presented to them, for its acceptance or rejection.[44] But the present statute contains no such provision. It merely requires that the composition shall have been "accepted in writing" by a majority of the creditors, after which the bankrupt may make application to the court for its confirmation.[45] It is therefore not necessary to call a meeting of the creditors to vote upon the question whether or not they will accept the terms offered, but the bankrupt may go to them separately and procure their signatures.[46] But all of the creditors must have notice of the proposed composition, whether or not they have proved their claims at the time of the offer; the proposition must be offered and explained to all alike, and they must have a reasonable opportunity to consider it.[47] This having been done, however, the decision of the majority will be binding upon all, where their judgment is exercised in good faith, and there is nothing to indicate fraud, accident, or mistake.[48] And creditors who have signed an acceptance of the composition will not be permitted to disturb the arrangement by withdrawing their signatures, where it is not alleged that they were procured by fraud or misrepresentation.[49] And mere delay, without laches, in obtaining the requisite number of signatures, will not be sufficient ground for refusing to confirm the composition.[50]

It is required that the acceptance shall be by a "majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims." This makes it impossible

[43] Official Form No. 60. The referee may in his discretion adjourn from time to time meetings of creditors in composition proceedings, before as well as after adjudication. In re Bernstein (D. C.) 272 Fed. 1018, 47 Am. Bankr. Rep. 139.

[44] See In re Dumahaut, 15 Blatchf. 20, Fed. Cas. No. 4,124; In re Ewing, 2 Low. 407, Fed. Cas. No. 4,587; In re McDowell, 6 Biss. 193, 10 N. B. R. 459, Fed. Cas. No. 8,776; In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12,519; In re Spencer, 18 N. B. R. 199, Fed. Cas. No. 13,229; In re Richmond, 18 N. B. R. 362, Fed. Cas. No. 11,798; Shaw v. Vaughan, 52 Mich. 405, 18 N. W. 126.

[45] Bankruptcy Act 1898, § 12b.

[46] In re Rider, 1 Nat. Bankr. News, 483. The Act of Congress of June 25, 1910, 36 Stat. 838, does indeed provide that the court shall call a meeting of creditors, where composition is offered before an adjudication in bankruptcy; but the object of the meeting is stated to be "the allowance of claims, examination of bankrupt, and preservation or conduct of estates." It is not intended as a meeting for debating and voting on the offer of composition.

[47] In re Rider, 96 Fed. 808, 3 Am. Bankr. Rep. 178.

[48] In re Weber Furniture Co., 13 N. B. R. 559, Fed. Cas. No. 17,331. When a proposed composition has not been assented to by a majority, both in number and amount, of the creditors, the court cannot compel those who have not consented to accept the proposition. In re Goldstein (D. C.) 213 Fed. 115.

[49] In re Levy, 110 Fed. 744, 6 Am. Bankr. Rep. 299.

[50] In re Cavan, 19 N. B. R. 303, Fed. Cas. No. 2,528.

for a composition to be forced through by the vote of one or a few creditors holding heavy claims, or, on the other hand, by a numerical majority of creditors whose claims are trifling or inconsiderable. It is held that those signing the acceptance must constitute a majority in number and amount of the claims at the time of the hearing on application to confirm the composition; it is not enough that they constituted a majority at the time the composition was offered or accepted.[51] An assignee holding a large number of claims should be counted as only one creditor in making up this majority, and he is not entitled to as many votes as the creditors whom he represents, nor are his assignors to be counted in determining the number necessary to make a majority.[52] A partnership being a creditor, any one of the partners may bind the firm by accepting the terms of composition.[53] But in the case of the bankruptcy of a firm and its members, a partner who desires to make a composition with his individual creditors must obtain the acceptance of a majority of those creditors; it is not enough that he obtains the acceptance of a majority of the firm creditors, even though the consenting creditors may be more than a majority of all the creditors, both firm and individual.[54]

§ 650. Same; Creditors Entitled to Vote.—Only those creditors are entitled to participate in composition proceedings, or be counted in ascertaining the necessary majority, who have claims which are technically provable in bankruptcy,[55] and hence not the holder of a merely uncertain and contingent claim,[56] nor the accommodation maker of a note for the bankrupt's benefit,[57] nor one whose claim is for damages for a tort not assessed or liquidated in any way.[58] But for this purpose, the court may allow the ascertainment of an unliquidated claim by permitting the prosecution of a pending suit in a state court, or by ordering an inquiry before itself.[59] Nor is it even sufficient that the creditor should have a provable debt. For the statute explicitly requires the consent of a ma-

[51] In re Rider, 96 Fed. 808, 3 Am. Bankr. Rep. 178. But claims filed after the creditor's meeting closes, though regular in form and filed before the petition for confirmation is filed, cannot be counted in determining whether a majority of the creditors agreed to a composition before adjudication. In re Chinese Fur Importers (D. C.) 269 Fed. 669, 46 Am. Bankr. Rep. 336.

[52] In re Messengill, 113 Fed. 366, 7 Am. Bankr. Rep. 669.

[53] Bruen v. Marquand, 17 Johns. (N. Y.) 58.

[54] In re Ullman, 180 Fed. 944, 24 Am. Bankr. Rep. 755; In re Spades, 6 Biss. 448, 13 N. B. R. 72, Fed. Cas. No. 13,196.

[55] Ex parte Trafton, 2 Low. 505, 14 N. B. R. 507, Fed. Cas. No. 14,133.

[56] In re Kahn, 121 Fed. 412, 9 Am. Bankr. Rep. 107.

[57] Liebke v. Thomas, 116 U. S. 605, 6 Sup. Ct. 496, 29 L. Ed. 744.

[58] In re Bailey, 2 Woods, 222, Fed. Cas. No. 729.

[59] Ex parte Trafton, 2 Low. 505, 14 N. B. R. 507, Fed. Cas. No. 14,133. But where, in composition proceedings, the amount of the claim of one of the creditors is disputed by the debtor, and an estimate is made to be used merely as showing on what sum the creditor is entitled to vote, such estimate does not estop the debtor from questioning the

jority of those creditors "whose claims have been allowed." Therefore it is necessary that the creditor should have proved his claim and secured its allowance.[60] A secured creditor who is fully protected by his security and willing to rest upon it, is not to be counted in.[61] But a creditor whose lien or other security does not fully cover his claim may have the security valued or foreclosed, and will be allowed to prove a claim for the balance or deficiency, and to this extent he may participate in the composition proceedings.[62] And notes of a bankrupt, which are secured only by the personal indorsement of another, may be included as unsecured debts in a composition with creditors, and the confirmation of such composition will discharge the bankrupt as maker of the notes, without affecting the liability of the indorser.[63] But a creditor whose claims are more than offset by the claims of the bankrupt against him cannot be counted in for the purpose of a composition.[64] On the other hand, an objection to a creditor's vote on an offer of composition, on the ground that his claim is invalid, cannot be raised for the first time on an application to confirm the composition.[65] And the vote or consent of a person who is not lawfully to be accounted a creditor will not nullify the proceedings, at least if the elimination of his consent would not change the result.[66] And a creditor who has bought a claim, with the intention of preventing the adoption of a pending offer of composition, may refuse his acceptance and be counted in determining the necessary majority, if he had no fraudulent or merely oppressive motive in the transaction.[67] In the matter of accepting or rejecting a composition, creditors may act by "duly authorized agent, attorney, or proxy."[68] But a person acting under a power of attorney must keep strictly within its limits and cannot vary his instructions.[69] Whether or not a married woman, without authority from her husband, can vote her debt against a bankrupt's estate on the question of accepting a composition, at any rate an affidavit of the husband that he has given his wife authority to

amount of the claim on which the percentage of the composition shall be calculated in paying the composition. In re Holmes, 15 Blatchf. 170, 18 N. B. R. 230, Fed. Cas. No. 6,632a.

[60] In re Ennis, 183 Fed. 859, 25 Am. Bankr. Rep. 383; American Woolen Co. v. Cohen, 142 App. Div. 880, 127 N. Y. Supp. 787; In re Keller, 18 N. B. R. 331, Fed. Cas. No. 7,654; In re Bryce, 19 N. B. R. 287, Fed. Cas. No. 2,069.

[61] In re Van Auken, 14 N. B. R. 425, Fed. Cas. No. 16,828; In re Snelling, 19 N. B. R. 120, Fed. Cas. No. 13,140.

[62] Flower v. Greenebaum, 9 Biss. 451, 50 Fed. 190; In re Schwab, 8 Ben. 353, Fed. Cas. No. 12,499; Paret v. Ticknor, 4 Dill. 111, 16 N. B. R. 315, Fed. Cas. No. 10,711.

[63] Stauffer-Eshleman Co. v. Abington Hardware & Furniture Co., 131 La. 715, 60 South. 202.

[64] In re Purcell, 18 N. B. R. 447, Fed. Cas. No. 11,470.

[65] In re Bloch, 18 N. B. R. 328, Fed. Cas. No. 1,551.

[66] In re Walshe, 2 Woods, 225, Fed. Cas. No. 17,118.

[67] Ex parte Jewett, 2 Low. 393, 11 N. B. R. 443, Fed. Cas. No. 7,303.

[68] Bankruptcy Act 1898, § 1, cl. 9.

[69] In re Alexander, 8 Ben. 99, Fed. Cas. No. 159.

vote in favor of the composition is a ratification and estoppel validating the wife's act.[70]

§ 651. Same; Fraudulent Inducement to Consent.—The rules of equity being applicable in bankruptcy, and fraud and underhand practices being specially abhorred, a payment of money to a creditor of a bankrupt, to induce him to consent to a pending offer of composition, or to induce him to forbear an active or threatened opposition, will invalidate the entire composition arrangement; and this rule applies although the required number of creditors accepted the offer of composition, without counting the one to whom payment was made, and even though it does not appear that their action was in any way influenced by the transaction.[71] And money so paid may be recovered back by the trustee in bankruptcy, or, according to some of the authorities, by the bankrupt himself or by injured creditors.[72] The rule, however, may possibly be relaxed in a case where the payment was made out of property which was not included in the bankrupt's schedule and was not available as assets in the bankruptcy.[73] The principle is the same where the consent of the creditor is obtained by the bankrupt's secret promise to pay him a larger share of his debt than the other creditors will receive under the composition. "It is a settled doctrine of equity jurisprudence that where creditors unite in a composition agreement, a secret promise by the debtor to one creditor to pay him more than the others is void. There is no reason why this settled doctrine should not apply to compositions in bankruptcy proceedings. There is indeed a stronger reason for its application in such cases than in any others, and the authorities do apply it to compositions in bankruptcy proceedings." [74] Nor is there any difference when the inducement offered to the creditor is that the bankrupt will give him security for the remainder of his debt, or additional security or better security than he now holds; any such bargain will

[70] In re Bailey, 2 Woods, 222, Fed. Cas. No. 729.

[71] In re Bennett, 8 Ben. 561, Fed. Cas. No. 1,312; Fairbanks v. Amoskeag Nat. Bank, 38 Fed. 630; In re Sawyer, 2 Low. 475, 14 N. B. R. 241, Fed. Cas. No. 12,395; Bullene v. Blain, 6 Biss. 22, Fed. Cas. No. 2,124; Brownsville Mfg. Co. v. Lockwood, 11 Fed. 705.

[72] Fairbanks v. Amoskeag Nat. Bank, 38 Fed. 630; Bean v. Brookmire, 1 Dill. 151, Fed. Cas. No. 1,169; s. c., 2 Dill. 108, 7 N. B. R. 568, Fed. Cas. No. 1,170.

[73] National Park Bank v. Peoples' Bank, 14 Phila. (Pa.) 405, Fed. Cas. No. 10,049.

[74] Carey v. Hess, 112 Ind. 398, 14 N. E. 235. And see Citizens' Nat. Bank v. Kerney, 59 Ind. App. 96, 108 N. E. 139; Lieblein v. George, 193 Mich. 462, 160 N. W. 538; Union Exchange Nat. Bank v. Joseph, 194 App. Div. 295, 185 N. Y. Supp. 403; Nole v. Abate, 190 App. Div. 705, 180 N. Y. Supp. 299; Claflin v. Torlina, 11 N. B. R. 521, 56 Mo. 369; Bean v. Amsinck, 10 Blatchf. 361, 8 N. B. R. 228, Fed. Cas. No. 1,167; In re Keller, 18 N. B. R. 331, Fed. Cas. No. 7,654; Woodman v. Stow, 11 Ill. App. 613; Russell v. Rogers, 10 Wend. (N. Y.) 473, 25 Am. Dec. 574; Bullene v. Blain, 6 Biss. 22, Fed. Cas. No. 2,124; Cullingworth v. Loyd, 2 Beav. 385. See Jacobs v. Siff, 74 Misc. Rep. 58, 131 N. Y. Supp. 656.

vitiate the composition.[75] Thus, where an insolvent debtor, desiring to obtain his release in bankruptcy by a composition with his creditors, agrees to execute his notes to one of the creditors for the balance of his debt, the notes so given are void.[76]

These rules have been applied with such severity that composition agreements have been held invalid, or have been set aside, on account of a secret or fraudulent advantage given to one creditor, even though it did not appear that the bankrupt himself procured it or was a party to it.[77] In one case, an offer of money was made to two creditors, by the bankrupt's bookkeeper, to induce them to consent, and the bankrupt had no actual knowledge of the offer, but the bookkeeper was employed generally to see the creditors and procure their consent. It was held that the bankrupt was chargeable with what his representative did in the matter, and the whole proceeding was thereby vitiated and the composition must fail.[78] In another case, where a creditor was induced to consent to the composition by an undefined expectation of advantage held out to him by the indorser of the note which the creditor held, the composition was set aside, though it did not appear that the bankrupt had anything to do with it.[79] And in another case it was held that the signature of a creditor to the composition agreement, obtained upon the promise of another creditor to give him the promisor's trade in the future, would invalidate the composition.[80] But on the other hand, that creditors holding notes of a bankrupt corporation, indorsed by individuals connected with the bankrupt, before accepting a composition, obtained an agreement by such indorsers that they should not thereby be discharged, does not invalidate the composition, since that would be the legal result of it without any promise.[81]

Aside from any fraudulent or secret advantage, creditors may be moved to consent to a composition in bankruptcy by reasons other than a strict consideration for the interests of the majority, as, for example, personal friendship for the bankrupt, sympathy with him in his business misfortunes, or the expectation of profitable business with him in the future. Their assent, if given from such motives, is not invalid nor il-

[75] Chuck v. Mesritz, 2 Woods, 204, Fed. Cas. No. 2,710; Bean v. Brookmire, 2 Dill. 108, 7 N. B. R. 568, Fed. Cas. No. 1,170; Howell v. Todd, Fed. Cas. No. 6,783; Way v. Langley, 15 Ohio St. 392; Mallouk v. American Exchange Nat. Bank, 75 Misc. Rep. 285, 135 N. Y. Supp. 78.

[76] Tinker v. Hurst, 70 Mich. 159, 38 N. W. 16, 14 Am. St. Rep. 482.

[77] In re Sawyer, 2 Low. 475, 14 N. B. R. 241, Fed. Cas. No. 12,395. Votes in favor of accepting a composition, cast by an assignee who paid face value for the claims shortly before the creditors' meeting, should not be counted in determining the vote on the composition. In re Weintrob (D. C.) 240 Fed. 532, 39 Am. Bankr. Rep. 407.

[78] In re Bennett, 8 Ben. 561, Fed. Cas. No. 1,312.

[79] In re Sawyer, 2 Low. 475, 14 N. B. R. 241, Fed. Cas. No. 12,395.

[80] In re Shine, Fed. Cas. No. 12,788.

[81] In re B. Jacobson & Son Co., 196 Fed. 949, 28 Am. Bankr. Rep. 492.

legal. "But the extent to which the majority is composed of creditors so influenced is an important factor in determining the weight to be given to the assent of the majority upon the question whether the proposed composition is really for the best interest of all creditors." [82] In the absence of any fraudulent or illegal bargain, a creditor, for the purpose of assisting the bankrupt in securing confirmation of a proposed composition, may withdraw his claim, and such creditor will then not be counted in determining the number of creditors whose consent is necessary.[83]

A bankrupt may use his credit to acquire the money required for the purposes of a composition offered conformably to the bankruptcy act to his creditors, and what inducement he gives to the person loaning him the money is a matter which does not concern the existing creditors, and hence does not affect the validity of the composition. And extortion or attempted extortion as a consideration for acting or forbearing to act in bankruptcy proceedings (which is expressly forbidden by the statute) cannot be inferred from a promise by the bankrupt, after adjudication, that if certain creditors would loan him a specified sum to be used in paying the consideration of an offered composition, he would pay them the balance of their claim when such composition was confirmed, after deducting their share of the consideration of the composition, which promise they accepted, making the loan for the said purpose.[84] And when a bankrupt has proposed terms of composition and the same have been approved by a majority of the creditors, such creditors and their attorneys have an interest in common in securing an acceptance of the composition offered, and thereafter may properly participate in securing the necessary consents. And it is not improper for the attorney for the receiver, having secured powers of attorney to that end, to represent and vote for creditors in favor of the composition, so long as no false statements are made, and there is no trickery or collusion between creditors and the bankrupt, and no fraud practised.[85]

§ 652. **Deposit for Payment.**—Before application is made for the confirmation of a composition, "the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings" must have been "deposited in such place as shall be designated by and subject to the order of the judge." [86] This requirement is imperative. If it is not complied with, the composition will not be confirmed, even though the application

[82] In re Griffith Stillings Press (D. C.) 244 Fed. 315, 39 Am. Bankr. Rep. 813; In re Spiller (D. C.) 230 Fed. 490, 36 Am. Bankr. Rep. 399.

[83] In re M. & H. Gordon (D. C.) 245 Fed. 905, 40 Am. Bankr. Rep. 301.

[84] Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, 29 Am. Bankr. Rep. 493. And see Hickman v. Galveston Dry Goods Co., 42 Tex. Civ. App. 582, 94 S. W. 157.

[85] In re McLellan, 204 Fed. 482, 30 Am. Bankr. Rep. 325.

[86] Bankruptcy Act 1898, § 12b.

is not opposed by any creditor,[87] and confirmation will also be withheld where the money deposited to cover the cost of the proceedings is not sufficient in amount.[88] The "cost of the proceedings" includes any fees which may be payable under the statute in disbursing the money.[89] And the "debts which have priority," for the purposes of this provision, must be held to include all taxes due from the bankrupt or on his property.[90] As to the consideration to be paid to the creditors, it is held that the bankrupt is required to deposit the percentage offered, not only on all claims filed before confirmation, but also on all other claims listed by him in his schedule; but he is not required to deposit sufficient to cover such percentage on secured claims, nor for any supposed deficiency thereon, if it has not yet been ascertained and filed.[91]

§ 653. Application, Notice, and Hearing.—An official form has been prescribed for the application for confirmation of a composition. It is to be addressed to the judge of the court and is signed by the bankrupt, and recites briefly the offer of terms of composition, its acceptance by the required proportion of creditors, and compliance with the various requirements of the act, and asks that the composition may be confirmed by the court.[92] The confirmation or rejection of a composition is a matter which must be passed upon and decided by the judge of the court of bankruptcy; it is not within the jurisdiction or authority of the referee.[93] But it is proper for the referee, when so requested, to appoint a day for bringing the composition before the court for hear-

[87] In re Frear, 120 Fed. 978, 10 Am. Bankr. Rep. 199. But as a composition is solely for the benefit of the creditors, they are entitled, if they choose, to waive the actual deposit of the money or securities constituting the consideration. Kinkead v. J. Bacon & Sons, 230 Fed. 362, 144 C. C. A. 504, 36 Am. Bankr. Rep. 390.

[88] In re Rider (D. C.) 96 Fed. 808, 3 Am. Bankr. Rep. 178.

[89] In re Mayer, 2 Nat. Bankr. News, 527. Where a third person advances money to a bankrupt, to be deposited to perform an offer of composition, such deposit is liable for expenses incurred by reason of the stay secured by the bankrupt by the composition proceedings, if they fail, but not for delay occasioned by the opposition of a creditor to the offer of composition. In re Wiener (D. C.) 217 Fed. 173, 33 Am. Bankr. Rep. 355. Money obtained by bankrupts after the filing of the petition against them, and deposited with an offer of composition, does not belong to the estate, and if the offer was made in good faith, although rejected for insufficiency, the money should not be retained because the continuance of the business pending disposition of the offer resulted in loss to the creditors. In re Morris & Rice (D. C.) 258 Fed. 712, 44 Am. Bankr. Rep. 146. As to liability for expenses incurred in an investigation of the bankrupt's affairs by an attorney, see In re Siegel (D. C.) 252 Fed. 197, 41 Am. Bankr. Rep. 753; and same case on appeal, 256 Fed. 226, 167 C. C. A. 442, 43 Am. Bankr. Rep. 73.

[90] In re Flynn (D. C.) 134 Fed. 145, 13 Am. Bankr. Rep. 720.

[91] In re Harvey (D. C.) 144 Fed. 901, 16 Am. Bankr. Rep. 345. And see In re Atlantic Const. Co. (D. C.) 228 Fed. 571, 35 Am. Bankr. Rep. 838; In re Alpert (D. C.) 237 Fed. 295, 38 Am. Bankr. Rep. 459.

[92] Official Form No. 61.

[93] Bankruptcy Act 1898, § 38, cl. 4; Idem., § 1, cl. 16; In re Bloodworth-Stembridge Co., 178 Fed. 372, 24 Am. Bankr. Rep. 156. See In re Spiller (D. C.) 230 Fed. 490, 36 Am. Bankr. Rep. 399.

ing, and to issue the required notices to creditors.[94] And it is proper and permissible for the judge to send the case to the referee to ascertain and report the facts, when objections are raised to the approval of the composition which depend on disputed matters of fact, or even in an unopposed case, when the judge has not sufficient facts before him to form a clear judgment as to the propriety of confirming the composition.[95] The statute explicitly requires that the creditors shall have notice of "all hearings upon applications for the confirmation of compositions." [96] If notices are not issued, it will be ground for refusing or withholding confirmation, or perhaps for setting aside an order of confirmation made by the court on the supposition that the notices had been given, and if any creditor is negligently or intentionally omitted from the number of those to whom the notices are sent, it appears that he will not be bound by the result of the proceeding.[97]

It is the evident intention of the statute that any creditors who are dissatisfied with the terms of composition offered by the bankrupt, and unwilling that the composition should be effected, shall have the privilege and opportunity of opposing the application for confirmation, and may thereupon set up any objections within their knowledge which are sufficient, under the statute, to warrant the court in refusing the application. But only creditors who have proved their claims have a standing in court for this purpose.[98] It is immaterial, however, that the opposing creditor bought up a claim against the bankrupt for the very purpose of using it in opposition to the proposed composition, if he had no motive in so doing that was fraudulent or oppressive, but only a desire to realize as much as possible from the estate.[99] Objections may be based on the commission of acts by the bankrupt which would bar his application for a discharge,[100] and also on matters peculiar to the composition, such as irregularities in the offer or its acceptance, the genuineness of signatures purporting to accept, fraudulent practices in

[94] In re Hilborn, 104 Fed. 866, 4 Am. Bankr. Rep. 741.

[95] Adler v. Jones, 109 Fed. 967, 48 C. C. A. 761, 6 Am. Bankr. Rep. 245; In re Levy, 172 Fed. 780, 22 Am. Bankr. Rep. 769; In re Walshe, 2 Woods, 225, Fed. Cas. No. 17,118; In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12,519.

[96] Bankruptcy Act 1898, § 58a, cl. 2; In re Fox (D. C.) 222 Fed. 135, 34 Am. Bankr. Rep. 812. All creditors must be notified of a proposed composition, whether or not they have proved their claims, and must be honestly advised of the true condition of the debtor's affairs. In re Kinnane Co. (D. C.) 217 Fed. 488, 33 Am. Bankr. Rep. 243.

[97] In re Cadenas & Coe, 178 Fed. 158, 24 Am. Bankr. Rep. 135; In re Spencer, 18 N. B. R. 199, Fed. Cas. No. 13,229; In re Hilborn, 104 Fed. 866, 4 Am. Bankr. Rep. 741.

[98] In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12,519; In re Keller, 18 N. B. R. 331, Fed. Cas. No. 7,654; In re Mathers, 17 N. B. R. 225, Fed. Cas. No. 9,274; In re Bryce, 19 N. B. R. 287, Fed. Cas. No. 2,069.

[99] Ex parte Morris, 12 N. B. R. 170; In re Comstock, 154 Fed. 747, 19 Am. Bankr. Rep. 65.

[100] In re Cohen, 149 Fed. 908, 18 Am. Bankr. Rep. 84; In re Levenson (D. C.) 223 Fed. 874, 35 Am. Bankr. Rep. 260.

inducing creditors to accept, or the acceptance by a sufficient proportion of the creditors.[101] But a general objection, to the effect that the estate could pay more than the percentage offered by the bankrupt, will not avail unless the disparity is great and evident.[102] And facts known to creditors when they accepted the offer, or when the composition was confirmed, cannot afterwards be used to vitiate or destroy it.[103] Creditors desiring to oppose the application for confirmation should be required to enter their appearance and to file written specifications of the grounds of their opposition,[104] which should be similar to specifications in opposition to a discharge, and they have the burden of proof, and must sustain their objections by satisfying evidence.[105] The bankrupt will of course have the right and capacity to appear and controvert the objections offered by creditors.[106]

Where the court refused to confirm an offer of composition, because the bankrupt, yielding to the demand of a creditor, had promised to reimburse such creditor for certain expenses, which would operate as a preference, but thereafter the claim of that creditor was withdrawn, and it appeared that the composition offered would be for the best interest of the creditors, it was held that the bankrupt should be allowed to renew his application for confirmation of the composition.[107] But where, after the offer of a composition to the creditors, a new or amended offer is made, the court is without authority to confirm it until it has been again submitted in the same manner as an original offer and all the creditors have had opportunity to accept or reject it.[108]

§ 654. **Confirmation and Proceedings Thereon.**—The bankruptcy act provides that "the judge shall confirm a composition if satisfied that it is for the best interests of the creditors, that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured except as herein

[101] In re Scott, 15 N. B. R. 73, Fed. Cas. No. 12,519; In re Asten, 8 Ben. 350, 14 N. B. R. 7, Fed. Cas. No. 594.

[102] In re Welles, 18 N. B. R. 525, Fed. Cas. No. 17,377.

[103] In re South Boston Iron Co., 4 Cliff. 343, Fed. Cas. No. 13,183. But the fact that a former offer of composition, confirmation of which was refused because of irregularity in the proceedings, was accepted by a given creditor, does not preclude him from objecting to a subsequent offer in substantially the same terms. In re Kinnane Co. (D. C.) 221 Fed. 762, 34 Am. Bankr. Rep. 119.

[104] Adler v. Jones, 109 Fed. 967, 48 C. C. A. 761, 6 Am. Bankr. Rep. 245; City Nat. Bank v. Doolittle 107 Fed. 236, 46 C. C. A. 258, 5 Am. Bankr. Rep. 736.

[105] In re H. J. Arrington Co., 113 Fed. 498, 8 Am. Bankr. Rep. 64; City Nat. Bank v. Doolittle, 107 Fed. 236, 46 C. C. A. 258, 5 Am. Bankr. Rep. 736; Bolles v. Kelley, 222 Fed. 63, 137 C. C. A. 601, 34 Am. Bankr. Rep. 704; In re Rivkin (D. C.) 216 Fed. 218, 33 Am. Bankr. Rep. 170.

[106] In re French, 181 Fed. 583, 25 Am. Bankr. Rep. 77.

[107] In re M. & H. Gordon (D. C.) 245 Fed. 905, 40 Am. Bankr. Rep. 301.

[108] In re Kinnane Co. (D. C.) 217 Fed. 488, 33 Am. Bankr. Rep. 243.

provided, or by any means, promises, or acts herein forbidden."[109] If satisfied of these various particulars, it is the duty of the court to confirm the composition, because it is an arrangement for shortening and simplifying the bankruptcy proceedings which the bankrupt and his creditors have a lawful right to make.[110] At the same time, this section of the statute contemplates that dissenting creditors may be compelled to accept the percentage which is satisfactory to the majority, and may be deprived of their remedies on the balance of their claims, and therefore it should be strictly construed.[111]

As to the requirement that the proposed composition should be "for the best interests of the creditors," it must appear to the court to be for the best interest of all the creditors, not merely for the advantage of certain creditors or of a certain class,[112] and though it is opposed by only a small minority of the creditors, yet the court has power to reject it if satisfied that a settlement of the estate through the agency of a trustee in bankruptcy would be more for their interest.[113] Whether it is expedient to accept the percentage offered by the bankrupt is a question primarily for the creditors themselves to determine, and the approval of a majority of them is prima facie evidence that the acceptance of the offer will be for the best interests of all concerned, so that the burden of proof will rest upon those who oppose the confirmation of the composition on this ground.[114] If no one offers objection to the composition, this fact may be taken by the court as satisfactory evidence that it will be beneficial to all the creditors. But if objection is interposed by a minority, it becomes the duty of the court to make an independent investigation and determination.[115] "In the absence of any ob-

[109] Bankruptcy Act 1898, § 12d. It is within the discretion of the trial judge to refuse to confirm a composition offered by the bankrupt and recommended by the referee, in order that a claimant, denied a hearing because of delay in filing and serving specifications, may have his day in court, and to remand the matter to the referee. In re Soloway & Katz, 211 Fed. 333, 128 C. C. A. 12, 32 Am. Bankr. Rep. 234.

[110] In re McLellan, 204 Fed. 482, 30 Am. Bankr. Rep. 325; In re Soloway & Katz, 234 Fed. 67, 148 C. C. A. 83, 37 Am. Bankr. Rep. 257.

[111] Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93.

[112] In re Hannahs, 8 Ben. 533, Fed. Cas. No. 6,033; In re Purcell, 18 N. B. R. 447, Fed. Cas. No. 11,470; In re Kinnane Co. (D. C.) 221 Fed. 762, 34 Am. Bankr. Rep. 119. In determining whether an offer of composition should be accepted, the court will not consider the interest of the bankrupt, nor of a purchaser of the bankrupt's property, but only the interest of the creditors. In re Kligerman (D. C.) 253 Fed. 778, 42 Am. Bankr. Rep. 670.

[113] In re Whipple, 2 Low. 404, 11 N. B. R. 524, Fed. Cas. No. 17,513.

[114] In re Joseph, 23 Blatchf. 237, 24 Fed. 137; In re Hoxie, 180 Fed. 508, 25 Am. Bankr. Rep. 32; In re Waynesboro Drug Co., 157 Fed. 101, 19 Am. Bankr. Rep. 487; In re Barde, 207 Fed. 654; In re Goldstein (D. C.) 213 Fed. 115; In re Dozier Wholesale Grocery Co. (D. C.) 234 Fed. 169, 37 Am. Bankr. Rep. 633.

[115] In re Waynesboro Drug Co., 157 Fed. 101, 19 Am. Bankr. Rep. 487; In re Graham & Sons, 252 Fed. 93, 164 C. C. A. 205, 42 Am. Bankr. Rep. 52.

jection, it should be supposed that the creditors know their own interest best; but when objections are interposed by the minority, whose claims may be discharged against their will, it is the duty of the court to examine those objections fully and carefully. Rather than be annoyed with litigation and dilatory proceedings, or for other causes, charitable or sympathetic, some creditors readily give their consent to propositions made, without scrutiny or hesitation. If no other creditors were involved, courts might, without interposition, permit them to decide for themselves what their own interests demand. But the act calls for the judgment of the court on the question, for the obvious reason that the minority need and are entitled to protection." [116] But "while the rights of the minority creditors should be carefully watched and protected against all unreasonable acts of the majority, the judgment of the requisite majority should always be allowed to prevail, unless obtained without sufficient consideration or by some unfairness or undue influence." [117] In determining this question, the composition offer should be compared with what the creditors would probably receive upon a settlement of the estate by a trustee in bankruptcy, and not with what the debtor might possibly be able to pay them.[118] In other words, the question whether the bankrupt might have offered better terms than he did is not before the court; that is for the creditors to decide before accepting. And only those assets should be considered which have been surrendered or can be recovered and made available for distribution.[119] The question then is whether the creditors will receive more or less under the composition than may reasonably be expected by the administration of the assets of the bankrupt in due course; and if the latter alternative would give them a substantially greater sum than the former, the composition should be denied, as not being for their best interests; otherwise it should be confirmed.[120] Thus, "the court should refuse to confirm a composition when it clearly appears that there have been preferential payments, and there is reasonable cause to believe that

[116] In re Keiler, 18 N. B. R. 36, Fed. Cas. No. 7,648; In re Morris (D. C.) 246 Fed. 1021, 39 Am. Bankr. Rep. 352. And see In re Graham & Sons, 252 Fed. 93, 94 C. C. A. 205, 42 Am. Bankr. Rep. 52.

[117] In re Wronkow, 15 Blatchf. 38, 18 N. B. R. 81, Fed. Cas. No. 18,105. The assent of 90 per cent. of a bankrupt's creditors to an offer of composition is prima facie evidence that the composition is for the best interests of creditors, and the burden of showing the contrary is on objecting creditors. In re Spiller (D. C.) 230 Fed. 490, 36 Am. Bankr. Rep. 399.

[118] In re Whipple, 2 Low. 404, 11 N. B. R. 524, Fed. Cas. No. 17,513.

[119] In re Linderman, 166 Fed. 593, 22 Am. Bankr. Rep. 131.

[120] Adler v. Jones, 109 Fed. 967, 48 C. C. A. 761, 6 Am. Bankr. Rep. 245; In re Rider, 1 Nat. Bankr. News, 483; In re Keiler, 18 N. B. R. 36, Fed. Cas. No. 7,648; In re H. J. Arrington Co., 113 Fed. 498, 8 Am. Bankr. Rep. 64. And see In re Waynesboro Drug Co., 157 Fed. 101, 19 Am. Bankr. Rep. 487; Riley v. Pope, 186 Fed. 857, 26 Am. Bankr. Rep. 618; In re Kinnane Co. (D. C.) 217 Fed. 488, 33 Am. Bankr. Rep. 243.

they, or any substantial part of the same, may be recovered by the trustee, and it also appears that the estate in hand, with such preferences recovered and added, will net the creditors a greater percentage than is offered in the proposed composition."[121] And the court may also consider the relations of the creditors favoring the composition to the debtor, and the relative number of creditors whose individual opinions are expressed in person in the acceptance of the offer as compared with those who dissent.[122]

As to the objection that the bankrupt has been guilty of acts or omissions which would bar his discharge, if it is clearly made out this objection must prevail, and the composition must be rejected, however advantageous to creditors it might have been, and though it will result in their securing a smaller percentage of their debts than they would have received under the composition.[123] But, generally speaking, an objection of this kind will not be sustained unless it appears that the conduct of the bankrupt to which exception is taken was willfully and intentionally false, fraudulent, or deceitful. This applies to the objection that he failed to keep proper books of account or concealed or destroyed his books or accounts,[124] that he omitted to include in his schedule property which belonged to his estate,[125] that he obtained money or property on credit by means of a materially false financial statement,[126] that he concealed, removed, or misappropriated property,[127] or that he gave fraudulent preferences.[128]

It is also proper for the court to consider any irregularities which may have occurred in the previous proceedings, and indeed it has no

[121] In re McLellan, 204 Fed. 482, 30 Am. Bankr. Rep. 325.

[122] In re Weber Furniture Co., 13 N. B. R. 529, Fed. Cas. No. 17,330. And see In re Griffith Stillings Press (D. C.) 244 Fed. 315, 39 Am. Bankr. Rep. 813.

[123] In re Griffin, 180 Fed. 792, 25 Am. Bankr. Rep. 206; In re Comstock, 154 Fed. 747, 19 Am. Bankr. Rep. 65; In re Godwin, 122 Fed. 111, 10 Am. Bankr. Rep. 252.

[124] In re Sabsevitz, 197 Fed. 109, 28 Am. Bankr. Rep. 623; In re Olman, 134 Fed. 681, 13 Am. Bankr. Rep. 395; In re Wilson, 107 Fed. 83, 5 Am. Bankr. Rep. 849; In re Barde, 207 Fed. 654; In re Rosenthal, 231 Fed. 449, 145 C. C. A. 443; In re Gottlieb (C. C. A.) 262 Fed. 730, 44 Am. Bankr. Rep. 464, 45 Am. Bankr. Rep. 180; In re Silberstein (D. C.) 225 Fed. 665, 34 Am. Bankr. Rep. 479.

[125] In re B. Jacobson & Son Co., 196 Fed. 949, 116 C. C. A. 499, 28 Am. Bankr. Rep. 492; In re Reiman, 12 Blatchf. 562, 13 N. B. R. 128, Fed. Cas. No. 11,675.

[126] In re Sabsevitz, 197 Fed. 109, 28 Am. Bankr. Rep. 623; In re O'Callaghan, 199 Fed. 662, 29 Am. Bankr. Rep. 304; In re Seligman, 163 Fed. 549, 20 Am. Bankr. Rep. 774; In re Witman (D. C.) 215 Fed. 286; In re Kerner (D. C.) 245 Fed. 807, 40 Am. Bankr. Rep. 183.

[127] In re Bloch, 18 N. B. R. 328, Fed. Cas. No. 1,551; In re Burman (D. C.) 210 Fed. 512, 32 Am. Bankr. Rep. 62. A composition agreement will not be confirmed where, if the bankrupt's statements to sellers of merchandise were correct, a large amount of assets had disappeared concerning which he could give no explanation. In re Weintrob (D. C.) 240 Fed. 532, 39 Am. Bankr. Rep. 407.

[128] In re Jacobs, 18 N. B. R. 48, Fed. Cas. No. 7,159. But see In re Rivkin (D. C.) 216 Fed. 218, 33 Am. Bankr. Rep. 170.

power to confirm an irregular composition.[129] But irregularities which are the effect of mere mistake, and not of fraud, are not necessarily fatal.[130] It is also proper to refuse to confirm a composition where there is evidence that the proceedings are collusive.[131] But though there are indicia of fraud, the court should not refuse to confirm the composition without giving the bankrupt and the majority creditors an opportunity to be heard.[132] It is also essential that the creditors, in considering the terms offered, should have been honestly and fully advised of the true condition of the debtor's affairs, so that they may be presumed to have acted intelligently and understandingly. And if it is shown that this was not the case, the court will be justified in withholding its approval.[133] But when questions of policy and expediency have been fairly before the creditors and disposed of by them, and their action has been approved by the district court, it will not be interfered with on appeal.[134]

§ 655. Performance and Distribution.—"Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided."[135] Since a composition is essentially a voluntary arrangement and settlement between the bankrupt and his creditors, taking the case out of court, it is doubtful whether the court of bankruptcy has power to make a summary order for its enforcement; and at any rate this will not be done where it does not appear that the creditors are willing and desirous to proceed with it.[136] The official form prescribed for the order of distribution intends that the moneys shall be paid out by the clerk of the court,[137] first to priority claims, then to cover the costs of the proceedings, and then to the general creditors.[138] Money payable to a creditor on a composition cannot be attached, or its payment obstructed,

[129] In re Frear, 120 Fed. 978, 10 Am. Bankr. Rep. 199. And see In re Kinnane Co. (D. C.) 221 Fed. 762, 34 Am. Bankr. Rep. 119. The court has no power to confirm a composition which provides for compensation to a receiver in a sum largely in excess of that prescribed by the act. In re Sol Gross & Co., Inc. (D. C.) 274 Fed. 741.

[130] In re Henry, 9 Ben. 449, 17 N. B. R. 463, Fed. Cas. No. 6,370.

[131] In re Keiler, 18 N. B. R. 36, Fed. Cas. No. 7,648. But see In re Allen, 17 N. B. R. 157, Fed. Cas. No. 210.

[132] In re Weber Furniture Co., 13 N. B. R. 559, Fed. Cas. No. 17,331.

[133] In re Keiler, 18 N. B. R. 36, Fed. Cas. No. 7,648; In re Greenebaum, Fed. Cas. No. 5,769.

[134] In re Wilson, 16 Blatchf. 112, Fed. Cas. No. 17,781.

[135] Bankruptcy Act 1898, § 12e.

[136] In re Remsen, 9 Ben. 260, Fed. Cas. No. 11,698.

[137] But it has been held that the clerk of the District Court is not required to distribute the consideration in composition cases, and the referee should be designated to make the distribution. In re Newbold (D. C.) 244 Fed. 888, 40 Am. Bankr. Rep. 298.

[138] Official Form No. 63. Where an order of confirmation of composition reserved for liquidation the claims of

by proceedings in another court; and the bankruptcy court will not suspend or deny the creditor's right to receive his composition, except in favor of one who claims a specific lien thereon, or who has procured the appointment of a receiver to take the creditor's title.[139] Nor has the court any power to require the bankrupt to pay the composition percentage to a creditor whose claim was not scheduled or filed, or proved within a year after the adjudication.[140] But creditors receiving their respective shares of a composition are not bound to see that other creditors receive their shares.[141] The costs of the proceeding are to be paid out of the money deposited by the bankrupt, and constitute a preferred claim. But a fee cannot be allowed to the bankrupt's attorney for his services in securing the confirmation of the composition, when it was opposed by creditors in good faith and on reasonable grounds.[142]

The statute directs that "upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him."[143] But a composition proceeding will be regarded as pending until all notes become due which were given by the debtor to effect the same.[144] And it seems that, even after the confirmation of a composition, the estate may be reopened for the purpose of recovering or receiving the surrender of a preference, and although it will inure to the benefit of the bankrupt himself by reason of the composition.[145]

§ 656. Effect of Failure of Performance.—The acceptance of a composition and its confirmation by the court will not operate as a dis-

creditors who were entitled to a special fund, such claims should be liquidated before the distribution of the consideration. In re H. B. Hollins & Co. (D. C.) 230 Fed. 920, 37 Am. Bankr. Rep. 205. Where a creditor who was a party to a composition agreement sues on the debt, the burden is on the debtor to prove a tender to the plaintiff of the proportion of the debt called for by the composition. Ocean Accident & Guarantee Corp. v. Beck (Sup.) 153 N. Y. Supp. 932. And see Beck v. Witteman Bros., 186 App. Div. 961, 173 N. Y. Supp. 491.

139 In re Kohlsaat, 18 N. B. R. 570, Fed. Cas. No. 7,918.

140 In re Abrams & Rubins, 173 Fed. 430, 23 Am. Bankr. Rep. 25; In re Lane, 125 Fed. 772, 11 Am. Bankr. Rep. 136. But see In re Englander's, Inc. (D. C.) 267 Fed. 1012, 45 Am. Bankr. Rep. 508. A creditor may participate in a composition, though he fails to prove his claim within the year, if the bankrupt admits its validity and deposits funds for its partial payment. In re Aarons (D. C.) 243 Fed. 634, 40 Am. Bankr. Rep. 229.

141 Ex parte Hamlin, 2 Low. 571, 16 N. B. R. 320, Fed. Cas. No. 5,993.

142 In re Martin, 153 Fed. 582.

143 Bankruptcy Act 1898, § 70f. See In re McKeon, 7 Ben. 513, 11 N. B. R. 182, Fed. Cas. No. 8,858. Where a bankrupt has deposited money in pursuance of an offer of composition, and proceedings are delayed by the opposition of minority creditors, but the offer is finally confirmed, the bankrupt is entitled to any interest which the money may have earned in the mean time. In re Kelley (D. C.) 223 Fed. 383, 35 Am. Bankr. Rep. 127.

144 In re Hinsdale, 9 Ben. 91, 16 N. B. R. 550, Fed. Cas. No. 6,526.

145 In re B. Feinberg & Sons, 187 Fed. 283, 26 Am. Bankr. Rep. 587.

charge or release of the debtor from any given debt, unless the distributive share of that creditor under the composition agreement is actually paid or unconditionally tendered to him.[146] And the question whether such payment or tender has been made is open to trial in any court in which the debt may be sued for.[147] Hence, upon failure of performance of the condition of a composition, the creditor may pursue his appropriate remedies for the recovery of his original debt (not merely for the percentage offered under the composition) in any proper court.[148] And if the debtor is subsequently adjudged bankrupt in a fresh proceeding on his own petition, having paid the cash part of a composition previously effected, but not the notes which were given for the remainder of the percentage offered, the creditors may prove their original claims, giving credit for the cash received.[149] But mere delay in paying composition notes, occasioned by legal or other difficulties, does not ipso facto avoid the composition, nor does failure to pay one creditor according to the composition forfeit the bankrupt's rights as to creditors punctually paid.[150] Where a bankrupt executes composition notes with an agreement that if any note shall be in default all shall become due, and a creditor taking the notes assigns his claim to a third person, and takes the latter's notes in payment and retains the composition notes as security, he cannot proceed on the composition notes until after default on the other notes.[151] One who has agreed to become a surety on a composition will not be summarily compelled to give security, where it appears that the bankrupt has abandoned the composition, and has not given the notes agreed upon as a part of it.[152]

§ 657. Vacating and Setting Aside Composition.—It is provided in the bankruptcy act that "the judge may, upon the application of parties in interest, filed at any time within six months after a composition

[146] In re Hurst, 1 Flip. 462, 13 N. B. R. 455, Fed. Cas. No. 6,925; Harrison v. Gamble, 69 Mich. 96, 36 N. W. 682; Whittemore v. Stephens, 48 Mich. 573, 12 N. W. 858. If a bankrupt fails to comply with a composition agreement with his creditors, they will have an action thereon against him. Kobre Assets Corp. v. Baker, 178 App. Div. 62, 164 N. Y. Supp. 597.

[147] Whittemore v. Stephens, 48 Mich. 573, 12 N. W. 858.

[148] Ransom v. Geer, 20 Blatchf. 535, 12 Fed. 607; Harrison v. Gamble, 69 Mich. 96, 36 N. W. 682; Page v. Carton, 64 Misc. Rep. 645, 120 N. Y. Supp. 277. Compare In re Bayly, 19 N. B. R. 73, Fed. Cas. No. 1,144. Where notes are given under an order confirming a composition in bankruptcy, and are not paid, the original debt revives. American Woolen Co. v. Friedman, 97 Misc. Rep. 593, 163 N. Y. Supp. 162.

[149] In re A. B. Carton & Co., 148 Fed. 63, 17 Am. Bankr. Rep. 343; Brookmire v. Bean, 3 Dill. 136, 12 N. B. R. 217, Fed. Cas. No. 1,942.

[150] In re Kohlsaat, 18 N. B. R. 570, Fed. Cas. No. 7,918.

[151] Willey v. Browne, 206 Pa. St. 322, 55 Atl. 1029.

[152] In re Remsen, 9 Ben. 260, Fed. Cas. No. 11,698.

has been confirmed, set the same aside and reinstate the case, if it shall be made to appear upon a trial that fraud was practised in the procurement of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition." [153] This action can be taken only by the court of bankruptcy. No state court can annul or disregard a discharge in bankruptcy, whether it was obtained in the ordinary way or as the result of a composition.[154] And further, authority to set aside a composition is confided only to the "judge" of the court of bankruptcy, which term, in this instance, does not include the referee.[155] The application for this purpose should take the form of a petition. And leave to file such a petition should only be refused when the petition on its face shows that, upon the facts stated, the petitioner could not under any circumstances be entitled to relief.[156] The petition should show by proper averments sufficient grounds why the court should revoke the order confirming the composition or set it aside.[157] And it should allege that the fraud charged was not known to the petitioner until after the composition was confirmed, but need not state the time or manner in which such knowledge was acquired, nor is it demurrable for omitting to allege that the petitioner restored or offered to restore the consideration immediately on discovery of the fraud, or for want of a tender of the consideration into court.[158] The petition should be verified in the usual form for a bill in equity, but verification by an agent is not sufficient when the principal allegations are made on information and belief and the agent is not shown to have any personal knowledge of the facts.[159] Notice should be given to the bankrupt and to all the creditors.[160] Such a petition can be filed only by a "party in interest." But a creditor who has assigned his claim, receiving a consideration therefor, is no longer a party in interest, although the assignment was procured through the

[153] Bankruptcy Act 1898, § 13. See In re Ballance, 206 Fed. 505, 30 Am. Bankr. Rep. 689. A composition cannot be set aside where all the facts constituting the alleged fraud were known to the creditors before it was confirmed. Union Furniture Co. v. Walker-Cooley Furniture Co., 206 Fed. 217, 31 Am. Bankr. Rep. 73. As to the necessity and duty of setting aside the composition when fraud is found, see In re Ballance, 219 Fed. 537, 135 C. C. A. 287, 33 Am. Bankr. Rep. 642.

[154] Turner v. Hudson, 105 Me. 476, 75 Atl. 45, 18 Ann. Cas. 600. But compare Mallouk v. American Exchange Nat. Bank, 75 Misc. Rep. 285, 135 N. Y. Supp. 78.

[155] See Bankruptcy Act 1898, § 1, cl. 16, and Id. § 38.

[156] In re Allen B. Wrisley Co., 133 Fed. 388, 66 C. C. A. 450, 13 Am. Bankr. Rep. 193.

[157] City Nat. Bank v. Doolittle, 107 Fed. 236, 46 C. C. A. 258, 5 Am. Bankr. Rep. 736. See In re Kass (D. C.) 263 Fed. 138, 45 Am. Bankr. Rep. 301.

[158] In re Roukous, 128 Fed. 645, 12 Am. Bankr. Rep. 128.

[159] In re Roukous, 128 Fed. 648, 12 Am. Bankr. Rep. 169.

[160] Ex parte Hamlin, 2 Low. 571, 16 N. B. R. 320, Fed. Cas. No. 5,993.

fraud and misrepresentation of the trustee and the bankrupt.[161] But the fact that a creditor has commenced an action at law against the bankrupt will not prevent him from also maintaining a petition to set aside the composition.[162]

An application of this kind positively cannot be considered by the court unless filed within the six months allowed by the statute.[163] The limitation prescribed is absolutely imperative. And the time allowed is not enlarged by the provision found in another section of the statute, that a discharge may be revoked within a year after it is granted, for this relates only to a discharge obtained in the ordinary way, not to a discharge resulting by operation of law from the confirmation of a composition.[164]

So also, the section quoted above defines exclusively the ground upon which a composition may be set aside, namely, fraud in its procurement. It operates as a limitation upon the general grant of authority given to courts of bankruptcy by an earlier provision (section 2, clause 9) to "set aside compositions and reinstate the cases."[165] Hence the court has no power to set aside a composition merely because the petitioning creditor's address was erroneously stated in the bankrupt's schedule, in consequence of which the creditor had no notice of the proceedings in bankruptcy, and did not prove his debt, and the same was not included in the composition.[166] Neither can a composition be set aside on account of inadequacy, or because the estate might have paid a larger dividend,[167] nor because the bankrupt has failed to carry out his part of the composition agreement.[168] But the fact that the bankrupt made a false schedule or a false oath to his schedule constitutes ground for setting aside a composition subsequently effected, as the schedule is supposed to inform the creditors of the extent and nature of his assets and to influence them in accepting terms of composition offered, and hence fraud in the schedule is fraud practised in procuring the composition.[169] So the fact that the trustee joins with the bank-

[161] In re Allen B. Wrisley Co., 133 Fed. 388, 66 C. C. A. 450, 13 Am. Bankr. Rep. 193.

[162] In re Roukous, 128 Fed. 648, 12 Am. Bankr. Rep. 169.

[163] In re Ennis, 183 Fed. 859, 25 Am. Bankr. Rep. 383; In re Jersey Island Packing Co., 152 Fed. 839, 18 Am. Bankr. Rep. 417; In re Eisenberg, 148 Fed. 325, 16 Am. Bankr. Rep. 776. See, as to laches of petitioning creditors, In re Herman, 9 Ben. 436, 17 N. B. R. 440, Fed. Cas. No. 6,405.

[164] In re Jersey Island Packing Co., 152 Fed. 839, 18 Am. Bankr. Rep. 417.

[165] In re Rudnick, 93 Fed. 787, 2 Am. Bankr. Rep. 114; In re Cooper Bros., 166 Fed. 932, 20 Am. Bankr. Rep. 634. See In re Siegel, 256 Fed. 226, 167 C. C. A. 442, 43 Am. Bankr. Rep. 73.

[166] In re Rudnick, 93 Fed. 787, 2 Am. Bankr. Rep. 114.

[167] In re Shaw, 9 Fed. 495.

[168] In re Eisenberg, 148 Fed. 325, 16 Am. Bankr. Rep. 776.

[169] In re Roukous, 128 Fed. 645, 12 Am. Bankr. Rep. 128.

rupt to effect a composition to the detriment of creditors by means of false representations as to the assets, is ground not only for his removal, but also for vacating the composition.[170] But a composition should not be set aside though some creditors fraudulently obtained notes for more than their pro rata share, where it appears that the applicant for the order also obtained a preference.[171]

It is provided that when a composition is set aside, "the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition."[172] But all acts regularly done in pursuance of the composition, the same having been partly performed, remain valid, and the rights and title of the trustee are subject thereto.[173] There is also a provision that "in the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication."[174] In this event, it has been held that a workman, employed by the bankrupt during the time when the composition was in force, is entitled to payment of his wages earned during that period. "These wages are somewhat analogous to claims for expenditures incurred in preserving or taking care of the bankrupt's property before it comes into the hands of the assignee; and such expenditures will be allowed by the bankruptcy court in the exercise of its equitable jurisdiction."[175]

§ 658. **Operation and Effect.**—The confirmation and performance of a composition operate as a discharge by operation of law, and release the bankrupt from all of his debts which would be barred by a discharge, and in like manner terminate all remedies of creditors for the enforcement of their claims against either the bankrupt or his property.[176] Fur-

[170] In re Allen B. Wrisley Co., 133 Fed. 388, 66 C. C. A. 450, 13 Am. Bankr. Rep. 193.

[171] In re Sacharoff & Kleiner, 163 Fed. 664, 20 Am. Bankr. Rep. 814.

[172] Bankruptcy Act 1898, § 70d.

[173] Ex parte Hamlin, 2 Low. 571, 16 N. B. R. 320, Fed. Cas. No. 5,993.

[174] Bankruptcy Act 1898, § 64c.

[175] In re Wells, 4 Fed. 68.

[176] In re Radley (D. C.) 252 Fed. 205, 42 Am. Bankr. Rep. 261; In re O'Gara Coal Co., 260 Fed. 742, 171 C. C. A. 480, 44 Am. Bankr. Rep. 206; Herrington v. Davitt (Sup.) 145 N. Y. Supp. 452; Greenberger v. Schwartz, 261 Pa. 265, 104 Atl. 573. See In re Bjornstad, 11 Biss. 68, 5 Fed. 791; In re Becket, 2 Woods, 173, 12 N. B. R. 201, Fed. Cas. No. 1,210; Taylor v. Skiles, 113 Tenn. 288, 81 S. W. 1258; Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93; Mandell v. Levy, 47 Misc. Rep. 147, 93 N. Y. Supp. 545; Harrison v. Gamble, 69 Mich. 96, 36 N. W. 682; Denny v. Merrifield, 128 Mass.

ther, "upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him." [177] That is, the legal effect of a composition is that the legal title to the bankrupt's property remains in him. If it is effected before an adjudication, the title is never divested; if afterwards, the title which vests by operation of law in the trustee in bankruptcy is automatically taken from him and revested in the bankrupt.[178] And "a certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt, if recorded, would impart." [179] Thereafter the bankrupt is at liberty to deal with his assets as he may please,[180] and may prosecute suits in his own name, though he may consent to the further prosecution of an action in the name of the trustee in bankruptcy, after the composition, and in that case the court in which the suit is pending will not be obliged to dismiss it on account of the closing of the estate in bankruptcy.[181] But the bankrupt takes back his title in the same condition in which it was before the bankruptcy. If he held a merely defeasible title to certain property, his trustee in bankruptcy would acquire no higher or stronger title, and if a composition is offered and confirmed, the original title, but no more, will revest in the bankrupt.[182] Also, the confirmation of a composition suspends the functions of the trustee as to administering the estate.[183] And the statute directs that the case (that is, the pending case in bankruptcy) shall be "dismissed." But this only means that the court shall proceed

228: Turner v. Hudson, 105 Me. 476, 75 Atl. 45, 18 Ann. Cas. 600. Where an offer of composition was accepted by creditors of a firm adjudged a bankrupt without a proviso that the partners individually should be discharged from partnership debts or without any agreement that they should remain liable, the mere fact that the referee and the court and the parties had a mistaken view as to what the law was did not affect the legal liability of the partners. Abbott v. Anderson, 265 Ill. 285, 106 N. E. 782, L. R. A. 1915F, 668, Ann. Cas. 1916A, 741.

[177] Bankruptcy Act 1898, § 70f.

[178] Cumberland Glass Mfg. Co. v. De Witt, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042, 34 Am. Bankr. Rep. 723; American Improvement Co. v. Lilienthal (Cal. App.) 184 Pac. 692; Houston v. Shear (Tex. Civ. App.) 210 S. W. 976; Ligon v. Allen, 56 Miss. 632; McDonald v. H. E. Taylor Co., 144 App. Div. 329, 128 N. Y. Supp. 1048. On confirmation of a composition, money belonging to the bankrupt in the hands of a third person, which had not been reduced to possession by the trustee, at once revests in the bankrupt free from any claim or right of the trustee. In re Frischknecht, 223 Fed. 417, 139 C. C. A. 11, 34 Am. Bankr. Rep. 530. After the confirmation of a composition, the court of bankruptcy has no jurisdiction of a petition by the bankrupt to require the proceeds of property claimed by him to be paid over to him. In re Hollins, 229 Fed. 349, 143 C. C. A. 469, 36 Am. Bankr. Rep. 168. And see In re Hollins, 238 Fed. 787, 151 C. C. A. 637, 38 Am. Bankr. Rep. 432.

[179] Bankruptcy Act 1898, § 21g.

[180] In re Shaw, 9 Fed. 495.

[181] Stone v. Jenkins, 176 Mass. 544, 57 N. E. 1002, 79 Am. St. Rep. 343. And see Merchants' Bank of Mobile v. Zadek, 203 Ala. 518, 84 South. 715.

[182] Zavelo v. Cohen Bros., 156 Ala. 517, 47 South. 292.

[183] In re August, 19 N. B. R. 161, Fed. Cas. No. 645.

no further with the administration of the estate under the bankruptcy act, and does not forbid further proceedings in the case such as are necessary to terminate it, for instance, appropriate proceedings before the referee to pass upon the accounts of the trustee, and, after allowing the same, to direct that the trustee be discharged and the estate closed.[184] But no new claims against the estate can be filed and allowed,[185] though a question as to what amount the trustee shall pay over to the bankrupt as the balance in his hands should be determined by the referee under a special order of the court.[186] And the trustee cannot be held personally liable to a creditor for the difference between the dividend received under the composition agreement and the greater dividend which the trustee assured the creditor he would receive, such assurance being merely an expression of opinion that the larger dividend could be realized.[187]

At least all those creditors who have proved their claims will be regarded as parties to the bankruptcy proceeding so as to be bound and concluded by the composition;[188] and after the confirmation of the composition it is too late for creditors to claim that a conveyance made by the debtor before the bankruptcy was fraudulent as against them.[189] Just as in the case of a discharge obtained in the ordinary way, a composition prevents creditors from maintaining any action or suit for the enforcement of a claim or the collection of a debt which would be released by a discharge.[190] And a creditor who receives a composition with full knowledge of the facts cannot afterwards require a set-off to be enforced against the debtor in a court of equity, which he had opportunity to assert at the time the composition was effected.[191] A suit against the bankrupt in a state court by a creditor included in the composition may be enjoined pending the completion of the composition,[192] but after that, the court of bankruptcy will not interfere by injunction, as the debtor has a complete defense by simply pleading the composition and his consequent discharge.[193] But there is this difference between the effect of

[184] United States v. Sondheim, 188 Fed. 378. And see In re Hyman, 18 N. B. R. 299, Fed. Cas. No. 6,985. As to payment of costs, see In re Harris, 117 Fed. 575, 15 Am. Bankr. Rep. 705.

[185] In re Cooper Bros., 166 Fed. 932, 20 Am. Bankr. Rep. 634. A judgment liquidating a claim not proved and filed within the statutory time is barred where there has been confirmation of a composition. In re Maytag-Mason Motor Co. (D. C.) 223 Fed. 684, 35 Am. Bankr. Rep. 160.

[186] In re August, 19 N. B. R. 161, Fed. Cas. No. 645.

[187] Bossak v. Siff, 147 App. Div. 177, 132 N. Y. Supp. 109.

[188] Clairmonte v. Napier Motor Co., 11 Cal. App. 265, 104 Pac. 712; In re Rodger, 18 N. B. R. 381, Fed. Cas. No. 11,992.

[189] McMaster v. Campbell, 41 Mich. 513, 2 N. W. 836.

[190] Taylor v. Skiles, 113 Tenn. 288, 81 S. W. 1258.

[191] Hunt v. Holmes, 16 N. B. R. 101, Fed. Cas. No. 6,890.

[192] In re Shafer, 17 N. B. R. 116, Fed. Cas. No. 12,695.

[193] In re Negley, 20 Fed. 499.

a composition and that of a discharge, that a new promise will not revive a debt included in and settled by the composition, though it would in the case of a discharge. For a discharge does not satisfy or extinguish the debt, though it bars any further proceeding for its collection; but a composition is an accord and satisfaction and wipes out the cause of action.[194] But a composition, like a discharge, must be pleaded in order to be a bar.[195] And if set up after the time for final performance of the terms of the composition, the plea must aver not only the proceedings leading up to the composition and its confirmation by the court, but also performance on the part of the debtor, or a sufficient excuse for failure to perform.[196] It is also provided that "a certified copy of an order confirming or setting aside a composition, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made." [197] The statute does not in terms direct that such evidence shall be accepted as conclusive, but it is difficult to see how it could be accorded any less effect. And at any rate it is well settled that a composition, confirmed by the bankruptcy court, cannot be impeached in any collateral proceeding in a state court.[198]

§ 659. Same; What Debts Released.—The bankruptcy act provides that "the confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge." [199] Broadly speaking, therefore, all those debts to which the bankrupt might plead in bar a discharge obtained in the ordinary course of administration will be equally released by the confirmation of a composition,[200] while, on the other hand, an action on a debt or claim will not be barred by composition proceedings if it would not be discharged by the debtor's dis-

[194] Taylor v. Skiles, 113 Tenn. 288, 81 S. W. 1258. Contra, see In re Kinnane Co. (D. C.) 221 Fed. 762, 34 Am. Bankr. Rep. 119. A bankrupt's promise, made prior to a composition settlement and repeated thereafter, to pay a certain creditor's entire claim if he aided the bankrupt in securing money to settle with his other creditors, was void, where the subsequent promise was merely a reassurance of payment, with no additional consideration. Lieblein v. George, 193 Mich. 462, 160 N. W. 538.

[195] Consolidated Rubber Tire Co. v. Vehicle Equipment Co., 121 App. Div. 764, 106 N. Y. Supp. 599. A creditor who has received the debtor's note given in a composition with creditors, and who denies the effect of the composition as discharging his debt, is chargeable with the amount of the note unless he produces or accounts for it. Beck v. Witteman Bros., 185 App. Div. 643, 173 N. Y. Supp. 488; Id., 186 App. Div. 961, 173 N. Y. Supp. 491.

[196] Harrison v. Gamble, 69 Mich. 96, 36 N. W. 682. And see Dobson v. Noyes, 39 Kan. 471, 18 Pac. 697.

[197] Bankruptcy Act 1898, § 21f.

[198] Loeffler v. Wright, 13 Cal. App. 224, 109 Pac. 269; Farwell v. Raddin, 129 Mass. 7.

[199] Bankruptcy Act 1898, § 14c. As to effect of order releasing the bankrupt, after confirmation of a composition, on the compensation of the referee in the case, see Kinkead v. J. Bacon & Sons, 230 Fed. 362, 144 C. C. A. 504, 36 Am. Bankr. Rep. 390.

[200] In re Jersey Island Packing Co.,

charge in bankruptcy under the act.[201] Thus, a composition will not affect the debtor's liability on a debt contracted by his fraud,[202] nor while he was acting in a fiduciary capacity,[203] nor in respect to a claim founded on one of the kinds of torts mentioned in the statute as not being released by a discharge.[204] The act provides that a discharge shall not release the debtor from such claims as "have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."[205] Hence a creditor whose name and address, with the amount due him, are correctly stated in the bankrupt's schedule, being chargeable with notice of the bankruptcy proceedings (even if he has no actual knowledge), must prove his claim and secure its allowance, whereupon he will be entitled to notice of the composition proceedings; and if he neglects to do this, and pays no attention to the bankruptcy proceedings, he is chargeable with laches and can take no action to recover the balance of his debt after receiving the dividend payable under the composition.[206] On the other hand, a creditor whose claim is not listed by the bankrupt nor included in the composition arrangement, and who does not of his own motion come in and prove his claim, will not be affected or bound by the composition, provided he at all times lacked that notice or actual knowledge of the bankruptcy proceedings which would have charged him with the duty of intervening for the protection of his own interests.[207] This rule has been applied to a case where the creditor's address was stated as "unknown," and he took no part in the composition proceedings,[208] and in a case where the debt was stated at less than its true amount, and the creditor did not join in the composition and objected to its confirmation

152 Fed. 839, 18 Am. Bankr. Rep. 417; Consolidated Rubber Tire Co. v. Vehicle Equipment Co., 121 App. Div. 764, 106 N. Y. Supp. 599; Herschman v. Justices of the Municipal Court of City of Boston, 220 Mass. 137, 107 N. E. 543. See Beck v. Witteman Bros., 185 App. Div. 643, 173 N. Y. Supp. 488.

201 Wilmot v. Mudge, 103 U. S. 217, 26 L. Ed. 536; Bayly v. Washington & Lee University, 106 U. S. 11, 1 Sup. Ct. 88, 27 L. Ed. 97; Zavello v. J. S. Reeves & Co., 171 Ala. 401, 54 South. 654; Mudge v. Wilmot, 124 Mass. 493. Compare Wells v. Lamprey, 16 N. B. R. 205.

202 In re Tooker, 8 Ben. 390, 14 N. B. R. 35, Fed. Cas. No. 14,096.

203 In re Rodger, 18 N. B. R. 252, Fed. Cas. No. 11,991; In re Shafer, 17 N. B. R. 116, Fed. Cas. No. 12,695; Succession of Bayly, 30 La. Ann. 75.

204 In re Coe, 183 Fed. 745, 106 C. C A. 181, 26 Am. Bankr. Rep. 352.

205 Bankruptcy Act 1898, § 17.

206 In re Wilkens, 191 Fed. 94, 27 Am. Bankr. Rep. 235; In re Abrams & Rubins, 173 Fed. 430, 23 Am. Bankr. Rep. 25; In re Starr, 56 Fed. 142; Troy v. Rudnick, 198 Mass. 563, 85 N. E. 177; Glover Grocery Co. v. Dorne, 116 Ga. 216, 45 S. E. 347.

207 In re Blackmore, 11 Fed. 412; Flower v. Greenbaum, 9 Biss. 455, 2 Fed. 897; Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93; Robinson v. Soule, 56 Miss. 549; Collins & Toole v. Crews, 3 Ga. App. 238, 59 S. E. 727; Shulman v. Graves, 63 Ala. 402; Smith v. Rucker, 88 Ark. 615, 114 S. W. 1181; In re Black Diamond Copper Min. Co., 10 Ariz. 42, 85 Pac. 653.

208 Harrison v. Gamble, 69 Mich. 96, 36 N. W. 682.

and refused to accept any money under it.[209] Again, creditors whose claims are barred by failure to file or present the same within the year allowed for that purpose have no standing before the bankruptcy court in composition proceedings.[210] But the fact that a corporation has been adjudged bankrupt and has effected a composition with its creditors will not prevent creditors from maintaining an action against its directors, to enforce a liability imposed on them personally by statute for failing to report the condition of the company, since such a statutory liability is entirely independent of the cause of action against the corporation.[211] And on the same principle, any rights or claims which the creditors of a corporation may have against stockholders of it, growing out of the action of the corporation in issuing stock in exchange for property of inadequate value, are unaffected by a composition effected by the corporation in bankruptcy with the creditors.[212]

§ 660. Same; Effect on Rights of Secured Creditors.—Liens and other securities which would be valid and unassailable in the ordinary course of bankruptcy proceedings are equally protected in composition arrangements and are not discharged or affected.[213] If the bankrupt wishes to bring the claims of secured creditors under the operation of the composition, it is his duty to have the securities valued as the law directs.[214] But, the other conditions existing, a composition confirmed by the court has the effect to confine a secured creditor to his security, and to discharge the debtor from personal liability for the debt,[215] so that, for example, after the confirmation of a composition, a mortgage creditor cannot recover a deficiency judgment on the foreclosure of his mortgage.[216] But so far as concerns the property affected by a lien, the court of bankruptcy loses all control over it when the composition is confirmed, and cannot thereafter protect it, by injunction, from seizure

[209] Hewes v. Rand, 129 Mass. 519.

[210] In re French (D. C.) 181 Fed. 583, 25 Am. Bankr. Rep. 77.

[211] Wood & Selick v. Vanderveer, 55 App. Div. 549, 67 N. Y. Supp. 371.

[212] In re Berler Shoe Co. (D. C.) 246 Fed. 1018, 40 Am. Bankr. Rep. 470.

[213] Oilfields Syndicate v. American Improvement Co. (C. C. A.) 260 Fed. 905, 44 Am. Bankr. Rep. 490; In re Cyclopean Co., 167 Fed. 971, 93 C. C. A. 447, 21 Am. Bankr. Rep. 679; In re Stowell (D. C.) 24 Fed. 468; Stewart-Noble Drug Co. v. Bishop-Babcock-Becker Co., 62 Colo. 197, 162 Pac. 159; Vaughn-Carlton Co. v. Studebaker Corp., 22 Ga. App. 684, 97 S. E. 99. A discharge of a bankrupt by means of a composition with creditors does not discharge the lien of a judgment rendered more than four months before the filing of the petition in bankruptcy. Oilfields Syndicate v. American Improvement Co. (D. C.) 256 Fed. 979, 43 Am. Bankr. Rep. 325; Cobb v. First Nat. Bank of Livonia (D. C.) 263 Fed. 1000, 45 Am. Bankr. Rep. 48. But compare American Can Co. v. Schenkel, 110 Misc. Rep. 345, 180 N. Y. Supp. 102.

[214] Flower v. Greenebaum (C. C.) 50 Fed. 190.

[215] In re Lytle, 11 Phila. (Pa.) 522, 14 N. B. R. 457, Fed. Cas. No. 8,650. Compare Cavanna v. Bassett, 9 Biss. 435, 3 Fed. 215.

[216] American Woolen Co. v. Cohen, 142 App. Div. 880, 127 N. Y. Supp. 787.

under process from a state court.[217] But a creditor holding security cannot play fast and loose with the composition proceedings, and ask to have his share of the composition impounded to await the result of a suit in which he seeks to establish and enforce his lien, so that he may claim it if unsuccessful.[218] But notes of a bankrupt which are secured only by the personal indorsement of a third person may be included as unsecured debts in a composition with creditors, and the confirmation of such composition will discharge the bankrupt as maker of the notes.[219] And an attachment levied about a month before the adjudication of bankruptcy, on a debt included in and released by the composition, will be dissolved thereby.[220]

§ 661. Same; Joint Liability of Others With Bankrupt.—A composition in bankruptcy, while it discharges the bankrupt himself from any further liability for his debts, subject to the exceptions and limitations mentioned in the preceding sections, does not operate to exonerate or release any person who is jointly liable with him for the payment of the same debt, or who is collaterally liable therefor, in the character of a surety, guarantor, or otherwise.[221] Thus, a composition in bankruptcy proceedings against the maker of a note does not discharge the indorser, since the release of the maker is effected by operation of law and not by the act or consent of the parties.[222]

[217] In re Lytle, 11 Phila. (Pa.) 522, 14 N. B. R. 457, Fed. Cas. No. 8,650.

[218] York Mfg. Co. v. Merchants' Refrigerating Co., 168 Fed. 108, 21 Am. Bankr. Rep. 748.

[219] Stauffer, Eshleman Co. v. Abington Hardware & Furniture Co., 131 La. 715, 60 South. 202.

[220] Miller v. Mackenzie, 43 Md. 404, 13 N. B. R. 496, 20 Am. Rep. 111. And see In re Lilienthal, 256 Fed. 819, 168 C. C. A. 165, 43 Am. Bankr. Rep. 665.

[221] Easton Furniture Mfg. Co. v. Caminez, 146 App. Div. 436, 131 N. Y. Supp. 157; Guild v. Butler, 122 Mass. 498, 23 Am. Rep. 378; In re Burchell, 4 Fed. 406; Mason & Hamlin Organ Co. v. Bancroft, 1 Abb. N. C. (N. Y.) 415; Moore v. Stanwood, 98 Ill. 605; Hem v. Allen, 179 Ill. App. 223; E. S. Parks Shellac Co. v. Harris, 237 Mass. 312, 129 N. E. 617; McClintic-Marshall Co. v. City of New Bedford (Mass.) 131 N. E. 444; Sprague, Warner & Co. v. Fischer, 199 Mich. 601, 165 N. W. 858; Martin Furniture Co. v. Massey, 135 Tenn. 338, 186 S. W. 451.

[222] In re American Paper Co. (D. C.) 255 Fed. 121, 42 Am. Bankr. Rep. 716; Silverman v. Rubenstein (Sup.) 162 N. Y. Supp. 733; Bromberg v. Self, 16 Ala. App. 627, 80 South. 631.

CHAPTER XXXIII

DISCHARGE OF BANKRUPT

§ 662. **Right to Discharge in General.**—The granting of a discharge to a bankrupt is not optional or discretionary with the court. The provision of the statute is that "the judge shall hear the application for a discharge" and "discharge the applicant" unless statutory cause for refusing the discharge is shown.[1] The right to a general discharge from one's debts by means of a proceeding in bankruptcy is of course purely statutory, in the sense that it can be granted or withheld, or coupled with conditions or limitations, as the legislative department may deem best.[2] But when it has been granted as an integral part of the system of bankruptcy, then, the conditions having been fulfilled, it becomes a legal right of the particular bankrupt, and can be denied only when some objection is filed and affirmatively sustained based upon a reason specifically enumerated in the statute.[3] The purpose of the act being to release honest debtors from the burden of their debts, and its provisions being very liberal as concerns the discharge of the bankrupt, it should be given a liberal construction in his favor on this point.[4] At the same time, a discharge in bankruptcy, while claimable as a right in a proper case, is a high privilege, and, to earn it, the bankrupt must comply strictly with the provisions of the statute, and it must be shown that all the steps required to be taken have been taken,[5] and also, it is said, the bankrupt must have taken all proper steps to expedite the proceedings.[6] But objections must be founded on one or more of the statutory grounds, and it is only upon one or other of these grounds that the discharge can be refused.[7] The bankrupt, for instance, cannot be punished by withholding his discharge for improvident or reckless financial transactions which occurred long before the filing of the petition.[8]

[1] Bankruptcy Act 1898, § 14b; In re Walsh, 256 Fed. 653, 168 C. C. A. 47, 43 Am. Bankr. Rep. 266; In re Whitney (D. C.) 250 Fed. 1005, 41 Am. Bankr. Rep. 548; In re Lockwood (D. C.) 240 Fed. 158, 39 Am. Bankr. Rep. 478.

[2] In re Armstrong (D. C.) 248 Fed. 292, 40 Am. Bankr. Rep. 770.

[3] In re Kaufman, 239 Fed. 305, 152 C. C. A. 293, 38 Am. Bankr. Rep. 648.

[4] In re Rosenfeld (C. C. A.) 262 Fed. 876, 44 Am. Bankr. Rep. 390; In re Jacobs, 241 Fed. 620, 154 C. C. A. 378, 39 Am. Bankr. Rep. 385; In re Braus, 248 Fed. 55, 160 C. C. A. 195, 40 Am. Bankr. Rep. 668.

[5] Popejoy v. Diedrich, 68 Colo. 383, 189 Pac. 841; In re Levenstein (D. C.) 180 Fed. 957, 24 Am. Bankr. Rep. 822.

[6] In re Wolfowitz, 192 Fed. 105, 112 C. C. A. 445, 27 Am. Bankr. Rep. 558.

[7] In re Epstein (D. C.) 248 Fed. 191, 40 Am. Bankr. Rep. 406; Robinson v. J. R. Williston & Co. (C. C. A.) 266 Fed. 970, 45 Am. Bankr. Rep. 619.

[8] In re Boner (D. C.) 169 Fed. 727, 22 Am. Bankr. Rep. 151.

The right to apply for a discharge in bankruptcy is personal to the bankrupt, and his failure or delay in applying therefor cannot affect the rights of third persons, other than in so far as he may fail to procure a discharge from subsequent liability on their claims.[9] Further, the right of discharge in bankruptcy is essentially a constituent of the proceedings in which the adjudication and the administration of the bankrupt estate are had, and it cannot be detached and taken to a court of another jurisdiction.[10] It appears from the language of the statute that an application for discharge must be filed while the proceedings are still "pending" in the bankruptcy court. But it has been held that where the referee, without the knowledge of the bankrupt, entered an order discharging the trustee, there being no assets and no claims proved, this is not such a final disposition of the case as to deprive the bankrupt of his right to a discharge.[11]

Corporations, as well as natural persons, are entitled to the benefit of a discharge in bankruptcy.[12] And in a proceeding against a partnership, although no adjudication is made against the partners, they and their estates are brought within the jurisdiction of the court, which may on their application discharge them from further liability for the partnership debts.[13]

§ 663. Same; Responsibility for Acts of Partner, Agent, or Employé.—Under former bankruptcy acts it was held that misconduct in the management of a partnership business, if of such a character as to come within the statutory definition of the grounds for refusing a discharge, would be effective to bar the discharge of both partners, though one alone was guilty or reprehensible and the other entirely innocent.[14] But this doctrine is not favored by the modern authorities. Almost without exception they hold that the making of a false statement for credit, the concealment of assets, or the failure to keep books of account, when wholly the act of one partner, may be sufficient to prevent the granting of a discharge to that partner or to the firm, but will not be ground for refusing a discharge to another partner who did not participate in the wrongful act and had no knowledge of it.[15] Even the making of a statement for credit by one partner, from facts stated to him by

[9] In re Skaats (D. C.) 233 Fed. 817, 37 Am. Bankr. Rep. 579.

[10] Armstrong v. Norris, 247 Fed. 253, 159 C. C. A. 347, 40 Am. Bankr. Rep. 735.

[11] In re Forsyth, 9 Biss. 560, 4 Fed. 629.

[12] In re Hargadine-McKittrick Dry Goods Co. (D. C.) 239 Fed. 155, 39 Am. Bankr. Rep. 142. And see, supra, § 150.

[13] Armstrong v. Norris, 247 Fed. 253, 159 C. C. A. 347, 40 Am. Bankr. Rep. 735.

See Peterson v. Peregoy & Moore Co., 180 Iowa, 325, 163 N. W. 224.

[14] In re George, 1 Low. 409, Fed. Cas. No. 5,325; In re Colcord, 2 Hask. 455, Fed. Cas. No. 2,970a.

[15] Ragan, Malone & Co. v. Cotton & Preston, 200 Fed. 546, 118 C. C. A. 640, 29 Am. Bankr. Rep. 597; Hardie v. Swafford Bros. Dry Goods Co., 165 Fed. 588, 91 C. C. A. 426, 20 L. R. A. (N. S.) 785, 21 Am. Bankr. Rep. 457; Frank v. Mich-

his copartner, who was to furnish the entire capital for the business, though in fact untrue, will not defeat the right of the partner making it to his discharge in bankruptcy, where the falsity of the material statements so made was unknown to him.[16] And if fraud can in any case be imputed to an innocent partner on account of the fraud of his copartner, as respects the false or improper keeping of books of account, it can only be in cases where the fraudulent entries or omissions have reference to partnership transactions, so as to fall within the general scope of the partner's authority. And the fraud of a partner in so keeping the firm books, of which he had sole charge, as to conceal withdrawals of money by himself from his partner as well as from creditors cannot be imputed to the innocent partner, so as to bar his right to a discharge.[17]

On similar principles, where a business belonging to a married woman is conducted wholly by her husband, to whom she confides its entire management, and he, without her knowledge or privity, conceals property from the creditors, and the wife becomes bankrupt, she is not to be deprived of her right to a discharge by reason of her husband's misconduct, being herself guiltless of any actual fraudulent intent, and her negligence in relation to the business not being equivalent to fraud, for the purposes of a penal statute, though perhaps, in this case, her discharge may be made conditional upon her using all reasonable means within her power to discover to the bankruptcy court the assets so concealed.[18] Still there are decisions holding that if the act or omission in question fell within the general scope of the authority confided to a manager or agent, it must be imputed to the principal.[19] Thus it is said that one appointed by a duly executed writing as manager and attorney in fact for the owner in conducting a mercantile business has such authority that a materially false property statement made by him for the purpose of obtaining goods for sale in such business on credit is one made by the owner, so as to bar the latter's discharge.[20] And where the manager of a bankrupt firm (not himself a member of the firm), acting within the scope of his authority, signed a false statement of the firm's financial condition for the purpose of obtaining credit, this was held sufficient to prevent the discharge of either of the partners, though one of them was a woman advanced in years, who took no part in the business, but

igan Paper Co., 179 Fed. 776, 103 C. C. A. 268, 24 Am. Bankr. Rep. 261; In re Cotton & Preston, 183 Fed. 181, 25 Am. Bankr. Rep. 517; In re Schachter, 170 Fed. 683, 22 Am. Bankr. Rep. 389.

[16] W. S. Peck Co. v. Lowenbein, 178 Fed. 178, 101 C. C. A. 498, 24 Am. Bankr. Rep. 138.

[17] In re Schultz, 109 Fed. 264, 6 Am. Bankr. Rep. 91.

[18] In re Hyman, 97 Fed. 195, 3 Am. Bankr. Rep. 169; In re Meyers, 105 Fed. 353, 5 Am. Bankr. Rep. 4.

[19] In re Janavitz, 219 Fed. 876, 135 C. C. A. 546, 34 Am. Bankr. Rep. 105; In re Landersman (D. C.) 239 Fed. 766, 38 Am. Bankr. Rep. 685.

[20] In re Reed, 191 Fed. 920, 26 Am. Bankr. Rep. 286.

intrusted her interests to such manager, who was her son.[21] So it has been ruled that a merchant who has failed to keep proper books of account is not entitled to his discharge in bankruptcy, though the fault was wholly with his bookkeeper, as the law puts upon the merchant the duty of seeing that his books are properly kept.[22] And the same ruling was made in the case of a bankrupt who signed a blank statement of his financial condition and directed his bookkeeper to fill it out. This was done and the statement submitted to a bank, which, relying on its correctness, lent the bankrupt money. The statement was false in material particulars, but this the bankrupt did not know, as he relied on the bookkeeper's honesty and accuracy. Nevertheless his discharge was refused.[23] And where the bankrupt did business through the medium of a corporation, which was merely a form of business activity, a concealment of assets belonging to him will be sufficient to bar his discharge, though the assets would first be applicable to the creditors of the corporation.[24]

§ 664. Same; Effect of Prior Application or Decision.—An order refusing to grant a discharge to a bankrupt, if in the nature of a final determination on the merits of the controversy, is a bar to any second application for discharge in the same proceedings, and must be regarded as res judicata as to the matters involved,[25] though it may be otherwise if the refusal was based merely on some irregularity in the proceedings.[26] Though such an attempt is rarely made, it is not uncommon for a bankrupt who has failed to obtain his discharge to file a new petition in bankruptcy within a short time and renew the endeavor to secure a release from his debts. But it is held that a subsequent proceeding in bankruptcy for the sole purpose of obtaining a discharge, to which a prior proceeding has determined that the bankrupt is not entitled, presents no ground for relief, is vexatious, and cannot lawfully be maintained.[27] And this rule is applied even though the bankrupt's applica-

[21] In re Schwartz & Co., 201 Fed. 166, 28 Am. Bankr. Rep. 670.

[22] In re Hammond, 1 Low. 381, 3 N. B. R. 273, Fed. Cas. No. 5,999.

[23] In re Gilpin, 160 Fed. 171, 20 Am. Bankr. Rep. 374.

[24] In re Berger, 200 Fed. 325, 29 Am. Bankr. Rep. 712.

[25] In re Brockway, 21 Blatchf. 136, 23 Fed. 583; In re Royal, 113 Fed. 140, 7 Am. Bankr. Rep. 636. A bankrupt's acquittal on the charge of fraudulently concealing his assets does not preclude refusing him a discharge in bankruptcy on specifications that he had concealed his books of account and had obtained credit by false statements. In re Simon, (D. C.) 268 Fed. 1006, 46 Am. Bankr. Rep. 170.

[26] In re Connelly, 2 Cranch C. C. 415, Fed. Cas. No. 3,111.

[27] Kuntz v. Young, 131 Fed. 719, 65 C. C. A. 477, 12 Am. Bankr. Rep. 505; Monk v. Horn (C. C. A.) 262 Fed. 121, 44 Am. Bankr. Rep. 472. In re Fiegenbaum, 121 Fed. 69, 57 C. C. A. 409, 9 Am. Bankr. Rep. 595; In re Kuffler, 168 Fed. 1021, 93 C. C. A. 671, 22 Am. Bankr. Rep. 289. But compare In re Claff, 111 Fed. 506, 7 Am. Bankr. Rep. 128. And see In re Farrell, 5 N. B. R. 125, Fed. Cas. No. 4,680, as to a new proceeding in bank-

tion for a discharge in the earlier proceeding was dismissed for want of prosecution.[28] And in fact there are numerous decisions holding that, although the question of a discharge was never tried or determined in the first proceeding, still the bankrupt's failure to apply for it within the time limited is substantially equivalent to a judgment by default in favor of his creditors, and renders the question of his right to receive it res judicata, and so will constitute sufficient ground for refusing to discharge him in a subsequent proceeding in bankruptcy, at least so far as concerns the debts which were provable under the earlier petition, though he may be discharged in the later case as against new debts.[29] But it has been held that an order refusing to discharge a bankrupt under the bankruptcy act of 1867 does not estop the bankrupt from applying for a discharge in a proceeding instituted under the act of 1898, upon the same facts and even as to the same debts.[30] But a judgment denying a debtor a discharge from a debt under a state insolvency law is not an adjudication of his right to a discharge from such debt in bankruptcy, where it does not appear upon what grounds the judgment was based.[31]

The statute also provides that a discharge may not be granted to the bankrupt if he has, "in voluntary proceedings, been granted a discharge in bankruptcy within six years."[32] This provision has no application

ruptcy where the discharge was formerly refused only on the ground that it was not applied for in due time. See also Bluthenthal v. Jones, 51 Fla. 396, 41 South. 533, 13 L. R. A. (N. S.) 629, 120 Am. St. Rep. 181, as to the effect of failure on the part of creditors to raise any objection to the second application for discharge, though notified thereof.

[28] Pollet v. Cosel, 179 Fed. 488, 103 C. C. A. 68, 24 Am. Bankr. Rep. 678.

[29] Horner v. Hamner, 249 Fed. 134, 161 C. C. A. 186, L. R. A. 1918E, 465, 40 Am. Bankr. Rep. 817; In re Schwartz (D. C.) 248 Fed. 841, 41 Am. Bankr. Rep. 246; Siebert v. Dahlberg, 218 Fed. 793, 134 C. C. A. 460, 33 Am. Bankr. Rep. 272; In re Cooper (D. C.) 236 Fed. 298, 37 Am. Bankr. Rep. 625; In re Warnock (D. C.) 239 Fed. 779, 39 Am. Bankr. Rep. 539. In re Bacon, 193 Fed. 34, 113 C. C. A. 358, 27 Am. Bankr. Rep. 736 (writ of error denied in Bacon v. Buffalo Cold Storage Co., 225 U. S. 701, 32 Sup. Ct. 836, 56 L. Ed. 1264); Kuntz v. Young, 131 Fed. 719, 65 C. C. A. 477, 12 Am. Bankr. Rep. 505; In re Richter, 190 Fed. 905, 27 Am. Bankr. Rep. 215; In re Springer, 199 Fed. 294, 29 Am. Bankr. Rep. 96; In re Westbrook, 186 Fed. 414, 26 Am. Bankr. Rep. 181; In re Stone, 172 Fed. 947, 23 Am. Bankr. Rep. 24; In re Von Borries, 168 Fed. 718, 21 Am. Bankr. Rep. 849; In re Weintraub, 133 Fed. 1000, 13 Am. Bankr. Rep. 711.

[30] In re Herrman, 106 Fed. 987, 46 C. C. A. 77; In re Herrman (D. C.) 134 Fed. 566.

[31] In re Bybee (D. C.) 124 Fed. 1011, 10 Am. Bankr. Rep. 761.

[32] Bankruptcy Act 1898, § 14b, as amended by Act Cong. June 25, 1910, § 6. And see In re Chase (D. C.) 186 Fed. 408, 26 Am. Bankr. Rep. 456. The bankrupt may be granted a discharge in voluntary proceedings as to debts from which, in a voluntary proceeding had within six years previous, he was not discharged because the application was not filed within the twelve-month period. In re Skaats (D. C.) 233 Fed. 817, 37 Am. Bankr. Rep. 579. For the purpose of this provision a release obtained by the confirmation of a composition with creditors is the same thing as a "discharge" in bankruptcy. In re Radley (D. C.) 252 Fed. 205, 42 Am. Bankr. Rep. 261. Though the law precludes more than one discharge in voluntary bankruptcy within a period of six years, an insolvent may have more than one adjudication within that period and his property be distribut-

to cases in which a discharge was applied for before its enactment, but it applies to all cases in which the application for discharge is made after its passage, and such application does not expose it to the objection of being retroactive legislation.[33] The words "in voluntary proceedings" refer to the proceedings in which the prior discharge was granted, and not to the proceedings in which the second discharge is sought, so that it makes no difference in the application of the provision whether the second proceeding is based on a voluntary or an involuntary petition.[34] The period of six years is to be measured backward from the time of the hearing on the application for the second discharge, and not from the time of the commencement of the second proceeding.[35]

§ 665. Parties Entitled to Oppose Discharge.—The provision of the statute is that opposition to a bankrupt's application for discharge may be made by "the trustee and other parties in interest," [36] but there is a special limitation as to intervention by the trustee which will be noticed later. Any creditor of the bankrupt who has a provable claim is a party in interest and entitled to oppose the discharge, though he has not proved his claim or secured its allowance.[37] In that case he must of course prove, or it must clearly appear by the evidence before the court, that he is really a creditor.[38] And specifications of objection filed by

ed among his creditors, though he can obtain but one discharge. In re Johnson (D. C.) 233 Fed. 841, 37 Am. Bankr. Rep. 597.

[33] In re Neely (D. C.) 134 Fed. 667, 12 Am. Bankr. Rep. 407; In re Seaholm, 136 Fed. 144, 69 C. C. A. 142, 14 Am. Bankr. Rep. 292.

[34] In re Seaholm, 136 Fed. 144, 69 C. C. A. 142, 14 Am. Bankr. Rep. 292; In re Neely, 134 Fed. 667, 12 Am. Bankr. Rep. 407.

[35] In re Haase, 164 Fed. 1022, 21 Am. Bankr. Rep. 928; In re Jordan, 142 Fed. 292, 15 Am. Bankr. Rep. 449; In re Little, 137 Fed. 521, 70 C. C. A. 105, 13 Am. Bankr. Rep. 640. See In re Dunphy, 206 Fed. 680, 30 Am. Bankr. Rep. 760; In re Rubin (D. C.) 259 Fed. 607, 43 Am. Bankr. Rep. 729.

[36] Bankruptcy Act 1898, § 14b, as amended by Act Cong. June 25, 1910, 36 Stat. 838. As to the meaning of the phrase "parties in interest," see In re Nathanson, 155 Fed. 645, 19 Am. Bankr. Rep. 56; Dutton v. Freeman, 5 Law Rep. 447, Fed. Cas. No. 4,210. A mere volunteer or stranger to the proceeding cannot be heard to object to the bankrupt's application for discharge. In re Walsh, 256 Fed. 653, 168 C. C. A. 47, 43 Am. Bankr. Rep. 266; In re White (D. C.) 238 Fed. 874, 38 Am. Bankr. Rep. 481.

[37] In re Nathanson, 155 Fed. 645, 19 Am. Bankr. Rep. 56; In re Frice, 96 Fed. 611, 2 Am. Bankr. Rep. 674; In re Groome, 1 Fed. 464; In re Murdock, 1 Low. 362, 3 N. B. R. 146, Fed. Cas. No. 9,939; In re Sheppard, 1 N. B. R. 439, Fed. Cas. No. 12,753; In re Book, 3 McLean, 317, Fed. Cas. No. 1,637; In re Smith, 8 Blatchf. 461, Fed. Cas. No. 12,977; In re Boutelle, Fed. Cas. No. 1,705; Haxtun v. Corse, 2 Barb. Ch. (N. Y.) 506. Compare Talcott v. Friend, 179 Fed. 676, 103 C. C. A. 80, 24 Am. Bankr. Rep. 708. And see the following for contrary decisions under the act of 1867: In re Balmer, 3 Hughes, 637, Fed. Cas. No. 820; In re King, Fed. Cas. No. 7,784; In re Cohaus, Fed. Cas. No. 2,959b. The fact that objections are interposed to the allowance of a given creditor's claim against the bankrupt does not estop the objecting creditor from opposing the discharge for the omission of such liability from a financial statement on which credit was extended. In re Waite (D. C.) 223 Fed. 853, 35 Am. Bankr. Rep. 189.

[38] In re Boutelle, 2 N. B. R. 129, Fed. Cas. No. 1,705.

one not shown to be a creditor should state the facts showing how and why he is a party in interest.[39] But one who has a suit pending against the bankrupt, for the recovery of a debt which is contested, is entitled to contest the application for discharge, though the claim has not been proved in the bankruptcy proceeding.[40] Where a person is named as a creditor in the bankrupt's schedule, that fact will constitute prima facie evidence that he has the right to appear in opposition to the discharge,[41] though, on the other hand, if the bankrupt, in pursuance of an arrangement with a certain creditor, omits the debt from his schedule, the creditor will not be permitted to object to the discharge, at least on the ground of such omission.[42] The term "creditor," as descriptive of one having the right to oppose the discharge in the character of a party in interest, will include a person having an equitable claim against the estate,[43] or a contingent and unliquidated claim which, for that reason, is not provable in the bankruptcy proceeding,[44] or a claim secured by a mortgage,[45] and even a debt barred by the statute of limitations at the time when the creditor filed his specifications of objection.[46] But opposition cannot be made by a creditor whose claim is not provable in the bankruptcy proceedings or is of such a character that it would not be affected by the discharge.[47] A claim which is illegal does not constitute the holder a "creditor" for this purpose, but if the bankrupt has allowed it to be filed and proved, without interposing any objection to it or requesting the trustee to do so, it seems that he will be estopped to deny the standing of the creditor when the question of his discharge comes up.[48] Where the creditor is a corporation, its stockholders are not parties in interest in such sense as to be entitled individually to oppose the bankrupt's discharge.[49] And where a partnership which had proved a claim against the estate is afterwards dissolved, without any disposition

[39] In re Levey, 133 Fed. 572, 13 Am. Bankr. Rep. 312.

[40] In re Conroy, 134 Fed. 764, 14 Am. Bankr. Rep. 249.

[41] In re Barrager, 191 Fed. 247, 27 Am. Bankr. Rep. 366; Haley v. Pope, 206 Fed. 266, 124 C. C. A. 330, 30 Am. Bankr. Rep. 644.

[42] In re Whetmore, Deady, 585, Fed. Cas. No. 17,508.

[43] In re Tebbetts, 5 Law Rep. 259, Fed. Cas. No. 13,817.

[44] Ex parte Traphagen, Fed. Cas. No. 14,140. See In re Menzin, 238 Fed. 773, 151 C. C. A. 623, 38 Am. Bankr. Rep. 435.

[45] In re Ely, Fed. Cas. No. 4,428.

[46] In re Westbrook, 186 Fed. 414, 26 Am. Bankr. Rep. 181.

[47] In re Meikleham (D. C.) 236 Fed. 401, 38 Am. Bankr. Rep. 324; In re Nathanson (D. C.) 155 Fed. 645, 19 Am. Bankr. Rep. 56. But compare In re Armstrong (D. C.) 248 Fed. 292, 40 Am. Bankr. Rep. 770, holding that a creditor having a provable claim may oppose the discharge on the ground that the bankrupt obtained credit on false statements, although such creditor's claim would not be barred by the discharge. A creditor cannot oppose the discharge and at the same time sue on his claim in the state courts, on the ground that it is not provable in bankruptcy and not dischargeable. In re Menzin (D. C.) 233 Fed. 333, 37 Am. Bankr. Rep. 468.

[48] In re A. B. Carton & Co., 148 Fed. 63, 17 Am. Bankr. Rep. 343.

[49] In re Tallmadge, Fed. Cas. No. 13,738.

being made of the claim as between the partners, no one of them can maintain opposition to the bankrupt's discharge without showing affirmatively that all consent.[50]

It is also important to notice that where the ground of opposition is fraud on the part of the bankrupt (as, in the case of concealing or transferring property, or obtaining credit on a false statement), the right to make the objection is not confined to the person defrauded, but it may be made by any other creditor or party in interest.[51] And further, the right of creditors to oppose a bankrupt's discharge on the ground of an alleged fraudulent transaction does not depend on their having taken any legal proceedings, through the trustee or otherwise, to recover the property affected.[52]

Creditors may, however, be estopped from opposing the bankrupt's application for discharge. Thus, a creditor will be estopped from setting up in opposition to such application matters which have already been litigated between them to final decree in a state court, the decision therein having been adverse to the contention of the creditor.[53] And a similar estoppel is raised against a creditor who participated in a previous general assignment by the bankrupt, to the extent of ratifying it and taking measures under it to secure his claim, or accepting a preference which it gave him,[54] though it has been held that the mere acceptance of a dividend under such an assignment will not estop the creditor if he had no power to dissent from the assignment or to repudiate or avoid it.[55] A creditor may also be estopped from setting up in opposition to the discharge a false financial statement made by the bankrupt, and on which he obtained credit from such creditor, where the creditor has expressly waived the fraud, by admitting in writing that any inaccuracies in the statement were inadvertent and without wrongful intent.[56]

As to opposition by the trustee in bankruptcy, this right is given to him by the 1910 amendment to the bankruptcy act, but only on condition that he "shall be authorized so to do at a meeting of creditors called for that purpose." Unless so authorized, he has no right to

[50] In re Hendrick, 143 Fed. 647, 16 Am. Bankr. Rep. 218. See In re Hagy, 220 Fed. 665, 136 C. C. A. 307, 34 Am. Bankr. Rep. 319.

[51] In re A. B. Carton & Co., 148 Fed. 63, 17 Am. Bankr. Rep. 343; In re Harr, 143 Fed. 421, 16 Am. Bankr. Rep. 213. But compare In re Burk, Deady, 425, 3 N. B. R. 296, Fed. Cas. No. 2,156. Creditors may object to the bankrupt's discharge because of false statements made to obtain credit from another creditor, although that creditor does not object. In re Kretz (D. C.) 212 Fed. 784, 32 Am. Bankr. Rep. 365.

[52] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715.

[53] In re Antisdel, 18 N. B. R. 289, Fed. Cas. No. 490.

[54] In re Jones, 12 N. B. R. 48, Fed. Cas. No. 7,452; In re Schuyler, 3 Ben. 200, 2 N. B. R. 549, Fed. Cas. No. 12,494.

[55] In re Kraft, 3 Fed. 892.

[56] In re Russell, 176 Fed. 253, 100 C. C. A. 77, 23 Am. Bankr. Rep. 850.

intervene and file objections.[57] But on the other hand, when he has obtained authority from the creditors, neither the referee nor the court has power to withhold from him the right to file objections, or to prescribe as conditions to its exercise that no expense shall be imposed on the estate or that it shall not delay settlement beyond a stated time.[58] The requirement of the statute that authority to the trustee to file objections must be given at a meeting of the creditors called for that purpose is satisfied if the authority is given at a meeting called by the referee; it is not necessary that the judge should issue the call and hold the meeting, or that he should specially authorize such call and meeting.[59] The District Court, sitting in bankruptcy, should not on its own motion interpose objections to the bankrupt's application for discharge, since it sits to try, and not to create, the issue.[60]

§ 666. Grounds for Refusal of Discharge.—The precedent conditions having been complied with, the grant or refusal of a discharge does not rest in the discretion of the judge, but the applicant is entitled to a discharge as a matter of right, unless he is found guilty of some one of the prescribed acts or omissions.[61] There must of course be jurisdiction of the application, and it is said that the court is without jurisdiction unless there are dischargeable debts, and where the only claims listed by a bankrupt, or filed, are stated in his schedule to be disputed, and are in fact in litigation, the court has no power to grant him a discharge.[62] Aside from these cases, however, a discharge can be refused only on one or more of the specific grounds mentioned in the statute not on account of any acts or conduct on the part of the bankrupt however reprehensible, which do not clearly come within the words of the law.[63] And

[57] In re Hockman, 205 Fed. 330, 30 Am. Bankr. Rep. 921. See In re Levey, 133 Fed. 572; In re White, 248 Fed. 115, 160 C. C. A. 255, 41 Am. Bankr. Rep. 458. Where, after notice given of the hearing on the trustee's petition to have leave to oppose the bankrupt's discharge, no creditor appears either to contest or to authorize such action, the referee has no authority to order the trustee to oppose the discharge. In re White (D. C.) 238 Fed. 874, 38 Am. Bankr. Rep. 481.

[58] In re Churchill, 197 Fed. 114, 28 Am. Bankr. Rep. 603.

[59] In re Reiff, 205 Fed. 399, 29 Am. Bankr. Rep. 753.

[60] In re Walsh, 256 Fed. 653, 168 C. C. A. 47, 43 Am. Bankr. Rep. 266.

[61] In re Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468.

[62] In re Gulick, 190 Fed. 52, 26 Am. Bankr. Rep. 632.

[63] Woodruff v. Cheeves, 105 Fed. 601, 44 C. C. A. 631, 5 Am. Bankr. Rep. 296; Strause v. Hooper, 105 Fed. 590, 5 Am. Bankr. Rep. 225; In re Clark, Biss. 73, 3 N. B. R. 16, Fed. Cas. No. 2,800; In re Elliott, 2 N. B. R. 110, Fed. Cas. No. 4,391. But in a case where the bankrupt's financial transaction showed that his financial difficulties were the result of suspicious and fraudulent dealings, and he had been guilty of gross misrepresentations as to his solvency, and his assets in bankruptcy were purchased by a pawnbroker, who at once installed the bankrupt as manager of the business, with the same apparent control thereof as before, the court held, with severe animadversions that the bankrupt was not entitled to a discharge. In re Miller, 135 Fed. 591, 14 Am. Bankr. Rep.

these specified grounds for denying a discharge are not in the nature of offenses or forfeitures of the right to a discharge, but are rather in the nature of violations of conditions precedent.[64] It is therefore no sufficient ground for refusing to discharge the bankrupt that he misused and wasted his estate before the filing of the petition,[65] or that his petition was filed merely for the purpose of defeating the claims of the judgment creditor who objects.[66] But it has been ruled that the court is not required to grant a discharge to a bankrupt, knowing at the time that facts exist which would render such discharge revocable for fraud had they first come to light after it was granted.[67] Under the act of 1867, the bankrupt was required to show that he had in all respects conformed to the provisions of the act, and the judge was required to be satisfied of this before granting the discharge; and it was held that the bankrupt was made responsible for the regularity of the proceedings, and was bound to see that all the necessary steps were regularly taken, or he could not have his discharge.[68] But under the present statute, an application for discharge is considered to be an independent proceeding, in which the jurisdiction and the validity of the prior proceedings are not involved,[69] so that a discharge cannot be denied on account of an irregularity in the former steps of the bankruptcy, such as an error in the name of the bankrupt in giving notices to creditors.[70] While the commission of an offense punishable by imprisonment under the terms of the bankruptcy law is made ground for withholding a discharge, this privilege cannot be denied to a bankrupt because he has violated a criminal statute of the state, not denouncing the particular offenses made punishable by the bankruptcy act,[71] or because of the alleged offense of larceny, or larceny as bailee, committed by the bankrupt against the objecting creditor more than a year before the petition is filed.[72] But on

329. But one of the statutory grounds for refusing a discharge had already been established in this case.

[64] In re Seeley, 19 N. B. R. 1, Fed. Cas. No. 12,628.

[65] In re Rogers, 1 Low. 423, 3 N. B. R. 564, Fed. Cas. No. 12,001.

[66] In re Taylor, 188 Fed. 479, 26 Am. Bankr. Rep. 143. But where a schoolteacher prepared for a bankruptcy in which no assets should be disclosed, in order to avoid payment for an expensive fur coat, it was held that her omission from the schedules of salary due at the time they were verified would preclude her discharge. In re Garrity, 247 Fed. 310, 159 C. C. A. 404, 40 Am. Bankr. Rep. 664.

[67] In re Luftig, 162 Fed. 322, 15 Am. Bankr. Rep. 773.

[68] In re Bellamy, 1 Ben. 426, 1 N. B. R. 96, Fed. Cas. No. 1,267; In re Littlefield, 1 Low, 331, 3 N. B. R. 57, Fed. Cas. No. 8,398.

[69] In re Walrath, 175 Fed. 243, 24 Am. Bankr. Rep. 541.

[70] In re Elkind, 175 Fed. 64, 23 Am. Bankr. Rep. 166.

[71] In re McLellan, 204 Fed. 482, 30 Am. Bankr. Rep. 325. The provision which bars a discharge if the bankrupt has "committed an offense punishable by imprisonment as herein provided" is limited to acts made offenses by the Bankruptcy Act. In re Oliner (C. C. A.) 262 Fed. 734, 44 Am. Bankr. Rep. 450, 45 Am. Bankr. Rep. 185.

[72] In re Wolf, 159 Fed. 299, 20 Am. Bankr. Rep. 304.

the other hand, to deprive a bankrupt of his right to a discharge, it is not necessary that he shall have been convicted of one of the offenses enumerated in the act, but it is enough if it be shown by clear and convincing evidence that he has been guilty of such offense.[73] The sections making the offense of knowingly and fraudulently making a false oath by the bankrupt in the bankruptcy proceedings, in respect to his property, a ground for denying him a discharge, do not extend to previous conduct or transactions which are merely fraudulent as to creditors and not made criminal.[74] Finally, the insanity of a bankrupt, though it has prevented his examination by the creditors and still continues, is not a bar to his discharge, as it is not one of the grounds specified for refusing a discharge, and especially in view of the fact that the statute provides that the insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as if insanity had not supervened.[75]

§ 667. Same; Want of Jurisdiction.—In several decisions under former bankruptcy laws, it was held competent for creditors to oppose a bankrupt's application for discharge on the ground that the court had no jurisdiction of the case originally, that is, no jurisdiction to entertain the petition and make the adjudication, either because the bankrupt was not locally within the jurisdiction of the court, or for want of proper jurisdictional averments in the petition, and if this was shown, it was ground for refusing the discharge.[76] But the better modern opinion is that, where an adjudication in bankruptcy has been duly made, upon a petition sufficient upon its face, and without any challenge to the jurisdiction of the court, it is final and conclusive, not only in collateral proceedings, but also in the further proceedings in the same case, and if it has not been appealed from, reversed, or set aside, creditors cannot oppose the bankrupt's application for discharge on the ground of an original want of jurisdiction over him.[77] Clearly this cannot be done by a creditor who has recognized the validity of the adjudication by filing and proving his claim, participating in the election of a trustee, and sharing in the distribution of the estate.[78]

[73] In re Shear, 201 Fed. 460, 29 Am. Bankr. Rep. 688; In re George, 1 Low. 409, Fed. Cas. No. 5,325.

[74] Fellows v. Freudenthal, 102 Fed. 731, 4 Am. Bankr. Rep. 490. And see In re Warne, 10 Fed. 377.

[75] In re Miller, 133 Fed. 1017, 13 Am. Bankr. Rep. 345.

[76] In re Groome, 1 Fed. 464; In re Leighton, 4 Ben. 457, 5 N. B. R. 95, Fed. Cas. No. 8,221; In re Beals, 9 Ben. 223, 17 N. B. R. 107, Fed. Cas. No. 1,165; In re Penn, 4 Ben. 99, 3 N. B. R. 582, Fed. Cas. No. 10,926; Stiles v. Lay, 9 Ala. 795.

[77] In re Clisdel, 101 Fed. 246, 4 Am. Bankr. Rep. 95; In re Goodale, 109 Fed. 783, 6 Am. Bankr. Rep. 493; In re Walrath, 175 Fed. 243, 24 Am. Bankr. Rep. 541; In re Ives, 5 Dill. 146, 19 N. B. R. 97, Fed. Cas. No. 7,115. And see In re Tinker, 99 Fed. 79, 3 Am. Bankr. Rep. 580.

[78] In re Mason, 99 Fed. 256, 3 Am. Bankr. Rep. 599.

§ 668. Same; Transactions Prior to Enactment of Bankruptcy Law.—The authorities generally agree that a discharge in bankruptcy cannot be refused on account of acts or omissions occurring, or transactions completed, before the enactment of the bankruptcy law, although the same things would have constituted good grounds of opposition to the discharge if done after the statute came into force, for the contrary construction would give the act an ex post facto operation, or at least make it objectionably retrospective.[79] Thus, for example, the failure of the bankrupt to keep proper books of account or records from which his financial condition could be known, or his wrongful acts in concealing, destroying, or mutilating such books or records, will not warrant the court in refusing to grant him a discharge, unless such omission or offense occurred since the date of the enactment of the bankruptcy law.[80] And whereas the statute (in its original form) required that such omission to keep books or destruction or concealment of books must have been "in contemplation of bankruptcy," the courts held that a debtor cannot be said to be "in contemplation of bankruptcy" at a time when no bankruptcy law is in existence, even though a bill for a bankruptcy statute is then pending before Congress, and the debtor expects to take the benefit of it if it should become a law.[81] But as to the offense of concealing property from his trustee "while a bankrupt," it is held that the act of concealment may be continuous, and that if a concealment of goods or money is begun before the enactment of the bankruptcy law, with intent to defraud creditors, and is continued after the adjudication of bankruptcy, by failure to list it in the schedule or to disclose it to the trustee, it is a concealment from the trustee "while a bankrupt," within the meaning of the statute, and ground for refusing a discharge.[82]

§ 669. Same; Purchasing Consent of Creditor.—The bankruptcy act of 1867 provided that a discharge should not be granted "if the bankrupt, or any person in his behalf, has procured the assent of any cred-

[79] In re Goodale, 109 Fed. 783, 6 Am. Bankr. Rep. 493; In re Webb, 98 Fed. 404, 3 Am. Bankr. Rep. 386; Paxton v. Scott, 66 Neb. 385, 92 N. W. 611; Schreck v. Hanlon, 74 Neb. 264, 104 N. W. 193; In re Webb, 2 Nat. Bankr. News, 11; In re Moore, 1 Hask. 134, Fed. Cas. No. 9,751; In re Keefer, 4 N. B. R. 389, Fed. Cas. No. 7,636.

[80] In re Marx, 102 Fed. 676, 4 Am. Bankr. Rep. 521; In re Phillips, 98 Fed. 844, 3 Am. Bankr. Rep. 542; In re Dews, 96 Fed. 181, 2 Am. Bankr. Rep. 483; In re Carmichael, 96 Fed. 594, 2 Am. Bankr. Rep. 815; In re Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600; In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Shorer, 96 Fed. 90, 2 Am. Bankr. Rep. 165; In re Stark, 96 Fed. 88, 2 Am. Bankr. Rep. 785; In re Lieber, 2 Nat. Bankr. News, 21; In re Friedberg, 19 N. B. R. 302, Fed. Cas. No. 5,116.

[81] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Shertzer, 99 Fed. 706, 3 Am. Bankr. Rep. 699.

[82] In re Jacobs & Verstandig, 147 Fed. 797, 17 Am. Bankr. Rep. 470; In re Quackenbush, 102 Fed. 282, 4 Am. Bankr. Rep. 274.

itor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation." [83] And it was held that although a creditor thus corruptly influenced was estopped from afterwards setting up the fraud as a ground of opposition to the discharge, yet other creditors, upon learning of the fraud, might object on that ground.[84] The fact of bribery being established, it was no defense to say that the assent of that creditor was altogether unnecessary.[85] A promise by a debtor to pay his creditor "all he ever owed him when he got able," upon condition that he would assent to his discharge in bankruptcy, was held to constitute a pecuniary consideration or obligation sufficient to defeat the right of the bankrupt to be discharged.[86] But the rule did not apply to a payment by the bankrupt of the fees of an attorney and of a notary and the register in making proofs of claims against his estate, though his sole motive in doing so was to obtain the consent of creditors to his discharge.[87]

The present bankruptcy law makes no explicit provision for this case. But it declares that it shall be an offense punishable by imprisonment if any person shall have "received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act," [88] and also that the word "person," "when used with reference to the commission of acts which are herein forbidden, shall include persons who are participants in the forbidden acts." [89] And it is held that, if the bankrupt pays money to a creditor to induce him to forbear opposition to the discharge, or procures the buying up of the creditor's claim for the like purpose, and the creditor knows whence the money comes and its purpose, not only is the creditor guilty of the offense denounced by the statute, but the bankrupt also is guilty as a participant therein, and this is ground for refusing to grant the discharge.[90]

§ 670. Same; Fraudulent or Preferential Transfers.—It is ground for refusing to discharge a bankrupt if he shall have, "at any time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property with intent to hinder, delay, or defraud his creditors." [91] As this is in

[83] Rev. Stat. U. S. § 5110, par. 8.

[84] In re Bright, 9 Fed. 491.

[85] In re Douglass, 11 Fed. 403.

[86] In re Ekings, 6 Fed. 170.

[87] In re Svenson, 9 Biss. 69, 19 N. B. R. 229, Fed. Cas. No. 13,659.

[88] Bankruptcy Act 1898, § 29b, cl. 4.

[89] Bankruptcy Act 1898, § 1, cl. 19.

[90] In re Luftig, 162 Fed. 322, 15 Am. Bankr. Rep. 773. And see In re Sanborn, 131 Fed. 397, 12 Am. Bankr. Rep. 428.

[91] Bankruptcy Act 1898, § 14b, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797. Though property fraudulently transferred by the bankrupt within the four months' period is subsequently recovered by the trustee, or even surrendered to him on demand, this does not prevent the transfer being urged in opposition to the bankrupt's application for discharge. In re Singer, 251 Fed. 51, 163 C. C. A. 301, 41 Am. Bankr. Rep. 503. On

the nature of a penal enactment, it is to be construed with some strictness. The fact that the bankrupt may have made a fraudulent conveyance of property will not affect his right to a discharge unless it comes strictly within the statute.[92] Thus, the fact of such fraudulent conveyance is immaterial with respect to the bankrupt's discharge unless it was made within the four months before the filing of the petition in bankruptcy,[93] except, perhaps, in the case of an instrument which must be recorded to be effective, and which was recorded within the four months, though executed some time before.[94] Further, there must have been a fraudulent intent on the part of the bankrupt.[95] But an intention to dispose of his property in such a way as to keep it beyond the reach of his creditors is an intention to hinder, delay, and defraud them, and will bar the discharge.[96] But since, under the bankruptcy law, there are substantial differences between a conveyance fraudulent as to creditors and the giving of a preference, voidable though the preference may be, and since this part of the statute speaks only of the former class of transactions, it cannot be extended so widely as to include the latter, and hence a preferential payment or transfer of property, though it may be voidable in the bankruptcy proceedings, will not constitute ground for refusing

the other hand, it is not of importance in this connection that the trustee has not been able, or has not tried, to avoid the transfer. Devorkin v. Security Bank & Trust Co., 243 Fed. 171, 156 C. C. A. 37, 39 Am. Bankr. Rep. 738.

92 Ashley v. Robinson, 29 Ala. 112, 65 Am. Dec. 387.

93 Gill v. White, 249 Fed. 50, 161 C. C. A. 110, 41 Am. Bankr. Rep. 606; In re Fackler (D. C.) 246 Fed. 864, 39 Am. Bankr. Rep. 742; In re Schickerling, 204 Fed. 592, 123 C. C. A. 60, 30 Am. Bankr. Rep. 312; In re Jacobs (D. C.) 144 Fed. 868; In re Brumbaugh (D. C.) 128 Fed. 971, 12 Am. Bankr. Rep. 204; In re Wakefield (D. C.) 207 Fed. 180, 31 Am. Bankr. Rep. 42; In re Hennebry (D. C.) 207 Fed. 882, 31 Am. Bankr. Rep. 231.

94 In re McKane (D. C.) 155 Fed. 674, 19 Am. Bankr. Rep. 103.

95 Pirvitz v. Pithan, 194 Fed. 403, 114 C. C. A. 365, 27 Am. Bankr. Rep. 621. Fraudulent intent must have been actual on the part of the bankrupt, and in the absence of evidence of such intent, it is not enough that the transfer may have operated, as a matter of law, to hinder or defraud creditors. In re Braus, 248 Fed. 55, 160 C. C. A. 195, 40 Am. Bankr. Rep. 668. Thus, while a general assignment for the benefit of creditors is an act of bankruptcy, and is a "transfer intended to hinder, delay, or defraud creditors," within the meaning of that section of the Bankruptcy Act which avoids such transfers, yet if it was not made with any improper intent, it is no ground for refusing a discharge. Feder v. Goetz (C. C. A.) 264 Fed. 619, 45 Am. Bankr. Rep. 57. But an actual fraudulent intent may be inferred from the transfer of valuable property to relatives of the bankrupt for a nominal consideration at a time when the bankrupt was obviously insolvent. In re Singer, 251 Fed. 51, 163 C. C. A. 301, 41 Am. Bankr. Rep. 503.

96 In re Nelson (D. C.) 179 Fed. 320, 23 Am. Bankr. Rep. 37. A transfer of property by the bankrupt which is simply a device to defeat a landlord's claim for rent is in fraud of creditors and precludes discharge. In re Braus (D. C.) 237 Fed. 139, 38 Am. Bankr. Rep. 109. A discharge may also be refused where the bankrupt, within the four months, sold his entire stock of merchandise, and to avoid complying with the "bulk sales law" of the state, which would have required the filing of a list of his creditors, swore that he had no creditors. In re De Nomme (D. C.) 214 Fed. 671.

the bankrupt's discharge.[97] It is the intent of the debtor that must be looked to, and the fact that the transaction may or may not result in a preference is not controlling. Thus, a transfer of property to one creditor may be ground for refusing a discharge to the bankrupt, where it was made with the avowed purpose of hindering and delaying another creditor and preventing the latter from sharing in it.[98] So, a sale by the bankrupt of all his property, within four months prior to bankruptcy, with a direction that the proceeds shall go to such of his creditors as will agree to a compromise, is in fraud of creditors and bars his right to a discharge.[99] But a sale and transfer by an insolvent partnership of all of its property for its full value, the proceeds being used to discharge its indebtedness so far as possible without preference, is not a transfer to hinder or defraud creditors.[100]

To satisfy the statute, it must appear that the property in question actually belonged to the bankrupt at the time of its transfer, removal, concealment, etc. Thus, where a broker pledges stock which is in his hands, but which belongs to a customer, as security for a loan to himself, it is not a transfer of "his" property with intent to defraud creditors.[101] Again, there must have been an actual transfer or removal.[102] An agreement between a bankrupt and his wife, by which he undertook to transfer certain property to her as a preference, but which was void under the law of the state for want of power in the parties to contract with each other, and which was not accompanied by any actual transfer or removal of the property, which in fact passed into the hands of the trustee in bankruptcy, does not defeat the bankrupt's right to a discharge.[103] And payments made to a creditor from time to time, to enable the bankrupt to continue in business, and to induce the creditor to continue supplying material for the business, and which do not reduce

[97] In re Alpert (D. C.) 237 Fed. 295, 38 Am. Bankr. Rep. 459; In re Kean (D. C.) 237 Fed. 682, 38 Am. Bankr. Rep. 628; In re Friedrich (D. C.) 199 Fed. 193, 28 Am. Bankr. Rep. 656; In re Bouck (D. C.) 199 Fed. 453, 28 Am. Bankr. Rep. 378; In re Battle (D. C.) 154 Fed. 741, 19 Am. Bankr. Rep. 40; In re Maher (D. C.) 144 Fed. 503, 16 Am. Bankr. Rep. 340; In re Steed (D. C.) 107 Fed. 682, 6 Am. Bankr. Rep. 73. See In re Sternburg (D. C.) 249 Fed. 980, 41 Am. Bankr. Rep. 476.

[98] Grafton v. Meikleham, 246 Fed. 737, 159 C. C. A. 39, 40 Am. Bankr. Rep. 433.

[99] In re Julius Bros. (D. C.) 209 Fed. 371, 31 Am. Bankr. Rep. 132.

[100] In re Julius Bros., 217 Fed. 3, 133 C. C. A. 328, L. R. A. 1915C, 89.

[101] In re Jacob Berry & Co. (D. C.) 146 Fed. 623, 15 Am. Bankr. Rep. 360.

[102] To justify the denial of a discharge to a bankrupt on the ground that he transferred property with intent to delay or defraud creditors, the transfer must have been effective. W. A. Liller Building Co. v. Reynolds, 247 Fed. 90, 159 C. C. A. 308, 40 Am. Bankr. Rep. 371. The deposit by bankrupts of money in bank in their own names cannot be considered such a transfer or concealment of property as to bar their right to discharge. In re Oliner (C. C. A.) 262 Fed. 734, 44 Am. Bankr. Rep. 450, 45 Am. Bankr. Rep. 185.

[103] In re Brown (D. C.) 140 Fed. 383, 15 Am. Bankr. Rep. 350. See In re Hedley, 156 Fed. 314, 19 Am. Bankr. Rep. 409.

the assets available to creditors, are not fraudulent in this sense.[104] And gifts by a bankrupt to his wife and children, previous to the bankruptcy, although they may be voidable by the creditors, do not necessarily warrant the refusal of a discharge.[105] But this is a well-known device of fraudulent bankrupts, which the courts are astute to frustrate. And it may be said generally that where an insolvent debtor, just before his bankruptcy, so manipulates his property as to get it into the possession and apparent ownership of his wife or his children, it is such a fraudulent "transfer" or "concealment" of assets as will prevent him from obtaining a discharge.[106]

The question of the fraudulent character of a given transfer is not always or necessarily to be litigated for the first time on the bankrupt's application for discharge. It may have been tried and determined at an earlier stage of the proceedings, and if so, the decision then made is conclusive.[107] And if rights of third parties, adverse claimants, are involved, it is not proper to attempt their determination in such a collateral proceeding as the statutory hearing on the bankrupt's application to be discharged.[108] On the other hand, the judgment of a state court, in a suit brought by the bankrupt's trustee, refusing to set aside a transfer of property made by the bankrupt as fraudulent, is conclusive on the creditors, and they cannot thereafter set up the same transfer as a ground of opposition to the discharge of the bankrupt.[109]

§ 671. **Same; Creation of Fiduciary, Fraudulent, or Tortious Debts.**—It is no ground for refusing a bankrupt's application for discharge that the creditor objecting thereto holds a judgment against him for willful and malicious injury to property, or a claim founded upon the fraud of the bankrupt, or for obtaining property by false pretenses, or for the embezzlement or defalcation of the bankrupt while acting as an officer or in any fiduciary capacity. Such debts, it is true, will not be released by the discharge when granted, but they do not defeat the bankrupt's right to be discharged, as they are not among the enumerated grounds for refusing a discharge.[110] If no claims whatever were filed and proved

[104] In re Maher (D. C.) 144 Fed. 503, 16 Am. Bankr. Rep. 340.

[105] In re Warne (C. C.) 12 Fed. 431.

[106] In re Schenck, 116 Fed. 554, 8 Am. Bankr. Rep. 727; In re Skinner, 97 Fed. 190, 3 Am. Bankr. Rep. 163; In re Kamsler, 97 Fed. 194; In re Eldred, 3 N. B. R. 256, Fed. Cas. No. 4,328.

[107] In re Miller, 135 Fed. 591, 14 Am. Bankr. Rep. 329.

[108] Fellows v. Freudenthal, 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490.

[109] In re Tiffany, 147 Fed. 314, 17 Am. Bankr. Rep. 296; In re McGurn, 102 Fed. 743, 4 Am. Bankr. Rep. 459.

[110] In re Carmichael, 96 Fed. 594, 2 Am. Bankr. Rep. 815; In re Peacock, 101 Fed. 560, 4 Am. Bankr. Rep. 136; In re Gara, 190 Fed. 112, 26 Am. Bankr. Rep. 573; In re Rhutassel, 96 Fed. 597, 2 Am. Bankr. Rep. 697; In re Mussey, 99 Fed. 71, 3 Am. Bankr. Rep. 592; In re Black, 97 Fed. 493; In re Thomas, 92 Fed. 912, 1 Am. Bankr. Rep. 515; In re Lieber, 2 Nat. Bankr. News, 21; In re Rosenfield, 1 N. B. R. 575, Fed. Cas. No. 12,058; In re Rathbone, 2 Ben. 138, Fed. Cas. No.

against the estate of the bankrupt except such as were clearly excepted from the operation of a discharge, the granting of a discharge could not benefit the bankrupt, and would be an idle formality, and it might be refused for that reason. But if there are any other claims, though they may be inconsiderable in comparison with the non-dischargeable debts, the discharge cannot be withheld.[111] And in a case where the only debt scheduled against the bankrupt was a judgment of a state court, and, as the law then stood, it was doubtful whether or not it would be affected by the discharge, the court held that it had jurisdiction of the bankrupt's application, and would grant him a discharge if he was otherwise entitled to it, leaving the question as to its effect on the judgment to be determined elsewhere and in a more appropriate proceeding.[112]

§ 672. Same; Concealment of Property.—It is made a punishable offense (and therefore a ground for refusing to discharge the bankrupt) if he shall have "concealed, while a bankrupt or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy."[113] But there must also have been an actual fraudulent intent on the part of the bankrupt, that is, an intent to conceal the property from the trustee, or to mislead him in regard to it, for the purpose of saving it from the bankruptcy proceedings and enjoying it himself.[114] Though there may have been an actual concealment of property, it is not ground for refusing the discharge if it was not willful but the result of mere accident or mistake.[115] Again, a fraudulent intent alone does not make out the case contemplated by the statute. There must be an actual concealment or withholding of assets of the estate,[116] and there is no concealment when the claim is openly made that the property in question does not belong to the bankrupt but to another.[117] But the forbidden act may include a concealment of the title to property as well as the hid-

11,580; In re Tallman, 2 Ben. 348, Fed. Cas. No. 13,739; In re Elliot, 2 N. B. R. 110, Fed. Cas. No. 4,391: In re Tracy, 2 N. B. R. 298, Fed. Cas. No. 14,124.

111 In re Brumbaugh, 128 Fed. 971, 12 Am. Bankr. Rep. 204.

112 In re Tinker, 99 Fed. 79, 3 Am. Bankr. Rep. 580.

113 Bankruptcy Act 1898, § 29b. And see In re Leslie, 119 Fed. 406, 9 Am. Bankr. Rep. 561.

114 In re Agnew (D. C.) 225 Fed. 650, 35 Am. Bankr. Rep. 709. It is not necessary, in this case, to show an intention to defraud creditors; it is sufficient if an intent to hinder and delay them existed. In re Perlmutter (D. C.) 256 Fed. 862, 43 Am. Bankr. Rep. 362.

115 In re Conn, 108 Fed. 525, 6 Am. Bankr. Rep. 217; In re De Leeuw, 98 Fed. 408, 3 Am. Bankr. Rep. 418; In re Pierce, 103 Fed. 64, 4 Am. Bankr. Rep. 554; In re Boynton, 10 Fed. 277; In re Smith, 1 Woods, 478, 13 N. B. R. 256, Fed. Cas. No. 12,995; In re Scott, 11 Fed. 133.

116 Yehon v. Ullman, 147 Fed. 694, 78 C. C. A. 82, 17 Am. Bankr. Rep. 435. The use by the bankrupt of money taken from the business for his personal expenses, and for the discharge of his individual debts, is not a concealment of assets preventing his discharge. In re Rivas (D. C.) 268 Fed. 690, 45 Am. Bankr. Rep. 434.

117 In re Marsh, 109 Fed. 602, 6 Am. Bankr. Rep. 537. As to concealment of borrowed money, see In re De Mauriac, 206 Fed. 358, 30 Am. Bankr. Rep. 677.

ing from view of the property itself.[118] And although the trustee may have actual knowledge, gained from previous business relations with the bankrupt, that the latter owns certain property which he has not listed in his schedule, it is none the less concealed from the trustee if he does not know where the property is or how to find it.[119] It is also held that the act of concealment may be continuous, and that a bankrupt who hid property from his creditors while insolvent, though more than four months before the filing of the petition, is not entitled to his discharge if he kept the same concealed until after his adjudication.[120] Again, it is necessary that the property concealed should have been property "belonging to his estate in bankruptcy." And hence it is necessary for creditors objecting to the discharge to show that the property in question was of such a character that it would constitute assets of the estate in bankruptcy, that the bankrupt owned it at the time of the adjudication, and that it was then in his possession, or at least that it was then in such a situation that he could have claimed it for himself.[121] Property acquired after the adjudication belongs to the bankrupt and not to the estate, and therefore he is not bound to disclose it.[122] And the concealment of a claim against his wife on account of a gift made to her several years before his bankruptcy, and which was valid as to him and all his creditors except one, who might have maintained a suit to set it aside, is not enough to forfeit the right to a discharge.[123] But on the other hand, where the bankrupt has property in his possession and has the use of it as his own, and willfully omits it from his schedule and keeps it from his trustee, it is no answer to a charge of concealment thereof that the property belonged of right to his assignee under a previous assignment under the state insolvency law.[124] And if the bankrupt was a member of a firm (not in bankruptcy) and has the actual possession of joint estate and the books of the firm, he must disclose them to his individual trustee in bankruptcy.[125] So if he has mingled his own money with funds of an estate of which he is administrator, he must give the bankruptcy court a correct and intelligible account of his affairs, so that it can be deter-

[118] In re Hussman, 2 N. B. R. 437, Fed. Cas. No. 6,951.

[119] In re Beal, 1 Low. 323, 2 N. B. R. 587, Fed. Cas. No. 1,156.

[120] In re James (C. C. A.) 181 Fed. 476, 24 Am. Bankr. Rep. 288. See In re Frosteg (D. C.) 252 Fed. 199, 42 Am. Bankr. Rep. 275.

[121] Vehon v. Ullman, 147 Fed. 694, 78 C. C. A. 82, 17 Am. Bankr. Rep. 435; In re Isaac Prager & Son, 134 Fed. 1006, 13 Am. Bankr. Rep. 527; In re Fritchard, 103 Fed. 742, 4 Am. Bankr. Rep. 609; In re Locks, 104 Fed. 783, 5 Am. Bankr. Rep. 136; In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715. See In re Fleishman, 120 Fed. 960, 9 Am. Bankr. Rep. 557. See In re De Mauriac (D. C.) 206 Fed. 358, 30 Am. Bankr. Rep. 677.

[122] In re Parish, 122 Fed. 553, 10 Am. Bankr. Rep. 548.

[123] In re House, 103 Fed. 616, 4 Am. Bankr. Rep. 603.

[124] In re Beal, 1 Low. 323, 2 N. B. R. 587, Fed. Cas. No. 1,156.

[125] In re Beal, 1 Low. 323, 2 N. B. R. 587, Fed. Cas. No. 1,156.

mined what property belongs to the estate in bankruptcy; and until he does this his discharge will be withheld.[126] But if the title to the property in question depends upon the validity of a certain chattel mortgage and its foreclosure, this question will not be determined summarily on the application for discharge, but the discharge will not be granted until it shall have been determined in a proper proceeding.[127] Further, it is necessary that the property should have been concealed from the trustee. And where the bankrupt, after having made up his schedules, delivered his canceled checks to the trustee's son, which placed them at the command of creditors, it was held that he had not concealed them from his trustee.[128] But it is not necessary to constitute the statutory ground for withholding the discharge that the concealment of property should have been successful. It is none the less a concealment though the property is finally discovered by the trustee and recovered for the benefit of the estate.[129] Nor is the bankrupt's offense of concealment condoned by the fact that he lists the property on his schedule after it has been discovered by the trustee or the creditors.[130]

It is further to be understood that the word "concealment" is not to be construed so strictly as to confine it to objects which are physically capable of being hidden or secreted. The bankrupt's interest in a business, his rights under a will or a trust, his interest in an insurance policy, or other choses in action, may constitute assets of his estate. And in regard to such assets, he "conceals" them if he keeps silence in relation to them, omits them from his schedule, and gives false or equivocating evidence concerning them, as, by testifying that they have no existence or that they do not belong to him.[131] But it is not technically a concealment of an asset if the bankrupt lists or discloses it, although he attempts to divert attention from it by pretending that it has only a nominal value, or assigns it a value much below its actual worth in the market.[132] To cover up assets by conducting business in the name of

[126] In re Walther, 95 Fed. 941, 2 Am. Bankr. Rep. 702.

[127] In re Olansky, 163 Fed. 428, 20 Am. Bankr. Rep. 780.

[128] In re Kyte, 174 Fed. 867, 23 Am. Bankr. Rep. 414.

[129] In re Quackenbush, 102 Fed. 282, 4 Am. Bankr. Rep. 274.

[130] In re Sussman, 190 Fed. 111, 26 Am. Bankr. Rep. 18.

[131] In re Bacon, 205 Fed. 545, 30 Am. Bankr. Rep. 584; In re Cohen, 201 Fed. 188, 29 Am. Bankr. Rep. 698; In re Towne, 122 Fed. 313, 10 Am. Bankr. Rep. 284; In re Otto, 115 Fed. 860, 8 Am. Bankr. Rep. 305; In re Woods, 98 Fed. 972, 3 Am. Bankr. Rep. 572; In re Hammond, 1 Low. 381, 3 N. B. R. 273, Fed. Cas. No. 5,999. The concealment by the bankrupt, during the four months before the filing of the petition, of the fact that a deed previously executed by him was a mortgage is a concealment of property. In re White (D. C.) 222 Fed. 688, 34 Am. Bankr. Rep. 803. The withholding of a small deposit in a bank from the trustee in bankruptcy is a concealment of property warranting refusal of discharge. In re Smith (D. C.) 232 Fed. 248, 37 Am. Bankr. Rep. 230.

[132] In re McBryde, 99 Fed. 686, 3 Am. Bankr. Rep. 729; In re Semmel, 118 Fed. 487, 9 Am. Bankr. Rep. 351.

one's wife, and pretending to act only as her agent or manager, is a favorite device of fraudulent bankrupts, and this will be probed by the courts, and the bankrupt refused his discharge if it is found that he was the real owner of the business.[133] In regard to property conveyed away in fraud of creditors, the question is more difficult. But it may be stated as the general result of the authorities that, in order to establish a concealment of assets such as will defeat the bankrupt's right to a discharge, it must be shown that the property in fact belonged to him at the time of the bankruptcy. And if it had previously been transferred to another, the transfer being actual and not merely colorable and such as to place the property beyond the reach of the bankrupt, the bankrupt's omission of it from his schedule or his denial that he owns it is not a concealment of assets, although the transfer would be voidable at the suit of creditors or of the trustee.[134] But if the pretended transfer was colorable only and not real, and the property continues to be held for the benefit of the bankrupt and subject to his control, or under a secret trust for him, or he retains a secret interest in it or use of it, it continues to be his property in such sense that his failure to disclose it or surrender it to the trustee will constitute a concealment of assets.[135] An amendment to the bankruptcy law, enacted in 1903, makes it a ground for refusing a discharge that the bankrupt has made a transfer of property in fraud of his creditors, if within four months before the filing of the petition, so that, at present, a discharge might be refused on this ground, though the transaction did not constitute a "concealment" of assets.[136] But the two grounds of objection to a discharge are entirely distinct, and allegations of the one would not be supported by proof of the other.

Facts and circumstances showing a fraudulent concealment of assets by a bankrupt, which will defeat his right to a discharge, must be proved and will not be deduced, as a matter of doubtful inference, from

[133] In re Miller, 212 Fed. 920, 129 C. C. A. 440; In re Freund, 98 Fed. 81, 3 Am. Bankr. Rep. 418; In re Welch, 100 Fed. 65, 3 Am. Bankr. Rep. 93; In re Rathbone, 1 N. B. R. 536, Fed. Cas. No. 11,583; In re Hill, 2 Ben. 349, 1 N. B. R. 431, Fed. Cas. No. 6,483; In re Rathbone, 3 Ben. 50, 2 N. B. R. 260, Fed. Cas. No. 11,581.

[134] In re Hammerstein, 189 Fed. 37, 110 C. C. A. 472; In re Kean (D. C.) 237 Fed. 682, 38 Am. Bankr. Rep. 628; In re Dauchy, 130 Fed. 532, 65 C. C. A. 78, 11 Am. Bankr. Rep. 511, affirming 122 Fed. 688, 10 Am. Bankr. Rep. 527; Fields v. Karter, 115 Fed. 950, 53 C. C. A. 432, 8 Am. Bankr. Rep. 351; In re Wermuth, 179 Fed. 1009, 24 Am. Bankr. Rep. 785.

[135] In re Graves, 189 Fed. 847, 26 Am. Bankr. Rep. 633; Hudson v. Mercantile Nat. Bank, 119 Fed. 346, 56 C. C. A. 250, 9 Am. Bankr. Rep. 432; In re Wilcox, 109 Fed. 628, 48 C. C. A. 567, 6 Am. Bankr. Rep. 362; In re Welch, 100 Fed. 65, 3 Am. Bankr. Rep. 93; In re Holstein, 114 Fed. 794, 8 Am. Bankr. Rep. 147; In re Berner, 2 Nat. Bankr. News, 268; In re Wakefield, 207 Fed. 180, 31 Am. Bankr. Rep. 42.

[136] In re Dauchy, 122 Fed. 688, 10 Am. Bankr. Rep. 527, affirmed 130 Fed. 532, 65 C. C. A. 78, 11 Am. Bankr. Rep. 511.

other facts and circumstances.[137] But it may be stated as a general rule that, where the established facts show a very large shrinkage or disappearance of assets within a short period, such assets being definitely shown to have existed, and the discrepancy being too great to be accounted for by the ordinary vicissitudes of business, it is a fair presumption that the bankrupt is concealing some or all of such assets, and this presumption he must overcome by giving a credible account of the loss or shrinkage, and if he fails to do so, it will be just cause for refusing to discharge him.[138]

§ 673. Same; Omissions in Schedule and List of Creditors.—If a bankrupt knowingly, intentionally, and dishonestly omits from his schedule of assets property which should have been listed therein and turned over to his trustee, and swears to the schedule thus fraudulently incomplete, he is guilty both of concealing property from his trustee and of making a false oath in a proceeding in bankruptcy, and on both grounds forfeits his right to a discharge.[139] This is the case, for example, where he makes a willfully false statement in his schedule that all his property has gone into the possession of a receiver appointed by a state court, when in fact he has property which he did not turn over to the receiver nor list in his schedule.[140] And the fact that the bankrupt amends his schedule and lists the omitted property, after the discovery of the fact that he has concealed assets and made a false oath, will not relieve him from the consequences of his original fault nor entitle him to a discharge.[141] But the rule applies only to the omission

[137] In re Conn, 108 Fed. 525, 6 Am. Bankr. Rep. 217.

[138] In re Coppleman, 207 Fed. 815, 30 Am. Bankr. Rep. 414; In re Loeb, 232 Fed. 601, 146 C. C. A. 559, 36 Am. Bankr. Rep. 768; In re Schwartz, 201 Fed. 166, 28 Am. Bankr. Rep. 670; In re Simon & Sternberg, 151 Fed. 507, 18 Am. Bankr. Rep. 204; In re Jacobs & Verstandig, 147 Fed. 797, 17 Am. Bankr. Rep. 470; In re Boyden, 132 Fed. 991, 13 Am. Bankr. Rep. 269; In re Becker, 112 Fed. 1020, 50 C. C. A. 666; In re Leslie, 119 Fed. 406, 9 Am. Bankr. Rep. 561; In re Cashman, 103 Fed. 67, 4 Am. Bankr. Rep. 326; In re Hoffman, 102 Fed. 979, 4 Am. Bankr. Rep. 331; In re Morgan, 101 Fed. 982, 4 Am. Bankr. Rep. 402; In re O'Gara, 97 Fed. 932, 3 Am. Bankr. Rep. 349; In re Grossman, 111 Fed. 507, 6 Am. Bankr. Rep. 510. Compare In re Lesser, 114 Fed. 83, 52 C. C. A. 31, 8 Am. Bankr. Rep. 15. And see In re Allendorf, 129 Fed. 981, 12 Am. Bankr. Rep. 320.

[139] Osborne v. Perkins, 112 Fed. 127, 50 C. C. A. 158, 7 Am. Bankr. Rep. 250; In re McCann, 179 Fed. 575, 24 Am. Bankr. Rep. 789; In re Guilbert, 169 Fed. 149, 22 Am. Bankr. Rep. 221; In re Breiner, 129 Fed. 155, 11 Am. Bankr. Rep. 684; In re Bullwinkle, 111 Fed. 364, 6 Am. Bankr. Rep. 756; In re Semmel, 118 Fed. 487, 9 Am. Bankr. Rep. 351; In re Lowenstein, 106 Fed. 51; In re Lewin, 103 Fed. 852, 4 Am. Bankr. Rep. 636; In re Gammon, 109 Fed. 312, 6 Am. Bankr. Rep. 482; In re Wood, 98 Fed. 972, 3 Am. Bankr. Rep. 572; In re Roy, 96 Fed. 400, 3 Am. Bankr. Rep. 37. See In re Opava (D. C.) 235 Fed. 779, 37 Am. Bankr. Rep. 799.

[140] In re Lesser, 108 Fed. 205, 5 Am. Bankr. Rep. 330.

[141] In re Breiner, 129 Fed. 155, 11 Am. Bankr. Rep. 684; In re Brincat (D. C.) 233 Fed. 811, 37 Am. Bankr. Rep. 587.

of property in which the creditors can claim an interest or which could be made available for the satisfaction of their claims through the bankruptcy proceedings.[142] And hence it is not ground for denying the discharge that the bankrupt failed to place any valuation on the property which he listed and claimed as exempt,[143] or did not specify a valuable gold watch as included in the "personal wearing apparel" which he claimed to be exempt,[144] or omitted a portion of his monthly salary as a public state officer which was earned but not payable at the time of filing the petition,[145] or property previously transferred by a conveyance which was valid as against him, though it might have been voidable at the suit of creditors,[146] or money which he gave to his wife nine years before,[147] or property which he had previously transferred to a creditor to whom it had been pledged as security for a debt of equal or greater amount.[148] But where the bankrupt omits from his schedule a contract under which he was entitled to receive money, though it was nominally assigned to another, and was in fact assigned to the amount he owed the assignee, it being otherwise treated by the bankrupt, the assignee, and the other party thereto, as the bankrupt's property, this amounts to a false oath and bars his discharge.[149]

Under the former bankruptcy law, it was held to be ground for refusing a discharge if the bankrupt had willfully and fraudulently omitted to include any of his known creditors and their claims in his list of debts,[150] though not so if the omission was not the result of a fraudulent purpose,[151] or if the names of creditors were omitted by their own direction or with their consent.[152] This rule would appear to be equally valid under the present statute, since the bankrupt is explicitly required to file a sworn list of his creditors, and since his intentional omission

142 In re Winchester, 155 Fed. 505, 19 Am. Bankr. Rep. 227.

143 In re Reed, 191 Fed. 920, 26 Am. Bankr. Rep. 286. Whether a specific item of property should go to creditors or be reserved by the bankrupt as an exemption is not for the bankrupt to determine, and a bankrupt cannot retain a sum of money as an exemption regardless of the consent of the bankruptcy court. In re Brincat (D. C.) 233 Fed. 811, 37 Am. Bankr. Rep. 587.

144 Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

145 In re Doherty, 135 Fed. 432, 13 Am. Bankr. Rep. 549.

146 In re Crenshaw, 95 Fed. 632, 2 Am. Bankr. Rep. 623; In re Wakefield, 207 Fed. 180, 31 Am. Bankr. Rep. 42. See In re Schroeder (D. C.) 264 Fed. 862, 45 Am. Bankr. Rep. 202; In re Hagy, 220 Fed. 665, 136 C. C. A. 307, 34 Am. Bankr. Rep. 319.

147 In re Howell, 105 Fed. 594.

148 In re Webb, 98 Fed. 404, 3 Am. Bankr. Rep. 386.

149 In re Semmel, 118 Fed. 487, 9 Am. Bankr. Rep. 351.

150 In re Kallish, Deady, 575, Fed. Cas. No. 7,599; In re Perley, Fed. Cas. No. 10,992; In re Redfield, 2 Ben. 71, Fed. Cas. No. 11,629.

151 Burnside v. Brigham, 8 Metc. (Mass.) 75; Platt v. Parker, 4 Hun (N. Y.) 135, 13 N. B. R. 14; Knabe v. Hayes, 71 N. C. 109.

152 In re Needham, 1 Low. 309, 2 N. B. R. 387, Fed. Cas. No. 10,081.

of a creditor from the list would constitute his verification of it the making of a "false oath in a proceeding in bankruptcy."[153] But this has been denied.[154] And it appears that where a proposed voluntary bankrupt, who has no property except such as is exempt, borrows a small sum of money to pay the fees and costs of his attorney, just before filing his petition, he is not required to list the amount so borrowed in his schedule of assets, and his omission to do so is no ground of opposition to his application for discharge.[155]

§ 674. **Same; Knowledge and Fraudulent Purpose.**—The mere fact that the bankrupt omitted from his schedule of assets property which he ought to have listed therein is not alone sufficient to bar his discharge. To constitute such an offense against the bankruptcy law as will warrant the court in refusing him the privilege of a discharge, it must further be made to appear that such omission was made with a clear and definite knowledge on his part of the existence of the property in question, and of the nature of his right to it or interest in it, and for the fraudulent purpose of keeping it from the knowledge of his trustee and the creditors and preventing its administration as a part of his estate in bankruptcy.[156]

§ 675. **Same; Omission by Mistake or by Advice of Counsel.**—The omission of a bankrupt to include particular property in his schedule of assets will not be ground for refusing his application for discharge, where such omission was not caused by a fraudulent intent to conceal the property from his trustee, but was the result of a mistake of law or fact, or of an honest though erroneous belief that he had no available interest in the property.[157] Thus, for example, a discharge should not be refused because the schedule states that the bankrupt owns a half interest in certain property, when the truth is that he has a life interest in the whole of it, where he testifies that he did not

[153] In re Jutkovitz (D. C.) 259 Fed. 915, 44 Am. Bankr. Rep. 231. A discharge in bankruptcy can be denied for a false schedule, which stated the claim of one creditor at a sum much smaller than it actually was. In re Rowe (D. C.) 240 Fed. 165, 39 Am. Bankr. Rep. 461.

[154] In re Blalock, 118 Fed. 679, 9 Am. Bankr. Rep. 266.

[155] Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

[156] Smith v. Keegan, 111 Fed. 157, 49 C. C. A. 282, 7 Am. Bankr. Rep. 4; In re Eaton, 110 Fed. 731, 6 Am. Bankr. Rep. 531; In re Slingluff, 105 Fed. 502; Fellows v. Freudenthal, 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490; In re De Leeuw, 98 Fed. 408, 3 Am. Bankr. Rep. 418; In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Marsh, 2 Nat. Bankr. News, 593; In re Parker, 4 Biss. 501, Fed. Cas. No. 10,720; In re Burk, Deady, 425, 3 N. B. R. 296, Fed. Cas. No. 2,156; In re Wyatt, 2 N. B. R. 288, Fed. Cas. No. 18,106; In re Tebbetts, 5 Law Rep. 259, Fed. Cas. No. 13,817; Allen v. Hickling, 11 Ill. App. 549.

[157] In re Opava (D. C.) 235 Fed. 779, 37 Am. Bankr. Rep. 799; In re Morrow, 97 Fed. 574, 3 Am. Bankr. Rep. 263; In

know exactly what his interest was.[158] And bad faith will not be inferred because of slight understatements and overstatements of debts, which practically counteract each other.[159] But the defense or excuse of mistake must be clearly made out, and cannot be accepted in the face of plain facts, where it is incredible that the omission could have been due to inadvertence.[160] It is also permissible for the bankrupt to show, as negativing any fraudulent purpose on his part, that he acted under the advice of his counsel in omitting to list any particular item of property in his schedule.[161] But to excuse the omission on this ground, it is necessary to show that the counsel's advice related to matter of law only, that there was at least some substantial reason in law to question the necessity of including the property in the schedule, that the bankrupt stated all the facts to his attorney fully and fairly, and that the advice was given and accepted in good faith.[162] On similar principles, the bankrupt may be protected by showing that he relied on a ruling or decision of the referee in his own case. Thus, it appeared that the bankrupt was a general insurance agent, and the question was raised whether his interest in renewal premiums under his contract was a part of his estate in bankruptcy. The referee decided that it was not, whereupon the bankrupt proceeded to collect his earned commissions and appropriated the money to his own use. On petition for review, the referee's decision was reversed. But it was held that this was no ground for refusing a discharge to the bankrupt.[163]

§ 676. Same; Omission of Property Without Value.—In pursuance of the same general principle,—that a bankrupt does not forfeit his right to a discharge by omitting property from his schedule, unless it is done knowingly and fraudulently,—he is not to be denied the privilege of a discharge merely on account of the omission of items of prop-

re Crenshaw, 95 Fed. 632, 2 Am. Bankr. Rep. 623; In re Freund, 98 Fed. 81, 3 Am. Bankr. Rep. 418; In re Huber, 1 Nat. Bankr. News, 431; In re Finan, 2 Nat. Bankr. News, 872; In re Boynton, 10 Fed. 277; In re Smith, 1 Woods, 478, 13 N. B. R. 256, Fed. Cas. No. 12,995; In re Scott, 11 Fed. 133; In re Woodward, 8 Ben. 563, Fed. Cas. No. 18,001.

158 In re Blalock, 118 Fed. 679, 9 Am. Bankr. Rep. 266.

159 In re Miner, 114 Fed. 998, 8 Am. Bankr. Rep. 248.

160 In re Royal, 112 Fed. 135, 7 Am. Bankr. Rep. 106.

161 Klein v. Powell, 174 Fed. 640, 98 C. C. A. 394, 23 Am. Bankr. Rep. 494; In re Schofield, 147 Fed. 862, 15 Am. Bankr. Rep. 824; In re Neely, 134 Fed. 667, 12 Am. Bankr. Rep. 407; In re Stafford (D. C.) 226 Fed. 127, 35 Am. Bankr. Rep. 747; In re Meikleham (D. C.) 236 Fed. 401, 38 Am. Bankr. Rep. 324.

162 Remmers v. Merchants' Laclede Nat. Bank, 173 Fed. 484, 97 C. C. A. 490, 23 Am. Bankr. Rep. 78; In re Breitling, 133 Fed. 146, 66 C. C. A. 212, 13 Am. Bankr. Rep. 126; In re Alleman, 162 Fed. 693, 20 Am. Bankr. Rep. 745; In re Stoddart, 114 Fed. 486, 7 Am. Bankr. Rep. 762; In re Berner, 2 Nat. Bankr. News, 268; In re Headley, 2 Nat. Bankr. News, 684.

163 In re Wright, 177 Fed. 578, 24 Am. Bankr. Rep. 437.

erty which have no value, or could not be made to realize anything for the creditors, or which he honestly believes to be worthless.[164] Thus a concealment of property, or the making of a false oath, is not to be predicated of the omission from the schedule of stock or bonds of an insolvent or dissolved corporation,[165] or of debts due to the bankrupt from persons who cannot be made to pay,[166] or a leasehold interest in realty, under a yearly lease, where there is nothing to show that the use of the property is worth more than the rent,[167] or an option to purchase leased premises under a lease which the bankrupt had surrendered,[168] or a contract to purchase land, on which a payment equal only to the accrued interest had been made, and which the vendor had a right to cancel for non-performance.[169] So, also, it is true that all property of substantial value belonging to the bankrupt should be listed in his schedule, notwithstanding the fact that it is hypothecated or pledged for its full value. But if he omits to list such property, not with any fraudulent intent, but under the honest belief that, being so pledged, it is no longer his, or is not worth including, this is no reason for refusing his discharge.[170] And the bankrupt may easily be excused for failing to list a small sum of money on deposit with a person who has a claim against him of equal or greater amount.[171]

§ 677. Same; Omission of Doubtful Claims or Assets.—If the right of the bankrupt to a particular item of property, or his interest in it, depends on the solution of doubtful questions of law, that is, if there is substantial reason in law to doubt whether the property should constitute an asset of his estate in bankruptcy or could be made available for creditors through the medium of the bankruptcy proceedings, and if, for this reason, the bankrupt omits to list it in his schedule, it cannot be said that his purpose in so doing was fraudulent, and therefore he should not be refused his discharge.[172] Thus, where the question whether the

[164] In re Hughes (C. C. A.) 262 Fed. 500, 44 Am. Bankr. Rep. 447; Anderson v. Forest City Nat. Bank, 254 Fed. 793, 166 C. C. A. 239, 42 Am. Bankr. Rep. 423; Baker v. Bishop-Babcock-Becker Co., 220 Fed. 657, 136 C. C. A. 265, 34 Am. Bankr. Rep. 396; In re Le Claire, 124 Fed. 654, 10 Am. Bankr. Rep. 733; In re Dews, 96 Fed. 181, 2 Am. Bankr. Rep. 483; In re Bryant, 104 Fed. 789, 5 Am. Bankr. Rep. 114; Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

[165] In re McCrea, 161 Fed. 246, 20 Am. Bankr. Rep. 412; In re Eaton, 110 Fed. 733, 6 Am. Bankr. Rep. 531.

[166] In re Pearce, 21 Vt. 611, Fed. Cas. No. 10,873.

[167] In re Hirsch, 97 Fed. 571, 3 Am. Bankr. Rep. 344.

[168] In re Kolster, 146 Fed. 138, 17 Am. Bankr. Rep. 52.

[169] In re Miner, 114 Fed. 998, 8 Am. Bankr. Rep. 248.

[170] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Hamilton, 133 Fed. 823, 13 Am. Bankr. Rep. 333; In re Adams, 104 Fed. 72, 4 Am. Bankr. Rep. 696.

[171] In re Miner, 114 Fed. 998, 8 Am. Bankr. Rep. 248.

[172] In re McCrea, 161 Fed. 246, 20 Am.

bankrupt's interest in his grandfather's estate was vested or contingent was difficult of solution, and the bankrupt had previously been advised by counsel that he had no interest in such estate on which he could raise money, his failure to schedule such interest as a part of his estate in bankruptcy could not preclude his right to a discharge.[173] In another case, it appeared that a testator bequeathed a sum of money to trustees, in trust to pay the income to his wife during her life, and with power to her to dispose of the principal by will, and added that, in default of such disposition by her, "I give the said trust fund, upon her decease, to my own then surviving next of kin." After the death of the testator, his son was adjudged bankrupt, and thereafter the testator's wife died, having exercised the power of appointment by bequeathing the fund to the bankrupt unconditionally. The bankrupt did not list this property in his schedule of assets, nor offer to surrender it to his trustee. It was held that, in view of the doubtful questions of law, whether the bankrupt's interest in the trust fund at the date of the adjudication was a vested interest such as would pass to his trustee, and whether his title thereto, after his mother's decease, was derived from her will or from the prior will of his father, it could not be said that he had "knowingly and fraudulently" concealed property from his trustee, so as to forfeit his right to a discharge.[174] But on the other hand, where a bankrupt has received a deed purporting to convey an interest in land, and has acted upon it by obtaining a loan secured by a mortgage on such interest, which is outstanding at the time of the adjudication in bankruptcy, he has no right to omit the property or the debt from his schedules on the theory that in fact the conveyance vested no interest in him, that being a matter to be determined by the court; and his entire omission of any mention of the property is ground for refusing to grant him a discharge.[175]

§ 678. Same; False Oath or Testimony; Refusal to Testify.—It is statutory ground for refusing to discharge a bankrupt if he shall have "made a false oath in, or in relation to, any proceeding in bankruptcy." This offense may be committed by his making a material and intentionally false statement in his voluntary petition for adjudication, or in the

Bankr. Rep. 412; In re Brumbaugh, 128 Fed. 971, 12 Am. Bankr. Rep. 204; In re Countryman, 119 Fed. 639, 9 Am. Bankr. Rep. 572; In re Todd, 112 Fed. 315, 7 Am. Bankr. Rep. 770; In re McAdam, 98 Fed. 409, 3 Am. Bankr. Rep. 417; In re Freund, 98 Fed. 81, 3 Am. Bankr. Rep. 418; In re Webb, 98 Fed. 404, 3 Am. Bankr. Rep. 386; In re Dews, 96 Fed. 181, 2 Am. Bankr. Rep. 483; In re Kaufman, 239 Fed. 305, 152 C. C. A. 293, 38 Am. Bankr. Rep. 648.

[173] Woods v. Little, 134 Fed. 229, 67 C. C. A. 157, 13 Am. Bankr. Rep. 742.

[174] In re Wetmore, 99 Fed. 703, 3 Am. Bankr. Rep. 700. And see In re Buchanan, 219 Fed. 492, 135 C. C. A. 204, 33 Am. Bankr. Rep. 638.

[175] In re Gailey, 127 Fed. 538, 62 C. C. A. 336, 11 Am. Bankr. Rep. 539.

poverty affidavit accompanying it,[176] or by swearing to a schedule of assets which is false, and known to be so, in respect to particular items of property, or which intentionally omits to mention property which should have been included,[177] or by giving willful false testimony in the course of his examination before the referee, provided the evidence is material and relates to a subject which is a legitimate matter of inquiry on such examination.[178] But it is not enough to justify the refusal of a discharge that the bankrupt's testimony was evasive, misleading, or unsatisfactory, or that his behavior was disrespectful and contumacious.[179] Again, any pleading, verified and filed in the bankruptcy proceeding, may contain such a "false oath" as to forfeit the right to a discharge. But the verification of an answer by the bankrupt containing a false statement of fact, does not constitute the making of a false oath in this sense, where the answer was filed too late and was not in fact considered.[180] It is not entirely clear that perjury committed by the bankrupt on the hearing of his application for discharge will be ground for refusing to grant the discharge, to which he appears otherwise to be entitled. It has been held that this is "making a false oath in a proceeding in bankruptcy," just as much as at any other stage of the case.[181] But in a later case the court felt compelled to grant a discharge to the bankrupt, notwithstanding that he had sworn falsely in his effort to obtain it, while at the same time the court promised to punish him for contempt of court if he attempted to make use of the discharge so obtained.[182]

But in order that false testimony or statements should operate to deprive the bankrupt of his discharge, they must have been made in the same proceeding in which the discharge is sought, that is to say, by the bankrupt in his own bankruptcy case.[183] Hence, where a petition in involuntary bankruptcy was filed against a corporation, and one who was an officer of it and a stockholder in it gave testimony on the hearing of the petition, which was false, and afterwards he was himself adjudged bankrupt, it was held that his right to a discharge was not prejudiced by

[176] See Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

[177] In re Herrman, 136 Fed. 767, 69 C. C. A. 413, 13 Am. Bankr. Rep. 778; In re Goodman, 171 Fed. 287, 22 Am. Bankr. Rep. 570; In re Kamsler, 97 Fed. 194; In re Roy, 96 Fed. 400, 3 Am. Bankr. Rep. 37.

[178] In re Luftig, 162 Fed. 322, 15 Am. Bankr. Rep. 773; In re Conroy, 134 Fed. 704, 14 Am. Bankr. Rep. 249; In re Kamsler, 97 Fed. 194; In re Zoffer, 211 Fed. 936, 128 C. C. A. 434.

[179] In re Cohen, 149 Fed. 908, 18 Am. Bankr. Rep. 84; In re Fanning, 155 Fed. 701, 19 Am. Bankr. Rep. 55.

[180] In re Young, 140 Fed. 728, 15 Am. Bankr. Rep. 477.

[181] In re Dews, 101 Fed. 549.

[182] In re Kretsch, 172 Fed. 523, 22 Am. Bankr. Rep. 284.

[183] But see In re Lesser, 234 Fed. 65, 148 C. C. A. 81, 36 Am. Bankr. Rep. 833, in which it is held that a bankrupt who commits perjury in any bankruptcy proceeding, though it be not his own, must be denied his discharge.

such false testimony.[184] For the same reason, testimony given by the bankrupt in prior proceedings under the state insolvency law, even if materially false, cannot prejudice his right to a discharge, and this holds true even where such testimony is read into the record on the bankrupt's examination in the bankruptcy proceedings, where this is done by agreement of counsel, without the concurrence of the bankrupt and without his making any oath in respect to the truth of it.[185] So also the falsity of an oath taken by the bankrupt does not affect his right to a discharge where it was not made in connection with the administration of his estate or in any way affecting such estate,[186] or where the statement was not material to any issue in the bankruptcy proceedings,[187] and the statute cannot be extended so as to embrace previous conduct or transactions which are merely fraudulent as to creditors, but not made criminal.[188]

Further, the oath or testimony of the bankrupt must have been knowingly and fraudulently false.[189] Hence a false statement made by the bankrupt upon his examination, touching the existence of certain books of account, will not prevent his discharge if it appears that such statement was against his own interest, and apparently without motive, and the circumstances indicate that it was innocently and not willfully made.[190] And the false oath must be such as would sustain an indictment for perjury,[191] but if this condition is fulfilled, it is immaterial the bankrupt could not be convicted of perjury, on account of the protection given to him by another provision of the statute.[192] And the objecting creditors must sustain the burden of proving that the oath or statement was not only false, but was knowingly and intentionally so.[193] It ap-

[184] In re Blalock, 118 Fed. 679, 9 Am. Bankr. Rep. 266.

[185] In re Goldsmith, 101 Fed. 570, 4 Am. Bankr. Rep. 234.

[186] Bauman v. Feist, 107 Fed. 83, 46 C. C. A. 157, 5 Am. Bankr. Rep. 703.

[187] In re Chamberlain (D. C.) 180 Fed. 304, 25 Am. Bankr. Rep. 37. False and evasive testimony concerning the making of a financial statement to a mercantile agency is not immaterial, but justifies denial of the bankrupt's discharge, although no creditor relied on the statement. In re Sheinberg (D. C.) 223 Fed. 218, 35 Am. Bankr. Rep. 132. On the other hand, the making by a voluntary bankrupt of an oath to his schedules, in which it was stated that he had no property, when in fact he had a small amount of money, with which he paid the costs, and a small amount of household furniture, which he could have claimed as exempt, was not sufficient to constitute a bar to his discharge. Humphries v. Nalley (C. C. A.) 269 Fed. 607, 46 Am. Bankr. Rep. 63.

[188] Fellows v. Freudenthal, 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490.

[189] Kentucky Nat. Bank v. Carley, 127 Fed. 686, 62 C. C. A. 412, 12 Am. Bankr. Rep. 119; In re Hale, 206 Fed. 856, 31 Am. Bankr. Rep. 88; In re Lundberg (C. C. A.) 272 Fed. 107; In re Wilson (D. C.) 269 Fed. 845, 46 Am. Bankr. Rep. 477.

[190] In re Warne, 12 Fed. 431.

[191] In re Strouse, 2 Nat. Bankr. News, 64.

[192] In re Gaylord, 112 Fed. 668, 50 C. C. A. 415, 7 Am. Bankr. Rep. 1; In re Dow's Estate, 105 Fed. 889, 5 Am. Bankr. Rep. 400; In re Leslie, 119 Fed. 406, 9 Am. Bankr. Rep. 561. But compare In re Marx, 102 Fed. 676, 4 Am. Bankr. Rep. 521; In re Logan, 102 Fed. 876, 4 Am. Bankr. Rep. 525.

[193] Bauman v. Feist, 107 Fed. 83, 46 C. C. A. 157, 5 Am. Bankr. Rep. 703; In

pears also that a bankrupt's discharge should not be denied because of an alleged false oath, where he corrected his testimony before the close of his examination.[194] But this has been denied.[195]

The act further specifies as a ground for refusing a discharge that the bankrupt has "refused to answer any material question approved by the court." [196] It makes no difference that his refusal to answer was based on a claim of his constitutional privilege against incriminating himself,[197] nor does he regain his right to a discharge by offering to answer the particular question, or by actually answering it, after specifications in opposition to his discharge are filed.[198]

§ 679. Same; Obtaining Credit by False Statements.—This ground of objection to a bankrupt's discharge was not included in the bankruptcy act as originally enacted, but was added in 1903 by an amendment, which specified as a ground of refusing a discharge that the bankrupt had "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." [199] This was broadened by a further amendment in 1910, so as to provide that it shall be ground for denying the discharge if the bankrupt shall have "obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person." [200] These amendments are retroactive, in so far as that they apply to all cases where the application for discharge was made after the amendment took effect, although the false statement may have been made before.[201] As the law stood between the dates of these two

re Gaylord, 112 Fed. 668, 50 C. C. A. 415, 7 Am. Bankr. Rep. 1; In re Slingluff, 105 Fed. 502; In re Marcus, 203 Fed. 29, 30 Am. Bankr. Rep. 176.

194 In re Doyle, 199 Fed. 247, 29 Am. Bankr. Rep. 102.

195 In re Marcus, 192 Fed. 743, 27 Am. Bankr. Rep. 164. In this case it was said by Hand, J.: "I cannot agree with the learned master that it is in the least material that the bankrupt subsequently corrects a false oath by telling the truth, except in so far as it throws light upon what his actual intention or understanding was when he made the first statements. Suppose that the correction had occurred at a separate session of the first meeting of creditors, surely no one would say that such a fact was material. Suppose he first testified falsely, and was afterwards broken down by cross-examination into a confession. Once he has given material testimony, which he intends to have taken as such in the case, and which he knows to be false, the crime is complete, whatever may be his subsequent atonement."

196 See In re Rea Bros. (D. C.) 251 Fed. 431, 40 Am. Bankr. Rep. 429.

197 In re Dresser, 146 Fed. 383, 76 C. C. A. 655, 16 Am. Bankr. Rep. 561; In re Schwartz & Co., 201 Fed. 166, 28 Am. Bankr. Rep. 670.

198 In re Weinreb, 153 Fed. 363, 82 C. C. A. 439, 18 Am. Bankr. Rep. 387; In re Schwartz & Co., 201 Fed. 166, 28 Am. Bankr. Rep. 670.

199 Act Cong. Feb. 5, 1903, 32 Stat. 797, amending Bankruptcy Act 1898, § 14.

200 Act Cong. June 25, 1910, 36 Stat. 838, amending Bankruptcy Act 1898, § 14.

201 In re Dresser, 145 Fed. 1021, 74 C. C. A. 680; In re Scott (D. C.) 126 Fed. 981, 11 Am. Bankr. Rep. 327.

amendments, there was some doubt as to whether one borrowing money could be said to "obtain property" on credit,[202] but the obtaining of money is now expressly included.[203] However, it is held that the obtaining of a surety or indemnity bond by means of false financial statements, is not the obtaining of "property" on credit, within the meaning of the law.[204] Although it is not necessary that a statement made by bankrupt to obtain goods on credit should have been made, or the goods delivered, within four months prior to his bankruptcy, in order to bar his discharge,[205] yet it is strictly necessary to show that some one has actually parted with money or property in reliance upon such statement,[206] and the lapse of a considerable period of time may have an important bearing on this point. Thus, a false financial statement, made eighteen months before a sale of goods to the bankrupt, cannot be considered a proximate cause of the sale, so as to entitle the seller to object to the bankrupt's application for discharge on account of it.[207] And a discharge will not be withheld where it is shown that the creditor first refused to make the loan to the bankrupt which the latter asked for, and for which he submitted the alleged false statement, and afterwards made the loan on security given at the time and which he then deemed sufficient.[208]

Within the meaning of the statute, obtaining property "on credit" means obtaining it without present payment, but with a promise on the part of the debtor that payment will be made and an expectation of receiving it on the part of the creditor.[209] And the financial statement presented by the debtor must be the inducement to the extension of credit. It is necessary, therefore, that the creditor should have relied

[202] See In re Louisville National Banking Co., 158 Fed. 403, 85 C. C. A. 513, 19 Am. Bankr. Rep. 309; In re Pfaffinger (D. C.) 154 Fed. 528, 19 Am. Bankr. Rep. 41; In re Gilpin (D. C.) 160 Fed. 171, 20 Am. Bankr. Rep. 374.

[203] Securing the renewal of notes by means of a false statement in writing is held to be "obtaining property" thereby. Samet v. Farmers' & Merchants' Nat. Bank, 247 Fed. 669, 159 C. C. A. 571, 40 Am. Bankr. Rep. 450. So, the obtaining of goods under a contract of conditional sale is an obtaining of property, notwithstanding the seller's reservation of title. In re Fackler (D. C.) 246 Fed. 864, 39 Am. Bankr. Rep. 742.

[204] In re Tanner (D. C.) 192 Fed. 572, 27 Am. Bankr. Rep. 615. The obtaining by bankrupts of a license to do business as private bankers, by means of a false written statement made to the Comptroller of the State of New York, as required by statute, is not an "obtaining of property" within the meaning of the Bankruptcy Act. In re Oliner (C. C. A.) 262 Fed. 734, 44 Am. Bankr. Rep. 450, 45 Am. Bankr. Rep. 185.

[205] In re Simon (D. C.) 201 Fed. 1004, 29 Am. Bankr. Rep. 808.

[206] In re Troutman & Jesse (D. C.) 251 Fed. 930, 40 Am. Bankr. Rep. 418; In re McLellan (D. C.) 204 Fed. 482, 30 Am. Bankr. Rep. 325.

[207] In re Broverman (D. C.) 199 Fed. 863, 28 Am. Bankr. Rep. 513. And see In re Allendorf (D. C.) 129 Fed. 981, 12 Am. Bankr. Rep. 320; In re Kean (D. C.) 237 Fed. 682, 38 Am. Bankr. Rep. 628. But compare In re Samet (D. C.) 243 Fed. 203, 39 Am. Bankr. Rep. 632.

[208] In re Kaplan (D. C.) 141 Fed. 463, 15 Am. Bankr. Rep. 534.

[209] In re Wylly (D. C.) 210 Fed. 954, 32 Am. Bankr. Rep. 145.

upon it as evidence of the debtor's ability to pay.[210] Thus, where a bank which loans money to a bankrupt on warehouse receipts as collateral would not have done so without a financial statement, which was furnished and which was false, the loan is the extension of a credit on the part of the bank.[211] But the creditor's reliance on the statement made by the debtor need not always be directly proved. It is enough if it is fairly presumable from the circumstances. The fact, for instance, that the creditor wrote the word "caution" on the debtor's statement as a guide to his salesmen and directed that the credit should be limited to a certain small sum does not necessarily save the bankrupt from the consequences of falsity in the statement.[212] And if the creditor did rely on the statement, the question cannot be raised as to whether or not he was justified in so doing; it is immaterial that he might have discovered its falsity by investigating the real estate records.[213] It should be added that this ground of objection to the discharge of a bankrupt is not limited to the case of merchants, but applies to all who ask for a discharge in bankruptcy.[214]

The "false statement in writing" described in the statute must be a financial statement, or statement of the debtor's assets or financial condition, as distinguished from a mere misrepresentation as to a material fact.[215] For this reason, probably, it is held that a check given by the bankrupt in payment for goods, drawn on a bank where he has neither money nor credit, is not such a "statement" as the law intends, and further, that the "credit" meant is express credit, and not such unintended credit as is forced upon a seller who accepts a worthless check.[216] On the other hand, a bankrupt's statement that he has a certain amount of money invested is a statement of fact, and not a mere representation nor an estimate of value, and if it was made for the purpose, and with the result, of obtaining credit, it is ground for denying his discharge.[217]

In regard to the untruthfulness of the statement, it is said that the word "false," as used in the statute means more than merely erroneous or untrue, being used in its primary legal sense as importing an intention to deceive, and hence such a statement, in order to constitute a bar to

[210] Rauch v. Manchester-Smith Co., 240 Fed. 687, 153 C. C. A. 485, 39 Am. Bankr. Rep. 484; Bank of Commerce & Savings v. Matthews, 257 Fed. 292, 168 C. C. A. 376, 43 Am. Bankr. Rep. 284.

[211] In re Savarese, 209 Fed. 830, 126 C. C. A. 554, 31 Am. Bankr. Rep. 758.

[212] In re Neuman (D. C.) 251 Fed. 667, 40 Am. Bankr. Rep. 427.

[213] In re Blank (D. C.) 236 Fed. 801, 38 Am. Bankr. Rep. 71.

[214] In re Day (D. C.) 268 Fed. 871, 46 Am. Bankr. Rep. 394.

[215] In re Morgan (C. C. A.) 267 Fed. 959, 45 Am. Bankr. Rep. 612.

[216] In re Rea Bros. (D. C.) 251 Fed. 431, 40 Am. Bankr. Rep. 429; Robinson v. J. R. Williston & Co. (C. C. A.) 266 Fed. 970, 45 Am. Bankr. Rep. 619. See In re Robinson (D. C.) 256 Fed. 55, 43 Am. Bankr. Rep. 64.

[217] In re Simon (D. C.) 268 Fed. 1006, 46 Am. Bankr. Rep. 170.

a discharge, must have been knowingly and intentionally untrue,[218] or it must have been either knowingly false, or made so recklessly as to warrant a finding that the bankrupt acted fraudulently in making it.[219] But there are decisions that if the statement was made for the purpose of obtaining credit and brought about that result, and was false in fact, it is none the less a bar to the bankrupt's discharge because the inaccuracy was due to a mistake made in good faith,[220] or because it was made and given as a mere matter of form and with no actual intention to defraud.[221] The false statement must have been made by the bankrupt, but need not be in his writing. It is equally effective to bar his discharge where the paper was filled out by a representative of the creditor from figures given by the bankrupt.[222] And where one member of a firm makes a materially false statement of its assets and liabilities, for the purpose of obtaining credit, this will prevent the discharge of that partner and also of the firm, though probably not of an innocent partner.[223] And although cases must be rare in which the bankrupt would make a materially false statement for the purpose of obtaining money or property for any one else than himself, yet it is said that the effect on

[218] Doyle v. First Nat. Bank of Baltimore, 231 Fed. 649, 145 C. C. A. 535, 36 Am. Bankr. Rep. 331; Aller-Wilmes Jewelry Co. v. Osborn, 231 Fed. 907, 146 C. C. A. 103, 36 Am. Bankr. Rep. 714; In re Lundberg (C. C. A.) 272 Fed. 107; In re Rosenfeld (C. C. A.) 262 Fed. 876, 44 Am. Bankr. Rep. 390; In re Goldberg (D. C.) 256 Fed. 541, 43 Am. Bankr. Rep. 127; In re Kemp (D. C.) 255 Fed. 125, 42 Am. Bankr. Rep. 417; Franklin v. Monning Dry Goods Co., 217 Fed. 929, 133 C. C. A. 601, 33 Am. Bankr. Rep. 257; Gilpin v. Merchants' Nat. Bank, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023, 21 Am. Bankr. Rep. 429; Hamlin v. J. M. Radford Grocery Co. (Tex. Civ. App.) 182 S. W. 716. The intent to deceive being an essential ingredient of this ground of objection to the bankrupt's discharge, his signing as president statements of the financial condition of a corporation, wholly relying on the advice of his financial adviser, will not have that effect. In re Stafford (D. C.) 226 Fed. 127, 35 Am. Bankr. Rep. 747. But it is enough to show that the untruthfulness in the statement related to a subject within the knowledge of the bankrupt. In re Perlmutter (D. C.) 256 Fed. 862, 43 Am. Bankr. Rep. 362. The falsity in the statement, however, must have been material and not trifling. In re Kerner, 250 Fed. 993, 163 C. C. A. 243, 41 Am. Bankr. Rep. 507.

[219] In re Collins (D. C.) 157 Fed. 120, 19 Am. Bankr. Rep. 688.

[220] In re Aldridge, 168 Fed. 93; In re Shaffer, 169 Fed. 724, 22 Am. Bankr. Rep. 147. And see In re Matthews (C. C. A.) 272 Fed. 263, 47 Am. Bankr. Rep. 38.

[221] In re Arenson, 195 Fed. 609, 28 Am. Bankr. Rep. 113; In re Terens, 172 Fed. 938, 22 Am. Bankr. Rep. 895.

[222] In re Puschkin, 183 Fed. 882, 25 Am. Bankr. Rep. 742. But where a bankrupt made a full disclosure of his financial condition to an objecting creditor's agent, and depended on him to enter the facts according to the disclosure, and signed the statement so made without reading it, it was not "false" so as to bar the bankrupt's discharge, though it was inaccurate. International Harvester Co. v. Carlson, 217 Fed. 736, 133 C. C. A. 430, 33 Am. Bankr. Rep. 178.

[223] Ragan, Malone & Co. v. Cotton & Preston, 200 Fed. 546, 118 C. C. A. 640, 29 Am. Bankr. Rep. 597; In re Neyland & McKeithen, 184 Fed. 144, 24 Am. Bankr. Rep. 879; In re Josephson (D. C.) 229 Fed. 272, 36 Am. Bankr. Rep. 505. See In re Waite (D. C.) 223 Fed. 853, 35 Am. Bankr. Rep. 189.

his right to a discharge is not different because the credit was obtained by a corporation of which he owned a majority of the stock.[224]

In its original form, this clause of the statute required the statement to have been made "to such person," that is, the person who was thereby induced to furnish the credit. The amendment of 1910 changed this so as to read "to any person or his representative." But even before 1910, it was held that the statement was made "to such person" if it was given to an agent for the purpose of using it in obtaining property for the bankrupt and if its contents were communicated by the agent to such person.[225] But a financial statement made by the bankrupt to a mercantile or commercial agency, in response to its request therefor or in answer to its inquiries, though materially false, is not a bar to his discharge, where creditors merely relied on his rating thus obtained and furnished him goods on credit, but without direct communication with the bankrupt himself.[226] "Ordinarily statements are given by merchants to commercial agencies to continue a business rating, and are regarded merely as a basis for continued credit, and not as a medium through which particular credit is given or obtained, and in such a case, even when the statement is false, the bankrupt is not debarred from a discharge in bankruptcy."[227] But such a statement, made to a commercial agency, reciting that it is made as a basis for credit with the associate members of such agency, and which is communicated to members, who extend credit on the faith of it, is equivalent to one made directly to them.[228] And the result is the same where the bankrupt having made such a statement to a mercantile agency, refers to it in his application for credit with a particular creditor, and is granted credit in reliance on it.[229]

[224] In re Dresser, 145 Fed. 1021, 74 C. C. A. 680, affirming 144 Fed. 318, 13 Am. Bankr. Rep. 616; In re Bleyer (D. C.) 210 Fed. 391, 32 Am. Bankr. Rep. 98. And see In re Perlmutter (D. C.) 256 Fed. 862, 43 Am. Bankr. Rep. 362.

[225] In re Dresser, 146 Fed. 383, 76 C. C. A. 655, 16 Am. Bankr. Rep. 561.

[226] In re Russell, 176 Fed. 253, 100 C. C. A. 77, 23 Am. Bankr. Rep. 850; Novick v. E. P. Reed & Co., 192 Fed. 20, 28 Am. Bankr. Rep. 521; In re Foster, 186 Fed. 254, 24 Am. Bankr. Rep. 368; In re Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73; J. W. Ould Co. v. Davis, 246 Fed. 228, 158 C. C. A. 388, 40 Am. Bankr. Rep. 185; In re Kretz (D. C.) 212 Fed. 784, 32 Am. Bankr. Rep. 365; In re Zoffer, 211 Fed. 936, 128 C. C. A. 434.

[227] In re Simon, 201 Fed. 1004, 29 Am. Bankr. Rep. 805.

[228] In re Cloutier Bros. (D. C.) 228 Fed. 569, 36 Am. Bankr. Rep. 319; In re Pincus (D. C.) 147 Fed. 621, 17 Am. Bankr. Rep. 331. Whether false statements to a mercantile agency, subsequently communicated and acted upon, bar a discharge depends on whether the agency was the creditor's representative when the statement was acted on and whether the false statement was still in force. Haimowich v. Mandel, 243 Fed. 338, 156 C. C. A. 118, 39 Am. Bankr. Rep. 513.

[229] In re Haimowich (D. C.) 232 Fed. 378, 36 Am. Bankr. Rep. 648; In re Kyte (D. C.) 174 Fed. 867, 23 Am. Bankr. Rep. 414. An objecting creditor cannot set up the claim that he relied on false statements as to the bankrupt's financial condition made by the bankrupt to a commercial agency three months after

In regard to the substance of the statement, the falsity of it may consist in a claim of assets which are purely imaginary, or which, though real, are not the property of the bankrupt.[230] Thus, false statements by a broker as to the amount of stock on hand for customers who are trading on margin, pursuant to which customers made payment, will preclude his discharge.[231] And a materially false statement made by a bankrupt as to the solvency of a corporation of which he was president, on the faith of which he obtained a large sum of money from a bank on the notes of the corporation indorsed by himself, the proceeds of which he used for his own purposes, will be a sufficient objection to his application for discharge.[232] But the giving by a bankrupt of a mortgage on property which he does not own, to secure a note for borrowed money, has been held not within the statute.[233] The falsity of the statement may also consist in a gross overestimate of the value of land or other property which the bankrupt really owns,[234] or in the omission, concealment, or understatement of his debts.[235] And a bankrupt's written statement of his financial condition, from which liabilities are omitted, cannot be defended on the ground that assets were also omitted and that the balance was therefore substantially correct.[236] Neither can the omission of liabilities from such a statement be defended on the ground that the bankrupt thought his creditors would not press him, nor is it cured by the subsequent payment or release of the debts which were concealed.[237] But a discharge will not be refused on this ground where the statement did not on its face purport to include all the bankrupt's indebtedness and did not state that there was no other indebtedness.[238] Nor will a discharge be refused on account of the bankrupt's having omitted, in such a statement, debts due to some of his relatives, for money loaned to him, where the agreement with them was that such loans were not to be paid back if the bankrupt was unable to repay them, and that they were not to interfere with the claims of his other

the goods were sold and the credit extended. In re Main (D. C.) 205 Fed. 421, 30 Am. Bankr. Rep. 547.

[230] In re Nadel (D. C.) 211 Fed. 767, 33 Am. Bankr. Rep. 727; In re Goodhile (D. C.) 130 Fed. 782, 12 Am. Bankr. Rep. 380.

[231] In re Shea (D. C.) 245 Fed. 363, 40 Am. Bankr. Rep. 175.

[232] In re Bleyer, 215 Fed. 896, 132 C. C. A. 236, 33 Am. Bankr. Rep. 76.

[233] In re Hudson (D. C.) 262 Fed. 778, 45 Am. Bankr. Rep. 275.

[234] In re Ellerbee (D. C.) 198 Fed. 952, 29 Am. Bankr. Rep. 87.

[235] In re Smith (D. C.) 232 Fed. 248, 37 Am. Bankr. Rep. 230; Cleland v. Iowa Loan & Trust Co., 260 Fed. 653, 171 C. C. A. 417, 44 Am. Bankr. Rep. 429; In re Miller (D. C.) 192 Fed. 730, 27 Am. Bankr. Rep. 606; In re Augspurger (D. C.) 181 Fed. 174, 25 Am. Bankr. Rep. 83; In re Brener (D. C.) 166 Fed. 930, 20 Am. Bankr. Rep. 644.

[236] In re Maaget (D. C.) 245 Fed. 804, 40 Am. Bankr. Rep. 221; In re Reed (D. C.) 256 Fed. 412, 43 Am. Bankr. Rep. 132.

[237] Josephs v. Powell & Campbell, 213 Fed. 627, 130 C. C. A. 291, 32 Am. Bankr. Rep. 222.

[238] In re Rammage (D. C.) 260 Fed. 893.

creditors. In such a case, decision on the application for discharge may be postponed, and if the relatives will refrain from proving their claims as debts, and will give the bankrupt a release or waiver of them, the discharge may be granted.[239] And where two bankers in the same town are in the habit of "clearing" or settling their accounts against each other at the close of each day's business, the debtor bank for the day giving a draft on a third bank, and numbers of such drafts drawn by one of the bankers (the bankrupt in this case) have been provided for, although he had no funds in the hands of the drawee at the time of making the drafts, the fact that the last two drafts, so drawn while he was insolvent, are dishonored, does not make them "materially false statements in writing" given for the purpose of obtaining property on credit.[240] Finally, if it is clearly shown that any one of the items in the bankrupt's financial statement was materially false, though others may be open to dispute or question, or may be successfully defended, it is the plain duty of the court to refuse a discharge.[241]

§ 680. Same; Failure to Keep Books of Account.—The bankruptcy act, as amended in 1903, provides that it shall be a ground for refusing a discharge, if the bankrupt has "with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained." This does not require that the bankrupt shall have kept books of account. He may be entitled to his discharge though he has nothing whatever to show in the way of account books or records. To bar his discharge it is necessary that his omission to keep accounts should have resulted from a wish to conceal his financial condition from his creditors and in pursuance of an intent so to do.[242] Thus, the fact that he kept no books of account will not warrant the court in refusing him a discharge, where the business in which he was engaged was such that ordinarily books of account would not be kept,[243] or where he was an employé and not engaged in any business of his own,[244] or where, for several years before, he had not been engaged in any business in which the keeping of books would be necessary or appropriate.[245] So, where the bankrupt was a farmer and not a business man, and showed entire willingness to give evidence as to facts and transactions alleged to constitute a concealment

[239] In re Josephs (D. C.) 205 Fed. 548, 30 Am. Bankr. Rep. 586.

[240] Firestone v. Harvey, 174 Fed. 571, 98 C. C. A. 420, 23 Am. Bankr. Rep. 468.

[241] In re Darevski (D. C.) 171 Fed. 288, 22 Am. Bankr. Rep. 571.

[242] In re Brockman, 168 Fed. 1015, 21 Am. Bankr. Rep. 251; In re Keefer, 135 Fed. 885; In re Josephson (D. C.) 229 Fed. 272, 36 Am. Bankr. Rep. 505.

[243] In re Corn, 106 Fed. 143, 5 Am. Bankr. Rep. 478; In re Opava (D. C.) 235 Fed. 779, 37 Am. Bankr. Rep. 799.

[244] In re McCrea, 161 Fed. 246, 20 Am. Bankr. Rep. 412.

[245] Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

of assets, it was considered that a fraudulent intent could not be imputed to him from his mere failure to keep any books.[246] And this "intent to conceal" his financial condition is not shown as to a building contractor, where, during the ten years he had been engaged in the business, he never had kept any books at all.[247] Further, the failure to keep proper books of account in a business which had been entirely closed out before the bankruptcy, there being no debts or assets arising out of such business, will not prevent a discharge.[248] But in this situation, the bankrupt must show that everything in relation to the discontinued business had been so fully ended that no account therein can in any way affect the interests of his creditors at the time of his bankruptcy.[249]

But assuming the other conditions to exist, the failure to keep books need not have been systematic, but may have been occasional; and the failure to enter one particular transaction on the books may constitute a failure to "keep" proper books. Thus, for example, the sale of firm assets to a new firm composed of the same members and one other, without any entry of the transaction on the books of the old firm, is a violation of the act.[250] And so where the bankrupt fails to enter on his books a transfer of property made about the time when his affairs became embarrassed,[251] or a transfer of his business to his wife, which is thereafter supposed to be continued by her, but with no visible difference in the conduct of it,[252] or a sale of his stock of goods in bulk for about half its cost and under circumstances indicating haste and secrecy.[253] So the prohibition of the statute must be applied where the bankrupt mingled his wife's money and his own and deposited it all in a bank in his wife's name, and kept no account or record to show how much of it was his,[254] and where there was a very great shrinkage of the bankrupt's assets, and his books entirely failed to show what had become of his property.[255] But the mere fact that the partners in the bankrupt firm sometimes drew out for personal use equal sums, without entering the same on the books, is not enough to show an inten-

[246] In re Marsh, 2 Nat. Bankr. News, 593.

[247] In re Tanner, 192 Fed. 572, 27 Am. Bankr. Rep. 615; In re Arnold (D. C.) 228 Fed. 75, 35 Am. Bankr. Rep. 740.

[248] In re Friedberg, 19 N. B. R. 302, Fed. Cas. No. 5,116; In re Keach, 1 Low. 335, 3 N. B. R. 13, Fed. Cas. No. 7,629.

[249] Tyler v. Angevine, 15 Blatchf. 536, Fed. Cas. No. 14,306.

[250] In re Colcord, 2 Hask. 455, Fed. Cas. No. 2,970a.

[251] In re Grieves, Fed. Cas. No. 5,809. See In re Sims (D. C.) 213 Fed. 992, 32 Am. Bankr. Rep. 564.

[252] In re Bemis, 104 Fed. 672, 5 Am. Bankr. Rep. 36.

[253] In re Morgan, 101 Fed. 982, 4 Am. Bankr. Rep. 402.

[254] Bragassa v. St. Louis Cycle, 107 Fed. 77, 46 C. C. A. 154, 5 Am. Bankr. Rep. 700.

[255] In re Brod, 166 Fed. 1011, 21 Am. Bankr. Rep. 426, affirmed Brod v. J. K. Orr Shoe Co., 173 Fed. 1019, 97 C. C. A. 667.

tion to conceal their financial condition.[256] And a merely temporary and accidental omission in good faith and for a reasonable time to make the proper entries would not be a failure to keep the books, although a cessation to keep them, on purpose, or for an unreasonable length of time, would be.[257]

Of course it is not necessary for the bankrupt to keep the books with his own hand. In one case, a discharge was granted to a bankrupt who could neither read nor write English, though he kept no books but a cash book and a check book, in which the entries were made by a young woman clerk who could not be located as a witness.[258] On the other hand, it is doubtful if the bankrupt can excuse himself for the inaccurate or unintelligible condition of his books, by showing that he left the entire charge of them to a bookkeeper whom he believed to be competent.[259] In one case it was said: "The law does not require traders to keep a bookkeeper, but to keep books, and they are responsible to see that it is done."[260] But a bankrupt residing in New York, and being a member of a firm doing business in Michigan, is not prevented from obtaining his discharge either by the failure of the firm to keep proper books of account or by his neglect to see that proper books were kept.[261] But where the bankrupt did business through a corporation which he owned and controlled, his failure to keep books, either individually or through the corporation, so as to show his business transactions, will constitute a good objection to his discharge.[262]

§ 681. **Same; Destruction, Mutilation, or Concealment of Books.**—Destruction or concealment of books of account, to constitute ground of objection to a bankrupt's discharge, must appear to have been done by the bankrupt himself, or at least with his knowledge and connivance.[263] Thus, a bankrupt's discharge will not be barred by the fact that the account books of a corporation for which he was bookkeeper, and in which he had no interest, had been mutilated before they came into the possession of the corporation.[264] But where a debtor has keep books of account or records of his business carried on before the enactment of the bankruptcy law, their destruction or concealment, after the passage of

256 In re Mackenzie, 132 Fed. 114, 12 Am. Bankr. Rep. 605.

257 In re Hammond, 1 Low, 381, 3 N. B. R. 273, Fed. Cas. No. 5,999; In re Burgess, 3 N. B. R. 196, Fed. Cas. No. 2,153.

258 In re Mintzer, 197 Fed. 647, 28 Am. Bankr. Rep. 743.

259 See In re Janavitz, 219 Fed. 876, 135 C. C. A. 546, 34 Am. Bankr. Rep. 105; In re Landersman (D. C.) 239 Fed. 766, 38 Am. Bankr. Rep. 685.

260 In re Hammond, 1 Low, 381, 3 N. B. R. 273, Fed. Cas. No. 5,999.

261 In re Garrison, 149 Fed. 178, 79 C. C. A. 126, 17 Am. Bankr. Rep. 831.

262 In re Berger, 200 Fed. 325, 29 Am. Bankr. Rep. 712.

263 In re Brice, 102 Fed. 114, 4 Am. Bankr. Rep. 355.

264 Bauman v. Feist, 107 Fed. 83, 46 C. C. A. 157, 5 Am. Bankr. Rep. 703.

the act, will be ground for refusing his discharge, if done with the fraudulent intent denounced by the statute.[265]

The mutilation of books of account, either by tearing out leaves or by changing the entries, may constitute a "destruction" or a "concealment" of them, according to the circumstances.[266] But such a mutilation may be explained, and condoned if done without any fraudulent intent.[267] Thus, where it appears that certain erasures in the bankrupt's books arose from errors in the original entries, which were corrected by erasing the figures and substituting the correct ones therefor, and there was no suggestion of a fraudulent intent, a discharge will not be refused because of such erasures.[268]

If the bankrupt testifies that he does not know where his books of account are, when they are in fact in the custody of one of his creditors, where he knows them to be and where he has access to them, he is guilty of concealing them,[269] as also where he first denies having kept any books, and then, when investigation has shown their existence, produces only one, and that not the most important.[270] Bankrupts, however, usually profess ignorance as to what has become of their books, at least if they have not been produced and turned over to the trustee at once; and if such ignorance really exists, it negatives a fraudulent purpose of concealing them. The plausibility of such an excuse must depend on many surrounding circumstances. In one case a discharge was granted where the testimony of the bankrupt was that, at the time of his failure, thinking the books were of no further value to him, and having no place to keep them, he left them lying in the store and supposed they had been lost or mislaid in some way unknown to him;[271] and so in another case, where the books were in a safe in the store when the sheriff levied, and the bankrupt said he had never seen the books since and did not know what had become of them;[272] and in another case, where the books had been turned over to a brother-in-law when the latter bought the business, and no effort was made to call him as a witness or require the production of the books.[273] But a discharge was refused in a case where the books were needed to explain a large shrinkage of assets, and the bankrupts had

[265] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715.

[266] In re Mendelsohn, 102 Fed. 119, 4 Am. Bankr. Rep. 103.

[267] In re Nooman, 3 N. B. R. 267, Fed. Cas. No. 10,291.

[268] In re Antisdel, 18 N. B. R. 289, Fed. Cas. No. 490. And see In re Rivas (D. C.) 268 Fed. 690, 45 Am. Bankr. Rep. 434.

[269] In re Kamsler, 97 Fed. 194. And see In re Simon (D. C.) 268 Fed. 1006, 46 Am. Bankr. Rep. 170.

[270] In re McBachron, 116 Fed. 783, 8 Am. Bankr. Rep. 732.

[271] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715.

[272] In re Stark, 96 Fed. 88, 2 Am. Bankr. Rep. 785.

[273] In re Shorer, 96 Fed. 90, 2 Am. Bankr. Rep. 165.

turned them over to a creditor along with the stock in the store, on a bill of sale, but never went back for the books nor made any effort to recover them;[274] and in a case where the bankrupt testified that his wife had kept the books, but that they could not now be found.[275]

Almost any records which might serve to show the financial condition of the bankrupt are to be considered "books or records" within the prohibition against their destruction or concealment. Thus, where the bankrupt kept no proper books of account, but did keep a bank account, his canceled checks and the stubs in his check book constitute records from which his financial condition could to some extent at least be ascertained; and his destruction of such records shortly before his bankruptcy, and while he was insolvent, no adequate reason being shown therefor, may be held to have been with intent to conceal his financial condition, and be ground for refusing a discharge.[276] And a similar ruling was made in a case where the bankrupt had kept no accounts at all but certain loose memoranda of sales, and had destroyed these.[277]

§ 682. Same; Intent to Conceal Financial Condition.—Under the bankruptcy act of 1867, it was not necessary that the bankrupt's omission to keep proper books of account should have been willful or fraudulent, in order to bar his discharge; the intent was immaterial; the mere omission was the thing forbidden.[278] But the present statute provides that the discharge may be refused on this ground only when the failure to keep books, or their destruction or concealment, was "with intent to conceal his financial condition," in this respect following the English law, whereby an intent on the part of the bankrupt to conceal the true state of his affairs must be coupled with the willful omission to keep proper books. As the act of 1898 stood originally, it required that this intent should have been "fraudulent" and "in contemplation of bankruptcy." But the words quoted were stricken out by the amendment of 1903, so that, at present, if there was an intent to conceal his financial condition, it is not necessary to show that it was fraudulent.[279] This

[274] In re Ablowich, 99 Fed. 81, 3 Am. Bankr. Rep. 586.

[275] In re Wiedmann, 188 Fed. 684, 26 Am. Bankr. Rep. 697.

[276] In re Hodge, 205 Fed. 824, 30 Am. Bankr. Rep. 522. But compare In re Studebaker, 127 Fed. 951, 62 C. C. A. 583, 11 Am. Bankr. Rep. 384. Proof that the bankrupt destroyed his canceled checks and stubs in cleaning out his safe, after turning his business over to his principal creditor, but that thereafter he and his attorney stood ready to produce all books required by the trustee, does not show an intent to conceal his financial condition, which would be necessary to prevent his discharge for the destruction of the checks. In re Rivas (D. C.) 268 Fed. 690, 45 Am. Bankr. Rep. 434.

[277] In re Hirshowitz, 194 Fed. 562. 27 Am. Bankr. Rep. 701.

[278] In re Newman, 3 Ben. 20, 2 N. B. R. 302, Fed. Cas. No. 10,175; In re Solomon, 6 Phila. (Pa.) 481, 2 N. B. R. 285, Fed. Cas. No 13,167; In re Archenbrown, 12 N. B. R. 17, Fed. Cas. No. 505.

[279] In re Hodge, 205 Fed. 824, 30 Am.

intent, however, is an indispensable requisite to successful opposition to the discharge. The mere failure of the bankrupt to keep any books is not enough.[280] Nor is it enough to show that the books have disappeared,[281] or that they were kept in a negligent or careless manner,[282] or that the true state of the bankrupt's affairs or his real financial condition cannot be ascertained from the books as kept.[283] It is further necessary to show that the failure to keep books, or their destruction or concealment, or the manner of keeping them resulted from the bankrupt's intention to use this means of concealing his financial condition.[284] And the exact intention on the part of the bankrupt is important. Where a transaction alleged to have been fraudulent was fully entered on the books, although the entries were made to deceive the general creditors, yet if they were not made with an intent to falsify the books, the particular intention denounced by the statute is not present.[285] But conversely, if the bankrupt meant to conceal his financial condition, and for that reason kept no books, it is immaterial what the actual effect on creditors may have been.[286]

The objecting creditors must assume the burden of proving this intent on the part of the bankrupt.[287] Naturally the mental state involved in the harboring of an intent is not susceptible of proof by direct evidence, unless it may be by the bankrupt's own admissions,[288] as appeared in one case where the bankrupt deposited his money in his wife's name and made no entry on his own books, and admitted that he did this to keep his creditors from "jumping on it" before he had an opportunity to use it.[289] But proof of various circumstances supporting the hypothesis that he entertained such an intent, or all pointing to such an intent as the

Bankr. Rep. 522; In re Hanna, 168 Fed. 238, 21 Am. Bankr. Rep. 843; In re Linker (D. C.) 222 Fed. 173, 33 Am. Bankr. Rep. 709. See In re Helfgott (D. C.) 245 Fed. 358, 40 Am. Bankr. Rep. 196.

[280] In re Brown, 199 Fed. 356, 29 Am. Bankr. Rep. 73; Sherwood Shoe Co. v. Wix, 240 Fed. 692, 153 C. C. A. 490, 38 Am. Bankr. Rep. 670; In re Newbury & Dunham, 209 Fed. 195, 126 C. C. A. 207, 31 Am. Bankr. Rep. 365.

[281] In re Philipps, 98 Fed. 844, 3 Am. Bankr. Rep. 542.

[282] In re Haskell, 164 Fed. 301, 20 Am. Bankr. Rep. 914; In re Wix (D. C.) 236 Fed. 262, 38 Am. Bankr. Rep. 185.

[283] In re Brice, 102 Fed. 114, 4 Am. Bankr. Rep. 355; In re Lafleche, 109 Fed. 307, 6 Am. Bankr. Rep. 483; In re Landersman (D. C.) 239 Fed. 766, 38 Am. Bankr. Rep. 685.

[284] Van Ingen v. Schophofen, 129 Fed. 352, 64 C. C. A. 22, 12 Am. Bankr. Rep. 24; In re Allendorf, 129 Fed. 981, 12 Am. Bankr. Rep. 320; In re Idzall, 96 Fed. 314, 2 Am. Bankr. Rep. 741; In re Carmichael, 96 Fed. 594, 2 Am. Bankr. Rep. 815; In re Spear, 103 Fed. 779, 4 Am. Bankr. Rep. 617; In re Boasberg, 1 Nat. Bankr. News, 133.

[285] In re Hamilton, 133 Fed. 823, 13 Am. Bankr. Rep. 333.

[286] In re Schachter, 170 Fed. 683, 22 Am. Bankr. Rep. 389.

[287] In re Forth, 151 Fed. 951, 18 Am. Bankr. Rep. 186; In re Shertzer, 99 Fed. 706, 3 Am. Bankr. Rep. 699; In re Finan, 2 Nat. Bankr. News, 872.

[288] In re Feldstein, 115 Fed. 259, 53 C. C. A. 479, 8 Am. Bankr. Rep. 160.

[289] In re Bragasa, 2 Nat. Bankr. News, 837.

only explanation of his conduct, will raise a presumption that such an intent existed, and this will justify the refusal of a discharge, unless the facts are satisfactorily explained by the bankrupt.[290] Such explanations are often attempted by bankrupts, and have sometimes passed muster. In one case, the bankrupt was a dealer in pianos, and his books showed all receipts from customers who had taken pianos on lease or conditional sale or time sales, but not receipts for pianos sold for cash. His explanation was that he did not want his salesmen to know that he was selling pianos at cost for cash, and it was held that no "intent to conceal his financial condition" had been established, for concealment can exist only when it obtains with reference to persons entitled to know the facts.[291] So it was held a reasonable excuse for failure to enter certain loans on the bankrupt's books that he was afraid that, if the objecting creditor knew that he got money outside, he would close him up, whereas the bankrupt hoped that he could work along from season to season and eventually pay his debts.[292] And so in a case where it appeared that the bankrupt had not kept such books or records as would be sufficient to disclose his true financial condition, but that his system or method of keeping his accounts, incomplete and insufficient as it was, had been persisted in by him during the whole time he had been in business (about nine years) and had not been in any respect changed after the passage of the present bankruptcy act.[293] On the other hand, a bankrupt is not entitled to a discharge where he admittedly destroyed his books of account with intent to conceal the record of his business, though he testified that his motive was to destroy evidence that might have been used in a criminal prosecution against him for violating a state statute.[294] It is also proper to refuse a discharge where the bankrupt

[290] In re Janavitz, 219 Fed. 876, 135 C. C. A. 546, 34 Am. Bankr. Rep. 105; In re Weston, 206 Fed. 281, 124 C. C. A. 345, 30 Am. Bankr. Rep. 647; In re Shrimer (D. C.) 228 Fed. 794, 36 Am. Bankr. Rep. 404; McKibbon, Driscoll & Dorsey v. Haskell, 198 Fed. 639, 117 C. C. A. 343, 28 Am. Bankr. Rep. 588; In re Alvord (D. C.) 135 Fed. 236, 14 Am. Bankr. Rep. 264; In re Feldstein (D. C.) 108 Fed. 794, 6 Am. Bankr. Rep. 458; In re Studebaker (D. C.) 124 Fed. 945, 10 Am. Bankr. Rep 205; In re Kenyon (D. C.) 112 Fed. 658, 7 Am. Bankr. Rep. 527; In re Cashman (D. C.) 103 Fed. 67, 4 Am. Bankr. Rep. 326; In re Morgan (D. C.) 101 Fed. 982, 4 Am. Bankr. Rep. 402. A bankrupt who conducted an extensive boot and shoe business, and whose stock in trade exceeded $10,000, must, where he failed to keep books of account or records showing an account of stock, liabilities, and assets, be deemed to have intended to conceal his financial condition, so that a discharge should be denied. In re Amster (D. C.) 249 Fed. 256, 41 Am. Bankr. Rep. 249.

[291] In re Barthier (D. C.) 188 Fed. 394, 33 Am. Bankr. Rep. 900. But where a bankrupt kept books until he became financially involved, and then omitted entries for the admitted purpose of concealing his condition from his employés, it may properly be inferred that he also intended concealment from his creditors. In re Harrell (D. C.) 263 Fed. 954, 45 Am. Bankr. Rep. 37.

[292] Van Ingen v. Schophofen, 129 Fed. 352, 64 C. C. A. 22, 12 Am. Bankr. Rep. 24.

[293] In re Idzall, 96 Fed. 314, 2 Am. Bankr. Rep. 741.

[294] In re Wolf, 156 Fed. 543, 19 Am. Bankr. Rep. 70.

concealed or destroyed his books in order to thwart an investigation into his financial condition,[295] or where he destroyed them when he was preparing to file a petition in bankruptcy, and the books were material to a proper understanding of the state of his affairs.[296] And his omission to make proper entries on the books is not excused by his saying that he thought it unnecessary for his creditors to know that he was getting money from his wife.[297]

§ 683. **Same; Contemplation of Bankruptcy.**—In its original form the bankruptcy act of 1898 provided that the failure to keep books of account or records, or their destruction or concealment, should be ground for refusing the bankrupt's discharge only in case such acts or omissions on his part were "in contemplation of bankruptcy." And it was held that this meant contemplation, on the part of a debtor, of filing his voluntary petition in bankruptcy, or of involuntary bankruptcy proceedings being taken against him by his creditors for some act which the statute makes an act of bankruptcy; and that the phrase did not mean merely contemplation of a state of insolvency.[298] And since there could be no contemplation of bankruptcy, in this sense, at a time when no bankruptcy law was in existence, such acts or omissions were no ground for refusing to discharge the bankrupt when occurring before the enactment of the statute.[299] But these words were stricken out by the amendment of 1903, and are therefore no longer of importance.[300]

§ 684. **Same; What are Proper Books of Account.**—The question, whether or not the bankrupt has kept proper books of account, is in every case a question of evidence, and it depends largely upon the nature and extent of the business which he has carried on.[301] The test is this: If a competent accountant can, from an examination of the books produced and in the possession of the trustee, determine the true financial condition of the debtor, they are sufficient to justify granting him a discharge.[302] The law does not require that the bankrupt

[295] Ablowich v. Stursberg, 105 Fed. 751, 45 C. C. A. 31, 5 Am. Bankr. Rep. 403.

[296] In re Conley, 120 Fed. 42, 9 Am. Bankr. Rep. 496.

[297] In re Koelle, 171 Fed. 257, 22 Am. Bankr. Rep. 515.

[298] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Carmichael, 96 Fed. 594, 2 Am. Bankr. Rep. 815; In re Morgan, 101 Fed. 982, 4 Am. Bankr. Rep. 402; In re Bamberger, 2 Nat. Bankr. News, 95; In re Stark, 1 Nat. Bankr. News, 232. See In re Feldstein, 115 Fed. 259, 53 C. C. A. 479, 8 Am. Bankr. Rep. 160.

[299] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Carmichael, 96 Fed. 594, 2 Am. Bankr. Rep. 815; In re Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600.

[300] Act Cong. Feb. 5, 1903, 32 Stat. 797, amending Bankruptcy Act 1898, § 14b.

[301] In re Newman, 3 Ben. 20, 2 N. B. R. 302, Fed. Cas. No. 10,175.

[302] In re Gay, 1 Hask. 108, Fed. Cas. No. 5,279; In re Bellis, 4 Ben. 53, Fed.

shall have kept any particular kind of books, or that his books shall have been kept according to any special mode or system of bookkeeping, or in the most scientific and approved manner, but only that they shall disclose his financial condition.[303] As remarked in one case, "in construing this statute, courts deal with both the creditor and the bankrupt in the light of the character of the business of the bankrupt. Some unfortunate debtors are illiterate and whose business has been such as the court would not expect accounts of to be kept. In other cases account books are required, but not with the formality or precision that business men of experience would keep. There is and can be no hard and fast rule upon the question as to the precise kind of account books that must be kept and produced. * * * Books of account, however crudely kept, but kept with honesty and presented to the trustee and referee would have been a solution of the entire situation."[304] Thus, where bankrupt stockbrokers kept certain individual accounts of customers in their general ledger by number, instead of by the name of the customer, but also kept other records, such as letters of instruction or powers of attorney, from which such accounts might be readily identified, it cannot be said that they had failed to keep books of account from which their financial condition could be ascertained.[305] In another case, a bankrupt's stock consisted in part of a stock of goods which he had brought over from a former business, and the partners in the new business being unable to agree on the discount to be made from the cost price, the items of such stock were valued at cost and set down in lead pencil in the inventory, so that by making a proper discount from the items so entered, the exact status of the firm at any particular time could be determined. It was held that the failure to take stock and inventory the value of all the assets at the end of each year did not show that the firm's books were improperly kept for the purpose of concealing its financial condition.[306] It may be said further that casual mistakes in the books will not prevent the granting of a discharge,[307] nor the fact that the books, having been in charge of a competent bookkeeper, were inaccurate on account of mis-

Cas. No. 1,275; In re Schumpert, Fed. Cas. No. 12,491; In re Bartenback, Fed. Cas. No. 1,068; In re Vernia, 5 Fed. 723; In re Frey, 9 Fed. 376; In re Graves, 24 Fed. 550; In re Simon, 201 Fed. 1004, 29 Am. Bankr. Rep. 808.

[303] In re Simon, 201 Fed. 1004, 29 Am. Bankr. Rep. 808; In re Frey, 9 Fed. 376; In re Idzall, 96 Fed. 314, 2 Am. Bankr. Rep. 741; In re Chamberlain, 125 Fed. 629, 11 Am. Bankr. Rep. 95; In re McCarthy, Fed. Cas. No. 8,680.

[304] Baylor v. Rawlings, 200 Fed. 131, 118 C. C. A. 305, 28 Am. Bankr. Rep. 773.

[305] In re A. O. Brown & Co. (C. C. A.) 204 Fed. 63, 30 Am. Bankr. Rep. 305.

[306] In re Marcus, 203 Fed. 29, 30 Am. Bankr. Rep. 176.

[307] In re Winsor, 16 N. B. R. 152, Fed. Cas. No. 17,885.

understanding, inadvertence, or mistakes,[308] nor on account of obscurities which need explanation, when they are in fact explained.[309] But if the books are unintelligible, and the intent to conceal is made out, a discharge cannot be granted to the bankrupt.[310]

It was said above that the law does not require the keeping of any particular kind of books. There are certain books which are almost invariably kept, and regarded as indispensable, in all well-conducted business. Yet the absence of any one of these may be pardoned, if the necessary information, that is, the true financial condition of the bankrupt, can be ascertained from other existing books or records. Thus, generally, a tradesman must keep an invoice or stock book.[311] But the want of an invoice book will not prevent his discharge where he has so preserved his invoice bills that a complete account of all goods received by him can be made out from them[312] So, failure to keep a cash book may be fatal to the application for discharge, if the consequence is that it is impossible to determine the state of the bankrupt's affairs,[313] but not where cash receipts and payments may be shown from other books,[314] as from a bank book and an account book of receipts and expenditures.[315] The "blottter" may become an important or even an indispensable book, as where the latest sales of goods were entered on it, but not posted up in the journal and ledger.[316] And books showing only the aggregate monthly purchases and sales are not proper books of account.[317] And so, where the books of a firm doing an extensive business do not show the state of accounts between the partners, they are not entitled to a discharge.[318] A custom of keeping no proper books, but making entries of various transactions on as many slips of paper, which are not elsewhere recorded or otherwise co-ordinated, has generally been regarded as not enough to satisfy the statute.[319] But a mere pocket memorandum book may be a sufficient "record" to disclose the bankrupt's financial condition,[320] though not if it is so loosely kept that he himself cannot tell from it the amount of his

[308] In re Marcus, 203 Fed. 29, 30 Am. Bankr. Rep. 176.

[309] In re Townsend, 2 Fed. 559.

[310] In re Mackay, 4 N. B. R. 66, Fed. Cas. No. 8,837.

[311] In re White, 2 N. B. R. 590, Fed. Cas. No. 17,532.

[312] In re Reed, 12 N. B. R. 390, Fed. Cas. No. 11,639.

[313] In re Bellis, 4 Ben. 53, 3 N. B. R 496, Fed. Cas. No. 1,275.

[314] In re Hannahs, 8 Ben. 475, Fed. Cas. No. 6,032.

[315] In re Marsh, 19 N. B. R. 297, Fed. Cas. No. 9,109.

[316] Longis v. Creditors, 20 La. Ann. 15.

[317] In re Anketell, 19 N. B. R. 268, Fed. Cas. No. 394.

[318] In re Jorey, 2 Bond, 336, 2 N. B. R. 668, Fed. Cas. No. 7,530.

[319] In re Hammond, 1 Low. 381, 3 N. B. R. 273, Fed. Cas. No. 5,999; In re Perry, Fed. Cas. No. 10,999; In re Bamberger, 2 Nat. Bankr. News, 95; In re Hunt, 26 Fed. 739.

[320] In re Howard, 180 Fed. 399, 103 C. C. A. 545, 24 Am. Bankr. Rep. 841.

business or the particulars of his debts.[321] And the practice of entering transactions of a particular kind only in a private memorandum book, always carried by the bankrupt himself and shown to no one, is evidence of an intent to conceal his financial condition.[322]

§ 685. **Time of Application for Discharge.**—A bankrupt may file his application for discharge "after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt"; and "if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months."[323] As to the earliest permissible time for filing the application, it has been ruled that "one month" means one calendar month, to be computed by excluding the first day and including the last, so that if the adjudication was made on March 7th, an application filed on April 7th would be premature.[324] As to the limitation of twelve months, this gives the bankrupt a year and a day from the date of adjudication, and no longer, unless the time is extended by the judge for cause shown as above stated.[325] But one additional day may be added where the last day of the twelve months is a public holiday.[326] The court, however, has no power to open an adjudication entered on default in involuntary proceedings, and make a new one, to permit the bankrupt to file an application for discharge, which he neglected to do within the time prescribed.[327] It is no part of the referee's duty to notify the bankrupt or his attorney of the time when the application may be filed or of the expiration of the year for filing it; the bankrupt himself must take notice of these matters.[328] And the limitation of the statute is impera-

[321] In re Newman, 3 Ben. 20, 2 N. B. R. 302, Fed. Cas. No. 10,175; In re Garrison, 5 Ben. 430, 7 N. B. R. 287, Fed. Cas. No. 5,254.

[322] In re Pomerantz & Hopkins, 168 Fed. 444, 21 Am. Bankr. Rep. 857; In re Feldstein, 115 Fed. 259, 53 C. C. A. 479, 8 Am. Bankr. Rep. 160.

[323] Bankruptcy Act 1898, § 14a.

[324] In re Goldberg, 1 Nat. Bankr. News, 266. "Adjudication," with respect to time, means the date of the entry of a decree that the defendant is a bankrupt, or, if such decree is appealed from, then the date when such decree is finally confirmed. Bankruptcy Act 1898, § 1, cl. 2. An objection by a creditor that the petition for discharge was prematurely filed cannot be waived by him, since the court is bound, for the protection of all the creditors, to see that all the statutory conditions of granting the discharge are fulfilled. In re Wheeler, 5 Fed. 299.

[325] In re Holmes, 165 Fed. 225, 21 Am. Bankr. Rep. 339. But there are decisions holding that the "next twelve months" begin to run, not from the date of the adjudication, but from the expiration of the one month. In re Walters (D. C.) 209 Fed. 133, 31 Am. Bankr. Rep. 565; In re Jacobs, 241 Fed. 620, 154 C. C. A. 378, 39 Am. Bankr. Rep. 385.

[326] In re Lang, 2 N. B. R. 480, Fed. Cas. No. 8,056; In re De Lewandowski (D. C.) 243 Fed. 787, 39 Am. Bankr. Rep. 804.

[327] In re Morse, 168 Fed. 157, 21 Am. Bankr. Rep. 709.

[328] In re Knauer, 133 Fed. 805, 13 Am. Bankr. Rep. 503.

tive and not merely directory. If the twelve months have expired without the filing of an application (saving the case where the bankrupt was "unavoidably prevented" from acting in time), it is not within the discretion or authority of the court to entertain the application or to grant a discharge, but its jurisdiction and authority in this particular are at an end.[329] And a bankrupt who has failed to apply for his discharge within the time limited cannot thereafter file a second petition in bankruptcy, and obtain a discharge from the debts which were scheduled and provable in the previous bankruptcy.[330]

After the expiration of the twelve months, the bankrupt has no absolute right to apply for a discharge, but he may be allowed to do so within the next six months, by an order of court, based on a petition to the judge for leave to file such application, accompanied by satisfactory evidence that the bankrupt was unavoidably prevented from making his application within the year.[331] But this petition must absolutely be presented before the end of the additional six months; if not, the court has no jurisdiction to act upon it.[332] And not merely must the application be so filed, but it is also imperative that the necessary showing should be made and leave of court obtained to file it before the six months run out. In one case, the bankrupt filed his application sixteen months after the adjudication, but without obtaining leave to do so and without showing cause excusing his delay. Afterwards, but more than eighteen months after the adjudication, he presented a verified petition setting forth the reasons for his delay, and praying for leave to file his application, and that the order granting such leave might be entered nunc pro tunc as of the date when the application was originally presented. But his petition was denied, on the ground that the failure seasonably to obtain leave to file the application was attributa-

[329] In re Knauer, 133 Fed. 805, 13 Am. Bankr. Rep. 503; In re Sloan, 13 Blatchf. 67, 12 N. B. R. 59, Fed. Cas. No. 12,945; In re Wilmott, 2 N. B. R. 214, Fed. Cas. No. 17,778; In re Greenfield, 2 N. B. R. 298, Fed. Cas. No. 5,774; In re Martin, 2 N. B. R. 548, Fed. Cas. No. 9,153; In re Schenck, 5 N. B. R. 93, Fed. Cas. No. 12,447; In re Barrett, 11 N. B. R. 527, Fed. Cas. No. 1,044. See In re Canady, 2 Biss. 75, 3 N. B. R. 11, Fed. Cas. No. 2,377.

[330] In re Silverman, 157 Fed. 675, 19 Am. Bankr. Rep. 460; In re Loughran, 218 Fed. 619, 134 C. C. A. 377, 33 Am. Bankr. Rep. 350.

[331] In re Wolff, 100 Fed. 430, 4 Am. Bankr. Rep. 74. See In re Donaldson, 2 Dill. 546, 11 N. B. R. 460, Fed. Cas. No. 3,982; In re Lowenstein, 3 Dill. 145, 13 N. B. R. 479, Fed. Cas. No. 8,573. The court, for cause shown, may extend the time within which an application for a discharge may be filed by the administrator of a bankrupt dying pending the bankruptcy proceedings. In re Agnew (D. C.) 225 Fed. 650, 35 Am. Bankr. Rep. 709.

[332] In re Levenstein, 180 Fed. 957, 24 Am. Bankr. Rep. 822; In re Wagner, 139 Fed. 87, 15 Am. Bankr. Rep. 100; In re Fahy, 116 Fed. 239, 8 Am. Bankr. Rep. 354; In re Schwartz (D. C.) 248 Fed. 841, 41 Am. Bankr. Rep. 246; In re Snell (D. C.) 244 Fed. 613, 40 Am. Bankr. Rep. 356; In re Taunton (D. C.) 216 Fed.

ble to the laches of the party and not to the act of the court.[333] A petition of this kind, if filed in due season, is addressed to the discretion of the court, and therefore notice to creditors is not required, unless the judge shall direct that notice be given, and then its terms and time are within his own judgment.[334] As to what circumstances are sufficient to show that the bankrupt was "unavoidably prevented" from filing his application within the regular time, it is in the power of the court to give a liberal construction to the phrase quoted.[335] Thus, where the delay in filing an application for discharge was due to the fault of a clerk or other employee of the bankrupt's attorney, or to the fault of employees in the postal service, a nunc pro tunc order allowing the filing of the application may be made.[336] So, where bankrupt's counsel delayed more than a year in filing his petition for discharge, under the belief that certain proceedings in a state court should first be terminated.[337]

It should also be noted that the Soldiers' and Sailors' Civil Relief Act, March 8, 1918, c. 20, § 205, authorized the suspension or stay of all civil proceedings, until the termination of the war then in progress, against persons in the military service of the United States. It is probable that this would authorize the suspension of bankruptcy proceedings against a person in the military service, or authorize the court to receive his application for discharge in bankruptcy after the termination of the war, or after his return from the service, without reference to the limitation of time in the bankruptcy act. But in a case where it was shown, not that the bankrupt himself had entered the military service, but that his attorney had done so, and that the latter had turned over the case to another attorney, who neglected to file the application for discharge until more than 18 months after the adjudication, it was held that these facts did not vest the court with jurisdiction to entertain the application.[338]

But in ordinary circumstances and conditions it should be remembered that the law allows the bankrupt eleven months in which to make his application, and that a discharge in bankruptcy is a great privilege, mercifully allowed by the law, but wholly for his own benefit. It is therefore not too much to expect that he should pay keen attention to

987, 33 Am. Bankr. Rep. 308; In re De Lewandowski (D. C.) 243 Fed. 787, 39 Am. Bankr. Rep. 804.

[333] In re Wolff, 100 Fed. 430, 4 Am. Bankr. Rep. 74.

[334] In re Churchill, 197 Fed. 111, 28 Am. Bankr. Rep. 607; In re Chase, 186 Fed. 408, 26 Am. Bankr. Rep. 456; In re Fritz, 173 Fed. 560, 23 Am. Bankr. Rep. 84.

[335] In re Churchill, 197 Fed. 111, 28 Am. Bankr. Rep. 607; In re Waller, 249 Fed. 187, 161 C. C. A. 223, 41 Am. Bankr. Rep. 314.

[336] In re Daly (D. C.) 224 Fed. 263, 35 Am. Bankr. Rep. 219.

[337] In re Swain (D. C.) 243 Fed. 781, 39 Am. Bankr. Rep. 841.

[338] In re Weldon (D. C.) 262 Fed. 828, 45 Am. Bankr. Rep. 196.

his rights in this particular, and that causes preventing him from acting within the allotted time should be very serious indeed. It has been ruled that nothing can be considered sufficient cause for delay which could have been avoided by ordinary diligence and attention on his part, where he was informed by his attorney of the time when he must file his application and had plenty of time to prepare.[339] Where the bankrupt or members of his family were sick and he had no money to pay for preparing his application for discharge, this may be an acceptable excuse for delay beyond the year allowed,[340] but not where it appears that there was nothing to prevent his attorney from preparing the petition for his signature and verification within the appointed time,[341] and merely to say that the necessity of filing the petition was overlooked owing to press of business is no excuse at all.[342] And where the fact is such that, if the bankrupt had applied for his discharge within the twelve months, it would necessarily have been refused, because of his discharge in voluntary proceedings within six years previously, this fact does not "unavoidably prevent" him from taking action within the twelve months, and therefore does not justify an extension of time until after the six-year period shall have expired.[343] If the court grants an extension of time on an insufficient showing, creditors may move to vacate the order.[344] But no question of this kind can be raised on the hearing of the application for discharge. In other words, when leave to file the application out of time has been granted, and the order has not been vacated or withdrawn, its propriety is judicially settled, and when the application comes on for hearing, creditors can oppose the discharge only on the statutory grounds.[345]

§ 686. **Petition for Discharge.**—"The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt." [346] But if it is defective, either in respect to the allegations of fact or the prayer for relief, the court may permit its amendment.[347] Thus, where one member of a bankrupt firm desires to apply separately for his discharge, the petition therefor should recite the ad-

[339] In re Daly (D. C.) 205 Fed. 1002, 30 Am. Bankr. Rep. 475.

[340] In re Casey, 195 Fed. 322, 28 Am. Bankr. Rep. 359.

[341] In re Lewin, 135 Fed. 252, 14 Am. Bankr. Rep. 358.

[342] In re Anderson, 134 Fed. 319, 14 Am. Bankr. Rep. 221; In re Daly (D. C.) 205 Fed. 1002, 30 Am. Bankr. Rep. 475.

[343] In re Vaine, 186 Fed. 535; In re Chase, 186 Fed. 408, 26 Am. Bankr. Rep. 456.

[344] In re Haynes & Sons, 122 Fed. 560, 10 Am. Bankr. Rep. 13; In re Maier (D. C.) 256 Fed. 60, 43 Am. Bankr. Rep. 509.

[345] In re Haynes & Sons, 122 Fed. 560, 10 Am. Bankr. Rep. 13.

[346] General Order No. 31. For the form for a petition for discharge, see Official Form No. 57.

[347] In re Kaufman, 136 Fed. 262, 14 Am. Bankr. Rep. 393.

judication of the firm and of the petitioner as a member of it, and should pray for a discharge from both firm and individual debts,[348] but if faulty in these particulars, it may be made right by amendment.[349] The petition for discharge should be considered as a pleading, within the meaning of the bankruptcy law and therefore should be verified under oath, but if no objection to a want of verification is made until after the evidence on the application has been heard before the referee, it will then be too late.[350] As the petition is addressed to the judge, and is a matter for his personal consideration, it must be filed with the clerk of the court, and not with the referee.[351] But in a case where the application, although erroneously filed with the referee in the first place, instead of the clerk, was, with the other proceedings thereon before the referee, filed with the clerk within a year after the adjudication, and no objection had been taken by creditors to the improper original filing with the referee, it was held that the petition would be regarded as properly filed.[352]

§ 687. Notice of Application for Discharge.—The law provides that the creditors shall have thirty days' notice by mail of the bankrupt's application for discharge.[353] Compliance with this requirement is essential to the validity of the discharge, and it is so far jurisdictional that no petition for discharge will be considered without proof that the prescribed notice has been given.[354] And since the referee has no power to hear applications for discharge, the notice to creditors must be on the order of the court, in accordance with the official form (No. 57); but the referee has power to call a meeting of creditors for the purpose of authorizing the trustee to file objections, and may give the notices for this purpose.[355] The official forms evidently intend that the notice shall both be published in a newspaper and mailed to creditors whose addresses are known. For the latter purpose, a notice printed on the back of a postal card and duly mailed will be sufficient.[356] While the notice should contain all that the law and the official form prescribe, it

[348] In re Meyers, 97 Fed. 757, 3 Am. Bankr. Rep. 260.

[349] In re Morrison, 127 Fed. 186, 11 Am. Bankr. Rep. 498; In re Bidwell, 2 N. B. R. 229, Fed. Cas. No. 1,392.

[350] In re Taylor, 188 Fed. 479, 26 Am. Bankr. Rep. 143.

[351] In re Hockman, 205 Fed. 330, 30 Am. Bankr. Rep. 921; In re Taylor, 188 Fed. 479, 26 Am. Bankr. Rep. 143; but see In re Pincus, 147 Fed. 621, 17 Am. Bankr. Rep. 331.

[352] In re Taylor, 188 Fed. 479, 26 Am. Bankr. Rep. 143.

[353] Bankruptcy Act 1898, § 58a. as amended by Act Cong. June 25, 1910, 36 Stat. 838.

[354] In re Sykes, 106 Fed. 669, 6 Am. Bankr. Rep. 264; Lathrop v. Stuart, 5 McLean, 167, Fed. Cas. No. 8,113; In re Langfeldt (D. C.) 253 Fed. 458, 41 Am. Bankr. Rep. 586.

[355] In re Hockman, 205 Fed. 330, 30 Am. Bankr. Rep. 921.

[356] In re Downing, 199 Fed. 329, 28 Am. Bankr. Rep. 778.

is not improper to add to it (for the purpose of saving expense) a notice of a meeting of creditors for the purpose of examining the bankrupt.[357] The notice by mail should be given to all creditors who have proved their debts, or whose names are included by the bankrupt in his schedule of creditors,[358] but if no proofs of claims have been filed, and no assets have come into the hands of the trustee, notice may be by publication only.[359] But this course is not proper where there are known creditors, unless the bankrupt shows that the addresses of such creditors are unknown to him and cannot be ascertained after diligent search and inquiry.[360] But notice sent by mail to a judgment creditor, directed to his address as known at the beginning of the bankruptcy proceedings, will be sufficient, although the creditor has died in the mean time, at least if the will has not been admitted to probate and no steps have been taken to substitute the executor as a creditor in the bankruptcy.[361]

§ 688. **Proceedings in Opposition to Discharge.**—The General Orders in bankruptcy provide that "a creditor opposing the application of a bankrupt for his discharge shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge."[362] Under this provision the judge may, in his discretion, extend the time for entering an appearance, as well as the time for filing specifications, and may grant leave to do so after the time has expired as well as before; but the creditor has no right to enter an appearance after the return day, and generally should not be allowed to do so except for good cause shown excusing his delay.[363] Creditors who do thus appear and filed objections on the merits to the granting of a discharge thereby waive objections to any error or irregularity in the granting of

[357] In re Price, 91 Fed. 635, 1 Am. Bankr. Rep. 419.

[358] In re McIntire, 1 Ben. 543, Fed. Cas. No. 8,822. Where a creditor objecting to the bankrupt's discharge has died, notice of the hearing should be given to his attorney, to his widow or her attorney, and to his children or next of kin. In re Blaesser (D. C.) 230 Fed. 528, 36 Am. Bankr. Rep. 795.

[359] Anonymous, 1 N. B. R. 122, Fed. Cas. No. 457.

[360] In re Dvorak, 107 Fed. 76, 6 Am. Bankr. Rep. 66.

[361] Lent v. Farnsworth, 180 N. Y. 503, 72 N. E. 1144.

[362] General Order in Bankruptcy No. 32. See In re Braun, 1 Ben. 274, 1 N. B. R. 5, Fed. Cas. No. 1,116, as to entering appearance and filing specifications before the return day. Objections to the bankrupt's discharge must be filed with the clerk of the bankruptcy court, and not with the referee. In re C. H. Kendrick & Co. (D. C.) 226 Fed. 980, 35 Am. Bankr. Rep. 630. Objections to a bankrupt's discharge constitute the beginning of a new suit or action, the hearing of which is in effect a trial in equity. In re Malschick (D. C.) 217 Fed. 492, 33 Am. Bankr. Rep. 214.

[363] In re Levin, 176 Fed. 177, 99 C. C. A. 531, 23 Am. Bankr. Rep. 845; In re Ginsburg, 130 Fed. 627, 12 Am. Bankr. Rep. 459; In re Chase, 186 Fed. 408, 26 Am. Bankr. Rep. 456; In re Grant, 135 Fed. 889, 14 Am. Bankr. Rep. 398.

an extension of time for filing the petition for discharge.[364] But on the other hand, a creditor who does not enter his appearance at the time specified (or within a further time granted to him by the court, as above stated) has no standing in court on the hearing of the petition for discharge, and cannot be heard in opposition to it, but on the contrary will be understood as assenting to it.[365] The entry of an appearance by one or more creditors for the purpose of opposing the application for discharge suspends all further proceedings until the filing of the specifications; but if the specifications are not filed within the ten days (or within an extension of the time specially granted by the court), then the case proceeds as if no opposition had been entered.[366] But one creditor may adopt and prosecute the objections filed by another creditor, when the latter has declared his intention to abandon the same,[367] though not after the claim of the creditor originally objecting has been stricken out.[368] And the fact that creditors, who proposed to contest the granting of a discharge on the ground that the bankrupt has defrauded them, have abandoned their opposition is entitled to consideration by the court.[369]

§ 689. **Withdrawal of Opposition.**—A creditor who has entered opposition to the bankrupt's application for discharge may withdraw the same without the consent of the other creditors,[370] but not without notice to other creditors who have adopted the specifications as representing their own objections and are proposing to prosecute them.[371] Or when a creditor who has filed specifications of objection is about to withdraw them, other creditors may be substituted and carry on the opposition.[372] But the law frowns severely upon any attempt to induce a creditor to withdraw his opposition, for the sake of a pecuniary advantage or benefit to himself. Any agreement or arrangement by which a creditor is to be paid in full, on consideration of his withdrawing opposition to the discharge, or is to receive a larger share of his debt than other creditors, or to receive other property or a bonus or present, is corrupt, illegal, and contrary to public policy, and cannot be enforced in any form

[364] In re Churchill, 197 Fed. 111, 28 Am. Bankr. Rep. 607.

[365] In re Sutherland, Deady, 573, Fed. Cas. No. 13,640; In re Smith, 5 N. B. R. 20, Fed. Cas. No. 12,985; In re Seabury, 10 N. B. R. 90, Fed. Cas. No. 12,573; In re Schuyler, 3 Ben. 200, 2 N. B. R. 549, Fed. Cas. No. 12,494.

[366] In re McVey, 2 N. B. R. 257, Fed. Cas. No. 8,932; In re Frizelle, 5 N. B. R. 119, Fed. Cas. No. 5,132.

[367] In re Guilbert, 154 Fed. 676, 18 Am. Bankr. Rep. 830.

[368] In re McDonald, 14 N. B. R. 477, Fed. Cas. No. 8,753.

[369] In re Hammerstein, 189 Fed. 37, 110 C. C. A. 472, 26 Am. Bankr. Rep. 757.

[370] Brangan v. His Creditors, 64 Cal. 394, 1 Pac. 477.

[371] In re Dietz, 97 Fed. 563, 3 Am. Bankr. Rep. 316.

[372] In re Houghton, 2 Low. 328, 10 N. B. R. 337, Fed. Cas. No. 6,730.

of proceeding.[373] If a promissory note is given to the creditor in pursuance of such an agreement, it is invalid and cannot be collected by law.[374] If the consideration is the bankrupt's promise to pay him in full, no action can be maintained on such promise.[375] So where the bankrupt's wife executes a mortgage on her separate property, at his request, in pursuance of an agreement by which he was to pay the debt of his creditor in full if the latter would assent to his discharge, the mortgage is without consideration and tainted with the illegality of the transaction, notwithstanding it was executed after the discharge and though the wife did not know of the agreement.[376] A corrupt bargain of this sort will also invalidate the discharge, if granted, or at least it will constitute sufficient ground for revoking and annulling it.[377] And so strictly is the rule applied that it has been held ground for vacating a discharge that a creditor's withdrawal from opposition was purchased, though it was done by a friend of the bankrupt, without the procurement or participation of the bankrupt, where the latter was privy to the arrangement and consented to it.[378] But in a case where a surety of the bankrupt paid the debt of a creditor who was opposing the discharge, merely for his own purposes, and because the granting of the discharge would put him (the surety) in a better position, and this was done without consulting with the bankrupt or informing him of the transaction until long afterwards, and the latter had no part in it nor made any promise to repay the amount, it was held that this would not vitiate the discharge.[379]

§ 690. **Want or Failure of Opposition.**—The court will not refuse to discharge the bankrupt unless creditors appear in opposition to the discharge, file written specifications sufficiently alleging the grounds of their opposition, and sustain the burden of proving the grounds specified. The formal prerequisites to a discharge having been complied with, the judge will not, of his own motion, seek out grounds for refusing to discharge the bankrupt or consider objections not specified. Hence if the specifications filed are found in favor of the bankrupt, or are withdrawn, or are ruled out because the creditor is estopped to allege the particular matter, or if none are filed, the court will not refuse a discharge, ex proprio motu, although it may appear that the bankrupt has committed some act which would deprive him of the right to a discharge if properly specified.[380] And where there is no opposing party to the discharge, the

[373] Blasdel v. Fowle, 120 Mass. 447, 21 Am. Rep. 533. Compare Fox v. Paine, 10 Ala. 523.

[374] Bell v. Leggett, 7 N. Y. 176; Marble v. Grant, 73 Me. 423; Rice v. Maxwell, 13 Smedes & M. (Miss.) 289, 53 Am. Dec. 85.

[375] Austin v. Markham, 44 Ga. 161, 10 N. B. R. 548.

[376] Blasdel v. Fowle, 120 Mass. 447, 21 Am. Rep. 533.

[377] Coates v. Blush, 1 Cush. (Mass.) 564. Compare Fox v. Paine, 10 Ala. 523.

[378] In re Dietz, 97 Fed. 563, 3 Am. Bankr. Rep. 316.

[379] Ex parte Briggs, 2 Low. 389, Fed. Cas. No. 1,868.

[380] In re Whitney (D. C.) 250 Fed.

proceeding may be continued from time to time, to suit the convenience of the bankrupt.[381]

§ 691. **Time to File Specifications in Opposition.**—Creditors desiring to oppose the bankrupt's application for discharge are required (by General Order No. 32) to enter their appearance on the day when creditors are required to show cause, and to file their specifications within ten days thereafter. But though the notice to show cause usually designates not only the return day, but a particular hour of that day, creditors are not restricted to the hour so appointed, but have the entire day in which to enter their appearance and ten days thereafter for filing the specifications.[382] The general order does not operate as a statute of limitations, so as to cut off absolutely the right of creditors to file opposition if not exercised within the ten days, or prevent the court from granting an extension of time for good reasons shown.[383] But after the expiration of the ten days, no creditor can claim any absolute right to file specifications. Whether he shall be allowed to do so rests entirely in the discretion of the court. It may be granted as a privilege by the judge, but not without good cause shown, and not unless the creditor clears himself of the imputation of laches.[384] And specifications of opposition filed after the expiration of the prescribed time, without leave of court first obtained or valid excuse for the delay, will be disregarded, or may be dismissed on motion of the bankrupt.[385]

§ 692. **Form and Sufficiency of Specifications.**—Specifications in opposition to the bankrupt's application for discharge must of course be in writing,[386] and must disclose the name of the objecting party, and must allege that he is a party in interest, and, if he is a creditor, that he has a debt provable in bankruptcy, or that it has been proved and allowed if such is the case, and further that his claim is one which will be affected

1005, 41 Am. Bankr. Rep. 548; In re Lockwood (D. C.) 240 Fed. 158, 39 Am. Bankr. Rep. 478; In re Blaesser (D. C.) 230 Fed. 528, 36 Am. Bankr. Rep. 795; In re McDuff, 101 Fed. 241, 41 C. C. A. 316, 4 Am. Bankr. Rep. 110; In re Hixon, 93 Fed. 440, 1 Am. Bankr. Rep. 610; In re Thomas, 92 Fed. 912, 1 Am. Bankr. Rep. 515; In re Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600; In re Antisdel, 18 N. B. R. 289, Fed. Cas. No. 490; In re Clark, 19 N. B. R. 301, Fed. Cas. No. 2,812; In re Fowler, 2 Low. 122, Fed. Cas. No. 4,999. Contra, In re Sohoo, 3 N. B. R. 215, Fed. Cas. No. 13,162; In re Wilkinson, 3 N. B. R. 286, Fed. Cas. No. 17,667.

[381] In re Sutherland, Deady, 573, Fed. Cas. No. 13,640.

[382] In re Barrager, 191 Fed. 247, 27 Am. Bankr. Rep. 366.

[383] In re Nathanson, 152 Fed. 585, 18 Am. Bankr. Rep. 252.

[384] In re Young, 162 Fed. 912, 20 Am. Bankr. Rep. 697; In re Frice, 96 Fed. 611, 2 Am. Bankr. Rep. 674; In re Morgan, 101 Fed. 982, 4 Am. Bankr. Rep. 402; In re Marsh, 2 Nat. Bankr. News, 649; In re Levin, 7 Biss. 231, 14 N. B. R. 385, Fed. Cas. No. 8,291; In re Jacobs, 5 Sawy. 458, Fed. Cas. No. 7,160; In re Grefe, 2 N. B. R. 329, Fed. Cas. No. 5,794.

[385] In re Albrecht, 104 Fed. 974, 5 Am. Bankr. Rep. 223; In re Buxbaum, 2 Hughes, 339, 13 N. B. R. 477, Fed. Cas. No. 2,259.

[386] In re Shoemaker, 4 Biss. 245, Fed. Cas. No. 12,799.

by the discharge if granted.[387] As to substance, the specification must distinctly allege at least one of the statutory grounds for refusing the discharge, objections not specified in the act being unavailable.[388] Further, there must be adequate statements of issuable facts; mere statements of conclusions of law are not sufficient.[389] And it is an inflexible rule that the allegations of the specifications must be clear, distinct, specific, and circumstantial. General allegations will not suffice; all the essential facts must be particularized. Vague charges will not do; the allegations must be so precise and full as to inform the bankrupt of the exact charge which he is called upon to refute, and to inform the court of the exact issue to be tried.[390] For this reason a specification which merely follows the general language of the statute, without attempting to set forth particular facts, transactions, or details, is not sufficient.[391] Alternative or disjunctive pleading should not be permitted,[392] and in fact the specifications should be of such a character that their sufficiency may be tested by demurrer or by exceptions analogous to those allowed in equity.[393] It has even been held, in several cases, that the specifica-

[387] In re Main, 205 Fed. 421, 30 Am. Bankr. Rep. 547; In re White, 248 Fed. 115, 160 C. C. A. 255, 41 Am. Bankr. Rep. 458; In re Fackler (D. C.) 246 Fed. 864, 39 Am. Bankr. Rep. 742; In re Chandler, 138 Fed. 637, 71 C. C. A. 87, 14 Am. Bankr. Rep. 512; In re Servis, 140 Fed. 222, 15 Am. Bankr. Rep. 271; In re Palmer, 3 N. B. R. 301, Fed. Cas. No. 10,682.

[388] In re Griffin Bros., 154 Fed. 537, 19 Am. Bankr. Rep. 78; In re McGurn, 102 Fed. 743, 4 Am. Bankr. Rep. 459; In re Rhutassel, 96 Fed. 597, 2 Am. Bankr. Rep. 697; In re Brincat (D. C.) 233 Fed. 811, 37 Am. Bankr. Rep. 587. Where specifications of opposition to a discharge wholly fail to state any statutory ground for refusal, their insufficiency is not waived by failing to except thereto, and they may be disregarded. In re McCarthy, 170 Fed. 859, 22 Am. Bankr. Rep. 499.

[389] In re Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600; In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; Stewart v. Hargrove, 23 Ala. 429.

[390] In re Wittenberg, 160 Fed. 991, 20 Am. Bankr. Rep. 398; In re Servis, 140 Fed. 222, 15 Am. Bankr. Rep. 271; In re Frice, 96 Fed. 611, 2 Am. Bankr. Rep. 674; In re Parish, 122 Fed. 553, 10 Am. Bankr. Rep. 548; In re Waggoner, 1 Ben. 532, Fed. Cas. No. 17,037; In re White, 18 N. B. R. 107, Fed. Cas. No. 17,533; In re Rathbone, 2 Ben. 138, 1 N. B. R. 294, Fed. Cas. No. 11,580; In re Burk, Deady, 425, 3 N. B. R. 296. Fed. Cas. No. 2,156; In re Eidom, 3 N. B. R. 106, Fed. Cas. No. 4,314; In re Freeman, 4 Ben. 245, 4 N. B. R. 64, Fed. Cas. No. 5,082; In re Hill, 2 Ben. 136, 1 N. B. R. 275, Fed. Cas. No. 6,482; In re Tyrrel, 2 N. B. R. 200, Fed. Cas. No. 14,314; In re Hansen, 2 N. B. R. 211, Fed. Cas. No. 6,039. See In re Simon (D. C.) 268 Fed. 1006, 46 Am. Bankr. Rep. 170.

[391] In re Main, 205 Fed. 421, 30 Am. Bankr. Rep. 547; In re Mintzer, 197 Fed. 647, 28 Am. Bankr. Rep. 743; In re Lewis, 163 Fed. 137, 20 Am. Bankr. Rep. 711; In re Bromley, 152 Fed. 493. 18 Am. Bankr. Rep. 227; In re Ginsburg, 130 Fed. 627, 12 Am. Bankr. 459; In re Peck, 120 Fed. 972, 9 Am. Bankr. Rep. 747; In re Graves, 24 Fed. 550; In re Son, 2 Ben. 153, 1 N. B. R. 310, Fed. Cas. No. 13,174. An exception exists in the case of alleging the failure to keep books of account, or the destruction or concealment of books, where, from the nature of the case, it may be impossible for the objecting creditor to particularize. Here an allegation in the language of the statute may suffice. See In re Magen Bros. Co., 192 Fed. 883, 113 C. C. A. 207, 27 Am. Bankr. Rep. 729.

[392] In re Marsh, 2 Nat. Bankr. News, 649.

[393] Troeder v. Lorsch, 150 Fed. 710, 80 C. C. A. 376, 17 Am. Bankr. Rep. 723.

tions must set forth the facts with the same particularity and exactness that are required in an indictment or a criminal information.[394] And this rule may not be too severe in cases where the ground of opposition alleged is the commission of a crime punishable under the bankruptcy law, though otherwise it appears to go to the extreme limit.

An allegation which merely states the creditor's belief that the bankrupt owns property which he is concealing and has not listed in his schedule is insufficient.[395] If this is the ground of opposition relied on, the specification must distinctly allege a concealment of the property or that the trustee has been prevented from taking possession of it,[396] that the property has been concealed from the trustee, a charge that it has been concealed "from his estate in bankruptcy" being insufficient,[397] as is also a statement that the bankrupt has placed his property in the hands of his wife,[398] and it must specify and describe the particular property alleged to have been concealed, with as much certainty as the nature of the case admits, the courts refusing to consider such general statements as that the bankrupt has "concealed a part of his effects," "concealed his estate and effects," or "concealed certain papers," and the like.[399] So if the creditor means to oppose the discharge on the ground that the bankrupt has obtained money or property on credit by means of a materially false statement, he must charge that it was made in writing,[400] and must state the substance of the false statement and the name of the person defrauded by it.[401] Again, where it is specified that the bankrupt has

[394] In re Levey, 133 Fed. 572, 13 Am. Bankr. Rep. 312; In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715; In re Butterfield, 5 Biss. 120, 14 N. B. R. 147, Fed. Cas. No. 2,247. But compare In re Smith, 5 N B. R. 20, Fed. Cas. No. 12,985; In re Mudd, 2 Nat. Bankr. News, 710. Specifications in opposition to a discharge, especially where attempting to charge some criminal act, should be pleaded with greater particularity than in ordinary civil actions, though the strict rules as to indictments do not apply. In re White (D. C.) 222 Fed. 688, 34 Am. Bankr. Rep. 803.

[395] In re Thomas, 92 Fed. 912, 1 Am. Bankr. Rep. 515; In re White (D. C.) 222 Fed. 688, 34 Am. Bankr. Rep. 803; In re Abramovitz (D. C.) 253 Fed. 299, 41 Am. Bankr. Rep. 588.

[396] In re Taplin, 135 Fed. 861, 14 Am. Bankr. Rep. 360.

[397] In re Adams, 171 Fed. 599, 22 Am. Bankr. Rep. 613.

[398] In re Hill, 2 Ben. 136, 1 N. B. R. 275, Fed. Cas. No. 6,482. See In re Felts (D. C.) 205 Fed. 983.

[399] In re Parish, 122 Fed. 553, 10 Am. Bankr. Rep. 548; In re White (D. C.) 222 Fed. 688, 34 Am. Bankr. Rep. 803; In re Agnew (D. C.) 225 Fed. 650, 35 Am. Bankr. Rep. 709; In re Opava, 235 Fed. 779, 37 Am. Bankr. Rep. 799. In re Mawson, 2 Ben. 332, 1 N. B. R. 437, Fed. Cas. No. 9,318; In re Hixon, 93 Fed. 440, 1 Am. Bankr. Rep. 610; In re Condict, 19 N. B. R. 142, Fed. Cas. No. 3,094; In re Carrier, 47 Fed. 438; In re Dreyer, 2 N. B. R. 212, Fed. Cas. No. 4,082. But see In re Milgraum & Ost, 129 Fed. 827, 12 Am. Bankr. Rep. 306, as to an allegation that bankrupts had concealed "large quantities of merchandise" in a certain house.

[400] In re Lewis, 163 Fed. 137, 20 Am. Bankr. Rep. 711.

[401] E. H. Godshalk Co. v. Sterling, 129 Fed. 580, 64 C. C. A. 148, 12 Am. Bankr. Rep. 302; In re Levey (D. C.) 133 Fed. 572, 13 Am. Bankr. Rep. 312. See In re Epstein (D. C.) 248 Fed. 191, 40 Am. Bankr. Rep. 406: In re Main (D. C.) 205 Fed. 421, 30 Am. Bankr. Rep. 547. A specification of objections

committed perjury in his testimony before the referee, the objection must set out the testimony alleged to be false, together with the facts relied on to prove its falsity, so as to present a specific issue.[402] And a specification stating that the bankrupt procured the assent of certain creditors to the granting of the discharge, without alleging that he did so by means of a pecuniary consideration or otherwise corruptly, is not sufficient.[403] And a specification that the bankrupt has falsely set forth in his petition and schedule that he had no property is defective and insufficient; it must specify what property he had.[404] And the same is true of a specification that the bankrupt made "various contradictory statements" in the course of the proceedings.[405] But it is said that where fraudulent payments are charged, it is not necessary to state that the persons receiving such payments were creditors.[406] Where it is essential that acts alleged as a ground for refusing the discharge should have been committed within a particular period of time, the time must be distinctly specified in the creditor's pleading. An allegation that such an act was done "a short time prior to" the filing of the petition, for instance, will not suffice.[407] Finally, where the specifications filed are too vague and indefinite to be triable, the case stands as if there were no opposition and no specifications filed, and the bankrupt must receive his discharge if otherwise entitled to it.[408]

§ 693. Same; Allegations of Knowledge, Falsity, and Fraudulent Intent.—A specification in opposition to a bankrupt's application for discharge, on the ground of his having concealed property from his trustee, is fatally defective if it fails to allege that the offense was committed "knowingly and fraudulently," these words being included in the statute as a necessary part of the crime or ground for refusing a discharge.[409] Thus, an allegation that he has "not offered to surrender all of his property for the benefit of his creditors" and that he is "withholding property from his creditors" is not sufficient,[410] nor is an alle-

to discharge, asserting that the bankrupt obtained property on credit from the objecting creditor on a materially false statement in writing, made for the purpose of obtaining property on credit, is objectionable, where there is no specification or statement of what property was thus obtained. In re Troutman & Jesse (D. C.) 251 Fed. 930, 40 Am. Bankr. Rep. 418.

[402] In re Goodale, 109 Fed. 783, 6 Am. Bankr. Rep. 493; In re Greer (D. C.) 248 Fed. 131, 40 Am. Bankr. Rep. 797.

[403] In re Mawson, 2 Ben. 332, 1 N. B. R. 437, Fed. Cas. No. 9,318.

[404] In re Beardsley, 1 N. B. R. 304, Fed. Cas. No. 1,183; In re Rathbone, 1 N. B. R. 324, Fed. Cas. No. 11,582.

[405] In re Blalock, 118 Fed. 679, 9 Am. Bankr. Rep. 266.

[406] In re Smith, 5 N. B. R. 20 Fed. Cas. No. 12,985.

[407] In re Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73; In re Peacock, 101 Fed. 560, 4 Am. Bankr. Rep. 136.

[408] In re Son, 2 Ben. 153, 1 N. B. R. 310, Fed. Cas. No. 13,174.

[409] In re Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Pierce, 103 Fed. 64, 4 Am. Bankr. Rep. 554; In re Griffin Bros., 154 Fed. 537, 19 Am. Bankr. Rep. 78.

[410] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715.

gation that the bankrupt, "with a fraudulent intent, has failed to include in his schedules property belonging to him,"[411] nor a charge that, at the time of filing the petition, he owned and possessed property which he has fraudulently concealed and fraudulently failed to inventory,[412] nor an allegation that he fraudulently disposed of a part of his property and in his petition concealed the fact, and has converted the proceeds of the property to his own use.[413] Similarly, the making of a false oath in a proceeding in bankruptcy, considered as a ground for refusing a discharge, must have been done "knowingly and fraudulently," and if this is not distinctly alleged, the specifications will be insufficient.[414] So again, a charge that the bankrupt has concealed his books of account or destroyed them is defective if it fails to allege that this was done with intent to conceal his financial condition.[415] And if the ground of opposition is that the bankrupt omitted the name and claim of the objecting creditor from his schedule it must be alleged that it was willfully and fraudulently done.[416] And if the act of the bankrupt objected to is a transfer of his property made within four months before the filing of the petition in bankruptcy, it must be alleged to have been made with intent to hinder, delay, or defraud his creditors, though in this case the words "knowingly and fraudulently" need not be used.[417]

§ 694. Same; Allegations as to Failure to Keep Books or Destruction or Concealment of Books.—Where the ground of objection to the bankrupt's discharge is that he has failed to keep books of account from which his financial condition could be ascertained, or that he has destroyed or concealed his books, the specifications of objection may state the charge generally, following the language of the statute, and without giving particulars, since these matters are peculiarly within the bankrupt's own knowledge and cannot ordinarily be specified in detail.[418] And a specification on this ground is not defective for uncertainty be-

411 In re Adams, 104 Fed. 72, 4 Am. Bankr. Rep. 696.

412 In re Taplin, 135 Fed. 861, 14 Am. Bankr. Rep. 360.

413 In re Patterson, 121 Fed. 921, 10 Am. Bankr. Rep. 371.

414 In re Patterson, 121 Fed. 921, 10 Am. Bankr. Rep. 371; In re Beebe, 116 Fed. 48, 8 Am. Bankr. Rep. 597; In re Blalock, 118 Fed. 679, 9 Am. Bankr. Rep. 266; In re Mayer, 195 Fed. 571, 28 Am. Bankr. Rep. 342; In re Smith, 5 N. B. R. 20, Fed. Cas. No. 12,985.

415 In re Griffin Bros., 154 Fed. 537, 19 Am. Bankr. Rep. 78.

416 Symonds v. Barnes, 59 Me. 191, 8 Am. Rep. 418, 6 N. B. R. 377.

417 In re Gift, 130 Fed. 230, 12 Am. Bankr. Rep. 244.

418 In re Magen Bros. Co., 192 Fed. 883, 113 C. C. A. 207, 27 Am. Bankr. Rep. 729; In re Ginsburg, 130 Fed. 627, 12 Am. Bankr. Rep. 459; In re Randall, 159 Fed. 298, 20 Am. Bankr. Rep. 305; In re Nathanson, 155 Fed. 645, 19 Am. Bankr. Rep. 56; In re Patterson, 121 Fed. 921, 10 Am. Bankr. Rep. 371; In re Bellis, 4 Ben. 53, 3 N. B. R. 496, Fed. Cas. No. 1,275. Compare In re Milgraum & Ost, 129 Fed. 827, 12 Am. Bankr. Rep. 306; In re Dreyer, 2 N. B. R. 212, Fed. Cas. No. 4,082. "Whether a bankrupt has kept such accounts, and if so, whether he retains, conceals, or destroys

cause it alleges, in the disjunctive, that the bankrupt, with intent to conceal his financial condition, either destroyed or failed to keep books of account.[419] So, if the specification charges that he failed to keep books of account or records from which his financial condition could have been ascertained, it is not necessary to proceed further and enumerate or describe the books or records which the bankrupt ought to have kept in order to disclose the state of his affairs.[420] Or if the particular charge is that the bankrupt, intending to conceal his financial condition, destroyed his canceled checks and their stubs, it is not necessary more definitely to describe the checks and stubs alleged to have been destroyed.[421] But the intent to conceal his financial condition is an essential element of this offense, and this must be distinctly alleged. It is not sufficient, for example, to allege that the bankrupt failed to keep books of account "and hence the true status of his affairs cannot be ascertained." It must be specifically charged that his failure to keep books, or his destruction or concealment of them, was in pursuance of an intent to conceal his financial situation.[422] And if the ground of objection is that the bankrupt gave false testimony before the referee in regard to the books which he kept or did not keep, or in regard to the disposition which he has made of them, the specifications must be defi-

them, is a matter peculiarly within his own knowledge and which, in the nature of things, a creditor ordinarily does not know. All he does know is that the bankrupt has not surrendered such books to the trustee. Now the purpose of a specification is to fairly apprise the bankrupt of such matters in bar of his discharge as will be insisted upon, in order that he may be able to meet them. Such matters are not to be specified with the exactness and formality required in indictments, but only in such substantial form as will fairly inform one of the charges made against him. But where, as in the case of books of account, the bankrupt in the very nature of things, and he alone, already knows what books he did or did not keep, and the creditor does not know, except as he infers their nonexistence, concealment, or destruction from the fact of their nondelivery to the trustee, it would seem that a specification following the language of the statute and covering nonkeeping, concealment, or destruction sufficiently and fairly apprises the bankrupt of the matter insisted upon in that respect." In re Magen Bros. Co., supra.

[419] In re Brod, 166 Fed. 1011, 21 Am. Bankr. Rep. 426, affirmed in Brod v. J. K. Orr Shoe Co., 173 Fed. 1019, 97 C. C. A. 667. "Assuredly three separate specifications charging the bankrupts respectively with destroying, with concealing, and with failing to keep books, etc., would each have been good. Each being singly self-sufficient, certainly there is no reason why the three, united in a single specification, become bad." In re Magen Bros. Co., 192 Fed. 883, 113 C. C. A. 207, 27 Am. Bankr. Rep. 729.

[420] E. H. Godshalk Co. v. Sterling, 129 Fed. 580, 64 C. C. A. 148, 12 Am. Bankr. Rep. 302.

[421] E. H. Godshalk Co. v. Sterling, 129 Fed. 580, 64 C. C. A. 148, 12 Am. Bankr. Rep. 302.

[422] In re Blalock, 118 Fed. 679, 9 Am. Bankr. Rep. 266; In re Bradin, 179 Fed. 768, 24 Am. Bankr. Rep. 793; In re Marston, 5 Ben. 313, Fed. Cas. No. 9,142. A specification of objections against a bankrupt's discharge that he failed to keep books, with full and complete knowledge of the importance and necessity thereof, in the brokerage business, and with intent to "defraud and deceive" the undersigned objecting creditors and others, while inapt, was considered sufficient to sustain an amendment, so as to conform it to the statute. In re Weston,

nite and certain and must set forth such particulars as will raise a distinct issue.[423]

§ 695. Signature and Verification of Specifications.—Specifications in opposition to a bankrupt's discharge must be in writing, signed, and verified. If the objecting creditor is a partnership, its signature may be affixed by one of the partners having authority to sign the firm name;[424] if it is a corporation, the specification may be signed by a duly authorized officer, who will also affix the corporate seal.[425] If several creditors desire to urge the same objections to the bankrupt's application for discharge, they are not required to make and sign separate specifications, but may join in one paper,[426] but in that case, each of them must sign and swear to the specification.[427] These specifications are "pleadings," within the meaning of the provision of the bankruptcy act that "all pleadings setting up matters of fact shall be verified under oath,"[428] and therefore they must be sworn to by the objecting creditor.[429] It is said, however, that the want of a verification is an irregularity which may be waived, and it will be considered as waived if the bankrupt does not object to the specification on this ground.[430] At any rate, the defect may be supplied by amendment.[431] The form generally approved for the verification of specifications is that by which the objecting creditor "does hereby make solemn oath that the statements of fact contained" in the specification "are true according to the best of my knowledge, information, and belief."[432]

Though specifications of objection should not ordinarily be signed and verified by attorneys at law or in fact for objecting creditors, instead of the creditors themselves, yet they may be so signed under exceptional circumstances.[433] But in that case the reason why the verification is made by counsel instead of by the creditor in person should be

206 Fed. 281, 124 C. C. A. 345, 30 Am. Bankr. Rep. 647.

[423] In re Nathanson (D. C.) 155 Fed. 645, 19 Am. Bankr. Rep. 56.

[424] In re Glass, 119 Fed. 509, 9 Am. Bankr. Rep. 391.

[425] In re Glass, 119 Fed. 509, 9 Am. Bankr. Rep. 391.

[426] In re Milgraum & Ost, 129 Fed. 827, 12 Am. Bankr. Rep. 306.

[427] In re Glass, 119 Fed. 509, 9 Am. Bankr. Rep. 391.

[428] Bankruptcy Act 1898, § 18c.

[429] In re Brown, 112 Fed. 49, 50 C. C. A. 118, 7 Am. Bankr. Rep. 252; In re Baerncopf, 117 Fed. 975, 9 Am. Bankr. Rep. 133; In re Gift, 130 Fed. 230, 12 Am. Bankr. Rep. 244; In re Servis, 140 Fed. 222, 15 Am. Bankr. Rep. 271. Compare In re Jamieson, 120 Fed. 697, 9 Am. Bankr. Rep. 681.

[430] In re Main, 205 Fed. 421, 30 Am. Bankr. Rep. 547.

[431] In re Meurer, 144 Fed. 445, 15 Am. Bankr. Rep. 823; In re Gift, 130 Fed. 230, 12 Am. Bankr. Rep. 244. See In re Kretz (D. C.) 212 Fed. 784, 32 Am. Bankr. Rep. 365.

[432] In re Nathanson, 155 Fed. 645, 19 Am. Bankr. Rep. 56; In re Glass, 119 Fed. 509, 9 Am. Bankr. Rep. 391; In re Milgraum & Ost, 129 Fed. 827, 12 Am. Bankr. Rep. 306; In re Peck, 120 Fed. 972, 9 Am. Bankr. Rep. 747.

[433] In re Milgraum & Ost, 129 Fed. 827, 12 Am. Bankr. Rep. 306.

explicitly stated in the affidavit.[434] And in one case it has even been held that attorneys, solicitors, or other agents should not be allowed to verify the specifications, unless in pursuance of a previous order of court allowing them so to do, and in that event both the order and the oath must state the reasons.[435]

§ 696. **Amendment of Specifications.**—It is within the authority and discretion of the court to permit the amendment of specifications in opposition to the bankrupt's discharge, as, for the purpose of supplying a necessary allegation which was originally omitted,[436] provided the specification, as first drawn, contains enough of substance to warrant an amendment, according to the usual rules in such cases.[437] And it is said that the courts should be liberal in allowing amendments in these cases, where no laches or unfairness on the part of the creditor appears, and no injustice to the bankrupt will result nor any unreasonable delay in the progress of the case.[438] But a speedy discharge of the bankrupt (if he is entitled to it) is one of the objects of the bankruptcy law, and creditors who desire to oppose it must act with reasonable promptness, and they will not be allowed to amend their specifications if justly chargeable with laches.[439] Leave to amend can only be granted by the judge of the bankruptcy court, and application for such leave should be made to him and not to the referee.[440] After the expiration of the ten days allowed for filing specifications of opposition, they can be amended only upon application to the court; and amended specifications filed without leave of court first obtained will be stricken from the files, if the bankrupt so moves.[441] But it is in the power of the judge, on application duly made, to allow amendments after the end of the ten days, provided the amendments are merely enlargements of the specifications already on file, in the way of supplying details, or improving allegations

[434] In re Randall, 159 Fed. 298, 20 Am. Bankr. Rep. 305; In re Baerncopf, 117 Fed. 975, 9 Am. Bankr. Rep. 133.

[435] In re Glass, 119 Fed. 509, 9 Am. Bankr. Rep. 391.

[436] In re Miller, 192 Fed. 730, 27 Am. Bankr. Rep. 606; In re Walker (D. C.) 209 Fed. 144; In re Pechin (D. C.) 225 Fed. 798, 34 Am. Bankr. Rep. 721; In re Knaszak, 151 Fed. 503, 18 Am. Bankr. Rep. 187; In re Glass, 119 Fed. 509, 9 Am. Bankr. Rep. 391; In re Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600; In re Bellis, 4 Ben. 53, 3 N. B. R. 496, Fed. Cas No. 1,275; In re Jacobs, 5 Sawy. 458, Fed. Cas. No. 7,160; Ashley's Adm'r v. Robinson, 29 Ala. 112, 65 Am. Dec. 387.

[437] In re Weston, 206 Fed. 281, 30 Am. Bankr. Rep. 647; In re Nathanson, 155 Fed. 645, 19 Am. Bankr. Rep. 56.

[438] In re Carley, 117 Fed. 130, 55 C. C. A. 146, 8 Am. Bankr. Rep. 720.

[439] Kentucky Nat. Bank v. Carley, 121 Fed. 822, 58 C. C. A. 158, 10 Am. Bankr. Rep. 375; In re Mudd, 105 Fed. 348, 5 Am. Bankr. Rep. 242.

[440] In re Peck, 120 Fed. 972, 9 Am. Bankr. Rep. 747; In re Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Leszynsky, 2 Nat. Bankr. News, 738; In re Headley, 2 Nat. Bankr. News, 684. But see, as to the authority of a special master, In re Hanna, 168 Fed. 238, 21 Am. Bankr. Rep. 842.

[441] In re Clothier, 108 Fed. 199, 6 Am. Bankr. Rep. 203.

already made, and do not change the substantial nature of the objections urged.[442] But when the time has run, it is too late to permit an amendment setting out an entirely new and separate ground of objection.[443] So, without special reference to the time, an amendment may be allowed for the purpose of inserting a necessary allegation, after the evidence has been taken,[444] but not for the purpose of introducing an entirely new ground of objection and presenting a separate and distinct issue for the consideration of the court.[445]

§ 697. **Exceptions to Sufficiency of Specifications.**—Where a bankrupt presents his application for discharge in due form, and specifications in opposition thereto are filed by creditors, it has been held that no further pleading on the part of the bankrupt is necessary, and that the allegations of the specifications cannot be taken as confessed for want of an answer by the bankrupt,[446] and that his failure to demur to such specifications is not an admission of their legal sufficiency.[447] But clearly the bankrupt may take advantage of defects in the specifications, and refuse to proceed to trial if their allegations are faulty or insufficient. And hence he must have the right to raise the preliminary question of their sufficiency, either by demurrer, by exceptions analogous to those allowed in equity, or in some other proper way.[448] And indeed in some districts, it is the settled practice to require this to be done, within a prescribed time.[449] Further it must be remembered that defects or irregularities in the execution of the specifications will be deemed waived if not seasonably objected to by the bankrupt,[450] and even the objection of the lack of an essential averment will be deemed waived, and will not be considered on appeal, if an exception was not properly taken in the court below.[451]

§ 698. **Dismissal for Want of Prosecution.**—Creditors have an interest in the prompt determination of the bankrupt's application for

[442] In re Osborne, 115 Fed. 1, 52 C. C. A. 595, 8 Am. Bankr. Rep. 165; In re Gift, 130 Fed. 230, 12 Am. Bankr. Rep. 244; In re Hendrick, 138 Fed. 473, 14 Am. Bankr. Rep. 795.

[443] In re Johnson, 192 Fed. 356, 27 Am. Bankr. Rep. 644.

[444] In re Pierce, 103 Fed. 64, 4 Am. Bankr. Rep. 554.

[445] In re Graves, 24 Fed. 550; In re Pierce, 103 Fed. 64, 4 Am. Bankr. Rep. 554.

[446] In re Logan, 102 Fed. 876, 4 Am. Bankr. Rep. 525; In re Hendrick, 138 Fed. 473, 14 Am. Bankr. Rep. 795.

[447] In re Crist, 116 Fed. 1007, 9 Am. Bankr. Rep. 1.

[448] In re Marsh, 2 Nat. Bankr. News, 649; In re Burk, Deady, 425, 3 N. B. R. 296, Fed. Cas. No. 2,156; In re Duncan, 18 N. B. R. 42, Fed. Cas. No. 4,133.

[449] In re Baldwin, 119 Fed. 796, 9 Am. Bankr. Rep. 591; In re Wakefield, 207 Fed. 180, 31 Am. Bankr. Rep. 42. See In re Frosteg (D. C.) 252 Fed. 199, 42 Am. Bankr. Rep. 275.

[450] In re Baerncopf, 117 Fed. 975, 9 Am. Bankr. Rep. 133; In re Robinson, 123 Fed. 844, 10 Am. Bankr. Rep. 477; In re Wakefield, 207 Fed. 180, 31 Am. Bankr. Rep. 42.

[451] In re Osborne, 115 Fed. 1, 52 C. C. A. 595, 8 Am. Bankr. Rep. 165.

discharge, because while it is pending they are prevented from pursuing their ordinary remedies against him. But it is doubtful whether the court has authority to dismiss the application, as for want of prosecution, if the bankrupt is guilty of unreasonable delay in bringing it on for hearing. Several of the decisions maintain that this cannot be done, since the statute provides that the discharge "shall" be granted, unless one or other of the enumerated grounds for refusing it is established, and laches or delay on the part of the bankrupt is not among those enumerated grounds.[452] In this event, it is said, any creditor may apply to the court to require the bankrupt to have the question of his discharge determined, or, in other words, a creditor may move to set the case down for hearing,[453] and the court may order that creditors and all others who have proved their debts shall have leave to prosecute any and all suits at law or in equity, as if there had been no adjudication of bankruptcy.[454] But there are other decisions which hold that a bankrupt who delays unreasonably to press his application for discharge is guilty of abusing the proceedings for the sake of hindering creditors, and that a motion to dismiss for want of prosecution is proper in such cases and should be granted.[455] And it is also ruled that the court has authority to allow the bankrupt to withdraw his petition for discharge, no adjudication having passed upon it, and to file a new one at a later day.[456]

§ 699. **Evidence on Application for Discharge.**—On the trial of a bankrupt's application for discharge, to which creditors have filed specifications of opposition, the testimony must be strictly confined to the issues raised by the specifications, and evidence will not be received which relates to grounds of objection not set forth in the specifications, or

[452] In re Glasberg, 197 Fed. 896, 117 C. C. A. 235, 28 Am. Bankr. Rep. 826; In re Wolff, 132 Fed. 396, 13 Am. Bankr. Rep. 95. The fact that, from some unknown cause, the hearing was not held for 19 months after the application for discharge does not authorize the judge to refuse to hear the application at all, or to refuse the discharge. A bankruptcy case is one in equity, and the refusal of the discharge in bankruptcy, the effect of which would be to bar the discharge entirely, and to prevent the discharge of the debts therein filed in other bankruptcy proceedings, is too heavy a penalty to impose for mere delay in bringing the application for discharge on for hearing, in view of the fact that the extreme penalty for negligence in failing to press an equity suit for trial is merely dismissal without prejudice. In re Neal (D. C.) 270 Fed. 289, 46 Am. Bankr. Rep. 325.

[453] In re Fowler, 2 Low. 122, Fed. Cas. No. 4,999; In re Sutherland, Deady, 573, Fed. Cas. No. 13,640.

[454] In re Kelly (D. C.) 3 Fed. 219.

[455] Lindeke v. Converse, 198 Fed. 618, 117 C. C. A. 322, 28 Am. Bankr. Rep. 596; In re Overstreet (D. C.) 268 Fed. 987, 45 Am. Bankr. Rep. 129. In re Lederer, 125 Fed. 96, 10 Am. Bankr. Rep. 492; In re Kuffler, 144 Fed. 445, 16 Am. Bankr. Rep. 305. The case last cited was reversed on appeal, but on other grounds, the reviewing court agreeing with the court below as respects the point to which the decision is here cited. In re Kuffler, 151 Fed. 12, 80 C. C. A. 508, 18 Am. Bankr. Rep. 16.

[456] In re Svenson, 9 Biss. 69, 19 N. B. R. 229, Fed. Cas. No. 13,659.

which relates to transactions outside the scope of the matters alleged.[457] As remarked in one of the cases: "The opposing creditors are bound by their specifications. They cannot go beyond them or produce evidence outside of them. Where would be the use of specifications if this were not so? Instead of apprising the bankrupt of the specific grounds upon which his discharge was to be opposed, they would only tend to deceive and mislead him."[458] Thus, for example, where the ground of opposition specified is that the bankrupt had conveyed his property with intent to defraud creditors, evidence that he concealed his property is immaterial and must be excluded.[459] So, where the specifications allege the making of a false oath by the bankrupt during his examination before the referee, it is not a question of his general truthfulness, but a question as to some specific matter which can be framed into an issue material to the bankruptcy proceedings.[460] Further it is necessary, not only that the opposing creditors should specify some one or more of the statutory grounds for refusing a discharge, but that the particular charge should be sustained by the evidence, that is, each of the constituent elements of the offense or wrongful act alleged against the bankrupt must be supported by proper evidence and satisfactorily proved.[461]

§ 700. Same; Admissibility of Evidence.—On the trial of objections to a bankrupt's discharge, much pertinent evidence may usually be drawn from the record of previous proceedings in the bankruptcy case, or of collateral suits growing out of it. For the matters set up in opposition to the discharge have ordinarily been more or less fully investigated at some earlier stage of the proceedings. As to the admissibility of such evidence against the bankrupt, the general rule is that any evidence which he has furnished himself, and which can be used as an admission or declaration against him, may be admitted if relevant, but not records made or testimony given by third parties beyond the control of the bankrupt. Thus, the schedule of property prepared and filed by the bankrupt is evidence against him, but not an inventory or return by the trustee

[457] In re Felts, 205 Fed. 983; In re Bouck, 199 Fed. 453, 28 Am. Bankr. Rep. 378; In re Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Rosenfeld, 2 N. B. R. 116, Fed. Cas. No. 12,057; Tenny v. Collins, 4 N. B. R. 477, Fed. Cas. No. 13,833.

[458] In re Rosenfeld, 2 N. B. R. 116, Fed. Cas. No. 12,057.

[459] In re Bouck, 199 Fed. 453, 28 Am. Bankr. Rep. 378.

[460] Troeder v. Lorsch, 150 Fed. 710, 80 C. C. A. 376, 17 Am. Bankr. Rep. 723.

[461] In re Rosenberg (D. C.) 268 Fed. 658, 45 Am. Bankr. Rep. 319; In re Croonborg (C. C. A.) 268 Fed. 352, 46 Am. Bankr. Rep. 383; In re Brockman, 168 Fed. 1015, 21 Am. Bankr. Rep. 251; In re Holman, 92 Fed. 512, 1 Am. Bankr. Rep. 600; In re Thomas, 92 Fed. 912, 1 Am. Bankr. Rep. 515; In re Rhutassel, 96 Fed. 597, 2 Am. Bankr. Rep. 697; In re McGurn, 102 Fed. 743, 4 Am. Bankr. Rep. 459; In re Cornell, 97 Fed. 29, 3 Am. Bankr. Rep. 172; In re Phillips, 98 Fed. 844, 3 Am. Bankr. Rep. 542; In re Royal, 113 Fed. 140, 7 Am. Bankr. Rep. 636. But the failure to prove the entire amount of the property alleged to have been concealed by the bankrupt is not a

of the property which came into his hands.[462] So, the bankrupt's sworn answer in a chancery case is admissible against him,[463] or his deposition made in a suit by the trustee against him and others, and the decree in such suit,[464] but not a statement filed in a state court by a creditor,[465] nor the record of proceedings by the trustee in a suit against a third person.[466] So, declarations made by a debtor, at the time of his failure, that he had means to pay all his debts, may be admissible as tending to show a fraudulent concealment of assets, though not alone sufficient for that purpose.[467] But the allegations contained in the creditors' petition in involuntary bankruptcy, on which the adjudication was made, are not evidence against the bankrupt on his subsequent application for discharge, even though he suffered the adjudication to go by default.[468] For similar reasons, the testimony given by the bankrupt on his examination by creditors before the referee is admissible against him on the hearing of his application for discharge, if the correctness of the record produced is properly established,[469] at least in so far as particular portions of such testimony, or particular statements or declarations contained in it, are pointed out by the creditor who wishes to use it, and are shown to be relevant to the issues raised by the specifications of objection.[470] But the testimony of third persons, taken on examinations before the referee, is not admissible.[471] But where the bankrupt's first or original petition for discharge was denied (not on the merits), and he made another application, it was held that the testimony of a witness taken on the hearing under the first petition was competent evidence on the hearing on the second application, the witness having died in the meantime.[472]

In other particulars, the ordinary rules governing the admissibility of evidence will apply in these proceedings. A creditor of a voluntary

fatal defect in the evidence. In re Magen (D. C.) 218 Fed. 692, 33 Am. Bankr. Rep. 346.

462 Stevens v. Thompson, 17 N. H. 103.

463 Anonymous, Fed. Cas. No. 463.

464 In re Leland, 8 Ben. 204, Fed. Cas. No. 8,232.

465 In re Williams, 6 Biss. 233, 11 N. B. R. 145, Fed. Cas. No. 17,700.

466 In re Leland, 8 Ben. 204, Fed. Cas. No. 8,232.

467 In re Delavan, Fed. Cas. No. 3,758.

468 In re Lathrop, 3 N. B. R. 46, Fed. Cas. No. 8,105.

469 Shaffer v. Koblegard Co., 183 Fed. 71, 105 C. C. A. 363, 24 Am. Bankr. Rep. 898; In re Goodhile, 130 Fed. 782, 12 Am. Bankr. Rep. 380; In re Bard, 108 Fed. 208, 5 Am. Bankr. Rep. 810; In re Logan, 102 Fed. 876, 4 Am. Bankr. Rep. 525; In re Malschick (D. C.) 217 Fed. 492, 33 Am. Bankr. Rep. 214.

470 In re Marsh, 2 Nat. Bankr. News, 649.

471 In re Goodhile (D. C.) 130 Fed. 782, 12 Am. Bankr. Rep. 380; In re Wilcox, 109 Fed. 628, 48 C. C. A. 567, 6 Am. Bankr. Rep. 362. But compare In re Cooke (D. C.) 109 Fed. 631, 5 Am. Bankr. Rep. 434. And see In re Blaesser (D. C.) 230 Fed. 528, 36 Am. Bankr. Rep. 795, holding that (notwithstanding General Order No. 22) testimony given before the referee by the creditor objecting to the discharge, who died without signing his testimony or being sworn thereto, may be considered when written out and proved by the reporter or some one else.

472 In re Brockway (D. C.) 12 Fed. 69.

bankrupt is a competent witness for other creditors opposing the bankrupt's discharge.[473] And one who appeared as counsel in an equity suit brought by the trustees against the bankrupt and others may be compelled to testify as a witness for the creditors.[474] The testimony of absent witnesses may be taken by deposition; but in this case notice of the taking of the deposition must be served upon the bankrupt and filed with the referee.[475] An application to examine a witness who is a resident of another state, in support of the creditors' specifications, should be made to the federal district court of the district wherein the witness has his residence.[476] It is of course not necessary, or even possible, to prove every allegation of the specifications by direct testimony, but circumstantial evidence may be relied on in proper cases. Thus, where the charge is the obtaining of goods on credit by means of a materially false statement in writing, the fact that the creditor parted with his property in reliance on such statement may be shown circumstantially.[477] And so, evidence of concealment of assets claimed by the bankrupt to be exempt, although irrelevant as evidence in support of the specifications, might be competent on the question of knowledge to show methods of concealment by the bankrupt with a view to bankruptcy.[478]

§ 701. Same; Burden of Proof.—The filing of specifications in opposition to a bankrupt's application for discharge does not make out a prima facie case against him which he is bound to disprove.[479] But on the contrary, the burden of proof is on the objecting creditors, and they must sustain the allegations of their specifications by satisfactory and convincing evidence, so as to show clearly the existence of at least one of the statutory grounds for refusing a discharge.[480] If they fail in

[473] In re Day, Fed. Cas. No. 3,671a.

[474] In re Leland, 8 Ben. 204, Fed. Cas. No. 8,232.

[475] Bankruptcy Act 1898, § 21c.

[476] In re Robinson, 179 Fed. 724, 24 Am. Bankr. Rep. 617.

[477] In re Reed, 191 Fed. 920, 26 Am. Bankr. Rep. 286.

[478] In re Isaacson, 175 Fed. 292, 23 Am. Bankr. Rep. 665.

[479] In re May, 2 Nat. Bankr. News, 93.

[480] In re Gottlieb (C. C. A.) 262 Fed. 730, 44 Am. Bankr. Rep. 464, 45 Am. Bankr. Rep. 180; Horner v. Hamner, 249 Fed. 134, 161 C. C. A. 186, L. R. A. 1918E, 465, 40 Am. Bankr. Rep. 817; In re Garrity, 247 Fed. 310, 159 C. C. A. 404, 40 Am. Bankr. Rep. 664; In re Braun, 239 Fed. 113, 152 C. C. A. 155, 38 Am. Bankr. Rep. 651; Sheinberg v. Hoffman, 236 Fed. 343, 149 C. C. A. 475, 38 Am. Bankr. Rep. 24; Poff v. Adams, Payne & Gleaves, 226 Fed. 187, 141 C. C. A. 185, 35 Am. Bankr. Rep. 307; In re Cohen, 206 Fed. 457, 124 C. C. A. 363, 30 Am. Bankr. Rep. 653; In re Johnson (D. C.) 215 Fed. 748; In re Shrimer (D. C.) 228 Fed. 794, 36 Am. Bankr. Rep. 404; In re Haimowich (D. C.) 232 Fed. 378, 36 Am. Bankr. Rep. 648; In re Wix (D. C.) 236 Fed. 262, 38 Am. Bankr. Rep. 185; In re Maaget (D. C.) 245 Fed. 804, 40 Am. Bankr. Rep. 221; In re Lally (D. C.) 255 Fed. 358, 43 Am. Bankr. Rep. 252; In re Main, 205 Fed. 421, 30 Am. Bankr. Rep. 547; Hardie v. Swafford Bros. Dry Goods Co., 165 Fed. 588, 91 C. C. A. 426, 20 L. R. A. (N. S.) 785, 21 Am. Bankr. Rep. 457; In re Eades, 143 Fed. 293, 74 C. C. A. 431, 16 Am. Bankr. Rep. 30; In re Garrison, 149 Fed. 178, 79 C. C. A. 126, 17 Am. Bankr. Rep. 831; In re Walder, 152 Fed. 489, 18 Am. Bankr. Rep. 419; In re Kolster, 146 Fed. 138,

this, the specifications of objection will be overruled and dismissed and the discharge will be granted.[481] But the burden of proof may shift, and put the bankrupt upon the defensive. And this happens when enough has been shown by the creditors to make out a prima facie case, and it can be rebutted only by proof of facts which must be specially and peculiarly within the bankrupt's own knowledge. Thus, where the ground of opposition is the concealment of property from the trustee, and the creditors have shown the recent existence of assets which have not been scheduled or surrendered, and their disappearance or large shrinkage within a short time prior to the bankruptcy, the burden is on the bankrupt to account for the disappearance or diminution of his estate, and if he fails to give a reasonable and credible explanation, the court will be justified in inferring a fraudulent concealment of assets, such as to forfeit his right to a discharge.[482] On a similar principle, an objecting creditor has the burden of showing that a materially false statement made by the bankrupt as a basis for credit was known by him to be untrue when made;[483] but when that fact is proved, the burden shifts to the bankrupt to show that it was not made with intent to deceive.[484] So also, it is said that, to entitle a partner to a discharge notwithstanding the fact that the firm failed to keep proper books of account, with intent on the part of some member to conceal its financial condition, the burden rests on him to prove that he was innocent of any participation therein.[485] When the objecting creditors have shown that the bankrupt failed to keep proper books of account, the circumstances of his business or occupation being such as to make them necessary for an understanding of his financial situation, the presumption then arises that the bankrupt intended the natural and probable consequences of

17 Am. Bankr. Rep. 52; In re Keefer, 135 Fed. 885, 14 Am. Bankr. Rep. 290; In re Hamilton, 133 Fed. 823, 13 Am. Bankr. Rep. 333; In re McGurn, 102 Fed. 743, 4 Am. Bankr. Rep. 459; In re Chamberlain, 125 Fed. 629, 11 Am. Bankr. Rep. 95; In re Fitchard, 103 Fed. 742, 4 Am. Bankr. Rep. 609; In re Wetmore, 99 Fed. 703, 3 Am. Bankr. Rep. 700; In re Phillips, 98 Fed. 844, 3 Am. Bankr. Rep. 542; In re Shertzer, 99 Fed. 706, 3 Am. Bankr. Rep. 699; In re Hixon, 93 Fed. 440, 1 Am. Bankr. Rep. 610; In re Idzall, 96 Fed. 314.

[481] In re Miller, 212 Fed. 920, 129 C. C. A. 440; In re Corn (D. C.) 106 Fed. 143, 5 Am. Bankr. Rep. 478; In re Hirsch (D. C.) 97 Fed. 571, 3 Am. Bankr. Rep. 344; In re O'Kell, 2 N. B. R. 105, Fed. Cas. No. 10,475; In re Harris, 2 N. B. R. 105, Fed. Cas. No. 6,112.

[482] In re Cooper, 230 Fed. 991, 145 C. C. A. 185, 38 Am. Bankr. Rep. 589; In re Brincat (D. C.) 233 Fed. 811, 37 Am. Bankr. Rep. 587; In re Diamond, 204 Fed. 137, 30 Am. Bankr. Rep. 363; In re Miller, 203 Fed. 170, 30 Am. Bankr. Rep. 113; In re McCann, 179 Fed. 575, 24 Am. Bankr. Rep. 789; Seigel v. Cartel, 164 Fed. 691, 21 Am. Bankr. Rep. 140; In re Leslie, 119 Fed. 406, 9 Am. Bankr. Rep. 561; In re Finkelstein, 101 Fed. 418, 3 Am. Bankr. Rep. 800; In re Meyers, 96 Fed. 408, 2 Am. Bankr. Rep. 707; In re Wood, 98 Fed. 972, 3 Am. Bankr. Rep. 572.

[483] In re Troutman & Gesse (D. C.) 251 Fed. 930, 40 Am. Bankr. Rep. 418.

[484] In re Arenson, 195 Fed. 609, 28 Am. Bankr. Rep. 113; In re Perlmutter (D. C.) 256 Fed. 862, 43 Am. Bankr. Rep. 362.

[485] In re Schachter, 170 Fed. 683, 22 Am. Bankr. Rep. 389.

such failure, that is to say, the concealment of his financial condition from his creditors, and, to obtain his discharge, he must rebut this presumption by satisfactory evidence.[486] But these rules do not of course apply in cases where there can be no burden of proof one way or the other, as where the question presented is one of law and not of fact, as, for example, upon the construction of the statute.[487]

§ 702. **Same; Weight and Sufficiency of Evidence.**—On opposition to a bankrupt's application for discharge, it is not required of the opposing creditors that they should establish the allegations of their specifications beyond a reasonable doubt. Their evidence must, indeed, be sufficient to overcome any opposing presumptions as well as the evidence produced on behalf of the bankrupt,[488] but a proceeding of this kind is not a criminal case, although the ground of opposition specified may also be a crime under the statute. Thus, where it is charged that the bankrupt swore falsely in verifying his schedule or in the proceedings in bankruptcy, the evidence must be sufficiently clear and convincing to overcome the presumption of his honesty; but it is not required to be of the high degree necessary to sustain a conviction for perjury.[489] In fact, it is only necessary that there should be a fair preponderance of the credible evidence supporting the case of the objecting creditors,[490] but this preponderance must exist, for an evenly balanced condition of the proof will warrant a decision in favor of the bankrupt.[491] It is difficult to characterize exactly the kind of evidence and the weight of the evidence which the creditors must produce, as it necessarily varies greatly with the facts and circumstances of each particular case.[492]

[486] Thompson v. Lamb (C. C. A.) 263 Fed. 61, 45 Am. Bankr. Rep. 316; Devorkin v. Security Bank & Trust Co., 243 Fed. 171, 156 C. C. A. 37, 39 Am. Bankr. Rep. 738; In re Landersman (D. C.) 239 Fed. 766, 38 Am. Bankr. Rep. 685; In re Chass (D. C.) 238 Fed. 573, 37 Am. Bankr. Rep. 734.

[487] In re Gilpin (D. C.) 160 Fed. 171, 20 Am. Bankr. Rep. 374.

[488] In re Garrity, 247 Fed. 310, 159 C. C. A. 404, 40 Am. Bankr. Rep. 664; In re Perlmutter (D. C.) 256 Fed. 862, 43 Am. Bankr. Rep. 362; Troeder v. Lorsch, 150 Fed. 710, 80 C. C. A. 376, 17 Am. Bankr. Rep. 723; In re Delmour (D. C.) 161 Fed. 589, 20 Am. Bankr. Rep. 405; In re Greenberg (D. C.) 114 Fed. 773, 8 Am. Bankr. Rep. 94. Compare In re Hennebry (D. C.) 207 Fed. 882, 31 Am. Bankr. Rep. 231.

[489] Remmers v. Merchants-Laclede Nat. Bank, 173 Fed. 484, 97 C. C. A. 490, 23 Am. Bankr. Rep. 78.

[490] Thompson v. Lamb (C. C. A.) 263 Fed. 61, 45 Am. Bankr. Rep. 316; In re Brincat (D. C.) 233 Fed. 811, 37 Am. Bankr. Rep. 587; In re Atlas (D. C.) 219 Fed. 783, 34 Am. Bankr. Rep. 44; In re Bacon (D. C.) 205 Fed. 545, 30 Am. Bankr. Rep. 584; In re Doyle (D. C.) 199 Fed. 247, 29 Am. Bankr. Rep. 102; In re Dauchy, 130 Fed. 532, 65 C. C. A. 78, 11 Am. Bankr. Rep. 511; In re Leslie (D. C.) 119 Fed. 406, 9 Am. Bankr. Rep. 561. But compare In re Braus, 248 Fed. 55, 160 C. C. A. 195, 40 Am. Bankr. Rep. 668.

[491] In re Hirsch (D. C.) 96 Fed. 468, 2 Am. Bankr. Rep. 715.

[492] The following cases may be consulted, each of which was concerned with the weight and sufficiency of the evidence offered on a contest of the bankrupt's right to a discharge: In re Rosenfeld (C. C. A.) 262 Fed. 876, 44 Am. Bankr. Rep. 390; Goerner v. Eastman (C. C. A.) 261 Fed. 177, 44 Am. Bankr.

But the general opinion of the courts may be seen from their frequent use, in stating the requirements, of such phrases as "clear and convincing proof," [493] "strict and convincing evidence," [494] "satisfactory and sufficient evidence," [495] "clear and satisfying evidence," [496] and even "indisputable proof." [497] Particularly in regard to questions of fraud, motive, intent, and the like, it is not sufficient to prove merely suspicious circumstances or conduct which wears a sinister aspect.[498] A fraudulent conveyance of property must be shown affirmatively, and it is not sufficient that the bankrupt's evidence on his examination tends indirectly to support the contention of the creditors.[499] And while evasive and disingenuous testimony is not a ground for refusing his discharge, it is a material consideration in determining his credibility when testifying as to what

Rep. 303; Sternburg v. M. Cohen & Co., 254 Fed. 1, 165 C. C. A. 411, 42 Am. Bankr. Rep. 456; In re Schultz, 250 Fed. 103, 162 C. C. A. 275, 41 Am. Bankr. Rep. 367; In re Newmark, 249 Fed. 341, 161 C. C. A. 349, 41 Am. Bankr. Rep. 54; Sherwood Shoe Co. v. Wix, 240 Fed. 692, 153 C. C. A. 490, 38 Am. Bankr. Rep. 670; In re Cooper, 230 Fed. 991, 145 C. C. A. 185, 38 Am. Bankr. Rep. 589; Broomfield v. Lehman, 215 Fed. 97, 131 C. C. A. 405; In re Wakefield (D. C.) 207 Fed. 180, 31 Am. Bankr. Rep. 42; In re Hindin (D. C.) 219 Fed. 605, 34 Am. Bankr. Rep. 114; In re Arnold, 228 Fed. 75, 35 Am. Bankr. Rep. 740; In re Goldberg (D. C.) 256 Fed. 541, 43 Am. Bankr. Rep. 127; In re Jutkovitz (D. C.) 259 Fed. 915, 44 Am. Bankr. Rep. 231; In re Landersman (D. C.) 239 Fed. 766, 38 Am. Bankr. Rep. 685; In re Wiback (D. C.) 245 Fed. 135, 40 Am. Bankr. Rep. 172; In re Kaplan (D. C.) 245 Fed. 222, 40 Am. Bankr. Rep. 181; In re Helfgott (D. C.) 245 Fed. 358, 40 Am. Bankr. Rep. 196; In re Maaget (D. C.) 245 Fed. 804, 40 Am. Bankr. Rep. 221; In re Fackler (D. C.) 246 Fed. 864, 39 Am. Bankr. Rep. 742; In re Kappes (D. C.) 258 Fed. 653, 44 Am. Bankr. Rep. 159; In re Schroeder (D. C.) 264 Fed. 862, 45 Am. Bankr. Rep. 202; Troeder v. Lorsch, 150 Fed. 710, 80 C. C. A. 376, 17 Am. Bankr. Rep. 723; In re Taylor, 182 Fed. 187, 24 Am. Bankr. Rep. 945; In re Margolis, 181 Fed. 591, 24 Am. Bankr. Rep. 934; In re Chamberlain, 180 Fed. 304, 25 Am. Bankr. Rep. 37; In re Tillyer, 147 Fed. 860, 17 Am. Bankr. Rep. 125; In re Burstein, 160 Fed. 765, 20 Am. Bankr. Rep. 399; In re Goldich, 164 Fed. 882, 21 Am. Bankr. Rep. 249; In re Guilbert, 169 Fed. 149, 22 Am. Bankr. Rep. 221; Barton Bros. v. Texas Produce Co., 136 Fed. 355, 69 C. C. A. 181, 14 Am. Bankr. Rep. 502; In re Doherty, 135 Fed. 432, 13 Am. Bankr. Rep. 549; In re Harr, 143 Fed. 421, 16 Am. Bankr. Rep. 213; In re Jacobs, 144 Fed. 868, 16 Am. Bankr. Rep. 482; In re Leslie, 119 Fed. 406, 9 Am. Bankr. Rep. 561; In re Young, 140 Fed. 728, 15 Am. Bankr. Rep. 477; In re Miner, 117 Fed. 953, 9 Am. Bankr. Rep. 100; In re Baerncopf, 117 Fed. 975, 9 Am. Bankr. Rep. 133; In re Boyden, 132 Fed. 991, 13 Am. Bankr. Rep. 269; In re Blalock, 118 Fed. 679, 9 Am. Bankr. Rep. 266; In re Murray, 162 Fed. 983, 20 Am. Bankr. Rep. 700; In re Hedley, 156 Fed. 314, 19 Am. Bankr. Rep. 409; In re Lewin, 155 Fed. 501, 18 Am. Bankr. Rep. 72; In re Moore, 1 Hask. 134, Fed. Cas. No. 9,751.

[493] In re Agnew (D. C.) 225 Fed. 650, 35 Am. Bankr. Rep. 709; In re Lally (D. C.) 255 Fed. 358, 43 Am. Bankr. Rep. 252; In re Taylor (D. C.) 188 Fed. 479, 26 Am. Bankr. Rep. 143; In re Salsbury (D. C.) 113 Fed. 833, 7 Am. Bankr. Rep. 771; In re Howden (D. C.) 111 Fed. 723, 7 Am. Bankr. Rep. 191.

[494] Garry v. Jefferson Bank, 186 Fed. 461, 108 C. C. A. 439, 26 Am. Bankr. Rep. 511.

[495] In re Hirsch (D. C.) 97 Fed. 571, 3 Am. Bankr. Rep. 344.

[496] In re Berner, 2 Nat. Bankr. News, 268.

[497] In re Banks, Fed. Cas. No. 958.

[498] In re Howard, 180 Fed. 399, 103 C. C. A. 545, 24 Am. Bankr. Rep. 841; McCutcheon v. Townley (C. C. A.) 266 Fed. 985, 46 Am. Bankr. Rep. 96. See In re Goodridge, 2 N. B. R. 324, Fed. Cas. No. 5,547.

[499] In re Ferris, 105 Fed. 356, 5 Am. Bankr. Rep. 246.

became of certain money or property.[500] On the other hand, the case may be such that the bankrupt's testimony alone will be sufficient to rebut the case of the creditors, where it is clear and positive and is not discredited by any fact proved.[501]

§ 703. **Hearing and Determination of Application.**—The order of court designating the time and place for hearing the bankrupt's application for discharge, and directing that creditors and other parties in interest may then and there appear and show cause against the same, must be signed by the clerk and bear the seal of the court.[502] And while the proceedings may be continued from day to day, if necessary, an adjournment without day will put an end to them, unless a new order is issued.[503] Under the act of 1867, creditors were entitled to a trial by jury of issues of fact raised by the specifications,[504] but it is otherwise under the present statute, since the law specifically directs that the application for discharge shall be heard by the judge, and since it grants a jury trial only in certain particular cases, among which this is not included.[505] Creditors opposing the bankrupt's application for discharge have the affirmative of the issue, and consequently have the right to begin.[506] The bankrupt must attend the hearing upon his application,[507] and his presence cannot be dispensed with by the referee if it is demanded by the creditors.[508] Further, the creditors have the right to examine the bankrupt, when so in attendance at the hearing, for the purpose of eliciting evidence which will support their objections, and the fact that he has already been examined at an earlier stage of the proceedings will not excuse him from this duty.[509] On this hearing only such grounds of objection to the bankrupt's discharge may be heard and considered as have been set forth in the specifications of the opposing creditors, and the evidence will be confined to the material facts alleged in the specifications.[510] Thus, the question whether or not the debt of a particular creditor is such as to be excepted from the operation of a discharge in bankruptcy cannot properly be raised or tried on the bankrupt's

[500] In re Leslie, 119 Fed. 406, 9 Am. Bankr. Rep. 561.

[501] In re Eades, 143 Fed. 293, 74 C. C. A. 431, 16 Am. Bankr. Rep. 30.

[502] In re Bellamy, 1 Ben. 474, 1 N. B. R. 113, Fed. Cas. No. 1,268.

[503] In re Seckendorf, 2 Ben. 462, Fed. Cas. No. 12,600.

[504] In re Lawson, 2 N. B. R. 396, Fed. Cas. No. 8,151.

[505] Bankruptcy Act 1898, § 14b, and § 19a.

[506] Anonymous, Fed. Cas. No. 464.

[507] Bankruptcy Act 1898, § 7. The bankrupt must attend the hearing even though he may have removed from the district pending the proceedings. In re Curle (D. C.) 217 Fed. 688, 33 Am. Bankr. Rep. 502.

[508] In re Shanker, 138 Fed. 862, 15 Am. Bankr. Rep. 109.

[509] In re Mellen, 97 Fed. 326, 3 Am. Bankr. Rep. 226.

[510] In re Taplin, 135 Fed. 861, 14 Am. Bankr. Rep. 360; In re Adams, 104 Fed. 72, 4 Am. Bankr. Rep. 696; In re Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Baldwin, 119 Fed. 796, 9 Am. Bankr. Rep. 591. See In re Marshall Paper Co., 95 Fed. 419, 2 Am. Bankr. Rep. 653; In

application for discharge;[511] and the propriety or validity of an order extending the time for filing the application for discharge cannot be reviewed on the hearing of the application itself.[512] And further, a creditor cannot object to the action of the court in granting the discharge, on the ground that the issue found in favor of the bankrupt, and on which the case turned, was inconclusive, where that issue was distinctly raised by the creditor's own allegations.[513] In determining on the application, the court must be governed solely and entirely by the admissible evidence produced on the hearing of the application and objections,[514] and the referee, for instance, has no legal right to consider evidence which has been previously offered before him as referee, if it is not repeated at the present hearing or made a part of the record.[515]

The specifications in opposition may be rejected for insufficiency, or they may be overruled and dismissed if not sustained by the evidence, but in some way they must be disposed of, and a motion to grant the discharge cannot be granted by the court until this has been done.[516] When final action has been taken on the case, it may perhaps be reopened for good cause shown, but not for the purpose of letting in additional evidence when the original hearing was full and complete and the proofs were then formally closed.[517] But an appeal lies from a judgment granting or refusing a discharge.[518] Costs are not usually awarded to the prevailing party unless the objections filed were found to be frivolous or vexatious or, on the other hand, the bankrupt is shown to have the means of paying costs.[519]

§ 704. Same; Powers and Duties of Judge and Referee.—Under the explicit language of the bankruptcy act, the bankrupt's application for discharge must be heard and determined by the judge of the court of bankruptcy, not by the referee. The latter officer has no jurisdiction either to grant or to refuse a discharge, but this duty is cast upon the

re Newmark, 249 Fed. 341, 161 C. C. A. 349, 41 Am. Bankr. Rep. 54. See In re Meikleham (D. C.) 236 Fed. 401, 38 Am. Bankr. Rep. 324.

[511] In re Rhutassel, 96 Fed. 597, 2 Am. Bankr. Rep. 697; In re Lockwood (D. C.) 240 Fed. 158, 39 Am. Bankr. Rep. 478.

[512] In re Casey, 195 Fed. 322, 28 Am. Bankr. Rep. 359.

[513] Kentucky Nat. Bank v. Carley, 127 Fed. 686, 62 C. C. A. 412, 12 Am. Bankr. Rep. 119.

[514] In re Murray, 162 Fed. 983, 20 Am. Bankr. Rep. 700; In re Walder, 152 Fed. 489, 18 Am. Bankr. Rep. 419; In re Halsell, 132 Fed. 562, 13 Am. Bankr. Rep. 106.

[515] In re Walder, 152 Fed. 489, 18 Am. Bankr. Rep. 419.

[516] In re Randall, 159 Fed. 298, 20 Am. Bankr. Rep. 305.

[517] Kentucky Nat. Bank v. Carley, 127 Fed. 686, 62 C. C. A. 412, 12 Am. Bankr. Rep. 119; In re Royal, 113 Fed. 140, 7 Am. Bankr. Rep. 636; In re White (D. C.) 242 Fed. 1001, 38 Am. Bankr. Rep. 673.

[518] Bankruptcy Act 1898, § 25a. And see, supra, § 43.

[519] In re George, 1 Low. 494, Fed. Cas. No. 5,326. But this matter may depend upon the local rules of court. See, for instance, In re Fritz, 173 Fed. 560, 23 Am. Bankr. Rep. 84.

judge, who must either hear the case originally or upon the report and recommendations of the referee or a special master, and render the decision.[520] But while this duty cannot be delegated, yet, when specifications in opposition to the bankrupt's application are filed, it is in the power of the judge to refer the issues raised thereby to the referee, in the character of a special master, with instructions to ascertain and report the facts.[521] And while it is customary to select and appoint the referee who has acted in the proceedings as special master to hear the application for discharge, yet any other person may be appointed in the discretion of the judge, and, when so appointed, is entitled to a reasonable compensation.[522] A preliminary question may arise before the referee when the application is thus sent to him, as to the sufficiency of the specifications in opposition, the bankrupt, for example, claiming that they are too vague and indefinite to raise an issue. Though there is some difference of opinion on the point, it is generally held that the referee has authority to pass upon this question, and that he should refuse to receive evidence on specifications which are clearly insufficient,[523] his proper course being to report back to the court that nothing has been filed with him in the way of objections which would require the taking of testimony.[524] But when questions arise as to the admissibility of evidence, the referee has no power to exclude it, but must require and receive an answer to the question objected to, and incorporate in his report to the court the question challenged, the objections made thereto, his ruling on its admissibility, and the answer given.[525] But the functions of the referee are not limited to taking and reporting the evidence adduced on the hearing, but he should also find and report the facts as he deduces them from the evidence and state his conclu-

[520] In re Taylor, 188 Fed. 479, 26 Am. Bankr. Rep. 143; In re C. H. Kendrick & Co. (D. C.) 226 Fed. 980, 35 Am. Bankr. Rep. 630; In re Hockman (D. C.) 205 Fed. 330, 30 Am. Bankr. Rep. 921; In re Randall, 159 Fed. 298, 20 Am. Bankr. Rep. 305; In re Johnson, 158 Fed. 342, 19 Am. Bankr. Rep. 814; In re McDuff, 101 Fed. 241, 41 C. C. A. 316, 4 Am. Bankr. Rep. 110; In re Mawson, 2 Ben. 122, 1 N. B. R. 265, Fed. Cas. No. 9,317; Bankruptcy Act 1898, § 38, cl. 4; Idem, § 1, cl. 16.

[521] Fellows v. Freudenthal, 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490; In re McDuff, 101 Fed. 241, 41 C. C. C. A. 316, 4 Am. Bankr. Rep. 110; In re Daugherty, 189 Fed. 239, 26 Am. Bankr. Rep. 550; In re Eldred, 152 Fed. 491, 18 Am. Bankr. Rep. 243; In re Walsh, 256 Fed. 653, 168 C. C. A. 47, 43 Am. Bankr. Rep. 266.

[522] In re Gillardon, 187 Fed. 289, 26 Am. Bankr. Rep. 103.

[523] In re Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Mudd, 2 Nat. Bankr. News, 710; In re Hendrick, 138 Fed. 473, 14 Am. Bankr. Rep. 795. Compare In re Brockman, 168 Fed. 1015, 21 Am. Bankr. Rep. 251; In re Puffer, 2 N. B. R. 43, Fed. Cas. No. 11,459.

[524] In re Hendrick, 138 Fed. 473, 14 Am. Bankr. Rep. 795.

[525] In re Isaacson, 175 Fed. 292, 23 Am. Bankr. Rep. 665; In re Knaszak, 151 Fed. 503, 18 Am. Bankr. Rep. 187. See In re Magen (D. C.) 218 Fed. 692, 33 Am. Bankr. Rep. 346.

sions of law and his recommendation as to whether the discharge should be granted or refused,[526] and in so doing, he should exercise an independent judgment on the facts brought out before him.[527] If his report is incomplete or defective, it will be sent back to him with directions to proceed according to the statute.[528] Otherwise, however, the referee's findings of fact are entitled to the very highest consideration, and while the judge is not technically concluded thereby, but must bring his own mind to bear on the evidence, yet the report of the referee will be accepted as correct, unless very plainly shown to be wrong.[529] And his recommendations will also be considered as entitled to great weight. But a recommendation that the discharge should be granted, when the referee has found that one of the specifications of objection was supported by the evidence, is erroneous and will be disregarded.[530]

Exceptions to the report of the referee, in the character of a special master, on the specifications of opposition and the hearing before him, must be filed within twenty days after the filing of the report, in accordance with the practice in equity.[531] But the time may be extended by the court; and where the record of an order so extending the time to file exceptions was never entered and has been lost or destroyed, the court at a subsequent term has power to supply the record.[532]

[526] In re Kaiser, 99 Fed. 689, 3 Am. Bankr. Rep. 767; In re Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73; In re Hughes, 2 Ben. 85, 1 N. B. R. 226, Fed. Cas. No. 6,841. Where the referee, who heard objections to the bankrupt's petition for discharge, merely reported the testimony and failed to find any conclusion, the court may either find the ultimate facts or refer the matter back to the referee with instructions to find and report the same, that being the more approved practice. In re Troutman & Jesse (D. C.) 251 Fed. 930, 40 Am. Bankr. Rep. 418.

[527] In re Mayer, 195 Fed. 571, 28 Am. Bankr. Rep. 342; In re Hindin (D. C.) 219 Fed. 605, 34 Am. Bankr. Rep. 114; See In re Rubin & Lipman (D. C.) 215 Fed. 669, 32 Am. Bankr. Rep. 295.

[528] Mahoney v. Ward, 100 Fed. 278, 3 Am. Bankr. Rep. 770. In re Lenweaver (D. C.) 226 Fed. 987, 36 Am. Bankr. Rep. 73. A report by the special commissioner on specifications opposing a discharge in bankruptcy, which was in the form of an opinion, need not be returned for particular findings of fact and conclusions of law. In re Rowe (D. C.) 240 Fed. 165, 39 Am. Bankr. Rep. 461.

[529] In re Hughes (C. C. A.) 262 Fed. 500, 44 Am. Bankr. Rep. 447; In re Goldberg (D. C.) 256 Fed. 541, 43 Am. Bankr. Rep. 127; In re Lally (D. C.) 255 Fed. 358, 43 Am. Bankr. Rep. 252; In re Amster (D. C.) 249 Fed. 256, 41 Am. Bankr. Rep. 249; In re Rowe (D. C.) 240 Fed. 165, 39 Am. Bankr. Rep. 461; In re Kean (D. C.) 237 Fed. 682, 38 Am. Bankr. Rep. 628; Baker v. Bishop-Babcock-Becker Co., 220 Fed. 657, 136 C. C. A. 265, 34 Am. Bankr. Rep. 396; In re McCann, 179 Fed. 575, 24 Am. Bankr. Rep. 789; In re Wheeler, 165 Fed. 188, 21 Am. Bankr. Rep. 262; In re Knaszak, 151 Fed. 503, 18 Am. Bankr. Rep. 187; In re Shriver, 125 Fed. 511, 10 Am. Bankr. Rep. 746; In re Lafleche, 109 Fed. 307, 6 Am. Bankr. Rep. 483; In re McKane, 155 Fed. 674, 19 Am. Bankr. Rep. 103; In re Covington, 110 Fed. 143, 6 Am. Bankr. Rep. 373.

[530] In re Cohen (D. C.) 192 Fed. 751, 26 Am. Bankr. Rep. 544.

[531] In re Pierce (D. C.) 210 Fed. 389, 32 Am. Bankr. Rep. 96.

[532] International Harvester Co. v. Carlson, 217 Fed. 736, 133 C. C. A. 430, 33 Am. Bankr. Rep. 178.

§ 705. Staying or Suspending Discharge.—It is within the authority of the court of bankruptcy to adjourn the hearing on a bankrupt's application for discharge or temporarily to stay proceedings thereon, if it appears that the decision thereon may be affected by the result of pending and uncompleted proceedings, or by the intervention of new parties who desire to come in.[533] Also there may be circumstances in which the rights of creditors would be unjustly cut off by the premature discharge of the bankrupt. Thus, an application for discharge may be stayed until there has been a definite settlement of the rights of creditors who claim the privilege of enforcing their demands against property which has been set apart to the bankrupt as exempt.[534] And a claimant holding a lien against garnishees indebted to the bankrupt is entitled to a stay of the discharge for a reasonable time, to enable him to enforce his rights against the garnishees and the sureties on a bond to dissolve the garnishment.[535] But the court of bankruptcy will not stay its decision on the discharge to await the result of a pending action in a state court wherein creditors of the bankrupt seek to set aside a transfer of property made by him before the adjudication of bankruptcy, and which they allege to have been fraudulent as to creditors, the same plaintiffs opposing the bankrupt's discharge on the ground of the same alleged fraud; for the issues are not identical, nor would the decree of the state court determine the right of the bankrupt to be discharged.[536] So also, under the 1910 amendment to the bankruptcy act, arming the trustee with the rights of a judgment creditor, he is qualified to sue under a state statute to reach surplus revenue to which the bankrupt will be entitled under a testamentary trust, and his recovery will be for the benefit of all the creditors; and since such right will not be affected by the bankrupt's discharge, a judgment creditor is not entitled to have the granting of the discharge postponed to enable him to prosecute such a suit for the benefit of judgment creditors only.[537]

[533] In re Ketchum, 1 Fed. 838; In re Mawson, 1 N. B. R. 271, Fed. Cas. No. 9,320; In re Thompson, 2 Ben. 166, 1 N. B. R. 323, Fed. Cas. No. 13,935; In re Steed, 107 Fed. 682, 6 Am. Bankr. Rep. 73. And see In re J. L. Philips & Co., 224 Fed. 628, 34 Am. Bankr. Rep. 877; In re Bishop (D. C.) 253 Fed. 454, 42 Am. Bankr. Rep. 495; Steinhauer & Wight, Inc., v. Adair, 20 Ga. App. 733, 93 S. E. 280.

[534] In re Woodruff, 96 Fed. 317, 2 Am. Bankr. Rep. 678; In re McBryde, 99 Fed. 686, 3 Am. Bankr. Rep. 729; In re Mitchell, 175 Fed. 877, 23 Am. Bankr. Rep. 707.

[535] In re Maher, 169 Fed. 997, 22 Am. Bankr. Rep. 290.

[536] In re Cornell, 97 Fed. 29, 3 Am. Bankr. Rep. 172.

[537] In re Morris, 204 Fed. 770, 123 C. C. A. 220. It was otherwise before the amendment of 1910. See In re Tiffany, 147 Fed. 314, 17 Am. Bankr. Rep. 296.

§ 706. Order of Discharge.—The form for an order granting a discharge to a bankrupt has been officially prescribed.[538] The court of bankruptcy has power to amend an order of discharge at any time before the proceedings in the case have been closed, provided such amendment will not affect vested rights.[539] And on the other hand, an order granting or refusing a discharge may be entered nunc pro tunc, where the parties have acted on the theory that such an order was in force, and the rights of third persons will not be prejudiced,[540] or where other circumstances make such a course proper. Thus, a discharge in bankruptcy is not void because granted after the death of the bankrupt,[541] but in such a case it should be entered as of a date prior to his decease.[542] Where specifications in opposition to the discharge have been overruled, and the discharge ordered, the bankrupt's certificate of discharge will not issue until the expiration of ten days after the order, or until the expiration of any extension of the time allowed to creditors to appeal from such order.[543] As to the substance of the order of discharge, it will be expressed always in general terms, and will not attempt to enumerate or describe the debts which are excepted from its operation. On the application for discharge, the character of any particular debt is not in issue, nor will the court undertake to decide whether or not it will be released by the discharge. Hence creditors having claims which they allege to be within the excepted classes cannot ask the court to frame its order of discharge in such a way as to make specific exceptions in favor of their debts. The court will grant a discharge in the usual form, leaving its scope for future determination when the question shall properly arise.[544]

Equity Rule 4, providing that where an order is entered in the equity docket or order book without prior notice to or in the absence of a party, the clerk shall forthwith send notice thereof to the party's solicitor, does not apply to a judgment of discharge in bankruptcy, since the bankruptcy side of the court is entirely distinct from the equity side, and the dockets are separate, although proceedings in bankruptcy are in a general way assimilated to proceedings in equity.[545]

[538] Official Form No. 59.

[539] In re Diamond, 149 Fed. 407, 79 C. C. A. 227, 17 Am. Bankr. Rep. 563.

[540] In re Drisko, 2 Low. 430, 13 N. B. R. 112, Fed. Cas. No. 4,090.

[541] Robinson v. Butler, 4 Ky. Law Rep. 449; In re Parker, 1 Nat. Bankr. News, 261.

[542] Young v. Ridenbaugh, 3 Dill. 239, 11 N. B. R. 563, Fed. Cas. No. 18,173; Robinson v. Butler, 4 Ky. Law Rep. 449.

[543] In re Hirsch, 96 Fed. 468, 2 Am. Bankr. Rep. 715.

[544] In re Mussey, 99 Fed. 71, 3 Am. Bankr. Rep. 592. But see In re J. L. Philips & Co. (D. C.) 224 Fed. 628, 34 Am. Bankr. Rep. 877, as to granting a discharge on conditions which will protect a garnishing creditor.

[545] In re Stafford (D. C.) 240 Fed. 155, 39 Am. Bankr. Rep. 469.

§ 707. Revoking Discharge.—The statute provides that "the judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge." [546] It will be observed that this authority is given exclusively to the judge of the court of bankruptcy and cannot be exercised by the referee. But the petition for revocation of a discharge may be referred to the referee as special commissioner, to ascertain and report upon the matters of fact alleged in the petition.[547] It is also held that the jurisdiction to revoke or cancel a discharge is vested exclusively in the court of bankruptcy which granted it, and a federal court of equity in a district other than that in which the discharge was granted, has no jurisdiction to set it aside for fraud.[548] But it is still an open question whether the court of bankruptcy has such control over an order of discharge once entered as courts of record possess with reference to their ordinary judgments or orders, or whether its jurisdiction is limited to the precise grounds, presented in the precise way, set forth in the statute. Several decisions maintain that the court has power, on motion of a proper party, or even on its own motion, to set aside or recall an order of discharge for such causes (aside from the charge of fraud in obtaining it) as would justify that action in any other case, as, for instance, mistake, surprise, or unavoidable accident.[549] But other cases, while conceding this authority, hold that it cannot be exercised after the expiration of a year from the time of granting the discharge.[550]

The application must be made by a "party in interest," and a petition which merely alleges that the petitioner is a "creditor" does not sufficiently allege this fact; the petition must show that he had a provable debt which would be affected by the discharge.[551] But the fact that a creditor has omitted to prove his claim and that it has become too late for him to do so does not deprive him of the character of a party in

[546] Bankruptcy Act 1898, § 15a.

[547] In re Meyers, 100 Fed. 775.

[548] Atlantic Dynamite Co. v. Reger, 200 Fed. 1002, 29 Am. Bankr. Rep. 659; Nicholas v. Murray, 5 Sawy. 320, 18 N. B. R. 469, Fed. Cas. No. 10,223.

[549] In re Louisville Nat. Banking Co., 158 Fed. 403, 85 C. C. A. 513; In re Bimberg, 121 Fed. 942, 9 Am. Bankr. Rep. 601; In re Dupee, 2 Low. 18, 6 N. B. R. 89, Fed. Cas. No. 4,183. A discharge may be vacated to allow creditors to file specifications of opposition thereto, when their failure to file the specifications at the proper time occurred through mistake. In re Applegate (D. C.) 235 Fed. 271, 37 Am. Bankr. Rep. 759.

[550] In re Cuthbertson, 202 Fed. 266, 29 Am. Bankr. Rep. 823.

[551] In re Chandler, 138 Fed. 637, 71 C. C. A. 87, 14 Am. Bankr. Rep. 512; In re Groodzinsky (D. C.) 248 Fed. 753, 40 Am. Bankr. Rep. 861; In re Levy (D. C.) 227 Fed. 1011, 36 Am. Bankr. Rep. 181.

interest, since, if he succeeds in having the discharge vacated, he can collect his debt from the bankrupt's after-acquired property.[552] And a creditor who neglects to file objections in due time, and subsequently discovers fraud, may require the bankrupt to take his discharge and then apply to revoke it.[553] Moreover, the bankrupt himself is a party in interest, and may move to have the discharge set aside, for the purpose of amending his schedules by including debts which were originally omitted through mistake or inadvertence.[554] By whomsoever filed, a petition to vacate the discharge on the statutory ground must set forth distinctly each one of the facts necessary to sustain it and to justify the action asked for.[555] And the law does not authorize a rehearing or new trial on specifications already filed in opposition to the discharge, and which were heard and determined before the discharge, even if the opposing creditor can adduce new facts, happening since the discharge, which would be competent evidence if a new trial were authorized by the statute.[556] Besides this, the burden of proof is on a petitioner seeking to have the discharge vacated, and he must prove, by sufficient evidence, every fact essential to the jurisdiction of the court and to its exercise in the particular case.[557] The act also provides that when a discharge is revoked, the trustee shall be vested with the title to all of the property of the bankrupt as of the date of the final decree revoking the discharge,[558] and also that the property acquired by the bankrupt in addition to that which composed his estate at the time the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while the discharge was in force.[559]

§ 708. Same; Time for Application; Laches.—The period of one year within which an application to revoke a bankrupt's discharge must be filed begins to run from the date of the order granting the discharge, and not from the discovery of the fraud on which the application is based.[560] And the requirement that the application shall be presented

552 In re Bimberg, 121 Fed. 942, 9 Am. Bankr. Rep. 601. But see Arrington v. Arrington, 132 Fed. 200, 13 Am. Bankr. Rep. 89.

553 In re Fowler, 2 Low. 122, Fed. Cas. No. 4,999.

554 In re McKee, 165 Fed. 269, 21 Am. Bankr. Rep. 309. A discharge will be set aside and the case reopened to allow the bankrupt to amend his schedules to include a debt which, through mistake, was listed in the name of the wrong party. In re Adams (D. C.) 242 Fed. 335, 40 Am. Bankr. Rep. 22.

555 In re Cuthbertson, 202 Fed. 266, 29 Am. Bankr. Rep. 823; Vary v. Jackson, 164 Fed. 840, 21 Am. Bankr. Rep. 334; In re Bates, 27 Fed. 604.

556 In re Corwin, 1 Fed. 847.

557 In re Cuthbertson, 202 Fed. 266, 29 Am. Bankr. Rep. 823; In re Stetson, 4 Ben. 147, 3 N. B. R. 726, Fed. Cas. No. 13,381.

558 Bankruptcy Act 1898, § 70d.

559 Bankruptcy Act 1898, § 64c.

560 Mall v. Ulrich, 37 Fed. 653; Pickett v. McGavick, Fed. Cas. No. 11,126; In re Brown, Fed. Cas. No. 1,983; In re Her-

within the year is a limitation directly on the power or jurisdiction of the court, as distinguished from a limitation on the cause of action, so that, if this provision of the law is not complied with, it is beyond the power of the court to revoke the discharge.[561] It is even doubtful whether leave to amend a defective petition can be granted after the expiration of the year. Applications for leave to amend have been refused, when the year had fully run, when the petitions as originally presented were insufficient in substance, though filed in due time.[562]

But there is authority for the proposition that this special statute of limitations applies only where the revocation of the discharge is sought on the one ground specified in the fifteenth section of the Bankruptcy Act, that is, that it was "obtained through the fraud of the bankrupt." A discharge, for instance, which was granted without any notice to the creditors is invalid, and therefore a petition by creditors for its revocation is not barred by the lapse of a year.[563]

Even in the case of an application to revoke for the cause of fraud, however, it is further necessary that the application should be presented by a party who has "not been guilty of undue laches." This is not an exception to the prescription of the statute, but an additional prerequisite to the revocation, and does not dispense with the limitation of one year after discovery of the fraud.[564] And the practical construction put upon the act by the courts does not permit the creditor to take the whole of the statutory year (or practically all of it) before the imputation of laches can attach to him. On the contrary, he may be chargeable with laches in his conduct even before the discharge was granted. Thus, a creditor who had ample opportunity during the pendency of the proceedings to examine the bankrupt fully as to all matters regarded as fraudulent or suspicious, and who appeared in opposition to his discharge, and was given time to file specifications of opposition, but failed to do so, and permitted the discharge to be granted without further objection, is not entitled to be heard on a subsequent application to revoke the discharge, being guilty of laches.[565] The case may be otherwise

zig, 16 Abb. New Cas. (N. Y.) 179. As to waiver of the statute of limitations by the bankrupt, see In re Graff (D. C.) 242 Fed. 577, 40 Am. Bankr. Rep. 205.

[561] In re Howard, 201 Fed. 577; In re Cuthbertson, 202 Fed. 266, 29 Am. Bankr. Rep. 823; In re Weintrob (D. C.) 263 Fed. 904, 45 Am. Bankr. Rep. 390. Since an action to set aside the discharge of a bankrupt must be brought within a year from the discharge, a state court, even if it had jurisdiction, could not set aside the discharge after the lapse of more than a year. Andrus v. Cornwell, 134 La. 403, 64 South. 221.

[562] In re Howard, 201 Fed. 577; In re Sims, 9 Fed. 440.

[563] John B. Ellison & Sons v. Weintrob (C. C. A.) 272 Fed. 466, 46 Am. Bankr. Rep. 353.

[564] In re Weintrob (D. C.) 263 Fed. 904, 45 Am. Bankr. Rep. 390.

[565] In re Upson (D. C.) 124 Fed. 980, 10 Am. Bankr. Rep. 758; In re Mauzy (D. C.) 163 Fed. 900, 21 Am. Bankr. Rep. 59. And see In re Groves (D. C.) 244 Fed. 197, 39 Am. Bankr. Rep. 853.

where the petitioner had no opportunity either to discover the fraud in question before the discharge was granted or to allege it in opposition to the discharge.[566] But one in this position must show very clearly how and when he acquired information of the fraud, and that he failed to receive notice of the application for discharge or was otherwise prevented from setting it up at that time.[567]

But even if there is nothing in the conduct of the creditor before or at the time of granting the discharge to charge him with laches, and if the fraud was really discovered after the order of discharge (as the statute intends), still he must act with reasonable promptness after the discovery. An unexcused delay of eight months, for example, will be ground for refusing to entertain a petition for the revocation of the discharge.[568] So, in a case under the former bankruptcy law, where the interest of the creditors who petitioned for a review of the discharge was small in comparison with the aggregate of the debts, and the bankrupt had resumed his business on the faith of his discharge, and had entered into extensive contracts, it was held that five months was too unreasonable a delay on the part of the creditors, no sufficient excuse being offered and the petition must be dismissed.[569] And it is not only necessary that the application for revocation of the discharge should be presented in due time, but it must be prosecuted with reasonable diligence. In a case where a creditor applied for the revocation of the bankrupt's discharge within little more than two months after it was granted, but then delayed for more than seven years to bring the matter on for hearing, during which time the bankrupt died, it was held that the creditor's right to prosecute his application was barred by his laches, as against the heirs and legal representatives of the bankrupt.[570]

§ 709. **Same; Grounds for Revoking.**—The bankruptcy act specifies but one single ground for revoking the discharge of a bankrupt, that is, that it was "obtained through the fraud of the bankrupt."[571] And the

[566] In re Griffin Bros. (D. C.) 154 Fed. 537, 19 Am. Bankr. Rep. 78.

[567] In re Howard (D. C.) 201 Fed. 577.

[568] In re Downing (D. C.) 199 Fed. 329, 28 Am. Bankr. Rep. 778.

[569] In re Murray, 14 Blatchf. 43, Fed. Cas. No. 9,953. And see In re Buenstein, 9 Ben. 215, Fed. Cas. No. 2,076.

[570] Drees v. Waldron, 128 C. C. A. 609, 212 Fed. 93, 128 C. C. A. 609, 31 Am. Bankr. Rep. 722.

[571] This is true of a proceeding strictly to "revoke" a discharge in bankruptcy. Aside from this, however, the court undoubtedly has jurisdiction to set aside or annul an order of discharge in bankruptcy in the same manner and on the same grounds which would justify the like action with respect to any other judgment rendered by it. Thus, the statute explicitly requires that the creditors shall have 30 days' notice of an application for the bankrupt's discharge, and if this requisite is entirely omitted, the discharge granted is invalid and may therefore be set aside. John B. Ellison & Sons v. Weintrob (C. C. A.) 272 Fed. 466, 46 Am. Bankr. Rep. 353. But jurisdiction to hear and act upon the application for discharge having been established by the mailing of notices to the creditors, the discharge is not invalid and cannot

term "fraud," as here used, means bad faith, involving moral turpitude or intentional wrong, as distinguished from fraud in law.[572] It must be actual fraud knowingly practiced by the bankrupt.[573] And the fraud must have been practised in "obtaining" the discharge. Fraud committed by the bankrupt prior to his adjudication, or at any earlier stage of the proceedings in bankruptcy, will not be sufficient. It constitutes a ground for objecting to the grant of a discharge, and should be set up in opposition thereto, but the order of discharge precludes the subsequent allegation of fraud so committed, and it cannot be made the basis of a petition to revoke.[574] But the willful and fraudulent concealment of property, practised by the bankrupt throughout the whole proceedings, and continued up to and through the proceedings on his application for discharge, constitutes the suppression of a fact which, if it had been known, would have barred his right to a discharge, and therefore may be considered as fraud in the obtaining of the discharge, so that, if it comes to the knowledge of parties in interest only after the discharge has been granted, and they act promptly, it will furnish ground for revoking the discharge.[575] So the willful and intentional omission of a creditor's name or address from the bankrupt's schedule may be ground for annulling the discharge, when done with the purpose of keeping the proceeding secret from that creditor and preventing him from opposing the discharge.[576] A more direct instance of fraud in obtaining the discharge is presented in the case where the bankrupt, though perfectly well acquainted with the correct address of a given creditor, causes the notice of his application for discharge to be sent to a wrong address, so that the creditor has no knowledge of the proceedings for discharge in time to act.[577] Again, it is a fraud upon the law and ground for revoking a discharge where a creditor who has filed specifications of opposition

be set aside merely because one creditor failed to receive his notice, the same having been duly mailed to him. In re Walsh (D. C.) 213 Fed. 643.

572 In re Cuthbertson (D. C.) 202 Fed. 266, 29 Am. Bankr. Rep. 823. And see In re Griffin Bros. (D. C.) 154 Fed. 537, 19 Am. Bankr. Rep. 78; In re Augenstein, 2 MacArthur (9 D. C.) 322, 16 N. B. R. 252.

573 In re Wright, 177 Fed. 578, 24 Am. Bankr. Rep. 437.

574 In re Hoover, 105 Fed. 354, 5 Am. Bankr. Rep. 247; In re Adams, 29 Fed. 843; In re Weintrob (D. C.) 263 Fed. 904, 45 Am. Bankr. Rep. 390.

575 In re Meyers, 100 Fed. 775; In re Paine, 127 Fed. 246, 11 Am. Bankr. Rep. 351; In re Augenstein, 2 MacArthur (D. C.) 322, 16 N. B. R. 252; In re Rainsford, 5 N. B. R. 381, Fed. Cas. No. 11,537. See also In re Hansen, 107 Fed. 252, 5 Am. Bankr. Rep. 747; Throop v. Griffin, 180 Pa. St. 452, 36 Atl. 865.

576 In re Herrick, 7 N. B. R. 341, Fed. Cas. No. 6,419. But the omission by a bankrupt of a debt from the schedule annexed to his petition is not ground for setting aside the discharge, where there was no fraudulent purpose, although the omitted creditor had no notice of the bankruptcy proceedings in time to have proved his claim, since in this case the creditor is not prejudiced by the discharge. In re Monroe, 114 Fed. 398, 7 Am. Bankr. Rep. 706.

577 In re Roosa, 119 Fed. 542, 9 Am. Bankr. Rep. 531. But see In re Fritz, 173 Fed. 560, 23 Am. Bankr. Rep. 84.

thereto is induced, by a pecuniary consideration, to withdraw his opposition and permit the discharge to be granted as unopposed, and this, though the payment was not made by the bankrupt but by a third person, if the bankrupt knew of and consented to the arrangement.[578] And the same rule has been applied in a case where certain of the objecting creditors withdrew their opposition without any corrupt motive, but without notifying other creditors who had relied on the specifications filed as representing their own objections and instructed their attorneys to co-operate with the attorneys of the objecting creditors.[579]

Further it is necessary that knowledge of the fraud alleged should have come to the creditors seeking to have it revoked "since the discharge was granted." If they knew of it in time to have interposed it as a bar to the discharge, they cannot use it in this way afterwards.[580] And a discharge will not be set aside when the fraudulent acts relied on by the creditors were suspected and believed to exist, though not positively known, before the discharge was granted,[581] nor where the facts in question, though not within the creditor's personal knowledge, were well known to the trustee in bankruptcy before the discharge, since the trustee is the representative of the creditors and his knowledge is imputable to them.[582]

§ 710. Conclusiveness and Effect of Discharge.—The bankruptcy act provides that a certified copy of an order granting a discharge shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.[583] This applies to proceedings in all courts; and a state court is bound to take notice of a discharge in bankruptcy under the federal law when it is properly pleaded.[584] But aside from this, an order of discharge is a judgment and is supported by the same presumptions which attach to any other; and therefore it is conclusive evidence of all facts appearing on the record or deducible therefrom by necessary inference, and of the fact that the bankrupt has been lawfully discharged from all of his provable debts save those specifically excepted by the statute.[585] But the right to a discharge

[578] In re Dietz, 97 Fed. 563, 3 Am. Bankr. Rep. 316. Compare Heim v. Chapman, 171 Mass. 347, 50 N. E. 529.

[579] In re Dietz, 97 Fed. 563, 3 Am. Bankr. Rep. 316. But see In re Douglass, 11 Fed. 403.

[580] In re Fowler, 2 Low. 122, Fed. Cas. No. 4,999. A discharge cannot be revoked, nine months after it was granted, on account of the bankrupt's failure to schedule certain property, where it does not appear that the creditors were not at all times well aware of the material circumstances, or that they extended credit on account of the bankrupt's possession of such property. Gage v. Penfield, 249 Fed. 961, 162 C. C. A. 159, 41 Am. Bankr. Rep. 322.

[581] Marrionneaux's Case, 1 Woods, 37, 13 N. B. R. 222, Fed. Cas. No. 9,088.

[582] In re Hansen, 107 Fed. 252, 5 Am. Bankr. Rep. 747.

[583] Bankruptcy Act 1898, § 21f.

[584] Wood v. Carr, 115 Ky. 303, 73 S. W. 762.

[585] Palmer v. Hussey, 119 U. S. 96, 7

and the effect of it when granted are entirely distinct questions. The proper time and place for the determination of the effect of a discharge is when the same is pleaded or relied on by the debtor as a defense to the enforcement of a particular claim, and that issue cannot properly arise or be considered in determining the right to a discharge, and therefore the discharge is not evidence on the question whether or not a particular claim is within the excepted classes.[586] Assuming, however, that it is not so excepted, it is to be remarked that a discharge in bankruptcy operates only as a bar to an action for the recovery of the debt, and not as a payment of the debt or as a release and extinguishment.[587] A moment's reflection will show that, if this were not so, a barred debt could not be revived and made enforceable by a new promise to pay it. But a discharge in bankruptcy is a plea in bar,[588] which is a perfect defense to a suit on a debt barred thereby,[589] and a plea of discharge in bankruptcy is a legitimate and meritorious defense which is not to be regarded with any disfavor by the courts.[590] This plea may be interposed in a suit begun before the bankruptcy and still pending after the discharge, as, in a creditor's suit, where it may be set up in a supplemental answer.[591] Or the plaintiff in any pending suit may anticipate the plea of a discharge in bankruptcy, and may, by leave of court and before defendant has pleaded his discharge, discontinue the action, without costs; or if the defendant pleads his discharge, no terms being imposed,

Sup. Ct. 158, 30 L. Ed. 362; Crouse v. Whittlesey, 66 Hun (N. Y.) 629, 20 N. Y. Supp. 965; Ruckman v. Cowell, 1 N. Y. 505; Blake v. Bigelow, 5 Ga. 437; Boas v. Hetzel, 3 Pa. St. 298; Belknap v. Davis, 21 Vt. 409; Tichenor v. Allen, 13 Gratt. (Va.) 15; Jones v. Knox, 51 Ala. 367; Norris v. Goss, 2 Speer (S. C.) 80. See In re Krall, 196 Fed. 402, 28 Am. Bankr. Rep. 452; Andrus v. Cornwell, 134 La. 403, 64 South. 221.

586 In re Lockwood, 240 Fed. 161, 39 Am. Bankr. Rep. 482; Hallagan v. Dowell, 179 Iowa, 172, 161 N. W. 177; In re Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468; In re McCarty, 111 Fed. 151, 7 Am. Bankr. Rep. 40; United States v. Peters, 166 Fed. 613, 22 Am. Bankr. Rep. 177.

587 In re Walsh, 256 Fed. 653, 168 C. C. A. 47, 43 Am. Bankr. Rep. 266; Butler Cotton Oil Co. v. Collins, 200 Ala. 217, 75 South. 975; American Improvement Co. v. Lilienthal (Cal. App.) 184 Pac. 692; Rate v. American Smelting & Refining Co., 56 Mont. 277, 184 Pac. 478; Herrington v. Davitt (Sup.) 145 N. Y. Supp. 452; Lanier v. Tolleson, 20 S. C. 57; Craig v. Seitz, 63 Mich. 727, 30 N. W. 347; Citizens' Loan Ass'n v. Boston & M. R. Co., 196 Mass. 528, 82 N. E. 696, 14 L. R. A. (N. S.) 1025, 124 Am. St. Rep. 584, 13 Ann. Cas. 365. Compare J. B. Ellis & Co. v. Mobile, J. & K. C. R. Co., 166 Ala. 187, 51 South. 860; Needham v. Matthewson, 81 Kan. 340, 105 Pac. 436, 26 L. R. A. (N. S.) 274, 135 Am. St. Rep. 374, 19 Ann. Cas. 146.

588 House v. Schnadig, 138 Ill. App. 498.

589 Craig v. Seitz, 63 Mich. 727, 30 N. W. 347. In re Weisberg (D. C.) 253 Fed. 833, 42 Am. Bankr. Rep. 616. In an action against husband and wife, an answer, pleading the discharge of the husband in bankruptcy, is a good defense both as to him and as to the community property. Sounds Credits Co. v. Powers, 100 Wash. 668, 171 Pac. 1031.

590 Citizens' Nat. Bank v. Branden, 19 N. D. 489, 126 N. W. 102, 27 L. R. A. (N. S.) 858.

591 Stewart v. Isidor, 5 Abb. Prac. N. S. (N. Y.) 68, 1 N. B. R. 485; Fort-Mims & Haynes Co. v. Branan-Akers Co., 140 Ga. 131, 78 S. E. 721.

and recovers judgment, he will be entitled to his costs the same as in other cases; for the principle that, where a cause of action is extinguished, the action cannot proceed for the mere purpose of recovering costs does not apply to the status of an action to recover a debt after it has been discharged in bankruptcy, the action having been commenced before the discharge.[592] And the discharge has no necessary effect on the right or duty of a trustee in bankruptcy to continue the prosecution of an action already begun by him.[593]

A discharge in bankruptcy will revoke a power of attorney to confess judgment,[594] and excuse the debtor from complying with the condition of a bond, before given, to take the benefit of the state insolvency law,[595] and release him from liability on a note given before the adjudication, though it was expressly stated to have been given for cash advanced to enable him to file his petition in bankruptcy.[596] But a discharge does not extinguish any valid lien,[597] nor terminate a lease in which the bankrupt is the tenant, unless the landlord re-enters or the trustee has assumed the lease,[598] nor will it be a defense to an action for the breach of the bankrupt's bond as a public officer, occurring subsequent to the discharge.[599] And in a suit to recover damages for personal injuries, plaintiff is not precluded from recovering reasonable charges incurred for the services of a physician and other like charges, necessarily resulting from his injury, because he included such claims in his schedule in bankruptcy and had been discharged from legal liability for the same.[600] So, in an action of trover, neither the defendant nor his surety in the bail bond therein can set up as a defense the discharge of the defendant in bankruptcy pending the trial, the petition in trover being one of title and not of debt.[601]

§ 711. Effect of Discharge as to Property Fraudulently Transferred or Not Scheduled.—A discharge in bankruptcy, while it releases the

[592] Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417.

[593] In re Penn, 5 Ben. 500, 8 N. B. R. 93, Fed. Cas. No. 10,928; Guernsey v. Douglas, 171 Cal. 329, 153 Pac. 227.

[594] Dye v. Bartram, 5 Ohio Dec. 508.

[595] Nesbit v. Greaves, 6 Watts & S. (Pa.) 120; Hubert v. Horter, 81 Pa. St. 39, 14 N. B. R. 430.

[596] Nelson v. Stewart, 54 Ala. 115, 25 Am. Rep. 660.

[597] Reed v. Bullington, 49 Misc. 223, 11 N. B. R. 408; Boone v. Revis, 44 Tex. 384. See Hartnett v. Wilson, 31 Cal. App. 678, 161 Pac. 281. Although a defendant receives a discharge in bankruptcy, which he sets up in a plea puis darrein continuance, the suit may still proceed to a qualified or special judgment, to permit the plaintiff to enforce a lien by attachment against defendant's property, or to bring suit against the sureties on a bond given to release such attachment. Star Braiding Co. v. Stienen Dyeing Co. (R. I.) 114 Atl. 129.

[598] Witthaus v. Zimmermann, 91 App. Div. 202, 86 N. Y. Supp. 315.

[599] White v. Blake, 79 Me. 114, 8 Atl. 457.

[600] Sibley v. Nason, 196 Mass. 125, 81 N. E. 887, 12 L. R. A. (N. S.) 1173, 124 Am. St. Rep. 520, 12 Ann. Cas. 938.

[601] Berry v. Jackson, 115 Ga. 196, 41

bankrupt from personal liability for his debts and gives him his after-acquired property free from any liability therefor, does not release any property owned by him at the commencement of the proceedings. Title thereto passes by operation of law to the trustee in bankruptcy, and this title is not affected by the discharge of the bankrupt. Hence the discharge does not in any way preclude the trustee from recovering property previously transferred by the bankrupt in fraud of his creditors.[602] It has also been ruled in several cases that, after the discharge, creditors may proceed in any proper form of action or suit to subject to their claims any property of the bankrupt which he omitted to list in his schedule of assets, whether such omission was fraudulently planned or was the result of mere oversight.[603] But since the bankruptcy law expressly confers on a trustee in bankruptcy the right to avoid any transfer by the bankrupt of his property which any creditor might have avoided, and to recover the property so transferred or its value, the better opinion appears to be that a judgment creditor of the bankrupt, after the latter's discharge, cannot levy on and sell the bankrupt's property because of fraud in securing the discharge, but the rights of creditors must be worked out through the trustee.[604] Notwithstanding a bankrupt's discharge, where the estate has not been technically closed, the court of bankruptcy has jurisdiction, by an order made in summary proceedings, to compel the bankrupt to surrender to the trustee property belonging to the estate, the existence of which was concealed or had not come to the knowledge of the trustee before the discharge was granted.[605]

§ 712. **Collateral Impeachment of Discharge.**—An appeal may be taken from an order granting a discharge in bankruptcy, or the court which granted it may revoke it, within one year, for the causes specified in the statute. But these remedies are absolutely exclusive, and a state court can neither annul nor disregard a discharge duly granted by

S. E. 698, 90 Am. St. Rep. 102; Birmingham Fertilizer Co. v. John A. Cox & Son, 10 Ga. App. 699, 73 S. E. 1090; Watts v. Wight Inv. Co., 25 Ga. App. 291, 103 S. E. 184.

[602] In re Pierce, 103 Fed. 64, 4 Am. Bankr. Rep. 554; In re Groves (D. C.) 244 Fed. 197, 39 Am. Bankr. Rep. 853; Nye v. Hart, 22 Ohio Cir. Ct. R. 427; Stephenson v. Bird, 168 Ala. 363, 53 South. 92, Ann. Cas. 1912B, 249; McLeod's Trustee v. McLeod, 89 S. W. 199, 28 Ky. Law Rep. 284; Blick v. Nimmo, 121 Md. 139, 88 Atl. 116.

[603] Horn v. Bates (Ky.) 114 S. W. 763; Card v. Walbridge, 18 Ohio, 411. See Rand v. Iowa Cent. Ry. Co., 186 N. Y. 58, 78 N. E. 574, 116 Am. St. Rep. 530, 9 Ann. Cas. 542. Compare Boyd v. Olvey, 82 Ind. 294.

[604] Hibbard v. Henderson, 44 Or. 318, 75 Pac. 889.

[605] Levy v. Schorr (C. C. A.) 266 Fed. 207, 45 Am. Bankr. Rep. 324; In re Margolies (C. C. A.) 266 Fed. 203, 45 Am. Bankr. Rep. 412; In re Levy (D. C.) 261 Fed. 432, 44 Am. Bankr. Rep. 248.

a court of bankruptcy having jurisdiction, nor allow it to be impeached in any collateral proceeding for any cause which would have prevented the granting of the discharge or which would have been sufficient ground for revoking the discharge in the bankruptcy court.[606] It was ruled in some of the decisions under earlier bankruptcy laws that the jurisdiction of the court granting the discharge was open to question, and that a party interested in avoiding the effect of the discharge should be permitted to show, in a collateral proceeding, that it was granted without jurisdiction.[607] But this view has been controverted by authorities of perhaps quite equal authority,[608] and is contrary to the general rules protecting judgments against collateral attack. The proper rule is that all legal presumptions must be indulged in favor of the order of discharge, and that it cannot be held void in a collateral proceeding unless want of jurisdiction in the court which granted it appears affirmatively on the face of the record,[609] or that if the bankruptcy court had jurisdiction of the subject-matter, by reason of the filing of a petition which (aided by every presumption and inference) can be held sufficient to confer jurisdiction, then the discharge must be conclusively presumed valid.[610] Further, it must be remembered that a proceeding in bankruptcy is a proceeding in rem. And therefore a discharge granted by a court having jurisdiction of the estate cannot be treated by any other court as void as to any particular creditor, on

[606] United States v. Griswold, 7 Sawy. 311, 8 Fed. 556; Lathrop v. Stuart, 5 McLean, 167, Fed. Cas. No. 8,113; Custard v. Wigderson, 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740; Young v. Stevenson, 73 Ark. 480, 84 S. W. 623; Lutz v. Kalmus, 115 N. Y. Supp. 230; Delta County Bank v. McGranahan, 37 Wash. 307, 79 Pac. 796; First Nat. Bank v. Masterson, 29 Okl. 76, 116 Pac. 162; Parker v. Atwood, 52 N. H. 181; Corey v. Ripley, 57 Me. 69, 2 Am. Rep. 19, 4 N. B. R. 503; Alston v. Robinett, 37 Tex. 56, 9 N. B. R. 74; Howland v. Carson, 28 Ohio St. 625, 16 N. B. R. 372; Milhous v. Aicardi, 51 Ala. 594; Fuller v. Pease, 144 Mass. 390, 11 N. E. 694; Talbott v. Suit, 68 Md. 443, 13 Atl. 356; Way v. Howe, 108 Mass. 502, 11 Am. Rep. 386, 4 N. B. R. 677; Blair v. Hanna, 87 Ind. 298; Brown v. Covenant Mut. Life Ins. Co., 86 Mo. 51; Brady v. Brady, 71 Ga. 71; Begein v. Brehm, 123 Ind. 160, 23 N. E. 496; Lawver v. Gladden (Pa.) 1 Atl. 659; Thurmond v. Andrews, 10 Bush (Ky.) 400; Stetson v. Bangor, 56 Me. 286; Smith v. Ramsey, 27 Ohio St. 339; Seymour v. Street, 5 Neb. 85; Oates v. Parish, 47 Ala. 157; Sheets v. Hawk, 14 Serg. & R. (Pa.) 173; Thomas v. Jones, 39 Wis. 124. But see Andrus v. Cornwell, 134 La. 403, 64 South. 221, for an intimation that a discharge in bankruptcy may be impeached in a state court on the ground of its being an absolute nullity.

[607] Poillon v. Lawrence, 77 N. Y. 207; Crouse v. Whittlesey, 61 Hun, 622, 15 N. Y. Supp. 851; Stiles v. Lay, 9 Ala. 795; Smith v. Engle, 44 Iowa, 265, 14 N. B. R. 481; Landly v. Cummings, 5 Ky. Law Rep. 511; Hennessee v. Mills, 1 Baxt. (Tenn.) 38.

[608] Morrison v. Woolson, 23 N. H. 11; Reed v. Vaughan, 15 Mo. 137, 55 Am. Dec. 133; Laidley v. Cummings, 83 Ky. 606.

[609] Ross-Lewin v. Goold, 211 Ill. 384, 71 N. E. 1028; Williams v. Scott, 122 N. C. 545, 29 S. E. 877.

[610] Ross-Lewin v. Goold, 211 Ill. 384, 71 N. E. 1028; Jones v. Knox, 51 Ala. 367.

the theory that the court never acquired jurisdiction of his person because he was not served with notice of the proceedings, and this, although his name was purposely omitted from the list of creditors, or although the omission to serve him with notice was fraudulent and intentional.[611]

Neither is it permissible, in any collateral proceeding, to impeach a discharge in bankruptcy on the ground of fraud practised by the bankrupt in obtaining it (though directed against the particular creditor who complains) or on the ground of a fraudulent concealment of assets or other fraudulent conduct of the bankrupt, since the remedy for these matters is to be sought in the court of bankruptcy and there alone.[612] At any rate, it is clear that a creditor who has unsuccessfully opposed the bankrupt's application for discharge is thereby estopped, in a suit which he afterwards brings to recover his debt, and to which the defendant pleads his discharge, from showing that the discharge was fraudulently obtained.[613] And for even stronger reasons, no mere irregularities of practice or errors of law alleged to have been committed by the court of bankruptcy can be set up to avoid the effect of the discharge. It cannot be questioned in any other court for any lack of conformity to the provisions of the bankruptcy law, or as having been wrongly, improperly, or irregularly allowed.[614] On the contrary, if the plea setting up the discharge shows the court to have had jurisdiction of the petition, and to have proceeded, on the petition, to grant the discharge, all the intermediate steps will be presumed to have been duly and regularly taken.[615]

But it is always permissible for a creditor to avoid the effect of a discharge in bankruptcy as to his particular claim (without questioning its validity), by showing that his debt is one of the kind expressly excepted by law from the operation of a discharge, as, for instance,

[611] Allen v. Thompson, 10 Fed. 116; Benedict v. Smith, 48 Mich. 593, 12 N. W. 866; Thornton v. Hogan, 63 Mo. 143; Williams v. Butcher, 12 N. B. R. 143; Sawyer v. Rector, 5 Dak. 110, 37 N. W. 741; Brown v. Kroh, 31 Ohio St. 492; Bailey v. Corruthers, 71 Me. 172; Black v. Blazo, 117 Mass. 17, 13 N. B. R. 195. Contra, see Batchelder v. Low, 43 Vt. 662, 5 Am. Rep. 311, 8 N. B. R. 571; Jones v. Knox, 51 Ala. 367.

[612] Ocean Nat. Bank v. Olcott, 46 N. Y. 12; Smith v. Ramsey, 27 Ohio St. 339, 15 N. B. R. 447; Rayl v. Lapham, 27 Ohio St. 452, 15 N. B. R. 508; Oates v. Parish, 47 Ala. 157; Ewell v. Pitman (Ky.) 27 S. W. 870; Farr v. Evans, 26 Pittsb. Leg. J. (Pa.) 141; Morris v. Creed, 11 Heisk. (Tenn.) 155; Brown v. Causey, 56 Tex. 340; Seymour v. Street, 5 Neb. 85; Wiley v. Pavey, 61 Ind. 457, 28 Am. Rep. 677; Wales v. Lyon, 2 Mich. 276. Contra, see Gupton v. Connor, 11 Humph. (Tenn.) 287; Bond v. Baldwin, 9 Ga. 9; Shelton v. Pease, 10 Mo. 473.

[613] Wales v. Lyon, 2 Mich. 276.

[614] Grover v. Fox, 36 Mich. 463; Marshall v. Sumner, 59 N. H. 218, 47 Am. Rep. 194; Hudson v. Bigham, 12 Heisk. (Tenn.) 58, 8 N. B. R. 494; Dusenbury v. Hoyt, 45 How. Prac. (N. Y.) 147; Sinclair v. Smyth, 1 Brev. (S. C.) 402.

[615] Morrison v. Woolson, 29 N. H. 510; Hubbell v. Cramp, 11 Paige (N. Y.) 310.

that it was created by the bankrupt by fraud or while acting in a fiduciary capacity,[616] or that the creditor had no knowledge of the proceedings in time to file his claim for proof and allowance.[617] This does not amount to an attack upon the discharge, either direct or collateral, since it admits its validity, and only seeks to withdraw the particular claim from its operation, in accordance with the provisions of the bankruptcy law.

The foregoing principles are also applicable in cases where the bankrupt is discharged on a composition with his creditors. Thus where, in proceedings in a court of competent jurisdiction for the discharge of a debtor on a composition, the decree is based on a finding that the bankrupt has not been guilty of any of the acts which would bar his discharge, nor of a failure to perform any of the duties necessary to secure it, which finding was essential to the exercise of the court's jurisdiction, the decree will be binding as to such matters on all parties to the proceeding until properly set aside, and cannot be collaterally impeached.[618]

§ 713. Pleading Discharge; Necessity of Pleading.—Since a discharge in bankruptcy does not destroy or extinguish the debts upon which it operates, and since it is a defense personal to the debtor and which he may waive,[619] it follows that the bankrupt, if he wishes to avail himself of the benefit of his discharge in any particular suit, must plead it properly and seasonably, and if he omits to do so, it constitutes no bar to the rendition of a valid judgment against him.[620] Thus, if

[616] Sutherland v. Lasher, 41 Misc. Rep. 249, 84 N. Y. Supp. 56; Santa Rosa Bank v. White, 139 Cal. 703, 73 Pac. 577; Stevens v. Brown, 49 Miss. 597, 11 N. B. R. 568; Linn v. Hamilton, 34 N. Y. Law, 305; Broadnax v. Bradford, 50 Ala. 270. To allege that a given claim is not discharged because it was not duly scheduled in the bankruptcy proceedings is not a collateral attack on the discharge. Hyde Park Flint Bottle Co. v. Miller, 179 App. Div. 73, 166 N. Y. Supp. 110. An action by a creditor on his debt against the bankrupt would not be a collateral attack on the discharge. Collins v. Davidson, 34 Ohio Cir. Ct. R. 668.

[617] Fields v. Rust, 36 Tex. Civ. App. 350, 82 S. W. 331.

[618] Hoskins v. Velasco Nat. Bank, 48 Tex. Civ. App. 246, 107 S. W. 598.

[619] Taber v. Donovan, 156 Mich. 652, 121 N. W. 481; Ludeling v. Felton, 29 La. Ann. 719; Manwarring v. Kouns, 35 Tex. 171; Horner v. Spelman, 78 Ill. 206; Goodrich v. Hunton, 2 Woods, 137, Fed. Cas. No. 5,544.

[620] In re Nuttall, 201 Fed. 557, 29 Am. Bankr. Rep. 800; In re Boardway, 248 Fed. 364, 41 Am. Bankr. Rep. 478; Fowle v. Park, 48 Fed. 789; Doggett v. Emerson, 1 Woodb. & M. 195, Fed. Cas. No. 3,962; Fellows v. Hall, 3 McLean, 281, Fed. Cas. No. 4,722; City of Newark v. Stout, 52 N. J. Law, 35, 18 Atl. 943; Schreiber v. Schomacker Piano Forte Mfg. Co., 152 App. Div. 817, 137 N. Y. Supp. 747; Griffith v. Adams, 95 Md. 170, 52 Atl. 66; McDougald v. Chatanooga Medicine Co., 10 Ga. App. 653, 73 S. E. 1089; Friedman v. Zweifler, 74 Misc. Rep. 448, 132 N. Y. Supp. 320; Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93; Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417; Lovell v. Sneed, 79 Ark. 204, 95 S. W. 157; Lane v. Holcomb, 182 Mass. 360, 65 N. E. 794; Collins v. Mc-

the defendant in an action fails to plead his discharge in bankruptcy and permits a judgment to go against him, he cannot afterwards, on the ground of the discharge, have relief in equity against any proceedings founded on the judgment, as, by enjoining the levy of execution thereunder.[621] Nor can he have the judgment set aside, in order to enable him to plead his discharge,[622] though it was formerly held in Alabama, and perhaps is still the law in that state, that where a bankrupt is sued before a justice of the peace and omits then to plead his discharge, it is nevertheless a good defense on an appeal by him to the circuit court.[623] And a discharge in bankruptcy must be pleaded affirmatively in a proceeding by scire facias to revive a judgment, as well as in an original suit.[624] So again, where a suit is pending against several defendants, and one of them obtains his discharge in bankruptcy but does not plead it, and judgment is rendered against them all and the amount is paid by one of the other defendants, the latter is entitled to enforce contribution from the bankrupt.[625] And it should be noted that the court of bankruptcy cannot and will not do anything to relieve a defendant who, failing to plead his discharge in a suit in another court on a dischargeable debt, suffers a judgment.[626] Furthermore, laches in making an application for leave to plead a discharge in bankruptcy is a sufficient ground for denying such application.[627] So, where the defendant in a suit filed an answer which made no reference to the fact that he had been discharged in bankruptcy, and first brought that fact

Walters, 35 Misc. Rep. 648, 72 N. Y. Supp. 203; Bailey v. Kraus, 39 Misc. Rep. 845, 81 N. Y. Supp. 492; Collins v. Hammock, 59 Ala. 448; Brown v. J. & E. Stevens Co., 52 Conn. 110; Smith v. Cook, 71 Ga. 705; Horner v. Spelman, 78 Ill. 206; Jenks v. Opp, 43 Ind. 108; Palmer v. Moore, 3 La. Ann. 208; Ludeling v. Felton, 29 La. Ann. 710; Jones v. Coker, 53 Miss. 195; Bank of Missouri v. Franciscus, 15 Mo. 303; Cronell v. Dakin, 38 N. Y. 253; Gardner v. Hengehold, 6 Ohio Dec. 997; Park v. Casey, 35 Tex. 536; Bellamy v. Woodson, 4 Ga. 175, 48 Am. Dec. 221; Finney v. Mayer, 61 Ga. 500; Gallaher v. Michel, 26 La. Ann. 41; Hollister v. Abbot, 31 N. H. 442, 64 Am. Dec. 342; Steward v. Green, 11 Paige (N. Y.) 535; Paschall v. Bullock, 80 N. C. 329; Bell v. Cunningham, 81 N. C. 83; Herschman v. Bolster, 220 Mass. 137, 107 N. E. 543; Drake v. Hodgson, 192 App. Div. 676, 183 N. Y. Supp. 486; Bryan v. Orient Lumber & Coal Co., 55 Okl. 370, 156 Pac. 897; People's Trust Co. v. Ehrhart, 56 Pa. Super. Ct. 101; First Nat. Bank v. Cootes, 74 W. Va. 112, 81 S. E. 844.

621 Goodrich v. Hunton, 2 Woods. 135, Fed. Cas. No. 5,544; Stone v. Schneider-Davis Co., 51 Tex. Civ. App. 517, 112 S. W. 133; Marsh v. Mandeville, 28 Miss. 122; Rahm v. Minis, 40 Cal. 421; White v. Powell, 38 Tex. Civ. App. 38, 84 S. W. 836. But see Bunting Stone Hardware Co. v. Alexander (Tex. Civ. App.) 190 S. W. 1152.

622 Mack Mfg. Co. v. Van Duerson, 138 Fed. 953.

623 McCrary v. Mabe, 7 Ala. 356.

624 In re Wesson, 88 Fed. 855; Spring Run Coal Co. v. Tozier, 102 Pa. St. 342; Stewart v. Colwell, 24 Pa. St. 67; Duncan v. Hargrove, 22 Ala. 150.

625 Brown v. J. & E. Stevens Co., 52 Conn. 110.

626 In re Ferguson, 2 Hughes, 286, 16 N. B. R. 530, Fed. Cas. No. 4,738

627 Medbury v. Swan, 46 N. Y. 200, 8 N. B. R. 537.

to the attention of the court by a motion in arrest of judgment, three weeks after a verdict had been returned against him, and did not attempt to plead his discharge in bar until nearly seven months after the verdict, it was held that he had waived his right to do so.[626] But of course the case is otherwise where the bankrupt has had no opportunity to plead his discharge before judgment goes against him. Here he does not lose its protection by the rendition of a judgment on a dischargeable debt.[629] So, in a case where the failure to plead the discharge was due to the fact that the attorney representing the defendant in that litigation was unaware of it, it was held that leave might be granted to vacate the judgment given against him and for him to plead the discharge, but only on terms including the payment of costs and disbursements.[630]

§ 714. Same; Who may Plead Discharge.—It is often said that a plea of discharge in bankruptcy is strictly personal to the debtor, that he may waive the benefit of his discharge by failing to plead it, and that if he chooses to do so, no one can plead the discharge for him.[631] And the cases are no doubt correct in holding that the plea cannot be set up by a co-defendant in the action,[632] nor by one who is in possession of property of the debtor, transferred with an intent to defraud creditors, in an action to set aside such transfer.[633] But on the other hand the plea of a discharge in bankruptcy can certainly be made by the personal representatives of the debtor, and indeed it is held that his administrator cannot waive the benefit of the discharge by failing to plead it.[634] So it may be pleaded by the heirs of the bankrupt, or by his widow in an action to recover land formerly belonging to the bankrupt and transferred to her through the agency of a third person.[635] And the plea is also permissible when interposed by a surety of the bankrupt, in respect to the transaction out of which the surety's liability is supposed to grow.[636] And again, where the question respects the discharge as affecting a lien on property, the plea can be urged by

[626] Lane v. Holcomb, 182 Mass. 360, 65 N. E. 794.

[629] Ewing v. Peck, 17 Ala. 339; Brown v. Branch Bank of Montgomery, 20 Ala. 420; Milhous v. Aicardi, 51 Ala. 594.

[630] De Marco v. Mass, 31 Misc. Rep. 827, 64 N. Y. Supp. 768.

[631] Bush v. Stanley, 122 Ill. 406, 13 N. E. 249; Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417; First International Bank v. Lee (N. D.) 141 N. W. 716; Alabama Great Southern Ry. Co. v. Crawley, 118 Miss. 272, 79 South. 94.

[632] George Bohon Co. v. Moren & Sipple, 151 Ky. 811, 152 S. W. 944.

[633] Dewey v. Moyer, 9 Hun (N. Y.) 473, 16 N. B. R. 1.

[634] Parker v. Grant, 91 N. C. 338; Wheatman v. Andrews, 85 N. J. 107, 89 Atl. 285.

[635] Upshur v. Briscoe, 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931.

[636] McDonald v. State, 77 Ind. 26; Boule v, Pucket, 7 Humph. (Tenn.) 169.

any one claiming an interest in the property adverse to the lien asserted.[637] Finally, where the object of the plea is not to show the bankrupt's immunity from liability for his past debts, but to show (as a fact relevant to the issue on trial) that the claim of a particular creditor was released or extinguished by the discharge, it may be alleged as matter of fact by any party who finds it a necessary part of his claim or defense.[638]

§ 715. Same; Form and Effect of Plea.—The mode of pleading a discharge in bankruptcy is to be determined by the mode of pleading in the state courts.[639] And it must be remembered that a state court has the right to proceed with any case pending before it until the discharge is brought to its notice by a proper and sufficient plea.[640] As to the general sufficiency of a plea of this kind, there has been much conflict of opinion as to whether it is necessary to show the jurisdiction of the bankruptcy court. Numerous decisions have maintained that the plea is not sufficient unless it sets forth the facts on which jurisdiction both of the subject-matter and of the person depend.[641] But other cases have ruled that this is not necessary, in view of the fact that an order of discharge in bankruptcy is a judgment of a court of general jurisdiction, the federal district courts, sitting in bankruptcy, not being courts of limited or local jurisdiction in such sense that their judgments must show the facts essential to jurisdiction.[642] And where the state law provides that a judgment may be pleaded by stating that it was duly given or made, a plea alleging that the defendant was "duly adjudged" a bankrupt in a designated federal court sufficiently alleges the jurisdiction of that court.[643] Generally speaking, however, it is necessary

[637] Fleitas v. Mellen, 39 Fed. 129.

[638] Fleitas v. Richardson, 147 U. S. 550, 13 Sup. Ct. 495, 37 L. Ed. 276.

[639] Landly & Co. v. Cummings, 5 Ky. Law Rep. 511. And see Wheeler v. Newton, 168 App. Div. 782, 154 N. Y. Supp. 431. A discharge in bankruptcy is provable in an action for conversion of stocks and bonds under a plea of not guilty. Pitcairn v. Scully, 252 Pa. 82, 97 Atl. 120.

[640] Bennett v. Lewis, 66 S. W. 523, 23 Ky. Law Rep. 2037. Whether a judgment against one who is thereafter adjudged a bankrupt is thereby discharged is a question properly raised by pleading the discharge in a proceeding to enforce the judgment, and not by a petition in the bankruptcy court to enjoin the judgment creditor from enforcing it. Hellman v. Goldstone, 161 Fed. 913, 20 Am. Bankr. Rep. 539.

[641] Bailey v. Kraus, 39 Misc. Rep. 845, 81 N. Y. Supp. 492; Ruckman v. Cowell, 1 N. Y. 505; Sackett v. Andross, 5 Hill (N. Y.) 327; Stephens v. Ely, 6 Hill (N. Y.) 607; Stow v. Parks, 1 Chand. (Wis.) 60; Wiggins v. Shapleigh, 20 N. H. 444; Morse v. Presby, 25 N. H. 299; Landly & Co. v. Cummings, 5 Ky. Law Rep. 511.

[642] Rowan v. Holcomb, 16 Ohio, 463; Mount v. Manhattan Co., 41 N. J. Eq. 211, 3 Atl. 726; Bryant v. Kinyon, 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801; Hays v. Ford, 55 Ind. 52; Cromwell v. Burr, 59 How. Prac. (N. Y.) 93.

[643] Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93.

for the plea to name the court in which the discharge was granted,[644] and it is proper and prudent, even if not strictly necessary, to aver the filing of the petition in bankruptcy, that being the fundamental jurisdictional fact,[645] and to state the date of the filing of such petition, if it has any bearing on the availability of the discharge as a defense to the claim in suit.[646] And on the same principle, the careful pleader will not omit to allege the residence or domicile of the bankrupt within the territorial jurisdiction of the bankruptcy court for the requisite length of time.[647] But a defect in a plea of bankruptcy, in failing to set forth such facts as will show the jurisdiction of the court, may be waived by pleading over.[648] But assuming the jurisdiction of the court to have been shown, and that the plea distinctly alleges that the defendant has been discharged by the judgment of the proper court, and has received his certificate of discharge, which allegations are necessary,[649] it is not necessary to allege all the different proceedings had to entitle him to his discharge,[650] as, for instance, that the requisite notices had been given to the creditors and others interested before the discharge was granted,[651] but the plea will be good if it sets out the order of discharge after a "taliter processum est" or other equivalent form of allegation.[652] For the court, at least in passing on a demurrer to a plea or answer setting up a discharge in bankruptcy, will assume that every step in the bankruptcy proceedings prior to and at the time of the discharge was in all respects regular and complied with every requirement of the statute.[653]

Next, it is necessary for the plea of a discharge in bankruptcy to show that the claim or debt in suit, and to which it is interposed as a defense, was a provable debt in the bankruptcy proceedings, and this should be done by alleging that it was listed in the bankrupt's schedules,

[644] Morrison v. Woolson, 29 N. H. 510; Bailey v. Kraus, 39 Misc. Rep. 845, 81 N. Y. Supp. 492. Compare Preston v. Simmons, 1 Rich. L. (S. C.) 262.

[645] Cutter v. Folsom, 17 N. H. 139; Wiggins v. Shapleigh, 20 N. H. 444; Price v. Bray, 21 N. J. Law, 13; McCormick v. Pickering, 4 N. Y. 276.

[646] House v. Johnson, 19 Colo. App. 524, 76 Pac. 743; Stephenson v. Bird, 168 Ala. 363, 53 South. 93, Ann. Cas. 1912B, 249.

[647] Cutter v. Folsom, 17 N. H. 139; Wiggins v. Shapleigh, 20 N. H. 444; McCormick v. Pickering, 4 N. Y. 276; Price v. Bray, 21 N. J. Law, 13.

[648] Price v. Bray, 21 N. J. Law, 13.

[649] Hayes v. Flowers, 25 Miss. 169; City of Newark v. Stout, 52 N. J. Law, 35, 18 Atl. 943. Compare Weld v. Locke, 18 N. H. 141.

[650] White v. How, 3 McLean, 291, Fed. Cas. No. 17,549; Lathrop v. Stuart, 5 McLean, 167, Fed. Cas. No. 8,113; Johnson v. Ball, 15 N. H. 407; Wiggins v. Shapleigh, 20 N. H. 444; McCormick v. Pickering, 4 N. Y. 276; Preston v. Simons, 1 Rich. L. (S. C.) 262; Downer v. Chamberlin, 21 Vt. 414.

[651] Weld v. Locke, 8 N. H. 141; Wiggins v. Shapleigh, 20 N. H. 444; State v. Gaston, 52 N. J. Law, 321, 19 Atl. 608; McCormick v. Pickering, 4 N. Y. 276.

[652] Price v. Bray, 21 N. J. Law, 13.

[653] Jarecki Mfg. Co. v. McElwaine, 107 Fed. 249, 5 Am. Bankr. Rep. 751.

or, if not so listed, that the creditor had notice or knowledge of the bankruptcy proceedings in time to prove his claim and have it allowed.[654] And the plea should show that the demand in suit was not contracted after the defendant was adjudicated a bankrupt.[655] But it is not necessary for the defendant to allege or show that the debt in question is not one of those excepted from the operation of the bankruptcy act. If the plaintiff contends that the debt was of a fiduciary character, contracted in fraud, for willful injury to the person, etc., it is for him to allege this fact in reply, but not for the defendant to negative it in advance.[656]

A plea of the defendant's bankruptcy should conclude with a verification,[657] and a certificate of the discharge should be filed with the plea,[658] but the court cannot dismiss the action merely on the filing of such a plea, but must submit the issue to the jury.[659] And a debtor will be estopped from pleading in bar, in a suit in a state court, a discharge in bankruptcy obtained pendente lite, where he fraudulently concealed from his creditor the pendency of the proceedings in bankruptcy until after the discharge was granted, and the creditor had no actual notice of the pendency of such proceedings.[660] A defective plea of discharge in bankruptcy is amendable on terms.[661]

In an action at law, if the suit was begun before the discharge in bankruptcy and is pending, the proper method of setting up the discharge in bar is by a plea "puis darrein continuance," or by such form of answer as is equivalent thereto under the modern forms of pleading.[662] If the proceeding is in equity, the discharge, granted since the

[654] Currier v. King, 81 Vt. 285, 69 Atl. 873; Balk v. Harris, 130 N. C. 381, 41 S. E. 940; Johnson v. Waxelbaum Co., 1 Ga. App. 511, 58 S. E. 56; Bennett v. Lewis, 66 S. W. 523, 23 Ky. Law Rep. 2037; Biela v. Urbanczyk, 38 Tex. Civ. App. 213, 85 S. W. 451; Reinhardt v. Friederich, 58 Ind. App. 421, 108 N. E. 258. But compare B. F. Roden Grocery Co. v. Leslie, 169 Ala. 579, 53 South. 815; Morrison v. Woolson, 23 N. H. 11; Harrington v. McNaughton, 20 Vt. 293.

[655] Fowler v. Michael (Tex. Civ. App.) 81 S. W. 321.

[656] Rowan v. Holcomb, 16 Ohio, 463; State v. Beck, 175 Ind. 312, 93 N. E. 664; McNeil v. Knott, 11 Ga. 142; Donald v. Kell, 111 Ind. 1, 11 N. E. 782; Wiggins v. Shapleigh, 20 N. H. 444; McCabe v. Cooney, 2 Sandf. Ch. (N. Y.) 314; Stow v. Parks, 1 Chand. (Wis.) 60. Contra, see Jordan v. Gatewood, Smith (Ind.) 82; Bivens v. Newcomb, 2 Ind. 98; Frost v. Tibbetts, 30 Me. 188; Hayes v. Flowers, 25 Miss. 169; Sackett v. Andross, 5 Hill (N. Y.) 327; Maples v. Burnside, 1 Denio (N. Y.) 332.

[657] Kirby v. Garrison, 21 N. J. Law, 179; Stoll v. Wilson, 38 N. J. Law, 198; Patrick v. Brown, 7 Phila. (Pa.) 133; Mayer v. Gimbel, 9 Phila. (Pa.) 90; Downer v. Chamberlin, 21 Vt. 414.

[658] Stoll v. Wilson, 38 N. J. Law, 198.

[659] Austin v. Markham, 44 Ga. 161, 10 N. B. R. 548; Cooper v. Cooper, 9 N. J. Eq. 566.

[660] Batchelder v. Low, 43 Vt. 662, 5 Am. Rep. 311, 8 N. B. R. 571.

[661] McNeil v. Knott, 11 Ga. 142; Stoll v. Wilson, 38 N. J. Law, 198; Bailey v. Kraus, 39 Misc. Rep. 845, 81 N. Y. Supp. 494.

[662] Reeves v. McCracken, 69 N. J. Eq. 203, 60 Atl. 332; Platt v. Cole, 5 Fed. 260; Penn v. Edwards, 50 Ala. 63; Keene v. Mould, 16 Ohio, 12; Humble v.

commencement of the suit, may be set up by a supplemental answer,[663] or, according to some of the authorities, by a cross-bill.[664] But where a defendant, before judgment against him, has suggested his bankruptcy, and filed a written motion for a continuance, he may, on subsequently obtaining a review, plead his discharge in bankruptcy in bar of the action.[665] In a proper case, the court may impose terms on granting an application for leave to plead a discharge in bankruptcy obtained pending the suit, as, a waiver of any costs up to the time of setting up the defense.[666]

If the defendant in an action pleads his discharge in bankruptcy, and the plaintiff means to contend that the discharge does not release his claim, because it belongs to one of the classes of debts expressly excepted by the statute, he should set up this matter by a replication.[667] And the same course is proper where he means to avoid the effect of the discharge by showing a new promise on the part of the defendant to pay the debt in suit.[668] But where, in a suit on a note, the answer sets up a discharge in bankruptcy before suit, it does not justify a reply that the money for which it was given was obtained on false pretenses.[669]

§ 716. Evidence as to Discharge.—Where one who has received a discharge in bankruptcy is sued on a debt existing at the time of the filing of the petition, the introduction of the order of discharge makes out a prima facie defense, and casts the burden on the plaintiff to show that, because of the nature of the claim, the failure to give notice, or some other statutory reason, the debt sued on was by law excepted from the operation of the discharge.[670] It is therefore an established general rule that, when a discharge in bankruptcy is pleaded in defense to an action, and the plaintiff contends that the discharge is not operative as to his debt, or that, for any reason, he is not bound by it, the burden is on him to establish this fact.[671] Thus, it is not incumbent on

Carson, 6 N. B. R. 84. See Boshes v. Kamin, 209 Ill. App. 508.

663 Kahn v. Casper, 51 App. Div. 540, 64 N. Y. Supp. 838; Holyoke v. Adams, 1 Hun (N. Y.) 223, 10 N. B. R. 270.

664 Banque Franco-Egyptienne v. Brown, 24 Fed. 106.

665 Todd v. Barton, 117 Mass. 291, 13 N. B. R. 197.

666 Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417.

667 Kellogg v. Kimball, 138 Mass. 441; Cooper Grocery Co. v. Blume (Tex. Civ. App.) 156 S. W. 1157; Cogburn v. Spence, 15 Ala. 549. 50 Am. Dec. 140; Stewart v. Hargrove, 23 Ala. 429; Brereton v. Hull, 1 Denio (N. Y.) 75. Compare Shelton v. Pease, 10 Mo. 473.

668 Young v. Denslinger, 2 Ill. App. 22.

669 Strauch v. Flynn, 108 Minn. 313, 122 N. W. 320.

670 Schweigert-Ewald Lumber Co. v. Bauman, 42 N. D. 221, 172 N. W. 808; Morency v. Landry, 79 N. H. 305, 108 Atl. 855, 9 A. L. R. 123; Brooks v. Pitts, 24 Ga. App. 386, 100 S. E. 776.

671 Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93; Manheim v. Loewe, 185 App. Div. 601, 173 N. Y. Supp. 260. Compare Hyde

the bankrupt, in the first instance, to show that the claim sued on was provable in the bankruptcy proceedings, where it appears on its face to be so provable.[672] But the bankrupt pleading his discharge,—and more especially when he relies on it as a basis for affirmative relief, such as the cancellation of a judgment against him,—must assume the burden of showing either that the debt was duly listed in his schedule, or else that the creditor had notice or actual knowledge of the bankruptcy proceedings in time to have filed his claim and procured its allowance.[673] And included in this is the necessity of identifying the claim now in suit with the one listed in the schedule.[674] If the debt was actually scheduled and is identified, then it is not incumbent on the bankrupt to show that the creditor had notice or knowledge of the proceedings in bankruptcy, for the law raises a presumption of such notice or knowledge.[675] But on the other hand, while a debt or claim omitted from the schedule may still be barred by the discharge, yet the burden in this case is on the bankrupt to show that the creditor had such timely notice or actual knowledge of the bankruptcy proceedings as is necessary under the statute to bring about this result.[676] But again, the presumption is that all scheduled debts are released by the discharge, and hence if a creditor, suing after the discharge, contends that his particular claim is not affected, because within one of the classes specially excepted by the statute, as having been created by fraud, embezzlement, defalcation of a trustee, etc., then he must assume the burden of proving this contention.[677]

Park Flint Bottle Co. v. Miller, 179 App. Div. 73, 166 N. Y. Supp. 110.

[672] Bailey v. Gleason, 76 Vt. 115, 56 Atl. 537. But see Baker v. Hughes, 5 Ga. App. 586, 63 S. E. 587.

[673] Weidenfeld v. Tillinghast, 54 Misc. Rep. 90, 104 N. Y. Supp. 712; Graber v. Gault, 103 App. Div. 511, 93 N. Y. Supp. 76; Bailey v. Gleason, 76 Vt. 115, 56 Atl. 537; Fields v. Rust, 36 Tex. Civ. App. 350, 82 S. W. 331; Bogart v. Cowboy State Bank & Trust Co. (Tex. Civ. App.) 182 S. W. 678; Bunting Stone Hardware Co. v. Alexander (Tex. Civ. App.) 190 S. W. 1152. Contra, see Alling v. Straka, 118 Ill. App. 184; Laffoon v. Kerner, 138 N. C. 281, 50 S. E. 654.

[674] Kreitlein v. Ferger (Ind. App.) 97 N. E. 819; B. F. Roden Grocery Co. v. Leslie, 169 Ala. 579, 53 South. 815; Anthony v. Sturdivant, 174 Ala. 521, 56 South. 571. But see King v. Kellogg, 114 Miss. 375, 75 South. 134.

[675] New York Institution for Instruction of Deaf and Dumb v. Crockett, 117 App. Div. 269, 102 N. Y. Supp. 412; Stevens v. King, 16 App. Div. 377, 44 N. Y. Supp. 893; Claflin v. Wolff, 88 N. J. Law, 308, 96 Atl. 73; Merchants' Bank of Brooklyn v. Miller, 176 App. Div. 412, 162 N. Y. Supp. 999.

[676] George F. Sloan & Bro. v. Grollman, 113 Md. 192, 77 Atl. 577; Wineman v. Fisher, 135 Mich. 604, 98 N. W. 404; Smith v. Hill, 232 Mass. 188, 122 N. E. 310, 2 A. L. R. 1667. Where the scheduling of a claim by the bankrupt was faulty, in naming the original creditor after the claim had been assigned, the bankrupt has the burden of showing due diligence to ascertain and state the true owner of the claim. Lansing Liquidation Corp. v. Heinze, 184 App. Div. 129, 171 N. Y. Supp. 738. Though the name of a creditor was inadvertently omitted from the schedule as filed, yet if he was afterwards added by an amendment duly allowed and was served with proper notice, the discharge will be conclusive upon him. Almond v. Coalson, 23 Ga. App. 797, 99 S. E. 707.

[677] Bailey v. Gleason, 76 Vt. 115, 56

As to the admissibility of evidence and the character of the evidence required, it is not necessary for a bankrupt pleading his discharge to prove each step in the bankruptcy proceedings. For the statute provides that a certified copy of an order granting a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.[678] Where the claim in suit, and against which the discharge is pleaded, consists of a judgment, and it is contended that the judgment is excepted from the operation of the discharge because rendered in an action for fraud, this question must be determined by an inspection of the record of the action in which the judgment was rendered, and the showing made by such record is conclusive.[679] So also, if it is claimed that the judgment in question was for "willful and malicious injury to the person or property," the fact of its being based on such a cause of action may be shown by record evidence.[680] But where the plaintiff's claim has not been reduced to judgment, its character, as being within or without the excepted classes, is an issue of fact which must be determined upon competent and sufficient evidence and submitted to the jury. This rule applies where the plaintiff contends that the debt in question was created by

Atl. 537; In re Peterson, 137 App. Div. 435, 121 N. Y. Supp. 738; Thompkins v. Williams, 137 App. Div. 521, 122 N. Y. Supp. 152; Culver v. Torrey, 34 Misc. Rep. 793, 69 N. Y. Supp. 919; In re Peterson's Estate, 64 Misc. Rep. 217, 118 N. Y. Supp. 1077; Van Norman v. Young, 228 Ill. 425, 81 N. E. 1060; Gatliff v. Mackey, 104 S. W. 379, 31 Ky. Law Rep. 947; Hallagan v. Dowell (Iowa) 139 N. W. 883; Gregory v. Edgerly, 17 Neb. 374, 22 N. W. 703; Sherwood v. Mitchell, 4 Denio (N. Y.) 435; Kreitlein v. Ferger, 238 U. S. 21, 35 Sup. Ct. 685, 59 L. Ed. 1184, 34 Am. Bankr. Rep. 862; Guindon v. Brusky, 142 Minn. 86, 170 N. W. 918; Brooks v. Pitts, 24 Ga. App. 386, 100 S. E. 776.

[678] Bankruptcy Act 1898, § 21f. And see Nation v. Jones, 3 Ga. App. 83, 59 S. E. 330; United Society of Shakers v. Underwood, 74 Ky. (11 Bush) 265, 21 Am. Rep. 214; Hays v. Ford, 55 Ind. 52, 15 N. B. R. 569; Williams v. First Nat. Bank, 21 Ga. App. 182, 94 S. E. 73; Bank of La Fayette v. Phipps, 24 Ga. App. 613, 101 S. E. 696.

[679] Louisville & N. R. Co. v. Bryant, 149 Ky. 359, 149 S. W. 830; Forsyth v. Vehmeyer, 176 Ill. 359, 52 N. E. 55; Hallgan v. Dowell, 179 Iowa, 172, 161 N. W. 177. A recital in a judgment rendered by a state court that the debt for which it was rendered is a liability arising out of fraud is conclusive, if based on a pleading to that effect, that it is not released or discharged in bankruptcy. Young v. City Nat. Bank (Tex. Civ. App.) 223 S. W. 340. A judgment creditor having the burden of showing that his claim is not barred by a discharge in bankruptcy, the creditor's declaration, from which the nature of the claim appears, should be given the construction most favorable to the bankrupt. In re Grout, 88 Vt. 318, 92 Atl. 646, Ann. Cas. 1917A, 210. Where the creditor's judgment, under the pleadings and the charge, might be based upon a contract or upon fraud or upon both, and there is nothing but the pleadings and the charge from which to determine the facts, the creditor does not sustain the burden of showing that his claim (duly scheduled in the bankruptcy proceedings) is excepted from the operation of the discharge. Guindon v. Brusky, 142 Minn. 86, 170 N. W. 918.

[680] Flanders v. Mullin, 80 Vt. 124, 66 Atl. 789, 12 Ann. Cas. 1010. See Bazemore v. Stephenson, 24 Ga. App. 180, 100 S. E. 234.

the fraud of the bankrupt,[681] or by his false representations or false pretenses,[682] and also in cases where the effect of the discharge will depend upon whether or not the creditor had notice or knowledge of the proceedings in bankruptcy,[683] and where the bankrupt's contention is that a certain person was acting as the creditor's agent, so that his knowledge of the proceedings should be imputed to the creditor himself.[684]

§ 717. **Effect of Refusal of Discharge or Failure to Apply.**—If the bankrupt does not obtain his discharge, none of the proceedings in the bankruptcy case will in any way affect the demands of his creditors against him.[685] And a creditor who has proved his claim and accepted and received a dividend thereon is not estopped from collecting the remainder of his debt in any proper way, if the bankrupt is not discharged, but the dividend will merely reduce his cause of action pro tanto.[686] If the bankrupt fails to apply for a discharge, the order of the court approving the record and closing the case without granting a discharge is equivalent to a judgment by default in favor of the bankrupt's then existing creditors, and is res judicata in any subsequent bankruptcy proceeding, precluding him from obtaining a discharge therein from any debts previously scheduled,[687] and the fact that a claim so scheduled is afterwards reduced to judgment does not create a new debt which could form the basis for a subsequent bankruptcy proceeding and discharge therein.[688] So when the bankrupt's application for a discharge is denied, the right to sue him upon any existing claim revives.[689] And the refusal of a discharge renders the issue of his right to a discharge from any debts provable in that proceeding res judicata, so that he is not entitled to retry it in a second proceeding.[690] But a creditor who desires to rely upon the order refusing a discharge, as res

[681] Culver v. Torrey, 34 Misc. Rep. 793, 69 N. Y. Supp. 919.

[682] Atlanta Skirt Mfg. Co. v. Jacobs, 8 Ga. App. 299, 68 S. E. 1077.

[683] Troy v. Rudnick, 198 Mass. 563, 85 N. E. 177; Bergmann v. Manes, 141 App. Div. 102, 125 N. Y. Supp. 973; Fields v. Rust, 36 Tex. Civ. App. 350, 82 S. W. 331; Armstrong v. Sweeney, 73 Neb. 775, 103 N. W. 436.

[684] Atkinson v. Elmore, 103 Mo. App. 403, 77 S. W. 492.

[685] Whitney v. Crafts, 10 Mass. 23; Chandler v. Windship, 6 Mass. 310; Lummus v. Fairfield, 5 Mass. 248. Where a bankrupt fails to obtain a discharge, creditors whose claims were proved are not affected by subsequent bankruptcy proceedings against him, which afford no ground for a stay of suits by them, nor are such suits barred by his discharge therein. In re Spangler (D. C.) 256 Fed. 62, 43 Am. Bankr. Rep. 63.

[686] Hamlin v. Hamlin, 3 Jones Eq. (56 N. C.) 191; American Woolen Co. v. Maaget, 86 Conn. 234, 85 Atl. 583.

[687] In re Bramlett, 161 Fed. 588, 20 Am. Bankr. Rep. 402; In re Elby, 157 Fed. 935, 19 Am. Bankr. Rep. 734.

[688] In re Schnabel, 166 Fed. 383, 23 Am. Bankr. Rep. 22; In re Kuffler, 155 Fed. 1018, 19 Am. Bankr. Rep. 181.

[689] Storrs v. Plumb, 30 Hun (N. Y.) 319.

[690] In re Kuffler, 155 Fed. 1018, 19 Am. Bankr. Rep. 181; In re Schwartz (D. C.) 248 Fed. 841, 41 Am. Bankr. Rep. 246.

judicata in a second proceeding instituted some years later, must prove it or otherwise call it to the attention of the court of bankruptcy, and if he fails to do so, and a general discharge is granted in the second proceeding, a state court must give effect to it in any proceedings thereafter brought to enforce the creditor's claim.[691]

[691] Youngman v. Salvage, 21 N. D. 317, 130 N. W. 930, Ann. Cas. 1913C, 1181.

CHAPTER XXXIV

DEBTS AFFECTED BY DISCHARGE

§ 718. **Debts and Liabilities Discharged, in General.**—It is the purpose of the bankruptcy law to relieve an honest debtor, who complies with all its requirements, from the entire burden of his debts, as they existed at the time of the filing of the petition in bankruptcy, with the exception of a few carefully specified classes. Hence it is the general rule, apart from the exceptions referred to, that a discharge in bank-

ruptcy releases the debtor and his after-acquired property from all debts and liabilities which were provable in bankruptcy and which existed at the commencement of the proceedings.[1] And it is immaterial that a particular creditor did not prove his claim in the bankruptcy proceedings. If the claim was provable and the creditor had an opportunity to prove it, his omission to do so will not withdraw it from the operation of the discharge.[2] Further, a provable debt is none the less barred by a discharge granted without opposition because the bankrupt had been refused a discharge in a prior proceeding, on the objection of the same creditor, in respect of the same indebtedness, where the ground of the refusal does not appear.[3] And the refusal of a discharge in an insolvency proceeding does not necessarily withdraw a debt proved therein from the operation of a discharge in a later bankruptcy proceeding, though the debt is not proved.[4] But the claim or liability must be a provable debt at the time of the filing of the petition in bankruptcy. Hence if it does not accrue or mature until after that date, it is not affected by the discharge.[5] Further, it must answer the description of a provable debt as defined in the bankruptcy law, and hence a claim may not be affected by the discharge because not a "fixed liability absolutely owing" by the bankrupt,[6] or because it was uncertain or contingent,[7] or

[1] Bankruptcy Act 1898, § 17a; A. Klipstein & Co. v. Allen-Miles Co., 136 Fed. 385, 69 C. C. A. 229, 14 Am. Bankr. Rep. 15; In re American Vacuum Cleaner Co., 192 Fed. 939, 26 Am. Bankr. Rep. 621; Ruhl-Koblegard Co. v. Gillespie, 61 W. Va. 584, 56 S. E. 898, 10 L. R. A. (N. S.) 305, 11 Ann. Cas. 929; Meyer v. Bartels, 56 Misc. Rep. 621, 107 N. Y. Supp. 778; Beyer v. Sadvoransky, 108 Misc. Rep. 463, 177 N. Y. Supp. 705; Nelson v. Petterson, 229 Ill. 240, 82 N. E. 229, 13 L. R. A. (N. S.) 912, 11 Ann. Cas. 178; Alling v. Straka, 118 Ill. App. 184; Drake v. Vernon, 26 S. D. 354, 128 N. W. 317; Thornburgh v. Madren, 33 Iowa. 380; Fleming v. Lullman, 11 Mo. App. 104; Lefler v. Hunt, 8 Blackf. (Ind.) 195; Magoon v. Warfield, 3 G. Greene (Iowa) 293; Talbott v. Suit, 68 Md. 443, 13 Atl. 356; Withers v. Stinson, 79 N. C. 341. But a discharge of a debtor in bankruptcy is only from personal liability for debts and claims against him. Robinson v. Tischler, 69 Fla. 77, 67 South. 565. Under the law of Georgia, nonpayment of rent is the gist of the summary remedy for eviction, and a discharge in bankruptcy of a debt existing on account of overdue rent is not "payment." Carter v. Sutton, 147 Ga. 496, 94 S. E. 760.

[2] In re Kuffler (D. C.) 153 Fed. 667, 18 Am. Bankr. Rep. 587.

[3] Bluthenthal v. Jones, 208 U. S. 64, 28 Sup. Ct. 192, 52 L. Ed. 390, 19 Am. Bankr. Rep. 288.

[4] Dean v. Justices of Municipal Court, 173 Mass. 453, 53 N. E. 893. Debts existing under the Bankruptcy Act of 1867, and kept alive by subsequent judgments, were not excepted from the operation of the Bankruptcy Act of 1898. In re Herrman, 106 Fed. 987, 46 C. C. A. 77.

[5] Van Tuyl v. Schwab, 174 App. Div. 665, 161 N. Y. Supp. 323; Rice v. Murphy, 109 Me. 101, 82 Atl. 842; Wight v. Gottschalk (Tenn. Ch. App.) 48 S. W. 140. But a claim which is a "fixed liability" and "absolutely owing" is provable in bankruptcy, and therefore dischargeable, although not yet payable when offered for proof. Supra, § 502. Thus a claim for unpaid installments under the bankrupts' contract for the purchase of land is discharged by his discharge in bankruptcy. O. L. Schwencke Land & Inv. Co. v. Forster (Sup.) 171 N. Y. Sup. 140.

[6] Phenix Nat. Bank v. Waterbury, 197 N. Y. 161, 90 N. E. 435. And see, supra, § 491.

[7] Leader v. Mattingly, 140 Ala. 444, 37 South. 270. And see, supra, § 499.

because it was a claim for damages not liquidated in time for proof and allowance.[8] And it is only debts or liabilities which are released by the discharge, and hence it does not operate to prevent the prosecution of an appeal.[9] Subject to these conditions, however, and provided only that it constitutes a provable debt, the nature of the creditor's claim is not material, with respect to the operation of the discharge upon it. Thus, for instance, the discharge will release the bankrupt from liability for breach of a covenant of warranty in his deed, the breach occurring before the bankruptcy,[10] and from his liability as the maker of a note,[11] and from all personal liability on a judgment recovered against him.[12] It is the nature of the transaction, and not the form of action, which is looked to in order to determine whether a cause of action is released by a discharge in bankruptcy,[13] and a court will look behind a judgment in order to ascertain whether the claim on which it was founded was of a nature to be provable in bankruptcy and so dischargeable.[14] In effect, it is after the discharge is granted, and not before it, that questions of this kind must be determined. For the court of bankruptcy, in granting the discharge, will not undertake to limit it to any particular debts nor undertake to decide upon what claims it shall operate and what shall be excepted from it.[15]

§ 719. Stockholders' Liabilities.—The liability of one who has subscribed for stock in a corporation, or to whom stock not fully paid has been issued, to make good the unpaid balance of his subscription is a debt provable against him in bankruptcy, and therefore will be released by his discharge, even though the call on which the action is based is not made until after the discharge.[16] But it is otherwise in regard to the liability imposed by some state statutes on the stockholders or directors of insolvent corporations to be answerable for the debts of the company,

[8] Jim Pearce & Co. v. Fisher, 170 Ala. 456, 54 South. 164. See King v. Kellogg, 114 Miss. 375, 75 South. 134. And see, supra, § 500.

[9] Stockwell v. Silloway, 105 Mass. 517.

[10] Sweaney v. Baugher, 166 Ind. 557, 77 N. E. 1083; Mackenzie v. Miller, 7 Ky. Law Rep. 831; Bradford v. Russell, 79 Ind. 64. And see, supra, § 513.

[11] Blackwell v. Farmers' & Merchants' Nat. Bank (Tex. Civ. App.) 76 S. W. 454; Dundee Nat. Bank v. Strowbridge (Sup.) 184 N. Y. Supp. 257.

[12] J. B. Ellis & Co. v. Mobile, J. & K. C. R. Co., 166 Ala. 187, 51 South. 860; Otto Young & Co. v. Howe, 150 Ala. 157, 43 South. 488; Barnes Cycle Co. v. Haines, 69 N. J. Eq. 651, 61 Atl. 515.

[13] Nelson v. Petterson, 131 Ill. App. 443.

[14] In re Kalk (D. C.) 270 Fed. 627, 46 Am. Bankr. Rep. 597; In re Levitan (D. C.) 224 Fed. 241, 34 Am. Bankr. Rep. 789; Halligan v. Dowell, 179 Iowa, 172, 161 N. W. 177; Bever v. Swecker, 138 Iowa, 721, 116 N. W. 704.

[15] Hanan v. Long, 150 App. Div. 327, 134 N. Y. Supp. 786. See In re Westbrook, 186 Fed. 414, 26 Am. Bankr. Rep. 181.

[16] Carey v. Mayer, 79 Fed. 926, 25 C. C. A. 239; Burke v. Maze, 10 Cal. App. 206, 101 Pac. 438, 440. Compare Glenn v. Howard, 65 Md. 40, 3 Atl. 895.

or for debts contracted under certain circumstances or within a particular time. A liability of this kind is statutory and not contractual, and therefore is not released by the discharge of the stockholder or director in bankruptcy,[17] unless, indeed, it has been reduced to judgment before the granting of the discharge, or the extent of the liability of the bankrupt, as a stockholder or director, has been fixed by a decree against the company and its stockholders, in which case it appears that it becomes a provable debt in the bankruptcy proceedings, and therefore will be extinguished by the discharge.[18]

§ 720. Claims of Sureties for Bankrupt.—A person who is responsible for the bankrupt's debt or undertaking, in the character of a surety, guarantor, or indorser, has no provable claim against the bankrupt's estate until he has paid or in some way discharged the obligation on which he is liable, and hence if there is no breach of the obligation and no payment by the surety or indorser before the bankrupt's discharge, he may, notwithstanding the discharge, have recourse against the bankrupt for any sum which he is thereafter compelled to pay.[19] But there is also a provision in the bankruptcy act that whenever a creditor, whose claim against the estate in bankruptcy is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and, if he discharges such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor.[20] Hence it appears that a surety or indorser (not having yet paid the debt) has a provable claim in the bankruptcy in the event that the principal creditor omits to prove the claim, and if his demand or claim thus becomes provable, it will also be released by the discharge granted to the bankrupt.[21]

§ 721. Claims Against Bankrupt as Surety.—Where the liability of a bankrupt as a surety has become fixed, definite, and certain at the commencement of the proceedings in bankruptcy, it constitutes a prova-

[17] Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co., 183 Mass. 557, 67 N. E. 870; First Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563. Contra, Van Tuyl v. Schwab, 174 App. Div. 665, 161 N. Y. Supp. 323; Richards v. Schwab, 101 Misc. Rep. 128, 167 N. Y. Supp. 535.

[18] Dight v. Chapman, 44 Or. 265, 75 Pac. 585, 65 L. R. A. 793. And see Philadelphia & R. Coal & Iron Co. v. Hotchkiss, 82 N. Y. 471.

[19] Goding v. Roscenthal, 180 Mass. 43, 61 N. E. 222. And see, supra, § 506. But if there has been a definitive breach of the contract or obligation, and a demand made on the surety for damages, before the bankruptcy proceedings, he then has a provable claim against the bankrupt, which will be released by the discharge of the bankrupt, although judgment is not recovered against the surety or paid until after the discharge. Williams v. United States Fidelity & Guaranty Co., 236 U. S. 549, 35 Sup. Ct. 289, 59 L. Ed. 713, 34 Am. Bankr. Rep. 181.

[20] Bankruptcy Act 1898, § 57i.

[21] Hayer v. Comstock, 115 Iowa, 187, 88 N. W. 351; Smith v. Wheeler, 55 App. Div. 170, 66 N. Y. Supp. 780.

ble debt against his estate, and therefore will be released by his discharge.[22] Thus, where the surety on an appeal bond becomes bankrupt and receives his discharge, after the rendition of a judgment on such appeal bond, the discharge is a defense to the enforcement of the judgment, and likewise to any debt or claim for the costs incurred by the judgment creditor in obtaining the judgment and defending the appeal.[23]

§ 722. **Claims for Alimony and Support of Wife or Children.**—The amendment to the bankruptcy act, adopted in 1903, expressly excepts from the operation of a discharge in bankruptcy "liabilities for alimony due or to become due, or for maintenance or support of wife or child."[24] But even before this amendment, it was the practically unanimous doctrine of the courts that a claim for alimony to a divorced wife was not a "debt" within the meaning of the bankruptcy law, and, not being provable as a debt, was not released by the bankrupt's discharge.[25] Nor was this based solely on the ground that a decree for alimony was always within the control of the court which rendered it. For it was also held that a discharge in bankruptcy is no bar to a claim based on a contract or agreement of the bankrupt to pay an annuity or fixed periodical sum to his divorced wife during her lifetime or until her remarriage.[26] For similar reasons, the discharge cannot be pleaded as a defense to a claim upon the bankrupt based on his liability to make an allowance or pay a fixed sum for the support of his minor children, whether such liability is imposed upon him by an order or decree of court,[27] as, for in-

[22] In re Sullivan (D. C.) 262 Fed. 574, 45 Am. Bankr. Rep. 131; McPhee v. United States, 64 Colo. 421, 174 Pac. 808; Hardy Buggy Co. v. Paducah Banking Co., 183 Ky. 776, 210 S. W. 452. And see supra, § 505.

[23] Coe v. Waters, 16 Colo. App. 311, 64 Pac. 1054.

[24] Bankruptcy Act 1898, § 17a, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797.

[25] Audubon v. Shufeldt, 181 U. S. 575, 21 Sup. Ct. 735, 45 L. Ed. 1009, 5 Am. Bankr. Rep. 829; In re Vadner (D. C.) 259 Fed. 614; In re Pyatt (D. C.) 257 Fed. 362, 42 Am. Bankr. Rep. 462; Turner v. Turner (D. C.) 108 Fed. 785, 6 Am. Bankr. Rep. 289; In re Anderson (D. C.) 97 Fed. 321, 5 Am. Bankr. Rep. 858; Egbers v. Egbers, 98 Wash. 531, 167 Pac. 1073; Brown v. Brown, 172 Ky. 754, 189 S. W. 921; Lemert v. Lemert, 72 Ohio St. 364, 74 N. E. 194, 106 Am. St. Rep. 621, 2 Ann. Cas. 914; Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; Dunbar v. Dunbar, 180 Mass. 170, 62 N. E. 248, 94 Am. St. Rep. 623; In re Williams, 208 N. Y. 32, 101 N. E. 853. And see supra, § 509.

[26] Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139; Schlessinger v. Schlessinger, 39 Colo. 44, 88 Pac. 970, 8 L. R. A. (N. S.) 863. Where a voluntary bankrupt listed in his schedule of debts a note given to his wife, and the contract between them provided that she should accept the note in satisfaction of such sum for maintenance and support as the court might award her in a divorce proceeding, or in satisfaction of a claim for support of herself and children, the liability evidenced by the note was not dischargeable in bankruptcy. Blackstock v. Blackstock (C. C. A.) 265 Fed. 249, 45 Am. Bankr. Rep. 192.

[27] Wetmore v. Markoe, 196 U. S. 68, 25 Sup. Ct. 172, 49 L. Ed. 390, 2 Ann. Cas. 265, 13 Am. Bankr. Rep. 1; In re Hubbard (D. C.) 98 Fed. 710, 3 Am. Bankr. Rep. 528; Rush v. Flood, 105 Ill. App. 182; In re Baker (D. C.) 96 Fed. 954, 3 Am. Bankr. Rep. 101.

stance, in a divorce suit or in bastardy proceedings, or is based upon his voluntary agreement to contribute to the support of his children remaining in the custody of his divorced wife.[28] But it is said that the obligation of a man to recompense his former wife for expenditures made, after she had remarried, for the benefit of their child, is like his obligation to recompense any other person who had contributed to the support of the child; it is merely a civil debt and is extinguished by the father's discharge in bankruptcy.[29] So the expression in the statute, "liabilities for maintenance or support of wife and child," does not refer to debts for goods purchased by the husband or parent, and used by the wife or child,[30] nor to a debt for medical attendance furnished to the wife or child of the bankrupt at his request, and while the normal family relations subsist between him and the recipient of the services,[31] but both of such kinds of debts will be released by his discharge. And it has been ruled that, where the father of a bastard child has been ordered by the court to pay a monthly stipend for its support, and, on his refusal, a final money judgment has been rendered for the total amount due, the rights of the person entitled to recover under the order of filiation are merged in the judgment, and the judgment, being a provable debt in bankruptcy and not expressly excepted from the operation of the discharge, will be released by it.[32]

§ 723. **Claims of Alien Creditors.**—A discharge in bankruptcy under the act of Congress will constitute a bar to the claim of an alien creditor suing in any court within the United States, in the same manner and to the same extent as though he were a citizen of the United States. For the bankruptcy law has intra-territorial force throughout the United States, and hence if a foreign creditor seeks to employ the process of our courts in a manner or for a purpose not authorized by that law, that is, for the collection of a debt which is released by the bankrupt's discharge, he must be amenable to the lex fori.[33] But the bankruptcy law has no extra-territorial force, and therefore, notwithstanding a discharge granted under it, the foreign creditor would probably be entitled to pursue any appropriate remedies against the bankrupt or his property within the jurisdiction of the courts of his own country.

[28] Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, 10 Am. Bankr. Rep. 139.

[29] Rush v. Flood, 105 Ill. App. 182.

[30] Schellenberg v. Mullaney, 112 App. Div. 384, 98 N. Y. Supp. 432.

[31] In re Ostrander, 139 Fed. 592, 15 Am. Bankr. Rep. 96.

[32] McKittrick v. Cahoon, 89 Minn. 383, 95 N. W. 223, 62 L. R. A. 757, 99 Am. St. Rep. 606.

[33] Morency v. Landry, 79 N. H. 305, 108 Atl. 855, 9 A. L. R. 123; Ruiz v. Eickerman, 2 McCrary, 259, 5 Fed. 790; Pattison v. Wilbur, 10 R. I. 448, 12 N. B. R. 193; In re Zarega, 4 Law Rep. 480, Fed. Cas. No. 18,204; Murray v. De Rottenham, 6 Johns. Ch. (N. Y.) 52. Compare Moore v. Horton, 32 Hun (N. Y.) 393

Particularly in regard to contracts, it may be said that: "According to the general doctrines of international law, the discharge of a contract by the law of the place where it is made is a discharge everywhere. Therefore, if a contract is made and to be performed in a foreign country, and a regular discharge in bankruptcy has been obtained by the debtor resident there, the discharge will constitute a valid defense to the contract, wherever the creditor may be domiciled, or wherever the contract may be put in suit. But in respect to contracts not made or to be performed within the country granting the discharge, it could of course have no extra-territorial validity, as against non-resident creditors, unless they came in and took part in the proceedings." [34]

§ 724. **Liabilities to State or United States.**—Although the question of the effect of a discharge in bankruptcy upon debts or liabilities of the bankrupt to a state has not often arisen in recent years, yet the authorities, so far as they go, are unanimous in holding that no financial claims of a state can be thus extinguished or released.[35] Also it was strongly held under the bankruptcy act of 1867 that a debt due to the United States is not barred by the bankrupt's discharge, although the government may prove its debt and have priority of payment over other creditors, and although the language of the clause relating to the effect of a discharge is general. This was held on the settled rule of construction that "the sovereign authority of the country is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights, or interests of the sovereign." [36] But it may be gravely doubted whether the United States is not so far named in the present bankruptcy act, and meant to be included therein, as that its claims shall be released by the discharge, except in the one instance specified. The language of the act is explicit. "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as are due as a tax levied by the United States," etc.[37] It seems an abso-

[34] 2 Black, Judgm. § 824.

[35] State v. Shelton, 47 Conn. 400; Commonwealth v. Hutchinson, 10 Pa. St. 466; Saunders v. Commonwealth, 10 Grat. (Va.) 494; Commonwealth v. Millen, 1 Ky. Law Rep. 270. An obligation on a forfeited bail bond is not provable in bankruptcy and not released by the bankrupt's discharge. In re Weber, 212 N. Y. 290, 106 N. E. 58.

[36] United States v. Herron, 20 Wall. 251, 22 L. Ed. 275; United States v. Rob Roy, 1 Woods, 42, 13 N. B. R. 235, Fed. Cas. No. 16,179; United States v. King, Wall. Sr. 13, Fed. Cas. No. 15,536; Hamilton v. Reynolds, 88 Ind. 191; Smith v. Hodson, 50 Wis. 279, 6 N. W. 812. Contra, see United States v. Davis, 3 McLean, 483, Fed. Cas. No. 14,929; United States v. Throckmorton, 8 N. B. R. 309, Fed. Cas. No. 16,516; United States v. Zerega, Fed. Cas. No. 16,786.

[37] Bankruptcy Act 1898, § 17a. And see United States v. Illinois Surety Co., 226 Fed. 653, 141 C. C. A. 409, 38 Am. Bankr. Rep. 880, holding that a claim against the bankrupt on his bond as a government contractor, if "absolutely owing" at the time of the bankruptcy, is a provable debt and therefore one which will be released by his discharge.

lutely necessary inference from this provision that if the United States holds any provable claim against a bankrupt, which is not for a tax, it will be released by his discharge, that is, of course, as to any balance which may remain unpaid after the government has been accorded its privilege of priority of payment. And in this connection, and as bearing significantly on the argument here advanced, it may be noted that the Supreme Court of the United States has decided that the general government's right of priority is no longer superior to the priority rights of all other classes of privileged creditors, but must be claimed and exercised in subordination to (at least) the claims for wages of labor.[38]

§ 725. Claims for Taxes.—It is expressly provided that a discharge in bankruptcy shall not release the bankrupt from any taxes levied by the state, county, district, or municipality "in which he resides."[39] But it frequently happens that a bankrupt will own lands or personalty, on which there are taxes due and unpaid, in another state or in another county or municipality, that is, in a state, county, or municipality in which he does not reside. On the face of the statute, it would seem that such taxes must be proved as debts and share in dividends, and that they would be barred by a discharge, wholly if not proved, and as to any excess over dividends if proved. By another provision of the statute,[40] priority of payment is given to "taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality." Grammatically interpreted this means the United States, "the" state, "the" county, etc. And reading these two parts of the act together, as in pari materia, it appears that "the" state is "the state in which the bankrupt resides," and so as to the county or municipal corporation. But it is probable that the courts, in order to avoid a result which is so anomalous, and which Congress could scarcely be presumed to have intended, would so construe the statute as to give priority of payment to, and except from the operation of a discharge, taxes due to "any" state, county, etc. The bankruptcy act of 1867 gave priority to "all debts due to the state in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof." But it also provided that "nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any state."

As to assessments for local improvements, even if these are not to be considered taxes in such sense as to be saved from the operation of a bankrupt's discharge, yet they commonly attach as liens on the property affected, and such liens are not disturbed by the proceedings in bank-

[38] Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706, 27 Am. Bankr. Rep. 873.

[39] Bankruptcy Act 1898, § 17a.

[40] Bankruptcy Act 1898, § 64.

ruptcy. But a judgment for costs in a criminal prosecution is not a debt "due as taxes" levied by the state, and consequently it is released by the discharge of the judgment debtor in bankruptcy.[41]

§ 726. Debts and Claims Not Provable.—The statute declares that a discharge in bankruptcy shall release the debtor from "all of his provable debts" with certain exceptions. Hence a discharge in bankruptcy is not a good defense except as to debts which were or might have been proved in the bankruptcy proceedings; and if a claim was not provable, it is not discharged, whether properly scheduled or not.[42] Now the nonprovable character of a debt may arise either out of the time of its accrual or out of its nature. As to the former condition, only such debts are provable (with certain minor exceptions) as existed at the date of the filing of the petition in bankruptcy. And therefore if a particular debt did not mature, or a particular liability did not attach, until after the filing of the petition, it is not provable and not dischargeable though it grows out of a contract or obligation antedating the petition in bankruptcy and which continues in effect.[43] Thus, for example, where the bankrupt is surety on a bond, and no breach of the condition of the bond has occurred until after his adjudication and discharge in bankruptcy, his liability on a subsequent breach is not affected by the discharge.[44] So where he has given a deed with covenants of warranty, his liability on a breach occurring before the commencement of the bankruptcy proceedings will constitute a provable debt, and so be released by the discharge.[45] But the mere probability, existing at the time of the bankruptcy, that a breach may occur does not make a provable debt,[46] and a breach actually occurring after the filing of the petition in bankruptcy creates a liability which is not affected by the discharge.[47] On the same principle, a promissory note given by a debtor after he has been adjudged a bankrupt, though before he is discharged, and though given for a debt which existed before the filing of the petition, is not released by his discharge.[48]

41 Olds v. Forrester, 126 Iowa, 456, 102 N. W. 419.

42 Smith v. McQuillin, 193 Mass. 289, 79 N. E. 401; National Mt. Wollaston Bank v. Porter, 122 Mass. 308; Pierce v. Wilcox, 40 Ind. 70; Drake v. Hodgson, 192 App. Div. 676, 183 N. Y. Supp. 486.

43 Colman Co. v. Withoft, 195 Fed. 250, 28 Am. Bankr. Rep. 328; In re Burka, 104 Fed. 326, 5 Am. Bankr. Rep. 12; Holbrook v. Foss, 27 Me. 441; Robinson v. Pesant, 53 N. Y. 419, 8 N. B. R. 426; Cohen v. Pecharsky, 67 Misc. Rep. 72, 121 N. Y. Supp. 602; Stern v. Nussbaum, 47 How. Prac. (N. Y.) 489; Jersey City Ins. Co. v. Archer, 7 N. Y. St. Rep. 326.

44 Paddleford v. State, 57 Miss. 118; Eastman v. Hibbard, 54 N. H. 504, 13 N. B. R. 360, 20 Am. Rep. 157.

45 Merrill v. Schwartz, 68 Me. 514; Dow v. Davis, 73 Me. 288.

46 Baker v. Hooks, 6 Ga. App. 121, 64 S. E. 573.

47 Bush v. Cooper, 18 How. 82, 15 L. Ed. 273; Abercrombie v. Conner, 10 Ala. 293; French v. Morse, 2 Gray (Mass.) 111; Murray v. De Rottenham, 6 Johns. Ch. (N. Y.) 52. Compare Bates v. West, 19 Ill. 134.

48 Jersey City Ins. Co. v. Archer, 122 N. Y. 376, 25 N. E. 338; Donnell v. Swain, 2 Clark (Pa.) 134.

As to the case where the nature or origin of a debt or claim is such that it is not a provable debt in bankruptcy, this subject has already been discussed in detail.[49] But some further considerations may be here added, as specially pertinent to the question of the effect of a discharge. And in the first place, nothing can be provable in bankruptcy unless it is in the nature of a debt. Hence a discharge in bankruptcy does not release a grantor or mortgagor from the estoppel created by the covenants in his conveyance,[50] nor will it release a defendant in replevin, who has given a forthcoming bond, from a judgment requiring him to restore the property.[51] And an action on the case for deceit is not barred by a discharge in bankruptcy, although the measure of damages is ascertainable by reference to a contract.[52] So a discharge in bankruptcy is no defense to an action for unliquidated damages arising solely from a tort.[53] Again, the debtor cannot plead his discharge in defense to a claim which, at the time of the bankruptcy, was too uncertain or contingent to constitute a provable debt,[54] such as a claim for subsequently accruing rent under a lease held by the bankrupt as tenant, and which is not terminated by the adjudication in bankruptcy.[55] Neither will a discharge in bankruptcy release the bankrupt from payment of a fine imposed upon him by a court as part of the punishment for an offense of which he has been convicted,[56] or imposed as punishment for violation of an injunction or other contempt of court.[57] But where the claim of a creditor was inherently of such a nature as to be provable in the bankruptcy proceedings, the mere fact that it was subject to objection on the ground of the statute of limitations having run against it, and that it was disallowed on that ground, does not take it out of the class of provable claims so as to prevent the pleading of the discharge in bar of any subsequent proceeding to collect it.[58]

[49] Supra, §§ 487–523.

[50] Kezer v. Clifford, 59 N. H. 208.

[51] Robinson v. Soule, 56 Miss. 549. A discharge in bankruptcy is not a defense to an action of trover, brought by a seller against the bankrupt to recover personalty sold to the bankrupt under a contract retaining title until payment, where the bankrupt kept possession after the discharge, even though the seller may at the trial exercise his statutory privilege to take a money verdict. Smith v. Turner, 141 Ga. 313, 80 S. E. 993.

[52] Hughes v. Oliver, 8 Pa. St. 426.

[53] Hun v. Cary, 59 How. Prac. (N. Y.) 426, affirmed 82 N. Y. 65, 37 Am. Rep. 546.

[54] Clemmons v. Brinn, 36 Misc. Rep. 157, 72 N. Y. Supp. 1066; Lesser v. Gray, 8 Ga. App. 605, 70 S. E. 104; Johnson v. Worden, 47 Vt. 457. 13 N. B. R. 335.

[55] Bernhardt v. Curtis, 109 La. 171, 33 South. 125, 94 Am. St. Rep. 445; Scott v. Demarest, 75 Misc. Rep. 289, 135 N. Y. Supp. 264; Shapiro v. Thompson, 160 Ala. 363, 49 South. 391; Hamilton v. McCroskey, 112 Ga. 651, 37 S. E. 859.

[56] Ex parte O'Donnell, 1 Nat. Bankr. News, 59.

[57] Spalding v. New York, 4 How. 21, 11 L. Ed. 858; People v. Spalding, 10 Paige (N. Y.) 284. But a judgment for costs in a criminal prosecution is not a fine imposed as a punishment for an offense, and its discharge in bankruptcy is not contrary to public policy, as an interference with the course of justice in the criminal prosecution. Olds v. Forrester, 126 Iowa, 456, 102 N. W. 419.

[58] Hargadine-McKittrick Dry Goods Co. v. Hudson, 122 Fed. 232, 58 C. C. A. 596, 10 Am. Bankr. Rep. 225.

§ 727. **Debts Not Duly Scheduled.**—Under the bankruptcy act of 1867, it was held that a creditor holding a provable claim (not within the excepted classes) was barred by the bankrupt's discharge, although his name was omitted from the bankrupt's schedule or incorrectly given, in consequence of which he never had any actual notice of the bankruptcy proceedings, provided only that the omission or incorrect statement was not fraudulent and intentional.[59] But the severity of this rule has been much modified by the present statute. It is still true that the bankrupt will be released from a debt which was duly listed in his schedule, with the creditor's name and address, although the creditor does not in fact receive notice, or acquire actual knowledge, of the bankruptcy proceeding.[60] But as the law now stands, the discharge will not release the bankrupt from any debt which was omitted from his schedule, or which was so incorrectly set forth as not to be "duly" scheduled, unless it is shown that the creditor, notwithstanding the omission or error, had notice or actual knowledge of the bankruptcy proceedings in time to have proved his claim.[61] First, as to the total omission of a claim from the bankrupt's list of creditors, it appears that the courts will accept no excuses for such failure to list the claim. The discharge remains inoperative as against the omitted claim although the reason of its omission was that the bankrupt was ignorant of its existence at the time the schedule was made up,[62] or failed to remember it,[63] or omitted it at the request of the creditor himself,[64] or in pursuance of an understanding with the claimant's attorney, subsequently employed by the bankrupt himself.[65]

[59] In re Archenbrown, 11 N. B. R. 149, Fed. Cas. No. 504; Hoffman v. Haight, 3 Mackey (D. C.) 21; Hubbell v. Cramp, 11 Paige (N. Y.) 310; Pattison v. Wilbur, 10 R. I. 448, 12 N. B. R. 193; Lamb v. Brown, 12 N. B. R. 522, Fed. Cas. No. 8,011; Burpee v. Sparhawk, 108 Mass. 111, 4 N. B. R. 684, 11 Am. Rep. 320; Thurmond v. Andrews, 10 Bush (Ky.) 400; Heard v. Arnold, 56 Ga. 570, 15 N. B. R. 543.

[60] Travis v. Sams, 23 Ga. App. 713, 99 S. E. 239; Beck & Gregg Hardware Co. v. Crum, 127 Ga. 94, 56 S. E. 242. But compare Dodgen v. McCrea (Tex. Civ. App.) 225 S. W. 71.

[61] In re Monroe (D. C.) 114 Fed. 398, 7 Am. Bankr. Rep. 706; Raley v. D. Sullivan & Co. (Tex. Civ. App.) 159 S. W. 99; Bogart v. Cowboy State Bank & Trust Co. (Tex. Civ. App.) 182 S. W. 678; Brooks v. Pitts, 24 Ga. App. 386, 100 S. E. 776; Calmenson v. Moudry, 137 Minn. 123, 162 N. W. 1076; In re Rosenthal, 193 App. Div. 908, 183 N. Y. Supp. 697; Karter v. Fields, 140 Ala. 352, 37 South. 204; Hughes v. Clark, 109 Ill. App. 107; Reynolds v. Whittemore, 99 Me. 108, 58 Atl. 415; Tyrrel v. Hammerstein, 33 Misc. Rep. 505, 67 N. Y. Supp. 717; Lutz v. Kalmus, 115 N. Y. Supp. 230; Bernheim v. Bloch, 45 Misc. Rep. 581, 91 N. Y. Supp. 40; Kreitlein v. Ferger (Ind. App.) 97 N. E. 819; Gilmore v. Farmer, 156 Ill. App. 70; Custard v. Wigderson, 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740; Wineman v. Fisher, 135 Mich. 604, 98 N. W. 404.

[62] Santa Rosa Bank v. White, 139 Cal. 703, 73 Pac. 577.

[63] Jones v. Walter, 115 Ky. 556, 74 S. W. 249.

[64] Davis & Broadway v. L. S. Barwick & Son, 88 S. C. 355, 70 S. E. 1007.

[65] Webster City Steel Radiator Co. v. Chamberlin, 137 Iowa, 717, 115 N. W. 504.

But it is not sufficient that the creditor's name and claim appeared on the list; it must, in the language of the statute, be "duly scheduled." And to this end it is essential that the debt or claim should be so described as to identify it, or at least to put the creditor upon notice in regard to it.[66] Thus, if a mortgage was executed by the bankrupt and his wife together, it cannot be said to be duly scheduled when it is described as having been given by the wife alone.[67] But the operation of the discharge will not be defeated by the fact that an obligation represented by a note was scheduled as upon an open account.[68] And small variations in the bankrupt's own name, comparing that signed to the note or other evidence of the debt with that signed to the petition in bankruptcy, are not important in this connection.[69] But it is very different in regard to setting out the name of the creditor. This must be correctly stated, and a misnomer will be ground for holding that the debt was not "duly scheduled," even though the variance is comparatively unimportant and such as would ordinarily be cured on the rule of idem sonans.[70] But the Supreme Court of the United States, upon a full consideration of the question, has decided that the listing of a creditor by a mere initial instead of giving the Christian name (as, for instance, naming him simply as "C. Ferger") is not such an insufficient compliance with the requirements of the statute as to except that creditor's claim from the operation of the discharge.[71] Further, the bankrupt must correctly state the name of the person who is the holder of the claim at the time the schedule is made up, that is, if he has knowledge of its having changed hands. Thus, a note is not duly scheduled in the name of the payee, if the bankrupt knows at the time that it had been discounted by a bank.[72] Nor is a claim correctly listed in the name of the original creditor if the bankrupt knows that the creditor is dead

[66] But an inaccurate statement of the amount due, or of the date of a judgment, in the bankrupt's schedules, if not injurious or harmful to the creditor, will not take the debt out of the operation of the discharge. Claflin v. Wolff, 88 N. J. Law, 308, 96 Atl. 73.

[67] Fifth Ave. Bldg. & Loan Ass'n v. Goldberg, 22 Pa. Super. Ct. 197.

[68] Matteson v. Dewar, 146 Ill. App. 523.

[69] Northern Commercial Co. v. Hartke, 110 Minn. 338, 125 N. W. 508; Finnell v. Armoura, 39 Utah, 316, 117 Pac. 49.

[70] Custard v. Wigderson, 130 Wis. 412, 110 N. W. 263, 10 Ann. Cas. 740; Marshall v. English-American Loan & Trust Co., 127 Ga. 376, 56 S. E. 449; Wright-Dalton-Bell-Anchor Store Co. v. Sanders, 142 Mo. App. 50, 125 S. W. 517; Cohen v. Pinkus, 126 App. Div. 792, 111 N. Y. Supp. 82; Haack v. Theise, 51 Misc. Rep. 3, 99 N. Y. Supp. 905; Liesum v. Kraus, 35 Misc. Rep. 376, 71 N. Y. Supp. 1022.

[71] Kreitlein v. Ferger, 238 U. S. 21, 35 Sup. Ct. 685, 59 L. Ed. 1184, 34 Am. Bankr. Rep. 862. But see Collins v. Davidson, 34 Ohio Cir. Ct. R. 668, holding that a debt of a bankrupt due to William J. Davidson is not discharged by scheduling it in the name of William F. Davidson.

[72] Columbia Bank v. Birkett, 174 N. Y. 112, 66 N. E. 652, 102 Am. St. Rep. 478. But compare Broadway Trust Co. v. Manheim, 47 Misc. Rep. 415, 95 N. Y. Supp. 93.

and that the claim has been distributed among his heirs.[73] Where a claim has been assigned and the bankrupt has no knowledge of that fact, it is sufficient for him to list it in the name of the original creditor; but if he knows of the assignment he must use due diligence to discover and present the assignee's name and address in the schedule.[74] It seems also that the surviving partner of a firm creditor is correctly named as the creditor in the schedule,[75] and that if original creditors are named it is immaterial that their interests have been committed to a receiver,[76] and that, if a debt due to a bank is correctly listed in the name of the bank, the schedule is not vitiated by the fact that it does not mention the cashier of the bank, who is the nominal holder of the note by which the debt is secured.[77]

It is also essential to the due listing of a debt that the address of the creditor should be given if known to the bankrupt. It has been decided that a schedule listing the creditor's residence by the name of a city (as "Indianapolis" or "New York City") without giving the street and house number, is at least a prima facie compliance with the statute, and the defect is not sufficient, as a matter of law, to render the discharge of the bankrupt inoperative as to that creditor.[78] But if the bankrupt undertakes to give full particulars, the address required is that of the creditor's residence, and it is not proper to state his business or office address, if the residence address is known or can be ascertained. A mistake of this kind will prevent the discharge from releasing the particular debt.[79] A debt is not duly scheduled where the address given is that of a discontinued business, the bankrupt knowing that the business had been closed and that the creditor could not be reached at that address.[80] So, a debt is not released where the address of the creditor was given in the schedule as at a certain club, of which the creditor was a member but at which he did not reside.[81]

If the creditor's address is not known, it may be so stated in the schedule, and, in the absence of fraud, this will be a sufficient compliance with the statute to bring the debt within the operation of the dis-

[73] Fible v. Crabb, 129 Ky. 461, 112 S. W. 576.

[74] Lansing Liquidation Corp. v. Heinze, 184 App. Div. 129, 171 N. Y. Supp. 738; Morency v. Landry, 79 N. H. 305, 108 Atl. 855, 9 A. L. R. 123; Mueller v. Goerlitz, 53 Misc. Rep. 53, 103 N. Y. Supp. 1037.

[75] Kaufman v. Schreier, 108 App. Div. 298, 95 N. Y. Supp. 729.

[76] Longfield v. Minnesota Sav. Bank, 95 Minn. 54, 103 N. W. 706.

[77] Ross-Lewin v. Goold, 211 Ill. 384, 71 N. E. 1028.

[78] Kreitlein v. Ferger, 238 U. S. 21, 35 Sup. Ct. 685, 59 L. Ed. 1184, 34 Am. Bankr. Rep. 862; Claflin v. Wolff, 88 N. J. Law, 308, 96 Atl. 73.

[79] McKee v. Preble, 154 App. Div. 156, 138 N. Y. Supp. 915; Weidenfeld v. Tillinghast, 54 Misc. Rep. 90, 104 N. Y. Supp. 712.

[80] Jenkins v. Levy (City Ct. N. Y.) 167 N. Y. Supp. 847.

[81] Horbach v. Arkell, 172 App. Div. 566, 158 N. Y. Supp. 842.

charge.[82] But it is a fraud to state the creditor's address as unknown, when in fact it is known to the bankrupt, and in this case the claim will not be affected by the discharge,[83] and the same result follows when the bankrupt inserts a certain street number as the residence of the creditor, when in fact he does not know where the creditor resides.[84] And a bankrupt is not permitted to state the creditor's residence as "unknown," and so bar the creditor's claim by his discharge, until he has made at least reasonably diligent efforts to discover it by proper inquiries.[85] For instance, if the name and address of the creditor are correctly given in the city directory, but are not stated in the bankrupt's schedule, the debt is not released.[86] So the debtor is not allowed to state the creditor's address as unknown when he could learn it from a draft drawn on him by the creditor which contained the latter's postoffice address,[87] or from a writ served upon him at the suit of the creditor.[88] But the bankrupt is justified in relying on information given to him by the creditor's attorney, as, where the attorney states that notice sent to a given address will reach the creditor,[89] or states that all communications in the matter should be addressed to the attorney's office.[90]

§ 728. Same; Creditor's Notice or Knowledge of Proceedings.—Under the explicit provisions of the bankruptcy act, the claim of a given creditor will be released by the discharge (being otherwise dischargeable) if the creditor had notice or actual knowledge of the bankruptcy proceedings, although his debt was altogether omitted from the bankrupt's schedule, or was incorrectly described therein, or the creditor's name or address was wrongly stated.[91] But the notice here intend-

[82] Steele v. Thalheimer, 74 Ark. 516, 86 S. W. 305; In re Mollner, 75 App. Div. 441, 78 N. Y. Supp. 281.

[83] Miller v. Guasti, 226 U. S. 170, 33 Sup. Ct. 49, 57 L. Ed. 173, 29 Am. Bankr. Rep. 201, affirming Guasti v. Miller, 203 N. Y. 259, 96 N. E. 416.

[84] Sutherland v. Lasher, 41 Misc. Rep. 249, 84 N. Y. Supp. 56.

[85] Feldmark v. Weinstein, 45 Misc. Rep. 329, 90 N. Y. Supp. 478; Schiller v. Weinstein, 47 Misc. Rep. 622, 94 N. Y. Supp. 763; In re Boom, 48 Misc. Rep. 632, 96 N. Y. Supp. 204; Cagliostro v. Indelli, 53 Misc. Rep. 44, 102 N. Y. Supp. 918; Hyde Park Flint Bottle Co. v. Miller, 179 App. Div. 73, 166 N. Y. Supp. 110; Popejoy v. Diedrich, 68 Colo. 383, 189 Pac. 841.

[86] In re Quackenbush, 122 App. Div. 456, 106 N. Y. Supp. 773; Murphy v. Blumenreich, 123 App. Div. 645, 108 N. Y. Supp. 175.

[87] Guasti v. Miller, 203 N. Y. 259, 96 N. E. 416.

[88] Parker v. Murphy, 215 Mass. 72, 102 N. E. 85.

[89] Vaughn v. Irwin, 49 Misc. Rep. 611, 96 N. Y. Supp. 742.

[90] In re David, 44 Misc. Rep. 516, 90 N. Y. Supp. 85.

[91] Kaufman v. Schreier, 108 App. Div. 298, 95 N. Y. Supp. 729; Morrison v. Vaughan, 119 App. Div. 184, 104 N. Y. Supp. 169; Thomson v. Caverley, 148 Ill. App. 295; Alling v. Straka, 118 Ill. App. 184; Zimmerman v. Ketchum, 66 Kan. 98, 71 Pac. 264; Fider v. Mannheim, 78 Minn. 309, 81 N. W. 2; Armstrong v. Sweeney, 73 Neb. 775, 103 N. W. 436; Perry Naval Stores Co. v. Caswell, 63 Fla. 552, 57 South. 660; Delta County Bank v. McGranahan, 37 Wash. 307, 79 Pac. 796; Briggs v. Angus, 52 Hun, 613, 5 N. Y. Supp. 313. Davis v. Findley,

ed is actual notice, and not such constructive notice as might be implied from the publication of the orders and proceedings in the bankruptcy case.[92] Actual notice or knowledge possessed by the creditor's authorized agent may be imputed to the creditor,[93] and the knowledge of a receiver may be imputed to the creditors whom he represents.[94] But an attorney employed to represent the creditor in an appeal from a judgment of a state court against the bankrupt, but not in any way employed in the bankruptcy proceedings, is not the creditor's agent in this sense or for this purpose.[95] And it is important to observe that an unscheduled debt cannot be brought within the operation of the discharge, on the ground that the creditor had actual notice of the proceedings, where his knowledge was not acquired until after the discharge had been granted, though he acquired it within the year allowed for proving claims and in time to have moved for the revocation of the discharge.[96] The question of notice or want of it is one to be tried when the discharge in bankruptcy is set up in defense to a suit by the creditor. When this is done, the creditor is entitled to show that he did not receive any notice, and had no actual knowledge of the bankruptcy proceedings.[97] And all facts, whether occurring before or after the commencement of the proceedings, tending to establish notice or the want of it, are competent evidence in determining the question.[98]

§ 729. **Debts Contracted in Fiduciary Capacity.**—By virtue of an express exception in the bankruptcy act, debts created by the fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting in any fiduciary capacity are not released by his discharge.[99]

201 Ala. 515, 78 South. 869; First Nat. Bank v. Bamforth, 90 Vt. 75, 96 Atl. 600.

[92] Santa Rosa Bank v. White, 139 Cal. 703, 73 Pac. 577. See Wheeler v. Newton, 168 App. Div. 782, 154 N. Y. Supp. 431. "Notice or actual knowledge" contemplates in every case actual personal notice of some sort to the creditor, as distinguished from mere imputed knowledge; hence constructive notice of bankruptcy proceedings is not sufficient to discharge an unscheduled debt. Lynch v. McKee (Tex. Civ. App.) 214 S. W. 484.

[93] Atkinson v. Elmore, 103 Mo. App. 403, 77 S. W. 492. A debt due to a bank, whose cashier had actual knowledge of the bankruptcy proceeding in time to have proved the debt, but failed to do so, is released by the discharge. Bank of Wrightsville v. Four Seasons, 21 Ga. App. 453, 94 S. E. 649.

[94] Dight v. Chapman, 44 Or. 265, 75 Pac. 585, 65 L. R. A. 793.

[95] Strickland v. Capital City Mills, 74 S. C. 16, 54 S. E. 220, 7 L. R. A. (N. S.) 426. But see Keefauver v. Hevenor, 163 App. Div. 531, 148 N. Y. Supp. 434, holding that, where notice of bankruptcy proceedings was given to an attorney of a judgment creditor employed to collect the judgment, it was sufficient, though no notice was given to the creditor's attorney of record.

[96] Birkett v. Columbia Bank, 195 U. S. 345, 25 Sup. Ct. 38, 49 L. Ed. 231, 12 Am. Bankr. Rep. 691.

[97] Westheimer v. Howard, 47 Misc. Rep. 145, 93 N. Y. Supp. 518. Without any evidence of notice to the creditor, it cannot be presumed that he received it. Hilton v. White, 171 App. Div. 931, 156 N. Y. Supp. 9.

[98] Knapp v. Harold, 25 Ohio Cir. Ct. R. 213.

[99] Forbes v. Keyes, 193 Mass. 38, 78 N. E. 733; Treadwell v. Holloway, 46 Cal.

But it is held that the words "fiduciary capacity," as here used, are to be limited to cases of technical trusts expressly created, not merely such as the law implies from the contract or the relation of the parties, but actually and expressly constituted; and hence the phrase cannot be extended so as to apply to cases where the law regards the relation of the parties simply as that of debtor and creditor, though the nature of the transaction between them is such that more or less confidence is necessarily reposed in the debtor.[100] Thus the position of one who owes money, including accounts collected for the creditor, is not one of trust within the meaning of this clause of the statute.[101] Nor does a mere conversion of money or property put the bankrupt in the position of a fiduciary debtor.[102] And a contract consigning goods for sale, with a stipulation that the consignee will "hold in trust" for the consignor all goods remaining unsold and the proceeds of his sales, does not create a technical trust nor make the debtor a fiduciary in respect to the proceeds of sales.[103] Again, there is no fiduciary relation between a buyer and seller of merchandise, in respect to the unpaid price of the goods, although the sale was induced by the fraudulent representations of the buyer.[104] For similar reasons, this provision of the act is held not to apply to the liability of a subscriber for corporate stock for an amount due on his subscription.[105] And although a conveyance of property by the bankrupt was intended to delay and defraud his creditors, it does not follow that the grantee therein holds the property in a fiduciary capacity.[106]

The test of the dischargeability of the creditor's claim is the nature of the debt as originally created, or the original circumstances out of which it arose. And courts will look behind a note, a mortgage, or even a judgment, to ascertain the nature of the debt; and if it is discovered to

547; Herman v. Lynch, 26 Kan. 435, 40 Am. Rep. 320; Ruff v. Milner, 92 Mo. App. 620; Gerner v. Yates, 61 Neb. 100, 84 N. W. 596. An act of fraud, embezzlement, misappropriation, or defalcation does not except a debt from a discharge in bankruptcy, unless the debtor created it while acting as an officer or in a fiduciary capacity. Martin v. Starrett, 97 Neb. 653, 151 N. W. 154.

[100] Lewis v. Shaw, 122 App. Div. 96, 106 N. Y. Supp. 1012; American Surety Co. v. Spice, 119 Md. 1, 85 Atl. 1031; Palmer v. Hussey, 87 N. Y. 303; Keime v. Graff, Fed. Cas. No. 7,650; Gibson v. Gorman, 44 N. J. Law, 325; Goddin v. Neal, 99 Ind. 334; First Nat. Bank v. Bamforth, 90 Vt. 75, 96 Atl. 600.

[101] Hanan v. Long, 150 App. Div. 327, 134 N. Y. Supp. 786. The debt arising from the collection of wages after they have been assigned, by one not standing in a fiduciary capacity nor using false pretenses or representations to obtain the money, is not within the provision of the statute as to debts not discharged. Glasco v. Cooper, 17 Ga. App. 690, 87 S. E. 1095; Stovall v. Coker, 18 Ga. App. 126, 88 S. E. 907.

[102] Watertown Carriage Co. v. Hall, 66 App. Div. 84, 72 N. Y. Supp. 466.

[103] In re Butts, 120 Fed. 966, 10 Am. Bankr. Rep. 16.

[104] Harrington & Goodman v. Herman, 172 Mo. 344, 72 S. W. 546, 60 L. R. A. 885.

[105] Morrison v. Savage, 56 Md. 143.

[106] Reeves v. McCracken, 69 N. J. Eq. 203, 60 Atl. 332.

be one which is not released by a discharge in bankruptcy, it will be so adjudged.[107] For if the debt was created by the bankrupt while acting in a fiduciary capacity, it is immaterial that it has been reduced to judgment; the judgment will not be barred or affected by the discharge in bankruptcy any more than the original debt would be.[108] And a discharge in bankruptcy is no more a defense to a petition for a personal decree for a deficiency after mortgage sale, where the mortgage was given to secure the loan of trust funds misappropriated by the defendant, than it would be in a proceeding brought against him in his fiduciary capacity.[109] But in the case of a judgment, the courts will not go back of the record to inquire into the nature of the debt. Thus, if the record shows on its face that the judgment was obtained in a suit on a promissory note, it shows that there was no fiduciary relation between the parties, and the discharge in bankruptcy will be a good defense.[110] And it should be noticed that there may be a novation of the debt such as to extinguish its fiduciary character, as where a debt due from a guardian is formally released on his giving his individual note for the amount due.[111] Embezzlement is an act which can be committed only by a person who holds funds in a fiduciary character, so that an allegation that the defendant "wrongfully embezzled" the plaintiff's money necessarily implies that he became possessed of it in a fiduciary capacity, and therefore his answer setting up a discharge in bankruptcy as a defense is demurrable as insufficient.[112]

§ 730. **Same; Trustees.**—A trustee under an express trust (whether created by deed, will, or otherwise) acts in a fiduciary capacity, and his discharge in bankruptcy will not release him from liability for any claims against him on account of his loss, misappropriation, or conversion of the trust funds.[113] And the same rule applies to a trustee for creditors, and to a receiver,[114] and to an assignee under a deed of assignment for the benefit of creditors.[115] So a husband's liability as trustee under an antenuptial contract to account to the deceased wife's personal representative for trust moneys is a fiduciary debt.[116] And where a sum of money to which a wife was entitled, on the sale of certain land in par-

[107] Donald v. Kell. 111 Ind. 1, 11 N. E. 782.

[108] Wade v. Clark, 52 Iowa, 158, 2 N. W. 1039, 35 Am. Rep. 262; Brooks v. Yocum, 42 Mo. App. 516; Simpson v. Simpson, 80 N. C. 332. See Ford v. Blackshear Mfg. Co., 140 Ga. 670, 79 S. E. 576.

[109] Field v. Howry, 132 Mich. 687, 94 N. W. 213.

[110] Donald v. Kell, 111 Ind. 1, 11 N. E. 782.

[111] Coleman v. Davies, 45 Ga. 489.

[112] Watertown Carriage Co. v. Hall, 176 N. Y. 313. 68 N. E. 629.

[113] Warren v. Robinson, 21 Utah, 429, 61 Pac. 28; Crisfield v. State, 55 Md. 192.

[114] Field v. Howry, 132 Mich. 687, 94 N. W. 213.

[115] Pinkston v. Brewster, 14 Ala. 315.

[116] Donovan v. Haynie, 67 Ala. 51.

tition proceedings, was decreed to be paid to her husband, he to apply the interest to his own use and to give bonds for the payment of the principal sum at his death, or whenever so required by the court, it was held that the liability of the husband to pay over the principal sum was incurred in a fiduciary capacity.[117] The principle is further illustrated by a case in which one of two parties who contemplated the formation of a partnership paid over to the other a sum of money for the benefit of the firm, and shortly afterwards died. During his sickness, the recipient of the money deposited it in a bank in his own name, and after the death of his intended partner, he converted the money to his personal use. It was held that the partnership was dissolved by the death of one of the parties to it, and that the other thereafter became a trustee of the money for the benefit of the decedent's estate, so that his liability to account for it was contracted in a "fiduciary capacity" and was not released by his discharge in bankruptcy.[118] But here, as in other cases, it is necessary to apply the rule that the words of the statute, "acting in a fiduciary capacity," are meant to include only cases of technical trust, not implied trusts.[119] Hence the provision does not include the obligation of one to whom, as a creditor, the debtor has delivered property with directions to sell it, and apply so much of the proceeds as may be necessary to pay the debt, and pay over the balance to the debtor; the liability of the creditor to account for such balance involves no breach of trust, but only of contract.[120] And so, a debt arising out of an implied understanding had on a conveyance in the ordinary form of an absolute deed from A. to B. of certain parts of A.'s real estate, no trust being expressly declared, is not excepted from the operation of a discharge in bankruptcy.[121] In a case before the United States Supreme Court, which came much closer to the line, it appeared that A. directed B. to pay to the plaintiff $700 a year during her natural life, or during her good behavior, and to that end he delivered to B. the sum of $10,000, declaring that such annual payments should be considered as interest thereon, and he directed that, in certain contingencies, the principal sum should be paid to the plaintiff, but that, if the plaintiff died without issue, it should revert to A. and his heirs. The plaintiff and B. each executed a written acceptance of these directions. It was held that, although, in the instruments embodying it, the transaction was called a "trust" and B. a "trustee" for the plaintiff, yet the obligation

[117] Mock v. Howell, 101 N. C. 443, 8 S. E. 167.

[118] Haggerty v. Badkin, 72 N. J. Eq. 473, 66 Atl. 420.

[119] Johnson's Adm'r v. Parmenter, 74 Vt. 58, 52 Atl. 73; Ehrhart v. Rork, 114 Ill. App. 509; Williamson v. Dickens, 5 Ired. (27 N. C.) 259.

[120] Cronan v. Cotting, 104 Mass. 245, 4 N. B. R. 667, 6 Am. Rep. 232; Bissell v. Couchaine, 15 Ohio, 58.

[121] Reeves v. McCracken, 69 N. J. Eq. 203, 60 Atl. 332.

assumed by him was not a debt created in a fiduciary capacity, within the meaning of the bankruptcy law.[122]

§ 731. **Same; Executors, Administrators, and Guardians.**—An executor or administrator is a technical trustee, and holds the funds of the estate in a fiduciary capacity, and debts and liabilities growing out of his administration of the estate are not affected by his discharge in bankruptcy.[123] If he mingles the funds of the estate with his own money, he is guilty of a wrongful misappropriation thereof within the meaning of the bankruptcy law,[124] and so if he deposits the money in a bank in his own name and for his own benefit, and it is lost through the insolvency of the bank or through his own misconduct with respect to it.[125] And though part of the debt due from an executor or administrator may be made up of interest, it is none the less true that the whole debt is excepted from the operation of a discharge in bankruptcy, for the interest is a mere incident of the principal and cannot be separated from it.[126] A debt due from an executor to the residuary legatee is of the fiduciary character excepted from the operation of a discharge in bankruptcy.[127] But it is not only in his dealings with the beneficiaries that a personal representative acts in a fiduciary character. If he has so administered the estate as to render himself personally liable to creditors, his debt to them is also a fiduciary debt.[128] But an agreement by an executor guarantying the payment of a demand against the estate, and admitting the possession of sufficient assets, does not constitute a debt of this kind.[129] And where he settles with the distributees of the estate by giving them his personal notes, and they release him, there is a novation of the debts, and claims founded on the notes have no fiduciary character.[130] Again, where a party paid an executor for a portion of the assets of the estate which he purchased at a discount, but without any actual fraud, and was, with the executor, held liable for a devastavit, his subsequent discharge in bankruptcy was held a complete defense to an action against him for the devastavit.[131]

The liability of a guardian to his ward, with respect to the ward's property or money, is also a fiduciary debt, and not released by the guardian's discharge in bankruptcy.[132] And so, where a guardian makes

[122] Upshur v. Briscoe, 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931.

[123] Johnson's Adm'r v. Parmenter, 74 Vt. 58, 52 Atl. 73.

[124] Johnson's Adm'r v. Parmenter, 74 Vt. 58, 52 Atl. 73.

[125] Brown v. Hannagan, 210 Mass. 246, 96 N. E. 714; Morris v. Covey, 104 Ark. 226, 148 S. W. 257.

[126] Johnson's Adm'r v. Parmenter, 74 Vt. 58, 52 Atl. 73.

[127] Crisfield v. State, 55 Md. 192.

[128] Laramore v. McKinzie, 60 Ga. 532.

[129] Amoskeag Mfg. Co. v. Barnes, 49 N. H. 312.

[130] Elliott v. Higgins, 83 N. C. 459; Light v. Merriam, 132 Mass. 283.

[131] Neal v. Clark, 95 U. S. 704, 24 L. Ed. 586.

[132] In re Maybin, 15 N. B. R. 468, Fed. Cas. No. 9,337; Simpson v. Simpson, 80

default, and his surety is forced to pay the deficit, the debt of the guardian to the surety for reimbursement is one contracted in a fiduciary capacity and is not affected by the former's discharge in bankruptcy.[133]

§ 732. Same; Agents.—Although an agent is "trusted" in the popular sense of the word, more or less confidence being necessarily reposed in his integrity and punctuality, this is not a case of express or technical trust so as to make his debt to his principal take on the character of a fiduciary debt.[134] Thus, an agent employed to collect rents due to his principal and remit the proceeds, does not act in the character of a trustee, and a debt created by his failure to account for money so collected is not excepted from the operation of his discharge in bankruptcy.[135] And generally this is true of any collecting agent employed to gather in periodical payments due from persons with whom his principal does business, or to collect a particular account, or generally or in specific instances to collect drafts, notes, and other bank items. There is no technical fraud in his mingling money so collected with his own funds, and if he misappropriates it or simply fails to account for it, it is not a breach of a technical trust, but only of a contract, and hence the claim against him is provable in bankruptcy and will be released by his discharge.[136] This is likewise true of an agent employed to sell and deliver goods of his principal (or simply to deliver goods sold) and collect and remit the proceeds, less his commission or other compensation; he is not a trustee nor does he act in a fiduciary capacity.[137] And a judgment obtained by a railroad company against a ticket agent for money collected by him for tickets sold and converted to his own use is not a fiduciary debt.[138] Again, an agent who retains money of his principal which was sent to him for a specific purpose, as, for instance, to take it to another

N. C. 332; Cromer v. Cromer, 29 Gratt. (Va.) 280.

133 Halliburton v. Carter, 55 Mo. 435, 10 N. B. R. 359.

134 Boyd v. Agriculture Ins. Co., 20 Colo. App. 28, 76 Pac. 986; Young v. Clark, 7 Cal. App. 194, 93 Pac. 1056.

135 In re Benoit, 194 N. Y. 549, 87 N. E. 1115; Byrnes v. Byrnes, 129 N. Y. 23, 29 N. E. 244; Stull v. Beddeo, 78 Neb. 119, 112 N. W. 315, 14 L. R. A. (N. S.) 507.

136 Noble v. Hammond, 129 U. S. 65, 9 Sup. Ct. 235, 32 L. Ed. 621; Grover & Baker Sewing Machine Co. v. Clinton, 5 Biss. 324, 8 N. B. R. 312, Fed. Cas. No. 5,845; Green v. Chilton, 57 Miss. 598, 34 Am. Rep. 483; Guilfoyle v. Anderson, 9 Daly (N. Y.) 64; Kaufman v. Alexander, 53 Tex. 562; Hanan v. Long, 150 App. Div. 327, 134 N. Y. Supp. 786. But compare Fulton v. Hammond, 11 Fed. 291; Shipley v. Platts, 17 S. D. 357, 97 N. W. 1. And see Williams v. Virginia-Carolina Chemical Co. (Ala.) 62 South. 755. A bankrupt was held not released from a debt created by the collection of certain notes for defeudant under an agreement reciting their receipt as trustee for collection. Williams v. Virginia-Carolina Chemical Co., 182 Ala. 413, 62 South. 755.

137 In re Camelo, 195 Fed. 632, 28 Am. Bankr. Rep. 353; In re Hale, 161 Fed. 387, 20 Am. Bankr. Rep. 633; American Agricultural Chemical Co. v. Berry, 110 Me. 528, 87 Atl. 218; Barber v. Sterling, 68 N. Y. 267.

138 In re Wenham, 153 Fed. 910, 16 Am. Bankr. Rep. 690.

place and there pay the note of the principal, cannot be treated as a defaulting trustee, but his liability will be discharged in bankruptcy.[139] This question not seldom arises in connection with the liability of one who is intrusted with the funds of another for the purpose of loaning them on real-estate security, and who is authorized to receive payment of the interest as due and of the principal of such loans, and directed to remit the same to his principal. When borrowers pay into his hands either the interest or the principal, it is held that he does not receive the money in the capacity of a trustee, and his failure to pay it over creates a simple debt which is dischargeable in bankruptcy.[140] But if, instead of investing the money sent to him, as directed, he converts it to his own use and employs it in his own business, it is considered that such a misapplication of the funds is a breach of trust, so that the debt thereby created will not be barred by his discharge in bankruptcy.[141] And the same result follows where he lends the principal's money to himself, or where, on lending it to a third person, he takes security in the form of a trust deed to himself as trustee. In the latter case, if the property or its proceeds come into his hands through foreclosure, he is technically a trustee and holds the property in a fiduciary capacity.[142] So also, an assignment of money to grow due in the future puts the assignor in the position of a trustee, so that if he collects the money when due and misappropriates it, he cannot plead his discharge in bankruptcy against the assignee's claim.[143]

§ 733. Same; Attorneys.—In several of the cases decided under former bankruptcy laws it was held that the relation of attorney and client is one of trust, and a violation of duty by the attorney is an act done in a fiduciary capacity under the bankruptcy law, and a debt growing out of the conversion or embezzlement by an attorney of his client's money or property, while in his hands, is a debt created while he is acting in a fiduciary capacity and therefore not released by his discharge in bankruptcy.[144] But the decisions to the contrary[145] appear to be sustained by the better reason, since the confidence which must necessarily be reposed in the integrity of an attorney at law, great as it is, is still not sufficient to make it a case of technical or express trust, to which cases alone the statute is intended to apply.[146]

[139] Pankey v. Nolan, 6 Humph. (Tenn.) 154; Phillips v. Russell, 42 Me. 360. Compare Matteson v. Kellogg, 15 Ill. 547.

[140] Bracken v. Milner, 104 Fed. 522, 5 Am. Bankr. Rep. 23.

[141] Flagg v. Ely, 1 Edm. Sel. Cas. (N. Y.) 206.

[142] Bracken v. Milner, 104 Fed. 522, 5 Am. Bankr. Rep. 23.

[143] J. L. Mott Ironworks v. Toumey, 94 App. Div. 216, 87 N. Y. Supp. 1020.

[144] Flanagan v. Pearson, 42 Tex. 1, 14 N. B. R. 37, 19 Am. Rep. 40; Heffren v. Jayne, 39 Ind. 463, 13 Am. Rep. 281.

[145] Wolcott v. Hodge, 15 Gray (Mass.) 547, 77 Am. Dec. 381; Woodward v. Towne, 127 Mass. 41, 34 Am. Rep. 337.

[146] Supra, § 729.

§ 734. Same; Bailees.—Unless expressly constituted a trustee, a bailee of personal property does not hold it in a fiduciary capacity, nor act in such a capacity when dealing with it, so that a debt or claim against him for the loss, destruction, or conversion of the property is simply founded on his breach of contract and will be released by his discharge in bankruptcy.[147] Thus, where one is intrusted with the effects of another to sell and dispose of them for the benefit of the latter, and to account to him therefor, the mere fact that such bailee has failed to account does not create a debt which is exempted from his discharge in bankruptcy.[148] So, where the bankrupts pledged accounts due them for merchandise sold to secure a loan, and also agreed to hold any goods returned by customers whose accounts were assigned as the property of the creditor or resell the same as his agents and account for the proceeds, it was held that a failure to pay over the proceeds of goods so resold did not create a liability for "willful and malicious injury" to the property of the creditor, nor a debt created by the bankrupts while acting in a fiduciary capacity.[149] And a claim against a pledgee of a certificate of stock, based on his pledging the stock for an amount in excess of the pledgor's indebtedness, shortly before his adjudication in bankruptcy, and a refusal to deliver the certificate to the pledgor on tender of payment of his debt, is predicated merely on the pledgee's breach of contract, and is a liability discharged in bankruptcy.[150] So again, where plaintiff sold personal property to defendant, under an agreement that the title should remain in the seller until the purchase price was paid, but defendant sold the property and appropriated the proceeds, it was held that his liability therefor was not created while he was acting in a fiduciary capacity.[151]

§ 735. Same; Bankers and Brokers.—A banker does not occupy the position of a trustee with respect to funds placed in his hands on general deposit. The relation of the parties is simply that of debtor and creditor. Hence a claim against the banker for the loss or conversion of the money will be a provable debt against him in bankruptcy and will be barred by his discharge.[152] So also, the dealings between a

147 Sumner v. Richie, 54 Iowa, 554, 6 N. W. 752; Phillips v. Russell, 42 Me. 360; Grannis v. Cubbedge, 71 Ga. 582. Compare Herman v. Lynch, 26 Kan. 435, 40 Am. Rep. 320. And see Burnham v. Noyes, 125 Mass. 85; Stokes v. Mason, 10 R. I. 261, 12 N. B. R. 498.

148 Georgia R. R. v. Cubbedge, 75 Ga. 321.

149 In re Toklas Bros., 201 Fed. 377, 29 Am. Bankr. Rep. 709.

150 Wood v. Fisk, 156 App. Div. 497, 141 N. Y. Supp. 342.

151 Bryant v. Kinyon, 127 Mich. 152, 86 N. W. 531, 53 L. R. A. 801.

152 Lewis v. Shaw, 122 App. Div. 96, 106 N. Y. Supp. 1012; Sheldon v. Clews, 13 Abb. New Cas. (N. Y.) 40; Shaw v. Vaughan, 52 Mich. 405, 18 N. W. 126; Maxwell v. Evans, 90 Ind. 596, 46 Am. Rep. 234; Hervey v. Devereux, 72 N. C. 463.

stockbroker and his customers are not of a fiduciary character, and the broker's discharge in bankruptcy will release him from claims against him growing out of his conversion or misappropriation of money placed in his hands by a customer as margin or for the purchase of stocks,[153] or his failure or refusal to return securities deposited with him as collateral,[154] or his unauthorized sale of stock purchased for a customer.[155]

§ 736. Same; Factors and Commission Merchants.—A factor or commission merchant is not technically a trustee with respect to the goods of his principal in his hands or with respect to the proceeds of sales, and his failure to pay over money due to his principal is not a breach of trust. It creates a simple debt, which is provable and dischargeable in bankruptcy, and not a fiduciary debt.[156] "If the act embraces such a debt, it will be difficult to limit its application. It must include all debts arising from agencies, and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the act." [157] But while this rule applies to debts due from a factor to his principal, it may be otherwise in respect to his liability for goods of the principal in his hands which he refuses to return on demand, having no legal excuse for such refusal. It has been held that this constitutes a debt created by his fraud or mis-

[153] In re Ennis & Stoppani, 171 Fed. 755, 22 Am. Bankr. Rep. 679; Halpine v. May, 100 Mass. 498; Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406; Clarke v. Milliken, 70 Misc. Rep. 492, 127 N. Y. Supp. 339.

[154] Palmer v. Hussey, 119 U. S. 96, 7 Sup. Ct. 158, 30 L. Ed. 362; Hennequin v. Clews, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565; Crosby v. Miller, Vaughn & Co., 25 R. I. 172, 55 Atl. 328; Hennequin v. Clews, 77 N. Y. 427, 33 Am. Rep. 641.

[155] Stratford v. Jones, 97 N. Y. 586.

[156] Chapman v. Forsyth, 2 How. 202, 11 L. Ed. 236; Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, 12 Am. Bankr. Rep. 659; In re Adler, 152 Fed. 422, 81 C. C. A. 564, 18 Am. Bankr. Rep. 240; In re Gulick, 186 Fed. 350, 26 Am. Bankr. Rep. 362; Mathieu v. Goldberg, 156 Fed. 541, 19 Am. Bankr. Rep. 191; In re Basch, 97 Fed. 761, 3 Am. Bankr. Rep. 235; In re Benedict, 37 Misc. Rep. 230, 75 N. Y. Supp. 165; Zeperink v. Card, 3 McCrary, 549, 11 Fed. 295; Owsley v. Cobin, 15 N. B. R. 489, Fed. Cas. No. 10,636; In re Smith, 9 Ben. 494, Fed. Cas. No. 12,976; Hayman v. Pond, 7 Metc. (Mass.) 328; Scott v. Porter, 93 Pa. St. 38, 39 Am. Rep. 719; Falkland v. Bank, 21 Hun (N. Y.) 450; Austill v. Crawford, 7 Ala. 335; Woolsey v. Cade, 54 Ala. 378, 25 Am. Rep. 711; Maxwell v. Evans, 90 Ind. 596, 46 Am. Rep. 234; Du Pont v. Beck, 81 Ind. 271; Grover & Baker S. M. Co. v. Clinton, 5 Biss. 324, 8 N. B. R. 312, Fed. Cas. No. 5,845; Keime v. Graff, 17 N. B. R. 319, Fed. Cas. No. 7,650; Kaufman v. Alexander, 53 Tex. 562; Butler-Kyser Mfg. Co. v. O. D. Mitchell & Co., 195 Ala. 240, 70 South. 665; New England Milk Producers' Ass'n v. Wing, 119 Me. 75, 109 Atl. 375; Keefauver v. Hevenor, 163 App. Div. 531, 148 N. Y. Supp. 434; Michelin Tire Co. v. Hearn (Tex. Civ. App.) 188 S. W. 943.

[157] Chapman v. Forsyth, 2 How. 202, 11 L. Ed. 236.

appropriation while acting in a fiduciary capacity, and one not dischargeable in bankruptcy.[158]

§ 737. **Same; Auctioneers.**—It has been held that an auctioneer acts in a fiduciary capacity in respect to goods placed in his hands for sale, and that his liability for their proceeds will therefore not be released by his discharge in bankruptcy.[159] But it is difficult to see what circumstance in his relation to the owner of the property, or in the nature of his employment, clothes an auctioneer with the character of a trustee, or distinguishes him, in this respect, from an ordinary bailee, factor, banker, broker, or attorney at law, all of whom, as shown in preceding sections, have been held not to act in a fiduciary capacity. And there is at least one decision of respectable authority to the effect that a deposit of money made by the purchaser at the sale is not received by the auctioneer in a fiduciary character.[160]

§ 738. **Same; Partners and Joint Adventurers.**—Although partners in business necessarily trust each other in a high degree, neither is a trustee for the other, in the technical sense, and hence a claim of one partner against the other for fraud or mismanagement of the partnership business, or for misappropriation of the firm's assets, is not a debt contracted while acting in a fiduciary capacity so as to be excepted from the operation of a discharge in bankruptcy.[161] And the same rule applies to joint adventures. Thus, where one receives money from another to be invested on their joint account in the purchase of land or commodities, with an agreement that it is to be returned if no investment is made, or that the profits of any successful purchase and sale shall be divided between them, no fiduciary debt is thereby created. Such an arrangement does not constitute the party receiving the money a trustee for the other, but merely a partner with him, and a debt growing out of the joint adventure will be dischargeable in bankruptcy.[162]

§ 739. **Same; Public and Other Officers.**—Among the debts expressly excepted from the operation of a discharge in bankruptcy are those created by the bankrupt's "fraud, embezzlement, misappropriation, or defalcation while acting as an officer." And it is held that the words "while acting as an officer" qualify each of the four preceding nouns, and not merely the word "defalcation." In other words, a debt created

158 Mathieu v. Goldberg, 156 Fed. 541, 19 Am. Bankr. Rep. 191.

159 Jones v. Russell, 44 Ga. 460, 11 N. B. R. 478; In re Lord, 5 Law Rep. 258, Fed. Cas. No. 8,501; Crowther v. Elgood, L. R. 34 Ch. Div. 691.

160 Gibson v. Gorman, 44 N. J. Law, 325.

161 Gee v. Gee, 84 Minn. 384, 87 N. W. 1116; Karger v. Orth, 116 Minn. 124, 133 N. W. 471; Inge v. Stillwell, 88 Kan. 33, 127 Pac. 527, 42 L. R. A. (N. S.) 1093.

162 Hill v. Shelbley, 68 Ga. 556; Pierce v. Shippee, 90 Ill. 371.

by the bankrupt's fraud while acting as an officer, or one created by his embezzlement while acting as an officer, or by his misappropriation of funds while acting as an officer, will be excepted from the operation of his discharge, in the same manner and to the same extent as a debt created by a technical "defalcation." [163] Among the public officers who are considered to be within this provision of the statute, so that money debts due from them in their official capacity are not affected by a discharge in bankruptcy, are collectors of taxes,[164] sheriffs, in so far as they receive or handle public money,[165] official auctioneers of cities,[166] any municipal officer whose duty requires him to collect and account for license fees,[167] and registers and receivers of the land offices.[168]

The bankruptcy acts of 1841 and 1867 both excepted from the operation of a discharge debts contracted in consequence of a defalcation as a "public officer." But the act of 1898, in this connection, omits the word "public" and employs the phrase "while acting as an officer." It is held that the change must be presumed to have been intentional, and that, by the omission of the word "public," Congress meant to bring officers of private corporations within the scope of its enactment.[169] Accordingly it is held that debts created in their official capacity by such officers as presidents and cashiers of banks, treasurers of other corporations, and generally all those who share in the management of the finances, are excepted from the operation of a discharge in bankruptcy.[170] But it has been ruled that where a defaulting public officer gives his note for the amount due (whether to his successor in office or to the officers authorized to demand the money in his hands), there is such a novation or change in the character of the debt that it loses its preferred character in bankruptcy, and becomes dischargeable like any ordinary claim founded on a note.[171]

[163] Tindle v. Birkett, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762, 18 Am. Bankr. Rep. 121; In re Harper, 133 Fed. 970. Under the act of 1867, which excepted from the effect of a discharge liabilities created by "defalcation" of a "public officer," it was held that the liability of a public officer merely for negligence in collecting and paying over claims placed in his hands for collection, was not within the terms of the statute. Courtney v. Beale, 84 Va. 692, 5 S. E. 708.

[164] Morse v. Lowell, 7 Metc. (Mass.) 152; Richmond v. Brown, 66 Me. 373; Town of Grantham v. Clark, 62 N. H. 426.

[165] Johnson v. Auditor, 78 Ky. 282; Councill v. Horton, 88 N. C. 222. See Ulner v. Doran, 167 App. Div. 259, 152 N. Y. Supp. 655.

[166] Jones v. Russell, 44 Ga. 460.

[167] In re Johnson, Fed. Cas. No. 7,365a.

[168] Ex parte Wright, Fed. Cas. No. 18,064.

[169] In re Harper, 133 Fed. 970, 13 Am. Bankr. Rep. 430, affirmed Harper v. Rankin, 141 Fed. 626, 72 C. C. A. 320, 15 Am. Bankr. Rep. 608.

[170] Harper v. Rankin, 141 Fed. 626, 72 C. C. A. 320, 15 Am. Bankr. Rep. 608; Bloemecke v. Applegate (C. C. A.) 271 Fed. 595; Boyd v. Applewhite, 121 Miss. 879, 84 South. 16; Floyd v. Layton, 172 N. C. 64, 89 S. E. 998; Shepard v. Morgan, 123 App. Div. 128, 108 N. Y. Supp. 379; Tatum v. Leigh, 136 Ga. 791, 72 S. E. 236, Ann. Cas. 1912D, 216; Peterborough R. R. v. Wood, 61 N. H. 418.

[171] Wilkes County Com'rs v. Staley, 82 N. C. 395. But see, per contra,

§ 740. Same; Sureties on Bonds of Fiduciary Debtors.—The obligation of a surety on the bond of an executor, administrator, guardian, or other principal acting in a fiduciary capacity is simply contractual, and has none of the elements of a trust, and therefore if the surety become bankrupt, and his liability on the bond is so far fixed as to constitute a provable debt against his estate, it will be released by his discharge in bankruptcy.[172] Thus, the surety on the bond of a guardian "merely guarantees the acts of his principal. No trust or confidence is reposed in him. He has nothing to do with the person or property of the ward, and has no control over the conduct of the guardian. He is liable simply on his contract and according to its terms."[173] So it is held that a surety on an administrator's bond occupies no fiduciary relation that will prevent his discharge in bankruptcy from operating as a release from liability for contribution to his co-surety, who has been compelled to pay the debt of the administrator.[174] And on the same principle, if a surety gives his personal note for the debt due from his principal, and pays the note at maturity, his claim against the principal for reimbursement is not of such a fiduciary character as to be excepted from the operation of the principal's discharge in bankruptcy.[175]

§ 741. Liabilities for Willful and Malicious Injuries.—In its original form, the bankruptcy act of 1898 excepted from the operation of a discharge in bankruptcy "judgments for willful and malicious injuries to the person or property of another." But the amendment of 1903 substituted the word "liabilities" for the word "judgments." At present, therefore, it is not necessary that a liability for such injuries should have been reduced to judgment in order that it may escape the effect of the discharge.[176] But on the other hand, the change in terminology did not have the effect of removing judgments for such injuries from the category of excepted debts, but had the effect of including such liabilities whether reduced to judgment or not.[177] And where a defendant,

Madison Tp. v. Dunkle, 114 Ind. 262, 16 N. E. 593.

172 Jones v. Knox, 46 Ala. 53, 7 Am. Rep. 583; Reitz v. People, 72 Ill. 435, 16 N. B. R. 196; McDonald v. State, 77 Ind. 26; Simpson v. Simpson, 80 N. C. 332; Davis v. McCurdy, 50 Wis. 569, 7 N. W. 665; Harmon v. McDonald, 187 Mass. 578, 73 N. E. 883, 3 Ann. Cas. 64; Fowler v. Kendall, 44 Me. 448; Saunders v. Commonwealth, 10 Gratt. (Va.) 494; McMinn v. Allen, 67 N. C. 131; Steele v. Graves, 68 Ala. 21; Ex parte Taylor, 1 Hughes, 617, 16 N. B. R. 40, Fed. Cas. No. 13,773.

173 Reitz v. People, 72 Ill. 435, 16 N. B. R. 96.

174 Miller v. Gillespie, 59 Mo. 220.

175 Light v. Merriam, 132 Mass. 283; Cromer v. Cromer, 29 Gratt. (Va.) 280; Leinkauf v. Wellhouse, 1 Ga. App. 670, 57 S. E. 961.

176 Bever v. Swecker, 138 Iowa, 721, 116 N. W. 704.

177 Thompson v. Judy, 169 Fed. 553, 95 C. C. A. 51, 22 Am. Bankr. Rep. 154; Stefanini v. Sroka, 43 Misc. Rep. 614, 88 N. Y. Supp. 167; Woehrle v. Cauclini, 158 Cal. 107, 109 Pac. 888; Barbery v. Cohen, 183 App. Div. 424, 170 N. Y. Supp. 762.

against whom a judgment has been obtained for an assault and who has been arrested on execution, makes application to take the poor debtor's oath, and gives a recognizance under the local statute, such recognizance is merely a cumulative security for the original judgment, and a judgment subsequently rendered on the recognizance is a liability for willful and malicious injury, and not released in bankruptcy.[178]

The courts have decided that the words "willful" and "malicious," as here used, do not connote malevolence in fact, or hatred or ill will. "Willful" means nothing more than intentional; and "malice" does not mean actual malice, but merely such a disregard of duty as is involved in the intentional doing of a willful act to the injury of another, or the doing of a wrongful act intentionally, without just cause or excuse.[179] This is illustrated by a case in which a judgment had been recovered, in an action of trespass vi et armis in a state court, against a schoolteacher for an assault upon a pupil alleged to have consisted in the infliction of corporal punishment with excessive severity. The district court held that this judgment was a dischargeable debt in bankruptcy, on the ground that the administration of corrective discipline by a teacher could not be regarded as "willful" or "malicious," in the absence of actual hatred or vindictiveness.[180] But this doctrine was reversed on appeal, the court holding as above stated, that the statute was satisfied with the intentional doing of a wrongful and injurious act without just cause or excuse.[181] On the same principle, it has been held that a judgment for personal injuries resulting from the sale to plaintiff of a quantity of pure carbolic acid, instead of a two per cent solution as asked for, is not dischargeable in bankruptcy.[182]

But here it is necessary to observe that negligence alone does not constitute either such malice or such willfulness as is contemplated by the act.[183] This rule was applied in a case where one built a fire in a street to burn leaves, and after he had left it, supposing it to be dead, the clothes of a child, who was throwing leaves on the fire, caught fire

[178] In re Colaluca, 133 Fed. 255, 13 Am. Bankr. Rep. 292.

[179] Peters v. United States, 177 Fed. 885, 101 C. C. A. 99, 24 Am. Bankr. Rep. 206; McChristal v. Clisbee, 190 Mass. 120, 76 N. E. 511, 3 L. R. A. (N. S.) 702, 5 Ann. Cas. 769; Kavanaugh v. McIntyre, 128 App. Div. 722, 11 N. Y. Supp. 987; Wellman v. Mead, 93 Vt. 322, 107 Atl. 396.

[180] United States v. Peters, 166 Fed. 613, 22 Am. Bankr. Rep. 177.

[181] Peters v. United States, 177 Fed. 885, 101 C. C. A. 99, 24 Am. Bankr. Rep. 206.

[182] In re Halper, 82 Misc. Rep. 205, 143 N. Y. Supp. 1005.

[183] Ex parte Harrison (D. C.) 272 Fed. 543, 47 Am. Bankr. Rep. 80; In re Madigan (D. C.) 254 Fed. 221, 41 Am. Bankr. Rep. 770; In re Cunningham (D. C.) 253 Fed. 663, 42 Am. Bankr. Rep. 560; In re Wakefield (D. C.) 207 Fed. 180, 31 Am. Bankr. Rep. 42; In re Grout, 88 Vt. 318, 92 Atl. 646, Ann. Cas. 1917A, 210; Weisfield v. Beale, 44 Pa. Super. Ct. 386. But see Pearlman v. Booth, 160 App. Div. 219, 145 N. Y. Supp. 539.

and he was seriously burned, for which injury a judgment was recovered, against the enforcement of which the judgment debtor pleaded his discharge in bankruptcy. His conduct was of course negligent, but he had no intent to injure the child, and it was therefore held that the judgment was released by his discharge.[184] So again, in one of the cases it appeared that a person had been injured by the bite of a vicious dog. The animal belonged to a tenant and was kept on the leased premises, but the injured party sued the landlord and recovered judgment, the ground of the defendant's liability being that he was aware, from previous similar occurrences, of the dog's dangerous propensities. It was held that this judgment was released by the defendant's discharge in bankruptcy, since the ground of recovery against him was merely negligence and not willfullness or malice.[185] In another case, plaintiff recovered a judgment against an innkeeper for wrongfully causing the death of her husband. It appeared that the husband was at the inn while in a state of excited alcoholic intoxication, and defendant gave him chloral to quiet him and prevent his injuring himself or others. Death ensued, and the theory of plaintiff's action was that it was caused either by the administration of the drug or by defendant's negligence in failing to take proper care of the guest. It was held that the judgment could not, under either ground of recovery, be considered as one for a willful and malicious injury, and therefore it was released by a discharge in bankruptcy.[186]

Questions of this kind frequently arise in the case of street accidents, and particularly those caused by automobiles. The Supreme Court has said (though the remark was obiter dictum): "One who negligently drives through a crowded thoroughfare and negligently runs over an individual would not, as we suppose, be within the exception. True, he drives negligently, and that is a wrongful act; but he does not intentionally drive over the individual. If he intentionally did drive over him, it would certainly be malicious."[187] In accordance with this principle, it is generally held that a person who drives an automobile carelessly, recklessly, or negligently, and perhaps in violation of traffic rules or the municipal regulations applicable to such traffic, and thereby causes injury to the person or property of another, may be liable in damages for the tort, but that if there was no intent on his part to bring

[184] McClellan v. Schmidt (D. C.) 235 Fed. 986, 38 Am. Bankr. Rep. 104.

[185] In re Lorde (D. C.) 144 Fed. 320, 16 Am. Bankr. Rep. 201.

[186] Tompkins v. Williams, 137 App. Div. 521, 122 N. Y. Supp. 152. But a plea of discharge in bankruptcy was held good in an action to recover damages for negligent treatment by defendant as a dentist of plaintiff's teeth, under a contract of employment between the parties for such services. Boshes v. Kamin, 209 Ill. App. 508.

[187] Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754, 11 Am. Bankr. Rep. 568.

about the accident, the claim for damages (or a judgment recovered thereon) will be released by his discharge in bankruptcy.[188] So it is said that a judgment for personal injuries caused by illegally driving an automobile while intoxicated is not one for willful and malicious injury to the person, since it does not involve an intent to cause the injury, and therefore such a judgment is barred by a discharge in bankruptcy.[189] But the distinction between negligence and wrongful intent is not always clear, and attention should be given to a case in the Supreme Court of Vermont, in which it was held that a discharge in bankruptcy was no bar to a judgment recovered in an action for causing death, as a result of defendant's running his motor car at an unlawful rate of speed and unlawfully attempting to pass the car in which the deceased was riding.[190]

On the other hand, a judgment for damages based on an assault and battery is for a willful and malicious injury and not released by the discharge in bankruptcy.[191] And so a judgment or a liability for damages for slander or libel is for such an injury to the person as is not released or affected by the discharge in bankruptcy.[192] And this is also true of a judgment in an action for false arrest or malicious prosecution,[193] and a judgment in forcible detainer against a landlord, based on his wrongfully and forcibly removing an assignee of the lease under a judgment for dispossession against the lessee alone.[194]

Further, since the exception in the statute applies not only to personal injuries, but also to willful and malicious injuries to "the property" of another, the courts have held that a fraudulent appropriation of the money or property of another is such an "injury" to it that the claim (or judgment) for damages will not be released by the discharge in bankruptcy.[195] In fact, it is broadly stated that one who disposes of

[188] In re Cunningham (D. C.) 253 Fed. 663, 42 Am. Bankr. Rep. 560; In re Madigan (D. C.) 254 Fed. 221, 41 Am. Bankr. Rep. 770; In re Grout, 88 Vt. 318, 92 Atl. 646, Ann. Cas. 1917A, 210; Jefferson Transfer Co. v. Hull, 166 Wis. 438, 166 N. W. 1.

[189] In re Wilson (D. C.) 269 Fed. 845, 46 Am. Bankr. Rep. 477.

[190] Ex parte Cote, 93 Vt. 10, 106 Atl. 519.

[191] In re Conroy, 237 Fed. 817, 151 C. C. A. 59, 38 Am. Bankr. Rep. 208; Taylor v. Buser (Sup.) 167 N. Y. Supp. 887.

[192] In re Dowie, 202 Fed. 816, 29 Am. Bankr. Rep. 338; McDonald v. Brown, 23 R. I. 546, 51 Atl. 213, 58 L. R. A. 768, 91 Am. St. Rep. 659; National Surety Co. v. Medlock, 2 Ga. App. 665, 58 S. E. 1131; Parker v. Brattan, 120 Md. 428, 87 Atl. 756; Sanderson v. Hunt, 116 Ky. 435, 76 S. W. 179, 3 Ann. Cas. 168; Drake v. Vernon, 26 S. D. 354, 128 N. W. 317. A judgment for damages for slander not being dischargeable in bankruptcy, a judgment against the plaintiff for costs in such an action partakes of the same character and is not released by the discharge. In re Dowie, 202 Fed. 816, 29 Am. Bankr. Rep. 338.

[193] Mason v. Perkins, 180 Mo. 702, 79 S. W. 683, 103 Am. St. Rep. 591; Taylor v. Marshall, 153 Ill. App. 409. But compare Johnston v. Bruckheimer, 133 App. Div. 649, 118 N. Y. Supp. 189.

[194] In re Munro, 195 Fed. 817, 197 Fed. 450, 28 Am. Bankr. Rep. 369.

[195] Hallagan v. Dowell (Iowa) 139 N. W. 883. A judgment against defendant for taking plaintiff's cattle without his

property without the owner's authority is guilty of a willful and malicious injury to property within the meaning of the Bankruptcy Act, so that his liability is not released by a discharge in bankruptcy.[196] Thus, where a stockbroker sells or hypothecates securities held by him as collateral, without the knowledge or consent of the owner, and appropriates the proceeds to his own use, it is a willful and malicious injury to property such as is not released by his discharge in bankruptcy.[197] This is also true of the unauthorized sale of mortgaged chattels by the mortgagee and payee of the note secured thereby, which was held by another as collateral, and the appropriation of the avails without the knowledge of the holder of the note,[198] and of the act of the mortgagor of chattels, holding permissive possession, in selling them at public sale and appropriating the proceeds.[199] A person who collects and uses salary or wages coming due to him after he has given an assignment thereof is likewise not released in bankruptcy from the resulting claim against him.[200] And it is said that a judgment in an action of replevin for the value of property obtained by the bankrupt by false representations that he was solvent and that his note was good for the property is not barred by his discharge.[201] But there is a decision that the liability of the maker of a note who converts to his own use the proceeds of a note deposited with the payee as collateral, does not arise from a willful and malicious injury to the property of the payee.[202]

§ 742. Liabilities for Seduction and Criminal Conversation.—Previous to the 1903 amendment to the bankruptcy act, there was some doubt as to whether the seduction of a woman or the wrong committed by criminal conversation or by the alienation of the affections of a husband or wife could be brought within the description of "willful and malicious injuries to the person or property of another"; though the courts generally inclined to the view that the terms quoted were broad enough to include injuries of the kind mentioned, and that judgments in such actions were not affected by a discharge in bankruptcy.[203] But this ques-

consent, and appropriating them to his own use, is not released by the defendant's discharge in bankruptcy. Vever v. Swecker, 138 Iowa, 721, 116 N. W. 704.

[196] Covington v. Rosenbusch, 22 Ga. App. 799, 97 S. E. 462.

[197] McIntyre v. Kavanaugh, 242 U. S. 138, 37 Sup. Ct. 38, 61 L. Ed. 205, 38 Am. Bankr. Rep. 429, affirming Kavanaugh v. McIntyre, 210 N. Y. 175, 104 N. E. 135; Wood v. Fiske, 175 App. Div. 135, 161 N. Y. Supp. 1097 (see this case on appeal, 215 N. Y. 233, 109 N. E. 177); Heaphy v. Kerr, 190 App. Div. 810, 180 N. Y. Supp. 542; Delve v. Devere (Sup.) 164 N. Y. Supp. 608.

[198] Sabinal Nat. Bank v. Bryant (Tex. Com. App.) 221 S. W. 940.

[199] Mason v. Sault, 93 Vt. 412, 108 Atl. 267.

[200] Covington v. Rosenbusch, 148 Ga. 459, 97 S. E. 78.

[201] In re Kalk (D. C.) 270 Fed. 627, 46 Am. Bankr. Rep. 597.

[202] First Nat. Bank v. Bamforth, 90 Vt. 75, 96 Atl. 600.

[203] Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754, 11 Am.

tion was set at rest by the amendment referred to, which explicitly includes among the debts which are not released by a discharge "liabilities for seduction of an unmarried female or for criminal conversation." [204] But a judgment rendered against a bankrupt in an action for breach of promise of marriage, where there is no proof of seduction of the plaintiff, or of malice or any injury to character, is for a mere contract debt, and comes within the operation of his discharge,[205] and so, perhaps, where seduction is shown as an element of damages, but not made a substantive part of the cause of action.[206] Yet it has been ruled that a judgment obtained by an unmarried woman for breach of marriage promise, accompanied by seduction, will be regarded as entirely for the seduction, and therefore not dischargeable in bankruptcy, in the absence of a showing as to what part of the damages was awarded for the breach of promise.[207]

§ 743. **Debts Contracted by Fraud.**—In the present bankruptcy act, as originally enacted, the classes of debts excepted from the operation of a discharge included "judgments in actions for frauds." Under the act of 1867, the exception had applied to "debts created by fraud." And in consequence of the change of language, it was held that a claim created by the fraud of the bankrupt was not now an excepted debt unless reduced to judgment.[208] But the revision of this section of the bankruptcy act by the amendment of 1903 omits the phrase "judgments in actions for frauds," and, indeed, contains no reference whatever to fraud, except in the sentence which provides that a discharge shall not release the bankrupt from debts "created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." At first sight this would appear to include all debts "created by fraud," but the Supreme Court held that the words "while acting as an officer or in any fiduciary capacity" qualified all four of the nouns preceding, so that debts created by the fraud of the bankrupt were held not excepted from the discharge unless so created while he was acting as an officer or in a fiduciary capacity.[209] But the reason for this con-

Bankr. Rep. 568; Colwell v. Tinker, 169 N. Y. 531, 62 N. E. 668, 58 L. R. A. 765, 98 Am. St. Rep. 587; Leicester v. Hoadley, 66 Kan. 172, 71 Pac. 318, 65 L. R. A. 523; In re Freche, 109 Fed. 620, 6 Am. Bankr. Rep. 479; In re Maples, 105 Fed. 919, 5 Am. Bankr. Rep. 426; Exline v. Sargent, 23 Ohio Cir. Ct. R. 180. Compare In re Tinker, 99 Fed. 79, 3 Am. Bankr. Rep. 580; In re Sullivan, 1 Nat. Bankr. News, 380; Howland v. Carson, 28 Ohio St. 625, 16 N. B. R. 372.

[204] In re Grounds (D. C.) 215 Fed. 280.

[205] Finnegan v. Hall, 35 Misc. Rep. 773, 72 N. Y. Supp. 347; Bond v. Milliken, 134 Iowa, 447, 109 N. W. 774, 120 Am. St. Rep. 440; In re Komar (D. C.) 234 Fed 378, 37 Am. Bankr. Rep. 683.

[206] Disler v. McCauley, 66 App. Div. 42, 73 N. Y. Supp. 270.

[207] In re Warth, 200 Fed. 408, 118 C. C. A. 560, 29 Am. Bankr. Rep. 210.

[208] Harrington & Goodman v. Herman, 172 Mo. 344, 72 S. W. 546, 60 L. R. A. 885; Lippincott, Johnson & Co. v. Herman, 179 Mo. 350, 78 S. W. 1132.

[209] Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, 12 Am.

struction was that, to include all debts fraudulently contracted would render meaningless the exception in the previous sentence in favor of such claims for fraud as had been reduced to judgment. And since Congress, in amending the section has omitted all mention of judgments on claims founded on frauds, this argument has lost its weight. Indeed, the significant omission of this phrase might support an argument that it was the intention of Congress to remove the limitation which required such claims to be reduced to judgment, and to provide, instead, that all claims "created by the fraud" of the bankrupt should be excepted from the discharge. And it is so held in some of the cases.[210]

Whether the more extended or the more restricted meaning be taken as correct, it is important to notice that a debt created through the fraud of the bankrupt is none the less excepted from the benefit of his discharge because it has been reduced to judgment. In other words, a cause of action does not become merged in a judgment thereon so as to preclude the creditor from showing that the original debt was created by fraud, and if it is established that the original debt would not have been dischargeable in bankruptcy, neither will the judgment recovered upon it be so dischargeable.[211] This fact need not appear on the face of the judgment, but it is proper to look behind it and examine the entire record in order to ascertain the character of the debt on which it was founded,[212] and if it thus appears that fraud was the gravamen or gist of the action, the judgment will be held not affected by the discharge.[213] But

Bankr. Rep. 659; Bullis v. O'Beirne, 195 U. S. 606, 25 Sup. Ct. 118, 49 L. Ed. 340, 13 Am. Bankr. Rep. 108; Tindle v. Birkett, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762, 18 Am. Bankr. Rep. 121; In re Ennis & Stoppani, 171 Fed. 755, 22 Am. Bankr. Rep. 679; Gee v. Gee, 84 Minn. 384, 87 N. W. 1116; J. C. Smith & Wallace Co. v. Lambert, 69 N. J. Law, 487, 55 Atl. 88; Crosby v. Miller, Vaughn & Co., 25 R. I. 172, 55 Atl. 328; Morse v. Kaufman, 100 Va. 218, 40 S. E. 916; Jewett Bros. & Jewett v. Bentson, 20 S. D. 175, 105 N. W. 173; Dilley v. Simmons Nat. Bank (Ark.) 158 S. W. 144.

[210] In re Butts, 120 Fed. 966; Frey v. Torrey, 175 N. Y. 501, 67 N. E. 1082.

[211] Forsyth v. Vehmeyer, 176 Ill. 359, 52 N. E. 55, affirmed 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723, 3 Am. Bankr. Rep. 807; Gee v. Gee, 84 Minn. 384, 87 N. W. 1116; Packer v. Whittier, 91 Fed. 511, 33 C. C. A. 658, 1 Am. Bankr. Rep. 621; In re Pettis, Fed. Cas. No. 11,046; Warner v. Cronkhite, 6 Biss. 453, Fed. Cas. No. 17,180; Horner v. Spelman, 78 Ill. 206; Freiberg v. Popper, 12 Hun (N. Y.) 658; Kaufman v. Lindner, 67 How. Prac. (N. Y.) 322; Young v. Grau, 14 R I. 340; In re Patterson, 2 Ben. 155, 1 N. B. R. 307, Fed. Cas. No. 10,817. Contra, see Shuman v. Strauss, 34 N. Y. Super. Ct. 6; Kames v. Fox, 14 Phila. (Pa.) 208; Palmer v. Preston, 45 Vt. 154, 12 Am. Rep. 191; Pitcairn v. Scully, 252 Pa. 82, 97 Atl. 120.

[212] Ames v. Moir, 138 U. S. 306, 11 Sup. Ct. 311, 34 L. Ed. 951; In re Bullis, 171 N. Y. 689, 64 N. E. 1119; Donald v. Kell, 111 Ind. 1, 11 N. E. 782; Moody v. Muscogee Mfg. Co., 134 Ga. 721, 68 S. E. 604, 20 Ann. Cas. 301; Ziegler v. Sugglt, 118 Minn. 74, 136 N. W. 411. A judgment in favor of plaintiff in an action for deceit is conclusive that the debt was the result of fraud and not discharged in bankruptcy. In re Shepardson (D. C.) 220 Fed. 186, 34 Am. Bankr. Rep. 284.

[213] Oberreich v. Foster, 148 Ill. App 397; In re Benoit, 124 App. Div. 142, 108 N. Y. Supp. 889; In re Blumberg, 94 Fed 476, 1 Am. Bankr. Rep. 633; Collins v.

on the other hand, the record is conclusive, and if it contains nothing to show the alleged fraudulent character of the claim sued on, it will not be sufficient to repel the plea of a discharge in bankruptcy.[214] And where a plaintiff sued for money had and received and also on an indebtedness alleged to have been created by the bankrupt's embezzlement of trust funds, and the verdict was general, and there was nothing to show that it included the latter indebtedness alone, there is no ground for holding the judgment to be excepted from the operation of the discharge in bankruptcy.[215] Further, if a plaintiff sues on a promissory note, an account stated, a written contract, a bond, or the like, it is an election to waive any fraud which induced or entered into the creation of the indebtedness, and such fraud cannot be brought up again and insisted on for the purpose of withdrawing the judgment from the effect of defendant's discharge in bankruptcy.[216]

In this connection, the word "fraud" means positive fraud or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality.[217] And a legal fraud can be committed only by fraudulent representations of fact or by such conduct or artifice for a fraudulent purpose as will throw one off his guard and cause him to omit inquiry or examination which he would otherwise make.[218] Where a purchaser receives goods knowing himself to be insolvent, and with the intention of disposing of them without paying the price, this constitutes such fraud as will take the case out of the operation of his discharge in

McWalters, 35 Misc. Rep. 648, 72 N. Y. Supp. 203.

[214] Barnes Mfg. Co. v. Norden, 67 N. J. Law, 493, 51 Atl. 454; Barnes Cycle Co. v. Haines, 69 N. J. Eq. 651, 61 Atl. 515; Quaker City Watch Co. v. Lamoreaux, 21 Pa. Super. Ct. 493.

[215] Cooke v. Plaisted, 181 Mass. 82, 62 N. E. 1054.

[216] Hargadine-McKittrick Dry Goods Co. v. Hudson, 122 Fed. 232, 58 C. C. A. 596, 10 Am. Bankr. Rep. 225; In re Rhutassel, 96 Fed. 597, 2 Am. Bankr. Rep. 697; In re Blumberg, 94 Fed. 476, 1 Am. Bankr. Rep. 633; Mulock v. Byrnes, 59 Hun, 623, 13 N. Y. Supp. 190; Palmer v. Preston, 45 Vt. 154, 12 Am. Rep. 191; Harrington & Goodman v. Herman, 172 Mo. 344, 72 S. W. 546, 60 L. R. A. 885; Gregory v. Williams, 106 Kan. 819, 189 Pac. 932. Contra, Stewart v. Emerson, 52 N. H. 301, 8 N. B. R. 462.

[217] Bullis v. O'Beirne, 195 U. S. 606, 25 Sup. Ct. 118, 49 L. Ed. 340, 13 Am. Bankr. Rep. 108; Neal v. Clark, 95 U. S. 704, 24 L. Ed. 586; Strang v. Bradner, 114 U. S. 555, 5 Sup. Ct. 1033, 29 L. Ed. 248; Noble v. Hammond, 129 U. S. 65, 9 Sup. Ct. 235, 32 L. Ed. 621; Western Union Cold Storage Co. v. Hurd, 116 Fed. 442, 8 Am. Bankr. Rep. 633; In re Shepardson (D. C.) 220 Fed. 186, 34 Am. Bankr. Rep. 284; Sanger Bros. v. Barrett (Tex. Civ. App.) 221 S. W. 1087; Lund v. Bull, 76 N. H. 132, 80 Atl. 141, Ann. Cas. 1912B, 819; Ely v. Curtis, 60 N. H. 513; Hennequin v. Clews, 77 N. Y. 427, 33 Am. Rep. 641; Louisville & N. R. Co. v. Bryant, 149 Ky. 359, 149 S. W. 830; Cooper Grocery Co. v. Gaddy (Tex. Civ. App.) 141 S. W. 825; Brenner v. Duard, 126 Mass. 400; Curtis v. Waring, 92 Pa. St. 104; Allen v. Hickling, 11 Ill. App. 549; Rowe v. Guilleaume, 18 Hun (N. Y.) 556. Compare Jones' Ex'rs v. Clark, 25 Gratt. (Va.) 642.

[218] In re Nuttall, 201 Fed. 557, 29 Am. Bankr. Rep. 800.

bankruptcy.[219] So a discharge will not release a bankrupt who was a public warehouseman from a claim or judgment arising by reason of his fraudulently removing property from his warehouse contrary to the provisions of a state statute,[220] nor can a discharge be set up by one who, after the sale of property and delivery of warehouse receipts for it, sells the same property to another,[221] nor by a debtor who, at the time of contracting the debt, pledges as security for it collateral which he knows to be worthless.[222] And it has been held that one who accepts a transfer of another's property, knowing that it is made for the purpose of defrauding the latter's creditors, is himself guilty of such actual fraud that a claim or judgment against him for the restoration of the property is not barred by his discharge.[223] But on the other hand, where plaintiff undertook to guaranty defendant's honesty in his capacity as an insurance agent, the liability of defendant to indemnify plaintiff for the amount plaintiff was compelled to pay under such guaranty is not a debt created by fraud in this sense.[224] And so of a transaction by which one induced another to dismiss an action on a note by representing that he would pay it if not molested, and thereafter went into bankruptcy.[225] And further, a debt, to be fraudulent within the meaning of the bankruptcy law, must be tainted with fraud in its inception. If the contract was fair and honest when made, although the debtor may subsequently be guilty of fraudulent conduct in respect to it, yet such conduct will not destroy the benefit of his discharge in bankruptcy.[226]

§ 744. **Same; Deceit and False Representations.**—In the bankruptcy act, as it stood originally, there was an exception from the operation of a discharge as to "judgments in actions for frauds, or obtaining property by false pretenses or false representations." This was amended in 1903, so as to except "liabilities for obtaining property by false pretenses or false representations."[227] But the purpose of the amendment

[219] Ames v. Moir, 138 U. S. 306, 11 Sup. Ct. 311, 34 L. Ed. 951; Strauss v. Abrahams, 32 Fed. 310; Classen v. Schoenemann, 80 Ill. 304, 16 N. B. R. 98; Ames v. Moir, 130 Ill. 582, 22 N. E. 535.

[220] Halsey v. Jordan, 155 Ill. App. 144.

[221] Taylor v. Farmer, 81 Ky. 458.

[222] Bank of North America v. Crandall, 87 Mo. 208.

[223] Mackel v. Rochester, 135 Fed. 904, 14 Am. Bankr. Rep. 429.

[224] American Surety Co. v. Spice, 119 Md. 1, 85 Atl. 1031.

[225] Jenkins v. Pilcher, 160 Mich. 349, 125 N. W. 355, 28 L. R. A. (N. S.) 423.

[226] Brown v. Broach, 52 Miss. 536, 16 N. B. R. 296.

[227] Bankruptcy Act 1898, § 17a, as amended by Act Congress Feb. 5, 1903, 32 Stat. 797. And see Nelson v. Petterson, 131 Ill. App. 443; Atlanta Skirt Mfg. Co. v. Jacobs, 8 Ga. App. 299, 68 S. E. 1077; Lee v. Tarplin, 194 Mass. 47, 79 N. E. 786; Morse v. Hutchins, 102 Mass. 439; In re Menzin, 238 Fed. 773, 151 C. C. A. 623, 38 Am. Bankr. Rep. 435; M. C. Kiser Co. v. Gerald, 17 Ala. App. 648, 88 South. 49; Brandt v. Klement, 20 Ga. App. 664, 93 S. E. 255; J. K. Orr Shoe Co. v. Upshaw & Powledge, 13 Ga. App. 501, 79 S. E. 362. Though fraud practised by other means than false representations may be actionable, it is only fraud by obtaining property by false pretenses or false representations

was not to remove liabilities evidenced by judgments from the excepted classes, but rather to add thereto liabilities so arising which had not been put into the form of judgments.[228] Hence a claim against the bankrupt for obtaining property by false representations is not merged in the judgment recovered upon it in such sense as to bring the judgment within the operation of the discharge where the claim would not be.[229] But if the creditor, having parted with his property in reliance on false pretenses or representations, accepts a note for the amount due, no fraud being practiced upon him to induce his acceptance of the note, neither the note nor a judgment recovered upon it will be excepted from the defendant's discharge.[230] And this provision of the statute does not embrace a case where the bankrupt obtained the property in question as a loan in the first instance, though he afterwards converted it.[231] So, where the bankrupt had already obtained goods from the plaintiff, his act in inducing the plaintiff to accept a note for the price by means of false representations is not an "obtaining of property."[232] Again, a representation made in good faith, though it does not actually correspond with the facts, or a warranty given on the sale of a chattel, is not a "false pretense" or a "false representation" within the meaning of this section.[233] And so, where the defendant, when he executed a note to the plaintiff, prior to being adjudged a bankrupt, represented that he owned an interest in a store, which was true at the time, the fact that a month or so afterwards he sold his interest without notice to the plaintiff did not amount to fraud so as to enable the plaintiff to recover on the note notwithstanding the defendant's discharge in bankruptcy, for the representation was not a continuing one.[234]

As to the character of the pretenses or representations intended by the statute, it may be said that a representation as to a fact, made knowingly, falsely, and fraudulently, for the purpose of obtaining money or property from another, and by means of which such money or property

which prevents the release of a bankrupt from his provable debts. Zimmern v. Blount, 238 Fed. 740, 151 C. C. A. 590.

228 Woehrle v. Canclini, 158 Cal. 107, 109 Pac. 888.

229 Dilley v. Simmons Nat. Bank, 108 Ark. 342, 158 S. W. 144; Hyland v. Fink (Sup.) 178 N. Y. Supp. 114; Chambers v. Kirk, 41 Okl. 696, 139 Pac. 986; In re Lewensohn (D. C.) 99 Fed. 73, 3 Am. Bankr. Rep. 594; Nichols v. Doak, 48 Wash. 457, 93 Pac. 919, 125 Am. St. Rep. 942; In re Lewensohn, 104 Fed. 1006, 44 C. C. A. 309. The record of the judgment is conclusive of its character as a claim for this purpose. Morrow v. Pfleiderer, 4 Ohio App. 283.

230 In re Rhutassel, 96 Fed. 597, 2 Am. Bankr. Rep. 697; Blackman v. McAdams, 131 Mo. App. 408, 111 S. W. 599.

231 Maxwell v. Martin, 130 App. Div. 80, 114 N. Y. Supp. 349. Where money was advanced to the bankrupt for an interest in a land speculation, which remained uncompleted because the bankrupt never acquired title to the land, the liability to refund is not one for obtaining property by false representations. Bowman v. Provident Realty Inv. Co., 40 Cal. App. 115, 180 Pac. 18.

232 Carville v. Lane, 116 Me. 332, 101 Atl. 968.

233 Guindon v. Brusky, 142 Minn. 86, 170 N. W. 918.

234 Gregory v. Pierce, 186 Iowa, 151, 172 N. W. 288.

is so obtained, is a legal fraud and within the statute.[235] By far the most common form of such fraud is that practised by an intending buyer of property who procures the sale and delivery of it to him without payment by means of false statements as to the nature and extent of his financial resources or as to his ownership of particular property. This is always held to be within the statute.[236] So also is the case where the purchaser falsely represents that he is that day to receive a check for a certain amount and that he will at once turn it over to the creditor,[237] or where he lies as to the value, situation, or condition of property which he really owns, as, by stating that it is free from incumbrances, that it is covered with valuable timber, or the like,[238] or where he undertakes to turn over to the seller, as part of the consideration, a note of a third person, knowing at the time that the note is in the hands of an assignee, from whom he cannot procure it,[239] or where he fraudulently causes the owner of property to believe that he intends to pay for it (having no such intention) or fraudulently conceals his intention not to pay,[240] or where he obtains goods on credit with the intention of setting over the goods to certain other favored persons, leaving himself nothing with which he could pay for them.[241] But inducing a creditor to surrender a note by promising immediately to take the benefit of the bankruptcy law and thereafter to pay the amount of it in full has been held not such a "false representation" as the statute contemplates.[242]

Money is property, and a liability for obtaining money by false representations is not dischargeable in bankruptcy.[243] And this is also true of a liability incurred by obtaining another surety for the bankrupt by his false representations.[244] But the services and advice of an attorney at law are not "property," and though they were procured by

[235] Forsyth v. Vehmeyer, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723, 3 Am. Bankr. Rep. 807.

[236] Forsyth v. Vehmeyer, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723, 3 Am. Bankr. Rep. 807; Forsyth v. Vehmeyer, 176 Ill. 359, 52 N. E. 55; Talcott v. Friend, 179 Fed. 676, 103 C. C. A. 80, 24 Am. Bankr. Rep. 708; In re Taff & Conyers, 182 Fed. 899, 25 Am. Bankr. Rep. 600; In re Alsberg, 16 N. B. R. 116, Fed. Cas. No. 261; Broadnax v. Bradford, 50 Ala. 270; Turner v. Atwood, 124 Mass. 411. In re Groodzinsky (D. C.) 248 Fed. 753, 40 Am. Bankr. Rep. 861; Ehlinger v. Speckels (Tex. Civ. App.) 189 S. W. 348; In re Dunfee, 219 N. Y. 188, 114 N. E. 52; E. I. Du Pont De Nemours Powder Co. v. Schwenger, 90 Misc. Rep. 678, 154 N. Y. Supp. 186. Contra, see Roth v. Pechin, 260 Pa. 450, 103 Atl. 894.

[237] Rowell v. Ricker, 79 Vt. 552, 66 Atl. 569.

[238] In re Bullis, 171 N. Y. 689, 64 N. E. 1119; Peel v. Bryson, 72 Ga. 331; Kennett v. Tudor, 91 Vt. 70, 99 Atl. 306.

[239] Forbes v. Thomas, 22 Neb. 541, 35 N. W. 411.

[240] Stewart v. Emerson, 52 N. H. 301, 8 N. B. R. 462; Brooks v. Pitts, 24 Ga. App. 386, 100 S. E. 776.

[241] Louisville Dry Goods Co. v. Lanman, 135 Ky. 163, 121 S. W. 1042, 28 L. R. A. (N. S.) 363, 135 Am. St. Rep. 451.

[242] Landgraf v. Griffith, 41 Ind. App. 372, 83 S. E. 1021.

[243] Hallagan v. Dowell (Iowa) 139 N. W. 883.

[244] Gaddy v. Witt (Tex. Civ. App.) 142 S. W. 926.

the client by false pretenses, yet the attorney's claim for a fee is barred by the client's discharge in bankruptcy.[245] It is not necessary that the false pretenses or representations should have been made in writing,[246] and a false representation by one partner, by means of which property was obtained by the firm, will be imputed to the other partners to the extent of holding them civilly liable for the debt.[247] But it is necessary that the creditor should have been induced actually to part with property or rights in reliance upon the representations made to him,[248] and that he should not have actual knowledge or notice of their falsity.[249]

§ 745. Same; Conversion of Property.—It was at one time quite generally held that a judgment recovered in an action for the conversion of money or of property, or of the proceeds of its sale, was not a judgment for fraud nor for false pretenses nor for willful and malicious injuries, and therefore was not excepted from the operation of a discharge in bankruptcy.[250] And as for a claim for damages for such a conversion, it was thought that if it was not contingent but fixed, and not unliquidated but certain, it was a provable debt in bankruptcy and therefore released by the bankrupt's discharge.[251] If, however, it was not of a character to be provable in bankruptcy, it was considered to be unaffected by the discharge, not on account of its falling within any of the excepted classes of claims, but because the law limits the effect of a discharge to the "provable debts" of the bankrupt.[252] This may of course be the case where, although the circumstances exist making a conversion possible, no conversion actually takes place until after the adjudication in bankruptcy.[253] It was thought, however, that a conversion of property might well be committed in such circumstances as to make it grossly unjust that the bankrupt should escape the consequences of his act by the medium of his discharge, as, for instance, where the

[245] Gleason v. Thaw, 236 U. S. 558, 35 Sup. Ct. 287, 59 L. Ed. 717, 34 Am. Bankr. Rep. 177; In re Thaw, 180 Fed. 419, 24 Am. Bankr. Rep. 759; Gleason v. Thaw, 185 Fed. 345, 196 Fed. 359, 25 Am. Bankr. Rep. 782.

[246] Katzenstein v. Reid, Murdock & Co., 41 Tex. Civ. App. 106, 91 S. W. 360.

[247] Frank v. Michigan Paper Co., 179 Fed. 776, 103 C. C. A. 268, 24 Am. Bankr. Rep. 261.

[248] Rudstrom v. Sheridan, 122 Minn. 262, 142 N. W. 313.

[249] Hoskins v. Velasco Nat. Bank, 48 Tex. Civ. App. 246, 107 S. W. 598.

[250] In re Ennis & Stoppani, 171 Fed. 755, 22 Am. Bankr. Rep. 679; Fechter v. Postel, 114 App. Div. 776, 100 N. Y. Supp. 207; Burnham v. Pidcock, 33 Misc. Rep. 65, 66 N. Y. Supp. 806; Crosby v. Miller, Vaughn & Co., 25 R. I. 172, 55 Atl. 328; Ex parte Peterson, 77 Vt. 226, 59 Atl. 828; State v. Beck, 175 Ind. 664, 93 N. E. 664.

[251] Sabinal Nat. Bank v. Bryant (Tex. Civ. App.) 191 S. W. 1179; Lilly v. Barron, 144 Ark. 422, 222 S. W. 712; First Nat. Bank v. Bamforth, 90 Vt. 75, 96 Atl. 600; Mason v. Sault, 93 Vt. 412, 108 Atl. 267.

[252] Watertown Carriage Co. v. Hall, 75 App. Div. 201, 77 N. Y. Supp. 1028, affirmed, 176 N. Y. 313, 68 N. E. 629. And see supra, § 514.

[253] Creamery Package Mfg. Co. v. Horton, 178 App. Div. 467, 165 N. Y. Supp. 257.

conversion was larcenous or practically a theft.[254] And in 1916, the Supreme Court of the United States decided that the unauthorized sale by a broker of certificates of stock held by him as collateral, and the appropriation of the avails to his own use, without the knowledge of the owner, is a "willful and malicious injury to property" and therefore the liability of the broker is not released by his discharge in bankruptcy.[255] Since then, the other courts have agreed that a discharge in bankruptcy cannot be set up as a bar to claims for damages arising out of similar instances of the conversion of money or property or the wrongful appropriation of the proceeds of property.[256]

§ 746. **Effect of Proving Debt and Receiving Dividends.**—A creditor who holds a claim against the bankrupt of such a character that it will not be released by the bankrupt's discharge, being within one of the classes of debts expressly excepted by the statute, and who proves his claim in the bankruptcy proceedings, does not thereby change the relation of the parties into the ordinary relation of debtor and creditor so as to make the claim dischargeable,[257] except, of course, in cases where he chooses to waive any tort involved in the transaction and prove his claim as upon a contract or an open account.[258] The exemptions or exceptions from the operation of a discharge specified in the statute do not rest upon any theory of the exclusion of the creditor from the bankruptcy act, or of deprivation of the right to participate in the distribution of the estate, but solely on the ground that, although such rights are enjoyed, an exemption from the effect of the discharge is superadded.[259] A creditor holding a non-dischargeable debt may therefore participate like any other creditor in the proceedings, and prove his debt and receive his dividends on it. But the nature of his claim does not give him any preference over other creditors. He is not in a position like that of a lien creditor or one entitled to priority. He has no exclusive or superior advantages in the assets over the other creditors.[260] But his rights differ from those of creditors with dischargeable debts in this, that, after the bankrupt's discharge, such a creditor may continue to prosecute a pending action against him or institute a new suit, or proceed

[254] In re Alpert (D. C.) 237 Fed. 295, 38 Am. Bankr. Rep. 459; In re Arnao (D. C.) 210 Fed. 395, 32 Am. Bankr. Rep. 88; Young v. City Nat. Bank (Tex. Civ. App.) 223 S. W. 340.

[255] McIntyre v. Kavanaugh, 242 U. S. 138, 37 Sup. Ct. 38, 61 L. Ed. 205, 38 Am. Bankr. Rep. 165.

[256] Baker v. Bryant Fertilizer Co. (C. C. A.) 271 Fed. 473, 46 Am. Bankr. Rep. 579; In re Keeler (D. C.) 243 Fed. 770, 40 Am. Bankr. Rep. 231; Raymond v. Cohen (N. H.) 112 Atl. 909.

[257] Brown v. Hannagan, 210 Mass. 246, 96 N. E. 714.

[258] Tindle v. Birkett, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762, 18 Am. Bankr. Rep. 121; In re Nuttall, 201 Fed. 557, 29 Am. Bankr. Rep. 800.

[259] Friend v. Talcott, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718, 30 Am. Bankr. Rep. 31.

[260] Winters v. Claitor, 54 Miss. 349.

in any legitimate way to enforce the unsatisfied balance of his claim against the bankrupt or against his after-acquired property, as if no discharge had been granted. His having proved his claim and received dividends on it does not in any way estop him from taking this course, and dividends received are to be treated merely as partial payments.[261] But of course he must account or give credit for the amount of any dividends received, and also, it seems, for dividends which he was entitled to receive and failed to receive only in consequence of his own neglect.[262] These rules apply equally in the case of a composition with creditors. A debt which would not be barred by the bankrupt's discharge in the ordinary way will not be released by the composition proceedings, although the creditor is made a party thereto, and accepts his pro rata share of the composition fund.[263]

§ 747. Effect of Discharge as to Co-Debtors and Persons Jointly Liable.—The bankruptcy act provides that "the liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."[264] This means that the liability of such persons shall not be canceled, released, diminished, or in any way affected by the discharge,[265] the intention of the statute being to make a discharge personal to the debtor, and not to release any other parties liable with him or liens not declared to be released.[266] And it is immaterial whether or not the creditor proves his claim in the bankruptcy proceedings,[267] or that he participates in a composition and consents to the discharge of the bankrupt thereby.[268] Bankruptcy proceedings, therefore, do not deprive a creditor of any right of action against third persons,[269] and the effect of the discharge in bankruptcy of one of the defendants in a pending suit is substantially the

[261] Friend v. Talcott, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718, 30 Am. Bankr. Rep. 31; Strang v. Bradner, 114 U. S. 555, 5 Sup. Ct. 1038, 29 L. Ed. 248; Standard Sewing Mach. Co. v. Kattell, 132 App. Div. 539, 117 N. Y. Supp. 32; Madison Tp. v. Dunkle, 114 Ind. 262, 16 N. E. 593; Stokes v. Mason, 10 R. I. 261, 12 N. B. R. 498; Talcott v. Harris, 18 Hun. (N. Y.) 567; Laramore v. McKinzie, 60 Ga. 532; McBean v. Fox, 1 Ill. App. 177; Katzenstein v. Reid, 41 Tex. Civ. App. 106, 91 S. W. 360. Compare Morse v. Lowell, 7 Metc. (Mass.) 152.

[262] Richmond v. Brown, 66 Me. 373.

[263] Bayly v. Washington & Lee University, 106 U. S. 11, 1 Sup. Ct. 88, 27 L. Ed. 97; In re Rodger, Fed. Cas. No. 11,991; Lewin v. Thurber, 62 Ga. 25; Leggett v. Barton, 40 N. J. Law, 83; Talcott v. Harris, 93 N. Y. 567; Scott v. Olmstead, 52 Vt. 211.

[264] Bankruptcy Act 1898, § 16.

[265] Elder v. Prussing, 101 Ill. App. 655; Ward v. Johnson, 13 Mass. 148; Edwards v. Coleman, 2 A. K. Marsh. (Ky.) 249; Hill v. Trainer, 49 Wis. 537, 5 N. W. 926; Polk v. Stephens, 118 Ark. 438, 176 S. W. 689; Bass v. Geiger, 73 Fla. 312, 73 South. 796; Levy v. Barley, 211 Ill. App. 498; First Nat. Bank v. Hoffman, 102 Kan. 465, 171 Pac. 13.

[266] Holland v. Cunliff, 96 Mo. App. 67, 69 S. W. 737.

[267] Gurley v. Robertson (Ala.) 59 South. 643.

[268] Hill v. Trainer, 49 Wis. 537, 5 N. W. 926.

[269] Mattone v. Illinois Surety Co., 123 N. Y. Supp. 236.

same as if he had died.[270] But as to a suit brought after the discharge, on a joint obligation of the bankrupt with others, the bankrupt is a necessary party to the action, because his discharge is a personal privilege which may be waived and which must be pleaded if he means to take advantage of it.[271] Where several persons jointly execute an undertaking in the name of a corporation, the fact that the creditor proved his claim in bankruptcy against the corporation does not estop him to sue on the individual liability of the persons executing the instrument.[272] The rule applies also to joint liabilities reduced to judgment. If one of two joint judgment debtors is discharged in bankruptcy, this does not affect the liability of the other,[273] or the right of the creditor to revive the judgment by scire facias against the defendant not discharged.[274] And where a discharged bankrupt applies for the cancellation of record of a judgment standing against him on a discharged debt (as is permitted by statute in some states), the court has no power to discharge the judgment as against the other defendants in the action.[275] The rule likewise applies to claims secured by lien. Thus, where one mortgages his land to secure the debt of another, the latter's discharge in bankruptcy, does not affect the mortgage or release the mortgagor.[276] So also as between the parties to negotiable instruments. The discharge in bankruptcy of the maker of a note does not release the indorser, and vice versa.[277] But a discharge obtained by a joint debtor is a bar to an action by his co-debtor for contribution.[278] Under the statutes of Washington, an adjudication of bankruptcy against a married man is also an adjudication against the community, and his discharge discharges the community.[279]

[270] Seymour v. O. S. Richardson Fueling Co., 103 Ill. App. 625.

[271] Jenks v. Opp, 43 Ind. 108. In an action against three obligors on a bond, where judgment goes for the plaintiff, the court will enter a special judgment against one of the defendants who has been discharged in bankruptcy, with a perpetual stay of execution against him. Wilcox v. Hersch (R. I.) 110 Atl. 409.

[272] Rideaour v. Mayo, 29 Ohio St. 138.

[273] Love v. McGill, 41 Tex. Civ. App. 471, 91 S. W. 246. But where a contractor, to whom material has been furnished, is discharged in bankruptcy prior to a judgment creating a lien for such material, the lien cannot thereafter be foreclosed against the property of the owner and a judgment rendered against him. Philip Carey Mfg. Co. v. Viaduct Place, 1 Ga. App. 707, 58 S. E. 274.

[274] Simpson v. Minnix, 30 App. D. C. 582.

[275] In re Quackenbush, 122 App. Div. 456, 106 N. Y. Supp. 773.

[276] Post v. Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; Security Sav. Bank v. Scott, 3 Cal. App. 687, 86 Pac. 903.

[277] Guild v. Butler, 122 Mass. 498, 23 Am. Rep. 378, 16 N. B. R. 347; King v. Central Nat. Bank, 6 Ga. 257; Pratt v. Chase, 122 Mass. 262; Harwell v. Steel, 17 Ala. 372; Dundee Nat. Bank v. Strowbridge (Sup.) 184 N. Y. Supp. 257; Commercial Bank of Boonville v. Varnum, 176 Mo. App. 78, 162 S. W. 1080.

[278] Dean v. Speakman, 7 Blackf. (Ind.) 317; Frentress v. Markle, 2 G. Greene (Iowa) 553.

[279] Gibbons v. Dexter Horton Trust & Savings Bank (D. C.) 225 Fed. 424, 35 Am. Bankr. Rep. 632.

§ 748. Same; Sureties and Guarantors.—Under the provision of the bankruptcy act that the liability of persons who are guarantors or sureties for a bankrupt shall not be "altered" by his discharge, it is held that the liability of such persons is not in any way released, changed, or diminished by the discharge of the principal debtor.[280] As to the peculiar position of sureties on an appeal bond, there has been some difference of opinion. The general rule is that the surety on such a bond is not released by the discharge in bankruptcy of the principal debtor, though the judgment was upon a debt provable and dischargeable in bankruptcy, and that, in such a case, a judgment may be rendered against the bankrupt, but with a perpetual stay of execution, which will preserve the liability of the surety.[281] Some of the decisions do not admit this rule to its fullest extent, but hold that, where the liability of the surety has become fixed before the discharge is granted to the principal, by the affirmance of the judgment appealed from or by the rendition of a judgment on the bond, then the liability of the surety is not released or affected, even though the judgment becomes inoperative as against the principal debtor.[282] But where the appeal bond is conditioned on the affirmance of the judgment or the dismissal of the appeal, and no final judgment is rendered in the action because it is terminated by the principal's discharge in bankruptcy (as, where the appeal is taken from the judgment of a justice of the peace and the bankrupt pleads his discharge in the higher court), then the liability of the surety is extinguished along with that of the principal, or rather, there is no breach of the condition of the bond on which the surety could be held liable.[283] In the case of

[280] Leader v. Mattingly, 140 Ala. 444, 37 South. 270; Boyd v. Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 986; State v. Federal Union Surety Co., 156 Mo. App. 603, 137 S. W. 613; D. C. Wise Coal Co. v. Columbia Lead & Zinc Co., 123 Mo. App. 249, 100 S. W. 680; Steinhauer & Wight v. Adair, 20 Ga. App. 733, 93 S. E. 280; Daniel v. Browder-Manget Co., 13 Ga. App. 392, 79 S. E. 237; First Nat. Bank v. Hoffman, 102 Kan. 165, 171 Pac. 13; McClintic-Marshall Co. v. City of New Bedford (Mass.) 131 N. E. 444. But a creditor suing the guarantor of the bankrupt's obligation will be subject to equities in the guarantor's favor growing out of the creditor's having collected collateral of the debtor hypothecated to it and later transferred to it by the debtor's trustee in bankruptcy at a fixed valuation. Neblett v. Cooper Grocery Co. (Tex. Civ. App.) 180 S. W. 1162.

[281] Vandiver v. American Can Co., 190 Ala. 352, 67 South. 299; Chewning v. Knight, 16 Ala. App. 357, 77 South. 969; James v. Harry Kitzenger & Co., 13 Ala. App. 448, 68 South. 582; Failor v. Wehe, 98 Kan. 325, 158 Pac. 74; Kohn, Weil & Co. v. Weinberg, 110 Miss. 275, 70 South. 353; Tutt v. Fighting Wolf Mining Co. (Mo. App.) 209 S. W. 304; Brown & Brown Coal Co. v. Antezak, 164 Mich. 110, 128 N. W. 774, 130 N. W. 305, Ann. Cas. 1912B, 778; Oberreich v. Foster, 152 Ill. App. 302; Sandusky v. Exchange Bank, 81 Ill. 353; Fisse v. Einstein, 5 Mo. App. 78; Hall v. Fowler, 6 Hill (N. Y.) 630; Knapp v. Anderson, 71 N. Y. 466.

[282] Slusher v. Hopkins, 97 S. W. 1128, 30 Ky. Law Rep. 257; St. Louis World Pub. Co. v. Rialto Grain & Securities Co., 108 Mo. App. 479, 83 S. W. 781; Williams & Freeman v. Bosworth (Miss.) 59 South. 6; Bailey v. Reeves (Miss.) 59 South. 802.

[283] Lafoon v. Kerner, 138 N. C. 281,

bonds given to release property from the lien of an attachment, the rule is modified by the consideration that an attachment lien is dissolved by operation of the bankruptcy act (in certain cases) if it attached within four months prior to the filing of the petition in bankruptcy, but not otherwise. Hence the general rule is that, if the bond makes the rendition of a judgment against the defendant in the action a condition precedent to any liability on the part of the surety, the defendant's discharge in bankruptcy will prevent the rendition of any general judgment against him, and to that extent prevent the happening of the event on which the surety's liability depends. But the court, in a proper case, may render a special judgment against the defendant, to enable the plaintiff to enforce the surety's liability on the bond, such special judgment containing a stipulation for a perpetual stay of execution against the defendant. And a proper case for the entry of such a judgment is presented when the proceeding in bankruptcy is not begun until more than four months after the laying of the attachment.[284] In regard to the somewhat similar case of a bond given to dissolve a garnishment, it has been held that the statute does not apply to the liability of a bankrupt's surety on such a bond given in a suit against the bankrupt on a provable debt, pending at the time the bankruptcy proceedings were instituted.[285] But a surety on an injunction bond given in a suit to restrain the enforcement of a judgment is not released from liability by the discharge of his principal in bankruptcy,[286] nor the surety on a forthcoming bond or redelivery bond or a claimant's bond given for goods taken on execution,[287] and the liability of a surety on a poor debtor's recognizance cannot be reduced to nominal damages by reason of the subsequent adjudication of the debtor as a bankrupt.[288] It is said, however, that the discharge in bankruptcy

50 S. E. 654; Goyer Co. v. Jones, 79 Miss. 253, 30 South. 651; Otto Young & Co. v. Howe, 150 Ala. 157, 43 South. 488; House v. Schnadig, 235 Ill. 301, 85 N. E. 395; Odell v. Wootten, 38 Ga. 224, 4 N. B. R. 183; Payne v. Able, 7 Bush (Ky.) 344, 3 Am. Rep. 316, 4 N. B. R. 220; Cisco Oil Mill v. Shepherd (Tex. Civ. App.) 183 S. W. 13.

[284] Schunack v. Art Metal Novelty Co., 84 Conn. 331, 80 Atl. 290; Crook Horner Co. v. Gilpin, 112 Md. 1, 75 Atl. 1049, 28 L. R. A. (N. S.) 233, 136 Am. St. Rep. 376; United States Wind Engine & Pump Co. v. North Penn Iron Co., 227 Pa. St. 262, 75 Atl. 1094; Butterick Pub. Co. v. E. F. Bowen Co., 33 R. I. 40, 80 Atl. 277; Rice v. Nirdlinger, 41 Pa. Super. Ct. 238; Wolf v. Stix, 99 U. S. 1, 25 L. Ed. 309. See Simon Casady & Co. v. Hartzell, 171 Iowa, 325, 151 N. W. 97.

[285] A. Klipstein & Co. v. Allen-Miles Co., 136 Fed. 385, 69 C. C. A. 229, 14 Am. Bankr. Rep. 15. But see National Surety Co. v. Medlock, 2 Ga. App. 665, 58 S. E. 1131.

[286] Stull v. Beddeo, 78 Neb. 119, 112 N. W. 315, 14 L. R. A. (N. S.) 507; Martin Furniture Co. v. Massey, 135 Tenn. 338, 186 S. W. 451.

[287] Evans v. Rea (Tex. Civ. App.) 193 S. W. 707; Pinkard v. Willis, 24 Tex. Civ. App. 69, 57 S. W. 891; Cermak v. Aldrich, 209 Ill. App. 204; Evans v. Rea, 108 Tex. 260, 191 S. W. 1133; De Loach v. Kennedy, 23 Ga. App. 736, 99 S. E. 314.

[288] Carpenter v. Goddard, 191 Mass. 54, 76 N. E. 953.

of the principal in a bail bond given by him in a civil action, before the liability of the bail became fixed, is a discharge of the bond.[289]

But the provision of the statute is not restricted to the case of sureties on bonds given in judicial proceedings. It applies so as to prevent the release of a surety on a note by the discharge of the principal debtor,[290] and to the case of one who has guarantied the payment of the rent reserved in a lease to the bankrupt,[291] and to the surety on a bond given by a contractor for the erection of a bridge or building, the construction of a road, or other work.[292] The statute is not even restricted to cases of technical suretyship. Thus, where a partnership is dissolved and the debts are assumed by one of the partners, he becomes the principal debtor and the other partner assumes a position analogous to that of a surety. If then the principal debtor is discharged in bankruptcy, this will not release the other partner.[293] So, where a wife executes a mortgage on her own real estate for the purpose of securing the individual debt of her husband, she is his surety to the extent of the property which she mortgages, and the mortgage is not released by the husband's discharge in bankruptcy from the debt secured.[294]

§ 749. Same; Contribution Between Sureties.—A discharge in bankruptcy cannot be pleaded in defense to an action brought by one co-surety against another for contribution, when the entire debt of the principal, for which the parties were jointly bound as sureties, was paid by the plaintiff, thus founding his right to contribution, after the discharge of the defendant.[295] But if the obligation to make contribution became a fixed liability of the defendant before his discharge, it would naturally be a provable claim against his estate in bankruptcy, and so would be released by the discharge.

§ 750. Partnership and Individual Debts.—Where one member of a partnership files his voluntary petition in bankruptcy, seeking a discharge from both individual and firm debts, and lists both classes of debts

[289] Keyes v. Bennett, 218 Ill. 625, 75 N. E. 1075, affirming 122 Ill. App. 60. And see Almon H. Fogg Co. v. Bartlett, 106 Me. 122, 75 Atl. 380, 138 Am. St. Rep. 338; Jones v. State, 28 Ark. 119.

[290] Mace v. Wells, 7 How. 272, 12 L. Ed. 698; Hardy v. Carter, 8 Humph. (Tenn.) 153; Wolfboro Loan & Banking Co. v. Rollins, 195 Mass. 323, 81 N. E. 204; Cilley v. Colby, 61 N. H. 63; Buchholz v. Feustel, 179 Ill. App. 396.

[291] Witthaus v. Zimmermann, 91 App. Div. 202, 86 N. Y. Supp. 315; Dersch v. Walker, 89 S. W. 233, 28 Ky. Law Rep. 325; Rafferty v. Klein, 256 Pa. 481, 100 Atl. 945.

[292] Empire State Surety Co. v. City of Des Moines, 152 Iowa, 531, 131 N. W. 870, 132 N. W. 837; Kimmel v. State (Ind. App.) 130 N. E. 239.

[293] Schmitt v. Greenberg, 58 Misc. Rep. 570, 109 N. Y. Supp. 881.

[294] Burtis v. Wait, 33 Kan. 478, 6 Pac. 783.

[295] Dunn v. Sparks, 1 Ind. 397, 50 Am. Dec. 473; s. c., 7 Ind. 490; Dole v. Warren, 32 Me. 94, 52 Am. Dec. 640; Wyckoff v. Gardner (N. J.) 5 Atl. 801; Goss v. Gibson, 8 Humph. (Tenn.) 197; Liddell v. Wiswell, 59 Vt. 365, 8 Atl. 680; Byers v. Alcorn, 6 Ill. App. 39; Smith v. Hodson, 50 Wis. 279, 6 N. W. 812.

in his schedule, and is adjudged bankrupt, but no adjudication is made against the partnership as such, the creditors of the firm may prove their debts against the bankrupt, and cause his interest in the firm property to be subjected to the payment thereof; and if a proper foundation is laid in the pleadings and notices to creditors, the discharge granted to the bankrupt will release him from both classes of debts.[296] But if neither the petition for adjudication, the notice to creditors, nor the application for discharge makes any reference to partnership liabilities, or asks relief against firm debts, such debts will not be affected by the discharge.[297] In the individual bankruptcy of one partner, his co-partner may prove a claim against him for a liability growing out of the partnership affairs, if it is fixed and certain or capable of being liquidated, and the omission to prove it in this case will bring it within the operation of the discharge.[298] But where the partner in bankruptcy had assumed and agreed to pay the firm debts, on a previous dissolution, and a judgment is entered on a firm debt, which the other partner is compelled to pay, but after the commencement of the bankruptcy proceedings, and hence not in time for proof and allowance, the partner so paying may maintain an action to recover the amount paid, notwithstanding the discharge of the bankrupt.[299] Where one partner thus secures his release from the firm debts, the defense is personal to him and available only so far as his individual liability is concerned, and will not ordinarily affect the responsibility of the other partners.[300] But it has been held that a discharge in bankruptcy of one partner on a firm debt is a good defense to an action against the two partners to renew a judgment on a partnership debt, where it appeared that the process in the action was served only on the partner who had been discharge, and where the firm had been dissolved many years before, and the judgment creditor had actual knowledge that it had assigned the firm and individual property under the state insolvency law,

[296] Lesser v. Gray, 236 U. S. 70, 35 Sup. Ct. 227, 59 L. Ed. 666, 34 Am. Bankr. Rep. 8; Gordon v. Texas Co., 119 Me. 49, 109 Atl. 368; In re Diamond, 149 Fed. 407, 79 C. C. A. 227, 17 Am. Bankr. Rep. 563; In re Kaufman, 136 Fed. 262, 14 Am. Bankr. Rep. 393; Jarecki Mfg. Co. v. McElwaine, 107 Fed. 249, 5 Am. Bankr. Rep. 751; In re Laughlin, 96 Fed. 589, 3 Am. Bankr. Rep. 1; Loomis v. Wallblom, 94 Minn. 392, 102 N. W. 1114, 69 L. R. A. 771, 3 Ann. Cas. 798; New York Institution for Instruction of Deaf and Dumb v. Crockett, 117 App. Div. 269, 102 N. Y. Supp. 412; Berry Bros. v. Sheehan, 115 App. Div. 488, 101 N. Y. Supp. 371. But compare In re Gruber, 129 App. Div. 297, 113 N. Y. Supp. 923; Dodge v. Kaufman, 46 Misc. Rep. 248, 91 N. Y. Supp. 727. And see Murphy v. Nicholson, 87 N. J. Law, 278, 94 Atl. 62.

[297] In re McFaun, 96 Fed. 592, 3 Am. Bankr. Rep. 66.

[298] Dycus v. Brown, 135 Ky. 140, 121 S. W. 1010, 28 L. R. A. (N. S.) 190.

[299] Ogilby v. Munro, 52 Misc. Rep. 170, 101 N. Y. Supp. 753; Hefner v. Hefner, 26 S. D. 704, 127 N. W. 634.

[300] Kimmel v. State (Ind. App.) 130 N. E. 239.

and where it did not appear that any firm assets existed, provided that the claim was properly scheduled and notice thereof duly given.[301]

But individual partners cannot be discharged from partnership debts under an adjudication against the partnership only; and the discharge of a firm, where the partners are not severally adjudicated bankrupt, does not release them personally from the partnership debts.[302] If some of the members of a bankrupt firm wrongfully converted stock certificates, so as to create a liability for "willful and malicious injury to the property of another," not dischargeable in bankruptcy, those members of the firm who did not participate in such wrongful acts are nevertheless not released from liability for such debts by the discharge in bankruptcy.[303]

§ 751. Discharge of Corporation and Effect on Liabilities of Officers and Stockholders.—Since the effect of a discharge in bankruptcy is to release only the bankrupt's personal liability, and since the sixteenth section of the bankruptcy act expressly provides that "the liability of a person who is co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt," the discharge of a bankrupt corporation does not release its stockholders, directors, or officers from any statutory liability imposed upon them to be answerable, in whole or in part, for the debts of the corporation; and if the law of the state makes the recovery of a judgment against the corporation a prerequisite to any proceeding against the stockholders or officers, the discharge of the corporation will not prevent creditors from subsequently taking judgment against it in a state court in such limited form as may enable them to enforce the secondary liability of the stockholders or officers.[304] And the fact that creditors may have proved their claims in bankruptcy against the corporation, and received dividends thereon, does not prevent them from collecting the unpaid balance in this way.[305] Further, the fact that a

[301] Loomis v. Wallblom, 94 Minn. 392, 102 N. W. 1114, 69 L. R. A. 771, 3 Ann. Cas. 798.

[302] In re Pincus, 147 Fed. 621, 17 Am. Bankr. Rep. 331; In re Bertenshaw, 157 Fed. 363, 19 Am. Bankr. Rep. 577; Schroeder v. Frey, 60 Hun, 58, 14 N. Y. Supp. 71; Wm. R. Moore Dry Goods Co. v. Ford (Ark.) 225 S. W. 320. But see Young v. Stevenson, 73 Ark. 480, 84 S. W. 623. And compare Abbott v. Anderson, 184 Ill. App. 598.

[303] Kavanaugh v. McIntyre, 210 N. Y. 175, 104 N. E. 135.

[304] In re Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468; s. c., 95 Fed. 419, 2 Am. Bankr. Rep. 653; Elsbree v. Burt, 24 R. I. 322, 53 Atl. 60; Way v. Barney, 116 Minn. 285, 133 N. W. 801, 38 L. R. A. (N. S.) 648, Ann. Cas. 1913A, 719; Chickasaw Hotel Co. v. C. B. Barker Const. Co., 135 Tenn. 305, 186 S. W. 115, L. R. A. 1916F, 106.

[305] First Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563.

corporation has been adjudged bankrupt does not relieve stockholders of debts contracted as partners.[306]

§ 752. **Effect of Discharge as to Securities and Liens.**—While a discharge in bankruptcy releases the debtor from personal liability for the debts proved and frees his after-acquired property from the claims of creditors, it does not divest or in any way affect a valid lien existing on property of the bankrupt, provided, first, that the lien is not of the kind stricken down by the commencement of bankruptcy proceedings within four months after its inception, and second, that the property has not been brought within the jurisdiction of the bankruptcy court and administered by it.[307] In the latter case, of course, the rights of the lien creditor will be adequately safeguarded.[308] And where a debt is discharged in bankruptcy pending an action in a state court to recover the same, and there is a lien created by law incident to such debt, a plea in bar of further proceedings in the case will not preclude the court from rendering such a judgment as may be necessary to enable the plaintiff to enforce the lien.[309] This rule applies (among others) to mechanics' liens,[310] and to a vendor's lien for purchase money, where such a lien is recognized by the laws of the particular state,[311] and to an equitable lien,[312] and to a suit by a creditor to enforce a trust in land held by the debtor's wife.[313] So, a discharge in bankruptcy se-

[306] Virginia-Carolina Chemical Co. v. Fisher, 58 Fla. 377, 50 South. 504.

[307] Butler Cotton Oil Co. v. Collins (Ala.) 75 South. 975; Gray v. Bank of Hartford, 137 Ark. 232, 208 S. W. 302; American Improvement Co. v. Lilienthal (Cal. App.) 184 Pac. 692; Wills v. E. K. Wood Lumber & Mill Co., 29 Cal. App. 97, 154 Pac. 613; Frey v. McGaw, 127 Md. 23, 95 Atl. 960, L. R. A. 1916D, 113; Paxton v. Scott, 66 Neb. 385, 92 N. W. 611; Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233; Taylor v. Marshall, 153 Ill. App. 409; Morganstein v. Commercial Nat. Bank, 125 Ill. App. 397; McDonald v. H. E. Taylor & Co., 144 App. Div. 329, 128 N. Y. Supp. 1048; Wyckoff v. Williams, 136 App. Div. 495, 121 N. Y. Supp. 189; Stevenson v. Bird, 168 Ala. 422, 53 South. 93; Newberry Shoe Co. v. Collier, 111 Va. 288, 68 S. E. 974; John Leslie Paper Co. v. Wheeler, 23 N. D. 477, 137 N. W. 412, 42 L. R. A. (N. S.) 292; Causey Lumber Co. v. Connor, 6 Ga. App. 444, 65 S. E. 194; McCall v. Herring, 116 Ga. 235, 42 S. E. 468; Philmon v. Marshall, 116 Ga. 811, 43 S. E. 48; Evans v. Rounsaville, 115 Ga. 684, 42 S. E. 100; Smith v. Zachry, 115 Ga. 722, 42 S. E. 102; Darling v. Woodward, 54 Vt. 101.

[308] First Nat. Bank v. Hoffman, 102 Kan. 465, 171 Pac. 13.

[309] Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417.

[310] Jensen v. Dorr, 23 Cal. App. 701, 139 Pac. 659; Chickasaw Hotel Co. v. C. B. Barker Const. Co., 135 Tenn. 205, 186 S. W. 115, L. R. A. 1916F, 106; Holland v. Cunliff, 96 Mo. App. 67, 69 S. W. 737; McCullough v. Caldwell, 5 Ark. 237; Jensen v. Dorr, 159 Cal. 742, 116 Pac. 553. See Ricks v. Smith, 20 Ga. App. 491, 93 S. E. 116.

[311] Graves v. Coutant, 31 N. J. Eq. 763; White v. Hartman, 26 Colo. App. 475, 145 Pac. 716. See Graham v. Richerson, 115 Ga. 1002, 42 S. E. 374; Pace v. Berry, 176 Ky. 61, 195 S. W. 131.

[312] Eisman v. Whalen, 39 Ind. App. 350, 79 N. E. 514, 1072.

[313] Evans v. Staalle, 88 Minn. 253, 92 N. W. 951.

cured by the debtor in a judgment, without notice to an attorney, who had filed a lien against the judgment for his fee, no mention of the lien having been made in the schedule of debts, does not discharge the attorney's interest in the judgment or bar his right to use the judgment to collect the amount of his lien.[314] And the right created by the assignment, as security, of one's expectancy in the estate of his living ancestor is a lien enforceable against him after his discharge in bankruptcy.[315] But the right of a judgment creditor to proceed under a state statute to reach the excess above the statutory homestead valuation of the homestead of the debtor is destroyed by the latter's discharge in bankruptcy, if the judgment was based on a claim provable in bankruptcy, and no proceedings to reach the homestead had been begun at the time of the discharge.[316]

In regard to an assignment of wages, it appears that a discharge in bankruptcy will not defeat the right of the assignee to recover the wages in so far as the same have been earned and assigned before the discharge,[317] though it will release the bankrupt from personal liability.[318] But an assignment, as security for a debt, of wages thereafter to be earned by the debtor, either under a general or specific employment, creates no lien until the wages have been earned, and where, before that time, the debtor is adjudged a bankrupt and is subsequently discharged, the debt is extinguished from the date of the adjudication, and no lien arises as to wages earned thereafter, but the same become the property of the bankrupt free from the claims of all his creditors, including the assignee.[319]

§ 753. Same; Attachment and Garnishment.—In certain circumstances the bankruptcy act destroys the lien of an attachment levied within four months prior to the institution of bankruptcy proceedings.

[314] Lown v. Casselman (N. D.) 141 N. W. 73.

[315] Bridge v. Kedon, 163 Cal. 493, 126 Pac. 149, 43 L. R. A. (N. S.) 404; Dumont, Roberts & Co. v. McDougal, 200 Ill. App. 583.

[316] Boggs v. Dunn, 160 Cal. 283, 116 Pac. 743.

[317] Wabash R. Co. v. Meyer, 119 Ill. App. 108; Raulins v. Levi, 232 Mass. 42, 121 N. E. 500.

[318] Mitchell v. Leland, 190 Mass. 258, 76 N. E. 670.

[319] Draeger v. Wisconsin Steel Co., 194 Ill. App. 440; Hupp v. Union Pac. R. Co., 99 Neb. 654, 157 N. W. 343, L. R. A. 1916E, 247; Rate v. American Smelting & Refining Co., 56 Mont. 277, 184 Pac. 478; In re West, 128 Fed. 205, 11 Am. Bankr. Rep. 782; In re Home Discount Co., 147 Fed. 538, 17 Am. Bankr. Rep. 168; In re Ludeke, 171 Fed. 292, 22 Am. Bankr. Rep. 467; Leitch v. Northern Pac. Ry. Co., 95 Minn. 35, 103 N. W. 704, 5 Ann Cas. 63; Levi v. Loevenhart & Co., 138 Ky. 133, 127 S. W. 748, 30 L. R. A. (N. S.) 375, 137 Am. St. Rep. 377. But compare Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233; Citizens' Loan Ass'n v. Boston & M. R. R., 196 Mass. 528, 82 N. E. 696, 14 L. R. A. (N. S.) 1025, 124 Am. St. Rep. 584, 13 Ann. Cas. 365. And see Monarch Discount Co. v. Chesapeake & O. Ry. Co., 285 Ill. 233, 120 N. E. 743.

Where these circumstances concur, and the debt in question is one provable in the bankruptcy, not only will the lien of the attachment be dissolved, but the liability of sureties on a bond given to dissolve the attachment will be released by the debtor's discharge in bankruptcy.[320] But in cases where the attachment was levied more than four months before the bankruptcy and is otherwise valid, it will not be dissolved or released by the discharge of the bankrupt, though the original debt may be extinguished thereby.[321] In that case, the plaintiff in attachment is entitled to the entry of a special judgment enforceable only against the attached property and an execution in accordance therewith.[322] And a judgment against the bankrupt which is specified to be enforceable against certain attached property and not otherwise, though in form a judgment for money, sufficiently recognizes the effect of his discharge and protects him against any unsatisfied balance of the debt after execution sale.[323] If the attached property has already been released, on the execution of a forthcoming bond, recognizance, or other obligation permitted by the local practice, there is nothing in the bankruptcy act to prevent the rendition of a formal judgment against the bankrupt defendant, with a perpetual stay of execution, so as to enable the plaintiff to proceed against the sureties on such bond or obligation.[324] The rules are much the same in the case of a garnishment. In some states, the interest which the plaintiff acquires in the property or credits of the defendant, by service of garnishee process on a person liable to the defendant as a debtor or a custodian of his property, is recognized as a lien, and an action pending to recover a debt which has been discharged in bankruptcy, having a garnishee action incidental thereto, will survive

320 Windisch-Muhlhauser Brewing Co. v. Simms, 129 La. 134, 55 South. 739; Sanderson v. Buckley, 111 Miss. 748, 72 South. 148.

321 In re Blumberg, 94 Fed. 476, 1 Am. Bankr. Rep. 633; Grandin v. First Nat. Bank, 70 Neb. 730, 98 N. W. 70; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770; Sims v. Jacobson, 51 Ala. 186. Where the bankrupt, sued more than four months before the petition, deposited with plaintiff's counsel a sum of money which was to stand in lieu of an attachment, the discharge in bankruptcy barred the creditor's right to such fund, there being no lien perfected by injunction or attachment. Fingold v. Schachter, 223 Mass. 274, 111 N. E. 903.

322 Stickney & Babcock Coal Co. v. Goodwin, 95 Me. 246, 49 Atl. 1039, 85 Am. St. Rep. 408; American Agricultural Chemical Co. v. Huntington, 99 Me. 361, 59 Atl. 515; Johnson v. Collins, 116 Mass. 392; Stockwell v. Silloway, 113 Mass. 382; Bosworth v. Pomeroy, 112 Mass. 293; Bates v. Tappan, 99 Mass. 376; Davenport v. Tilton, 10 Metc. (Mass.) 320.

323 F. Mayer Boot & Shoe Co. v. Ferguson, 19 N. D. 496, 126 N. W. 110.

324 Hill v. Harding, 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083; C. D. Smith & Co. v. Lacey, 86 Miss. 295, 38 South. 311, 109 Am. St. Rep. 707; Barnstable Sav. Bank v. Higgins, 124 Mass. 115; Danforth Mfg. Co. v. M. L. Barrett & Co., 138 Ill. App. 244. See Hamilton v. Bryant, 114 Mass. 543, 14 N. B. R. 479; Carpenter v. Turrell, 100 Mass. 450; Van Zandt Jacobs & Co. v. Steiber, 90 Conn. 507, 97 Atl. 763; Tormey v. Miller, 31 Cal. App. 469, 160 Pac. 858; Light v. Hunt, 17 Ga. App. 491, 87 S. E. 763.

the discharge, so far as to permit a judgment in form against the defendant, enforceable as to the equitable lien secured in the garnishee action.[325] And if so broad a rule as this might not be recognized in all jurisdictions, at least it is held that where a judgment lien has been obtained against the property of the garnishee, the discharge in bankruptcy of the principal debtor will not release the lien.[326]

§ 754. Same; Lien by Creditor's Suit.—A suit by a judgment creditor to set aside an alleged fraudulent conveyance and subject the property to his claim is not barred by the discharge in bankruptcy of the debtor pending the action,[327] but the suit may proceed as an action in rem against the property affected and on which it creates a lien, although the person and future assets of the debtor have been exonerated by the discharge,[328] provided, of course, that the land in suit has not been brought within the jurisdiction of the court of bankruptcy and there administered.[329] So, the lien obtained on an equitable interest of a judgment debtor by the institution of a creditor's action to reach such interest is not lost by the subsequent discharge in bankruptcy of the judgment debtor.[330]

§ 755. Same; Mortgages.—Since a bankrupt's equity of redemption in mortgaged premises, if it has any value, is an asset which must be made available for the satisfaction of his general creditors,[331] it is within the jurisdiction of the court of bankruptcy to stay a pending foreclosure of the mortgage in a state court,[332] to allow the trustee to redeem from the mortgage,[333] or to order the sale of the mortgaged property either subject to the mortgage or free from its lien.[334] But if the rights of the mortgage creditor are not in some such way brought into the

[325] Bank of Commerce v. Elliott, 109 Wis. 648, 85 N. W. 417; Ulner v. Doran, 167 App. Div. 259, 152 N. Y. Supp. 655; Friedman v. Gibbons, 101 Misc. Rep. 356, 167 N. Y. Supp. 685; Rosen v. Wygand, 174 N. Y. Supp. 672.

[326] Marx v. Hart, 166 Mo. 503, 66 S. W. 260, 89 Am. St. Rep. 715; Holland v. Cunliff, 96 Mo. App. 67, 69 S. W. 737. But see Jefferson Transfer Co. v. Hull, 166 Wis. 438, 166 N. W. 1.

[327] Bunch v. Smith, 116 Tenn. 201, 93 S. W. 80; Flint v. Chaloupka, 78 Neb. 594, 111 N. W. 465, 13 L. R. A. (N. S.) 309, 126 Am. St. Rep. 639.

[328] Phelps v. Curts, 80 Ill. 109, 16 N. B. R. 85; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 494.

[329] Flint v. Chaloupka, 78 Neb. 594, 111 N. W. 465, 13 L. R. A. (N. S.) 309, 126 Am. St. Rep. 639.

[330] Wahlheimer v. Truslow, 106 App. Div. 73, 94 N. Y. Supp. 137. But see Bowen & Thomas v. Keller, 130 Ga. 31, 60 S. E. 174, 124 Am. St. Rep. 164, as to a suit in rem by a creditor (not holding a lien) to reach exempt property of the bankrupt, homestead rights having been waived as to the particular debt.

[331] Supra, § 325.

[332] Supra, §§ 190, 569.

[333] Supra, §§ 305, 570.

[334] Supra, §§ 470, 471, 571. Where the maker of notes secured by a chattel mortgage filed his petition in bankruptcy, and the holder was allowed his claim against the bankrupt estate, and the mortgaged property was sold by the bankrupt's trustee under agreement with the holder, the discharge in bankruptcy would release any unsold property from the lien. First Nat. Bank v. Hoffman, 102 Kan. 465, 171 Pac. 13.

bankruptcy court for adjudication, or voluntarily submitted by him to that court, and assuming the mortgage not to be voidable as either a preference or a fraudulent transfer of property, then the lien of it is not divested or in any way affected by the discharge of the mortgagor in bankruptcy, though the debt secured be provable and so dischargeable.[335] And although a discharge in bankruptcy frees the after-acquired property of the bankrupt from liability for his prior debts, so that it cannot be taken in execution for them, yet it does not affect the lien of a mortgage previously made by the bankrupt, for a valuable consideration on a contingent interest which vests after the discharge,[336] or on a new or more perfect title subsequently acquired by the bankrupt to the same property.[337] And where a deed to land executed by the defendant was in fact a mortgage, the fact that his equity was not scheduled as a part of his assets in subsequent bankruptcy proceedings is no ground for an adjudication of the fee title in the plaintiff after the discharge of the trustee in bankruptcy.[338] But a discharge of the mortgagor in bankruptcy pending foreclosure proceedings will prevent the subsequent rendition of a decree for the deficiency.[339] Where, however, the mortgagor went through bankruptcy and obtained his discharge, without the mortgagee having any notice of the bankruptcy proceedings, and, in a foreclosure suit, the mortgagor failed to appear and plead his discharge, it was held that a deficiency decree was properly entered against him.[340]

§ 756. **Effect of Discharge on Rights as to Judgment and Execution.** —A judgment recovered against the bankrupt before the filing of the petition is a provable debt against his estate and therefore will be barred by his discharge; and the fact that he went into bankruptcy for the express purpose of avoiding a particular judgment does not limit the legal effect of the discharge.[341] But the lien of a judgment rendered, or of an execution levied, more than four months before the commencement

[335] Fleitas v. Richardson, 147 U. S. 550, 13 Sup. Ct. 495, 37 L. Ed. 276; Butler Cotton Oil Co. v. Collins, 200 Ala. 217, 75 South. 975; Copper Belle Min. Co. v. Costello, 12 Ariz. 318, 100 Pac. 807; Security Sav. Bank v. Scott, 3 Cal. App. 687, 86 Pac. 903; Stewart-Noble Drug Co. v. Bishop-Babcock-Becker Co., 62 Colo. 197, 162 Pac. 159; McBride v. Gibbs, 148 Ga. 380, 96 S. E. 1004; Camp v. Young, 119 Ga. 981, 47 S. E. 560; Johnson v. Whitley Grocery Co., 112 Ga. 449, 37 S. E. 766; Catterlin v. Armstrong, 101 Ind. 258; Schexnailder v. Fontenot, 147 La. 467, 85 South. 207; Laurel Oil & Fertilizer Co. v. Horne, 101 Miss. 629, 57 South. 624, 58 South. 652; Hoeffler Mfg. Co. v. Machajewski, 163 Wis. 184, 157 N. W. 702.

[336] Oliphint v. Eckerley, 36 Ark. 69; Haggerty v. Byrne, 75 Ind. 499; Bisby v. Walker, 185 Iowa, 743, 169 N. W. 467.

[337] Haggerty v. Byrne, 75 Ind. 499; Adam v. McClintock, 21 N. D. 483, 131 N. W. 394.

[338] Horn v. Bates (Ky.) 114 S. W. 763.

[339] Prentis v. Richardson's Estate, 118 Mich. 259, 76 N. W. 381.

[340] Hanson v. Smith, 187 Ill. App. 350.

[341] Finnegan v. Hall, 35 Misc. Rep. 773, 72 N. Y. Supp. 347; Kruegel v. Murphy & Bolanz (Tex. Civ. App.) 177 S. W. 1018.

of the bankruptcy proceedings is not extinguished by the discharge, where the holder of the judgment does not prove it as a debt against the estate,[342] or where the property affected did not pass to the trustee in bankruptcy as a part of the estate by reason of a right of homestead exemption existing at the date of the adjudication,[343] and even though a judgment creditor proves his claim against the estate, but receives nothing therefrom, if there is nothing to show that he has surrendered or waived the lien of his judgment on land not sold by the trustee, such lien will not be affected by the discharge.[344]

If a judgment is rendered against a debtor after he is adjudged a bankrupt, but before the granting of his discharge, the judgment is canceled by the discharge in so far as concerns the personal liability of the debtor and his after-acquired property, provided the debt in suit existed as a provable claim at the commencement of the bankruptcy proceedings and was of such a character that it would be released by the discharge.[345] Under former bankruptcy laws it was sometimes argued, in cases of this kind, that although the original debt might be provable and dischargeable in bankruptcy, yet the rendition of the judgment constituted a new debt, merging the original claim, and the judgment could not be affected by the discharge, not being a provable debt because not in existence at the commencement of the proceedings. But the courts refused to allow this contention.[346] And the point is met by the provision of the present bankruptcy act that provable claims against an estate shall include such as are "founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge."[347] And the application of the rule is not altered by the fact that the bankrupt, having a suit pend-

[342] Camp v. Young, 119 Ga. 981, 47 S. E. 560; Pinkard v. Willis, 24 Tex. Civ. App. 69, 57 S. W. 891; Bassett v. Thackara, 72 N. J. Law, 81, 60 Atl. 39; Hillyer v. Le Roy, 84 App. Div. 129, 82 N. Y. Supp. 80; Pickert v. Eaton, 81 App. Div. 423, 81 N. Y. Supp. 50; Realty Co. v. Gioshio, 50 Pa. Super. Ct. 185.

[343] Gregory Co. v. Cale, 115 Minn. 508, 133 N. W. 75, 37 L. R. A. (N. S.) 156; Kener v. La Grange Mills, 135 Ga. 730, 70 S. E. 245; McBride v. Gibbs, 148 Ga. 380, 96 S. E. 1004.

[344] McCarty v. Light, 155 App. Div. 36, 139 N. Y. Supp. 853; Oilfields Syndicate v. American Improvement Co. (D. C.) 256 Fed. 979, 43 Am. Bankr. Rep. 325; Olsen v. Nelson, 125 Minn. 286, 146 N. W. 1097.

[345] Boynton v. Ball, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985; Cavanaugh v. Fenley, 94 Minn. 505, 103 N. W. 711, 110 Am. St. Rep. 382; Grosso v. Marx, 45 Misc. Rep. 500, 92 N. Y. Supp. 773; Aiken v. Haskins, 34 Misc. Rep. 505, 70 N. Y. Supp. 293; Jensen v. Dorr, 159 Cal. 742, 116 Pac. 553; H. T. Hackney Co. v. Noe, 146 Ky. 818, 143 S. W. 418; Smith v. Kinney, 6 Neb. 447; Huntington v. Saunders, 166 Mass. 92, 43 N. E. 1035; Sanderson v. Daily, 83 N. C. 67; Curtis v. Slosson, 6 Pa. St. 265; Locheimer v. Stewart, 91 Tenn. 385, 19 S. W. 21, 30 Am. St. Rep. 887; Downer v. Rowell, 26 Vt. 397; Blair v. Carter, 78 Va. 621; Leonard v. Yohnk, 68 Wis. 587, 32 N. W. 702, 60 Am. Rep. 884; Valdosta Guano Co. v. Green & Sutton, 149 Ga. 610, 101 S. E. 538.

[346] Braman v. Snider, 21 Fed. 871; Mulhagen v. Carter, 6 Ky. Law Rep. 735.

[347] Bankruptcy Act 1898, § 63a, cl. 5.

ing against him at the time of the adjudication, omits to bring such adjudication to the notice of the court or to ask for a stay of the proceedings, but defends on the merits. None the less, if the judgment is rendered before the discharge is granted it will be barred thereby.[348] There has, however, been some uncertainty as to the method of claiming the benefit of a discharge as against a previous outstanding judgment. Clearly, an execution issued on such a judgment cannot be enforced against any property of the bankrupt acquired after the discharge,[349] and it is said that the officer holding the writ must take notice of the bankruptcy of the defendant, and disregard all property which is not subject to the specific lien of the judgment.[350] And the creditor has no right to have process issued for the enforcement of a judgment which is barred or released by the discharge in bankruptcy,[351] and if he applies for leave to issue execution it will be denied.[352] But if nevertheless execution is issued on the judgment, it has been held that it is not void, but only voidable at the instance of the bankrupt,[353] and he cannot (unless some local statute authorizes it) move to have the discharge entered of record for the purpose of preventing the issue of an execution not actually sued out.[354] But it seems he may move to have an outstanding execution stayed or quashed.[355] And according to the best modern doctrine, it is the right of the bankrupt, on motion, and without waiting for process on the judgment to be issued, to have its execution enjoined or perpetually stayed.[356] The discharge in bankruptcy will

[348] Boynton v. Ball, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985; Pine Hill Coal Co. v. Harris, 86 Ky. 421, 6 S. W. 24; Anderson v. Anderson, 65 Ga. 518, 38 Am. Rep. 797; Widner v. Yeast, 32 Kan. 400, 4 Pac. 838; Williams v. Humphreys, 50 N. J. Law, 500, 14 Atl. 583; Rogers v. Western Marine & Fire Ins. Co., 1 La. Ann. 161; West Philadelphia Bank v. Gerry, 106 N. Y. 467, 13 N. E. 453; Zumbro v. Stump, 38 W. Va. 325, 18 S. E. 443.

[349] Peterson v. Calhoun, 137 Ga. 799, 74 S. E. 519; Brooks v. Eblen, 106 S. W. 308, 32 Ky. Law Rep. 543; Ford v. Blackshear Mfg. Co., 140 Ga. 670, 79 S. E. 576. This rule applies to executions issued under Code Civ. Proc. N. Y. § 1391, as to an execution against wages being a lien and continuing levy upon wages due or to become due, and the debtor's discharge in bankruptcy, the judgment having been duly proven and allowed, frees his salary from the effects of such an execution in so far as concerns payments subsequent to the date of the adjudication. Brenen v. Dahlstrom Metallic Door Co., 189 App. Div. 685, 178 N. Y. Supp. 846.

[350] McCance v. Taylor, 10 Grat. (Va.) 580.

[351] Kruegel v. Murphy & Bolanz, 59 Tex. Civ. App. 482, 126 S. W. 680.

[352] Cohen v. Pinkus, 126 App. Div. 792, 111 N. Y. Supp. 82.

[353] Cogburn v. Spence, 15 Ala. 549, 50 Am. Dec. 140; Roden v. Jaco, 17 Ala. 344. Compare Ewing v. Peck, 26 Ala. 413.

[354] Brown v. Branch Bank at Montgomery, 20 Ala. 420.

[355] Cogburn v. Spence, 15 Ala. 549, 50 Am. Dec. 140; Alabama Great Southern Ry. Co. v. Crawley, 118 Miss. 272, 79 South. 94. But where, pending a motion by a judgment defendant to quash an execution on the ground of his discharge in bankruptcy, plaintiff issues a pluries execution, which defendant voluntarily pays, under no mistake as to his rights, he cannot recover it. Ewing v. Peck, 26 Ala. 413.

[356] Barnes Mfg. Co. v. Norden, 67 N. J. Law, 493, 51 Atl. 454; Chamberlain

also be a complete defense to an action on the judgment,[357] or to a writ of scire facias to revive it,[358] or an order in supplemental proceedings requiring the bankrupt to pay it,[359] or a proceeding in rem in equity against exempt property set apart to the bankrupt.[360] And although it is a general rule that a discharge in bankruptcy is personal and can be pleaded by the bankrupt alone, yet this does not apply to a third person holding title to land derived from the bankrupt, when the attempt is made to subject it to the lien of a judgment recovered against the bankrupt after his adjudication but before his discharge. Here the owner is entitled to defend his own title by defending that of his vendor, and this can be done only by setting up the discharge in bankruptcy.[361] But whenever the attempt is made to escape liability on a judgment so rendered, the creditor may show, if such is the fact, that the debt or claim in suit was of such a character as to be excepted from the operation of the discharge.[362]

If the action is still pending at the time of the granting of a discharge in bankruptcy, it is the right of the defendant to plead the discharge in bar of its further prosecution, and the effect is to preclude the court from entering any personal decree against him.[363] But an order on a discharge in bankruptcy providing that it shall not affect a certain pending case until final judgment therein, and that as to such judgment the discharge shall have the same force as it would have had if the judgment had been recovered after the application for discharge and before the granting of the same, permits the prosecution of such suit.[364]

v. Gurney, 1 How. Prac. (N. Y.) 238; Parks v. Goodwin, 1 Mich. 35; Crocker v. Bergh, 118 Minn. 316, 136 N. W. 737; Ziegler v. Suggit, 118 Minn. 74, 136 N. W. 411; Dick v. Powell, 2 Swan (Tenn.) 632; In re Levitan (D. C.) 224 Fed. 241, 34 Am. Bankr. Rep. 789; Morris v. Perkins, 148 Ga. 554, 97 S. E. 526; Strickland v. Brown, 19 Ga. App. 73, 90 S. E. 1039.

[357] Locheimer v. Stewart, 91 Tenn. 385, 19 S. W. 21, 30 Am. St. Rep. 887; McDonald v. Davis, 105 N. Y. 508, 12 N. E. 40.

[358] Troop v. Griffin, 180 Pa. St. 452, 36 Atl. 865; Morrow v. Pfleiderer, 4 Ohio App. 283. Where plaintiff's judgment was scheduled by the bankrupt, and plaintiff satisfied it of record on the bankrupt's assigning to him a judgment against a third person, which transaction was in violation of Bankruptcy Act, § 29b, cl. 4, and thereafter the plaintiff asked to have his judgment reinstated because the defendant had made fraudulent representations as to the judgment assigned, it was held that, because of the fraud of both parties, they should be left in the same position as they were after the satisfaction of the judgment. Wetter v. Russell, 104 Misc. Rep. 599, 172 N. Y. Supp. 224.

[359] Gardiner v. Ross, 19 S. D. 497, 104 N. W. 220.

[360] Richards v. Shields, 138 Ga. 583, 75 S. E. 602; Blair v. Carter's Adm'r, 78 Va. 621.

[361] Blair v. Carter's Adm'r, 78 Va. 621. As to the enforcement of the judgment against property which had been fraudulently conveyed by the bankrupt, see Deposit Nat. Bank v. Hay, 262 Pa. 388, 105 Atl. 463.

[362] Linn v. Hamilton, 34 N. J. Law, 305; Taylor v. Buser (Sup.) 167 N. Y. Supp. 887.

[363] Phelps v. Curts, 80 Ill. 109, 16 N. B. R. 85.

[364] Standard Sewing Mach. Co. v. Alexander, 68 S. C. 506, 47 S. E. 711.

And even as against a plea of discharge, it is permissible for the court to enter a special judgment against the bankrupt with a perpetual stay of execution, where this course is necessary to enable the plaintiff to take measures against persons secondarily liable, such as sureties on bonds.[365] And where the defendant, in an action on a judgment, had the right when the action was brought to set off against the plaintiff's judgment his own judgment against the plaintiff, such right is not affected by the plaintiff's subsequent discharge in bankruptcy.[366]

§ 757. Same; Cancellation of Judgment of Record.—A statute in New York provides that, at any time after one year has elapsed since a bankrupt was discharged of his debts pursuant to acts of Congress, he may apply to a court in which a judgment was rendered against him, and obtain an order directing the judgment to be canceled, if it appears that he has been discharged from payment of the judgment or the debt upon which it was recovered.[367] And similar laws are in force in some other states.[368] These statutes are mandatory,[369] and delay of the debtor in applying for his discharge is not ground for refusing to cancel such a judgment.[370] Neither should costs be imposed on the bankrupt on granting his motion to cancel a judgment.[371] He is still entitled to avail himself of this statute although he had an opportunity to plead his discharge in bar of the action in which the judgment was rendered, when leave to do so was coupled with conditions and he declined to avail himself of it,[372] though not where his counsel consented to the entry of judgment for the amount claimed.[373] Further, a statute of this kind is applicable only to judgments entered before the granting of the discharge,[374] and only to judgments on dischargeable debts. That is, the court, on such a motion, may look behind the judgment to determine the character of the liability on which it was founded, and refuse the motion if the debt was one from which a discharge would not release the bankrupt.[375] For this reason also, the statute does not require the cancellation of a judgment not duly scheduled by the bankrupt,

365 Kendrick & Roberts v. Warren Bros. Co., 110 Md. 47, 72 Atl. 461; Rosenthal v. Nove, 175 Mass. 559, 56 N. E. 884, 78 Am. St. Rep. 512. See House v. Schnadig, 138 Ill. App. 498.

366 Wyckoff v. Williams, 136 App. Div. 495, 121 N. Y. Supp. 189.

367 Code Civ. Proc. N. Y. § 1268.

368 Laws N. Dak. 1905, c. 125.

369 Walker v. Muir, 127 App. Div. 163, 111 N. Y. Supp. 465, affirmed 194 N. Y. 420, 87 N. E. 680; John Leslie Paper Co. v. Wheeler, 23 N. D. 477, 137 N. W. 412, 42 L. R. A. (N. S.) 292; Rukeyser v. Tostevin, 188 App. Div. 629, 177 N. Y. Supp. 291.

370 Eberspacher v. Boehm, 58 Hun, 603, 11 N. Y. Supp. 404.

371 Briefer v. Johnsen, 32 Misc. Rep. 764, 66 N. Y. Supp. 477.

372 Hussey v. Judson, 43 Misc. Rep. 370, 87 N. Y. Supp. 499.

373 Stevens v. Meyers, 72 App. Div. 128, 76 N. Y. Supp. 332.

374 Howe v. Noyes, 47 Misc. Rep. 338, 93 N. Y. Supp. 476.

375 Maier v. Maier, 77 Misc. Rep. 145, 135 N. Y. Supp. 1038. See Balliett v. Dearborn, 27 Fed. 507.

as the bankruptcy act excepts debts not scheduled from the operation of the discharge.[376] Again, this statute was not intended to enlarge the scope of the bankruptcy act by rendering null and void a lien which had been acquired in good faith more than four months prior to the commencement of the bankruptcy proceedings, and therefore, if the particular judgment is a lien on real estate, meeting these conditions, an order for its cancellation will contain a reservation of the creditor's right to enforce his lien.[377] The benefit of a statutory provision of this kind may be claimed, not only by the bankrupt himself, but also by an owner of land on which a judgment against the bankrupt is an apparent lien.[378] But the failure of the bankrupt to avail himself of the statute does not in any manner authorize the enforcement of a judgment which was discharged by the bankruptcy proceedings.[379] If the judgment creditor is aggrieved by the granting of a motion for cancellation, the proper practice is for him to appeal from the order, or ask leave to reargue but not to move to vacate it.[380]

[376] Feldmark v. Weinstein, 45 Misc. Rep. 329, 90 N. Y. Supp. 478; Woodward v. Schaefer, 91 N. Y. Supp. 104. See West Philadelphia Bank v. Gerry, 106 N. Y. 467, 13 N. E. 453.

[377] Pickert v. Eaton, 81 App. Div. 423, 81 N. Y. Supp. 50; In re David, 44 Misc. Rep. 516, 90 N. Y. Supp. 85; Popham v. Barretto, 20 Hun (N. Y.) 299; Arnold v. Treviranus, 78 App. Div. 589, 79 N. Y. Supp. 732; Olsen v. Nelson, 125 Minn. 286, 146 N. W. 1097.

[378] Graber v. Gault, 103 App. Div. 511,

[379] Leo v. Joseph, 56 Hun, 644, 9 N. Y. Supp. 612.

[380] McKee v. Preble, 154 App. Div. 156, 138 N. Y. Supp. 915.

CHAPTER XXXV

REVIVAL OF DEBTS BARRED BY DISCHARGE

§ 758. Validity and Consideration.—Although a discharge in bankruptcy releases the debtor from all legal liability to pay a debt which was provable in the bankruptcy proceedings, and which was not within the excepted classes, yet it does not extinguish the debt so as to make it incapable of revival. And although all remedies for the enforcement of such a debt are lost by the discharge, yet there remains a moral obligation upon the debtor to pay in full; and while this obligation is not one which can be enforced by suit, yet it furnishes a good and sufficient consideration for a new promise to pay the debt, and such a promise unequivocally given is binding on the debtor,[1] and may be enforced, notwithstanding the discharge of the bankrupt, in an action at law or any other proper form of proceeding.[2] So also, if a debtor, having been dis-

[1] Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, 29 Am. Bankr. Rep. 493; Cobb v. First Nat. Bank (D. C.) 263 Fed. 1000, 45 Am. Bankr. Rep. 48; Fairmont Creamery Co. v. Collier, 21 Ga. App. 87, 94 S. E. 56; Cauley v. Dunn, 167 N. C. 32, 83 S. E. 16; Ferguson-McKinney Dry Goods Co. v. Beuckman, 198 Mo. App. 41, 198 S. W. 504; Mutual Reserve Fund Life Ass'n v. Beatty, 93 Fed. 747, 35 C. C. A. 573, 2 Am. Bankr. Rep. 244; Lambert v. Schmalz, 118 Cal. 33, 50 Pac. 13; Old Town Nat. Bank v. Parker, 121 Md. 61, 87 Atl. 1105; In re Burton, 29 Fed. 637; German Exchange Bank v. Schnitzer, 72 Misc. Rep. 362, 130 N. Y. Supp. 223; Stern v. Bradner, Smith & Co., 127 Ill. App. 640; Anthony v. Sturdivant, 174 Ala. 521, 56 South. 571; McNair v. Gilbert, 3 Wend. (N. Y.) 344; Post v. Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; Craig v. Seitz, 63 Mich. 727, 30 N. W. 347; Ogden v. Redd, 13 Bush (Ky.) 581; Ford v. Sidebottom, 5 Ky. Law Rep. 316; Ross v. Jordan, 62 Ga. 298; Carey v. Hess, 112 Ind. 398, 14 N. E. 235; Succession of Andrieu, 44 La. Ann. 103, 10 South. 388; Way v. Sperry, 6 Cush. (Mass.) 238, 52 Am. Dec. 779; Edwards v. Nelson, 51 Mich. 121, 16 N. W. 261; Wislizenus v. O'Fallon, 91 Mo. 184, 3 S. W. 837; Second Nat. Bank v. Wood, 59 N. H. 407; Hobaugh v. Murphy, 114 Pa. St. 358, 7 Atl. 139; Murphy v. Crawford, 114 Pa. St. 496, 7 Atl. 142; Wells v. Mace, 17 Vt. 503.

[2] Torry v. Krauss, 149 Ala. 200, 43 South. 184; Hill v. Trainer, 49 Wis. 537, 5 N. W. 926; Egbert v. McMichael, 9 B. Mon. (Ky.) 44; Williams v. Robbins, 32 Me. 181; Briggs v. Sutton, 20 N. J. Law, 581; Hopkins v. Ward, 67 Barb. (N. Y.) 452; Kearns v. Boyle, 13 Phila. (Pa.) 193; Katz v. Moessenger, 110 Ill. 372. A promise by a debtor, who has been discharged in bankruptcy, to pay the balance of the debt remaining, is a waiver of the defense which the law gives him against an action on the original de-

charged in bankruptcy, gives his note to a particular creditor for the unpaid balance of the latter's claim, the moral obligation to pay constitutes a sufficient consideration for the note and will support an action on it.[3] The effect of a discharge obtained by means of a composition with creditors is exactly the same. This is a discharge by operation of law, instead of by order of court, but an indebtedness thus discharged is a sufficient consideration for a new and express promise to pay the original debt.[4] Of course a new consideration may be given by the creditor, such as his forbearance to foreclose a mortgage for a definite time, and this will likewise support a new promise to pay the original debt or the unsatisfied balance of it.[5] Any provable debt may be thus revived, as, for example, the claim of a surety on a note which was not due at the time of the bankruptcy proceedings.[6] And it is no objection to the enforcement of a promise to pay a debt discharged by bankruptcy that the debtor has selected some one or more creditors to be paid, to the exclusion of others. "The law allows a debtor who has been relieved from his debts by proceedings in bankruptcy to pay such debts, and will enforce a subsequent promise to make such payment, and the bankrupt can elect whether he will pay a part or all of the debts from which he has been thus relieved, he being the sole judge as to the extent to which he will revive such indebtedness." [7]

Subsequent creditors of a bankrupt are not entitled to question his promise to pay a creditor whose claim was barred by a discharge or composition, since the moral obligation is a sufficient consideration. But where a bankrupt, after the approval of a composition, executed a note secured by a mortgage to one of his creditors for the full amount of the debt, subsequent creditors may impeach the obligation as partially without consideration, if the composition creditor had also received a dividend.[8]

Regularly, the new promise should be made directly to the creditor. But there are circumstances in which it may be made to a third person for his benefit. Thus, where a bankrupt executed a written promise, intended to be binding on his executors as well as himself, to pay a

mand or promise. McClintic-Marshall Co. v. City of New Bedford (Mass.) 131 N. E. 444.

[3] Wislizenus v. O'Fallon, 91 Mo. 184, 3 S. W. 837; Succession of Andrieu, 44 La. Ann. 103, 10 South. 388.

[4] Herrington v. Davitt, 220 N. Y. 162, 115 N. E. 476, 1 A. L. R. 1700; In re Merriman, 44 Conn. 587, Fed. Cas. No. 9,479; Cohen v. Lachenmaier, 147 Wis. 649, 133 N. W. 1099.

[5] Stapp v. Thomas, 5 Ky. Law Rep. 603; Thornberry's Adm'r v. Dils, 80 Ky. 241.

[6] Cheney v. Barge, 26 Ill. App. 182.

[7] Thal v. Larmon (C. C.) 25 Fed. 290. Where a bankrupt and a creditor who had obtained a secret preference on a composition ignored it, a new promise by the bankrupt was held enforceable as a moral obligation. Citizens' Nat. Bank v. Kerney, 59 Ind. App. 96, 108 N. E. 139.

[8] Spann v. Read Phosphate Co., 238 Fed. 338, 151 C. C. A. 354, 38 Am. Bankr. Rep. 789.

note which had been released by his discharge, and handed the paper to his son, with directions to deliver it, after his death, to the payee of the note, it was held that the latter, on receipt of the agreement, had a claim against the estate of the decedent, though he had no knowledge of the agreement when it was made.[9] The fact that the promisee had also been adjudged a bankrupt at the time the promise was made does not affect the validity of the promise.[10] But where the partners in a firm had obtained their discharge in bankruptcy, and one of the partners, who had not surrendered a part of his separate property, agreed with a firm creditor to pay his claim, the partner, on paying it, cannot recover from his co-partner unless the latter agreed to pay a moiety of the claim.[11]

§ 759. **To Whom Promise May be Made.**—According to some of the authorities, a new promise to pay a debt discharged by bankruptcy is not enforceable or binding on the debtor unless made either to the creditor personally or to an accredited agent or attorney of his.[12] But other cases favor the rule that such a promise is equally binding and effective when made to a third person,—at least, a person who has some connection with the creditor and may be expected to repeat it to him,—provided it identifies the debt intended with certainty and is definite and unequivocal.[13] And it is beyond any doubt that if the promise is made (whether verbally or in writing) to the creditor's attorney or to an agent authorized to act for him either in the particular matter or in similar matters in general, it may be enforced by the creditor.[14] Thus, where the agent of the holder of a note has the note in his possession, and does not know that a renewal note has been given therefor, a new promise to the agent will remove the bar of the discharge in bankruptcy.[15] In this sense, also, a collector to whom the debt has been committed for collection is the agent of the creditor for the purpose of receiving a new promise to pay it.[16] And the wife of the creditor may act as his agent in such a matter, where the debt grew out of the sale of the wife's land.[17] And the promise may be made to the creditor himself, in such a sense as to satisfy the strictest rule, where it is transmitted to him by a person appointed for that purpose by the debtor.[18]

[9] Hockett v. Jones, 70 Ind. 227.

[10] Swan v. Lullman, 12 Mo. App. 584.

[11] Tyler v. Taylor, 21 Gratt. (Va.) 700.

[12] Prewett v. Caruthers, 12 Smedes & M. (Miss.) 491; Underwood v. Eastman, 18 N. H. 582; Moseley v. Coldwell, 3 Baxt. (Tenn.) 208; Stewart v. Reckless, 24 N. J. Law, 427; Jones v. Talbott, 13 Ky. Law Rep. 303.

[13] Bennett v. Everett, 3 R. I. 152, 67 Am. Dec. 498; Evans v. Carey, 29 Ala. 99; McKinley v. O'Keson, 5 Pa. St. 369.

[14] Underwood v. Eastman, 18 N. H. 582; Hunt v. Jones, 1 Ind. App. 545, 28 N. E. 98; Shaw v. Burney, 86 N. C. 331, 41 Am. Rep. 461; Bolton v. King, 105 Pa. St. 78; Hill v. Kendall, 25 Vt. 528.

[15] Jones v. Sennott, 57 Vt. 355.

[16] Reith v. Lullmann, 11 Mo. App. 254.

[17] Jones v. Talbott, 13 Ky. Law Rep. 303.

[18] Hockett v. Jones, 70 Ind. 227.

§ 760. Time of Making Promise.—In order that a new promise to pay a debt dischargeable in bankruptcy should overcome the effect of the discharge and found an enforceable obligation, it is necessary that it should have been made after the adjudication in bankruptcy has been passed against the debtor,[19] or at any rate after the filing of the petition in bankruptcy,[20] though it has been held that a letter written by the debtor before the petition in bankruptcy was actually filed, but which, in the ordinary course of the mail, would not reach the creditor until after the adjudication, was a sufficient new promise.[21] But it is not necessary that the bankrupt should wait until after his discharge has been granted in order to bind himself effectually by a new promise. A provable debt may be revived by such a promise made after the filing of the petition and pending the proceedings, and the force of the new obligation is not impaired by the subsequent grant of a discharge.[22] "The theory is that the discharge destroys the remedy but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time; that the bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. And so, under other bankrupt acts, it has been commonly held that a promise to pay a provable debt, notwithstanding the discharge, is as effectual when made after the filing of the petition and before the discharge as if made after the discharge." [23] But in this case it is necessary that the new promise should show distinctly that the bankrupt undertakes personally to pay the debt, and not to pay it out of his estate in bankruptcy.[24] It may be remarked further that a defense of a

[19] Stebbins v. Sherman, 3 N. Y. Super. Ct. 510. But see Kingston v. Wharton, 2 Serg. & R. (Pa.) 208, 7 Am. Dec. 638.

[20] Katz v. Moessenger, 7 Ill. App. 536. And see Stern v. Nussbaum, 47 How. Prac. (N. Y.) 489.

[21] Cheney v. Barge, 26 Ill. App. 182.

[22] Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, 29 Am. Bankr. Rep. 493; Old Town Nat. Bank v. Parker, 121 Md. 61, 87 Atl. 1105; Moore v. Trounstine, 126 Ga. 116, 54 S. E. 810, 7 Ann. Cas. 971; Dicks v. Andrews, 132 Ga. 601, 64 S. E. 788; Pearsall v. Tabour, 98 Minn. 248, 108 N. W. 808; Wiggin v. Hodgdon, 63 N. H. 39; Jersey City Ins. Co. v. Archer, 122 N. Y. 376, 25 N. E. 338; Fraley v. Kelly, 67 N. C. 78; Hornthal v. McRae, 67 N. C. 21; Griel v. Solomon, 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; Lanagin v. Nowland, 44 Ark. 84; Knapp v. Hoyt, 57 Iowa, 591, 10 N. W. 925, 42 Am. Rep. 59; Corliss v. Shepherd, 28 Me. 550; Otis v. Gazlin, 31 Me. 567; Wheeler v. Wheeler, 28 Ill. App. 385; Thornberry v. Dils, 3 Ky. Law Rep. 725. But see, per contra, Thornton v. Nichols & Lemon, 119 Ga. 50, 45 S. E. 785; Ogden v. Redd, 13 Bush (Ky.) 581; Graves v. McGuire, 79 Ky. 532; Chapman v. Pennie (Cal.) 39 Pac. 14; Holt v. Akarman (N. J.) 86 Atl. 408; Traders' Nat. Bank v. Hermer, 202 Mo. App. 402, 218 S. W. 937; Bank of Elberton v. Vickery, 20 Ga. App. 96, 92 S. E. 547.

[23] Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, 29 Am. Bankr. Rep. 493.

[24] Hornthal v. McRae, 67 N. C. 21;

discharge in bankruptcy, set up in a pending action, may be waived by the making of a new promise to pay the debt, given after the institution of the suit and before verdict.[25]

§ 761. Sufficiency of New Promise.—While no particular form of words is necessary in order to constitute an effective new promise to pay a debt barred by a discharge in bankruptcy,[26] yet it is required that the new promise shall be clear, distinct, and unequivocal, as well as certain and unambiguous.[27] There must be an express promise to pay the specific debt.[28] "The rule is different in regard to the defense of the statute of limitations against a debt barred by the lapse of time. In that case, acts or declarations recognizing the present existence of the debt have often been held to take a case out of the statute. Not so in the class of cases we are considering. Nothing is sufficient to revive a discharged debt unless the jury are authorized by it to say that there is the expression by the debtor of a clear intention to bind himself to the payment of the debt."[29] In other words, there must be a distinct recognition and renewal of the debt as a binding obligation.[30] In the case of a note, the promise of the debtor to pay it must be clear, distinct, and unequivocal, and without such clear and express promise, neither payment of interest, part payment of the principal, nor a declaration of an intention to pay it, will suffice to revive the note.[31]

Kirkpatrick v. Tattersall, 13 Mees. & W. 760.

[25] Decker v. Kitchen, 33 Hun (N. Y.) 268.

[26] Jones v. Talbott, 13 Ky. Law Rep. 303.

[27] Allen v. Ferguson, 18 Wall. 1, 21 L. Ed. 851; Stern v. Bradner Smith & Co., 225 Ill. 430, 80 N. E. 307, 116 Am. St. Rep. 151; Dressler v. Van Vlissingen, 195 Ill. App. 63; Brooks v. Paine, 77 S. W. 190, 25 Ky. Law Rep. 1125; Apperson v. Stewart, 27 Ark. 619; Shockey v. Mills, 71 Ind. 288, 36 Am. Rep. 196; Hubbard v. Farrell, 87 Ind. 215; Jersey City Ins. Co. v. Archer, 122 N. Y. 376, 25 N. E. 338; Stern v. Nussbaum, 5 Daly (N. Y.) 382; Riggs v. Roberts, 85 N. C. 151, 39 Am. Rep. 692; Turner v. Chrisman, 20 Ohio, 332; Huffman v. Johns (Pa.) 6 Atl. 205; Murphy v. Crawford, 114 Pa. St. 496, 7 Atl. 142; McDougall v. Page, 55 Vt. 187, 45 Am. Rep. 602; La Tourrette v. Price, 28 Miss. 702; Wheeler v. Simmons, 60 Hun, 404, 15 N. Y. Supp. 462. Where the defendant, some days after obtaining his discharge in bankruptcy, wrote the plaintiff a letter in which he said: "I will send you the first 'V' or 'X' I have," it was held that the expression did not fairly import an absolute promise to pay five or ten dollars, and did not take the plaintiff's debt out of the effect of defendant's discharge. Bigelow v. Norris, 141 Mass. 14, 6 N. E. 88. But on the other hand, a sufficient new promise was made out from the following words, written to a surety on a note given by the bankrupt for borrowed money: "If I live and am prospered, no man who helped me (without remuneration) will be the poorer for me, if not otherwise. That is all there is of it." Cheney v. Barge, 26 Ill. App. 182.

[28] Needham v. Matthewson, 81 Kan. 340, 105 Pac. 436.

[29] Allen v. Ferguson, 18 Wall. 1, 21 L. Ed. 851.

[30] Meech v. Lamon, 103 Ind. 515, 3 N. E. 159, 53 Am. Rep. 540; Brewer v. Boynton, 71 Mich. 254, 39 N. W. 49; Canfield's Appeal, 4 Walk. (Pa.) 457.

[31] Dressler v. Van Vlissingen, 195 Ill. App. 63.

Such statements as the following have been held sufficient: "I am going to pay you every dollar I owe you by the first of July;" [32] "I will pay him some day, can't say when;" [33] "your debt I will pay if I live;" [34] "I will pay the note;" [35] "I will pay the debt before I leave the state;" [36] the creditor "shall have her money, even if it is but a little at a time." [37] But under the rule as above stated, it is not sufficient that the bankrupt acknowledges the debt as still existing, or that he expresses the expectation of paying it or an intention to pay it. The necessary distinct promise to pay cannot be extracted from such expressions as that the debtor is "going" to pay the debt, or that he "expects" to pay it, or that he means to "make it all right," or that he does not intend the creditor shall lose anything.[38] Still less is the rule satisfied by showing merely the recognition by the bankrupt of a moral obligation resting on him,[39] or a willingness to pay the debt, or a statement that he will try to do so.[40] No sufficient new promise is made out by the bankrupt's declaration that "when I am in position to pay, there is no one I would more cheerfully pay," [41] or "I will make a desperate effort to pay you something on the note," [42] or "I will do all I can to pay you." [43] Some of the decisions have also held that the promise must be express, and cannot be made out by implication.[44] But it is perhaps better to say that the promise must be so far unqualified as necessarily to authorize the implication of an undertaking to pay the debt.[45] And in any

[32] St. John v. Stephenson, 90 Ill. 82.

[33] Bolton v. King, 105 Pa. St. 78.

[34] Fraley v. Kelly, 79 N. C. 348.

[35] Hunt v. Jones, 1 Ind. App. 545, 28 N. E. 98; Farmers' & Merchants' Bank v. Richards, 119 Mo. App. 18, 95 S. W. 290.

[36] Jones v. Talbott, 13 Ky. Law Rep. 303.

[37] Sundling v. Willey, 19 S. D. 293, 103 N. W. 38, 9 Ann. Cas. 644. And see Goldstein v. Saur (Tex. Civ. App.) 162 S. W. 441.

[38] Allen v. Ferguson, 18 Wall. 1, 21 L. Ed. 854; Dennan v. Gould, 141 Mass. 16, 6 N. E. 22; Brewer v. Boynton, 71 Mich. 254, 39 N. W. 49; Meech v. Lamon, 103 Ind. 515, 3 N. E. 159, 53 Am. Rep. 540; Willetts v. Cotherson, 3 Ill. App. 644; Shockey v. Mills, 71 Ind. 288, 36 Am. Rep. 196; Jones v. Talbott, 13 Ky. Law Rep. 303; Porter v. Porter, 31 Me. 169; Riggs v. Roberts, 85 N. C. 151, 39 Am. Rep. 692; Turner v. Chrisman, 20 Ohio, 332; Yoxtheimer v. Keyser, 11 Pa. St. 364, 51 Am. Dec. 555; Coe v. Rosene, 66 Wash. 73, 118 Pac. 881, 38 L. R. A. (N. S.) 577, Ann. Cas. 1913C, 741; Bartlett v. Peck, 5 La. Ann. 669. But compare Mordaunt v. Monroe, 124 Ill. App. 306; Hubbard v. Farrell, 87 Ind. 215.

[39] Mandell v. Levy, 47 Misc. Rep. 147, 93 N. Y. Supp. 545.

[40] Holden v. Chamberlin (N. D.) 179 N. W. 706.

[41] Kiernan v. Fox, 43 App. Div. 58, 59 N. Y. Supp. 330.

[42] Moore v. Trounstine, 126 Ga. 116, 54 S. E. 810, 7 Ann. Cas. 971.

[43] Holt v. Akarman (N. J.) 86 Atl. 408; Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406.

[44] Evans v. Carey, 29 Ala. 99; Willetts v. Cotherson, 3 Ill. App. 644; Katz v. Moessenger, 110 Ill. 372; Porter v. Porter, 31 Me. 169; Stark v. Stinson, 23 N. H. 259; In re Heazelton, 32 Leg. Int. (Pa.) 13; Bennett v. Everett, 3 R. I. 152, 67 Am. Dec. 498.

[45] Craig v. Seitz, 63 Mich. 347, 30 N. W. 347.

case there must be a clear and certain identification of the particular debt which the bankrupt has in mind and means to revive.[46]

The giving of a new note by the bankrupt, after his discharge, in renewal of a previous note, or simply for the amount of a pre-existing debt, will revive the debt and take it out of the effect of the discharge,[47] but not a mere unfulfilled offer or promise to give a new note.[48] And where the defendant in a pending suit pleads his bankruptcy, but afterwards withdraws the plea and confesses judgment, this will amount to a new promise binding him on the judgment.[49] But the fact that the debtor, after his discharge, states an account running prior to such discharge and fixes a certain balance, and agrees that his debtor may apply certain demands in his favor, does not avoid the effect of the discharge.[50] If there is contradictory evidence as to the making of the alleged new promise, or its terms, or as to the debtor's intention to bind himself to a specific promise to pay the debt, these questions must be left to the jury under proper instructions from the court.[51]

In order to give binding effect to a new promise to pay a debt discharged in bankruptcy, it is necessary that it should have been accepted by the creditor. But where the plaintiff's amended petition in a suit against a discharged bankrupt alleged that the defendant "promised and agreed to and with the plaintiff" to pay the barred debt as soon as he was able, it sufficiently alleged that the plaintiff had accepted the new promise.[52] So, evidence of a continued effort by a creditor of a discharged bankrupt to enforce the latter's promise to pay the barred debt, and to get the bankrupt to keep his promise, sufficiently shows an acceptance of the promise by the creditor.[53] If a discharged bankrupt's new promise to pay a barred debt was induced by the fraud of the creditor, the latter cannot recover upon it. But if the defendant bankrupt, in promising plaintiff to pay the barred debt, did not un-

[46] Landis v. Roth, 109 Pa. St. 621, 1 Atl. 49, 58 Am. Rep. 747; Hobough v. Murphy, 114 Pa. St. 358, 7 Atl. 139. A written promise to pay a debt discharged in bankruptcy need not describe the debt where there is only one debt due to that creditor. Goldstein v. Saur (Tex. Civ. App.) 162 S. W. 441.

[47] Christie v. Bridgman, 51 N. J. Eq. 331, 25 Atl. 939, 30 Atl. 429; Bown v. Thompson, 34 Leg. Int. (Pa.) 305; Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406; Greil v. Durr, 203 Ala. 644, 84 South. 743; Stokes v. Sanders, 181 App. Div. 249, 168 N. Y. Supp. 409.

[48] Porter v. Porter, 31 Me. 169; Stern v. Bradner Smith & Co., 127 Ill. App. 640.

[49] Anderson v. Clark, 70 Ga. 362; Dewey v. Moyer, 72 N. Y. 70.

[50] Warren v. Bishop, 22 Vt. 607; In re Heazelton, 1 Wkly. Notes Cas. (Pa.) 67.

[51] Pearsall v. Tabour, 98 Minn. 248, 108 N. W. 808; Pratt v. Russell, 7 Cush. (Mass.) 462; Shaw v. Burney, 86 N. C. 331, 41 Am. Rep. 461; Tioga County Savings & Trust Co. v. Gates, 254 Pa. 298, 98 Atl. 968.

[52] Brashears v. Combs, 174 Ky. 344, 192 S. W. 482.

[53] Brashears v. Combs, 174 Ky. 344, 192 S. W. 482.

derstand that the new promise would be binding upon him, that is, if he was mistaken as to its legal import and effect, the mistake was not such a mistake of law as would warrant equitable relief, either affirmative or defensive.[54]

§ 762. Same; Part Payment.—Neither a payment of interest nor a part payment of the principal will suffice to revive a debt from which the debtor has been released by a discharge in bankruptcy or constitute a new promise to pay it.[55] "A different rule prevails in case of a debt discharged in bankruptcy from that applied to the defense of the statute of limitations. In the latter case payment of a part of the debt is regarded as an acknowledgment of the existence of the debt, and the law implies a promise to pay the residue. But in the case of a debt discharged in bankruptcy, a promise cannot be inferred, but must be express, and so all the cases agree that partial payments will not revive the debt." [56] However, where there is a distinct and unambiguous promise, together with a partial payment, it fully and in every particular complies with the rule for the revival of a discharged debt.[57] But no such promise can be made out from the fact that the debtor, in authorizing the creditor to draw on him for part of the original debt, said that he "hoped" to pay the balance in full.[58] But the fact of part payment is admissible to identify the debt in reference to which an express promise to pay, otherwise of uncertain application, may be proved.[59]

§ 763. Same; Written or Oral Promise.—In Maine, Massachusetts, and New York (and perhaps in some other states) the statutes provide that no agreement or promise to revive a debt barred by a discharge in bankruptcy shall be binding and effective unless contained in some writing signed by the party to be charged.[60] Since the bankruptcy law

[54] Brashears v. Combs, 174 Ky. 344, 192 S. W. 482.

[55] Allen v. Ferguson, 18 Wall. 1, 21 L. Ed. 854; Meyer v. Bartels, 56 Misc. Rep. 621, 107 N. Y. Supp. 778; Stern v. Bradner Smith & Co., 225 Ill. 430, 80 N. E. 307, 116 Am. St. Rep. 151; Wilson v. Chandler, 133 Ill. App. 622; Jacobs v. Carpenter, 161 Mass. 16, 36 N. E. 676; Heim v. Chapman, 171 Mass. 347, 50 N. E. 529; Griel v. Solomon, 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; Stark v. Stinson, 23 N. H. 259; Wheeler v. Simmons, 60 Hun, 404, 15 N. Y. Supp. 462; Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406; Viele v. Ogilvie, 2 G. Greene (Iowa) 326; Tolle v. Smith, 98 Ky. 464, 33 S. W. 410. But see Warder v. Lake, 198 Ill. App. 514.

[56] Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406.

[57] Huffman v. Johns (Pa.) 6 Atl. 205; Lawrence v. Harrington, 48 Hun, 618, 1 N. Y. Supp. 577.

[58] Scheper v. Briggs, 28 App. Div. 115, 50 N. Y. Supp. 869.

[59] Willetts v. Cotherson, 3 Ill. App. 644.

[60] See Spooner v. Russell, 30 Me. 454; Otis v. Gazlin, 31 Me. 567; Kingley v. Cousins, 47 Me. 91; Nathan v. Leland, 193 Mass. 576, 79 N. E. 793; Jacobs v. Carpenter, 161 Mass. 16, 36 N. E. 676; Elwell v. Cumner, 136 Mass. 102; Bair

contains no provision on this subject, and since state statutes of this character do not purport to affect the debt itself, but only the remedy for its enforcement, they are not in contravention of the federal law, and are effective in the jurisdictions where they are in force. But according to what may be called the common or general law of the subject, and apart from such statutory provisions, it does not need a written promise to revive a discharged debt, but one merely spoken will be sufficient for the purpose if distinct and positive.[61]

§ 764. Conditional Promise.—It is not necessary that a new promise to pay a debt barred by a discharge in bankruptcy should be absolute, but it may be made upon a condition or coupled with a condition.[62] But in that case, where the condition is in the nature of a proposition offered to the creditor, it must be alleged and shown that he accepted it or assented to it,[63] and if the creditor expressly declines to agree to the condition, and insists on the immediate and unconditional payment of his claim, the debt is not revived and no action can be maintained on it.[64] Generally, however, a condition accepted by the creditor will not at all impair the effect of the agreement in reviving the debt, as, for example, where the bankrupt undertakes to pay the debt if time is granted to him for the purpose and it is accordingly granted,[65] or where the bankrupt promises to pay the debt in full if the creditor will pay the taxes for a year on certain property, which is done.[66] But here it must be observed that the condition must contain nothing unlawful or in contravention of the bankruptcy act. Thus, a promise to pay a particular creditor in full if he will refrain from opposing the bankrupt's

v. Hilbert, 84 App. Div. 621, 82 N. Y. Supp. 1010; Meyer v. Bartels, 56 Misc. Rep. 621, 107 N. Y. Supp. 778; Gruenberg v. Treanor, 40 Misc. Rep. 232, 81 N. Y. Supp. 675; Mandell v. Levy, 47 Misc. Rep. 147, 93 N. Y. Supp. 545; Polk v. Stephens, 118 Ark. 438, 176 S. W. 689.

[61] Mutual Reserve Fund Life Ass'n v. Beatty, 93 Fed. 747, 35 C. C. A. 573, 2 Am. Bankr. Rep. 244; Smith v. Stanchfield, 84 Minn. 343, 87 N. W. 917; Farmers' & Merchants' Bank v. Richards, 119 Mo. App. 18, 95 S. W. 290; Blanc v. Banks, 10 Rob. (La.) 115, 43 Am. Dec. 175; Worthington v. De Bardlekin, 33 Ark. 651; Ross v. Jordan, 62 Ga. 298; Craig v. Seitz, 63 Mich. 727, 30 N. W. 347; Henley v. Lanier, 75 N. C. 172, 15 N. B. R. 280; Kull v. Farmer, 78 N. C. 339; Lanier v. Tolleson, 20 S. C. 57; Farmers' & Mechanics' Bank v. Flint, 17 Vt. 508, 44 Am. Dec. 351; Barron v. Benedict, 44 Vt. 518; Holden v. Chamberlin (N. D.) 179 N. W. 706; Vachon v. Ditz (Wash.) 194 Pac. 545.

[62] Allen v. Ferguson, 18 Wall. 1, 21 L. Ed. 854; Knapp v. Hoyt, 57 Iowa, 591, 10 N. W. 925, 42 Am. Rep. 59; Herrington v. Davitt, 220 N. Y. 162, 115 N. E. 476, 1 A. L. R. 1700. A promise by the bankrupt to make a payment on a barred indebtedness out of particular funds if they proved sufficient for the purpose after the payment of other obligations, does not give rise to a general liability on the part of the bankrupt. Brashears v. Combs, 174 Ky. 344, 192 S. W. 482.

[63] Smith v. Stanchfield, 84 Minn. 343, 87 N. W. 917; International Harvester Co. v. Lyman, 90 Minn. 275, 96 N. W. 87.

[64] International Harvester Co. v. Lyman, 90 Minn. 275, 96 N. W. 87.

[65] Comfort v. Eisenbeis, 11 Pa. St. 13.

[66] Thornberry v. Dils, 80 Ky. 241.

application for a discharge, or if he will dismiss a proceeding to set aside the discharge, is fraudulent and void.[67]

If the condition was not in the nature of an election offered to the creditor, but contained something personal to the bankrupt, or involved the occurrence of a future event or the future existence of a certain state of affairs, then it must be pleaded and shown that the condition has been fulfilled or, as the case may be, that the event has happened or that the contemplated state of affairs now exists.[68] Thus, if the bankrupt promises to pay the debt after the lapse of a certain time, no action can be maintained on the debt or the new promise until such time has elapsed.[69] Generally, however, it is held that the bankrupt's undertaking to pay the debt when he completes a certain contract, when he collects certain claims due to him, when he returns from a contemplated journey, or the like, does not make the promise a conditional one, but is rather to be regarded as a specification of the time for payment.[70] Where the bankrupt's promise is that, if he had not paid a certain debt, contracted before the bankruptcy, he would pay it, the creditor has only to prove that the debt has not been paid, and then the promise becomes absolute.[71] So a promise that, if the creditor should lose a certain case then pending in the appellate court, the bankrupt would make it good to him, becomes enforceable upon the determination of the appeal adversely to the creditor.[72] A promise to do certain work and apply it on a debt discharged by bankruptcy cannot be construed into a promise to pay the debt in any other way.[73] It must also be remarked that if there is any indefiniteness or ambiguity in the statement of the condition, it must be effectually cleared up before the creditor can recover. Thus, a promise to pay "as soon as I get through with that squaring up" is not sufficient to revive the debt unless it is shown exactly what was meant by the "squaring up."[74] Finally, a condition attached to the promise may be waived by the bankrupt, and will be considered as having been

[67] Tirrell v. Freeman, 139 Mass. 297, 1 N. E. 350; Fell v. Cook, 44 Iowa, 485.

[68] Smith v. Stanchfield, 84 Minn. 343, 87 N. W. 917; Stern v. Bradner Smith & Co., 225 Ill. 430, 80 N. E. 307, 116 Am. St. Rep. 151; Griel v. Solomon, 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; Apperson v. Stewart, 27 Ark. 619; Tolle v. Smith, 98 Ky. 464, 33 S. W. 410; Yate v. Hollingsworth, 5 Har. & J. (Md.) 216; La Tourrette v. Price, 28 Miss. 702; Goldman v. Abrahams, 9 Daly (N. Y.) 223; Lanier v. Tolleson, 20 S. C. 57; Sherman v. Hobart, 26 Vt. 60; Dearing v. Moffit, 6 Ala. 776; Richardson v. Bricker, 7 Colo. 58, 1 Pac. 433, 49 Am. Rep. 344; Dantzler v. Scheuer, 203 Ala. 89, 82 South. 103.

[69] Arnold v. Elliott, 7 Humph. (Tenn.) 354.

[70] Eaton v. Yarborough, 19 Ga. 82; Swan v. Lullman, 12 Mo. App. 584. A promise to pay "as soon as possible," made after a discharge in bankruptcy, is not a conditional promise. Sundling v. Willey, 19 S. D. 293, 103 N. W. 38, 9 Ann. Cas. 644.

[71] Hill v. Kendall, 25 Vt. 528.

[72] Herndon v. Givens, 16 Ala. 261.

[73] Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406.

[74] Stern v. Nussbaum, 5 Daly (N. Y.) 382.

waived by his making payments on the debts prior to the happening of the condition.[75]

§ 765. Promise to Pay When Able.—A promise by a discharged bankrupt to pay an antecedent debt as soon as he is able (or as soon as he can, or as soon as he has the money, or the like), though it is a conditional promise, is not void for uncertainty, but is capable of enforcement by suit.[76] But the creditor, in order to recover on such a promise, must both plead and prove that the debtor is presently able to pay the debt.[77] It is, however, no ground of demurrer to the declaration in such a suit that it does not state in what the defendant's ability to pay consists.[78] To sustain the burden of proving the debtor's ability to pay, the creditor must show his present possession of sufficient and available means. Proof of his ability to borrow the money is not sufficient.[79] Further, the defendant is entitled to show what portion of his earnings it is necessary for him to use for the support of himself and his family, and if the residue is insufficient to pay the debt, ability to pay is not shown,[80] and the law does not require the debtor to reduce his family expenditures to such a point that enough will remain to satisfy the creditor.[81] And a promise to pay a debt when able must be construed as an undertaking to pay out of the first surplus money which the debtor may acquire, and there is no such surplus until he satisfies the claims of those who have extended him credit on the faith of his immunity from the burden of debts barred by his discharge. In other words, though the plaintiff may show that the defendant has sufficient property to pay the debt in suit, yet he cannot recover if it is shown that the payment of other just claims, contracted since his discharge in bank-

[75] Thompkins v. Hazen, 30 App. Div. 359, 51 N. Y. Supp. 1003. But see this case on appeal, 165 N. Y. 18, 58 N. E. 762.

[76] Krause v. Torry, 146 Ala. 548, 40 South. 956; Torry v. Krauss, 149 Ala. 200, 43 South. 184; Griel v. Solomon, 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; Egbert v. McMichael, 9 B. Mon. (Ky.) 44; Eckler v. Galbraith, 12 Bush (Ky.) 71; Brashears v. Combs, 174 Ky. 344, 192 S. W. 482; Holden v. Chamberlin (N. D.) 179 N. W. 706. A promise by the bankrupt to pay his notes at maturity if he is then able to do so, and if not able, then to pay them when he can do so, the time being extended for that purpose, is a valid promise. Dantzler v. Scheuer, 203 Ala. 89, 82 South. 103. Compare Bigelow v. Morris, 139 Mass. 12, 29 N. E. 61; Elwell v. Cumner, 136 Mass. 102. And see Caledonian Coal Co. v. Young, 22 N. M. 675, 167 Pac. 274, holding that a statement of a discharged bankrupt to a creditor that he would pay his account and all his other creditors "if able" did not amount to a promise, conditional or otherwise, and did not revive the debt.

[77] Patten v. Ellingwood, 32 Me. 163; Green v. McGowan, 7 Ky. Law Rep. 661; Taylor v. Nixon, 4 Sneed (Tenn.) 352; Stern v. Gerber, 137 N. Y. Supp. 879; Torry v. Krauss, 149 Ala. 200, 43 South. 184; Mason v. Hughart, 9 B. Mon. (Ky.) 480.

[78] Horner v. Speed, 2 Pat. & H. (Va.) 616.

[79] Kraus v. Torry, 146 Ala. 548, 40 South. 956.

[80] Kraus v. Torry, 146 Ala. 548, 40 South. 956.

[81] Torry v. Krauss, 149 Ala. 200, 43 South. 184.

ruptcy, would exhaust his estate and leave nothing for the plaintiff.[82] On the other hand, if the bankrupt, at the very time of making the promise, has sufficient means to discharge his outstanding new debts and also to satisfy the plaintiff, there seems to be no reason why the creditor should not immediately begin his suit. But the authorities appear to hold that a promise clearly relating to financial ability at some future time will not sustain an immediate action.[83]

§ 766. **Remedies of Creditor.**—Where the new promise is made after the adjudication in bankruptcy, but before the end of the proceedings, the creditor cannot prove a claim on it in the bankruptcy,[84] nor sue on it until after the question of the bankrupt's discharge has been determined.[85] But on the other hand, the fact that the creditor has proved the original debt in the bankruptcy proceedings, and received a dividend, does not prevent him from recovering the balance in an action on the new promise.[86] And an express promise to pay part of a debt, discharged by the proceedings in bankruptcy, will revive the debt pro tanto.[87] But the original debt is revived only as of the date of the new promise, and where judgment is obtained upon the latter, the debtor is entitled to claim the exemption provided by law in force at the latter date.[88] But where he has agreed that work done by him for the creditor shall go towards the payment of the discharged debt, this constitutes a new promise to pay the debt, and he cannot maintain an action to recover the value of such work.[89] The creditor may also recover interest on the original debt as well as the principal of it, where the bankrupt promised full payment, as the promise revives the debt on the original consideration.[90] But where the debt had been reduced to judgment, it is so far extinguished by the discharge in bankruptcy that the new promise to pay will not authorize the creditor at once to issue execution and sell the debtor's land, but he must first revive the judgment.[91] Nor can he arrest the debtor and hold him to bail.[92] But where the original debt is in such form as to be capable of assignment to a third person, the creditor may assign the new promise with it, and so enable the assignee to sue on it.[93]

[82] Eckler v. Galbraith, 12 Bush (Ky.) 71.

[83] Samuel v. Cravens, 10 Ark. 380.

[84] Kingston v. Wharton, 2 Serg. & R. (Pa.) 208, 7 Am. Dec. 638.

[85] Egbert v. McMichael, 9 B. Mon. (Ky.) 44.

[86] Kingston v. Wharton, 2 Serg. & R. (Pa.) 208, 7 Am. Dec. 638.

[87] Badger v. Gilmore, 33 N. H. 361, 66 Am. Dec. 729.

[88] Willis v. Cushman, 115 Ind. 100, 17 N. E. 168.

[89] Sampson v. Curtis, 39 Me. 398.

[90] Stern v. Bradner Smith & Co., 225 Ill. 430, 80 N. E. 307, 116 Am. St. Rep. 151.

[91] Graham v. Dreutzer, 75 Wis. 558, 44 N. W. 776, 17 Am. St. Rep. 205.

[92] Glazier v. Stafford, 4 Har. (Del.) 240.

[93] Way v. Sperry, 6 Cush. (Mass.) 238,

As to the form of action for the recovery of a debt or claim thus revived, there has been much difference of opinion. Numerous cases hold that when the bankrupt has given a new promise sufficient to revive a debt barred by his discharge, the creditor, in bringing suit for the recovery of the debt, must declare on the original obligation or engagement, and not on the new promise.[94] But the opposite view, namely, that the original debt is extinguished by the discharge, and the only cause of action is on the new promise, is supported by several decisions of weight.[95] Probably, however, the better reason as well as the preponderance of authority is with the decisions which leave it to the election of the creditor which course he will pursue, it being equally competent to him to sue directly on the new promise or to declare on the original debt and then plead the new promise in replication to the defendant's plea of his discharge in bankruptcy.[96]

§ 767. Burden of Proof and Evidence.—The burden rests on the plaintiff in an action, to prove a new promise to pay a debt released by the defendant's discharge in bankruptcy, and this fact he must establish by clear and satisfactory evidence.[97] Also the proof must correspond with the allegations of his declaration or complaint. Thus, if he alleges an unconditional promise of the defendant to pay, made after the latter's discharge, proof of a conditional promise will not authorize a

52 Am. Dec. 779; Underwood v. Eastman, 18 N. H. 582; Badger v. Gilmore, 33 N. H. 361, 66 Am. Dec. 729; Clark v. Atkinson, 2 E. D. Smith (N. Y.) 112; Wolffe v. Eberlein, 74 Ala. 99, 49 Am. Rep. 809. But compare White v. Cushing, 30 Me. 267; Wardwell v. Foster, 31 Me. 558; Moore v. Viele, 4 Wend. (N. Y.) 420; Walbridge v. Harroon, 18 Vt. 448.

[94] Bush v. Stanley, 122 Ill. 406, 13 N. E. 249; Herrington v. Davitt, 220 N. Y. 162, 115 N. E. 476, 1 A. L. R. 1700; Gruenberg v. Treanor, 40 Misc. Rep. 232, 81 N. Y. Supp. 675; Turner v. Chrisman, 20 Ohio, 332; Marshall v. Tracy, 74 Ill. 379; Apperson v. Stewart, 27 Ark. 619; Badger v. Gilmore, 33 N. H. 361; 66 Am. Dec. 729; Fraley v. Kelly, 67 N. C. 78; Riggs v. Roberts, 85 N. C. 151, 39 Am. Rep. 692; Dusenbury v. Hoyt, 53 N. Y. 521, 13 Am. Rep. 543.

[95] Trueman v. Fenton, 2 Cowp. 544; Post v. Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; Murphy v. Crawford, 114 Pa. St. 496, 7 Atl. 142; Hobough v. Murphy, 114 Pa. St. 358, 7 Atl. 139; Bolton v. King, 105 Pa. St. 78; Reeside v. Hadden, 12 Pa. St. 243; Field's Estate, 2 Rawle (Pa.) 351, 21 Am. Dec. 454; Chabot v. Tucker, 39 Cal. 434; Ross v. Jordan, 62 Ga. 298; Fleming v. Lullman, 11 Mo. App. 104; Eckler v. Galbraith, 12 Bush (Ky.) 71.

[96] Allen v. Ferguson, 18 Wall. 1, 21 L. Ed. 854; Torry v. Krauss, 149 Ala. 200, 43 South. 184; Horner v. Speed, 2 Pat. & H. (Va.) 616; Wolffe v. Eberlein, 74 Ala. 99, 49 Am. Rep. 809; Nowland v. Lanagan, 45 Ark. 108; Classen v. Schoenemann, 80 Ill. 304, 16 N. B. R. 98; Turner v. Chrisman, 20 Ohio, 332; Hubbard v. Farrell, 87 Ind. 215; Spooner v. Russell, 30 Me. 454; Craig v. Seitz, 63 Mich. 727, 30 N. W. 347.

[97] Pearsall v. Tabour, 98 Minn. 248, 108 N. W. 808; Brooks v. Paine, 77 S. W. 190, 25 Ky. Law Rep. 1125; Griel v. Solomon, 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; Badger v. Gilmore, 33 N. H. 361, 66 Am. Dec. 729; Spaulding v. Vincent, 24 Vt. 501; Haines v. Stauffer, 13 Pa. St. 541, 53 Am. Dec. 493; Dye v. Bertram, 6 Am. Law Rep. 355; Atwood v. Gillett, 2 Doug. (Mich.) 206; Underwood v. First Nat. Bank (Tex. Civ. App.) 185 S. W. 395; Holden v. Chamberlin (N. D.) 179 N. W. 706.

recovery.[98] On any doubtful or conflicting testimony, the question whether a new promise was or was not made must go to the jury.[99] But the possibility of wrong to a discharged bankrupt by perjured testimony as to a new promise, thereby depriving him of the benefit of his discharge, is not to be remedied by a forced interpretation of the evidence in support of the promise to pay.[100] If there is any doubt or ambiguity as to the debt to which the new promise was meant to apply, the plaintiff must identify it by strong and positive proof.[101] If the original debt was evidenced by a promissory note, the note itself may be given in evidence to show the consideration for the new promise.[102]

[98] Buford v. Crigler, 7 Ky. Law Rep. 662; Doom v. Snyder, 10 Ky. Law Rep. 281.

[99] Bennett v. Everett, 3 R. I. 152, 67 Am. Dec. 498; United Society in Canterbury v. Winkley, 7 Gray (Mass.) 460; Old Town Nat. Bank v. Parker, 121 Md. 61, 87 Atl. 1105; Brashears v. Combs, 174 Ky. 344, 192 S. W. 482.

[100] Pearsall v. Tabour, 98 Minn. 248, 108 N. W. 808.

[101] Pearsall v. Tabour, 98 Minn. 248, 108 N. W. 808.

[102] Egbert v. McMichael, 9 B. Mon. (Ky.) 44.

CHAPTER XXXVI

COSTS AND FEES

§ 768. **Deposit of Filing Fees.**—Upon the filing of a petition in bankruptcy, the law requires the clerk of the court to collect filing fees, to the extent of $15 for the referee, $5 for the trustee, and $10 for himself. These fees are to be deposited by the petitioning creditors in involuntary cases, and by the bankrupt in voluntary cases, except where he is excused on the ground of poverty.[1] This deposit, on the part of a voluntary bankrupt not so excused, is a condition precedent to the filing of the petition; but if the petition is placed on file and an adjudication made without payment of the fees, the objection may be raised on the bankrupt's application for discharge, and action on such application will be stayed until the filing fees are paid.[2] When the petition of a proposed voluntary bankrupt is accompanied by an affidavit stating that he has not and cannot obtain the money with which to pay the filing fees, the clerk will file the petition and docket the case without exacting the deposit of such fees.[3] But the question of the petitioner's ability to pay the fees is open to investigation at future stages of the proceedings. And while his affidavit of inability is prima facie evidence of the facts stated,[4]

[1] Bankruptcy Act 1898, §§ 40, 48, 51, 52. And see, supra, § 165.

[2] In re Barden, 101 Fed. 553, 4 Am. Bankr. Rep. 31.

[3] In re Fees Payable by Voluntary Bankrupts, 95 Fed. 120. Since, under the statute, payment of the clerk's filing fees has priority over payment of attorneys' fees, a bankrupt cannot reverse this order, and, after paying his attorney a fee, file his petition and schedules as a pauper. In re Darr (D. C.) 232 Fed. 415, 36 Am. Bankr. Rep. 432.

[4] In re Levy (D. C.) 101 Fed. 247.

it is not conclusive, and if circumstances appear casting doubt on the truth of the affidavit, the case may be sent to the referee to investigate and report the facts,[5] and then the petitioner must support his allegation of poverty by convincing evidence.[6] As to the fact of his actual inability to procure the money with which to pay the fees, he is not required to solicit gifts or loans from his friends for that purpose, and he is not guilty of a false oath in making affidavit that he "cannot obtain" the requisite sum, although it appears that friends would have advanced him the amount if requested.[7] But he cannot hold out property which is exempt under the laws of the state and still make the poverty affidavit. The provision of the bankruptcy act giving bankrupts the benefit of exemptions allowed by state law was not intended to exonerate them from payment of the filing fees on their voluntary petitions. Such a bankrupt is excused from payment of the fees only in case of absolute inability to pay them; and such inability does not exist so long as he has money or property sufficient for the purpose, although it is exempt.[8] Further, in case of the filing of a petition by a voluntary bankrupt without payment of the fees, "the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed."[9] This clearly means that the bankrupt may be required to pay the filing fees out of money acquired or earned since the filing of the petition, though the only decision on the point is to the contrary.[10] It is to be observed that the referee has no authority to make such an order, the power being confided to the judge alone.[11]

Upon the voluntary application of a partnership for the benefit of the act, only one petition need be filed, and all that is done thereupon constitutes one proceeding, although it involves granting a discharge to

[5] In re Collier, 93 Fed. 191, 1 Am. Bankr. Rep. 182.

[6] In re Williams, 2 Nat. Bankr. News, 206.

[7] Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529; In re Mason, 181 Fed. 899, 25 Am. Bankr. Rep. 73. But compare In re Hines, 117 Fed. 790, 9 Am. Bankr. Rep. 27. Where persons filing voluntary petitions in bankruptcy were able to pay their attorneys, and were earning money, and by proper saving and conduct could accumulate and procure the money with which to pay the filing fee and referee's fee, they will not be permitted to maintain the proceedings without such payment. In re Latham (D. C.) 271 Fed. 538, 46 Am. Bankr. Rep. 581.

[8] In re Mason, 181 Fed. 899, 25 Am. Bankr. Rep. 73; In re Hines, 117 Fed. 790, 9 Am. Bankr. Rep. 27; In re Bean, 100 Fed. 262, 4 Am. Bankr. Rep. 53; In re Collier, 93 Fed. 191, 1 Am. Bankr. Rep. 182. Contra, see Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

[9] General Orders in Bankruptcy, No. 35.

[10] Sellers v. Bell, 94 Fed. 801, 36 C. C. A. 502, 2 Am. Bankr. Rep. 529.

[11] In re Plimpton, 103 Fed. 775, 4 Am. Bankr. Rep. 614.

each of the partners, and only one deposit of the filing fee is required; it cannot be demanded of the partners, as a prerequisite to discharging them, that they should each separately deposit a like fee.[12] But where a partnership files a voluntary petition for the adjudication in bankruptcy of the firm as such, and also separate petitions for the adjudication of the several partners, each petition, with the accompanying schedules, constitutes a separate and distinct "case," within the meaning of the statute, and a deposit of the statutory filing fees must be made, not only for the partnership, but also for each member of the firm who seeks an adjudication.[13]

When the filing fees are deposited by the petitioning creditors in an involuntary case, or by their attorneys for them, they are entitled to have the amount refunded to them out of the estate in bankruptcy.[14]

§ 769. **Security for Costs.**—When a trustee in bankruptcy is urged by certain creditors to institute proceedings to set aside fraudulent conveyances or preferences, or otherwise to take action in court for the recovery of alleged assets of the estate, he may require those creditors to furnish him security or indemnity against the costs which may fall upon the estate in consequence of his compliance with their demands.[15] It is also provided by the general orders in bankruptcy that the clerk, the marshal, or the referee, before incurring expenses of certain kinds, may require the bankrupt or other person in whose behalf the duty is to be performed to furnish indemnity for such expenses, and that money advanced by the bankrupt or other person for this purpose shall be repaid him out of the estate. (General Order No. 10.) Thus, a petitioner in voluntary bankruptcy may be required to furnish indemnity to the referee for the cost of publishing the notice to creditors and the creditors' meeting, and if he fails to do so, without excuse, in time for the meeting to be held, his petition should be dismissed for want of prosecution.[16] But this provision does not apply to one against whom a petition in involuntary bankruptcy is filed and who denies insolvency and resists adjudication, and he cannot be required to deposit the cost of a reference and hearing.[17] And the statutes and rules as to security for

[12] In re Langslow, 98 Fed. 869, 1 Am. Bankr. Rep. 258; In re Gay, 98 Fed. 870, 3 Am. Bankr. Rep. 529. But compare In re Farley, 115 Fed. 359, 8 Am. Bankr. Rep. 266.

[13] In re Barden, 101 Fed. 553, 4 Am. Bankr. Rep. 31.

[14] In re Silverman, 97 Fed. 325, 3 Am. Bankr. Rep. 227; In re J. W. Harrison Mercantile Co., 95 Fed. 123, 2 Am. Bankr. Rep. 419.

[15] Supra, § 283. On the other hand, a trustee in bankruptcy bringing a suit in a state court, who has no assets in his hands except the claim sued on, and does not show any prospect of being able to succeed in the action, may and should be required to file security for costs. Uhr v. Coulter, 172 App. Div. 413, 158 N. Y. Supp. 512.

[16] In re Crisp (D. C.) 239 Fed. 419, 38 Am. Bankr. Rep. 557.

[17] In re Wester, 242 Fed. 465, 155 C. C. A. 241, 40 Am. Bankr. Rep. 89.

costs do not apply to petitions to review bankruptcy proceedings in matters of law, and there is no settled practice authorizing an application for security in such cases.[18] The provision as to repayment out of the estate of money advanced to cover costs does not apply to the filing fees which the clerk is directed to collect on the filing of a voluntary petition in bankruptcy, and this money is not to be returned to the bankrupt.[19] A creditor who objects to the bankrupt's application for discharge may prosecute his objections in forma pauperis, by virtue of the Act of Congress of July 20, 1892, 27 Stat. 252 (U. S. Comp. St. 1901, p. 706), which gives any citizen entitled to commence "any suit or action in any court of the United States" such right on making the required showing.[20]

§ 770. **Power to Award Costs.**—Under the provisions of the statute, the court of bankruptcy may "tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy."[21] But the obvious policy of the act, manifest in all of its provisions touching on the subject, is to reduce to a minimum the expense of administering estates, and the courts are bound to give the statute such a construction and application as will fulfill the intention of Congress in this regard.[22] The general orders also provide that, "in cases of involuntary bankruptcy, where the debtor resists adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner."[23] But as regards the case where the petition is dismissed, it is held that this applies only in cases where the jurisdiction of the court was not questioned, or was sustained, and the decision was on the merits, and not to cases where the petition was dismissed for want of jurisdiction or because the defendant was not within

[18] In re Vidal, 230 Fed. 603, 145 C. C. A. 13, 35 Am. Bankr. Rep. 806.

[19] In re Matthews (D. C.) 97 Fed. 772, 3 Am. Bankr. Rep. 265; Anonymous, 1 N. B. R. 122, Fed. Cas. No. 457.

[20] In re Gullbert, 154 Fed. 676, 18 Am. Bankr. Rep. 830.

[21] Bankruptcy Act 1898, § 2, cl. 18. A state court cannot review a judgment of a federal court allowing costs in bankruptcy proceedings. Thompson v. Sunrise Coal Co.'s Trustee, 181 Ky. 158, 204 S. W. 89.

[22] In re J. W. Harrison Mercantile Co., 95 Fed. 123, 2 Am. Bankr. Rep. 419; In re Fullick, 201 Fed. 463, 28 Am. Bankr. Rep. 634.

[23] General Orders in Bankruptcy, No. 34. And see In re Ghiglione, 93 Fed. 186, 1 Am. Bankr. Rep. 580; In re Morris, 115 Fed. 591, 7 Am. Bankr. Rep. 709; In re Reiswig (D. C.) 253 Fed. 390, 42 Am. Bankr. Rep. 161. Bankruptcy Act, § 2, subd. 18, and General Order No. 34 should be read together and are merely declaratory of the general power of courts of equity, including bankruptcy courts, over the allowance and apportionment of costs. Petition of Kurtz Brass Bed Co., 250 Fed. 116. Upon the dismis-

the classes of persons or corporations made subject to the law.[24] Another clause of the act provides that, when a petition in involuntary bankruptcy is accompanied by an application to seize and hold the property of the alleged bankrupt prior to the adjudication, the petitioners shall file a bond conditioned for the payment, in case the petition is dismissed, of costs, expenses, and damages, and if the petition is dismissed, the respondent shall be allowed costs, counsel fees, expenses, and damages occasioned, to be fixed by the court and paid by the obligors in the bond.[25] But it is held that this applies only to the one case specified, so that, upon the dismissal of a petition in bankruptcy, the respondent is entitled to costs, but not to an allowance for counsel fees or expenses or damages, unless there was an application to seize and hold his property,[26] and the fact that a temporary injunction was granted to restrain supposed debtors from paying money into the hands of the alleged bankrupt does not bring the case within the provision in question.[27] But the court of bankruptcy has authority under its general equity powers to order the petitioning creditors to pay the expenses of a receivership, where the receiver was appointed on their application on the filing of their petition, which petition was subsequently dismissed as unfounded,[28]

sal of an involuntary petition, the court has no inherent power to assess the compensation of the trustee and counsel against the petitioning creditors in the absence of fraud or bad faith. In re National Carbon Co., 241 Fed. 330, 154 C. C. A. 210, 39 Bankr. Rep. 218. On dismissal of a proceeding in involuntary bankruptcy, the respondent is not entitled to have an allowance for counsel fees taxed in his bill of costs, even though the proceeding was not instituted in good faith. In re Shon (D. C.) 212 Fed. 797.

[24] In re Philadelphia & Lewes Transp. Co. (D. C.) 127 Fed. 896, 11 Am. Bankr. Rep. 444.

[25] Upon the dismissal of a petition in involuntary bankruptcy, on which a receiver was appointed, the court of bankruptcy has jurisdiction to authorize the allowance of damages, etc., in accordance with Bankruptcy Act, § 3e, occasioned by the appointment of the receiver. In re Weissbord (D. C.) 241 Fed. 516, 39 Am. Bankr. Rep. 243. But see In re Wise (D. C.) 212 Fed. 567, holding that, since the counsel fees, expenses, and damages provided for in that section of the Act are for special services or for damages occasioned by the wrongful taking of the property of an alleged bankrupt, such fees and damages are not taxable in the bankruptcy proceedings, but are recoverable in a suit on the bond of the petitioners. Where an alleged bankrupt corporation, on the filing of an involuntary petition against it, consented to the appointment of a receiver without the bond required by the Act having been given, it cannot, on the dismissal of the petition, object to the payment of necessary disbursements out of the funds in the receiver's custody. In re Independent Machine & Tool Corp., 251 Fed. 484, 163 C. C. A. 478, 41 Am. Bankr. Rep. 517.

[26] In re Williams, 120 Fed. 34, 9 Am. Bankr. Rep. 736; In re Morris, 115 Fed. 591, 7 Am. Bankr. Rep. 709; In re Ghiglione, 93 Fed. 186, 1 Am. Bankr. Rep. 580.

[27] In re Williams, 120 Fed. 34, 9 Am. Bankr. Rep. 736.

[28] In re Lacov, 142 Fed. 960, 74 C. C. A. 130, 15 Am. Bankr. Rep. 290. See In re Eagle Steam Laundry Co., 184 Fed. 949, 25 Am. Bankr. Rep. 868. An accounting of the receipts and disbursements of a receiver appointed by a state court at the instance of a trustee in bankruptcy, and to protect property sued for by him, involves fixing his compensation, so far as such court can fix it. Hull v. Fifty-Second St. Storage House, 167 App. Div. 860, 153 N. Y. Supp. 850.

and to enforce such an order by proceedings in contempt.[29] But if the receiver has continued in the possession of the property until after the defendant has been adjudged bankrupt by the court in another district, the authority to compensate the receiver passes to the court making the adjudication, which takes exclusive jurisdiction of the estate.[30] Where creditors successfully oppose the bankrupt's application for discharge, and incur costs and expenses in so doing, they would ordinarily be taxable against the bankrupt. But if he is entirely without money, the court will not make a useless order upon him to pay such costs, and there is no warrant of law to tax such costs against the estate.[31]

§ 771. **Amount and Items of Costs.**—Fees of witnesses in bankruptcy proceedings are a part of the costs which may properly be taxed by the court, and their allowance is indirectly provided for in the clause which declares that "no person shall be required to attend as a witness before the referee at a place outside of the state of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him."[32] It is also provided that the bankrupt "shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence."[33] But extra compensation to expert witnesses, above the statutory witness fee and mileage, cannot be taxed as costs, or allowed against a losing party, in a court of bankruptcy; and the court will not be bound to make such an allowance because counsel have so agreed, especially where the agreement is not in writing.[34] As to the expense of taking down and preserving testimony, it is held that, except where a stenographer is employed on application of the trustee, as provided by section 38, clause 5, of the bankruptcy act, or there has been a stipulation of the parties, or money has been deposited for the expense as provided by general order No. 10, the referee cannot be allowed for the expense of a stenographer.[35] And in any event, the compensation allowed to stenographers will be scrutinized by the court, and reduced if deemed excessive.[36] As to costs on appeal, where proceedings for review of an order of the court of bankruptcy are dismissed for want of jurisdiction, without any motion therefor, neither party will be allowed costs.[37] And

[29] In re Lacov, 142 Fed. 960, 74 C. C. A. 130, 15 Am. Bankr. Rep. 290.

[30] In re Sears, Humbert & Co., 128 Fed. 275, 62 C. C. A. 623.

[31] In re Kyte, 189 Fed. 531, 26 Am. Bankr. Rep. 507.

[32] Bankruptcy Act 1898, § 41, proviso. And see, supra, § 273.

[33] Bankruptcy Act 1898, § 7, proviso.

[34] In re Carolina Cooperage Co., 96 Fed. 604.

[35] In re Mammoth Pine Lumber Co., 116 Fed. 731, 8 Am. Bankr. Rep. 651. And see supra, §§ 266, 273.

[36] In re Ellett Electric Co., 196 Fed. 400, 28 Am. Bankr. Rep. 453.

[37] Hutchinson v. Le Roy, 113 Fed. 202, 51 C. C. A. 159, 8 Am. Bankr. Rep. 20.

the same rule applies where, on appeal against a trustee from an order in bankruptcy, such order is reversed on a ground not assigned or urged by the appellant.[38] And though a decree in bankruptcy is reversed on review in the Circuit Court of Appeals, no costs should be allowed when the petition for review was delayed nearly six months, and the estate has probably deteriorated through the delay, and where further proceedings are necessary.[39] But where an appeal is taken from an order overruling respondent's demurrer to a bill of complaint brought by the trustee in bankruptcy, and pending the appeal the bill is voluntarily dismissed by the complainant, on leave of court, without prejudice, and at his own cost, thereby making necessary the dismissal of the appeal, he should be required to pay the costs on appeal.[40]

§ 772. **Persons Entitled to Costs.**—Where a petition for adjudication in involuntary bankruptcy is contested, costs will be awarded to the successful party, that is, to the alleged bankrupt if he defeats the petition, to the petitioning creditors if the adjudication is made.[41] But the present statute and orders do not contemplate an allowance of expenses or counsel fees to a person who is adjudged bankrupt after an unsuccessful resistance to the petition.[42] The bankrupt, however, is entitled to his disbursements in proceedings to obtain his discharge,[43] and if he advances the money necessary to pay for the issuance and publication of notices of his application for discharge, he is entitled to repayment of the same out of the estate.[44] So, in a proceeding to revoke or annul the discharge of a bankrupt, costs may be awarded to the prevailing party.[45] The trustee in bankruptcy is likewise entitled to costs on bringing to a successful conclusion an action to recover assets of the bankrupt, set aside an unlawful assignment or transfer of his property, avoid a fraudulent conveyance, or recover an illegal preference.[46] But claimants having claims against the estates of bankrupts must ordinarily establish them

See Gandia & Stubbe v. Cadierno, 233 Fed. 739, 147 C. C. A. 505, 36 Am. Bankr. Rep. 789.

[38] In re Dickson, 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349, 7 Am. Bankr. Rep. 186.

[39] In re Endlar, 192 Fed. 762, 113 C. C. A. 48, 27 Am. Bankr. Rep. 758.

[40] In re Orman, 107 Fed. 101, 46 C. C. A. 165, 5 Am. Bankr. Rep. 698.

[41] In re Sheehan, 8 N. B. R. 353, Fed. Cas. No. 12,738. On dismissal of a petition in bankruptcy, where there was an agreement between the petitioners and the alleged bankrupt that they should divide the cost of stenographers, the bankrupt was entitled to recover as costs the part of that expense paid by him, but not the expense of a transcript of the testimony for his own use. In re Pearce (D. C.) 235 Fed. 917, 37 Am. Bankr. Rep. 710.

[42] Otherwise under the act of 1867. See In re Comstock, 5 N. B. R. 191, Fed. Cas. No. 3,074.

[43] In re Dibblee, 4 Ben. 304, Fed. Cas. No. 3,887.

[44] In re Hatcher, 145 Fed. 658, 16 Am. Bankr. Rep. 722.

[45] In re Holgate, 8 Ben. 355, Fed. Cas. No. 6,601.

[46] Ommen v. Talcott, 175 Fed. 261, 23 Am. Bankr. Rep. 572; Stackhouse v. Holden, 66 App. Div. 423, 73 N. Y. Supp.

at their own expense, and they will not be allowed their costs and expenses out of the estate, unless, perhaps, where it appears that the defense made by the trustee was captious or unwarranted.[47] Especially where issues in the bankruptcy proceeding, arising out of the involved condition of the claims, were caused entirely by the methods of the creditor, the trustee should not be charged with the costs.[48] As to proceedings taken by parties other than the trustee, such as judgment creditors, mortgagees, or other lien claimants, to set aside fraudulent conveyances, or otherwise to rescue or reclaim property alleged to belong to the estate in bankruptcy, the general rule is that they may be allowed compensation out of the estate for costs, expenses, and counsel fees, in so far as their efforts have inured to the benefit of the general creditors, in the way of creating or preserving a fund for distribution, but not otherwise.[49] The costs of an attachment, execution, or other process which was begun within four months prior to the bankruptcy proceedings, and is therefore annulled by the adjudication are not a lien on the property in the hands of the trustee. But on the same principle as that last above mentioned, a sheriff or other person who has had the custody of the property may be reimbursed for his expenses in caring for and preserving it.[50] But where property of the bankrupt was attached within four months before the filing of the petition, it is error to require, as a condition of delivery of the attached property to the trustee, that he shall pay counsel fees and costs to the attorney for the attaching creditor and the costs of the attachment.[51]

§ 773. **Persons, Property, or Funds Liable for Costs.**—In some circumstances, the bankrupt may be personally liable for costs. Thus, where he appeals from the adjudication against him, he cannot have an order on the receiver appointed below to pay the costs of the appeal simply on the ground of his own poverty.[52] There are also cases in

203; Clowe v. Seavey, 74 Misc. Rep. 254, 131 N. Y. Supp. 817; Parker v. Travers, 74 N. J. Eq. 812, 71 Atl. 612.

[47] In re Stewart (D. C.) 178 Fed. 463, 24 Am. Bankr. Rep. 474. But see In re Waterloo Organ Co., 154 Fed. 657, 83 C. C. A. 481, 18 Am. Bankr. Rep. 752. Where the trustee contests the claim of an outsider, the controversy is inter partes, and costs follow as in any other case. In re All Star Feature Corp. (D. C.) 232 Fed. 1004. On the referee's finding for the claimant, seeking to reclaim property from the trustee in bankruptcy, the allowance of costs and disbursements to the claimant is in the referee's discretion. In re Reeves (D. C.) 227 Fed. 711, 36 Am. Bankr. Rep. 130. But see In re J. F. Pierson, Jr., & Co. (D. C.) 225 Fed. 889, 35 Am. Bankr. Rep. 213.

[48] Dowse v. Hammond, 130 Fed. 103, 64 C. C. A. 437.

[49] In re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815; In re J. C. H. Claussen & Co., 164 Fed. 300, 21 Am. Bankr. Rep. 34; In re Dumahaut, 19 N. B. R. 394, Fed. Cas. No. 4,126.

[50] In re Fortune, 1 Low. 306, 2 N. B. R. 662, Fed. Cas. No. 4,955; In re Williams, 2 N. B. R. 229, Fed. Cas. No. 17,705. And see supra, § 386.

[51] In re Shoemaker (C. C. A.) 205 Fed. 113, 30 Am. Bankr. Rep. 349.

[52] Herman Keck Mfg. Co. v. Lorsch, 179 Fed. 485, 103 C. C. A. 65, 24 Am. Bankr. Rep. 705.

which costs are properly payable by particular creditors, rather than out of the estate. Thus, where a petition in bankruptcy is dismissed because it is found that the bankrupt was insane at the time of committing the alleged act of bankruptcy, the costs may be charged against the petitioning creditors.[53] So where an execution creditor intervenes and opposes the adjudication, on the ground that the debtor is not insolvent, but unsuccessfully, the costs of the proceeding, in so far as the same was rendered necessary by his opposition, may be taxed against such intervener, including the fees of witnesses summoned by him and of any witnesses summoned by the petitioning creditors whose examination would not have been necessary but for the intervention.[54] On the other hand, petitioning creditors, who succeed in procuring an adjudication of bankruptcy, are entitled to be reimbursed out of the estate for their expenditures and to the allowance of a reasonable attorney's fee.[55] Where, on the application of creditors accompanying the petition in involuntary bankruptcy, property of the bankrupt is seized and held pending the adjudication, and the result is the securing or preserving for the estate of valuable property which otherwise would have been lost or dissipated, the petitioning creditors are entitled to reimbursement for their costs and expenses.[56] But where, such a course having been taken, the petition is dismissed, the damages occasioned by the seizure and detention of the property are recoverable, not indeed against the petitioning creditors generally, but against that creditor on whose application the property was seized.[57] Costs may also be awarded against a particular creditor who has insisted on and procured an unnecessary and fruitless examination of the bankrupt in the hope of discovering concealed assets,[58] or who has procured the appointment of a receiver, when such appointment proves to have been unauthorized or unnecessary,[59] or who has unsuccessfully opposed the bankrupt's application for discharge.[60]

Claimants of property and those asserting debts against the estate in bankruptcy are generally required to sustain the expense of contests. If a claim is disallowed, the claimant must pay the costs of the

[53] In re Ward, 203 Fed. 769, 29 Am. Bankr. Rep. 547.

[54] In re Carolina Cooperage Co., 96 Fed. 604. And see Petition of Kurtz Brass Bed Co. (D. C.) 250 Fed. 116, 42 Am. Bankr. Rep. 3.

[55] In re Mitteldorfer, Chase, 288, 3 N. B. R. 1, Fed. Cas. No. 9,675. And see Bankruptcy Act 1898, § 64b, cl. 3.

[56] In re Schwab, 3 Ben. 231, 2 N. B. R. 488, Fed. Cas. No. 12,498.

[57] In re Ward, 203 Fed. 769, 29 Am. Bankr. Rep. 547; T. E. Hill Co. v. United States Fidelity & Guaranty Co., 265 Ill. 534, 107 N. E. 194. See In re Veler, 249 Fed. 633, 161 C. C. A. 543, 41 Am. Bankr. Rep. 736.

[58] In re Rozinsky, 101 Fed. 229, 3 Am. Bankr. Rep. 830.

[59] In re Wentworth Lunch Co. (C. C. A.) 191 Fed. 821, 27 Am. Bankr. Rep. 515; In re Charles W. Aschenbach Co., 183 Fed. 305, 105 C. C. A. 517, 25 Am. Bankr. Rep. 502.

[60] In re Miers, 193 Fed. 288, 27 Am. Bankr. Rep. 870; In re Amer (D. C.) 228 Fed. 576, 35 Am. Bankr. Rep. 627.

examination and hearing,[61] and even where the claimant succeeds in establishing his claim, as against opposition, the court will not allow him costs and attorneys' fees out of the estate.[62] And especially where the costs on the contest of a claim grew out of a controversy between creditors, entirely carried on for the purpose of controlling the election of the trustee, they will not be allowed out of the estate.[63] The case is somewhat different in regard to a mortgagee or other holder of a valid lien on particular property of the bankrupt. If such a creditor files and proves his claim in the bankruptcy proceedings for allowance and payment out of the proceeds of the property affected, he is properly chargeable with his pro rata share of the costs of the bankruptcy proceedings.[64] But where the court of bankruptcy, for the sake of realizing the supposed value of the equity of redemption in the mortgaged property, takes control of the same and causes it to be sold by the trustee, the creditor assenting to, but not inviting, such a course, the proceeds should not be charged with any part of the costs and expenses of the bankruptcy proceeding in general, incurred solely for the benefit of unsecured creditors, but since the mortgagee is benefited to the extent of having his lien foreclosed for him by the bankruptcy sale, he may properly be called upon to bear the actual costs and expenses of the sale,[65] and also, if equitable considerations justify it, to contribute towards the expense of caring for and preserving the property before the sale.[66] And whereas the 1910 amendment to the bankruptcy act authorizes the payment of commissions to the trustee out of the proceeds of the sale of incumbered property, it is held that this applies only to cases in which

[61] In re Rome, 162 Fed. 971, 19 Am. Bankr. Rep. 820; In re Todd, 109 Fed. 265, 6 Am. Bankr. Rep. 88; In re Schocket, 177 Fed. 583, 24 Am. Bankr. Rep. 47.

[62] In re Coventry Evans Furniture Co., 171 Fed. 673, 22 Am. Bankr. Rep. 623. See In re J. F. Pierson, Jr., & Co. (D. C.) 225 Fed. 889, 35 Am. Bankr. Rep. 213.

[63] In re Worth, 130 Fed. 927, 12 Am. Bankr. Rep. 566.

[64] In re Franklin (D. C.) 151 Fed. 642, 18 Am. Bankr. Rep. 218. See In re Elmore Cotton Mills (D. C.) 217 Fed. 810, 33 Am. Bankr. Rep. 544. Where a mortgagee of a bankrupt asserts a lien for an excessive amount, which is contested by the trustee, part or all of the expense thereby incurred, including an attorney's fee, may be charged against the fund which would otherwise go to the mortgagee. In re Howard (D. C.) 207 Fed. 402, 31 Am. Bankr. Rep. 251.

[65] In re O'Gara Coal Co., 235 Fed. 83, 149 C. C. A. 195, 38 Am. Bankr. Rep. 131; In re Elmore Cotton Mills (D. C.) 217 Fed. 808, 33 Am. Bankr. Rep. 426; In re Rauch (D. C.) 226 Fed. 982, 36 Am. Bankr. Rep. 75; In re Cutler & John (D. C.) 228 Fed. 771, 36 Am. Bankr. Rep. 420; In re Williams' Estate, 156 Fed. 934, 84 C. C. A. 434, 19 Am. Bankr. Rep. 389; In re Howard, 207 Fed. 402; The Bethulia, 200 Fed. 879; Mills v. Virginia-Carolina Lumber Co., 164 Fed. 168, 20 Am. Bankr. Rep. 750; In re Prince & Walter, 131 Fed. 546, 12 Am. Bankr. Rep. 675; In re Goldville Mfg. Co., 123 Fed. 579, 10 Am. Bankr. Rep. 552; In re Peabody, 16 N. B. R. 243, Fed. Cas. No. 10,866. And see supra, § 571.

[66] See In re Evans Lumber Co., 176 Fed. 643, 23 Am. Bankr. Rep. 881. Compare In re Vulcan Foundry & Machine Co., 180 Fed. 671, 103 C. C. A. 637, 24 Am. Bankr. Rep. 825.

there was actually a substantial value to the equity of redemption, and in which, therefore, the bankruptcy court rightfully exercised its jurisdiction to sell free from liens, or in which the lienholder consented to a sale; but where the incumbered property brings much less than the amount of the liens on it, the trustee's commissions must be paid out of the bankrupt estate, and not by the lien creditors.[67] Where the trustees of a bankrupt corporation do not receive possession of its assets, because the same have been placed in the hands of receivers of another court in foreclosure proceedings, but they conceive it to be their duty to defend the foreclosure suits, and file a cross bill looking to the administration of the entire assets, they are entitled to have the compensation for themselves and their attorneys made a direct charge on the property prior to the claims of creditors and stockholders.[68]

Where the trustee brings suit to set aside a fraudulent conveyance, recover a preference, or the like, the costs are to be borne by the unsuccessful defendant, and not to be taken out of the property or fund recovered.[69] On the other hand, if he is unsuccessful in an action of this kind, the expense falls upon the estate in bankruptcy,[70] unless the trustee, being doubtful of the probable result of the action, has exercised his right to demand indemnity from those creditors who insist on his bringing the suit.[71] In the case of the bankruptcy of a partnership, the statute provides that "the expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine." [72]

Petitioning creditors, intervening creditors, and the alleged bankrupt may stipulate for an apportionment as between themselves of the costs and expenses of the proceeding, and in this case a creditor cannot set off against the amount of expenses taxed against him his demand against the bankrupt.[73]

§ 774. **Taxation of Costs.**—Claims for costs, expenses, and fees should be filed with the referee in bankruptcy, in order that they may

[67] In re Holmes Lumber Co., 189 Fed. 178, 26 Am. Bankr. Rep. 119. In re Russell Falls Co. (D. C.) 249 Fed. 260, 41 Am. Bankr. Rep. 448. But compare In re West (D. C.) 232 Fed. 903, 37 Am. Bankr. Rep. 421.

[68] Meddaugh v. Wilson, 151 U. S. 333, 14 Sup. Ct. 356, 38 L. Ed. 183.

[69] Bunch v. Smith, 116 Tenn. 201, 93 S. W. 80; Collins v. Bryan, 40 Tex. Civ. App. 88, 88 S. W. 432. See In re H. B. Hollins & Co. (D. C.) 225 Fed. 618. But in an action by a trustee in bankruptcy to set aside an assignment by the bankrupt of his interest in remainder, the taxable costs of an infant defendant, who was impleaded in the action and defended by a guardian ad litem, should be paid out of the funds of the estate. Clowe v. Seavey, 74 Misc. Rep. 254, 131 N. Y. Supp. 817.

[70] Ommen v. Talcott, 175 Fed. 261, 23 Am. Bankr. Rep. 572; In re Babcock, 1 Woodb. & M. 26, Fed. Cas. No. 697. And see supra, §§ 198, 308, 311, 432.

[71] See supra, § 283.

[72] Bankruptcy Act 1898, § 5e.

[73] King Hardware Co. v. J. G. Christopher Co., 222 Fed. 224, 138 C. C. A. 54, 34 Am. Bankr. Rep. 422.

be examined by parties in interest and that any person aggrieved by the ruling of the referee may have the same reviewed.[74] But the question of allowance may be determined by the referee ex parte, and notice to creditors of the hearing on such claims is not a prerequisite to the validity of his order.[75] And the amount to be allowed as a fee to the attorney of a voluntary bankrupt rests largely in the discretion of the referee, and his allowance will not be disturbed by the judge in the absence of evidence to show that it was unjust, excessive, or exorbitant.[76] Similarly, costs will be allowed to an alleged bankrupt on the dismissal of an involuntary petition against him only after the filing of his bill of costs with the clerk and notice to the petitioning creditors.[77] The statute allows, and gives priority to, "one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow."[78] But no attorney's fee can be allowed in voluntary proceedings, except upon proof of services actually rendered to the bankrupt in doing the things which the law requires of him.[79] And the statute does not make the allowance of an attorney's fee in involuntary cases a matter of right, but gives the court discretionary power, and where such an allowance is asked for, the attorney must disclose his dealings with his client, that the court may act intelligently in the matter.[80] Marshals must present vouchers for the items charged in their accounts, or produce satisfactory reasons for the absence of such vouchers.[81] And the claim of the marshal for expenditures must be supported by his own oath as to their amount and the necessity for them,[82] which, however, is not conclusive so as to preclude any further inquiry into the items charged.[83]

§ 775. Expenses of Administering Estates.—The authority and duty of a trustee in bankruptcy, with respect to expenditures for the care and preservation of the property committed to his charge, and the efficient administration of the estate in bankruptcy, have been discussed in an earlier section.[84] The general rule prescribed by the statute is as

[74] In re Stoddard Bros. Lumber Co., 169 Fed. 190, 22 Am. Bankr. Rep. 435; In re Rosenberg, 3 N. B. R. 73, Fed. Cas. No. 12,056.

[75] In re Stotts, 93 Fed. 438, 1 Am. Bankr. Rep. 641.

[76] In re Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235.

[77] In re Haeseler-Kohlhoff Carbon Co., 135 Fed. 867, 14 Am. Bankr. Rep. 381.

[78] Bankruptcy Act 1898, § 64b, cl. 3.

[79] In re Terrill, 103 Fed. 781, 4 Am. Bankr. Rep. 625.

[80] In re Carr, 117 Fed. 572, 9 Am. Bankr. Rep. 58.

[81] In re Comstock, 9 N. B. R. 88, Fed. Cas. No. 3,075.

[82] In re Hellmar, 4 Sawy. 163, 17 N. B. R. 362, Fed. Cas. No. 6,342.

[83] In re Pace, Fed. Cas. No. 10,640.

[84] See supra, § 308.

follows: "The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred." [85] The term "officers" here used includes others beside the trustee. Thus, a deputy marshal appointed to take charge of a bankrupt's store and the stock of goods therein, and responsible on his bond for the value of the property, may hire a competent person as watchman if he has any reason to apprehend danger to the property, and charge in his accounts a reasonable sum as compensation for the services of such watchman.[86] But the creditors are not officers; and hence, for instance, the expenses of the creditors in attending meetings will not be allowed out of the estate.[87] It is, in fact, the obvious policy of the act, manifest in all its provisions respecting expenses and fees, to reduce to a minimum the expense of administering estates, and the courts are bound to give the statute such a construction and application as will fulfill the intention of Congress in this regard.[88] There is a provision in the general orders, as to requiring indemnity for expenses about to be incurred, which is expressed as follows: "Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may

[85] Bankruptcy Act 1898, § 62a. Where a trustee in bankruptcy paid attorneys' fees, leaving an insufficient amount in his hands to pay a watchman employed to care for the property of the estate, he must stand the loss unless he can obtain a refund from the attorneys. In re Mitchell, 212 Fed. 932, 129 C. C. A. 452. Where a bankrupt with concealed assets purchased and conducted a business in another district in the name of another, who afterwards went into bankruptcy, the cost of administration of both estates in that district will be payable from the proceeds of the property therein. In re Offricht (D. C.) 260 Fed. 682, 43 Am. Bankr. Rep. 345. On bankruptcy proceedings of a stockbroker, the allowances to the special master and the expense for stenographic minutes must come preliminarily out of the general estate; if that is not sufficient they should come pro rata out of securities or their proceeds available to least favored claimants; and if not satisfied by such securities, out of securities of most favored claimants. In re J. C. Wilson & Co. (D. C.) 252 Fed. 631, 42 Am. Bankr. Rep. 350. Where property is finally adjudged not to belong to the estate in bankruptcy and is taken out of the trustee's possession on reclamation proceedings by the owner, charges for storing the property prior to the filing of the reclamation petition may be made against such owner. In re John H. Parker Co. (D. C.) 268 Fed. 868, 45 Am. Bankr. Rep. 34. Where one creditor on his own responsibility has recovered assets of the estate by suit, and is entitled to be reimbursed for the reasonable expense of such recovery, he may properly retain such expense from the proceeds of the judgment and pay over the remainder only to the trustee. In re Kenny (D. C.) 269 Fed. 54, 46 Am. Bankr. Rep. 214.

[86] In re Scott (D. C.) 99 Fed. 404, 3 Am. Bankr. Rep. 625. Compare In re Pickhardt (D. C.) 198 Fed. 879, 29 Am. Bankr. Rep. 524.

[87] In re Ward, 9 N. B. R. 349, Fed. Cas. No. 17,145.

[88] In re Harrison Mercantile Co. (D. C.) 95 Fed. 123, 2 Am. Bankr. Rep. 419. And see In re Metallic Specialty Co. (D. C.) 215 Fed. 937.

require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expenses. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same."[89] But it is held that this does not apply to the filing fees which the clerk is directed to collect upon the filing of a voluntary petition in bankruptcy, and this money is not to be returned to the bankrupt.[90]

§ 776. Fees of Clerks.—The bankruptcy act provides that the clerks of the courts of bankruptcy "shall receive as full compensation for their service to each estate a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt."[91] The matter of furnishing certified copies of records is provided for in another section of the statute, as follows: "Clerks shall respectively account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers."[92] These provisions are explained and reconciled in the general orders, which declare that "the fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers."[93] Where the local rule of court provides that the notice of final meeting shall be issued by the clerk in accordance with Official Form No. 57, which includes the petition for the bankrupt's discharge, the order of notice, jurat, etc., it is held that the clerk is not entitled to charge a fee of 25 cents for each notice sent to creditors, on petition for discharge, but is only entitled to the actual items of expense thereon for postage, stationery, and clerical assistance.[94]

[89] General Orders in Bankruptcy, No. 10.

[90] In re Matthews (D. C.) 97 Fed. 772, 3 Am. Bankr. Rep. 265.

[91] Bankruptcy Act 1898, § 52a.

[92] Bankruptcy Act 1898, § 51a.

[93] General Order No. 35, par. 1. An allowance to the clerk of the District Court for expenses in mailing bankruptcy notices, duly approved by the court, is not subject to collateral attack; and the clerk cannot be required to account to the government for the sums so allowed him. United States v. United States Fidelity & Guaranty Co. (D. C.) 263 Fed. 442, 45 Am. Bankr. Rep. 295. Clerks of federal courts are not entitled to fees for sending out copies of the petition and notice of an application for a bankrupt's discharge, but are only entitled to charge the necessary expenses therefor. In re Loughney (D. C.) 218 Fed. 980, 34 Am. Bankr. Rep. 206.

[94] In re Dunn Hardware & Furniture Co., 134 Fed. 997, 14 Am. Bankr. Rep. 186.

§ 777. Fees and Expenses of Marshals and Receivers.—In its original form, the bankruptcy act of 1898 authorized courts of bankruptcy to appoint receivers (or marshals to act as receivers) to take possession of the property of alleged bankrupts, when necessary, after the filing of the petition, and until it should either be dismissed or an adjudication made and a trustee appointed and qualified. But it made no special provision for the compensation of such receivers. In 1903 it was amended so far as to authorize the courts of bankruptcy, when the business of a bankrupt had been continued and carried on by a receiver or the marshal, to allow him additional compensation for such services, "but not at a greater rate than in this act allowed trustees for similar services." At that time the compensation of trustees was fixed by the forty-eighth section of the act, and consisted, in addition of the filing fee of five dollars, of commissions on all moneys disbursed by them at fixed percentages varying with the total amount. And some of the decisions held that a receiver might be allowed the maximum commission which would be awarded to a trustee in similar cases, but could claim nothing extra for carrying on the bankrupt's business.[95] The general rule, however, was that the court had authority to allow the receiver a just and reasonable compensation for his personal services, the amount of which rested in the sound discretion of the court and should depend upon all the circumstances of the particular case.[96] But in 1910, this subject underwent a complete revision at the hands of Congress, and the forty-eighth section of the act was rewritten, the portions of it applicable to the compensation of receivers and marshals being made to read as follows:

"(d) Receivers or marshals appointed pursuant to section two, subdivision three of this act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow,[97] not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys

[95] In re Cambridge Lumber Co., 136 Fed. 983, 14 Am. Bankr. Rep. 168; In re Richards, 127 Fed. 772, 11 Am. Bankr. Rep. 581.

[96] In re Scott, 99 Fed. 404, 3 Am. Bankr. Rep. 625; Dunlap Hardware Co. v. Huddleston, 167 Fed. 433, 21 Am. Bankr. Rep. 731; In re Huddleston, 167 Fed. 428, 21 Am. Bankr. Rep. 669; In re Scott, 99 Fed. 404, 3 Am. Bankr. Rep. 625; In re Sully, 133 Fed. 997, 13 Am. Bankr. Rep. 783; In re Adams Sartorial Art Co., 101 Fed. 215, 4 Am. Bankr. Rep. 107. And see, supra, § 216.

[97] Where the receiver turns over to the trustee cash, and also the bankrupt's stock, fixtures, and uncollected book accounts, he is entitled, at the time, to a commission on the cash only; he is not entitled to an allowance on the property

in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars; provided, that in case of the confirmation of a composition, such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions;[98] provided further, that when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee; provided further, that before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this act.[99]

"(e) Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars," with the same proviso as to the case of

turned over in kind until the trustee has realized on it. In re Falkenberg (D. C.) 206 Fed. 835, 30 Am. Bankr. Rep. 718.

[98] Where a composition is offered after the appointment of a trustee, the receiver may be allowed such amount as the court sees fit to allow up to the regular percentage. In re Miller (D. C.) 243 Fed. 242, 40 Am. Bankr. Rep. 155.

[99] The compensation of receivers specified in the Bankruptcy Act is not intended as a fixed, invariable amount to be awarded, but as the maximum to be allowed only in cases justifying it. And in the view of the provision of § 48b, relating to the division of the compensation of trustees, where there are several, the same rule applies as to receivers, and though there is more than one receiver the compensation cannot be increased, but the fees must be divided. In re Mills Tea & Butter Co. (D. C.) 235 Fed. 813, 37 Am. Bankr. Rep. 148. An allowance to the receiver in excess of the maximum fixed by the Bankruptcy Act cannot be allowed to stand, as it is beyond the power of the court, and the principle is not altered by the fact that no objection to such excessive allowance was made by attorneys representing

the confirmation of a composition, and as to notifying creditors of the application for compensation.[100]

Where a receiver is appointed pending the petition in bankruptcy, the petitioning creditor is required to give a bond, and if the petition is dismissed or withdrawn, "counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond."[101] But the court has power in the first instance to direct that the expenses and the compensation of the receiver shall be paid out of the property in his hands, although the proceedings are afterwards dismissed, as it is no part of the receiver's duty to move to recover such expenses and compensation against the petitioning creditors.[102] Where, after the appointment of a receiver, a second petition is filed in another district, where an adjudication is made, and to which the proceedings are transferred, as being the district of the bankrupt's domicile, the court in the latter district has jurisdiction to fix the compensation of the receiver, although payment can only be made on order of the court having the custody of the estate.[103] Where the receiver is afterwards appointed trustee, the settlement of his fees should be determined in connection with the claim for commissions and fees for services rendered to the estate as a whole.[104] In regard to the additional compensation to be allowed to the receiver when he carries on the business of the bankrupt, it has been held that a receiver who takes possession of the bankrupt's store, advertises a sale, and keeps the store open, for the purpose of retail sale, only for the remainder of the day on which he takes possession, and then closes the store and sells the stock in bulk, is not a mere custodian, but on the other hand, he does not "carry on the business" of the bankrupt so as to entitle himself to the extra compensation.[105] It should be observed that the requirement of notice to

nearly all the creditors, in view of the receiver's unusual assiduity and attention to the proceedings. In re Weissman (D. C.) 267 Fed. 588, 46 Am. Bankr. Rep. 189. And see In re Metropolitan Motor Car Co. (D. C.) 225 Fed. 274, 35 Am. Bankr. Rep. 539.

[100] Bankruptcy Act 1898, § 48, as amended by Act Cong. June 25, 1910, 36 Stat. 838.

[101] Bankruptcy Act 1898, § 3e. Where a company not subject to adjudication in bankruptcy acquiesced in the appointment of receivers and their conducting its business for a considerable time, it is liable for their compensation. In re Wilkes-Barre Light Co. (D. C.) 235 Fed. 807, 38 Am. Bankr. Rep. 99.

[102] In re T. E. Hill Co., 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73.

[103] In re Isaacson, 174 Fed. 406, 98 C. C. A. 614, 23 Am. Bankr. Rep. 98.

[104] In re James Carothers & Co., 182 Fed. 501.

[105] In re Charles Knosher & Co., 197 Fed. 136, 116 C. C. A. 560, 28 Am. Bankr. Rep. 747. Where the receiver inventories the bankrupt's stock, has it appraised, and sells it, he is more than a mere custodian, though he does not carry on the business, and he is entitled to such compensation as the court may allow for his entire services, within the general provisions of the section. In re Ginsburg, 208 Fed. 160. A receiver of bankrupts for a sale of their property, after hav-

creditors of the receiver's application for compensation is imperative, and no allowance of fees can rightfully be made until after such notice.[106] Creditors desiring to object should promptly file exceptions with the referee, and may bring the matter before the court by petition for review of the decision of the referee on the questions thus raised.[107] If the receivership was obtained by fraud or imposition practised upon the court, and was in no way beneficial to the estate, the court will be justified in refusing to make any allowance for the services of the receiver.[108]

In regard to the fees of the marshal, where he does not act as receiver, the provision of the statute is that "marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals." [109] But where the court of bankruptcy, upon the filing of a petition in involuntary bankruptcy, orders the marshal to take possession of the property of the bankrupt and hold the same until a trustee is appointed, the marshal is entitled to receive, out of the estate, compensation for his services under such order, in addition to the costs and expenses incurred.[110] As to expenses so incurred, it is held that a marshal thus placed in charge may hire a competent watchman or store-keeper, if he considers it necessary for the preservation of the property, and the reasonable pay of such a keeper will be allowed out of the estate.[111] The general orders provide that "the marshal shall make return under oath of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him,

ing it in possession not more than six days, during which time the store was closed, was held entitled to a fee not exceeding 2 per cent. on the first $1,000, and one-half of one per cent. on the balance. In re Griesheimer (D. C.) 209 Fed. 134, 31 Am. Bankr. Rep. 567.

[106] In re Falkenberg, 206 Fed. 835, 30 Am. Bankr. Rep. 718; In re Cash-Papworth Grow-Sir, 210 Fed. 24, 136 C. C. A. 604, 31 Am. Bankr. Rep. 709.

[107] In re Reliance Storage & W. Co., 100 Fed. 619, 4 Am. Bankr. Rep. 49.

[108] In re Desrochers, 183 Fed. 991, 25 Am. Bankr. Rep. 703.

[109] Bankruptcy Act 1898, § 52b. The fees and compensation of United States marshals are fixed by Rev. Stat. U. S. § 829. As to mileage on service of process, see In re Talbot, 2 N. B. R. 280, Fed. Cas. No. 13,727; Anonymous, Fed. Cas. No. 437. As to allowance of fee for serving order to show cause in bankruptcy proceeding, see In re Damon, 104 Fed. 775, 5 Am. Bankr. Rep. 133.

[110] In re Adams Sartorial Art Co., 101 Fed. 215, 4 Am. Bankr. Rep. 107; In re Scott, 99 Fed. 404, 3 Am. Bankr. Rep. 625; In re Woodard, 95 Fed. 955, 2 Am. Bankr. Rep. 692. See In re Burnell, 7 Biss. 275, 14 N. B. R. 498, Fed. Cas. No. 2,171.

[111] In re Scott, 99 Fed. 404, 3 Am. Bankr. Rep. 625; In re Lowenstein, 3 Ben. 422, 3 N. B. R. 268, Fed. Cas. No. 8,572; In re Comstock, 9 N. B. R. 88,

with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable."[112]

The subject of the costs and expenses which may properly be incurred by a receiver, and allowed out of the estate in bankruptcy, has been discussed in an earlier section.[113] But it may here be added that the expenses incurred by a receiver, in counsel and witness fees, in resisting a motion for his removal, will be allowed as a charge upon the fund or estate, where it appears that, although there were apparent grounds for the motion, yet the receiver had acted in good faith and with integrity of purpose.[114]

§ 778. **Compensation of Trustees.**—The bankruptcy act provides that "trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case,[115] except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified, the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition."[116] The general orders also provide that "the compensation allowed to trustees by the act shall be in full compensation for the services performed by them, but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts."[117] This provision of the statute is mandatory and must be followed, and the court has no authority to allow to a trustee a lumping sum in lieu of commissions calculated as the act directs.[118] Further, the commission must be calculated, as the statute

Fed. Cas. No. 3,075; In re Pace, Fed. Cas. No. 10,640; In re Johnston, 8 Ben. 191, 12 N. B. R. 345, Fed. Cas. No. 7,421.

[112] General Orders in Bankruptcy, No. 19.

[113] Supra, § 216.

[114] Cowdrey v. Railroad Co., 1 Woods, 331, Fed. Cas. No. 3,293.

[115] Where a partnership and its individual members are adjudged bankrupt on a single petition, there is but one "case" for the purpose of computing the fees and commissions of the trustee, for the word "case" is used in the bankruptcy act in its ordinary meaning as a comprehensive term, embracing the aggregate in respect to that which is brought and prosecuted in the form of a single proceeding. In re Rider (D. C.) 220 Fed. 193, 34 Am. Bankr. Rep. 280.

[116] Bankruptcy Act 1898, § 48a, as amended by Act Cong. June 25, 1910, 36 Stat. 838.

[117] General Order in Bankruptcy No. 35, par. 3.

[118] In re Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154.

prescribes, on the amount of money disbursed or turned over, not on the gross amount collected.[119] But money is disbursed or turned over by the trustee, when it is paid into the hands of a receiver appointed by a state court in a suit between the bankrupt and a creditor, the former claiming it as exempt and the latter denying the contention.[120] Aside from the question of expenses necessarily incurred, the courts have sometimes made extra allowances to trustees in bankruptcy for unusual or highly beneficial services to the estates in their charge.[121] But the provision of the seventy-second section of the act (added by the amendment of 1903) is explicit that "neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act." And the doctrine now prevails that this interposes an absolute bar to any extra allowance to the trustee, no matter how onerous or inconvenient his duties may have been, or how efficient or meritorious his services.[122] Thus, if the trustee is himself a lawyer, he is not bound to perform legal services, but if he does, he cannot have a fee from the estate.[123] And even where a creditor, desiring to secure the services of a particular person as trustee, promises him a sum in excess of the commissions which he will receive, the bargain is void and cannot be enforced in the face of the express prohibition contained in the statute.[124]

If the business of the bankrupt is carried on for a limited time by the trustee, under authority of the court, he may be allowed additional compensation for his services in such business. The amount of it rests very much in the discretion of the court, having regard to the nature of the services rendered and their benefit to the estate, provided that it shall not exceed the percentages specified in the act.[125] But the court

[119] In re Smith, 108 Fed. 39, 5 Am. Bankr. Rep. 559. Where, to preserve the assets of a bankrupt, they were transferred to a corporation for a small sum, and both secured and unsecured creditors received stock, the trustee's commissions must be based on the cash. American Surety Co. v. Freed, 224 Fed. 333, 140 C. C. A. 19, 35 Am. Bankr. Rep. 103.

[120] In re Castleberry (D. C.) 143 Fed. 1021, 16 Am. Bankr. Rep. 430.

[121] In re Dimm & Co., 146 Fed. 402, 17 Am. Bankr. Rep. 119; In re Mammoth Pine Lumber Co., 116 Fed. 731, 8 Am. Bankr. Rep. 651.

[122] In re Coventry Evans Furniture Co., 171 Fed. 673, 22 Am. Bankr. Rep. 623; In re Screws, 147 Fed. 989, 17 Am. Bankr. Rep. 269; In re Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154; In re Epstein, 109 Fed. 878, 6 Am. Bankr. Rep. 191.

[123] In re George Halbert Co., 134 Fed. 236, 67 C. C. A. 18, 13 Am. Bankr. Rep. 399; In re McKenna, 137 Fed. 611, 15 Am. Bankr. Rep. 4; In re Felson, 139 Fed. 275, 15 Am. Bankr. Rep. 185; In re Van Denburg (D. C.) 221 Fed. 475, 34 Am. Bankr. Rep. 521.

[124] Devries v. Orem, 104 Md. 648, 65 Atl. 430; Cowing v. Altman, 5 Hun (N. Y.) 556.

[125] In re George W. Shiebler & Co., 174 Fed. 336, 98 C. C. A. 208, 23 Am. Bankr. Rep. 162; In re Plummer, 2 Nat. Bankr. News, 292. Where the trustee "disburses" only the profit realized from carrying out a contract of the bankrupt,

has no authority to fix the compensation of a trustee in advance for such services to be rendered in the future.[126] The act also provides that "the court may, in its discretion, withhold all compensation from any trustee who has been removed for cause." [127] And it is held that this is applicable to a case where there was sufficient ground for the removal of a trustee, but, to avoid the odium of such a course, he was allowed to resign.[128] And since, within the limits fixed by law, the amount to be allowed as commissions to a trustee is subject to the sound judicial discretion of the court, it is held that, where a trustee has been negligent in the performance of his duty, the court may in a proper case, and even without the filing of any exceptions, deny him any commissions.[129] Where legal expenses are incurred in consequence of the negligent, irregular, or unauthorized actions of the trustee in dealing with the estate, as, for example, in contracting to sell property at private sale, but without the sanction or approval of the court or referee, they may be charged against his commissions.[130]

§ 779. **Fees and Expenses of Referees.**—Provision for the compensation of referees in bankruptcy is made by the statute in the following terms: "Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition." [131] Originally the act allowed referees' commissions

that is the only sum on which he can receive commissions, regardless of the total amount involved. In re New York Commercial Co., 231 Fed. 445, 145 C. C. A. 439, 36 Am. Bankr. Rep. 496.

[126] In re Willis W. Russell Card Co., 174 Fed. 202, 23 Am. Bankr. Rep. 300.

[127] Bankruptcy Act 1898, § 48c. See In re Leverton, 155 Fed. 931, 19 Am. Bankr. Rep. 434.

[128] In re E. I. Fidler & Son, 172 Fed. 632, 23 Am. Bankr. Rep. 16.

[129] In re Schoenfeld, 183 Fed. 219, 105 C. C. A. 481, 25 Am. Bankr. Rep. 748. And see In re Sweetser (D. C.) 240 Fed. 174.

[130] In re Eden Musee American Co. (D. C.) 230 Fed. 925, 36 Am. Bankr. Rep. 111.

[131] Bankruptcy Act 1898, § 40,. as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797. See In re J. B. White & Co. (D. C.) 225 Fed. 796, 35 Am. Bankr. Rep. 670. It is not proper to calculate the referee's commission on the total amount of the bankrupt's estate, but only on that portion distributable to creditors. In re Motridge, 258 Fed. 229, 169 C. C. A. 539, 44 Am. Bankr. Rep. 175. The referee is entitled to commissions on the amount of claims which would have been paid in cash under a composition agreement, if the creditors had not waived such payment in consideration of a smaller cash payment and the balance in notes given by another corporation. In re H. Batterman Co., 231 Fed. 699, 145 C. C. A. 585, 36 Am. Bankr. Rep. 695. The ref-

only on sums disbursed as "dividends and commissions." But the larger terms introduced by the amendment of 1903 permit the payment of commissions on moneys paid over to secured creditors or realized from the sale of incumbered property.[132] But the moneys must still be "disbursed to creditors." Hence, in a case where the referee continued the bankrupt's business in order to complete certain government contracts, and for that purpose raised and paid out nearly half a million dollars during a period of eighteen months, and, as a result, distributed to creditors about thirty thousand dollars, it was held that he was entitled to commissions only on the latter sum.[133] There has been a practice of referring particular issues or matters arising in the course of a bankruptcy case to the referee in the character of a special master, and allowing him fees or compensation as such.[134] For instance, where objections to a bankrupt's application for discharge are referred to the referee for hearing and report, it has been held that he is entitled to a reasonable allowance for his services, in addition to the fees allowed him by the bankruptcy act.[135] In this and similar cases, the theory probably has been that the commissions specified in the act were intended only to compensate the referee for the performance of duties strictly incident to his office, and such as must be performed in every case referred to him, as a matter of mere routine administration. Thus, it is said that a referee cannot make an extra charge for his services in presiding at creditors' meetings, conducting the bankrupt's examination, or making out the dividend sheet, as these services are particularly required of him by the statute and are supposed to be compensated by the

eree's commission is estimated on moneys disbursed to creditors, and not on the claims and liabilities scheduled. In re Philips & McEachin, 210 Fed. 889, 127 C. C. A. 499, 31 Am. Bankr. Rep. 542. Rent of leased premises occupied by the trustee is not a disbursement to a creditor on which the referee is entitled to a commission. Kinkead v. J. Bacon & Sons, 230 Fed. 362, 144 C. C. A. 504, 36 Am. Bankr. Rep. 390. Where, in a composition case, 25 per cent. in cash or 100 per cent. in stock (at par) of a corporation formed to take over the bankrupt's business were offered as alternatives, it was held that the referee's commission should be computed on the theory that the stock was worth 25 per cent. of its par value. In re Mills Tea & Butter Co. (D. C.) 235 Fed. 815, 37 Am. Bankr. Rep. 711.

[132] In re Holmes Lumber Co., 189 Fed. 178, 26 Am. Bankr. Rep. 119. The referee is not entitled to recover fees out of the proceeds of a sale of mortgaged property when it brings less than the amount of the mortgage debt. In re Stewart, 193 Fed. 791, 27 Am. Bankr. Rep. 529.

[133] Bray v. Johnson, 166 Fed. 57, 91 C. C. A. 643, 21 Am. Bankr. Rep. 383. And see In re J. Bacon & Sons (D. C.) 224 Fed. 764, 34 Am. Bankr. Rep. 825; In re M. F. Rourke Co. (D. C.) 209 Fed. 877, 31 Am. Bankr. Rep. 788.

[134] In re Hurley, 204 Fed. 126, 29 Am. Bankr. Rep. 567; In re Goldville Mfg. Co., 123 Fed. 579, 10 Am. Bankr. Rep. 552. See In re Talton, 137 Fed. 178, 14 Am. Bankr. Rep. 617.

[135] Fellows v. Freudenthal, 102 Fed. 731, 42 C. C. A. 607, 4 Am. Bankr. Rep. 490; In re Grossman, 111 Fed. 507, 6 Am. Bankr. Rep. 510; Bragassa v. St. Louis Cycle, 107 Fed. 77, 46 C. C. A. 154, 5 Am. Bankr. Rep. 700. Contra, In re

fifteen dollar fee.[136] But on the other hand, nothing could be more positive than the language of the amendatory act of 1903 (section 72) that "neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act." And it is held that this absolutely prohibits the court of bankruptcy from allowing any extra or additional compensation to the referee for any services whatever,[137] and, in particular, that it deprives the court of any authority to convert a referee in bankruptcy into a special master and compensate him as such.[138] But on the other hand, the compensation of the referee as fixed by the statute will not be abated or diminished in a particular case because some of the duties which ordinarily would be discharged by the referee, in the holding of hearings and making of orders, were assumed by the judge, at the request of the parties, on account of the magnitude of the interests involved and the unusual character of the proceedings.[139]

The referee is entitled to reimbursement for expenses necessarily incurred by him in the performance of his duties.[140] And he may make a general charge for blanks used in mailing notices to creditors and for orders entered, and also for the hire of a clerk, where the extent of his business is such that a clerk is needed, which charge should be a gross sum, and uniform in each case, regardless of the amount of work done.[141] And the expenses incurred in the publication of notice of application for

Wilcox, 156 Fed. 685, 19 Am. Bankr. Rep. 241.

[136] In re Barker, 111 Fed. 501, 7 Am. Bankr. Rep. 132.

[137] In re Daniels, 130 Fed. 597, 12 Am. Bankr. Rep. 446; In re Mammoth Pine Lumber Co., 116 Fed. 731, 8 Am. Bankr. Rep. 651; Dressel v. North State Lumber Co., 119 Fed. 531, 9 Am. Bankr. Rep. 541; In re Troth, 104 Fed. 291, 4 Am. Bankr. Rep. 780; United States v. Ward, 257 Fed. 372, 168 C. C. A. 412, 43 Am. Bankr. Rep. 711.

[138] In re Sweeney, 168 Fed. 612, 94 C. C. A. 90, 21 Am. Bankr. Rep. 866; In re Nankin, 246 Fed. 811, 159 C. C. A. 113, 40 Am. Bankr. Rep. 459; In re Growe Const. Co. (D. C.) 253 Fed. 981, 42 Am. Bankr. Rep. 654; In re Langford, Felts & Myers (D. C.) 225 Fed. 311, 35 Am. Bankr. Rep. 519.

[139] In re Barber, 97 Fed. 547, 3 Am. Bankr. Rep. 306.

[140] General Order No. 35, par. 2. The court of bankruptcy may authorize a referee to employ a clerk and may allow expenses for stationery, office rent, light, heat, and telephone, and such authorization may be made by standing rule or order, or by special order in any particular case. United States v. Ward, 257 Fed. 372, 168 C. C. A. 412, 43 Am. Bankr. Rep. 711. The referee is entitled to an allowance for the hire of a stenographer where correspondence with persons interested in the estate was so great that he could not personally attend to it all. In re Capital Security Co. (D. C.) 251 Fed. 927, 41 Am. Bankr. Rep. 184. Referees in bankruptcy, where it is reasonably necessary, are entitled to maintain offices for the transaction of their business, and to employ clerical assistance, and the expense may be prorated and charged to the various estates referred to them. In re McNeil Corp. (D. C.) 249 Fed. 765, 41 Am. Bankr. Rep. 162.

[141] In re Pierce, 111 Fed. 516, 6 Am. Bankr. Rep. 747; In re Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235; In re Mammoth Pine Lumber Co., 116 Fed. 731, 8 Am. Bankr. Rep. 651. Compare In re Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154; In re Dean, 1 N. B. R. 249, Fed. Cas. No. 3,699.

discharge, and for stationery, are chargeable against the bankrupt.[142] It was also held under the act of 1867 that the traveling expenses of a nonresident referee, when apportioned among the several cases before him, would be allowed.[143] The referee's order allowing fees to himself and the trustee is reviewable by the court,[144] even after payment has been made to the trustee, if the referee's account was not presented to and passed upon by the court as required,[145] but not where his account was duly kept, presented, and approved, and distribution of the estate has already been made.[146] However, where a referee has collected from parties or estates in bankruptcy proceedings, as compensation, money to which he is not legally entitled, and these fees have been collected or withheld from parties who are numerous, and the individual amounts are small, the United States may maintain a single action on his bond, on behalf of all parties injured, to recover back such illegal fees; and as the court of bankruptcy has no jurisdiction to allow to a referee under any form or guise any other or further compensation than that expressly authorized and prescribed by the bankruptcy law, such allowance, if made, does not bar an action for its recovery.[147]

§ 780. On What Sums Commissions are Calculated.—As originally enacted, the bankruptcy act allowed commissions to the referee and trustee on sums disbursed "as dividends and commissions." And it was held that this restricted them to the specified percentage on such sums as were available for, and distributed to, the general or unsecured creditors; that the payment in full of those claims which were entitled to priority (taxes, labor claims, etc.) was not the payment of a "dividend," and that commissions could not be reckoned either on the amount so paid out or on sums paid over to mortgagees or other secured creditors or lien holders.[148] Also it was held that the setting apart of a homestead

[142] In re Dixon, 114 Fed. 675, 8 Am. Bankr. Rep. 145.

[143] In re Sherwood, 1 N. B. R. 344, Fed. Cas. No. 12,774. This is explicitly allowed under General Order No. 35, par. 2.

[144] In re Allert, 173 Fed. 691, 23 Am. Bankr. Rep. 101. See In re Reliance Storage & W. Co., 100 Fed. 619, 4 Am. Bankr. Rep. 49. An order allowing the fees and compensation of a referee in bankruptcy is a judicial order and cannot be collaterally attacked. United States v. Brainerd (D. C.) 250 Fed. 1011, 41 Am. Bankr. Rep. 342.

[145] In re Mammoth Pine Lumber Co., 116 Fed. 731, 8 Am. Bankr. Rep. 651.

[146] In re Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235.

[147] United States v. Ward, 257 Fed. 372, 168 C. C. A. 412, 43 Am. Bankr. Rep 711.

[148] In re Iowa Falls Mfg. Co., 140 Fed. 527, 15 Am. Bankr. Rep. 384; In re Hinckel Brewing Co., 124 Fed. 702, 10 Am. Bankr. Rep. 692; In re Goldville Mfg. Co., 123 Fed. 579, 10 Am. Bankr. Rep. 552; In re Mammoth Pine Lumber Co., 116 Fed. 731, 8 Am. Bankr. Rep. 651; Hawthorne v. Hendrie & Bolthoff Mfg. & Supply Co., 50 Colo. 342, 116 Pac. 122; In re Barker, 111 Fed. 501, 7 Am. Bankr. Rep. 132; In re Smith, 108 Fed. 39, 5 Am. Bankr. Rep. 559; In re Utt, 105 Fed. 754, 45 C. C. A. 32, 5 Am. Bankr. Rep. 383; In re Barber, 97 Fed. 547, 3 Am. Bankr. Rep. 306; In re Fielding, 96 Fed. 800, 3 Am. Bankr. Rep. 135; In re Fort

exemption to the bankrupt from the proceeds of property sold by the trustee was not the making of a dividend, so as to entitle these officers to a commission on the amount.[149] From this rule it sometimes resulted that the whole of the assets of an estate in bankruptcy would be consumed in the payment of priority claims and secured debts, and that nothing whatever would be left on which the commissions of the trustee and referee could be calculated. Yet this was held to be immaterial, and that, in such cases, their services must go unrewarded, except for the trifling filing fees.[150] But the amendatory act of 1903 altered this by allowing commissions on moneys "disbursed to creditors," and this was still further enlarged by the amendment of 1910, which allows the commissions to be reckoned on "all moneys disbursed or turned over to any person, including lien holders." At present, therefore, trustees are to be allowed commissions on moneys received and disbursed by them which were derived from the sale of mortgaged property, and which were covered by and applicable to the payment of the lien.[151] And this rule applies although the property is purchased by the party holding the incumbrance, the price in such case being treated as constructively paid to the trustee.[152] So also, the officers are entitled to commissions on all sums which would have been paid through the trustee but for an outside agreement between the parties and their attorneys.[153] But when the trustee is permitted to sell pledged collaterals on paying the debt for which they were pledged, it is held that the balance of the price after paying the debt constitutes the "money disbursed" on which the com-

Wayne Electric Corp., 94 Fed. 109, 1 Am. Bankr. Rep. 706; In re Fielding, 2 Nat. Bankr. News, 735; In re Sabine, 1 Nat. Bankr. News, 312.

[149] In re Gardner (D. C.) 103 Fed. 922, 4 Am. Bankr. Rep. 420.

[150] Smith v. Township of Au Gres, 150 Fed. 257, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876, 17 Am. Bankr. Rep. 745.

[151] In re Howard (D. C.) 207 Fed. 402, 31 Am. Bankr. Rep. 251. See In re Anders Push Button Telephone Co. (D. C.) 136 Fed. 995, 13 Am. Bankr. Rep. 643 But notwithstanding the amendment of 1910, a trustee in bankruptcy is not entitled to a commission where the proceeds of incumbered property disposed of in bankruptcy are insufficient to satisfy the liens on it. In a proper case the lienholders may be charged with the costs of foreclosure, since that is for their benefit, but not with part of the expense of administering the estate, in which, in the case supposed, they have no interest. Gugel v. New Orleans Nat. Bank, 239 Fed. 676, 152 C. C. A. 510, 39 Am. Bankr. Rep. 160; C. B. Norton Jewelry Co. v. Hinds, 245 Fed. 341, 157 C. C. A. 533, 40 Am. Bankr. Rep. 320; In re Stewart (D. C.) 193 Fed. 791, 27 Am. Bankr. Rep. 529.

[152] In re West (D. C.) 232 Fed. 903; In re Sanford Furniture Mfg. Co. (D. C.) 126 Fed. 888, 11 Am. Bankr. Rep. 414; In re Morse Iron Works & Dry Dock Co. (D. C.) 154 Fed. 214, 18 Am. Bankr. Rep. 846. But compare In re Fort Wayne Electric Corp. (D. C.) 94 Fed. 109, 1 Am. Bankr. Rep. 706; In re Elk Valley Coal Mining Co. (D. C.) 213 Fed. 383, 32 Am. Bankr. Rep. 197; In re Columbia Cotton Oil & Provision Corp., 210 Fed. 824, 127 C. C. A. 374, 31 Am. Bankr. Rep. 339. And see In re Old Oregon Mfg. Co. (D. C.) 236 Fed. 804, 38 Am. Bankr. Rep. 409.

[153] In re Sanford Furniture Mfg. Co., 126 Fed. 888, 11 Am. Bankr. Rep. 414.

missions are to be estimated.[154] But property which comes into the possession of the trustee through the fraud of the bankrupt, and which is restored to the victim of the fraud, is not a part of the estate in bankruptcy out of which the officers may be allowed their statutory percentage.[155] And the same is true of real estate for the recovery of which the trustee has brought suit, but which never comes into the estate, because it is made the subject of a private settlement between the claimant and the creditors, the trustee thereupon dismissing his suit.[156]

§ 781. Fees of Attorneys.—Aside from the fees allowed for routine professional work in bankruptcy cases, the general rule is that compensation may be allowed to an attorney at law out of a particular property or fund before the court only when his services have had the effect of preserving it for the true owner, and out of the estate in general only when his services have resulted in adding to it, increasing its value, freeing it from claims, or otherwise benefiting the general body of creditors.[157] And while the amount of compensation rests largely in the sound judicial discretion of the court, yet even this must be controlled by the general purpose and policy of the act, which requires that, just as far as possible, all the assets shall be available for the creditors, and that estates in bankruptcy shall be administered with severe economy and at a minimum of expense.[158] Only a reasonable fee will be allowed to an attorney in any event,[159] and where a rule of court fixes the scale of fees allowable, such allowances will not be increased except in most unusual cases.[160] It is generally the referee, in the first instance, who will determine whether any, and what, fees shall be allowed, and he is by no means required to allow the fee claimed by the attorney or agreed upon between the attorney and the trustee, but may and should reduce it if he thinks it too great.[161] This question may be determined by the ref-

[154] In re Meadows, 199 Fed. 304, 29 Am. Bankr. Rep. 165.

[155] Gillespie v. J. C. Piles & Co., 178 Fed. 886, 102 C. C. A. 120, 24 Am. Bankr. Rep. 502; In re J C. Wilson & Co. (D. C.) 252 Fed. 631, 42 Am. Bankr. Rep. 350.

[156] In re Kaiser, 112 Fed. 955, 8 Am. Bankr. Rep. 108.

[157] Gillespie v. J. C. Piles & Co., 178 Fed. 886, 102 C. C. A. 120, 24 Am. Bankr. Rep. 502; In re Huddleston, 167 Fed. 428, 21 Am. Bankr. Rep. 669; In re Covington, 132 Fed. 884, 13 Am. Bankr. Rep. 150; In re Irwin, 177 Fed. 284, 22 Am. Bankr. Rep. 165; In re W. B Terrell Co. (D. C.) 250 Fed. 317, 40 Am. Bankr. Rep. 138.

[158] Dunlap Hardware Co. v. Huddleston, 167 Fed. 433, 21 Am. Bankr. Rep. 731; In re Young, 142 Fed. 891, 16 Am. Bankr. Rep. 106; In re Goldville Mfg. Co., 123 Fed. 579, 10 Am. Bankr. Rep. 552; In re Lang, 127 Fed. 755, 11 Am. Bankr. Rep. 794.

[159] In re Talton, 137 Fed. 178, 14 Am. Bankr. Rep. 617. The fee of an attorney collecting $6,000 for the bankrupt estate from the insurers on the occurrence of a loss was held properly allowable in the sum of $500. American Sav. Bank & Trust Co. v. Munson, 93 Wash. 78, 159 Pac. 1195.

[160] In re Keller, 207 Fed. 118, 31 Am. Bankr. Rep. 51.

[161] In re Ferreri, 188 Fed. 675, 26 Am. Bankr. Rep. 658.

eree ex parte, that is, it is not necessary that he should give to creditors notice of the pendency of the question and an opportunity to be heard thereon,[162] but he should be satisfied by evidence of the character and value of the attorney's services, and may suspend action on the application until satisfactory evidence is produced.[163] The decision of the referee, since it depends so much upon the exercise of judgment and discretion, will not be disturbed by the judge, in the absence of evidence to show that the fee allowed was exorbitant or excessive,[164] but the referee's discretion is judicial and not arbitrary, and even though he recommends the allowance of a particular fee, it will be reduced by the judge, if the latter regards it as extravagant,[165] or even by the appellate court, if the judge has failed to exercise his own discretion with a due regard to the policy of the statute and the rights of the parties.[166] Where more than one attorney or set of attorneys render services for the benefit of an estate in bankruptcy, there must be a division of the allowable fee, rather than a duplication or multiplication of fees.[167] In regard to the particular matter of the bankrupt's discharge, it has been ruled that, in voluntary proceedings, the bankrupt's attorney may be allowed a docket fee for filing the application for discharge if there is no contest. If there is a contest made by the trustee at the instance of creditors, which is unsuccessful, he may be given a larger allowance from the estate. But where an unsuccessful contest is made by one or more creditors, acting for themselves and not through the trustee as the representative of all, the question of costs should be treated as one arising inter partes, and the estate generally ought not to suffer from an ill-advised contest.[168]

§ 782. **Same; Attorney for Bankrupt.**—The statute provides for the allowance of "one reasonable attorney's fee for professional services actually rendered, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow."[169] In determining the reasonable value

[162] In re Stotts, 93 Fed. 438, 1 Am. Bankr. Rep. 641. In a proceeding in a court of bankruptcy to determine the amount to be allowed as a fee to the attorney of a creditor, out of such creditor's distributive share of the estate, a trial by jury may be allowed in the discretion of the court, but cannot be claimed as a matter of right, proceedings in bankruptcy being equitable in character. In re Rude, 101 Fed. 805, 4 Am. Bankr. Rep. 319.

[163] In re Dreeben, 101 Fed. 110, 4 Am. Bankr. Rep. 146; In re Curtis, 100 Fed. 784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17.

[164] In re Tebo, 101 Fed. 419, 4 Am. Bankr. Rep. 235.

[165] In re Carr, 116 Fed. 556, 8 Am. Bankr. Rep. 635; In re De Ran, 260 Fed. 732, 171 C. C. A. 470, 44 Am. Bankr. Rep. 409.

[166] In re Curtis, 100 Fed. 784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17; In re Iron Clad Mfg. Co., 215 Fed. 877, 132 C. C. A. 11, 33 Am. Bankr. Rep. 69.

[167] In re Coney Island Lumber Co., 199 Fed. 197, 29 Am. Bankr. Rep. 91.

[168] In re Keller, 207 Fed. 118, 31 Am. Bankr. Rep. 51.

[169] Bankruptcy Act 1898, § 64b. See

of services rendered to a bankrupt by his attorney, neither the assets nor the liabilities of the estate represent or measure the value of the matter involved,[170] but the allowance can be made only for the reasonable value of services actually required, irrespective of the services actually rendered;[171] that is, the attorney cannot claim compensation for all legal work he may do for the bankrupt in the proceedings, but only for that which the referee or the court may consider was required by the provisions of the law and the necessities of the particular case.[172] Further, it is necessary that the professional services should have been reasonably necessary to enable the bankrupt to discharge his duties under the law,[173] and that they should have conduced to the benefit of the estate or to its prompt, efficient, or economical administration.[174] And since the attorney's services must have been rendered to the bankrupt while he was "performing the duties prescribed," it follows that no fee can be allowed to the attorney if the bankrupt has not performed his statutory duties, or at least if it appears that he has actively endeavored to defeat or delay the proceeding.[175] But the fact that the bankrupt has disobeyed an order of the court requiring him to turn over money to his trustee, and has fled the jurisdiction and is in contempt, will not prevent the allowance of a proper fee to his attorney for services rendered in the course of the proceedings before the occurrence of the contempt, such misconduct on the part of the bankrupt having been without the attorney's privity or complicity.[176] The preparation of the bankrupt's petition and schedules is clearly a work necessary to enable him to perform his duties under the act, and a proper and moderate fee should be allowed to his attorney out of the estate for this work, both in voluntary and involuntary cases.[177] The amount is not to be determined by the mere clerical labor involved, for the proper preparation of a schedule

Smith v. Shenandoah Valley Nat. Bank of Winchester, Va., 246 Fed. 379, 158 C. C. A. 443, 40 Am. Bankr. Rep. 314. Where an alleged involuntary bankrupt successfully resists adjudication, he is entitled to have an attorney's fee taxed as part of the costs in his favor. In re Wise (D. C.) 212 Fed. 567. And see In re Weissbord (D. C.) 241 Fed. 516, 39 Am. Bankr. Rep. 243.

170 In re Lane Lumber Co., 206 Fed. 780, 30 Am. Bankr. Rep. 749.

171 In re Connell & Sons, 120 Fed. 846, 9 Am. Bankr. Rep. 474.

172 In re Payne, 151 Fed. 1018, 18 Am. Bankr. Rep. 192.

173 In re Lane Lumber Co., 206 Fed. 780, 30 Am. Bankr. Rep. 749.

174 In re Duran Mercantile Co., 199 Fed. 961, 29 Am. Bankr. Rep. 450; In re Goldville Mfg. Co., 123 Fed. 579, 10 Am. Bankr. Rep. 552; In re Rosenthal & Lehman, 120 Fed. 848, 9 Am. Bankr. Rep. 626.

175 In re Woodard, 95 Fed. 955, 2 Am. Bankr. Rep. 692.

176 In re Mayer, 101 Fed. 695, 4 Am. Bankr. Rep. 238.

177 In re Fullick, 201 Fed. 463, 28 Am. Bankr. Rep. 634; In re Anderson, 103 Fed. 854, 4 Am. Bankr. Rep. 640; In re Mayer, 101 Fed. 695, 4 Am. Bankr. Rep. 238; In re Carolina Cooperage Co., 96 Fed. 950, 3 Am. Bankr. Rep. 154; In re Kennedy, Fed. Cas. No. 7,700; In re Thompson, 13 N. B. R. 300, Fed. Cas. No. 13,938; In re Mansfield, 6 Ben. 284, Fed. Cas. No. 9,048; In re Averill, 1 Nat. Bankr. News, 544. Compare In re Matthews, 97 Fed. 772, 3 Am. Bankr. Rep. 265.

in bankruptcy requires a special kind of skill and knowledge. The systematizing, arrangement, and condensation of the matter should be considered.[178] Yet where the work involves nothing that would be beyond the powers of any competent accountant, the fact that it was done by the bankrupt's attorney does not entitle him to charge, as against the estate, on a scale which would be strictly appropriate only for professional services properly so called.[179] And he is not entitled to a fee for posting up the bankrupt's books and making extra copies of the schedules.[180] It is said that a bankrupt is not ordinarily entitled to the aid and presence of his counsel when attending before the referee or court for the purpose of giving information or undergoing examination, and hence his attorney should not be allowed fees out of the estate for such attendance upon the bankrupt, unless it is shown that there was some unusual contingency making his assistance really necessary.[181] Nor is the attorney entitled to a fee for assisting in making good the bankrupt's claim to exemptions and procuring the setting apart of the same,[182] or for services rendered in proceedings to confirm a composition,[183] nor for his services in obtaining a judgment in favor of the bankrupt before the bankruptcy, though he may have a fee for collecting the judgment for the trustee.[184] Again, the allowance to the attorney should not include a fee for defending the bankrupt against charges of fraud or concealment of assets, or other matters involving his personal liability, civil or criminal.[185] And where the trustee in bankruptcy is opposing the allowance of a claim against the estate, as are also some of the bankrupt's creditors, the bankrupt's attorney is not entitled to assist in such proceeding at the expense of the estate.[186] As to the bankrupt's application for discharge, an allowance has generally been made to the attorney for his services in supporting the application, to the extent of a docket fee if there is no substantial opposition, which may be materially increased if opposition develops.[187] But the latest opinion appears

[178] In re Andrews, 11 N. B. R. 59, Fed. Cas. No. 370.

[179] In re Lane Lumber Co., 206 Fed. 780, 30 Am. Bankr. Rep. 749.

[180] In re Connell & Sons (D. C.) 120 Fed. 846, 9 Am. Bankr. Rep. 474.

[181] In re Lane Lumber Co., 206 Fed. 780, 30 Am. Bankr. Rep. 749; In re Kross, 96 Fed. 816, 3 Am. Bankr. Rep. 187; In re Hammel (D. C.) 211 Fed. 238, 31 Am. Bankr. Rep. 672. But see In re Mayer, 101 Fed. 695, 4 Am. Bankr. Rep. 238; In re Michel, 95 Fed. 803; In re Clark, 43 How. Prac. (N. Y.) 70, Fed. Cas. No. 2,803.

[182] In re O'Hara, 166 Fed. 384, 21 Am. Bankr. Rep. 508; In re Castleberry, 143 Fed. 1021, 16 Am. Bankr. Rep. 430; In re Bohrman (D. C.) 224 Fed. 287, 34 Am. Bankr. Rep. 801.

[183] In re Fogarty, 187 Fed. 773, 109 C. C. A. 621, 26 Am. Bankr. Rep. 568; In re Kinnane Co.'s Estate, 242 Fed. 769, 155 C. C. A. 357, 39 Am. Bankr. Rep. 593.

[184] In re Blum, 193 Fed. 304, 28 Am. Bankr. Rep. 60.

[185] In re Mayer, 101 Fed. 695, 4 Am. Bankr. Rep. 238; In re Felson, 139 Fed. 275, 15 Am. Bankr. Rep. 185.

[186] In re Lane Lumber Co., 206 Fed. 780, 30 Am. Bankr. Rep. 749.

[187] In re Christianson, 175 Fed. 867,

to be that a contest over the discharge waged between certain individual creditors on the one side and the bankrupt on the other, and not conducted by the trustee as the representative of all the creditors, is a matter which should not involve the estate in liability for costs and fees, if the opposition proves unsuccessful.[188]

As to the allowance of a fee to the bankrupt's attorney in voluntary cases, since no conditions are attached to it in the statute, and it is merely directed to be "as the court may allow," it is held that the allowance of a fee in such cases and its amount rest entirely in the sound judicial discretion of the court of bankruptcy.[189] Generally, however, the attorney of a voluntary bankrupt may be allowed a fee, payable out of the estate, for such professional services as were necessary to enable the bankrupt to bring his case properly before the court, secure an adjudication and reference, surrender his estate, and perform his duties for the benefit of creditors, and receive his discharge if entitled thereto; and the fee is not necessarily to be restricted to such services as were specially beneficial to the estate or rendered primarily in its interest.[190] There can be no fixed fee for all cases, but the character and condition of the estate, the orders necessary to be secured for its protection, and the corresponding amount of time and attention required of the attorney, are all matters to be considered by the court in determining what is a reasonable amount in the circumstances.[191]

§ 783. Same; Attorneys for Petitioning and Other Creditors.—The court of bankruptcy is authorized to allow a reasonable fee to the attorney for the petitioning creditors in a case of involuntary bankruptcy, to be included in the costs of administration and paid out of the estate,[192] provided, of course, that an adjudication of bankruptcy is made on the petition, for if the debtor successfully resists it there can be

23 Am. Bankr. Rep. 710; In re Kross, 96 Fed. 816, 3 Am. Bankr. Rep. 187; In re Eidom, 3 N. B. R. 160, Fed. Cas. No. 4,315. But compare In re Brundin, 112 Fed. 306, 7 Am. Bankr. Rep. 296; In re Duran Mercantile Co., 199 Fed. 961, 29 Am. Bankr. Rep. 450; Ex parte Hale, 5 Law Rep. 403, Fed. Cas. No. 5,910. See In re Hammel (D. C.) 211 Fed. 238, 31 Am. Bankr. Rep. 672.

188 In re Keller, 207 Fed. 118, 31 Am. Bankr. Rep. 51. See In re Gillardon, 187 Fed. 289, 26 Am. Bankr. Rep. 103.

189 In re Smith, 108 Fed. 39, 5 Am. Bankr. Rep. 559; In re O'Connell, 98 Fed. 83, 3 Am. Bankr. Rep. 422; In re Burrus, 97 Fed. 926, 3 Am. Bankr. Rep. 296; In re Stotts, 93 Fed. 438, 1 Am. Bankr. Rep. 641; In re Beck, 92 Fed. 889, 1 Am. Bankr. Rep. 535; In re Goodwin, 2 Nat. Bankr. News, 445.

190 In re Kross, 96 Fed. 816, 3 Am. Bankr. Rep. 187.

191 In re Burrus, 97 Fed. 926, 3 Am. Bankr. Rep. 296.

192 Bankruptcy Act 1898, § 64b, cl. 3. And see In re Harrison Mercantile Co., 95 Fed. 123, 2 Am. Bankr. Rep. 419; In re Silverman, 97 Fed. 325, 3 Am. Bankr. Rep. 227; In re New York Mail S. S. Co., 7 Blatchf. 178, 3 N. B. R. 627, Fed. Cas. No. 10,208; In re King, 4 Biss. 319, Fed. Cas. No. 7,780; In re O'Hara, 3 Pittsb. (Pa.) 111, Fed. Cas. No. 10,465; In re Jones, 9 N. B. R. 491, Fed. Cas. No. 7,451; Miller v. Scott, 6 Phila. (Pa.)

no allowance to the creditors.[193] In case of an adjudication, the attorney for the creditors is entitled to this fee as of right, and its allowance or refusal is not a matter within the discretion of the court of bankruptcy.[194] But the amount to be allowed is a question for the exercise of a sound judicial discretion, and to be determined upon a consideration of the nature and character of the services rendered, but if the sum allowed is deemed excessive, it will be reduced on appeal or review.[195] The fee will have to be paid out of the general funds of the estate, and lien creditors cannot be required to bear the expense of it or contribute to it.[196] Further, it is to be considered as compensation for professional services actually rendered in and about the matter of securing an adjudication of bankruptcy. Petitioning creditors cannot be allowed, out of the estate, sums paid to their attorneys as retainers,[197] nor for services rendered in protecting their special and individual interests, but only for such as were for the common benefit of all the creditors.[198] If two separate petitions in involuntary bankruptcy are filed by different sets of creditors, the one fee allowable should go to the attorneys in that petition on which the adjudication is made,[199] and if the petitions are consolidated, the fee must be divided between them according to the relative value of the services and amount of work done by each.[200] It is the evident intention of the statute (and so the courts hold) to restrict

484, 2 N. B. R. 86, Fed. Cas. No. 5,620; Dundore v. Coates, 6 N. B. R. 304, Fed. Cas. No. 4,142; In re Mead, 8 Phila. (Pa.) 174, Fed. Cas. No. 9,364. In no event can more than one docket fee be taxed in any one bankruptcy proceeding. Peck v. Richter, 217 Fed. 880, 133 C. C. A. 590, 33 Am. Bankr. Rep. 11. Services for which an attorney's fee is to be allowed in involuntary bankruptcy include such only as are proper professional services, not including conferring with creditors to induce them to join in the petition. In re Sage (D. C.) 225 Fed. 397, 35 Am. Bankr. Rep. 625. The court of bankruptcy should not be called upon to settle differences between counsel for the petitioning creditors as to what proportion to the total sum allowed them jointly each should receive. Hall v. Reynolds, 231 Fed. 946, 146 C. C. A. 142, 36 Am. Bankr. Rep. 721.

193 In re Black Diamond Copper Min. Co., 10 Ariz. 42, 85 Pac. 653. Counsel fees for resisting the adjudication should not be allowed to the attorney for the minority stockholders in the bankrupt corporation, who, by holding the offices, were enabled to have the adjudication resisted in their interest. In re Murphy Boot & Shoe Co. (D. C.) 242 Fed. 991, 39 Am. Bankr. Rep. 811.

194 In re Curtis, 100 Fed. 784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17.

195 In re Williams (D. C.) 240 Fed. 788; In re Curtis, 100 Fed. 784, 41 C. C. A. 59, 4 Am. Bankr. Rep. 17; In re Sanger, 5 N. B. R. 54, Fed. Cas. No. 12,318. As to the elements to be taken into consideration in making an allowance to attorneys for the petitioning creditors, see In re Weissman (D. C.) 267 Fed. 588, 46 Am. Bankr. Rep. 189.

196 In re Freeman (D. C.) 190 Fed. 48, 27 Am. Bankr. Rep. 16; In re Gillaspie, 190 Fed. 88, 27 Am. Bankr. Rep. 59; In re Allert (D. C.) 173 Fed. 691, 23 Am. Bankr. Rep. 101.

197 In re Comstock, 9 N. B. R. 88, Fed. Cas. No. 3,075.

198 In re Mead, 8 Phila. (Pa.) 174, Fed. Cas. No. 9,364.

199 In re Southern Steel Co., 169 Fed. 702, 22 Am. Bankr. Rep. 476; Frank Dickey, 139 Fed. 744, 71 C. C. A. 562, 15 Am. Bankr. Rep. 155.

200 In re McCracken & McLeod, 129 Fed. 621, 12 Am. Bankr. Rep. 95.

this statutory fee to the services of attorneys rendered in preparing and presenting the petition and securing the adjudication. The "petitioning creditors" are to be considered as occupying the position of petitioning creditors only at this stage of the proceedings. Services rendered to them either before or after are not rendered to them in the character of "petitioning creditors," and are therefore not within this special provision of the act. No allowance can be made out of the estate to the creditors who presented the petition for services of an attorney rendered after the appointment of the trustee, as, in examining the bankrupt, sending out notices, attending sales, or the like, for such services are either for the benefit of the trustee or of the creditors individually.[201] But where the attorney for the petitioning creditors, concurrently with the petition or directly after it, prepared and presented a petition for an injunction restraining a mortgage trustee of the bankrupt from disposing of the property affected pendente lite, it was considered that he might be allowed a fee for this service.[202]

As a general rule, and aside from the special provisions for compensating the attorneys for petitioning creditors, it may be said that counsel employed by creditors of a bankrupt to represent them in the bankruptcy proceedings must look to their clients for compensation, and not to the estate of the bankrupt or to the court.[203] And especially, where professional services are rendered for the benefit of a particular creditor, and not for all the creditors of the estate, or where they are in opposition to the interests of the general creditors, they cannot be compensated out of the estate in bankruptcy.[204] Still, where the attorney for a particular creditor succeeds in an undertaking which materially benefits the estate as a whole, as, in unearthing concealed assets or recovering property fraudulently transferred, he may be allowed a reasonable fee out of the estate, for though he may have acted primarily in the interest of his own client, yet the result inures to the benefit of all. This is specially provided for in the bankruptcy act as amended,[205] and is also a doctrine generally recognized by the courts.[206] But there must have been professional service actually rendered. Thus, where notes of the bankrupt

[201] In re Silverman, 97 Fed. 325, 3 Am. Bankr. Rep. 227; In re Harrison Mercantile Co., 95 Fed. 123, 2 Am. Bankr. Rep. 419; In re Comstock, 9 N. B. R. 88, Fed. Cas. No. 3,075; In re Munford (D. C.) 255 Fed. 108, 43 Am. Bankr. Rep. 218.

[202] In re Harrison Mercantile Co., 95 Fed. 123, 2 Am. Bankr. Rep. 419.

[203] In re Evans, 116 Fed. 909, 8 Am. Bankr. Rep. 730; Mechanics'-American Nat. Bank v. Coleman, 204 Fed. 24, 29 Am. Bankr. Rep. 396; In re Smith, 108 Fed. 39, 5 Am. Bankr. Rep. 559.

[204] In re Baxter, 28 Fed. 452; In re Hope Min. Co., 2 Sawy. 351, 7 N. B. R. 598, Fed. Cas. No. 6,682; In re Shoemaker, 205 Fed. 113, 123 C. C. A. 345, 30 Am. Bankr. Rep. 349.

[205] Bankruptcy Act 1898, § 64b, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 800.

[206] In re Medina Quarry Co. (C. C. A.) 191 Fed. 815, 27 Am. Bankr. Rep. 466; In re E. I. Fidler & Son, 172 Fed. 632, 23 Am. Bankr. Rep. 16; In re Medina Quarry Co., 182 Fed. 508, 25 Am. Bankr. Rep.

are placed in the hands of an attorney for collection before maturity, but are paid in due course of the bankruptcy proceedings and without suit, the holder is not entitled to an allowance for attorney's fees thereon.[207] And where proceedings for the recovery of property concealed or fraudulently transferred have been instituted by the trustee, who is represented therein by competent counsel, it is not the privilege of creditors to have their own counsel assist in such proceedings, and if they do, they are not entitled to fees out of the estate.[208] So the court will not be justified either under the statutory provision above referred to or under its general equity powers, in charging the estate with fees to be allowed to attorneys for creditors, where the services rendered consisted in opposing the allowance of improper or fictitious claims against the estate, or securing their expunction after allowance, or defeating claims to priorities,[209] unless, possibly, in cases where the trustee in bankruptcy has refused to make defense against such claims or to take the proper steps to defeat them.[210] It should also be remarked that, where a creditor claims priority of payment out of the estate of the bankrupt, on the ground of his having a lien on particular property, and is opposed by the trustee and by other creditors, the attorney for such claimant, who successfully prosecutes the claim in the court of bankruptcy and secures its allowance, though he cannot of course claim a fee out of the estate, is entitled to a lien for his services on the fund thus secured for his client; and the court of bankruptcy has jurisdiction to determine the right to such lien, fix its amount, and enforce it in the distribution of the property.[211]

§ 784. **Same; Attorney for Receiver.**—The duties of a receiver in bankruptcy are ordinarily not such as to require the advice or assistance of an attorney, and he is not justified in retaining counsel and charging his fees against the estate, in the absence of an order of court authorizing the employment of the attorney,[212] or in the absence of a showing that the services of the attorney were distinctly beneficial to the estate

405; Smith v. Cooper, 120 Fed. 230, 56 C. C. A. 578, 9 Am. Bankr. Rep. 755; In re Evans, 117 Fed. 574.

207 In re Jenkins, 192 Fed. 1000, 27 Am. Bankr. Rep. 860.

208 In re Felson, 139 Fed. 275, 15 Am. Bankr. Rep. 185. But see In re Atkins (D. C.) 225 Fed. 639, 34 Am. Bankr. Rep. 794.

209 In re Medina Quarry Co. (C. C. A.) 191 Fed. 815, 27 Am. Bankr. Rep. 66: In re George Watkinson & Co., 130 Fed. 218, 12 Am. Bankr. Rep. 370; In re Harrison Mercantile Co., 95 Fed. 123, 2 Am. Bankr. Rep. 419.

210 In re Roadarmour, 177 Fed. 379, 100 C. C. A. 611, 24 Am. Bankr. Rep. 49; In re Little River Lumber Co., 101 Fed. 558.

211 In re Rude, 101 Fed. 805, 4 Am. Bankr. Rep. 319. And see In re Hershberger, 208 Fed. 94, 30 Am. Bankr. Rep. 635.

212 In re Leonard, 177 Fed. 503, 24 Am. Bankr. Rep. 97; In re T. E. Hill Co., 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73; In re Union Bank, 37 N. J. Eq. 420. And see supra, § 216.

as such.[213] Further, since a receiver in bankruptcy is required to stand independent of the parties to the litigation, the rule has been laid down that he will not be allowed to charge the estate for services rendered to him by the attorney for either party during the continuance of such relation.[214] Thus, where the attorneys for the receiver were also actively engaged throughout a protracted contest in bankruptcy, as attorneys for the petitioning creditors, and were not independent counsel employed by the receiver, as contemplated by an order granting leave to the receiver to employ counsel, and the bankruptcy proceeding was afterwards dismissed, it was held that the court rightly declined to make any allowance to the attorneys for services rendered to the receiver, such expenses being properly chargeable against the petitioning creditors.[215] Perhaps this rule should be modified in particular cases, where it is possible to distinguish clearly between services rendered to the receiver and services rendered to some other client. But at any rate, where attorneys for the receiver are also attorneys for the moving creditors and for the trustee, they are not entitled to charge the receiver for services performed in obtaining his appointment, or for other matters preliminary thereto, which services were rendered, not to the receiver, but in the interest of moving creditors, but only for services rendered to the receiver as such.[216] It should be added that the number of attorneys employed by a receiver in bankruptcy is not an element to be considered in allowing fees, but the allowance should be made as though but one attorney had been employed.[217]

§ 785. Same; Attorney for Trustee.—A trustee in bankruptcy may retain an attorney to advise and assist him, not unnecessarily or as a mere matter of course, but when the condition of the estate is such that he cannot safely or wisely proceed with its collection and distribution except under the guidance of competent professional advice; and for services thus rendered to a trustee in bankruptcy, in so far as the same were exclusively for his benefit or for the benefit of the estate which he represents, and were proper or necessary, and called for the exercise of professional knowledge and skill, as distinguished from mere clerical labor or business intelligence, the attorney is entitled to a reasonable fee, to be fixed by the court and paid out of the estate.[218] A trustee in bankruptcy who is also an attorney cannot recover for legal services performed for the petitioning creditors or for the bankrupt, since one who ac-

[213] Platt v. Archer, 13 Blatchf. 351, Fed. Cas. No. 11,214.

[214] In re Kelly Dry Goods Co., 102 Fed. 747, 4 Am. Bankr. Rep. 528.

[215] In re T. E. Hill Co., 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73.

[216] In re Falkenberg, 206 Fed. 835, 30 Am. Bankr. Rep. 718.

[217] In re Falkenberg, 206 Fed. 835, 30 Am. Bankr. Rep. 718.

[218] See supra, § 309.

cepts the position of trustee of a bankrupt's estate renounces the right to compensation in any other form or guise, and all services rendered must be referred to his position as trustee; but such a trustee may recover for services properly chargeable against the estate which were rendered prior to his appointment as trustee.[219] An allowance of compensation to counsel for the trustee in bankruptcy covering ordinary services does not necessarily preclude an additional allowance for subsequent unexpected and extraordinary services made necessary by the filing of a doubtful claim.[220] Attorneys' fees and expenses incurred in vacating a preference made by the bankrupt to a particular creditor will be paid out of funds recovered for the benefit of the general creditors.[221]

[219] Holland v. McIlwaine, 223 Fed. 777, 139 C. C. A. 597, 34 Am. Bankr. Rep. 416.

[220] In re Metallic Specialty Mfg. Co. (D. C.) 215 Fed. 937.

[221] In re Stearns Salt & Lumber Co., 225 Fed. 1, 140 C. C. A. 461, 35 Am. Bankr. Rep. 264.

CHAPTER XXXVII

CRIMES AND CRIMINAL PROCEDURE

§ 786. Persons Liable.—The bankruptcy act provides that the word "persons," "when used with reference to the commission of acts which are herein forbidden, shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies, of corporations."[1] Notwithstanding the broad nature of this provision, it was held in some of the earlier cases not to limit or affect the twenty-ninth section of the act, in which criminal offenses are defined and denounced, the rule of strict construction of criminal statutes forbidding such application. And particularly in relation to the offense of fraudulently concealing assets from the trustee, it was held that, where the bankrupt was a corporation, but its officers were not individually in bankruptcy, they could not be indicted for concealing the bankrupt's property or assets.[2] But these decisions have been disapproved, and the doctrine now prevailing is that a bankrupt corporation may be guilty of the offense of concealing assets, that its president or any other officer, though not himself a bankrupt, may be indicted and punished for that offense if he brought about the concealment or participated therein or conspired with others to effect it, and that it is immaterial that the corporation is not or cannot be indicted for the same offense or as one of the conspirators.[3] Further, an indictment may be sustained against the president or other managing officer of a bankrupt corporation for the offense of knowingly and fraudulently aiding and abetting it in the concealment of its assets from its trustee.[4] And on a similar principle, a member of a

[1] Bankruptcy Act 1898, § 1, clause 19.

[2] Field v. United States, 137 Fed. 6, 69 C. C. A. 568, 14 Am. Bankr. Rep. 507; United States v. Lake, 129 Fed. 499, 12 Am. Bankr. Rep. 270.

[3] Cohen v. United States, 157 Fed. 651, 85 C. C. A. 113, 19 Am. Bankr. Rep. 8; United States v. Freed, 179 Fed. 236, 25 Am. Bankr. Rep. 89; Wolf v. United States, 238 Fed. 902, 152 C. C. A. 36, 39 Am. Bankr. Rep. 107.

[4] Crim. Code U. S., §§ 332, 335; Kauf-

bankrupt partnership, though not himself adjudged bankrupt, is subject to prosecution for the fraudulent concealment of property of the partnership from its trustee.[5]

§ 787. **Concealment of Property by Bankrupt.**—It is a punishable offense if a person shall have knowingly and fraudulently "concealed, while a bankrupt or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy."[6] Under the act of 1867, it was held that this offense is committed if the bankrupt fraudulently omits from his schedule any property or effects which should have been listed, with the intention of concealing such property.[7] But the modern doctrine is that the offense consists of a continuous concealment during the whole course of the bankruptcy proceedings, and even beyond, or until discovery, and that the crime may be initiated, but is not necessarily consummated, by the fraudulent omission of property from the schedule.[8] Undoubtedly the failure to list property is a significant circumstance, but since the concealment must have been "knowingly and fraudulently" perpetrated, a mere omission through mistake or accident is not sufficient.[9] But the fact that the bankrupt used a part of the proceeds of property which he had concealed from his trustee in the payment of debts does not negative a fraudulent intent in such concealment.[10] The concealment must have taken place while the defendant was a bankrupt or after his discharge. Hence if a person begins to secrete or cover up his property in expectation of coming bankruptcy and with the intention of withholding it from administration in bankruptcy, it is not yet an offense under the statute, because not done "while a bankrupt." If such a scheme is pursued and carried on into the bankruptcy proceedings, after the defendant's adjudication, it would come under the denunciation of the statute.[11] But if all of the

man v. United States, 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C, 466, 32 Am. Bankr. Rep. 22.

[5] Conetto v. United States, 251 Fed. 42, 163 C. C. A. 292, 42 Am. Bankr. Rep. 189.

[6] Bankruptcy Act 1898, § 29b. As respects the bankrupt's offense of knowingly and fraudulently concealing, while a bankrupt, given property from his trustee, it is immaterial whether his bankruptcy was voluntary or involuntary. Tugendhaft v. United States (C. C. A.) 263 Fed. 562, 45 Am. Bankr. Rep. 310.

[7] United States v. Clark, 1 Low. 402, Fed. Cas. No. 14,806.

[8] Gretsch v. United States, 231 Fed. 57, 145 C. C. A. 245, 36 Am. Bankr. Rep. 571; Johnson v. United States, 163 Fed. 30, 89 C. C. A. 508, 18 L. R. A. (N. S.) 1194; 20 Am. Bankr. Rep. 724; Kern v. United States, 169 Fed. 617, 95 C. C. A. 145, 22 Am. Bankr. Rep. 223.

[9] In re Scott (D. C.) 6 Sawy. 234, 11 Fed. 133.

[10] Corenman v. United States, 188 Fed. 424, 110 C. C. A. 341. And see United States v. Lowenstein (D. C.) 126 Fed. 884, 11 Am. Bankr. Rep. 134. That a bankrupt knowingly and fraudulently conceals assets from his trustee is an offense under the statute, although he has disposed of the property before being ordered to turn it over to the trustee. In re Stern (D. C.) 215 Fed. 979.

[11] Glass v. United States, 231 Fed. 65,

bankrupt's acts, alleged to constitute concealment of property from his trustee, occurred before the filing of the petition in bankruptcy, the indictment cannot be sustained.[12] Next it is necessary that the property should have been concealed "from his trustee." But it is held that the concealment of property by a voluntary bankrupt, after his adjudication, though before the appointment of a trustee, is a concealment from the trustee, which, if knowingly and fraudulently done, will constitute a criminal offense.[13] To sustain an indictment under this provision of the statute, it is of course essential to allege and show that a trustee was actually appointed.[14] But it is held that the offense of conspiring to conceal a bankrupt's property from his trustee (altogether a different offense) may be committed although it is not shown that a trustee was ever appointed, as in a case where, by the carrying out of the conspiracy, all the bankrupt's property was removed out of the jurisdiction of the court before the adjudication in bankruptcy, so that the appointment of a trustee would have been a useless formality.[15] After a successful concealment of assets has been practised, and an indictment found against the bankrupt therefor, he cannot purge himself of his criminal liability by filing an amended schedule, setting forth the assets alleged to have been concealed. Such conduct may properly influence the court in determining the measure of punishment after conviction, but does not render the bankrupt any the less guilty of the statutory offense.[16] Finally, it is to be observed that, although the offense may be committed after the discharge of the bankrupt, it can be committed only with respect to property which was a part of his estate and should have been turned over to the trustee.[17] What the bankrupt may earn or acquire after the filing of the petition is not a part of his estate, and he is not bound to disclose it to his trustee. Hence it is not a vio-

145 C. C. A. 253, 36 Am. Bankr. Rep. 550; Kaufman v. United States, 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C, 466, 32 Am. Bankr. Rep. 22; United States v. Rhodes (D. C.) 212 Fed. 513.

[12] Warren v. United States, 199 Fed. 753, 118 C. C. A. 191, 43 L. R. A. (N. S.) 278, 29 Am. Bankr. Rep. 555.

[13] United States v. Goldstein (D. C.) 132 Fed. 789, 12 Am. Bankr. Rep. 755.

[14] The fact that the trustee appointed for a bankrupt failed to give bond, but continued to act as trustee, and there was no declaration of a vacancy, is no defense to a prosecution of the bankrupt for a fraudulent concealment of property. Sharfsin v. United States (C. C. A.) 265 Fed. 916, 46 Am. Bankr. Rep. 1.

[15] Radin v. United States, 189 Fed. 568, 111 C. C. A. 6, 25 Am. Bankr. Rep. 640.

[16] Kern v. United States, 169 Fed. 617, 95 C. C. A. 145, 22 Am. Bankr. Rep. 223.

[17] Where a partner appropriated firm assets, with the concurrence of his copartners, the assets so withdrawn, upon his bankruptcy individually and as a member of the firm, was "property belonging to his estate in bankruptcy" within the criminal provisions of the act. Malvin v. United States, 252 Fed. 449, 164 C. C. A. 373, 42 Am. Bankr. Rep. 98.

lation of the statute for the bankrupt to withhold or secrete from his trustee such after-acquired property.[18]

§ 788. **Making False Oath or Account.**—It is a punishable offense if any person shall have knowingly and fraudulently "made a false oath or account in, or in relation to, any proceeding in bankruptcy."[19] One guilty of false swearing in a bankruptcy proceeding must be prosecuted under this provision of the Bankruptcy Act, instead of under Penal Code, § 125, which is the general statute applicable to prosecutions for perjury, for the Bankruptcy Act provides a lighter punishment and a shorter period of limitations than the general statute, and the rule applies that for one offense there can be only one prosecution and conviction.[20] The offense denounced by the statute is of course not restricted to the bankrupt himself. The offense might be committed and the penalty incurred, for instance, by strangers examined as witnesses in the proceedings, or by creditors proving claims or filing sworn statements as to the nature and value of securities held, etc.,[21] or by the trustee in bankruptcy in respect to the verity of his accounts filed in the proceeding. But practically this provision of the act is most frequently invoked against the bankrupt. And it is held to be within the statute if he intentionally, and with a fraudulent purpose, omits from his schedule of assets (which must be sworn to) any material amount of property which should have been included,[22] but not where he fairly submitted the facts to his counsel, and, acting on advice then received, withheld a certain item from the schedule,[23] and probably not where the item omitted was of very doubtful value or where the bankrupt's title to it was doubtful in law.[24]

This provision of the statute applies also to any false testimony which may be given by the bankrupt on his examination before the referee.[25] And an indictment for perjury which alleges that the ac-

[18] In re Polakoff, 1 Nat. Bankr. News, 232.

[19] Bankruptcy Act 1898, § 29b.

[20] Rosenthal v. United States, 248 Fed. 684, 160 C. C. A. 584, 41 Am. Bankr. Rep. 583. See Wechsler v. United States, 158 Fed. 579, 86 C. C. A. 37, 19 Am. Bankr. Rep. 1.

[21] Ulmer v. United States, 219 Fed. 641, 134 C. C. A. 127, 34 Am. Bankr. Rep. 143. And see Lybrand v. United States (C. C. A.) 269 Fed. 601, 46 Am. Bankr. Rep. 469.

[22] United States v. Nihols, 4 McLean, 23, Fed. Cas. No. 15,880.

[23] United States v. Conner, 3 McLean, 573, Fed. Cas. No. 14,847. And see Levinson v. United States (C. C. A.) 263 Fed. 257, 45 Am. Bankr. Rep. 305.

[24] In re Shoemaker, 4 Biss. 245, Fed. Cas. No. 12,799.

[25] United States v. Coyle (D. C.) 229 Fed. 256; Wechsler v. United States, 158 Fed. 579, 86 C. C. A. 37, 19 Am. Bankr. Rep. 1. A bankrupt who, on examination in a bankruptcy proceeding, in answer to a question requiring a statement of his assets, willfully fails to disclose all of such assets, is guilty of making a false oath under this provision of the statute. United States v. Gray (D. C.) 255 Fed. 98, 43 Am. Bankr. Rep. 158.

cused gave false testimony before the referee in bankruptcy, is sustained by evidence that the hearing at which the accused testified was had in the referee's office, that the referee administered the oath to the accused as a witness, and personally conducted part of the examination, while the rest was conducted by counsel, that all the testimony was taken by a stenographer, and that the referee was at all times in the same room, or in an adjacent or adjoining room, in the absence of anything to show that the referee was not within the hearing of the examination at all times, as against the objection that the perjury was not committed before the referee in person, based on the statement of the stenographer, deduced from signs in her notes, that the referee was out of the room part of the time, but without any independent recollection on her part that such was the case.[26] It is also held that since the statute relates to false swearing in any "proceeding in bankruptcy," the offense here denounced may be committed by the bankrupt on his examination before the referee on an investigation of specifications filed in opposition to his application for discharge.[27]

§ 789. **Receiving Property from Bankrupt.**—Among the offenses denounced by the bankruptcy act is that committed by any person who shall have "knowingly and fraudulently * * * received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act."[28] The essential elements of the offense are that the accused should have received property from the bankrupt (which implies the complicity of the latter), that the property should be of substantial or material value, that the transfer should have been made after the filing of the petition in bankruptcy, that the transferee should have knowledge of the bankruptcy proceedings, and that the intention of the transferee (and necessarily of the bankrupt also) should be to defeat the operation of the bankruptcy act by withholding the property in question from administration under it. Prosecutions under this provision of the act do not appear to have been frequent. But attention may be called to a case in which, after the filing of a petition in bankruptcy, the bankrupt surrendered valuable mortgaged property to the trustee in the mortgage, the latter taking possession, and both were fined by the court of bankruptcy, as for contempt.[29]

§ 790. **Extortion.**—The bankruptcy act makes it a crime for any person to have "extorted or attempted to extort any money or property

[26] Kovoloff v. United States (C. C. A.) 202 Fed. 475, 28 Am. Bankr. Rep. 767.

[27] Edelstein v. United States, 149 Fed. 636, 79 C. C. A. 328, 17 Am. Bankr. Rep. 649; In re Kretsch, 172 Fed. 523, 22 Am. Bankr. Rep. 284.

[28] Bankruptcy Act 1898, § 29b, cl. 4.

[29] In re Arnett, 112 Fed. 770, 7 Am. Bankr. Rep. 522.

from any person as a consideration for acting or forbearing to act in bankruptcy proceedings." [30] It is said that "the ordinary meaning of the word 'extortion' is the taking or obtaining of anything from another by means of illegal compulsion or oppressive exaction. * * * The word has acquired a technical meaning in the common law, and designates a crime committed by an officer of the law, who, under color of his office, unlawfully and corruptly takes any money or thing of value that is not due him, or more than is due, or before it is due. The officer must unlawfully and corruptly receive such money or article of value for his own benefit or advantage." [31] Undoubtedly the provision above quoted would apply to those acting as officers in bankruptcy proceedings, and in addition, the federal laws make it a punishable offense for any officer of the United States to practise extortion upon any one, or to ask or receive any money or thing of value "with intent to have his decision or action on any question, matter, cause, or proceeding which may, at any time, be pending, or which may be by law brought before him in his official capacity, or in his place of trust or profit, influenced thereby." [32]

But extortion is not necessarily confined to those acting in an official capacity. It seems plain that the offense denounced by the statute might be committed by a creditor who should exact and receive a pecuniary reward for assenting to a composition or forbearing to oppose the bankrupt's application for discharge. But there is room for doubt as to whether the statute would apply to action or forbearance to act in respect to the institution of the bankruptcy proceedings. If a creditor, for instance, hearing that bankruptcy proceedings against his debtor were threatened or contemplated, should demand and receive something over and above the payment of his own debt as a consideration for his forbearing to join in the proposed petition, it is doubtful whether he would commit a punishable offense. The natural import of the language of the act, "acting or forbearing to act in bankruptcy proceedings," is that there must be a bankruptcy proceeding in existence or pending, in reference to which the action or non-action takes place. It could hardly be satisfied by a bankruptcy proceeding merely contemplated and which may not be instituted at all. And it has been held that, before any proceeding in bankruptcy has been commenced, a creditor may take from a third person a contract or security for the payment of money, as an inducement to forbear instituting proceedings against

[30] Bankruptcy Act 1898, § 29b, cl. 5.

[31] United States v. Deaver, 14 Fed. 595.

[32] Rev. Stat. U. S. §§ 5449, 5451, 5481, 5501.

the debtor, without violating any provision of the bankruptcy law or contravening public policy.[33]

But where the attorney for a trustee in bankruptcy at first took the course of arguing before the referee against the acceptance of a bid which had been made for the bankrupt's stock, on the ground that it was inadequate, and then compelled the bidder to pay him a sum of money in consideration of his changing his position and advising the referee to accept the bid, it was held that he was guilty of the offense of extortion under the bankruptcy act, and no defense could be found in the fact that he was legitimately entitled to use his influence and persuasion with the trustee or the referee.[34]

§ 791. Conspiring with Bankrupt.—This is not directly made a punishable offense by the terms of the bankruptcy act, though there is a reference in the statute to persons who are "participants" in any of the acts forbidden by the law.[35] But elsewhere it is provided that "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty" and to imprisonment.[36] And under this statute it has been held that persons may be indicted for conspiring with a bankrupt to commit the acts made criminal by the bankruptcy law, although no one but the bankrupt himself is mentioned in that connection.[37] Thus, concealment of assets from the trustee in bankruptcy is an offense which can be committed only while there is a person in bankruptcy, and with his participation, but when it is so committed, not only the bankrupt is punishable, but also any others who aid and abet in the concealment.[38] But since the statute does not make it a criminal offense for a person not a bankrupt to conceal the bankrupt's property from the trustee, an indictment does not state an offense when it charges that the defendants, who were not in any manner officially connected with the bankrupt corporation, either as directors or stockholders, conspired to conceal assets of the corporation from the trustee in bankruptcy (that is, conspired with each other, but not with the bankrupt or its officers), and in pursuance of such conspiracy removed the corporation's stock

[33] Ecker v. Bohn, 45 Md. 278, 16 N. B. R. 544. And see, supra, §§ 157, 158.

[34] United States v. Dunkley (D. C.) 235 Fed. 1000, 38 Am. Bankr. Rep. 127.

[35] Bankruptcy Act 1898, § 1, cl. 19.

[36] Rev. St. U. S. § 5440.

[37] United States v. Bayer, 4 Dill. 407, 13 N. B. R. 400, Fed. Cas. No. 14,547.

[38] United States v. Young & Holland Co., 170 Fed. 110, 22 Am. Bankr. Rep. 484; Kaufman v. United States, 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C, 466, 32 Am. Bankr. Rep. 22.

of goods from its place of business and sold the same and concealed the proceeds.[39]

§ 792. **Offenses by Referees and Trustees.**—Referees in bankruptcy are forbidden to act officially in any case in which they are directly or indirectly interested, to purchase, directly or indirectly, any property of an estate in bankruptcy under their jurisdiction as referees, or to refuse to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in their charge by parties in interest when directed by the court so to do. In either of these three cases, the offense must have been committed "knowingly." In either case, the punishment, upon conviction, is a fine of not more than five hundred dollars and forfeiture of the office of referee.[40] In regard to the second offense above named, it may be remarked that the prohibition of the statute would apply to a purchase by a referee, otherwise fair, at a public sale made by the trustee, as well as to a purchase by private sale from the trustee or from the bankrupt.

As to trustees in bankruptcy, the provision is that "a person shall be punished by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee."[41] It should be remarked that this offense exists solely by virtue of the bankruptcy act. Independently of that statute, there is no law of the United States providing for the punishment of a trustee in bankruptcy for the embezzlement of funds coming into his hands as trustee.[42] As in the case of a referee, so also in the case of a trustee, it is a punishable offense to refuse parties in interest a reasonable opportunity to inspect the accounts, papers, and records of estates in bankruptcy committed to their charge, at least when directed by the court so to do, and in the case of the trustee, also, the penalty includes forfeiture of his office.[43]

§ 793. **Jurisdiction.**—The courts of bankruptcy are invested with jurisdiction to "arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations, for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States."[44] The

[39] United States v. Waldman, 188 Fed. 524, 26 Am. Bankr. Rep. 677.

[40] Bankruptcy Act 1898, § 29c.

[41] Bankruptcy Act 1898, § 29a.

[42] United States v. Bixby, 10 Biss. 238, 6 Fed. 375.

[43] Bankruptcy Act 1898, § 29c.

[44] Bankruptcy Act 1898, § 2, cl. 4.

bankruptcy act also gave to the circuit courts of the United States "concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act." [45] But since the abolition of the circuit courts by the Federal Judicial Code of 1911, this provision has become unimportant. Where a state statute makes it a punishable offense, under certain circumstances, for an insolvent debtor to conceal his property, the proper state court is not deprived of jurisdiction to try and punish a person violating the statute by the fact that he afterwards becomes bankrupt and thereupon becomes liable to punishment under the bankruptcy act in respect to the same concealment of property.[46]

§ 794. Indictment or Information.—It was evidently the understanding and intention of Congress that offenses against the bankruptcy law might be prosecuted by information, since that provision of the act which limits the time within which prosecutions may be brought bars criminal proceedings "unless the indictment is found or the information is filed in court within one year after the commission of the offense." [47] But the offenses denounced by the act (except those which may be committed by referees or trustees in their official capacity) are punishable by imprisonment which may exceed one year in duration, and therefore, under section 335 of the Criminal Code of 1909, must be classed as felonies, and must be prosecuted by indictment.[48]

In any prosecution under the act the first essential to be pleaded and proved is the adjudication in bankruptcy. Hence it is ruled that the indictment must set forth the proceedings in the court of bankruptcy with such particularity as to show affirmatively that an adjudication of bankruptcy was made in a case in which the court, describing it, had jurisdiction.[49] And an indictment which does not state the name of the court or the time or place where the proceedings were instituted is not sufficient.[50] But it is not necessary to set forth in detail the petition in bankruptcy on which the adjudication was made, but only to refer to it

Only the court where the positive act of converting or retaining the physical property was done has jurisdiction of the offense of fraudulently concealing property from the trustee in bankruptcy; hence the court in which the petition in bankruptcy was filed has no jurisdiction of the offense of concealing property which was never within the district. Gretsch v. United States, 231 Fed. 57, 145 C. C. A. 245, 36 Am. Bankr. Rep. 571.

[45] Bankruptcy Act 1898, § 23c.

[46] State v. Thompson, 58 N. H. 270.

[47] Bankruptcy Act 1898, § 29d.

[48] Kaufman v. United States, 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C, 466, 32 Am. Bankr. Rep. 22.

[49] United States v. Prescott, 2 Biss. 325, Fed. Cas. No. 16,084.

[50] United States v. Latorre, 8 Blatchf. 134. Fed. Cas. No. 15,567. But see United States v. Deming, 4 McLean, 3, Fed. Cas. No. 14,945, holding an indictment for perjury in a proceeding in bankruptcy sufficient in alleging the petition as made "to a judge sitting as a bankrupt court."

in such a manner as to show its character and object.[51] And as an indictment need not ordinarily negative an exception, the jurisdiction of the court to make an adjudication in bankruptcy against the corporation in question may be sufficiently alleged without a particular averment that it was one of the classes of corporations made subject to the bankruptcy law.[52] And in fact, it has been held sufficient simply to allege that the defendant "was lawfully adjudged a bankrupt."[53]

In regard to the offense of concealing assets from the trustee, it is said that the word "conceal" is of plain import, and when coupled in an indictment with the words "unlawfully, knowingly, and fraudulently" clearly excludes unintentional acts; that, as the provisions of the statute relating to this offense set forth all the elements of the offense, an indictment in the words of the statute is sufficient; and that the particular manner of concealment of the property in question need not be described in the indictment, as this is a matter of evidence and not of pleading.[54] It is of course necessary to plead the time of the concealment, sufficiently to show that it occurred while the defendant was in bankruptcy or after his discharge. But it is held that it may be laid as of any date when the concealment continues, and hence it is proper to charge the commission of the offense as of the date when the bankrupt refused to turn over the property in question to the trustee.[55] The ownership of the property must be alleged. But an averment that the defendant concealed property "which then and there belonged to the estate in bankruptcy" sufficiently alleges the ownership of the property, and is not rendered insufficient or uncertain by the further averment that the property was "then and there the personal property of" the bankrupt, which must be construed in conjunction with the prior averment, or, even if the two averments must be regarded as repugnant, the latter may be rejected as surplusage.[56] So, where the indictment alleged the concealment, some months after the adjudication, of property "all then and there the property of him the said bankrupt," it was held that the failure to allege specifically that the property concealed was the property of the bankrupt at the time of the adjudication was a defect of form only, and not of substance.[57] And an averment that the

[51] United States v. Deming, 4 McLean, 3, Fed. Cas. No. 14,945.

[52] United States v. Freed, 179 Fed. 236, 25 Am. Bankr. Rep. 89.

[53] United States v. Crane, 3 Cliff. 211, Fed. Cas. No. 14,887.

[54] United States v. Comstock, 161 Fed. 644, 20 Am. Bankr. Rep. 520; Meyer v. United States, 220 Fed. 822, 136 C. C. A. 432, 33 Am. Bankr. Rep. 877; United States v. Greenbaum (D. C.) 252 Fed. 259, 42 Am. Bankr. Rep. 286; United States v. Rhodes (D. C.) 212 Fed. 513.

[55] United States v. Stern, 186 Fed. 854, 26 Am. Bankr. Rep. 110.

[56] United States v. Comstock, 161 Fed. 644, 20 Am. Bankr. Rep. 520. See United States v. Rosenstein (D. C.) 211 Fed. 738, 33 Am. Bankr. Rep. 730.

[57] United States v. Jackson, 2 Fed. 502.

bankrupt "unlawfully, knowingly, willfully, and fraudulently" concealed the property carries with it a sufficient averment of his knowledge that such property belonged to his estate in bankruptcy.[58] And it is not an essential element of this offense, such as must be averred in the indictment, that the bankrupt at the time of concealing the property knew either the fact that a trustee had been appointed for his estate or the name of the trustee.[59]

As to the offense of making a false oath in bankruptcy by swearing to a schedule of assets known to be false or incomplete, the indictment must allege the facts concerning the omission or understatement of assets sufficiently to show the materiality of the false statement, but need not expressly aver that it was material.[60] The particular property claimed to have been fraudulently and knowingly omitted from the schedule must be described in the indictment, but an allegation that it consisted of "one hundred and fifty thousand dollars in lawful money of the United States" is sufficiently specific.[61] But it will not do to allege that the bankrupt knew that his schedule was false and that he knew that he was the owner of a specified sum of money in addition to what was mentioned in the schedule. It is not the bankrupt's knowledge that is in question in this averment, but the fact itself. Hence the indictment must charge directly that he did have other property than that listed in the schedule.[62]

In an indictment for perjury committed in an examination or other proceeding in bankruptcy, if it is founded on the general provision of the federal criminal law as to perjury,[63] it is essential to allege that the false oath was taken "willfully," and the omission of this word is a fatal defect.[64] But where the alleged perjury consists in not giving a full and true account of his property by the bankrupt, the items on the schedule need not be set out in the indictment.[65] And an indictment is sufficient which, after alleging the prior proceedings and that an examination of the bankrupt was held and that he was sworn to make true answers, avers that he attempted to account for a certain item of property, with intent to defraud his creditors, by a fictitious loss.[66] So an indictment which charges that defendant committed perjury when he

[58] McNiel v. United States (C. C. A.) 150 Fed. 82, 18 Am. Bankr. Rep. 18.

[59] United States v. Comstock, 161 Fed. 644, 20 Am. Bankr. Rep. 520.

[60] United States v. Lake, 129 Fed. 499, 12 Am. Bankr. Rep. 270. And see United States v. Coyle (D. C.) 229 Fed. 256; Ulmer v. United States, 219 Fed. 641, 134 C. C. A. 127, 34 Am. Bankr. Rep. 143.

[61] United States v. Lake, 129 Fed. 499, 12 Am. Bankr. Rep. 270.

[62] Bartlett v. United States, 106 Fed. 884, 46 C. C. A. 19, 5 Am. Bankr. Rep. 678.

[63] Rev. Stat. U. S. § 5392, U. S. Comp. Stat. 1901, p. 3653.

[64] United States v. Lake, 129 Fed. 499, 12 Am. Bankr. Rep. 270.

[65] United States v. Chapman, 3 McLean, 390, Fed. Cas. No. 14,784.

[66] United States v. Crane, 3 Cliff. 211, Fed. Cas. No. 14,887.

swore that his books were burned on a certain day in April; that instead of being burned on that day they were in existence and in his possession as late as November following; and that he knew that he was making a false oath when he swore that they were burned in April, is good and sufficient, the defects, if any, being merely in matter of form not prejudicial to the defendant.[67] But where an indictment for conspiracy to conceal the assets of a bankrupt corporation from its trustee alleged, as the overt act, that defendants removed and sold the bankrupt's stock of goods and concealed the proceeds from the trustee, but did not allege any of the circumstances under which the goods were removed, so as to show that the removal was illegal and not under legal process, it was held insufficient.[68]

§ 795. **Burden of Proof and Evidence.**—In a prosecution of a bankrupt for the offense of concealing assets from his trustee, the burden is on the government to establish the defendant's guilt beyond a reasonable doubt, and where the charge concerns property which he had previously transferred, he is entitled to the presumption of law that he acted legally and in good faith in conveying it.[69] Yet if the evidence traces valuable property into the recent possession of the bankrupt, and then shows that he has failed to surrender it or account for it, it is incumbent on him to give a reasonable and credible account of its disappearance or disposition, and the jury will not be bound to accept his bare denial under oath.[70] In regard to the nature of the evidence admissible, it may be remarked that concealment of assets, like other offenses denounced by the bankruptcy law, may be proved by circumstantial evidence. "The evidence in such cases must accommodate itself to the issue to be tried, and be such as, in the practical affairs of life, tends to produce belief and conviction in the minds of those to whom such evidence is addressed. In other words, the evidence must in general be largely, if not wholly, circumstantial, and be in large measure governed by what the trial court in its judicial discretion shall consider its

[67] Kovoloff v. United States (C. C. A.) 202 Fed. 475, 28 Am. Bankr. Rep. 767.

[68] United States v. Waldman, 188 Fed. 524, 26 Am. Bankr. Rep. 677.

[69] Chodkowski v. United States, 194 Fed. 858, 114 C. C. A. 624, 28 Am. Bankr. Rep. 62. In a prosecution of the president and manager of a bankrupt corporation for aiding and abetting it in the concealment of assets from its trustee, the fact that there was no evidence that the defendant was holding the money for the bankrupt did not impair the government's case. Kaufman v. United States, 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C, 466, 32 Am. Bankr. Rep. 22.

[70] In re Lasky, 163 Fed. 99, 20 Am. Bankr. Rep. 729; United States v. Stern, 186 Fed. 854, 26 Am. Bankr. Rep. 110; Stern v. United States, 193 Fed. 888, 114 C. C. A. 102, 28 Am. Bankr. Rep. 101; Glass v. United States, 231 Fed. 65, 145 C. C. A. 253, 36 Am. Bankr. Rep. 550; Terry v. United States, 235 Fed. 701, 149 C. C. A. 121, 37 Am. Bankr. Rep. 666; Wolf v. United States, 238 Fed. 902, 152 C. C. A. 36, 39 Am. Bankr. Rep. 107.

appropriateness to the issue presented in a particular case." [71] But of course the court must also apply the ordinary rules for excluding evidence which is immaterial or too remote for consideration.[72] In a case of this kind, it is not improper to admit evidence of the amount and value of the defendant's stock in trade a few days prior to the filing of the petition in bankruptcy and also a short time afterwards,[73] and the trustee may testify that he was never informed by the bankrupt that property belonging to him was stored in a particular place, the property described in the indictment having been found by the trustee in that place.[74] To prove a continuous concealment of property, it is not necessary to take up each moment of the bankrupt's life while the proceedings lasted, and prove what he did as a means of proving what he failed to do,[75] nor is it necessary to prove the concealment of each and every article or sum of money set forth in the indictment, but proof of the concealment of any part of the property or money described is sufficient to sustain a conviction.[76] And it is not necessary to prove that a demand for the surrender of the property was made by the trustee.[77] But it is absolutely essential to show a valid adjudication in bankruptcy. Without this a conviction cannot stand. Concealment of assets from a de facto trustee is not within the statute.[78]

It has been held that, on a prosecution of a bankrupt for concealing property, the schedules filed by him in the bankruptcy proceeding are not admissible in evidence against him.[79] These decisions were rested upon an act of Congress which provides that no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding, shall be given in evidence or in any manner used against him in any criminal proceeding in any court of the United States.[80] But this statute has been repealed since the decision

[71] Stern v. United States, 193 Fed. 888, 114 C. C. A. 102, 28 Am. Bankr. Rep. 101. Where it appeared that the bankrupt, shortly before his adjudication, converted into money merchandise which he had bought on credit, evidence of conversations by the bankrupt at the time of disposing of the merchandise was admissible. Green v. United States, 240 Fed. 949, 153 C. C. A. 635, 39 Am. Bankr. Rep. 637.

[72] Bean v. United States, 192 Fed. 859, 113 C. C. A. 183, 27 Am. Bankr. Rep. 759; McNiel v. United States (C. C. A.) 150 Fed. 82, 18 Am. Bankr. Rep. 18. And see Meyer v. United States, 220 Fed. 822, 136 C. C. A. 432, 33 Am. Bankr. Rep. 877.

[73] Jacobs v. United States (C. C. A.) 161 Fed. 694, 20 Am. Bankr. Rep. 550.

[74] Johnson v. United States, 170 Fed. 581, 95 C. C. A. 661, 22 Am. Bankr. Rep. 359.

[75] Johnson v. United States, 163 Fed. 30, 89 C. C. A. 508, 20 Am. Bankr. Rep. 724.

[76] United States v. Stern, 186 Fed. 854, 26 Am. Bankr. Rep. 110.

[77] United States v. Smith, 13 N. B. R. 61, Fed. Cas. No. 16,339.

[78] Gilbertson v. United States, 168 Fed. 672, 94 C. C. A. 158, 22 Am. Bankr. Rep. 32.

[79] Johnson v. United States, 163 Fed. 30, 89 C. C. A. 508, 20 Am. Bankr. Rep. 724; Cohen v. United States, 170 Fed. 715, 96 C. C. A. 35, 22 Am. Bankr. Rep. 533.

[80] Rev. Stat. U. S. § 860, U. S. Comp. St. 1901, p. 661.

of the cases above cited.[81] It is true the bankruptcy law also contains a provision for the protection of the bankrupt. In providing for his examination in bankruptcy concerning his property, business, and affairs, it directs that "no testimony given by him shall be offered in evidence against him in any criminal proceeding."[82] But the Supreme Court of the United States holds that the protection afforded by this provision extends only to the testimony given by the bankrupt on his examination under that section of the bankruptcy law, and does not render inadmissible, on a criminal prosecution, the schedules filed by him in the bankruptcy proceeding.[83] But it may be open to serious question whether the broad provision of the fifth amendment to the federal Constitution would not protect the bankrupt against the admission of his schedules in evidence against him in a criminal case in a federal court. This question is not precluded by the decision of the Supreme Court above mentioned, because the prosecution there considered, and in which the schedules were held admissible, was not in a federal court, but in a state court (where the fifth amendment does not apply), and was not for an offense under the bankruptcy law, but for a violation of a state statute forbidding bankers to receive deposits when insolvent.

Returning to the privilege of immunity granted by the seventh section of the bankruptcy act, it is held that this does not protect the bankrupt from prosecution for perjury committed in the course of the examination therein referred to,[84] nor from a prosecution for testifying falsely in a proceeding to investigate the truth of specifications filed in opposition to his application for discharge.[85]

The crime of false swearing in bankruptcy proceedings is an entirely different offense from perjury at common law or under the federal criminal code, and it was not regarded by Congress as of equal enormity or of an equally aggravated character as perjury strictly so called. Hence it is not within the ancient rule of the common law that, to sustain a conviction of perjury, it must be proved by two witnesses, or by one witness with corroborating circumstances; and evidence which not only contradicts the defendant's testimony, but so far preponderates as to justify the jury in finding that the testimony in question was not only false, but was made or given by the defendant knowingly and fraudu-

[81] Act Cong. May 7, 1910, 36 Stat. 352, U. S. Comp. Stat. Supp. 1911, p. 272.

[82] Bankruptcy Act 1898, § 7, cl. 9.

[83] Ensign v. Pennsylvania, 227 U. S. 592, 33 Sup. Ct. 321, 57 L. Ed. 658, 30 Am. Bankr. Rep. 408; United States v. Green (D. C.) 220 Fed. 973, 34 Am. Bankr. Rep. 405.

[84] Wechsler v. United States, 158 Fed. 579, 86 C. C. A. 37, 19 Am. Bankr. Rep. 1.

[85] Edelstein v. United States, 149 Fed. 636, 79 C. C. A. 328, 17 Am. Bankr. Rep. 649.

lently, is enough to sustain a conviction.[86] In a prosecution for making false oaths in a proceeding in bankruptcy, the judgment roll in a previous action, to which defendant was a party, is admissible as bearing on his motive and the reason for his testimony in the bankruptcy proceeding.[87] So, the books of a bankrupt corporation, with explanatory testimony of accountants, and statements of the corporation made to credit companies, of which defendant had knowledge, are admissible in a prosecution for falsely claiming that payments made by defendant to the bankrupt were loans and not for the purchase of stock.[88] And in a prosecution for perjury committed by defendant in his examination concerning the estate of a bankrupt, evidence of defendant's confidential relations with the bankrupt are admissible to show motive.[89]

[86] Kahn v. United States, 214 Fed. 54, 130 C. C. A. 494, 32 Am. Bankr. Rep. 109.

[87] Hopkins v. United States, 234 Fed. 867, 148 C. C. A. 465, 37 Am. Bankr. Rep. 767.

[88] Levinson v. United States (C. C. A.) 263 Fed. 257, 45 Am. Bankr. Rep. 305.

[89] Ulmer v. United States, 219 Fed. 641, 134 C. C. A. 127, 34 Am. Bankr. Rep. 143.

APPENDIX

UNITED STATES BANKRUPTCY LAW

OF

JULY 1, 1898

AND

AMENDMENTS THERETO TO JANUARY 28, 1915[1]

CHAPTER I.

DEFINITIONS.

Section 1. MEANING OF WORDS AND PHRASES.—a The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United

—"A person against whom a petition has been filed."

—"adjudication."

—"appellate courts."

—"bankrupt."

—"clerk."

—"corporations."

—"court."

—"courts of bankruptcy."

[1] The text of the Bankruptcy Act of 1898 is here reprinted in full, together with all amendments. The original text of the statute is printed in Roman characters. Sections and parts of sections amended are enclosed in brackets. The amendatory matter, or substituted new section or part of a section, follows immediately after the part amended, and is printed in Italic characters. The successive amendments to the act were approved February 5, 1903 (32 Stat. 797), June 6, 1906 (34 Stat. 267), June 25, 1910 (36 Stat. 838), and January 28, 1915 (38 Stat. 804).

States court of the Indian Territory, and of Alaska; (9) "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

—"creditor."

—"date of bankruptcy;" "bankruptcy," etc.

—"debt."

—"discharge."

—"document."

—"holiday."

—when deemed "insolvent."

—"judge."

—"oath."

—"officer."

—"persons."

—"petition."

—"referee."

—"conceal."

—"secured creditor."

—"States."

—"transfer."

—"trustee."

—"wage-earner."

Words in masculine gender.

—importing, plural.

—importing, singular.

CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

Courts of bankruptcy.

Sec. 2. That the courts of bankruptcy as hereinbefore defined, viz, the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States, and have property within their jurisdictions; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; [(5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates;] *(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this Act allowed trustees for similar services* (amendment of 1903); *authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section forty-eight of this Act* (amendment of 1910); (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully admin-

—U. S. District courts.

—supreme court, D. C.

—Territorial courts.

Jurisdiction.

—to adjudge bankrupt.

—allow and disallow claims, etc.

—appoint receivers, etc.

—try and punish bankrupts, etc.

—to permit temporary transaction of business.

—to substitute additional persons in proceedings, etc.

—to collect and distribute assets.

—to close estates.

—to confirm or reject compositions.
—to modify, etc., referees' findings.
—determine exemptions.
—discharge bankrupts, etc.
—enforce orders.
—extradite bankrupts.
—make orders.
—punish for contempt.
—appoint trustees.
—tax costs.
—transfer cases.

istered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and (19) [transfer cases to other courts of bankruptcy.] *Transfer cases to other courts of bankruptcy; and (20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.* (Amendment of 1903.)

Unspecified powers.

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

CHAPTER III.

Bankrupts.

BANKRUPTS.

Acts of bankruptcy.
—of what to consist.

Sec. 3. ACTS OF BANKRUPTCY.—a Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or [(4) made a general assignment for the benefit of his creditors;] *or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States* (amendment of 1903); or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

Petition to be filed within 4 months.

b A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until

four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment. —from when to date.

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

d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him. Person denying insolvency. —to testify. —burdsn of proof, etc.

e Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt. Petitioner give bond. —liability for costs, etc.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond. —allowance of costs, etc. Counsel fees, etc., to be fixed by court.

Sec. 4. WHO MAY BECOME BANKRUPTS.—a [Any person who owes debts, except a corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.] *Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.* (Amendment of 1910.) Who may become bankrupts. —voluntary.

[b Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, —involuntary.

may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.] *b Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.*

The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States. (Amendment of 1903.)

Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act.

The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States. (Amendment of 1910.)

Partnership.

Sec. 5. PARTNERS.—a A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

—administration of estate.

b The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

—jurisdiction over one partner sufficient.

c The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

—trustee's duty.

d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

—expenses.

e The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

—payment of partnership debts.

—payment of individual debts.

—surplus of partnership property.

f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates. Claims of partnership against individual estates, etc.

h In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt. Administration of estate where all partners are not bankrupt.

Sec. 6. EXEMPTIONS OF BANKRUPTS.—a This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition. Exemption of bankrupts.

Sec. 7. DUTIES OF BANKRUPTS.—a The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding. Duties of bankrupts specified.

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence. Bankrupt, when not compelled to attend meeting. —examine claims. Expenses for attending meetings.

Death or insanity of bankrupts.
—not to abate proceedings.
—widow entitled to dower, etc.

Sec. 8. DEATH OR INSANITY OF BANKRUPTS.—a The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

Protection and detention of bankrupte.
Exemption from arrest.

Sec. 9. PROTECTION AND DETENTION OF BANKRUPTS.—a A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

Detention for purposes of examination.

b The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

May be kept in custody ten days, etc.

Extradition of bankrupts.

Sec. 10. EXTRADITION OF BANKRUPTS.—a Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

Suits by and against bankrupts.
—stay until adjudication.
—further stay.

Sec. 11. SUITS BY AND AGAINST BANKRUPTS.—a A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

—appearance of trustee.

b The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

—commenced prior to adjudication.

c A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed. —Time for bringing suits against trustees.

Sec. 12. COMPOSITIONS, WHEN CONFIRMED.—a [A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.] *A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.* (Amendment of 1910.) —Compositions. —when may be offered.

b An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge. —application for confirming.

c A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation. —date, etc., for hearing.

d The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. —conditions of confirmance.

e Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided. —distribution of consideration.

Sec. 13. COMPOSITIONS, WHEN SET ASIDE.—a The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition. —may be set aside. —upon practice of fraud.

Sec. 14. DISCHARGES, WHEN GRANTED.—a Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing —Discharges. —application for.

it within such time, it may be filed within but not after the expiration of the next six months.

—hearing of application.

[h The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.]

b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court. (Amendment of 1903.) *The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by the court: Provided, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose.* (Amendment of 1910.)

c The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge. Confirmation discharges from debts.

Sec. 15. DISCHARGES, WHEN REVOKED.—a The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge. Discharges, when revoked.

Sec. 16. CO-DEBTORS OF BANKRUPTS.—a The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt. Co-debtors' liability not affected by bankrupt's discharge, etc.

[**Sec. 17.** DEBTS NOT AFFECTED BY A DISCHARGE.—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.]

Debts not affected by a discharge.
—U. S. and State taxes.
—judgments in fraud actions, etc.
—claims not scheduled, etc.
—created by fraud, etc.

Sec. 17. Debts not Affected by a Discharge.—a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property or another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity. (Amendment of 1903.)

CHAPTER IV.

COURTS AND PROCEDURE THEREIN.

Courts and procedure.

Sec. 18. PROCESS, PLEADINGS, AND ADJUDICATIONS.—[a Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in

Service of petition, involuntary bankruptcy.
—returnable in 15 days.
—by publication.

suits in equity in courts of the United States.] *a Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.* (Amendment of 1903.)

Pleading within 10 days.

[b The bankrupt, or any creditor, may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow.] *b The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.* (Amendment of 1903.)

—verification.

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

Court to determine issues when facts controverted.

d If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this Act, and makes the adjudication or dismiss the petition.

Decision where pleadings not filed.

e If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

If judge absent, case to be referred to referee.

f If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

Hearing on filing voluntary petition.

g Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition.

—absence of judge.

If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

Jury trials. —person against whom involuntary petition filed, entitled.

Sec. 19. JURY TRIALS.—a A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

—right waived.

Attendance of jury, etc.

b If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be

certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

Lawe as to jury trials applicable.

c The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

Oaths, by whom administered.

Sec. 20. OATHS, AFFIRMATIONS.—a Oaths required by this Act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

Affirmations.

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

Evidence. Compulsory attendance of witnesses.

Sec. 21. EVIDENCE.—[a A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the State in which the proceedings are pending, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act.]

a A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act: Provided, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt. (Amendment of 1903.)

Depositions, lawe governing.

b The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

—notice of taking.

c Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

Certified copies of proceedings evidence.

d Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

—of order approving trustees' bond.

e A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

—of order confirming composition, etc.

f A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

—evidence of reinvesting title in bankrupt.

g A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

Reference of cases after adjudication.

Sec. 22. REFERENCE OF CASES AFTER ADJUDICATION.—a After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

Transfer of case to different referee.

b The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

Jurisdiction of United States and State courts. —circuit courts.

Sec. 23. JURISDICTION OF UNITED STATES AND STATE COURTS.—a The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

Suits by trustees, where brought.

[b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.]

b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e. (Amendment of 1903.)

b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e. (Amendment of 1910.)

Concurrent jurisdiction in circuit courts and courts of bankruptcy.

c The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act.[1]

Appellate courts, jurisdiction of.

Sec. 24. JURISDICTION OF APPELLATE COURTS.—a The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now

[1] But see Federal Judicial Code 1911, § 289, abolishing the circuit courts of the United States.

or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

—appeals from courts not in organized circuits and in District of Columbia.

b The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

Jurisdiction of circuit court of appeals.

(NOTE. The appellate jurisdiction of the Supreme Court of the United States, as defined in the foregoing section was greatly restricted by the provisions of the Act of Congress of January 28, 1915 (38 Stat. 804) § 4, as follows: "That the judgments and decrees of the circuit courts of appeals in all proceedings and cases arising under the Bankruptcy Act and in all controversies arising in such proceedings and cases shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such proceeding, case, or controversy unless the petition therefor is presented to the Supreme Court within three months from the date of such judgment or decree.")

Sec. 25. APPEALS AND WRITS OF ERROR.—a That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

Appeals

—when taken.

—to be within 10 days.

—hearing.

b From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

Appeal to U. S. Supreme Court.

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

—where amount exceeds $2,000, etc.

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States.

—where question certified by Supreme Court Justice.

c Trustees shall not be required to give bond when they take appeals or sue out writs of error.

—trustees not to give bond.

d Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

—certification to Supreme Court by courts.

(NOTE. The foregoing section was amended, and the appellate jurisdiction of the Supreme Court of the United States restricted, by the following provision of Section 4 of the Act of Congress of January 28, 1915 (38

Stat 804): "That the judgments and decrees of the circuit courts of appeals in all proceedings and cases arising under the Bankruptcy Act and in all controversies arising in such proceedings and cases shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such proceeding, case, or controversy unless the petition therefor is presented to the Supreme Court within three months from the date of such judgment or decree.")

Arbitration of controversies. —trustees may submit to.

Sec. 26. ARBITRATION OF CONTROVERSIES.—a The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

Selection of arbitrators.

b Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

Findings of arbitrators.

c The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

Compromise by trustee.

Sec. 27. COMPROMISES.—a The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

Designation of newspapers to publish notices.

Sec. 28. DESIGNATION OF NEWSPAPERS.—a Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

Penalty.

Sec. 29. OFFENSES.—a A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of

—for misappropriating property.

the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

—concealing property.

b A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

—false oath or account, etc.

—presenting false claim.

—receiving property from bankrupt.

—extorting money for forbearing to act, etc.

c A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having know-

ingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

—acting as referee when interested.
—purchasing property, etc.
—refused to permit inspection of accounts.

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

Prosecutions to be in one year.

Sec. 30. RULES, FORMS, AND ORDERS.—a All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

United States Supreme Court to make rules, etc.

Sec. 31. COMPUTATION OF TIME.—a Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

Computation of time

Sec. 32. TRANSFER OF CASES.—a In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

Transfer of cases commenced in different courts.

CHAPTER V.

OFFICERS, THEIR DUTIES AND COMPENSATION.

Officers.

Sec. 33. CREATION OF TWO OFFICES.—a The offices of referee and trustee are hereby created.

Offices of referee and trustee created.

Sec. 34. APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES. —a Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

Referees, appointment, etc.
—designation of districts.

Sec. 35. QUALIFICATIONS OF REFEREES.—a Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

—qualifications.

—to take oath.

Sec. 36. OATHS OF OFFICE OF REFEREES.—a Referees shall take the same oath of office as that prescribed for judges of United States courts.

—number of.

Sec. 37. NUMBER OF REFEREES.—a Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

Jurisdiction of referees.

—to consider petitions.

—administer oaths, examine witneeses, etc.

—take possession and release property, etc.

—perform certain duties of bankruptcy courts

—authorize employment of stenographers.

Sec. 38. JURISDICTION OF REFEREES.—a Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

Referees' duties.

—declare dividends.

—examine schedules, etc.

—furnish information, etc.

—give notices.

—prepare records, etc.

—prepare schedules, etc.

—preserve records, etc.

—transmit papers to clerks, etc.

—preserve evidence, etc.

—obtain papers, etc.

Sec. 39. DUTIES OF REFEREES.—a Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy

convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

—not to act if interested.

b Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

Compensation of referees.

Sec. 40. COMPENSATION OF REFEREES.—[a Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.] *a Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.* (Amendment of 1903.)

—on transfer from one to another.

b Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

—where reference revoked.

c In the event of the reference of a case being revoked before it is concluded, and when the case is especially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

Contempt before referees.

Sec. 41. CONTEMPTS BEFORE REFEREES.—a A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpœnaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

When witness not required to attend.

Contempt proceedings.

—penalty.

b The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

Records of referees.

—manner of keeping.

Sec. 42. RECORDS OF REFEREES.—a The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

Referees' absence or disability.

—filling vacancy.

Sec. 43. REFEREE'S ABSENCE OR DISABILITY.—a Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

Truatees.

—appointment.

Sec. 44. APPOINTMENT OF TRUSTEES.—a The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

—qualifications.

Sec. 45. QUALIFICATIONS OF TRUSTEES.—a Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

—death or removal. —suits not to abate, etc.

Sec. 46. DEATH OR REMOVAL OF TRUSTEES.—a The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

—duties specified.

Sec. 47. DUTIES OF TRUSTEES.—a Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) [collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest;] *collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied,* (Amendment of 1910); (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts ex-

pended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

—concurrence of two out of three necessary.

b Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

c The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the costs and disbursements of the proceedings. (Amendment of 1903.)

Trustees' compensation. —fee.

Sec. 48. COMPENSATION OF TRUSTEES.—[a Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars.] *a Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.* (Amendment of 1903.)

—commissions.

—apportionment where more than one.

b In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

—withholding of. c The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

(NOTE.—The Act of Congress of June 25, 1910, 36 Stat. 838, amended the foregoing forty-eighth section by striking out the whole of it, and substituting the section which immediately follows, bearing the same number.)

SEC. 48. COMPENSATION OF TRUSTEES, RECEIVERS AND MARSHALS:

"(a) Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.

"(b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

"(c) The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

"(d) Receivers or marshals appointed pursuant to section two, subdivision three, of this Act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: *Provided further*, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this Act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act.

"(e) Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this Act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: *Provided further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act."

Trustees' accounts and papers.

Sec. 49. ACCOUNTS AND PAPERS OF TRUSTEES.—a The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

Bonds of referees.

Sec. 50. BONDS OF REFEREES AND TRUSTEES.—a Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

—of trustees.

b Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

—of new trustee, etc.

c The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

—amount may be increased.

Surety's property, value.

d The court shall require evidence as to the actual value of the property of sureties.

—two necessary.

e There shall be at least two sureties upon each bond.

—excess of property.

f The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

—corporations may be.

g Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

Filing of bonds.

h Bonds of referees, trustees, and designated depositors shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

Bond, trustee's liability.

i Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees.

—joint.

j Joint trustees may give joint or several bonds.

—failure to give creates vacancy.

k If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

—suits upon referees'.

l Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

—suits upon trustees'.

m Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

Clerks' duties.

Sec. 51. DUTIES OF CLERKS.—a Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

—to account.

—collect fees, etc.

—deliver papers to referee, etc.

—pay referee.

Compensation of clerks.

Sec. 52. COMPENSATION OF CLERKS AND MARSHALS.—a Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

—of marshals.

b Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

Attorney-General to report annually.

Sec. 53. DUTIES OF ATTORNEY-GENERAL.—a The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

—statistical information for.

Sec. 54. STATISTICS OF BANKRUPTCY PROCEEDINGS.—a Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records

and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

CHAPTER VI.

CREDITORS.

Creditors.

Sec. 55. MEETINGS OF CREDITORS.—a The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held. —place and time of meeting.

b At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor. —presiding officer, duties.

c The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act. Creditors' duty.

d A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place. —subsequent meetings of.

e The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request. —call of meeting by court.

f Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered. —final meeting.

Sec. 56. VOTERS AT MEETINGS OF CREDITORS.—a Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided. Voting at creditors' meetings.

b Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess. —holders of secured claims, not entitled, etc.

Sec. 57. PROOF AND ALLOWANCE OF CLAIMS.—a Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, Proof of claims. —of what to consist.

and that the sum claimed is justly owing from the bankrupt to the creditor.

—when founded upon a writing.

b Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

—after proved, may be filed.

c Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

—allowance of claims, etc.

d Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

Claims of secured creditors, etc.

e Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

Claims, hearing objections.

f Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

Preferred claims.

[g The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.]

g The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances. (Amendment of 1903.)

Value of securities held by secured creditors, etc.

h The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

Claims secured by individual undertaking.

i Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

Debts due the United States, allowance of.

j Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

k Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed. Reconsideration of claims.

l Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part. —recovery of dividend.

m The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors. Claims of one bankrupt against another.

n Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided*, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer. Time for proving claims. —of infants, etc.

Sec. 58. NOTICES TO CREDITORS.—a [Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, and (8) the proposed dismissal of the proceedings.] Notice to creditors. —unless waived, etc.

Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy; (8) the proposed dismissal of the proceedings, and (9) there shall be thirty days' notice of all applications for the discharge of bankrupts. (Amendment of 1910.)

b Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct. —of first meeting. —other notices.

c All notices shall be given by the referee, unless otherwise ordered by the judge. —to referee.

Sec. 59. WHO MAY FILE AND DISMISS PETITIONS.—a Any qualified person may file a petition to be adjudged a voluntary bankrupt. Petition, who may file. —as voluntary bankrupt.

b Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value

—involuntary.

of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

—to be in duplicate.

c Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

Notice to creditors not joined in petition.

d If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a large number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

—hearing of case, etc.

—when dismissed.

Creditors, computing number of.

e In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

—appearance of.

f Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

Notice of dismissal.

g [A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.]

A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard. (Amendment of 1910.)

Preferred creditors.

Sec. 60. PREFERRED CREDITORS.—[a A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.]

a A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months

after the date of the recording or registering of the transfer, if by law such recording or registering is required. (Amendment of 1903.)

Preference, when given.

[b If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.]

—voidable.

b If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction. (Amendment of 1903.)

b If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction. (Amendment of 1910.)

Preferred creditor giving further credit, etc.

c If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

—set off of new credit.

Payments to attorneys, etc.

d If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be reexamined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

—reexamination of.

CHAPTER VII.

ESTATES.

Estates.

Depositories for money.

Sec. 61. DEPOSITORIES FOR MONEY.—a Courts of bankruptcy shall designate, by order, banking institutions as depositories for

—bond.

the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

Expenses of administering estates.

Sec. 62. EXPENSES OF ADMINISTERING ESTATES.—a The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

—report and approval.

Debts proved.

Sec. 63. DEBTS WHICH MAY BE PROVED.—a Debts of the bankrupt which may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

—fixed liability.

—costs of suit due, etc.

—costs incurred before filing petition.

—on open account.

—judgments, etc.

Allowance of unliquidated claims.

b Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Debts having priority. —taxes.

Sec. 64. DEBTS WHICH HAVE PRIORITY.—a The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

—order of payment.

—cost of preserving estate.

—filing fees.

b The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; [(2) the filing fees paid by creditors in involuntary cases;] *(2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery* (Amendment of 1903); (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter

—cost of administration, etc.

provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) [wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant;] *wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant* (Amendment of June 15, 1906); and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

—wages of workmen, etc.

—owing to person entitled to priority, etc.

c In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

Payment of claims accruing after composition, when discharge revoked, etc.

Sec. 65. DECLARATION AND PAYMENT OF DIVIDENDS.—a Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

Dividends. —on allowed claims.

[b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order.]

—declaration of first.

—subsequent.

b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: Provided, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, That the final dividend shall not be declared within three months after the first dividend shall be declared. (Amendment of 1903.)

c The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

—creditors receiving, not affected by proof of subsequent claims, etc.

—preference of certain creditors.

d Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts.

Limit to claimant's right to collect.

e A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act.

Unclaimed dividends.

—after 6 months paid into court.

Sec. 66. UNCLAIMED DIVIDENDS.—a Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

—after 1 year, distributed.

b Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

—of minors.

Liens.

—unrecorded claims not.

Sec. 67. LIENS.—a Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

—trustee subrogated to rights of creditor.

b Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

Lien, judgment, etc., created within 4 months, to be dissolved.

c A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

—if defendant were insolvent.

—knowledge of.

—through fraud.

—trustee subrogated, etc.

Liens given in good faith, etc.

d [Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act.]

d Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act. (Amendment of 1910.)

e That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.* (Amendment of 1903.)

Conveyances, etc., subsequent to act and within four months of petition.

—to defraud, etc., void.

—property remains part of assets.

Conveyances, etc., within four months of petition.

—void under State laws.

—void under this act.

f That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided,* That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

Liens, etc., created through legal proceedings.

—void, etc.

—property passes to trustee.

Court may order conveyances.

Purchaser for value.

Sec. 68. SET-OFFS AND COUNTERCLAIMS.—a In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

Set-offs and counterclaims.

—allowed.

b A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing.

—not allowed.

with a view to such use aud with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

Possession of property.

Sec. 69. POSSESSION OF PROPERTY.—a A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

—when bankrupte' may be seized.

—bond to indemnify.

—released on giving bond.

Title to property.

Sec. 70. TITLE TO PROPERTY.—a The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trademarks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

—vested in trustee.

—documents.

—patents, etc.

—certain powers.

—transferred in fraud.

—which might have been transferred, etc.

—policy of insurance.

—rights of action upon contracts.

Appraisal of property.

b All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

—sale.

Trustee to convey title.

c The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

—vesting title on.

d Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property

of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

—setting composition aside.

e The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.* (Amendment of 1903.)

—may avoid certain transfers, etc.

—recovery of property.

f Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him.

Title revested on confirming composition.

THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.

Force and effect.

a This Act shall go into full force and effect upon its passage: *Provided, however,* That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

—petition for voluntary bankruptcy.

—involuntary.

b Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it.

Cases pending under State laws.

Sec. 71. That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: Provided, That said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.

Indexes to be kept.

Certificates of search to be issued.

Sec. 72. That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this Act.

Referee and trustee not to be allowed further compensation.

That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said Act of July first, eighteen hundred and ninety-eight. (New sections added by act of 1903.)

Sec. 72. That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this Act.

That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of said Act approved July first, eighteen hundred and ninety-eight, as amended by said Act approved February fifth, nineteen hundred and three, and as further amended by said Act approved June fifteenth, nineteen hundred and six. (Amendment of 1910.)

*

GENERAL ORDERS AND FORMS IN BANKRUPTCY

ADOPTED AND ESTABLISHED BY THE SUPREME COURT OF THE UNITED STATES
NOVEMBER 28, 1898

TABLE OF THE GENERAL ORDERS

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these

general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

I.

DOCKET.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

II.

FILING OF PAPERS.

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

III.

PROCESS.

All process, summons and subpœnas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

IV.

CONDUCT OF PROCEEDINGS.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petititioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court. The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

V.

FRAME OF PETITIONS.

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

VI.

PETITIONS IN DIFFERENT DISTRICTS.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the

debtor has his domicil, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

VII.

PRIORITY OF PETITIONS.

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

VIII.

PROCEEDINGS IN PARTNERSHIP CASES.

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defences which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

IX.

SCHEDULE IN INVOLUNTARY BANKRUPTCY.

In all cases of involuntary bankruptcy in which the bankrupt is absent or can not be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

X

INDEMNITY FOR EXPENSES.

Before incurring any expense in publishing or mailing notices, or in travelling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

XI.

AMENDMENTS.

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

XII.

DUTIES OF REFEREE.

1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

XIII.

APPOINTMENT AND REMOVAL OF TRUSTEE.

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

XIV.

NO OFFICIAL OR GENERAL TRUSTEE.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

XV.

TRUSTEE NOT APPOINTED IN CERTAIN CASES.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

XVI.

NOTICE TO TRUSTEE OF HIS APPOINTMENT.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

XVII.

DUTIES OF TRUSTEE.

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not e removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

XVIII.

SALE OF PROPERTY.

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

XIX.

ACCOUNTS OF MARSHAL.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

XX.

PAPERS FILED AFTER REFERENCE.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

XXI.

PROOF OF DEBTS.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. *If the treasurer or corresponding officer is not within the district wherein the bankruptcy proceedings are pending the deposition may be made by some officer or agent of the corporation having knowledge of the facts.* (Words in italics were added by amendment promulgated November 1, 1915.) Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post office box or street number, as he may appoint; and thereafter,

and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

XXII.

TAKING OF TESTIMONY.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

XXIII.

ORDERS OF REFEREE.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order

was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

XXIV.

TRANSMISSION OF PROVED CLAIMS TO CLERK.

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

XXV.

SPECIAL MEETING OF CREDITORS.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

XXVI.

ACCOUNTS OF REFEREE.

Every referee shall keep an accurate account of his travelling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

XXVII.

REVIEW BY JUDGE.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

XXVIII.

REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

XXIX.

PAYMENT OF MONEYS DEPOSITED.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee desig-

nated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

XXX.

IMPRISONED DEBTOR.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

XXXI.

PETITION FOR DISCHARGE.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

XXXII.

OPPOSITION TO DISCHARGE OR COMPOSITION.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

XXXIII.

ARBITRATION.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper

and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

XXXIV.

COSTS IN CONTESTED ADJUDICATIONS.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

XXXV.

COMPENSATION OF CLERKS, REFEREES AND TRUSTEES.

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in travelling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.[1]

XXXVI.

APPEALS.

1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the supreme court of a Territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or de-

[1] The Supreme Court, on December 11, 1905, ordered that General Order No. 35, should be amended by adding the following sentence to the fourth subdivision thereof:
"He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned."

cree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

XXXVII.

GENERAL PROVISIONS.

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

XXXVIII.

FORMS.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

FORMS IN BANKRUPTCY.

[N. B.—Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken. Bankrupt Act of 1898, c. 4, § 20.]

TABLE OF FORMS.

[FORM No. 1.]

DEBTOR'S PETITION.

To the Honorable ——— ———,
Judge of the District Court of the United States for the ———
District of ———:

The petition of ——— ———, of ———, in the county of ———, and district and State of ———, ——— [*state occupation*], respectfully represents:

That he has had his principal place of business [*or* has resided, *or* has had his domicil] for the greater portion of six months next immediately preceding the filing of this petition at ———, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

——— ———.

——— ———, *Attorney.*

United States of America, District of ———. ss:

I, ——— ———, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

——— ———, *Petitioner.*

Subscribed and sworn to before me this ——— day of ———, A. D. 18—.

——— ———,

——— ———.

(*Official character.*)

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT.

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.

Claims which have priority.	Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	Where and when contracted.	Nature and consideration of the debt, and whether contracted as partner or joint contractor; and if so, with whom.	Amount.	
						$	c.
(1.) Taxes and debts due and owing to the United States.							
(2.) Taxes due and owing to the State of ——, or to any county, district, or municipality thereof.							
(3.) Wages due workmen, clerks, or servants, to an amount not exceeding $300 each, earned within three months before filing the petition.							
(4.) Other debts having priority by law.							
					Total.....		

——— ———, *Petitioner.*

SCHEDULE A. (2)

Creditors holding securities.

[N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by acts of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person; and if so, with whom.]

Reference to ledger or voucher.	Names of creditors.	Residences (if unknown, that fact must be stated).	Description of securities.	When and where debts were contracted.	Value of securities.		Amount of debts.	
					$	c.	$	
				Total.....				

——— ———, *Petitioner.*

SCHEDULE A. (3)

Creditors whose claims are unsecured.

[N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.]

Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	Amount.	
					$	c.
				Total		

——— ———. *Petitioner.*

SCHEDULE A. (4)

Liabilities on notes or bills discounted which ought to be paid by the drawers, makers, acceptors, or indorsers.

[N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.]

Reference to ledger or voucher.	Names of holders as far as known.	Residence (if unknown, that fact must be stated).	Place where contracted.	Nature of liability, whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.
					$
				Total	

——— ———, *Petitioner.*

SCHEDULE A. (5)

Accommodation paper.

[N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residences (if unknown, that fact must be stated).	Names and residence of persons accommodated.	Place where contracted.	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.	
						$	c.
					Total		

——— ———, *Petitioner.*

OATH TO SCHEDULE A.

United States of America, District of ——— ss:

On this —— day of ———, A. D. 18—, before me personally came ——— ———, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

———— ————,
[*Official character.*]

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT.

SCHEDULE B. (1)

Real estate.

Location and description of all real estate owned by debtor, or held by him.	Incumbrances thereon, if any, and dates thereof.	Statement of particulars relating thereto.	Estimated value.	
			$	c.
		Total.....		

——— ———, *Petitioner.*

SCHEDULE B. (2)

Personal property.

		$	
a.—Cash on hand			
b.—Bills of exchange, promissory notes, or securities of any description (each to be set out separately)			
c.—Stock in trade, in — business of —— ——, at ——, of the value of ——			
d.—Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz.			
e.—Books, prints, and pictures, viz.			
f.—Horses, cows, sheep, and other animals (with number of each), viz.			
g.—Carriages and other vehicles, viz.			
h.—Farming stock and implements of husbandry, viz.			
i.—Shipping, and shares in vessels, viz.			
k.—Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz.			
l.—Patents, copyrights, and trade-marks, viz.			
m.—Goods or personal property of any other description, with the place where each is situated, viz.			
	Total		

—— ——, *Petitioner.*

SCHEDULE B. (3)

Choses in action.

		Dollars.	Cts.
a.—Debts due petitioner on open account.....			
b.—Stocks in incorporated companies, interest in joint stock companies, and negotiable bonds			
c.—Policies of insurance			
d.—Unliquidated claims of every nature, with their estimated value			
e.—Deposits of money in banking institutions and elsewhere....			
	Total		

——— ———, *Petitioner.*

SCHEDULE B. (4)

Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge.

[N. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

General interest.	Particular description.	Supposed value of my interest.	
		$	c.
Interest in land			
Personal property			
Property in money, stock, shares, bonds, annuities, etc.			
Rights and powers, legacies and bequests	Total		

Property heretofore conveyed for benefit of creditors.		Amount realized from proceeds of property conveyed.	
		$	c.
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor			
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy			
	Total		

——— ———, *Petitioner.*

SCHEDULE B. (5)

A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.

		Valuation.	
		$	c.
Military uniform, arms, and equipments			
Property claimed to be exempted by State laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption			
	Total		

——— ———, *Petitioner.*

SCHEDULE B. (6)

BOOKS, PAPERS, DEEDS, AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE.

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.	
Deeds.	
Papers.	

——— ———, *Petitioner.*

OATH TO SCHEDULE B.

United States of America, District of ———, ss:

On this —— day of ———, A. D. 18—, before me personally came ——— ———, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

———— ————,

————— ————.

[*Official character.*]

SUMMARY OF DEBTS AND ASSETS.

[From the statements of the bankrupt in Schedules A and B.]

Schedule A	1 (1)	Taxes and debts due United States			
" "	1 (2)	Taxes due States, counties, districts, and municipalities.			
" "	1 (3)	Wages			
" "	1 (4)	Other debts preferred by law			
Schedule A	2	Secured claims			
Schedule A	3	Unsecured claims			
Schedule A	4	Notes and bills which ought to be paid by othsr parties thereto.			
Schedule A	5	Accommodation paper			
		Schedule A, total			
Schedule B	1	Real estate			
Schedule B	2-a	Cash on hand			
" "	2-b	Bills, promissory notes, and securities			
" "	2-c	Stock in trade			
" "	2-d	Household goods, &c			
" "	2-e	Books, prints, and pictures			
" "	2-f	Horses, cows, and other animals			
" "	2-g	Carriages and other vehicles			
" "	2-h	Farming stock and implements			
" "	2-i	Shipping and shares in vessels			
" "	2-k	Machinery, tools, &c			
" "	2-l	Patents, copyrights, and trade-marks			
" "	2-m	Other personal property			
Schedule B	3-a	Debts due on open accounts			
" "	3-b	Stocks, negotiable bonds, &c			
" "	3-c	Policies of insurance			
" "	3-d	Unliquidated claims			
" "	3-e	Deposits of money in banks and elsewhere			
Schedule B	4	Property in reversion, remainder, trust, &c.			
Schedule B	5	Property claimed to be excepted			
Schedule B	6	Books, deeds, and papers			
		Schedule B, total			

[FORM NO. 2.]

PARTNERSHIP PETITION.

To the Honorable ——— ———,
Judge of the District Court of the United States
for the —— District of ———:

The petition of ——— ——— respectfully represents:

That your petitioners and ——— ——— have been partners under the firm name of ——— ———, having their principal place of business at ———, in the county of ———, and district and State of ———, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by —— oath , contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by —— oath , contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts, and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

———— ————,
———— ————,
———— ————.
Petitioners.

———— ————, *Attorney.*

———— ————, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

———— ————,
———— ————,
———— ————,
Petitioners.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

———— ————,
[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[FORM No. 3.]

CREDITORS' PETITION.

To the Honorable ——— ———, judge of the District Court of the United States for the —— district of ———:

The petition of ——— ———, of ——— and ——— ———, of ———, and ——— ———, of ———, respectfully shows:

That ——— ———, of ———, has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business, [*or* resided, *or* had his domicil] at ———, in the county of ——— and State and district aforesaid, and owes debts to the amount of $1,000.

That your petitioners are creditors of said ——— ———, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500. That the nature and amount of your petitioners' claims are as follows: _____

_____

And your petitioners further represent that said ——— ——— is insolvent, and that within four months next preceding the date of this petition the said ——— ——— committed an act of bankruptcy, in that he did heretofore, to wit, on the —— day of _____

_____

Wherefore your petitioners pray that service of this petition, with a subpœna, may be made upon ——— ———, as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

——— ———,
——— ———,
——— ———,
Petitioners.

——— ———, *Attorney.*

United States of America, District of ———, ss.:

———, ———, ———, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

Before me, ——— ———, this —— day of ———, 189—.

———,
———.
(Official character.)

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[FORM No. 4.]

ORDER TO SHOW CAUSE UPON CREDITORS' PETITION.

In the District Court of the United States for the —— District of ———.

In the matter of _____	In Bankruptcy.

Upon consideration of the petition of ——— ——— that ——— ——— be declared a bankrupt, it is ordered that the said ——— ——— do appear at this court, as a court of bankruptcy, to be holden at ———, in the district

aforesaid, on the —— day of ———, at — o'clock in the ——— noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpœna, be served on said ——— ———, by delivering the same to him personally or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— day of ———, A. D. 18—.

{ Seal of the court. }

——— ———,
Clerk.

[Form No. 5.]

Subpœna to Alleged Bankrupt.

United States of America, ——— District of ———.

To ——— ———, in said district, greeting:

For certain causes offered before the District Court of the United States of America within and for the ——— district of ———, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court to be holden at ———, in said district, on the ——— day of ———, A. D. 189—, ——— ——— to answer to a petition filed by ——— ——— in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, this ——— day of ———, A. D. 189—.

{ Seal of the court. }

——— ———,
Clerk.

[Form No. 6.]

Denial of Bankruptcy.

In the District Court of the United States for the ——— District of ———.

In the matter of ————	In Bankruptcy.

At ———, in said district, on the ——— day of ———, A. D. 18—.

And now the said ——— ——— appears, and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court [*or*, he demands that the same may be inquired of by a jury].

——— ———.

Subscribed and sworn to before me this ——— day of ———, A. D. 18—.

——— ———,
[*Official character.*]

[FORM No. 7.]

ORDER FOR JURY TRIAL.

In the District Court of the United States for the ——— District of ———.

In the matter of ———	In Bankruptcy.

At ———, in said district, on the ——— day of ———, 18—.

Upon the demand in writing filed by ——— ———, alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency may be inquired of by a jury, it is ordered, that said issue be submitted to a jury.

{ Seal of the court. }

——— ———,
Clerk.

[FORM No. 8.]

SPECIAL WARRANT TO MARSHAL.

In the District Court of the United States for the ——— District of ———.

In the matter of ———	In Bankruptcy.

To the marshal of said district or to either of his deputies, greeting:

Whereas a petition for adjudication of bankruptcy was, on the ——— day of ———. A. D. 18—, filed against ——— ———, of the county of ——— and State of ———, in said district, and said petition is still pending; and whereas it satisfactorily appears that said ——— has committed an act of bankruptcy [*or* has neglected *or* is neglecting, *or* is about to so neglect his property that it has thereby deteriorated *or* is thereby deteriorating *or* is about thereby to deteriorate in value], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said ——— ———, and of all his deeds, books of account, and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the ——— of ———, A. D. 189—.

{ Seal of the court. }

——— ———,
Clerk.

RETURN BY MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of of the within-named ——— ———, and of all his deeds, books of account, and papers which have come to my knowledge.

——— ———,
Marshal [or *Deputy Marshal*].

Fees and expenses.

1. Service of warrant		
2. Necessary travel, at the rate of six cents a mile each way.....		
3. Actual expenses in custody of property and other services as follows		
[Here state the particulars.]		

——— ———,
Marshal [or *Deputy Marshal*].

District of ———, A. D. 18—.

Personally appeared before me the said ——— ———, and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

——— ———,
Referee in Bankruptcy.

[Form No. 9.]

Bond of Petitioning Creditor.

Know all men by these presents: That we, ——— ———, as principal, and ——— ———, as sureties, are held and firmly bound unto ——— ———, in the full and just sum of ——— dollars, to be paid to the said ——— ———, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ——— A. D., 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the ——— district of ——— against the said ———, and the said ——— has applied to that court for a warrant to the marshal of said district directing him to seize and hold the property of said ——— ———, subject to the further orders of said district court.

Now, therefore, if such a warrant shall issue for the seizure of said property, and if the said ——— ——— shall indemnify the said ——— ——— for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of —

——— ——— [Seal.]
——— ——— [Seal.]
——— ———
——— ——— [Seal.]

Approved this —— day of ———, A. D., 189—.

——— ———.
District Judge.

[FORM No. 10.]

BOND TO MARSHAL.

Know all men by these presents: That we, ——— ———, as principal, and ——— ———, as sureties, are held and firmly bound unto ——— ———, marshal of the United States for the ——— district of ———, in the full and just sum of ——— dollars, to be paid to the said ——— ———, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ——— A. D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the ——— district of ———, against the said ——— ———, and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said ——— ———, subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said district court upon a petition of said ——— ——— has ordered the said property to be released to him.

Now, therefore, if the said property shall be released accordingly to the said ——— ———, and the said ——— ———, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of —

——— ——— [SEAL.]
——— ——— [SEAL.]
——— ——— [SEAL.]

——— ———
——— ———

Approved this ——— day of ———, A. D. 189—.

———,
District Judge.

[FORM No. 11.]

ADJUDICATION THAT DEBTOR IS NOT BANKRUPT.

In the District Court of the United States for the ——— District of ———.

In the matter of ————	In Bankruptcy.

At ———, in said district, on ——— day of ———, A. D. 18—, before the Honorable ——— ———, judge of the ——— district of ———.

This cause came on to be heard at ———, in said court, upon the petition of ——— that ——— be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and [*Here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had.*]

And thereupon, and upon consideration of the proofs in said cause [*and the arguments of counsel thereon, if any*], it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said ——— was not a bankrupt, and that said petition be dismissed, with costs.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, in said district, on the ——— day of ———, A. D. 18—.

{ Seal of the court. }

———— ————,
Clerk.

[Form No. 12.]

Adjudication of Bankruptcy.

In the District Court of the United States for the ——— District of ———.

In the matter of
———————————
Bankrupt.
} In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—, before the Honorable ——— ———, judge of said court in bankruptcy, the petition of ——— ——— that ——— ——— be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said ——— ——— is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, at ———, in said district, on the ——— day of ———, A. D. 18—.

{ Seal of the court. }

———— ————,
Clerk.

[Form No. 13.]

Appointment, Oath, and Report of Appraisers.

In the District Court of the United States for the ——— District of ———.

In the matter of
———————————
Bankrupt.
} In Bankruptcy.

It is ordered that ——— ———, of ———, ——— ——— of ———, and ——— ———, of ———, three disinterested persons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this —— day of ———, A. D. 18—.

———— ————,
Referee in Bankruptcy.

—— District of ———, ss.:

Personally appeared the within named ——— ——— and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

———— ————.
———— ————.
———— ————.

Subscribed and sworn to before me this —— day of ———, A. D. 189—.

———— ————,
[*Official character.*]

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:

	Dollars.	Cents.

In witness whereof we hereunto set our hands, at ———, this —— day of ———, A. D. 18—.

———— ————.
———— ————.
———— ————.

———

[FORM No. 14.]

ORDER OF REFERENCE.

In the District Court of the United States for the ——— District of ———.

In the matter of ———————— *Bankrupt*.	In Bankruptcy.

Whereas ——— ———, of ———, in the county of ——— and district aforesaid, on the —— day of ———, A. D. 18—, was duly adjudged a bankrupt upon a petition filed in this court by [*or*, against] him on the —— day of ———, A. D. 189—, according to the provisions of the acts of Congress relating to bankruptcy,

It is thereupon ordered, that said matter be referred to ——— ———, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said ——— ——— shall attend before said referee on the —— day of ——— at ———, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said ——— bankruptcy.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the ——— day of ———, A. D. 18—.

{ Seal of the court. }

———— ————,
Clerk.

[Form No. 15.]

Order of Reference in Judge's Absence.

In the District Court of the United States for the ——— District of ———.

In the matter of ———	In Bankruptcy.

Whereas on the —— day of ———, A. D. 18—, a petition was filed to have ——— ———, of ———, in the county of ——— and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy*, on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors], it is thereupon ordered that the said matter be referred to ——— ———, one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said ——— ——— shall attend before said referee on the —— day of ———, A. D. 189—, at ———.

Witness my hand and the seal of the said court, at ———, in said district, on the —— day of ———, A. D. 189—.

{ Seal of the court. }

——— ———,
Clerk.

[Form No. 16.]

Referee's Oath of Office.

I, ——— ———, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

——— ———.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,
District Judge.

[Form No. 17.]

Bond of Referee.

Know all men by these presents: That we ——— ——— of ——— ——— as principal, and ——— ——— of ——— ——— and ———.——— of ——— ———, as sureties are held and firmly bound to the United States of America in the sum of ——— dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be

made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ———, A. D. 189—.

The condition of this obligation is such that whereas the said ——— ———, has been on the —— day of ———, A. D. 18—, appointed by the Honorable ——— ———, judge of the district court of the United States for the ——— district of ———, a referee in bankruptcy, in and for the county of ———, in said district, under the acts of Congress relating to bankruptcy.

Now, therefore, if the said ——— ——— shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed
in the presence of

——— ———, [L. S.]
——— ———, [L. S.]
——— ———. [L. S.]

Approved this —— day of ——— A. D. 189—.

——— ———,
District Judge.

[FORM No. 18.]

NOTICE OF FIRST MEETING OF CREDITORS.

In the District Court of the United States for the —— District of ———. In Bankruptcy.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

To the creditors of ——— ———, of ———, in the county of ———, and district aforesaid, a bankrupt.

Notice is hereby given that on the —— day of ——— A. D. 18—, the said ——— ——— was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at ——— in ———, on the —— day of ———, A. D. 18—, at —— o'clock in the ——— noon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

——— ———,
Referee in Bankruptcy.

——— ——, 18—.

[Form No. 19.]

List of Debts Proved at First Meeting.

In the District Court of the United States for the ——— District of ———.

In the matter of *Bankrupt*.	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—, before ——— ———, referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of creditors.	Residence.	Debts proved.	
		Dolls.	Cts.

——— ———,
Referee in Bankruptcy.

[Form No. 20.]

General Letter of Attorney in Fact when Creditor is not Represented by Attorney at Law.

In the District Court of the United States for the ——— District of ———.

In the matter of *Bankrupt*.	In Bankruptcy

To ——— ———:

——— ———.

I, ——— ———, of ———, in the county of ——— and State of ———, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the pur-

poses aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ———, A. D. 189—.

———. [L. s.]

Signed, sealed, and delivered in presence of—

———.

Acknowledged before me this —— day of ———, A. D. 189—.

———,
[*Official character.*]

[FORM No. 21.]

SPECIAL LETTER OF ATTORNEY IN FACT.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

To ———,
———:

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at ———, on the —— day of ———, before ———, or any adjournment thereof, and then and there ——— for ——— and in ——— name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

———. [L. s.]

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ———, A. D. 189—.

Signed, sealed, and delivered in presence of—

———.

Acknowledged before me this —— day of ———, A. D. 18—.

———,
(*Official character.*)

[FORM No. 22.]

APPOINTMENT OF TRUSTEE BY CREDITORS.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—, before ——— ———, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [*here*

insert the names of the newspapers in which notice was published], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint ——— ———, of ———, in the county of ——— and State of ———, to be the trustee— of the said bankrupt's estate and effects.

Signatures of creditors.	Residences of the same.	Amount of debt.	
		Dolls.	Cts.

Ordered that the above appointment of trustee— be, and the same is hereby approved.

———— ————,
Referee in Bankruptcy.

[Form No. 23.]

Appointment of Trustee by Referee.

In the District Court of the United States for the ——— District of ———.

In the matter of
———————————
Bankrupt . } In Bankruptcy.

At ———. in said district, on the —— day of ———, A. D. 18—, before ——— ———, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*] I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint ——— ———, of ———, in the county of ——— and State of ———, as trustee of the same.

———— ————,
Referee in Bankruptcy.

[Form No. 24.]

Notice to Trustee of his Appointment.

In the District Court of the United States for the ——— District of ———.

In the matter of
———————————
Bankrupt . } In Bankruptcy.

To ——— ———, of ———, in the county of ———, and district aforesaid:

I hereby notify you that you were duly appointed trustee [*or* one of the trustees] of the estate of the above-named bankrupt at the first meeting of the

creditors, on the —— day of ———, A. D. 18—, and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at ——— dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at ——— the —— day of ———, A. D. 18—.

———— ————,
Referee in Bankruptcy.

[FORM No. 25.]

BOND OF TRUSTEE.

Know all men by these presents: That we, ———— ————, of ———, as principal, and ———— ————, of ———, and ———— ————, of ———, as sureties, are held and firmly bound unto the United States of America in the sum of ——— dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ———, A. D. 189—.

The condition of this obligation is such, that whereas the above-named ———— ———— was, on the —— day of ———, A. D. 189—, appointed trustee in the case pending in bankruptcy in said court, wherein ———— ———— is the bankrupt, and he, the said ———— ————, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said ———— ————, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in presence of—

———— ————
———— ————

———— ————. [SEAL.]
———— ————, [SEAL.]
———— ————, [SEAL.]

[FORM No. 26.]

ORDER APPROVING TRUSTEE'S BOND.

At a court of bankruptcy, held in and for the —— District of ———, at ———, ———, this —— day of ———, 189—.

Before ———— ————, referee in bankruptcy, in the District Court of the United States for the ——— District of ———.

In the matter of ———————— *Bankrupt.*	In Bankruptcy.

It appearing to the Court ———— ————, of ———, and in said district, has been duly appointed trustee of the estate of the above-named bankrupt, and has given a bond with sureties for the faithful performance of his official du-

ties, in the amount fixed by the creditors [*or* by order of the court], to wit, in the sum of ——— dollars, it is ordered that the said bond be, and the same is hereby, approved.

———— ————,
Referee in Bankruptcy.

[FORM No. 27.]

ORDER THAT NO TRUSTEE BE APPOINTED.

In the District Court of the United States for the —— District of ———.

In the matter of *Bankrupt.*	In Bankruptcy.

It appearing that the schedule of the bankrupt discloses no assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

———— ————,
Referee in Bankruptcy.

[FORM No. 28.]

ORDER FOR EXAMINATION OF BANKRUPT.

In the District Court of the United States for the —— District of ———.

In the matter of *Bankrupt.*	In Bankruptcy.

At ———, on the —— day of ———, A. D. 18—.

Upon the application of ——— ———, trustee of said bankrupt [*or* creditor of said bankrupt], it is ordered that said bankrupt attend before ——— ———, one of the referees in bankruptcy of this court, at ——— on the —— day of ———, at — o'clock in the —— noon, to submit to examination under the acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

———— ————, *Referee in Bankruptcy.*

[FORM No. 29.]

EXAMINATION OF BANKRUPT OR WITNESS.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—, before ——— ———, one of the referees in bankruptcy of said court.

——— ———, of ———, in the county of ———, and State of ———, being duly sworn and examined at the time and place above mentioned, upon his oath says. [*Here insert substance of examination of party.*]

——— ———, *Referee in Bankruptcy.*

[FORM No. 30.]

SUMMONS TO WITNESS.

To ——— ———:

Whereas ——— ———, of ———, in the county of ———, and State of ———, has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the District Court of the United States for the ——— District of ———,

These are to require you, to whom this summons is directed, personally to be and appear before ——— ———, one of the referees in bankruptcy of the said court, at ———, on the —— day of ———, at — o'clock in the —— noon, then and there to be examined in relation to said bankruptcy.

Witness the Honorable ——— Judge of said court, and the seal thereof at ———, this —— day of ———, A. D. 189—.

——— ———, *Clerk.*

RETURN OF SUMMONS TO WITNESS.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

On this —— day of ———, A. D. 18—, before me came ——— ———, of ———, in the county of ——— and State of ———, and makes oath, and says that he did, on ———, the —— day of ———, A. D. 189—, personally serve ——— ———, of ———, in the county of ——— and State of ———, with a true copy of the summons hereto annexed, by delivering the same to him; and he further makes oath, and says that he is not interested in the proceeding in bankruptcy named in said summons.

———.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

———.

[FORM NO. 31.]

PROOF OF UNSECURED DEBT.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, in said district of ———, and made oath, and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of ——— dollars; that the consideration of said debt is as follows: ———

———

———

that no part of said debt has been paid [except ———

———];

that there are no set-offs or counterclaims to the same [except ———

———];

and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

———.

Creditor.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

———.

[*Official character.*]

[FORM NO. 32.]

PROOF OF SECURED DEBT.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, in said district of ———, and made oath, and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of ——— dollars; that the consideration of said debt is

as follows _____; that no part of said debt has been paid [except _____]; that there are no set-offs or counterclaims to the same [except _____]; and that the only securities held by this deponent for said debt are the following: _____

_____

_____

_____ _____,
Creditor.

Subscribed and sworn to before me this —— day of ———, A. D. —.

_____ _____.
[*Official character.*]

[FORM No. 33.]

PROOF OF DEBT DUE CORPORATION.

In the District Court of the United States for the ——— District of ——

In the matter of _____ *Bankrupt*. } In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ——— and State of ———, and made oath and says that he is ——— of the ———, a corporation incorporated by and under the laws of the State of ———, and carrying on business at ———, in the county of ——— and State of ———, and that he is duly authorized to make this proof, and says that the said ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of ——— dollars; that the consideration of said debt is as follows: _____

_____;

that no part of said debt has been paid [except _____

———]; that there are no set-offs or counterclaims to the same [except _____];

and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

_____ _____,
——— *of said Corporation.*

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

_____ _____;
[*Official character.*]

[FORM No. 34.]

PROOF OF DEBT BY PARTNERSHIP.

In the District Court of the United States for the ——— District of ———.

In the matter of _____ *Bankrupt*. } In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, in said district of

———, and made oath and says that he is one of the firm of ——— ———, consisting of himself and ——— ———, of ———, in the county of ——— and State of ———; that the said ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of ——— dollars; that the consideration of said debt is as follows: _____ _____;

that no part of said debt has been paid [except _____]; that there are no set-offs or counterclaims to the same [except _____]; and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever.

——— ———,
Creditor.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,
[*Official character.*]

[Form No. 35.]

Proof of Debt by Agent or Attorney.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

At ——— in said district of ——— on the —— day of ——— A. D. 189—, came ——— ———, of ———, in the county of ———, and State of ———, attorney [*or* authorized agent] of ———, in the county of ———, and State of ———, and made oath and says that ——— ———, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said ——— ———, in the sum of ——— dollars; that the consideration of said debt is as follows: _____ _____;

that no part of said debt has been paid [except _____];

and that this deponent has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use had or received any manner of security for said debt whatever. And this deponent further says, that this deposition can not be made by the claimant in person because _____ _____

and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

——— ———.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,
[*Official character.*]

[FORM No. 36.]

PROOF OF SECURED DEBT BY AGENT.

In the District Court of the United States for the ——— District of ———.

In the matter of
———
Bankrupt.
} In Bankruptcy.

At ———, in said district of ———, on the —— day of ———, A. D. 189—, came ——— ———, of ———, in the county of ———, and State of ———, attorney [*or*, authorized agent] of ———, in the county of ———, and State of ———, and made oath, and says that ——— ———, the person by [*or*, against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to the said ——— ——— in the sum of ——— dollars; that the consideration of said debt is as follows: ———; that no part of said debt has been paid [except ———]; that there are no set-offs or counter claims to the same [except ———]; and that the only securities held by said ——— for said debt are the following ———; and this deponent further says that this deposition can not be made by the claimant in person because ———, and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated.

———.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

———,
[*Official character.*]

———

[FORM No. 37.]

AFFIDAVIT OF LOST BILL, OR NOTE.

In the District Court of the United States for the ——— District of ———.

In the matter of
———
Bankrupt.
} In Bankruptcy.

On this —— day of ———, A. D. 18—, at ———, came ——— ———, of ———, in the county of ———, and State of ———, and makes oath and says that the bill of exchange [*or* note], the particulars whereof are underwritten, has been lost under the following circumstances, to wit, ———; and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said ——— ———, or any person

or persons to their use, to this deponent's knowledge or belief, negotiated the said bill [*or* note], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

Bill or note above referred to.

Date.	Drawer or maker.	Acceptor.	Sum.

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

———— ————,
(*Official character.*)

[Form No. 38.]

Order Reducing Claim.

In the District Court of the United States for the ——— District of ———.

In the matter of
———————————
Bankrupt. } In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—.

Upon the evidence submitted to this court upon the claim of ——— against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that the amount of said claim be reduced from the sum of ———, as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of ———, and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest*, with interest thereon from the —— day of ———, A. D. 18—].

———— ————,
Referee in Bankruptcy.

[Form No. 39.]

Order Expunging Claim.

In the District Court of the United States for the ——— District of ———.

In the matter of
———————————
Bankrupt. } In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—.

Upon the evideuce submitted to the court upon the claim of ——— against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that said claim be disallowed and expunged from the list of claims upon the trustee's record in said case.

———— ————,
Referee in Bankruptcy.

[FORM No. 40.]

LIST OF CLAIMS AND DIVIDENDS TO BE RECORDED BY REFEREE AND BY HIM DELIVERED TO TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt .*	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—.

A list of debts proved and claimed under the bankruptcy of ——— ———, with ——— dividend at the rate of —— per cent this day declared thereon by ——— ———, a referee in bankruptcy.

No.	Creditors. [To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	Sum proved.		Dividend.	
		Dolls.	Cts.	Dolls.	Cts.

——— ———,
Referee in Bankruptcy.

[FORM No. 41.]

NOTICE OF DIVIDEND.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt .*	In Bankruptcy.

At ———, on the —— day of ———, A. D. 18—.

To ——— ———,

Creditor of ——— ———, bankrupt:

I hereby inform you that you may, on application at my office, ———, on the ——— day of ———, or on any day thereafter, between the hours of ———, re-

ceive a warrant for the ——— dividend due to you out of the above estate. If you can not personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter.

——— ———, *Trustee.*

CREDITOR'S LETTER TO TRUSTEE.

To ——— ———,

Trustee in bankruptcy of the estate of ——— ———, bankrupt:

Please deliver to ——— ——— the warrant for dividend payable out of the said estate to me.

——— ———, *Creditor.*

[FORM No. 42.]

PETITION AND ORDER FOR SALE BY AUCTION OF REAL ESTATE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Respectfully represents ———, trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit: [*here describe it and its estimated value*] should be sold by auction, in lots or parcels, and upon terms and conditions, as follows: ———

Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated this —— day of ———, A. D. 18—.

——— ———, *Trustee.*

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition, by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ———, A. D. 189—.

———,

Referee in Bankruptcy.

[FORM NO. 43.]

PETITION AND ORDER FOR REDEMPTION OF PROPERTY FROM LIEN.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Respectfully represents ——— ———, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe the mortgage*], or to a conditional contract [*describing it*], or to a lien [*describe the origin and nature of the lien*], [*or, if the property be personal property*, has been pledged or deposited and is subject to a lien] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of ———, being the amount of said lien, in order to redeem said property therefrom.

Dated this —— day of ———, A. D. 18—.

——— ———, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of ———, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this —— day of ———, A. D. 189—.

———,
Referee in Bankruptcy.

[FORM NO. 44.]

PETITION AND ORDER FOR SALE SUBJECT TO LIEN.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

Respectfully represents ——— ———, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describe it*], or to a lien [*describe the origin and nature of the lien*], or [*if the property be personal property*] has been pledged or deposited and is subject to a lien for [*describe the nature of the lien*], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien,

or other incumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this —— day of ———, A. D. 189—.

——— ———, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [*or*, at private sale], keeping an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ———, A. D. 189—.

———,

Referee in Bankruptcy.

[Form No. 45.]

Petition and Order for Private Sale.

In the District Court of the United States for the ——— District of ———.

In the matter of

———

Bankrupt. } In Bankruptcy.

Respectfully represents ——— ———, duly appointed trustee of the estate of the aforesaid bankrupt.

That for the following reasons, to wit, ———

———

———

it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to wit: ———

———

———

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this —— day of ———, A. D. 189—.

——— ———, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now. after due hearing, no adverse interest being represented thereat [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each article sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ———, A. D. 189—.

———,

Referee in Bankruptcy.

[FORM No. 46.]

PETITION AND ORDER FOR SALE OF PERISHABLE PROPERTY.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

Respectfully represents ——— ——— the said bankrupt, [*or*, a creditor, *or* the receiver, *or* the trustee of the said bankrupt's estate].

That a part of the said estate, to wit, ———

———

———

now in ———. is perishable, and that there will be loss if the same is not sold immediately.

Wherefore, he prays the court to order that the same be sold immediately as aforesaid.

Dated this —— day of ———, A. D. 189—.

——— ———.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt, [*or* without notice to the creditors], now, after due hearing, no adverse interest being represented thereat, [*or* after hearing ——— ——— in favor of said petition and ——— ——— in opposition thereto] I find that the facts are as above stated, and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this —— day of ———. A. D. 189—.

———,

Referee in Bankruptcy.

[FORM No. 47.]

TRUSTEE'S REPORT OF EXEMPTED PROPERTY.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

At ———, on the —— day of ———, 18—.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy.

General head.	Particular description.	Value.	
		Dolls.	Cts.
Military uniform, arms, and equipments.....			
Property exempted by State laws...			

———,

Trustee.

[Form No. 48.]

Trustee's Return of no Assets.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt* .	In Bankruptcy.

At ———, in said district, on the —— day of ———, A. D. 18—.

On the day aforesaid, before me comes ——— ———, of ———, in the county of ——— and State of ———, and makes oath, and says that he, as trustee of the estate and effects of the above-named bankrupt , neither received nor paid any moneys on account of the estate.

Subscribed and sworn to before me at ———, this —— day of ———, A. D. 18—.

———,

Referee in Bankruptcy.

[FORM No. 49.]

ACCOUNT OF TRUSTEE.

DR. *The estate of* —— ——, *bankrupt, in account with* —— ——, *trustee.* CR.

		Dolls.	Cts.	Dolls.	Cts.			Dolls.	Cts.	Dolls.	Cts.

[Form No. 50.]

Oath to Final Account of Trustee.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt .*	In Bankruptcy.

On this —— day of ———, A. D. 18—, before me comes ——— ———, of ———, in the county of ——— and State of ———, and makes oath, and says that he was, on the —— day of ———, A. D. 18—, appointed trustee of the estate and effects of the above-named bankrupt, and that as such trustee he has conducted the settlement of the said estate. That the account hereto annexed containing —— sheets of paper, the first sheet whereof is marked with the letter —— [*reference may here also be made to any prior account filed by said trustee*] is true, and such account contains entries of every sum of money received by said trustee on account of the estate and effects of the above-named bankrupt , and that the payments purporting in such account to have been made by said trustee have been so made by him. And he asks to be allowed for said payments and for commissions and expenses as charged in said accounts.

——— ———, *Trustee.*

Subscribed and sworn to before me at ———, in said —— district of ———, this —— day of ———, A. D. 18—.

———— ————,
[*Official character.*]

[Form No. 51.]

Order Allowing Account and Discharging Trustee.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt .*	In Bankruptcy.

The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered, that the same be allowed, and that the said trustee be discharged of his trust.

———— ————,
Referee in Bankruptcy.

[FORM No. 52.]

PETITION FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*	In Bankruptcy.

To the Honorable ——— ———,

Judge of the District Court for the —— District of ———:

The petition of ——— ———, one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that ———, heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following to wit: [*here set forth the particular cause or causes for which such removal is requested.*]

Wherefore ——— ——— pray that notice may be served upon said ———. trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

——— ———.

———

[FORM No. 53.]

NOTICE OF PETITION FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt* .	In Bankruptcy.

At ———, on the —— day of ———, A. D. 18-

To ——— ———,

Trustee of the estate of ——— ———, bankrupt:

You are hereby notified to appear before this court, at ———, on the —— day of ———, A. D. 18—, at — o'clock —. m., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of ——— ———, one of the creditors of said bankrupt, filed in this court on the —— day of ———, A. D. 18— in which it is alleged [*here insert the allegation of the petition*].

——— ———, *Clerk.*

[Form No. 54.]

Order for Removal of Trustee.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

Whereas ——— ———, of ———, did, on the —— day of ———, A. D. 18—, present his petition to this court, praying that for the reasons therein set forth, ——— ———, the trustee of the estate of said ——— ———, bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said ——— ——— and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said ——— ——— be removed from the trust as trustee of the estate of said bankrupt, and that the costs of the said petitioner incidental to said petition be paid by said ——— ———, trustee [*or*, out of the estate of the said ——— ———, subject to prior charges].

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— day of ———, A. D. 18—.

{ Seal of the court. }

——— ———,
Clerk.

[Form No. 55.]

Order for Choice of New Trustee.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

At ———, on the —— day of ———, A. D. 18—.

Whereas by reason of the removal [*or* the death *or* resignation] of ——— ———, heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee,

It is ordered, that a meeting of the creditors of said bankrupt be held at ———, in ———, in said district, on the —— day of ———, A. D. 18—, for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place, and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

——— ———. *Referee in Bankruptcy.*

[FORM No. 56.]

CERTIFICATE BY REFEREE TO JUDGE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

I, ——— ———, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [*Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.*]

And the said question is certified to the judge for his opinion thereon.

Dated at ———, the —— day of ———, A. D. 18—.

———— ————,
Referee in Bankruptcy.

[FORM No. 57.]

BANKRUPT'S PETITION FOR DISCHARGE.

In the matter of ——— *Bankrupt*.	In Bankruptcy.

To the Honorable ——— ———,
Judge of the District Court of the United States for the District of ———.

——— ———, of ———, in the county of ——— and State of ———, in said district, respectfully represents that on the —— day of ———, last past, he was duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this —— day of ———, A. D. 189—.

———— ————, *Bankrupt.*

ORDER OF NOTICE THEREON.

District of ———, *ss*:

On this —— day of ———, A. D. 189—, on reading the foregoing petition, it is—

Ordered by the court, that a hearing be had upon the same on the —— day of ———, A. D. 189—, before said court, at ———, in said district, at —— o'clock in the —— noon; and that notice thereof be published in ——— ———, a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable ——— ———, judge of the said court, and the seal thereof, at ———, in said district, on the —— day of ———, A. D. 189—.

——— ———,
{ Seal of the court. } *Clerk.*

—— hereby depose, on oath, that the foregoing order was published in the ——— ——— on the following ——— days, viz:

On the —— day of ——— and on the —— day of ———, in the year 189—.

——— ———.

District of ———.

——— ———, 189—.

Personally appeared ——— ———, and made oath that the foregoing statement by him subscribed is true.

Before me,

——— ———.

[*Official character.*]

I hereby certify that I have on this —— day of ———, A. D. 189—, sent by mail copies of the above order, as therein directed.

——— ———,
Clerk.

[Form No. 58.]

Specification of Grounds of Opposition to Bankrupt's Discharge.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

——— ———, of ———, in the county of ——— and State of ———, a party interested in the estate of said ——— ———, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specification: [*Here specify the grounds of opposition.*]

——— ———, *Creditor.*

[Form No. 59.]

Discharge of Bankrupt.

District Court of the United States,

——— District of ———.

Whereas, ——— ——— of ——— in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said ——— ——— be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the —— day of ———, A. D. 189—, on which day the petition for ad-

judication was filed ——— him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable ——— ———, judge of said district court, and the seal thereof this —— day of ———, A. D. 189—.

{ Seal of the court. }

——— ———,
Clerk.

[Form No. 60.]

Petition for Meeting to Consider Composition.

District Court of the United States for the ——— District of ———.

——— *Bankrupt.*	In Bankruptcy.

To the Honorable ——— ———, Judge of the District Court of the United States for the —— District of ———:

The above-named bankrupt respectfully represent that a composition of ——— per cent upon all unsecured debts, not entitled to a priority ——— ——— in satisfaction of —— debts has been proposed by —— to —— creditors, as provided by the acts of Congress relating to bankruptcy, and —— verily believe that the said composition will be accepted by a majority in number and in value of ——— creditors whose claims are allowed.

Wherefore, he pray that a meeting of —— creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

——— ———,
Bankrupt.

[Form No. 61.]

Application for Confirmation of Composition.

In the District Court of the United States, for the ——— District of ———.

In the matter of ——— *Bankrupt.*	In Bankruptcy.

To the Honorable ——— ———, Judge of the District Court of the United States for the ——— District of ———.

At ———, in said district, on the —— day of ———, A. D. 189—, now comes ——— ———, the above-named bankrupt, and respectfully represents to the court that, after he had been examined in open court [*or* at a meeting of his creditors] and had filed in court a schedule of his property and a list of his creditors, as required by law, he offered terms of composition to his creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of ———

dollars, has been deposited, subject to the order of the judge, in the ——— National Bank, of ———, a designated depository of money in bankruptcy cases.

Wherefore the said ——— ——— respectfully asks that the said composition may be confirmed by the court.

——— ———, *Bankrupt.*

[Form No. 62.]

Order Confirming Composition.

In the District Court of the United States, for the ——— District of ———.

In the matter of ——— 	In Bankruptcy.

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, this —— day of ———, A. D. 189—.

{ Seal of the court. }

——— ———, *Clerk.*

[Form No. 63.]

Order of Distribution on Composition.

United States of America:
In the District Court of the United States, for the ——— District of ———.

In the matter of ——— *Bankrupt .*	In Bankruptcy.

The composition offered by the above-named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings; 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case, which list is made a part of this order.

Witness the Honorable ——— ———, judge of said court, and the seal thereof, this —— day of ———, A. D. 189—.

{ Seal of the court. }

——— ———, *Clerk.*

UNITED STATES BANKRUPTCY LAW

OF

MARCH 2, 1867

AS CONTAINED IN

REVISED STATUTES U. S., §§ 4972-5132

CHAPTER ONE.

COURTS OF BANKRUPTCY, THEIR JURISDICTION, ORGANIZATION, AND POWERS.

SEC. 4972. The jurisdiction conferred upon the district courts as courts of bankruptcy shall extend:

First. To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy.

Second. To the collection of all the assets of the bankrupt.

Third. To the ascertainment and liquidation of the liens and other specific claims thereon.

Fourth. To the adjustment of the various priorities and conflicting interests of all parties.

Fifth. To the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors.

Sixth. To all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

SEC. 4973. The district courts shall be always open for the transaction of business in the exercise of their jurisdiction as courts of bankruptcy; and their powers and jurisdiction as such courts shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.

SEC. 4974. A district court may sit for the transaction of business in bankruptcy, at any place within the district, of which place and of the time of commencing session the court shall have given notice, as well as at the places designated by law for holding sessions of such court.

(NOTE.—This section is a literal copy of the first section of the act of 2 March, 1867, c. 176, v. 14, p. 517; and the act of 22 June, 1874, c. 390, s. 2, v. 18, p. 178, amended the said first section by the addition of the following proviso: "*Provided*, That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides having jurisdiction of claims of such nature and amount.")

SEC. 4975. The district courts as courts of bankruptcy shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity.

SEC. 4976. In case of a vacancy in the office of district judge in any district, or in case any district judge shall, from sickness, absence, or other disability, be unable to act, the circuit judge of the circuit in which such district is included may make, during such disability or vacancy, all necessary rules and orders preparatory to the final hearing of all causes in bankruptcy, and cause the same to be entered or issued, as the case may require, by the clerk of the district court.

SEC. 4977. The same jurisdiction, power, and authority which are hereby conferred upon the district courts in cases in bankruptcy are also conferred upon the Supreme Court of the District of Columbia, when the bankrupt resides in that District.

SEC. 4978. The same jurisdiction, power, and authority which are hereby conferred upon the district courts in cases in bankruptcy are also conferred upon the supreme courts of the several Territories when the bankrupt resides in either of the Territories. This jurisdiction may be exercised, upon petitions regularly filed in such courts, by either of the justices thereof while holding the district court in the district in which the petitioner or the alleged bankrupt resides.

SEC. 4979. The several circuit courts shall have within each district concurrent jurisdiction with the district court, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to or vested in such assignee.

SEC. 4980. Appeals may be taken from the district to the circuit courts in all cases in equity, and writs of error from the circuit courts to the district courts may be allowed in cases at law, arising under or authorized by this Title, when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court for the same district.

SEC. 4981. No appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from; nor unless the appellant at the time of claiming the same shall give bond in the manner required in cases of appeals in suits in equity; nor shall any writ of error be allowed unless the party claiming it shall comply with the provisions of law regulating the granting of such writs.

SEC. 4982. Such appeal shall be entered at the term of the circuit court which shall be held within the district next after the expiration of ten days from the time of claiming the same.

SEC. 4983. If the appellant, in writing, waives his appeal before any decision thereon, proceedings may be had in the district court as if no appeal had been taken.

SEC. 4984. A supposed creditor who takes an appeal to the circuit court from the decision of the district court, rejecting his claim in whole or in part, shall, upon entering his appeal in the circuit court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceeding shall thereupon be had in the pleadings, trial, and determination of the cause, as in actions at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to the creditor.

SEC. 4985. The final judgment of the circuit court, rendered upon any appeal provided for in the preceding section, shall be conclusive, and the list of debts shall, if necessary, be altered to conform thereto. The party prevailing in the suit shall be entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they shall be allowed out of the estate.

SEC. 4986. The circuit court for each district shall have a general superintendence and jurisdiction of all cases and questions arising in the district court for such district when sitting as a court of bankruptcy, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not; and except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case as in a court of equity; and the powers and jurisdiction hereby granted may be exercised either by the court in term time, or, in vacation, by the circuit justice or by the circuit judge of the circuit.

SEC. 4987. The several supreme courts of the Territories shall have the same general superintendence and jurisdiction over the acts and decisions of the justices thereof in cases of bankruptcy as is conferred on the circuit courts over proceedings in the district courts.

SEC. 4988. In districts which are not within any organized circuit of the United States, the power and jurisdiction of a circuit court in bankruptcy may be exercised by the district judge.

SEC. 4989. No appeal or writ of error shall be allowed in any case arising under this Title from the circuit courts to the Supreme Court, unless the matter in dispute in such case exceeds two thousand dollars.

SEC. 4990. The general orders in bankruptcy heretofore adopted by the justices of the Supreme Court, as now existing, may be followed in proceedings under this Title; and the justices may, from time to time, subject to the provisions of this Title, rescind or vary any of those general orders, and may frame, rescind, or vary other general orders, for the following purposes:

First. For regulating the practice and procedure of the district courts in bankruptcy, and the forms of petitions, orders, and other proceedings to be used in such courts in all matters under this Title.

Second. For regulating the duties of the various officers of such courts.

Third. For regulating the fees payable and the charges and costs to be allowed, except such as are established by this Title or by law, with respect to all proceedings in bankruptcy before such courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings.

Fourth. For regulating the practice and procedure upon appeals.

Fifth. For regulating the filing, custody, and inspection of records.

Sixth. And generally for carrying the provisions of this Title into effect.

All such general orders shall from time to time be reported to Congress, with such suggestions as the justices may think proper.

SEC. 4991. The filing of the petition for an adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, shall be deemed to be the commencement of proceedings in bankruptcy.

SEC. 4992. The proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection. Copies of such records, duly certified under the seal of the court, shall in all cases be presumptive evidence of the facts therein stated.

SEC. 4993. Each district judge shall appoint, upon the nomination and recommendation of the Chief Justice of the Supreme Court, one or more registers in bankruptcy, when any vacancy occurs in such office, to assist him in the performance of his duties, under this Title, unless he shall deem the continuance of the particular office unnecessary.

SEC. 4994. No person shall be eligible for appointment as register in bankruptcy, unless he is a counselor of the district court for the district in which he is appointed, or of some one of the courts of record of the State in which he resides.

SEC. 4995. Before entering upon the duties of his office, every person appointed a register in bankruptcy shall give a bond to the United States, for the faithful discharge of the duties of his office, in a sum not less than one thousand dollars, to be fixed by the district judge, with sureties satisfactory to such judge; and he shall, in open court, take and subscribe the oath prescribed in section seventeen hundred and fifty-six, Title, "PROVISIONS APPLICABLE TO SEVERAL CLASSES OF OFFICERS," and also an oath that he will not, during his continuance in office, be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy, in either the district or circuit court in his district.

SEC. 4996. No register shall be of counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, nor in an appeal therefrom; nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of those courts as courts of bankruptcy, nor shall he be interested in the fees or emoluments arising from any such trusts.

SEC. 4997. Registers are subject to removal from office by the judge of the district court.

SEC. 4998. Every register in bankruptcy has power:

First. To make adjudication of bankruptcy in cases unopposed.

Second. To receive the surrender of any bankrupt.

Third. To administrator oaths in all proceedings before him.

Fourth. To hold and preside at meetings of creditors.

Fifth. To take proof of debts.

Sixth. To make all computations of dividends, and all orders of distribution.

Seventh. To furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case.

Eighth. To audit and pass accounts of assignees.

Ninth. To grant protection.

Tenth. To pass the last examination of any bankrupt in cases whenever the assignee or a creditor do not oppose.

Eleventh. To sit in chambers and dispatch there such part of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct.

SEC. 4999. No register shall have power to commit for contempt, or to make adjudication of bankruptcy when opposed; or to decide upon the allowance or suspension of an order of discharge.

SEC. 5000. Every register shall make short memoranda of his proceedings in each case in which he acts, in a docket to be kept by him for that purpose, and shall forthwith, as the proceedings are taken, forward to the clerk of the district court a certified copy of these memoranda, which shall be entered by the clerk in the proper minute-book to be kept in his office.

SEC. 5001. The judge of the district court may direct a register to attend at any place within the district for the purpose of hearing such voluntary applications under this Title as may not be opposed, of attending any meeting of creditors, or receiving any proofs of debts, and, generally, for the prosecution of any proceedings under this Title.

SEC. 5002. Every register, so acting, shall have and exercise all powers, except the power of commitment, vested in the district court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents.

SEC. 5003. Evidence or examination in any of the proceedings under this Title may be taken before the court, or a register in bankruptcy, viva voce or in writing, before a commissioner of the circuit court, or by affidavit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony in the same manner as in suits in equity in the circuit court.

SEC. 5004. All depositions of persons and witnesses taken before a register, and all acts done by him, shall be reduced to writing, and be signed by him, and shall be filed in the clerk's office as part of the proceedings. He shall have power to administer oaths in all cases and in relation to all matters in which oaths may be administered by commissioners of circuit courts.

SEC. 5005. Parties and witnesses summoned before a register shall be bound to attend in pursuance of such summons at the place and time designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpœna.

SEC. 5006. Whenever any person examined before a register refuses or declines to answer, or to swear to or sign his examination when taken, the

register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, and to punish him for contempt, if such person be compellable by law to answer such question or to sign such examination.

SEC. 5007. Any register may act in the place of any other register appointed by and for the same district court.

SEC. 5008. The fees of registers, as established by law or by rules and orders framed pursuant to law, shall be paid to them by the parties for whom the services may be rendered.

SEC. 5009. In all matters where an issue of fact or of law is raised and contested by any party to the proceedings before any register, he shall cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge.

SEC. 5010. Any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof; and such certificate, so signed, shall be binding on all the parties to the proceedings; but every such certificate may be discharged or varied by the judge at chambers or in open court.

SEC. 5011. In any proceedings within the jurisdiction of the court, under this Title, the parties concerned, or submitting to such jurisdiction, may at any stage of the proceedings, by consent, state any questions in a special case for the opinion of the court, and the judgment of the court shall be final unless it is agreed and stated in the special case that either party may appeal, if, in such case, an appeal is allowed by this Title. The parties may also, if they think fit, agree, that upon the questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs.

SEC. 5012. If any judge, register, clerk, marshal, messenger, assignee, or any other officer of the several courts of bankruptcy shall, for anything done or pretended to be done under this Title, or under color of doing anything thereunder, willfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or for any other person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by law, such person shall forfeit and pay a sum not less than three hundred dollars and not more than five hundred dollars, and be imprisoned not exceeding three years.

SEC. 5013. In this Title the word "assignee," and the word "creditor," shall include the plural also; and the word "messenger" shall include his assistant or assistants, except in the provision for the fees of that officer. The word "marshal" shall include the marshal's deputies; the word "person" shall also include "corporation;" and the word "oath" shall include "affirmation." And in all cases in which any particular number of days is prescribed by this Title, or shall be mentioned in any rule or order of court or general order which shall at any time be made under this Title, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also.

CHAPTER TWO.

VOLUNTARY BANKRUPTCY.

SEC. 5014. If any person residing within the jurisdiction of the United States, and owing debts provable in bankruptcy exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain a discharge from his debts, and shall annex to his petition a schedule and inventory, in compliance with the next two sections, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt.

SEC. 5015. The said schedule must contain a full and true statement of all his debts, exhibiting, as far as possible, to whom each debt is due, the place of residence of each creditor, if known to the debtor, and if not known the fact that it is not known; also the sum due to each creditor; the nature of each debt or demand, whether founded on written security, obligation, or contract, or otherwise; the true cause and consideration of the indebtedness in each case, and the place where such indebtedness accrued; and also a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same.

SEC. 5016. The said inventory must contain an accurate statement of all the petitioner's estate, both real and personal, assignable under this Title, describing the same and stating where it is situated, and whether there are any, and, if so, what incumbrances thereon.

SEC. 5017. The schedule and inventory must be verified by the oath of the petitioner, which may be taken either before the district judge, or before a register, or before a commissioner of the circuit court.

SEC. 5018. Every citizen of the United States petitioning to be declared bankrupt shall, on filing his petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath may be taken before either of the officers mentioned in the preceding section, and shall be filed and recorded with the proceedings in bankruptcy.

SEC. 5019. Upon the filing of such petition, schedule, and inventory, the judge or register shall forthwith, if he is satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal for the district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor; and to give such personal or other notice to any persons concerned as the warrant specifies.

SEC. 5020. Every bankrupt shall be at liberty, from [time] to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts.

CHAPTER THREE.

INVOLUNTARY BANKRUPTCY.

SEC. 5021. Any person residing within the jurisdiction of the United States and owing debts provable in bankruptcy exceeding the amount of three hundred dollars:

First. Who departs from the State, district, or Territory of which he is an inhabitant with intent to defraud his creditors, or, being absent, remains absent with such intent; or,

Second. Who conceals himself to avoid the service of legal process in any action for the recovery of a debt or demand provable in bankruptcy; or,

Third. Who conceals or removes any of his property to avoid its being attached, taken, or sequestered on legal process; or,

Fourth. Who makes any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or,

Fifth. Who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of any State, district, or Territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate, and for a sum exceeding one hundred dollars, if such process is remaining in force and not discharged by payment, or in some other manner provided by the law of such State, district, or Territory applicable thereto, for a period of seven days; or,

Sixth. Who has been actually imprisoned for more than seven days in a civil action founded on contract, for the sum of one hundred dollars or upward; or,

Seventh. Who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, makes any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or gives any warrant to confess judgment; or procures or suffers his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; or,

Eighth. Who, being a banker, broker, merchant, trader, manufacturer, or miner, has fraudulenly stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days, shall be deemed to have committed an act of bankruptcy, and to have become liable to be adjudged a bankrupt. And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this Title, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this Title was intended, and that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy.

SEC. 5022. Any act of bankruptcy committed since the second day of March, eighteen hundred and sixty-seven, may be the foundation of an adjudication of involuntary bankruptcy, upon a petition filed within the time prescribed by law, equally with one committed hereafter.

SEC. 5023. An adjudication of bankruptcy may be made on the petition of

one or more creditors, the aggregate of whose provable debts amounts to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed.

SEC. 5024. Upon the filing of the petition authorized by the preceding section, if it appears that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted. The court may also, by injunction, restrain the debtor, and any other person, in the mean time, from making any transfer or disposition of any part of the debtor's property not excepted by this Title from the operation thereof and from any interference therewith; and if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or to make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest and safely keep the alleged debtor, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until its decision upon the petition, or until its further order, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court.

SEC. 5025. A copy of the petition and order to show cause shall be served on the debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode; or, if the debtor cannot be found, and his place of residence cannot be ascertained, service shall be made by publication in such manner as the judge may direct. No further proceedings, unless the debtor appears and consents thereto, shall be had until proof has been given, to the satisfaction of the court, of such service or publication; and if such proof is not given on the return day of such order, the proceedings shall be adjourned and an order made that the notice be forthwith so served or published.

SEC. 5026. On such return day or adjourned day, if the notice has been duly served or published, or is waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demands, in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of the alleged bankruptcy. If the petitioning creditor does not appear and proceed on the return day, or adjourned day, the court may upon the petition of any other creditor, to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

SEC. 5027. If upon such hearing or trial the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens was the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover costs.

SEC. 5028. If upon the hearing or trial the facts set forth in the petition are found to be true, or if upon default made by the debtor to appear pursuant to the order, due proof of service thereof is made, the court shall adjudge the debtor to be a bankrupt, and shall forthwith issue a warrant to take possession of his estate.

SEC. 5029. The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same man-

ner and with similar proceedings to those [*hereinbefore*] [hereinafter] provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition.

SEC. 5030. The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days not exceeding five after the date of the order or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, post-paid, to the messenger, a schedule of the creditors and an inventory of his estate in the form and verified in the manner required of a petitioning debtor.

SEC. 5031. If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner provided for the service of the order to show cause; and if the bankrupt is absent or cannot be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain.

CHAPTER FOUR.

PROCEEDINGS TO REALIZE THE ESTATE FOR CREDITORS.

SEC. 5032. The notice to creditors under warrant shall state:

First. That a warrant in bankruptcy has been issued against the estate of the debtor.

Second. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

Third. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

SEC. 5033. At the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required.

SEC. 5034. The creditors shall, at the first meeting held after due notice from the messenger in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts. If no choice is made by the creditors at the meeting, the judge, or if there be no opposing interest, the register, shall appoint one or more assignees. If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy. All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election.

SEC. 5035. No person who has received any preference contrary to the provisions of this Title shall vote for or be eligible as assignee; but no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility.

SEC. 5036. The district judge at any time may, and upon the request in writing of any creditor who has proved his claim shall, require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties; the bond shall be approved by the judge or register by his indorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge or register orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

SEC. 5037. Any assignee who refuses or unreasonably neglects to execute an instrument when lawfully required by the court, or disobeys a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

SEC. 5038. An assignee may, with the consent of the judge, resign his trust and be discharged therefrom.

SEC. 5039. The court, after due notice and hearing, may remove an assignee for any cause which, in its judgment, renders such removal necessary or expedient. At a meeting called for the purpose by order of the court, in its discretion, or called upon the application of a majority of the creditors in number and value, the creditors may, with consent of the court, remove any assignee by such a vote as is provided for the choice of assignee.

SEC. 5040. The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee.

SEC. 5041. Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court, or at its discretion by an election by the creditors, in the same manner as in the original choice of an assignee, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all known creditors, and by such person as the court shall direct.

SEC. 5042. When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and in the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen.

SEC. 5043. Any former assignee, his executors or administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate.

SEC. 5044. As soon as an assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings.

SEC. 5045. There shall be excepted from the operation of the conveyance the necessary household and kitchen furniture, and such other articles and necessaries of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; also the wearing apparel of the bankrupt, and that of his wife and children, and the uniform, arms, and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution aud laws of each State, as existing in the year eighteen hundred and seventy-one; and such exemptions shall be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding. These exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee; and in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this Title; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court.

SEC. 5046. All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent-rights, and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any

cause of action which he had against any person arising from contract or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee.

SEC. 5047. The assignee shall have the like remedy to recover all the estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. And if any suit at law or in equity, in which the bankrupt is a party in his own name, is pending at the time of the adjudication of bankruptcy, the assignee may defend the same in the same manner and with the like effect as it might have been defended by the bankrupt.

SEC. 5048. No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving or remaining or new assignee, as the case may be, he shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally commenced by him.

SEC. 5049. A copy duly certified by the clerk of the court, under the seal thereof, of the assignment, shall be conclusive evidence of the title of the assignee to take, hold, sue for, and recover the property of the bankrupt.

SEC. 5050. No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon.

SEC. 5051. The debtor shall, at the request of the assignee and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt.

SEC. 5052. No mortgage of any vessel or of any other goods or chattels, made as security for any debt, in good faith and for a present consideration and otherwise valid, and duly recorded pursuant to any statute of the United States or of any State, shall be invalidated or affected by an assignment in bankruptcy.

SEC. 5053. No property held by the bankrupt in trust shall pass by the assignment.

SEC. 5054. The assignee shall immediately give notice of his appointment, by publication at least once a week for three successive weeks in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside, and shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded. [And the record of such assignment, or a duly-certified copy thereof, shall be evidence thereof in all courts.]

SEC. 5055. The assignee shall demand and receive, from all persons holding the same, all the estate assigned or intended to be assigned.

SEC. 5056. No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause

thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so.

SEC. 5057. No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed.

SEC. 5058. The assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort.

SEC. 5059. The assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be liable to be taken as his property or for the payment of his debts.

SEC. 5060. When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or register, or may authorize it to be deposited in any convenient bank, upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon.

SEC. 5061. The assignee, under the direction of the court, may submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators to be chosen by him and the other party to the controversy, and, under such direction, may compound and settle any such controversy, by agreement with the other party, as he thinks proper and most for the interest of the creditors.

SEC. 5062. The assignee shall sell all such unincumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors; but upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place, and manner of sale as will, in his opinion, prove to the interest of the creditors.

SEC. 5063. Whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

SEC. 5064. The assignee may sell and assign, under the direction of the court and in such manner as the court shall order, any outstanding claims or other property in his hands, due or belonging to the estate, which cannot be collected and received by him without unreasonable or inconvenient delay or expense.

SEC. 5065. When it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold, in such manner as may be deemed most expedient, under the direction of the messenger or as-

signee, as the case may be, who shall hold the funds received in place of the estate disposed of.

SEC. 5066. The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other incumbrance.

SEC. 5067. All debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. When the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate.

SEC. 5068. In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

SEC. 5069. When the bankrupt is bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, but his liability does not become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability becomes fixed, and before the final dividend is declared.

SEC. 5070. Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt or to stand in the place of the creditor if the creditor has proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the general orders, and subject to such regulations and limitations as may be established by such general orders.

SEC. 5071. Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

SEC. 5072. No debts other than those specified in the five preceding sections shall be proved or allowed against the estate.

SEC. 5073. In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed in favor of any debtor to the bankrupt of a claim in its nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition.

SEC. 5074. When the bankrupt, at the time of adjudication, is liable upon any bill of exchange, promissory note, or other obligation in respect of distinct

contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader and also as a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts.

SEC. 5075. When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

SEC. 5076. Creditors residiug within the judicial district where the proceedings in bankruptcy are pending shall prove their debts before one of the registers of the court, or before a commissioner of the circuit court, within the said district. Creditors residing without the district, but within the United States, may prove their debts before a register in bankruptcy, or a commissioner of a circuit court, in the judicial district where such creditor, or either one of joint creditors, reside; but proof taken before a commissioner, shall be subject to revision by the register of the court.

SEC. 5077. To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, under oath, and signed by the deponent, setting forth the demand, the consideration thereof, whether any and what securities are held therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person, for his use, received any security or satisfaction whatever other than that by him set forth; that the claim was not procured for the purpose of influencing the proceedings in bankruptcy; and that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the claim, or any part thereof, or to take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor, or any other person in the proceedings, is or shall be in any way affected, influenced, or controlled. No claim shall be allowed unless all the statements set forth in such deposition shall appear to be true.

SEC. 5078. Such oath shall be made by the claimant, testifying of his own knowledge, unless he is absent from the United States or prevented by some other good cause from testifying, in which case the demand may be verified by the attorney or authorized agent of the claimant, testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge. Corporations may verify their claims by the oath of their president, cashier, or treasurer. The court may require or receive further pertinent evidence either for or against the admission of any claim.

SEC. 5079. Such oath may be taken in any district before any register or any commissioner of the circuit court authorized to administer oaths; or, if the creditor is in a foreign country, before any minister, consul, or vice-consul

of the United States. When the proof is so made it shall be delivered or sent by mail to the register having charge of the same.

SEC. 5080. If the proof is satisfactory to the register it shall be delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time of receipt of such proof, and the amount and nature of the debts. Such books shall be open to the inspection of all the creditors. The court may require or receive further pertinent evidence either for or against the admission of any claim.

SEC. 5081. The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of a claim, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.

SEC. 5082. A bill of exchange, promissory note, or other instrument, used in evidence upon the proof of a claim, and left in court or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall indorse upon it the name of the party against whose estate it has been proved, and the date aud amount of any dividend declared thereon.

SEC. 5083. When a claim is presented for proof before the election of the assignee, and the judge or register entertains doubts of its validity or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen.

SEC. 5084. Any person who, since the second day of March, eighteen hundred and sixty-seven, has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provisions of the act of March two, eighteen hundred and sixty-seven, chapter one hundred and seventy-six, to establish a uniform system of bankruptcy, or to any provisions of this Title, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference.

SEC. 5085. The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers.

SEC. 5086. The court may, on the application of the assignee, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, to his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate and the due settlement thereof according to law. Such examination shall be in writing, and shall be signed by the bankrupt and filed with the other proceedings.

SEC. 5087. The court may, in like manner, require the attendance of any other person as a witness, and if such person fails to attend, on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person and bring him forthwith before the court, or before a register in bankruptcy, for examination as a witness.

SEC. 5088. For good cause shown, the wife of any bankrupt may be required to attend before the court to the end that she may be examined as a witness; and if she does not attend at the time and place specified in the order, the

bankrupt shall not be entitled to a discharge unless he proves to the satisfaction of the court that he was unable to procure her attendance.

SEC. 5089. If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailer, or any officer in whose custody he may be, or may direct the examination to be had, taken, and certified at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been had in court.

SEC. 5090. If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

SEC. 5091. All creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate, pro rata, without any priority or preference whatever, except as allowed by section fifty-one hundred and one. No debt proved by any person liable, as bail, surety, guarantor, or otherwise, for the bankrupt, shall be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct.

SEC. 5092. At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers are required by any rule of the court; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, and showing what debts or claims are yet undetermined, and what sum remains in his hands. The majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one-half in value of the creditors attend the meeting, either in person or by attorney, it shall be the duty of the assignee so to determine.

SEC. 5093. Like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of creditors shall then be called by the court, and a final dividend then declared, unless any suit at law or in equity is pending, or unless some other estate or effects of the debtor afterward come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate and effects into money, and within two months after the same are so converted they shall be divided in manner aforesaid. Further dividends shall be made in like manner as often as occasion requires, and after the third meeting of creditors no further meeting shall be called, unless ordered by the court.

SEC. 5094. The assignee shall give such notice to all known creditors, by mail or otherwise, of all meetings, after the first, as may be ordered by the court.

SEC. 5095. Any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

SEC. 5096. Preparatory to the final dividend, the assignee shall submit his account to the court, and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the

accounts of the assignee, and the assignee shall, if required by the court, be examined as to the truth of his account, and it is found correct he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt. The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their debts.

SEC. 5097. No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter.

SEC. 5098. If by accident, mistake, or other cause, without fault of the assignee, either or both of the second and third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if the meeting had been duly held.

SEC. 5099. The assignee shall be allowed, and may retain out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court.

SEC. 5100. In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars. If, at any time, there is not in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him.

SEC. 5101. In the order for a dividend, the following claims shall be entitled to priority, and to be first paid in full in the following order:

First. The fees, costs, and expenses of suits, and of the several proceedings in bankruptcy under this Title, and for the custody of property, as herein provided.

Second. All debts due to the United States, and all taxes and assessments under the laws thereof.

Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof.

Fourth. Wages due to any operative, clerk, or house-servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

Fifth. All debts due to any persons who, by the laws of the United States, are, or may be, entitled to a priority, in like manner as if the provisions of this Title had not been adopted. But nothing contained in this Title shall interfere with the assessment and collection of taxes by the authority of the United States or any State. [See §§ 3466–3468.]

SEC. 5102. Whenever a dividend is ordered, the register shall, within ten days after the meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward, by mail, to every creditor a statement of the dividend to which he is entitled, and such creditors shall be paid by the assignee in such manner as the court may direct.

SEC. 5103. If at the first meeting of creditors, or at any meeting of creditors specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct,

three-fourths in value of the creditors whose claims have been proved shall resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt shall be settled by trustees, under the inspection and direction of a committee of the creditors, the creditors may certify and report such resolution to the court, and may nominate one or more trustees to take and hold and distribute the estate, under the direction of such committee. If it appears, after hearing the bankrupt and such creditors as desire to be heard, that the resolution was duly passed, and that the interests of the creditors will be promoted thereby, the court shall confirm it; and upon the execution and filing, by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt shall be wound up and settled by trustees, according to the terms of such resolution, the bankrupt, or, if an assignee has been appointed, the assignee, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done, had such resolution not been passed. Such consent and the proceedings under it shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it. The court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors, and the trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors; and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy; and the trustees shall have all the rights and powers of assignees in bankruptcy. The court, on the application of such trustees, shall have power to summon and examine, on oath or otherwise, the bankrupt, or any creditor, or any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers in the same manner as in other proceedings in bankruptcy; and the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this Title. If the resolution is not duly reported, or the consent of the creditors is not duly filed, or if, upon its filing, the court does not think fit to approve thereof, the bankruptcy shall proceed as if no resolution had been passed, and the court may make all necessary orders for resuming the proceedings. And the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this Title.

CHAPTER FIVE.

PROTECTION AND DISCHARGE OF BANKRUPTS.

SEC. 5104. The bankrupt shall at all times, until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated. For neglect or refusal to obey any order of the court, the bankrupt may be committed and punished as for a contempt of court. If the bankrupt is without the district, and unable to return and personally attend at any of the times or do any of the acts which may be required pursuant to this section, and if it appears that such absence was not caused by willful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted so to do, with like effect as if he had not been in default.

SEC. 5105. No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby.

SEC. 5106. No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed.

SEC. 5107. No bankrupt shall be liable during the pendency of the proceedings in bankruptcy to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.

SEC. 5108. [*At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts.*] [At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and before the final disposition of the cause, the bankrupt may

apply to the court for a discharge from his debts. This section shall apply in all cases heretofore or hereafter commenced.]

SEC. 5109. Upon application for a discharge being made the court shall order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt.

SEC. 5110. No discharge shall be granted, or, if granted, shall be valid, in any of the following cases:

First. If the bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact.

Second. If the bankrupt has concealed any part of his estate or effects, or any books or writings relating thereto, or has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this Title, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof.

Third. If, within four months before the commencement of such proceedings, the bankrupt has procured his lands, goods, money, or chattels to be attached, sequestered, or seized on execution.

Fourth. If, at any time after the second day of March, eighteen hundred and sixty-seven, the bankrupt has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or has removed or caused to be removed any part of his property from the district, with intent to defraud his creditors.

Fifth. If the bankrupt has given any fraudulent preference contrary to the provisions of the act of March two, eighteen hundred and sixty-seven, to establish a uniform system of bankruptcy, or to the provisions of this Title, or has made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate.

Sixth. If the bankrupt, having knowledge that any person has proved such false or fictitious debt, has not disclosed the same to his assignee within one month after such knowledge.

Seventh. If the bankrupt, being a merchant or tradesman, has not, at all times after the second day of March, eighteen hundred and sixty-seven, kept proper books of account.

Eighth. If the bankrupt, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation.

Ninth. If the bankrupt has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed in satisfaction of his debts.

Tenth. If the bankrupt has been convicted of any misdemeanor under this Title.

SEC. 5111. Any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in

its discretion order any question of fact so presented to be tried at a stated session of the district court.

SEC. 5112. In all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, is filed in the case at or before the time of the hearing of the application for discharge; but this provision shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, eighteen hundred and sixty-nine.

SEC. 5113. Before any discharge is granted, the bankrupt must take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified as a ground for withholding such discharge, or as invalidating such discharge if granted.

SEC. 5114. If it shall appear to the court that the bankrupt has in all things conformed to his duty under this Title, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court.

SEC. 5115. The certificate of a discharge in bankruptcy shall be in substance in the following form:

District court of the United States, district of

Whereas has been duly adjudged a bankrupt under the Revised Statutes of the United States, Title "BANKRUPTCY," and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said be forever discharged from all debts and claims which by said Title are made provable against his estate, and which existed on the day of , on which day the petition for adjudication was filed by (or against) him; excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy. Given under my hand and the seal of the court at , in the said district, this day of

(Seal.) , Judge.

SEC. 5116. No person who has been discharged, and afterward becomes bankrupt on his own application, shall be again entitled to a discharge whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors who have proved their claims is filed at or before the time of application for discharge; but a bankrupt who proves to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

SEC. 5117. No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

SEC. 5118. No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint-contractor, indorser, surety, or otherwise.

SEC. 5119. A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting

a full copy of the same forth in its terms as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands. The certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge.

SEC. 5120. Any creditor of a bankrupt, whose debt was proved or provable against the estate in bankruptcy, who desires to contest the validity of the discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to annul the same. The application shall be in writing, and shall specify which, in particular, of the several acts mentioned in section fifty-one hundred and ten it is intended to prove against the bankrupt, and set forth the grounds of avoidance; and no evidence shall be admitted as to any other of such acts; but the application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of the application to be given to the bankrupt, and order him to appear and answer the same, within such time as to the court shall seem proper. If, upon the hearing of the parties, the court finds that the fraudulent acts, or any of them, set forth by the creditor against the bankrupt, are proved, and that the creditor had no knowledge of the same until after the granting of the discharge, judgment shall be given in favor of the creditor, and the discharge of the bankrupt shall be annulled. But if the court finds that the fraudulent acts and all of them so set forth are not proved, or that they were known to the creditor before the granting of the discharge, judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by the proceedings.

CHAPTER SIX.

PROCEEDINGS PECULIAR TO PARTNERSHIPS AND CORPORATIONS.

SEC. 5121. Where two or more persons who are partners in trade are adjudged bankrupt, either on the petition of such partners or of any one of them, or on the petition of any creditor of the partners, a warrant shall issue, in the manner provided by this Title, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted. All the creditors of the company, and the separate creditors of each partner, may prove their respective debts. The assignee shall be chosen by the creditors of the company. He shall keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member thereof; and after deducting out of the whole amount received by the assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. If there is any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there is any balance of the joint stock after payment of the joint debts, such balance shall be appropriated to and divided among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the

payment of his separate debts. The certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone. In all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one persou alone. If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

SEC. 5122. The provisions of this Title shall apply to all moneyed business or commercial corporations and joint-stock companies, and upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor of such corporation or company, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors. All the provisions of this Title which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporations or company in relation to the same matters concerning the corporation or company, and the money and property thereof. All payments, conveyances, and assignments declared fraudulent and void by this Title when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. Whenever any corporation by proceediugs under this Title is declared bankrupt, all its property and assets shall be distributed to the creditors of such corporations in the manner provided in this Title in respect to natural persons. But no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof.

SEC. 5123. Whenever a corporation created by the laws of any State, whose business is carried on wholly within the State creating the same, and also any insurance company so created, whether all its business shall be carried on in such State or not, has had proceedings duly commenced against such corporation or company before the courts of such State for the purpose of winding up the affairs of such corporation or company and dividing its assets ratably among its creditors and lawfully among those entitled thereto prior to proceedings having been commenced against such corporation or company under the bankrupt laws of the United States, any order made, or that shall be made, by such court agreeably to the State law for the ratable distribution or payment of any dividend of assets to the creditors of such corporation or company while such State court shall remain actually or constructively in possession or control of the assets of such corporation or company shall be deemed valid notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company.

CHAPTER SEVEN.

FEES AND COSTS.

SEC. 5124. In each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order for fees in bankruptcy, the following fees, which shall be applied to paying for the services of the registers:

First. For issuing every warrant, two dollars.

Second. For each day in which a meeting is held, three dollars.

Third. For each order for a dividend, three dollars.

Fourth. For every order substituting an arrangement by trust-deed for bankruptcy, two dollars.

Fifth. For every bond with sureties, two dollars.

Sixth. For every application for any meeting in any matter under this [*act*] [title,] one dollar.

Seventh. For every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court.

Eighth. For taking depositions, the fees now allowed by law.

Ninth. For every discharge when there is no opposition, two dollars.

Such fees shall have priority of payment over all other claims out of the estate, and, before a warrant issues, the petitioner shall deposit with the clerk of the court fifty dollars as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued shall pay the same, and the court may issue an execution against him to compel payment to the register.

SEC. 5125. The traveling and incidental expenses of the register, and of any clerk or other officer attending him, shall be settled by the court in accordance with the rules prescribed by the justices of the Supreme Court, and paid out of the assets of the estate in respect of which such register has acted; or if there are no such assets, or if the assets are insufficient, such expenses shall form a part of the costs in the case in which the register acts, to be apportioned by the judge.

SEC. 5126. Before any dividend is ordered, the assignee shall pay out of the estate to the messenger the following fees and no more:

First. For service of warrant, two dollars.

Second. For all necessary travel, at the rate of five cents a mile each way.

Third. For each written note to creditor named in the schedule, ten cents.

Fourth. For custody of property, publication of notices, and other services, his actual and necessary expenses upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of such expenses.

For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

SEC. 5127. The enumeration of the foregoing fees shall not prevent the justices of the Supreme Court from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in the three preceding sections, in classes of cases to be named in their general orders.

CHAPTER EIGHT.

PROHIBITED AND FRAUDULENT TRANSFERS.

SEC. 5128. If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this Title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited.

SEC. 5129. If any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this [*act*] [title,] or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this Title, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt.

SEC. 5130. The fact that such a payment, pledge, sale, assignment, transfer, conveyance, or other disposition of a debtor's property as is described in the two preceding sections, is not made in the usual and ordinary course of business of the debtor, shall be prima-facie evidence of fraud.

SEC. 5131. Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void; and any creditor who obtains any sum of money or other goods, chattels, or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained, to be recovered by the assignee for the benefit of the estate.

SEC. 5132. Every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or upon that of a creditor:

First. Who secretes or conceals any property belonging to his estate; or,

Second. Who parts with, conceals, destroys, alters, mutilates, or falsifies, or causes to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto; or,

Third. Who removes or causes to be removed any such property or book, deed, document, or writing out of the district, or otherwise disposes of any

part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay him in recovering or receiving the same; or,

Fourth. Who makes any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate with the like intent; or,

Fifth. Who spends any property belonging to his estate in gaming; or,

Sixth. Who, with intent to defraud, willfully and fraudulently conceals from his assignee or omits from his inventory any property or effects required by this Title to be described therein; or,

Seventh. Who, having reason to suspect that any other person has proved a false or fictitious debt against his estate, fails to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or,

Eighth. Who attempts to account for any of his property by fictitious losses or expenses; or,

Ninth. Who, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud; or,

Tenth. Who, within three months next before the commencement of proceedings in bankruptcy, with intent to defraud his creditors, pawns, pledges, or disposes of, otherwise than by transactions made in good faith in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for,

Shall be punishable by imprisonment, with or without hard labor, for not more than three years.

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