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John S. Jenness et al., and the record presents the same questions which have just been decided in that case. For the reasons there assigned, the judgment of the Superior Court of New Hampshire is affirmed.

ORDER.

This cause came on to be heard on the transcript of the record to the Superior Court of Judicature of the State of New Hampshire, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Superior Court of Judicature in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

JOHN L. SHAWHAN, DANIEL SHAWHAN, GEORGE H. PER-
RIN, BENJAMIN BERRY, CATHARINE SNODGRASS, AND
ISAAC MILLER, APPELLANTS, *v.* PERRY WHERRITT, AS-
SIGNEE OF THE BANKRUPT ESTATE OF BENJAMIN BRAND-
DON.

A decree of the District Court of the United States, sitting in bankruptcy, whereby a person proceeded against, *in invitum*, was declared to be a bankrupt, is sufficient evidence, as against those who were not parties to the proceeding, to show that there was a debt due to the petitioning creditor; that the bankrupt was a merchant or trader within the meaning of the act; and that he had committed an act of bankruptcy.¹

The first section of the bankrupt act declares that the making of any fraudulent conveyance, assignment, sale, gift, or other transfer of lands, tenements, goods, or chattels, is the commission of an act of bankruptcy.

No creditor can, by instituting proceedings in a State court, after the commis-
*628] sion of *an act of bankruptcy by his debtor, obtain a valid lien upon the property conveyed by such fraudulent deed, if he has notice of the commission of an act of bankruptcy by the debtor. It passes to the assignee of the bankrupt for the benefit of all the creditors.²

A lien thus acquired is not saved by the proviso of the second section of the bankrupt law. That proviso does not protect liens which are inconsistent with the second and fifth sections of the act, and these sections declare such a lien to be void.

THIS was an appeal from the Circuit Court of the United States for the District of Kentucky.

On the 6th of April, 1842, Benjamin Brandon executed the following deed :—

¹ APPLIED. *Boyd v. Olvey*, 82 Ind., 306. DISTINGUISHED. *In re Thomas*, 11 Bank. Reg., 333.

² CITED. *Buchanan v. Smith*, 16 Wall., 307; *Michaels v. Post*, 21 Id., 428.

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“ This indenture, made and entered into this 6th day of April, 1842, between Benjamin Brandon, of Harrison county and State of Kentucky, of the one part, and William A. Withers, of the county and State aforesaid, of the other part, witnesseth: That the said Benjamin Brandon, for and in consideration of one dollar, to him in hand paid, and for the further consideration hereinafter mentioned, hath given, granted, bargained, sold, released, conveyed, and confirmed, and by these presents do give, grant, bargain, sell, release, convey, and confirm unto the said William A Withers, his successor or successors, for ever, all the estate, real, personal, and mixed, of whatever nature or kind it may consist, (except such property only as by law not subject to execution,) said estate hereby conveyed consisting of a tract of about 336 acres of land, situated in the State and county aforesaid, and the same tract on which said Brandon now resides, and on which is a steam-mill and distillery, the boundary of which land is more particularly designated in the several deeds which said Brandon holds for said land; also, five negroes, two wagons and teams, about 400 head of hogs, about 15,000 pieces of cooper's stuff, all his stock of horses, cattle, and sheep, his household and kitchen furniture and farming utensils, his debts and choses in action, of every kind and description; it being the intention of said Brandon, by this deed, to convey to the said Withers and his successors, for ever, all his estate, real, personal, and mixed, and choses in action, with the exceptions hereinbefore expressed, whether the same be particularly mentioned and set forth in this instrument or not. To have and to hold all the estate, real, personal, and mixed, and choses in action, hereby conveyed to the said William A. Withers and his successor or successors, for ever, in trust, for the following purposes, namely:—To collect the debts and choses in action due, payable, or owing to said Brandon, and to sell the real estate hereby conveyed, either all together or in lots, as said trustee may think most advisable, at public auction, to the highest bidder, on the *following pay- [*629 ments: namely, one third of the purchase-money to be paid in hand, and the residue in one and two years; and the slaves and personal estate to be sold at public auction to the highest bidder, on a credit of twelve months; and after making to said trustee a just and reasonable compensation for his trouble and expenses in executing this trust, to pay all the money which he may receive as trustee aforesaid, either by the collection of debts or choses in action, from the proceeds of the sale of the trust estate, to all the creditors of said Brandon, ratably, proportionably to the amount of their respective

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debts or demands; but should any one or more of the creditors of said Brandon become the purchaser or purchasers of any portion of the real or personal estate, or slaves, hereby conveyed, said trustee is authorized and empowered to accept the debt or debts due or owing by said Brandon to such purchaser or purchasers, in payment for their respective purchases, so far as said debts may go; and in such cases, if any such should occur, only the residue of the price to be distributed *pro rata* as aforesaid; and after the payment of all said Brandon's debts, to pay the residue, if any, to said Brandon, his heirs and assigns; and the title to the estate hereby conveyed he doth hereby warrant and defend to said Withers, and his successor or successors, for ever, in trust for the purposes aforesaid, against the claim or claims of him, the said Benjamin Brandon, and against all other claims. In testimony of which, the said Benjamin Brandon hath hereunto subscribed his name and affixed his seal, this day and year first above written.

BENJAMIN BRANDON."

On the 3d of May, 1842, John L. Shawhan and others filed a bill in the Harrison Circuit Court of Kentucky, sitting as a court of equity. The bill recited, that the complainants were creditors of Brandon; that he had executed the deed above set forth, "for the purpose of hindering, delaying, and defrauding the creditors of the said Brandon in the collection of their debts"; that the trustee was about to sell and dispose of the property mentioned in the deed; and prayed for an injunction to stop him.

On the same day an injunction was issued, and served upon Brandon and Withers, the trustee.

On the 21st of May, 1842, Brandon and Withers filed separate answers to the bill. Brandon admitted his indebtedness, and the execution of the deed of trust; averred that Shawhan was present while the deed was preparing, and expressed himself satisfied with its provisions; denied most positively that he executed said deed either to hinder, delay, *630] or defraud his creditors, but, on the contrary, in good faith, believing that general satisfaction would be given to them. The answer of Withers was to the same effect as that of Brandon.

On the 25th of June, 1842, Withers and Brandon applied for an order to change the venue. It was granted, and the record sent to the county of Bourbon.

On the 24th of September, 1842, John Lail presented a petition to the United States Kentucky District Court, sitting in bankruptcy. It alleged that, on the 6th of April

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preceding, Brandon had made a fraudulent conveyance with intent to defraud his creditors; and that he had concealed himself to avoid being arrested. It then prayed that the court might declare the said Benjamin Brandon a bankrupt. With the petition were filed several exhibits, which it is not necessary to state particularly.

On the same day an order was passed, setting down the hearing for the 4th of the ensuing November, and, in the mean time, enjoining the defendant and all others from removing or otherwise disposing of the property of the defendant, or which, on the decree, the assignee might be entitled to reclaim and recover.

On the 22d of October, 1842, the Bourbon County Court, before which the suit of Shawhan and others against Brandon and Withers was pending, passed a decree annulling and setting aside the deed of trust, as being, in point of law, fraudulent and void. The court enumerated many of the creditors, whose claims had been exhibited, and then ordered, that "so much of the personal property, slaves, and real estate mentioned in said deed of trust as may be necessary for the purpose be sold to satisfy the aforesaid debts." Thomas B. Woodyard was appointed to make the sale, according to certain given directions.

On the 22d of November, 1842, the District Court of the United States passed the following order:—

"JOHN LAIL v. BENJAMIN BRANDON.

"The prayer of the petitioner, that the defendant be declared a bankrupt, having been heard upon the allegations of the petition, and the proofs taken and filed, (the defendant having failed to answer,) and now having been fully considered:

"It is found and adjudged by the court, that the said Benjamin Brandon, of Harrison county, being a retailer of merchandise, and indebted as in the petition mentioned, did, by making the deed of conveyance and assignment to William A. Withers, of all his property, real, personal, and mixed, and rights of property, subject to the payment of his debts by the *laws of the State, bearing date the 6th day of April, [*631 1842, and on the 7th day of that month and year admitted to record in the clerk's office of the Harrison County Court, and in the petition mentioned, whereof a copy is filed here, now adjudged a fraudulent conveyance and assignment; and by concealing himself to avoid being served with process, whereby a suit had been commenced against him, thereupon became and is a bankrupt.

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"Perry Wherritt is appointed the assignee, and required to execute bond in the penalty of \$5,000, with two sufficient sureties."

On the 24th of November, 1842, Woodyard, the commissioner appointed by Bourbon County Court, proceeded to sell the personal property of Brandon.

In May, 1843, the commissioner made his report to Bourbon County Court, whereupon another decree was passed, reciting that the former sale was insufficient to pay the debts, and directing that so much of the land comprised in the deed of trust as might be necessary for the purpose should be sold for the payment of the balance of the debts.

On the 14th of July, 1843, the commissioner sold the land, in conformity with the above order, and John L. Shawhan became the purchaser. A writ of possession was issued in his favor, in April, 1844, which will be mentioned again in its proper place.

On the 10th of August, 1843, Wherritt, as assignee of the estate of Benjamin Brandon, filed a bill in chancery, in the District Court of the United States for the District of Kentucky, against John L. Shawhan and the other parties named in the caption of this statement. The bill referred to the former proceedings of the court, declaring Brandon to be a bankrupt, and all the other facts in the case. It stated that the assignee had taken possession of the property of the bankrupt, including the land; that Shawhan and others knew of the commission of the act of bankruptcy, but had nevertheless obtained a decree of Bourbon County Court, under the authority of which they had sold the land to Shawhan, who was threatening to disturb the possession of the complainant, and by his threats and forced claims of title was preventing the complainant from disposing of the land. It then prayed that Shawhan might be ordered to surrender up, to be cancelled, any pretended claim, and that all the parties might answer, &c.

On the 18th of December, 1843, John L. Shawhan, Daniel Shawhan, and Benjamin Berry answered separately. Shawhan admitted the execution, by Brandon, of the deed of April *632] *6th, 1842, but denied that he had committed any acts of bankruptcy. It admitted also the proceedings by himself in the State court to set aside the deed as fraudulent, and the decree and sale as stated above; but insisted that by said proceedings he had acquired a lien on the property, which could not be impaired by the proceedings in bankruptcy, and that the proceedings in the State court, having been

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commenced before those in bankruptcy, could not be affected by those of the District Court of the United States.

It is not material to state the answers of the other defendants. To these answers there was a general replication.

At the April term, 1844, the Bourbon County Court passed a decree reciting the sale to Shawhan by the commissioner, Woodyard, and proceeding as follows, viz. :—

“It is therefore decreed and ordered, that the said purchases made by the said Shawhans be and the same are hereby confirmed; that the amounts so decreed to said Shawhans be and the same are hereby extinguished and satisfied, by the aforesaid purchases made by them, except as to said balance of \$149.34, which was decreed to the Shawhans above the amount of their purchases. That a writ of possession issue in favor of said John L. Shawhan, to put him into the possession of said tract of land mentioned in the complainant’s bill; that Thomas B. Woodyard, the commissioner herein, convey all the right and title of the defendants, Brandon and William A. Withers, in and to said tract of land, to said John L. Shawhan, by deed of special warranty, warranting the title of the same against the claims of the said Benjamin Brandon and William A. Withers, and all persons claiming by, through, or under them, but not against the claim or claims of any other person or persons whatever.”

The decree then proceeded to regulate certain details.

In June, 1844, the bill filed by Wherritt in the District Court of the United States came on for hearing, when the complainant prayed that the defendants might be ordered to pay over the amount of sales of the personal property which had been sold under the authority of Bourbon County Court. A reference took place to a master in chancery, upon the coming in of whose reports the court passed the following final decree, on the 10th of June, 1844.

“This cause having been heard at this term, and argued by counsel, thereupon, on consideration thereof:

“It is adjudged by the court, that the complainant was invested with all the estate which was of said Brandon at the time he became a bankrupt, and that the defendants did not, by their after-commenced suit, and proceedings therein had, *(with notice of his act of bankruptcy,) obtain a right [*633 to have it thereby subjected exclusively, or first, to the satisfaction of their demands; and that the defendants, John L. Shawhan, Daniel Shawhan, George H. Perrin, Benjamin Berry, Catharine Snodgrass, and Isaac Miller, by the subsequent sales of the movable property by them so caused, did become, on the demand of the complainant here made, and

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are each of them, liable for his, their, and her proper portion of the proceeds thereof, whereof they thus wrongfully obtained the benefit, and must pay the same, together with the interest thereon, to the complainant, for the purpose of equal distribution required by the statute; and it is adjudged, that the sale of the land so afterwards caused by the defendants was wrongful, and assailed here by the complainant, was and is ineffectual, and did not invest the defendant, John L. Shawhan, the purchaser, with the right thereto, in opposition to the title which had previously passed by decree of bankruptcy of its holder so declared, and was vested in the complainant as assignee so appointed; but the said Shawhan, by the assertion of his pretended claims so founded, has and does injuriously embarrass the title of the complainant.

"It is therefore ordered, adjudged, and decreed, that the defendant, John L. Shawhan, do, on or before the first day of July next, execute to the complainant, as assignee of the bankrupt estate of Benjamin Brandon, a deed of release of all right, title, and interest claimed by him, Shawhan, in and to the tract of land whereon the said Brandon resided, containing 350 acres, more or less, in the county of Harrison, in the bill and answers mentioned, with covenant of warranty against all persons claiming by, through, or under him.

"And it is adjudged and ordered, that said Shawhan do, on or before the said first day of July next, deliver to the complainant the possession of the said land."

The decree then went on to specify the amounts to be paid, &c.

From this decree there was an appeal to the Circuit Court of the United States of the District of Kentucky.

On the 22d of November, 1844, the Circuit Court affirmed the decree of the District Court.

The defendant appealed to this court, and the cause came up on this appeal.

It was argued by *Mr. Trimble*, for the appellants, and *Mr. Bibb*, for the appellee.

The appellants assigned the following causes of error.

I. The Circuit Court erred in affirming the decree of the District Court, and in decreeing costs against the appellants.

*634] *II. The Circuit Court ought to have reversed the decree of the District Court, and dismissed the bill, on the following grounds, to wit:—

1. The bill filed by the appellee in the District Court is predicated entirely on the provisions of the English statutes, or the former bankrupt law of the United States, passed in 1800.

2. There is no equity in the bill filed in the court below, when tested by the late bankrupt law of 1841.

3. The bill alleges that the appellee is in possession of the tract of land in contest, and prays the Court to quit him and the possession, and protect him against the process of the State court; and the decree directs John L. Shawhan to restore the possession.

4. The decree assumes a fact which is contradicted by the record. John L. Shawhan, &c., commenced their suit in the State court several months before Brandon became a bankrupt, and not afterwards, as is stated in the decree.

5. The principles assumed by the decree are expressly negatived by the bankrupt law of 1841, and can only be sustained by adopting the provisions of the English statutes, or the bankrupt law of 1800.

6. The decree directs the appellants to pay over to the appellee the amount of the sales of the slaves and personal estate of Brandon, when it appears from the record that the commissioner took notes for the purchase-money, and the appellants have not received either the notes or the money.

7. The petitioner was not a creditor of Brandon when the petition was filed.

That portion of the argument of the counsel for the appellants, which related to the principal point decided by the court, was as follows, viz.:—

By the decree of the District Court, it is said that the complainant in that court was invested with all the estate of Brandon at the time he became a bankrupt, and that the defendants did not, by a suit commenced afterwards, obtain a right to have it subjected to their demand, &c. If, by that expression, it was intended to say, that, by the decree in bankruptcy, the assignee was invested with all the estate of Brandon at the time he made the fraudulent deed of trust, the opinion of the court is in direct opposition to the plain and unequivocal words of the third section of the act. That section expressly declares that the estate of the bankrupt shall, from the time of the decree, be deemed to be divested out of the bankrupt, and by force of the decree be vested in the assignee. That provision of the section must be abrogated, and other words *interpolated before the opinion [*635 of the District Court can be sustained. It would be a strange perversion of that section, to say that the decree should have relation to an act of bankruptcy, contrary to the express words of the section. If that section had barely said that, by the decree, the estate should be divested out of the bankrupt, and vested in the assignee, without reference to

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the time when the estate should be so divested, there might have been some room left for construction. But such language has not been used. On the contrary, the words employed have left no room for construction as to the time when the property shall be divested out of the bankrupt, and vested in the assignee. The same section is equally explicit as to the power of the assignee to sell and dispose of the property of the bankrupt. It provides that the assignee shall have the same power to sell and dispose of the property which might be exercised by such bankrupt before or at the time of the bankruptcy declared. If, by the decree in bankruptcy, the property was divested out of the bankrupt from the time of making a fraudulent conveyance, he certainly could have no power to sell or dispose of his property at the time of the bankruptcy declared. If Congress had intended that the decree in bankruptcy should have relation to an act of bankruptcy, they would have employed language indicating such an intention. They have not done so, nor even left room for construction on that subject; but the most explicit language has been employed to prevent any such relation by construction. Neither the English statutes, nor the former bankrupt law of the United States, contain any provision similar to that in the third section of the late bankrupt law. The decisions in the English books, and the decisions of the American courts, founded on statutory provisions totally dissimilar, cannot, therefore, have any influence on the question. The statute 13th Eliz. empowers the commissioners in bankruptcy to sell and convey all the lands and tenements which the bankrupt had at the time he became a bankrupt; and further provides, that such conveyance shall be good against the bankrupt, and all other persons claiming by, from, or under him by any act after committing the act of bankruptcy. 2 Bl. Com., 285; 2 Phil. Ev., 289.

The statutes of James I. direct the commissioners to assign over to the assignees the whole of the bankrupt's estate, and makes void all acquisitions of property by, from, or under the bankrupt, at any time after committing the act of bankruptcy. A few cases, only, are excepted out of the general prohibition by the same statutes, and by the statute of 19th George II. 2 Bl. Com., 485, 486; 1 W. Bl., 68; 2 W. Bl., 829. The tenth section of the bankrupt law of the United States, passed *in 1800, contains similar provisions. *636] By the express provisions, therefore, of the English statutes, and of the bankrupt law of 1800, the assignment of the commissioners vested in the assignees the whole of the estate of the bankrupt which he had at the time when

he committed the act of bankruptcy. It has already been shown, that the late bankrupt law contains no such provision, but that its provisions expressly negative any relation to an act of bankruptcy.

Mr. Bibb's argument upon the same point was as follows:—

III. The rights, titles, and authorities of the assignee, when appointed by the court, had relation to the act of bankruptcy committed on the 6th of April, 1842, specified in the decree declaring the bankruptcy, and overreached and avoided the lien claimed by the appellants as the result of their proceedings in the State court, so originated after and with full knowledge of the prior act of bankruptcy.

Such relation is expressly enacted by the second and third sections of the act of 1841. That the effect of such relation, so enacted by the statute, is to annul all subsequent acts by which the assets of the bankruptcy are attempted to be diverted from the general fund for distribution among the several creditors of the bankrupt, is a doctrine well settled by very many adjudged cases. These precedents may be arranged under four classes.

1st Class. Transactions by and with a bankrupt preceding an act of bankruptcy, but in contemplation of bankruptcy, and for the purpose of preferring a creditor contrary to the spirit of the bankrupt law, and therefore void. Of this class these examples will suffice:—*Locke v. Winning*, 3 Mass., 325, 326, 329; *Harman v. Fishar*, 1 Cowp., 117, 123; *Rust v. Cooper*, 2 Cowp., 629, 632, 633; *Alderson v. Temple*, 4 Burr., 2238, 2239, 2241; *Compton v. Bedford*, 1 W. Bl., 362.

2d Class. Transactions by a bankrupt in themselves acts of bankruptcy, and therefore void. Of this class these examples, out of many others, will suffice:—*Worsely v. De Mattos*, 1 Burr., 468, 476, 484; *Wilson v. Day*, 2 Burr., 827; *Alderson v. Temple*, 4 Burr., 2239, 2240; *Devon v. Watts*, and *Hassells v. Simpson*, 1 Doug., 86, 89, 92; *Linton v. Bartlett*, 3 Wils., 47.

3d Class. Transactions by and with a bankrupt after an act of bankruptcy committed, and before commission sued out, void because after an act of bankruptcy. Of this class these examples will suffice:—*Hussey v. Fidell*, 3 Salk., 59; *Dyson v. Glover*, 3 Salk., 60; *King v. Leith*, 2 T. R., 141; *Vernon v. Hall*, 2 T. R., 648; *Dias v. Freeman*, 5 T. R., 197.

*4th Class. Efforts by process of law, after an act of bankruptcy, to abduct the property of the bankrupt from the assets for distribution among the general creditors,

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avoided by the commission after taken out upon the previous act of bankruptcy. Of this class these examples will suffice: —*Sill v. Worswick*, 1 H. Bl., 665; *Cooper v. Chitty*, 1 Burr., 20; *Coppendall v. Bridgen*, 2 Burr., 817, 820; *Smallcomb v. Cross*, 1 Ld. Raym., 252; *Rust v. Baker*, 2 Str., 996; *Payne v. Teap*, 1 Salk., 108; *Smith v. Milles*, 1 T. R., 475; *Ward v. Macauley*, 4 T. R., 489; Bull. N. P., 41, 42.

Such must be the relation to the time of the act of bankruptcy, and such the effect thereof, according to the enactments of the third, second, and fifth sections of the bankrupt law of 1841.

I put the third section foremost, because that section declares that the rights, titles, powers, and authorities of the assignee shall relate, not only to the time of the act of bankruptcy committed, but even to a time before the bankruptcy. I refer to the second section for the purposes, first, to show that the time of the decree passed is not the border and foremost faculty given to rights of the assignee, (as has been argued for the appellants,) when appointed by the court in consequence of the decree, but that the relation thereof to the act of bankruptcy, upon which the decree is founded, is clearly avouched by the second section; secondly, as explanatory of the sense and propriety of the expression in the third section, “before or at the time of his bankruptcy.”

The celebrated maxim of the Rabbins is, “In the law there is no such thing as first or last.” For in the law many things are set down, all taking effect, as the one law, at one and the same time. The sages of the law have been used to collect the sense and meaning of the law by comparing one part with another, and by viewing all the parts together as one whole, and not of one part only by itself,—“*Nemo enim aliquam partem recte intelligere possit, antequam totum iterum atque iterum per legerit.*” *Lincoln College’s Case*, 3 Co., 59*b*; *Stradling v. Morgan*, Plowd., 205; Co. Litt., 381., *a*.

I do not cite the second section as that which directly invalidates the lien set up by the appellants, but only as explanatory of the third section. The nullity of the lien claimed by the appellants by process of law in the State court, commenced and carried on after the act of bankruptcy, results from the relation of the rights, titles, powers, and authorities of the assignee to the time of Brandon’s bankruptcy, committed on the 6th day of April, enacted by the third section, and the system of equality among all the creditors of the
 *638] bankrupt established *by the fifth section. This equality among creditors, without preference or priority, is

the soul and spirit of the bankrupt law, to which the second and third sections are but handmaids and auxiliaries.

The English system of bankruptcy having been in use long before the system of bankruptcy was enacted in the United States, our statutes have borrowed the general outlines and phrases from the English statutes and the adjudications thereon. In particular instances expressions are altered to make the principle less dubious, and to enlarge the reach and extent of the statute. It will therefore not be without utility, in conducing to a clear understanding of our statute of 1841, to run a parallel between that and the English statutes.

By the English statute, the process against a bankrupt commenced by a petition of a creditor to the court, alleging the particular act of bankruptcy which the debtor had committed. So by ours. By the English statute and ours of 1800, the proper court, upon the presentation of a petition, appointed, as a matter of course, commissioners to hear and determine the matters of the petition against the debtor, and, if found true, "to declare him or her a bankrupt." By our statute of 1841, the petition is heard by the court, and, if true, the bankruptcy is declared by decree of the court. By the English system, and by our statute of 1800, the debtor had notice of the time and place appointed by the commissioners to hear and determine the matters of the petition, but no notice was given generally to persons interested to show cause against the petition. By our statute of 1841, notice of the time assigned by the proper court for the hearing of the petition is given by a publication in one or more newspapers, at least twenty days before the hearing, "and all persons interested may appear and show cause, if any they have, why the prayer of the petitioner should not be granted."

By the English system, the commission of bankruptcy was liable to be superseded (if improvidently issued) by application to the Court of Chancery. *Ex parte Gayther*, 1 Atk., 144; *Ex parte Sydebotham*, 1 Atk., 146; *Ex parte Hylliard*, 1 Atk., 147. By our statute of 1841, section first, the decrees declaring the bankruptcy, when passed by the proper court, and not reëxamined upon the petition of the bankrupt within ten days for a trial by jury, "shall be deemed final and conclusive."

By the English system, the creditors appointed the assignees to manage the estate and affairs of the bankrupt. By our statute of 1841, the assignee is appointed by the court, with power of removal and new appointment, *toties quoties*.

By the English statute and ours of 1800, the commissioners

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*639] *made a formal deed of conveyance and assignment of the property and effects of the bankrupt to the assignee. By our statute of 1841, no deed of conveyance or assignment is made to the assignee appointed by the court, but by the third section the decree of the court is made to stand in the place, and to have the effect, of a formal deed of conveyance and assignment to the assignee, when thereafter appointed by the court.

By the former statutes, the estate and title of the bankrupt were not divested out of him, nor vested in the assignees chosen by the creditors, until the formal deed of conveyance and assignment was executed by the commissioners to the assignees; although the power and authority of the bankrupt over his property was suspended by his act of bankruptcy. So is the law stated to be, in the cases of *Cary v. Crisp*, 1 Salk., 108; *Brassey v. Dawson*, 2 Str., 981, 982; Bull. N. P., 41.

By the first part of the third section of the act of 1841, "all the property and rights of property of every name and nature, and whether real, personal, or mixed, of every bankrupt," "who shall by the decree of the proper court be declared to be a bankrupt within this act, shall, by mere operation of law, *ipso facto*, from the time of such decree, be deemed to be divested out of the bankrupt, without any other act, assignment, or other conveyance whatsoever; and the same shall be vested, by force of the same decree, in such assignee as from time to time shall be appointed by the proper court for this purpose, which power of appointment and removal such court may exercise at its discretion," &c. In this the allusion to the former mode of assignment by a formal decree of conveyance is clear, and the decree itself is made to have like effect.

By the former statutes, when the deed of conveyance and assignment was executed, the rights and titles to the property of the bankrupt were in the assignees chosen by the creditors, from the time of the act of bankruptcy committed, by relation or retrospect, according to the numerous cases before cited.

By the after part of the third section of the act of 1841, the like relation, or retrospect, to the time of the act of bankruptcy committed, is enacted as to the rights, title, and authorities of the assignee when appointed by the court.

The words are,—“And the assignee so appointed shall be vested with all the rights, titles, powers, and authorities, to sell, manage, and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such

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court, as fully, to all intents and purposes, as if the same were vested in or might be exercised by such bankrupt *before* or at the time of his bankruptcy declared as aforesaid."

The word "before" so used has reference to the provisions *of the second section, whereby acts done "in contemplation of bankruptcy, and for the purpose of giving any [*640 creditor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupt," &c., "shall be deemed utterly void, and a fraud upon this act." Such acts so done before the act of bankruptcy, but being in contemplation of an act of bankruptcy afterwards committed, and contrary to the spirit of the bankrupt law, are declared void. Therefore, in the third section, the word "before" is introduced, in connection with the words "or at the time of his bankruptcy," so as to make the relation of the title, powers, and authorities of the assignee embrace fraudulent transactions by and with a bankrupt before the act of bankruptcy committed, as well as after the bankruptcy and before the appointment of the assignee.

The decree declaring the bankruptcy divests the title, rights, and authorities of the bankrupt out of him; the appointment and qualification of the assignee vests all the rights, titles, authorities, and powers in the assignee by relation, as fully as they were vested in the bankrupt himself "before or at the time of his bankruptcy." Moreover, this relation, so established by the word "before," extends to frauds and other injuries committed upon the property of the bankrupt, *in invitum*, before his act of bankruptcy (and before he contemplated bankruptcy), and to all other rights which the bankrupt himself might have asserted, if the misfortune of bankruptcy had not happened to him. So that fraudulent contrivances before or after the act of bankruptcy are within the rights, titles, powers, and authorities of the assignee.

If all the time between an act of bankruptcy committed and the decree pronounced upon the petition, after a notice (by publication of not less than twenty days) of the time assigned for the hearing, had been left as an hiatus, a chasm, not filled by the relation and retrospect of the title, rights, authorities, and powers of the assignee in bankruptcy, when appointed by the court, and thereby omitting all mesne acts contrary to the spirit of the bankrupt law, then, indeed, the statute would have been impotent to protect and secure the funds and assets of the bankruptcy for that just equality and distribution among all the creditors,—to every of the creditors *bonâ fide* a portion, rate and rate like, according to the

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quantity of his debt,—which are the soul, essence, and spirit of a bankrupt law, and the end designed and enacted by the fifth section.

Without such relation, the filing of the petition against a bankrupt, and the publication of the notice for the hearing, would have been a signal for acquiring priorities and preferences, by levy of executions, attachments, and every species *641] of depredation upon the estate, property, and effects of the bankruptcy; the statute would have been but a dead letter. For example, the appellants claim the whole property of the bankrupt by process and decrees in chancery begun after the act of bankruptcy committed, having knowledge thereof, and using the very fact and deed of trust, in itself a definite act of bankruptcy, as the foundation of their attachment.

But the statute is not so lifeless, so powerless. The legislators who enacted the statute of 1841, using the lessons of former legislation, the wisdom of experience, and profiting by the examples of former times and the adjudications upon former statutes of bankruptcy in England and the United States, comprehended the truth, that the relation of the rights, titles, powers, and authorities of the assignee in bankruptcy to the previous time of the act of bankruptcy committed, (and even “before,”) was necessary and proper to the end proposed, and so enacted.

(*Mr. Bibb* then commented at length upon the case of *Sill v. Worswick*, 1 H. Bl., 665, 694, which he considered very strongly in point.)

Mr. Justice GRIER delivered the opinion of the court.

Perry Wherritt, as assignee of Benjamin Brandon, a bankrupt, filed his bill in equity in the District Court of the United States for Kentucky, setting forth that, on regular proceedings in said court, Brandon was deemed and held to be a merchant and trader, within the bankrupt act, and found to have committed acts of bankruptcy by making a fraudulent transfer of his property, and by secreting himself to avoid the service of legal process, and was, therefore, decreed a bankrupt, on the 22d of November, 1842; that the complainant was duly appointed his assignee; that, on the 6th of April, 1842, Brandon had made a fraudulent deed of trust of all his property to William A. Withers; that John L. Shawhan and others, the defendants and appellants, with a full knowledge of the acts of bankruptcy, filed their bill in chancery in the Harrison Circuit Court of Kentucky, against Brandon, Withers, and others, charging that the said deed of

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trust was fraudulent and void; that the court decreed that the deed was void, and ordered the property to be sold for the benefit of Shawhan and the other creditors who had joined in the bill; that, since the decree in bankruptcy, the State court had proceeded to sell the real and personal estate of said Brandon; that Shawhan had purchased a tract of land belonging to Brandon, of 350 acres, of which the complainant had possession, whereby he was prevented from disposing of said land for a fair price; and praying that *Shawhan [*642 might be compelled to surrender and cancel his claim, and for all such equitable relief, general and special, as the merits of the case may require, &c.

The answer of Shawhan admits the execution by Brandon of the deed of the 6th of April, 1842, but denies that he had committed any acts of bankruptcy. It admits, also, the proceedings by himself in the State court to set aside the deed as fraudulent, and the decree and sale as stated in the bill. He insists that by said proceedings he had acquired a lien on the property, which could not be impaired by the proceedings in bankruptcy, and that the proceedings in the State court, having been commenced before those in bankruptcy, could not be affected by them, &c.

On the hearing of this cause at June term, 1844, before the District Court, "the complainant prayed as specific relief as to the movable property which was of said Brandon at the time he became bankrupt, and which the defendants afterwards caused to be sold under the decree of the Bourbon Circuit Court, that the defendants be adjudged to pay the amount of said sales"; and the court referred it to a master to report the amount of the sales of personal property, and afterwards decreed, "that the complainant was invested with all the estate which was of said Brandon at the time he became bankrupt, and that defendants did not, by their after-commenced suit and proceedings therein had, (with notice of his act of bankruptcy,) obtain a right to have it thereby subjected exclusively or first to the satisfaction of their demands; and that the defendants, John L. Shawhan, &c., by the subsequent sales of the movable property by them so caused, did become, on the demand of the complainant here made, and are, each of them, liable for their proper portion of the proceeds thereof, whereof they thus wrongfully obtained the benefit, and must pay the same, together with interest, to the complainant, for the purpose of equal distribution as required by the statute; and that the sale of the land so afterwards caused by the defendants was wrongful, and assailed here by the complainant, was and is ineffectual, and did not invest the

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defendant, John L. Shawhan, the purchaser, with the right thereto, in opposition to the title which had previously passed by decree of bankruptcy of its holder so declared, and was vested in the assignee so appointed," &c., &c. It was adjudged and decreed, also, that Shawhan should release all his title in the land to the complainant, and the defendants severally pay over to the plaintiff the money received by each of them from the proceeds of the personal property.

From this decree the defendants appealed to the Circuit *643] Court of the United States for the District of Kentucky, where the decree of the District Court was affirmed, and the defendants then prosecuted their appeal to this court.

Of the numerous objections to the decree taken on the argument, it will be necessary to notice but two, being those chiefly relied on by the counsel for the appellants.

1. That the decree in bankruptcy was not evidence, as against the defendants, who were no parties to it, either that there was a debt due to the petitioning creditor, or that Brandon was a merchant or trader within the meaning of the bankrupt act, or that he had committed an act of bankruptcy. It is a sufficient answer to this objection,—1st. That the thirteenth section of the bankrupt act declares, that "the proceedings in all cases of bankruptcy shall be deemed matters of record." 2d. Both parties admit the deed made by Brandon, on the 6th of April, was fraudulent, and the first section of the bankrupt act declares the execution of such a deed an act of bankruptcy. 3d. The record before us shows sufficiently that he was a merchant or trader, and therefore liable to be declared a bankrupt. The District Court had, therefore, plenary and exclusive jurisdiction of the subject-matter.¹ 4th. The public notice required by the act having been given, the creditors must be treated as having notice of the proceedings, and an opportunity to make their objections to them, and having neglected or refused so to do, they ought not to be allowed to impeach them collaterally, as they are in the nature of a proceeding *in rem*, before a court of record having jurisdiction. 5th. Even if the record in the bankrupt court be not conclusive as against the defendants, it is at least *prima facie* evidence that all facts necessary to sustain the decree were proved before the court; and lastly, the record of this case shows sufficient evidence to sustain the decree on all points. Besides, the third section of the act declares, that "all the property, &c., of every bankrupt, (except as herein-

¹ FOLLOWED. *Commercial Bank of Manchester v. Buckner*, 20 How., 120.

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after provided,) who shall by a decree of the proper court be declared to be a bankrupt within this act, shall, by mere operation of law, *ipso facto*, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment, or other conveyance whatsoever; and the same shall be vested by force of the same decree in such assignee," &c. As the court had jurisdiction of the subject-matter and person of the bankrupt, the decree is thus made conclusive evidence of the title of the assignee.¹

The English cases can have no application to this question, as there all proceedings in bankruptcy are before commissioners, under a commission issued out of chancery, and the commissioners are not a court of record.

*2d. The chief and important question involved in this case is whether the appellants, after an act of [*644 bankruptcy of which they had full knowledge, could, by proceeding in a State court, obtain a valid lien, and seize the property of the bankrupt to the exclusion of his other creditors, or whether such proceeding be not a fraud on the bankrupt law, and therefore void.

The appellants in their answer deny their knowledge of the act of bankruptcy, and that the defendant was a bankrupt before the decree. But this seems rather a denial of the law than of the fact; for the bill filed by them in the State court alleged that the deed made by Brandon of all his property to a trustee, on the 6th of April, 1842, was fraudulent and void. The first section of the bankrupt act, in enumerating the acts for which a merchant or trader shall be liable to be declared a bankrupt, by proceedings *in invitum*, mentions the making of "any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods, or chattels," &c. By their own showing, therefore, they had knowledge of the fact of bankruptcy. The acts thus enumerated are usually termed acts of bankruptcy, and may be considered as tests of insolvency, showing conclusively the inability of the trader to pay his debts, or carry on his trade. The policy and aim of bankrupt laws are to compel an equal distribution of the assets of the bankrupt among all his creditors. Hence, when a merchant or trader, by any of these tests of insolvency, has shown his inability to meet his engagements, one creditor cannot, by collusion with him, or by a race of diligence, obtain a preference to the injury of others. Such conduct is considered a fraud on the act, whose aim is to divide the assets equally, and therefore equitably. To pre-

¹ CITED. *Lamp Chimney Co. v. Brass and Copper Co.*, 1 Otto, 361.

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vent these frauds, the English bankrupt laws give the title of the assignee a relation back to the act of bankruptcy, so as to avoid all payments, sales, or contracts made after it. The second section of our bankrupt act effects the same object, not by establishing the doctrine of relation in direct terms, but by declaring all such payments, transfers, &c., void, and a fraud on the act, and enabling the assignee to recover the money paid, or property transferred, for the use of the creditors. This section declares fraudulent and void, not only "future payments, securities, conveyances or transfers of property, or agreements made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving a preference or priority to one creditor over another," but that "all other payments, securities," &c., "to any person whatever, not being a *bonâ fide* creditor or purchaser for *645] a valuable consideration without notice, shall *be deemed utterly void and a fraud on this act"; and the assignee is authorized to sue for, and recover and receive the same, as part of the assets of the bankruptcy.

It avoids, not only payments, securities, &c., made in collusion with a bankrupt in contemplation of bankruptcy, but those obtained by a creditor with notice; and it afterwards defines this notice which is the test of fraud or want of *bona fides* in the creditor to be "notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act." A creditor may always recover payment of his debt, or security for it, from his debtor, unless he has notice or knowledge that his debtor has committed an act of bankruptcy; and then he is forbidden to receive payment of his debt, or to obtain any other priority or advantage over the other creditors of the bankrupt. And if notice of this fact to the creditor makes a payment by the debtor void, it is obvious that a security or priority gained by suit in a State court after such notice could have no better claim to protection; for notice of the act of bankruptcy to the creditor is the test of the *mala fides* which vitiates the transaction.

The last proviso of the second section, which saves all "liens, mortgages, or other securities on property, which may be valid by the laws of the States respectively," subjects them, nevertheless, to this condition; that they shall not "be inconsistent with the second and fifth sections of the act." Liens or securities which would be otherwise valid by the State laws, being made void by the second section when obtained after notice of an act of bankruptcy, are, consequently, not saved by this proviso; but the property subject to them vests in the assignee discharged from such lien, and if the property

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has been sold under process from a State court, the creditor is liable to refund the money thus received to the assignee of the bankrupt. Having obtained this preference *malâ fide*, in fraud of the bankrupt law, he cannot be suffered to retain the fruits of it to the injury of other creditors; otherwise, the whole policy and aim of the law would be frustrated.

We are of opinion, therefore, that the lien obtained by Shawhan upon the property of Brandon by his proceedings in the State Court, after notice of the act of bankruptcy, was not saved or protected by the proviso to the second section of the act, and that he and the other appellants, who had appropriated the assets of the bankrupt to their own use, are liable to refund the same to the assignee in this suit; and that the decree of the Circuit Court of the United States for the District of Kentucky should be affirmed.

ORDER.

*This cause came on to be heard on the transcript of the record of the Circuit Court of the United States [646 for the District of Kentucky, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby affirmed with costs.

WILLIAM AND FRANCIS SADLER, COMPLAINANTS, v. THOMAS B. HOOVER, SYLVANUS CHAMBERS, AND SAMUEL H. DINKINS, PARTNERS BY THE STYLE OF THOMAS B. HOOVER AND COMPANY.

Where an appeal, from a Circuit Court, sitting in chancery, is brought up to this court upon a certificate of division in opinion, and the certificate states that the court was not able to agree in opinion, one of the judges being of opinion that a decree should be rendered for the complainants, and the other that a decree should be rendered for the defendants, this was not such a distinct statement of the point or points upon which the judges differed as would give this court jurisdiction.¹

The appeal must, therefore, be dismissed, for want of jurisdiction.

THIS case came up, on a certificate of division, from the Circuit Court of the United States for the Southern District of Mississippi.

¹ See *Perkins v. Hart*, 11 Wheat., *Dennistoun v. Stewart*, 18 Id., 555; *Ogil* 237; *Wolf v. Usher*, 3 Pet., 269; *rie v. Knox Ins. Co.*, Id., 577; *Hare* *United States v. Briggs*, 5 How., 208; *meyer v. Iowa County*, 3 Wall., 294.