Mr. Justice DANIEL dissented, for want of jurisdiction of the courts of the United States over corporations.

Marshall *v.* Balt. and Ohio R. R. Co., 16 How. Reports.

EDWARD M. LIVERMORE AND DAVID B. SEXTON, APPELLANTS, *v.* THOMAS A. JENCKES, ALEXANDER FARNUM, AND STEPHEN WATERMAN.

The laws of Rhode Island allow an assignment to be made by a failing debtor, for the benefit of certain preferred creditors, and for the exclusion of those who should refuse to execute releases from their respective claims.

The laws of New York do not permit such assignments.

Where an assignment with the above reservation was made in Rhode Island by a person and to persons residing there, which conveyed to trustees certain property in Rhode Island, and also property in New York, it was proper for the Circuit Court of New York to dismiss a bill filed by creditors residing there, provided there was no fraud in fact in the assignment.

The complainants never acquired nor ever had any lien upon the property in New York, so as to subject it legally or equitably to their demand against the failing debtors, either before or after it was carried into judgment in the Supreme Court of New York.

THIS was an appeal from the Circuit Court of the United States for the southern district of New York, sitting in equity.

Livermore and Sexton, who filed the bill, were citizens of New York, and Jenckes, Farnum, and Waterman, citizens of Rhode Island.

The complainants claimed to set aside an assignment made on the 19th of April, 1854, by Waterman, to Jenckes & Farnum, upon the ground that the assignment was to enure to such of Waterman's creditors who should sign a release. This provision, it was admitted, was valid by the laws of Rhode Island, where the assignment was executed, but invalid by the laws of New York, where the property in question was situated. Livermore and Sexton had become judgment creditors after the assignment was made; and if it could be set aside, the property would be open to execution upon their judgments.

The defendants all answered the bill, and much evidence was taken. After the cause was heard upon the pleadings and proofs, the Circuit Court passed the following decree:

"This cause having been heretofore brought on to be heard at final hearing on pleadings and proofs, and having been argued by Mr. A. J. Willard on the part of the plaintiffs, and by Mr. T. A. Jenckes and Mr. C. A. Seward on the part of the defendants, now, on consideration thereof, it is found and decided by the court, that the property in the State of New York, assigned by the defendant Waterman to the defendants Jenckes & Farnum, by the assignment mentioned in the pleadings herein, was taken into possession by said assignees, and converted into money, and the proceeds transferred to the State of Rhode Island, prior to the filing of the bill in this cause, and that the plaintiffs have no lien on said property, and that there was no fraud in fact in the making of said assignment; and it is therefore ordered, adjudged, and decreed, that the bill in this cause be and the same is hereby dismissed, with costs to the defendants against the plaintiffs to be taxed, and that the defendants have execution against the plaintiffs for such costs, according to the course and practice of this court."

The complainants appealed from this decree.

The cause was submitted on printed arguments by *Mr. Morrell* for the appellants, and *Mr. Jenckes* and *Mr. Clarence A. Seward* for the appellees.

The arguments upon both sides covered a great deal of ground.

It will be seen by the decree above recited, which was affirmed by this court, that the broad question of whether the law of Rhode Island or that of New York should govern, was not decided by either court, but that the decree was founded upon the three following circumstances:

1. That the property was converted into money, and transferred to Rhode Island.

2. That the plaintiffs had no lien on the property.

3. That there was no fraud in fact in the assignment.

In noticing the arguments upon the general proposition, whether the *lex loci contractus* or the *lex fori* should govern, the reporter can give only an outline.

The first point of *Mr. Morrell* was the following, viz:

First Point.—The Circuit Court erred in not deciding that the assignment from Waterman to Jenckes & Farnum was fraudulent and void as affecting the complainants below, and the other creditors of Waterman residing within the State of New York at the time of the assignment, so far at least as the assignment affected the estate of the assignor within the State of New York, at the time of its execution and delivery.

As it regards the invalidity of the assignment, the essential facts are briefly as follows:

Waterman being insolvent, and indebted, among others, to the complainants, and holding property and choses in action in the State of New York, assigned to J. & F., giving certain preferences, and directing the residue to be paid to such of his creditors at large as should release their demands within six months, reserving to himself the dividends of such creditors as should refuse to release.

We contend that such an assignment is adjudged fraudulent as to creditors, by the laws of the State of New York. That, as to property situated within the State of New York and the claims of resident creditors, the laws of the State of New York are paramount, and do not yield to the laws of the domicil of the debtor.

First. This case is one of State jurisdiction. It has arisen out of the conflict of the laws of the States of New York and Rhode Island. These laws relate to matters of internal administration, over which Congress, under the Constitution, has no control whatever. The States have not seen fit to lodge in Congress power to harmonize the conflict of their internal systems. Such a power, if lodged in the Federal Government, would necessarily involve the right to carry the laws and systems of polity prevailing in one State within the territorial limits of another. It would aim a blow at the integrity of the State sovereignties. Whatever may be thought of the neces-

sity or wisdom of such an accession of authority to the Union, it is undisputed that no such grant has been made by the Federal Constitution.

Story's Conflict of Laws, sec. 18.

Previous to the Constitution, the States possessed the absolute dominion common to all independent sovereigns over all persons and property within their territorial limits. They determined for themselves the laws by which real and personal property within their limits should be held and transmitted. If they recognised the dispositions of property made by foreign States, it was on a principle of comity alone, and not an acknowledgment of any inherent vitality in the laws of the foreign State within their own territories.

That body of opinion called the law of nations had no practical existence or positive efficacy, except so far as it had become embodied in and formed a part of some local system of laws.

The Constitution created the Federal sovereignty, and invested it with certain specified powers; but neither by express grant nor by necessary implication has the power been conferred to communicate vitality to the laws of one State within the limits of another.

Wherever it was deemed desirable that a harmonious system should exist throughout the Union in regard to a particular subject, the Constitution, in regard to that subject, conferred supreme legislative power on Congress, in some instances excluding the States from all legislative control over the subject, and in others permitting local legislation to a certain extent, but subordinating it to the paramount authority of Congress.

The power vested in Congress to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies, is an instance of this kind.

The system of laws adopted by Congress in such cases displace State legislation on the same subjects altogether. It was no part of the intent of the Constitution that Congress should leave the conflicting laws of the States in such cases in force, and adopt merely a system of rules by which the conflict arising out of these jarring provisions should be determined.

Such a principle would blend the national and local legislation into an inextricable maze. It would be impossible to define the limits of either. The line of demarcation once destroyed, the stronger of the antagonistic powers would gradually absorb the weaker, and the balance of the Union ultimately be destroyed.

It is not necessary to consider whether the power granted to Congress in regard to the establishment of bankrupt laws could be so exercised as to make the disposition of the estates of insolvents depend wholly and exclusively on the laws of Congress. Until Congress exercises the power, no such question can arise. The defendants rest their case upon the authority of the laws of the State of Rhode Island, and not upon those of Congress.

The power, then, of determining what disposition may be made by insolvents of their property within the State of New York, rests with that State to determine, free from any control in Congress, under existing laws.

If Congress cannot define a system of rules to determine controversies growing out of the conflict of the laws of the States, it is clear that the Federal courts cannot, independently of the States, compose and enforce such a system.

The adjudications of the Federal courts must, in every instance, rest upon the express or the implied authority of either the National or State Legislatures.

The language used by Mr. Justice Grier in Caskie *v.* Webster (2 Wallace, jun., 131) would, on a cursory examination, appear to imply that it was a part of the duty of the Federal courts to apply to controversies of this character a sort of modified *jus gentium*, adapted to harmonize with the objects and purposes of the Union of the States. He says: "We do not think that the different States of this Union are to be regarded, as a general thing, in the relation of States foreign to each other; especially ought they not to be so regarded in regard to questions relating to the commerce of the country, which is co-extensive with the whole land, and belongs, not to the States, but to the Union." A careful examination of that case will show that such was not his intent.

The question in that case was as to the validity, in Pennsylvania, of an assignment valid by the laws of Virginia, where it was made, in its operation upon property situated in Pennsylvania. We shall see hereafter that the case was decided in strict conformity with the laws of the State of Pennsylvania, and that the principle above cited was intended as an exposition of the liberal rules that governed the State of Pennsylvania in questions arising out of the conflict of her laws with those of other States.

The present controversy originated in the Supreme Court of the State of New York, which court had jurisdiction, not only of the subject-matter, but of the parties who had been served with process. It has been removed into this court merely in consequence of the parties being residents of different States.

This court must therefore give the same judgment which the courts of the State of New York would have been bound to give, had they adjudicated the case.

See the remarks of Chief Justice Marshall in Elmendorf *v.* Taylor, 10 Wheaton, 159.

Second. By the laws of the State of New York, an insolvent's assignment, containing the clause requiring creditors to release or forfeit their dividends, and directing them to be paid in that case to the assignor, is fraudulent as to creditors, and is void.

The Revised Statutes re-enact the statute of 13 Eliz., which is an affirmance of the common law.

Third. The assignment being of a nature forbidden by the laws of New York, according to the acknowledged principles governing the jurisprudence of that State, it cannot be asserted there as affecting property within that State, and as against a creditor of the assignor there resident.

We do not find that the precise point in question has been adjudicated in that State, but the principles governing the case are well settled.

[Mr. Morrell then examined the following cases: 2 Mason, 157; 12 Wheaton, 259; Ware, 232; 5 Greenl., 245; 19 Wendell, 15; 3 Dallas, 375, note; 14 Martin, 93, 102; Conflict

of Laws, sec. 390; 4 Term Reps., 192; 5 East., Potter *v.* Brown.]

These authorities go as far as authority can go to establish the principle, that it is not only within the power, but it is the duty, of a State to deny to strangers privileges not permitted to its own citizens. The wisdom of such a rule can find no better illustration than the present case. Waterman establishes himself in business in the State of New York, contracts debts due to its citizens, until, finding himself insolvent, he returns to the State of Rhode Island, and there executes an assignment, which, if executed in this State, would have been adjudged fraudulent as against his creditors. If the State of New York should allow so unequal a privilege to strangers, would she not be justly chargeable with neglecting the interests of her own citizens? Would it not, in the language of Judge Ware, be equivalent to surrendering her independence?

Such a doctrine would give rise to great abuses. A citizen of New York, in failing circumstances, wishing to make a disposition of his property forbidden by the laws of his own State, but permitted by another, could, by taking up a residence in the latter State, successfully evade the laws of his State.

There is another view of this case still more conclusive. The law of the State of New York, which in the present instance is in conflict with the laws of Rhode Island, is a part of the insolvent system of the State. The greatest diversity exists between the insolvent systems of the different States and foreign countries; all, however, recognise, in greater or less degree, the right of the State to assume the disposition of the estates of insolvents. In some countries, the system is coercive; in others, voluntary; and in some, a mixture of both; but all unite in limiting the power of the insolvent in regard to the absolute disposition of his estate. The laws which have relation to the estates of insolvents, and tend to prevent the unequal or unjust dispositions of such estates, are a part of the insolvent system of the State.

Whatever relates to the insolvent system of the State depends exclusively upon the *lex fori*.

If the insolvent or bankrupt laws of a foreign country or State are not permitted to have any extra-territorial efficacy, for the reason that every State must determine for itself the best mode of administering the estates of insolvents, with how much more reason should we refuse to permit a citizen of a foreign State voluntarily to make such a disposition of his property in this State, at variance with our insolvent laws?

The cases of insolvency and of administration are similar in principle in this respect.

Let us now consider the decisions that have been made on this subject in sister States:

[Mr. Morrell then examined the following cases:

Massachusetts: 13 Mass., 146; 6 Pick., 286; 19 Pick., 281; 15 Pick., 11; 19 Pick., 105.

Connecticut: 14 Conn., 555; 9 Conn., 487.

New Jersey: 1 Green, 326.

Missouri: 6 Missouri, 302.

Pennsylvania: The precise point does not appear to be adjudicated, although there are floating dicta adverse to the principle contended for. 3 Harris, 91; 6 Harris, 185; Caskie *v.* Webster, Wallace, jun.

Maryland: 7 Gill, 446, where the court states the condition of the question upon the State authorities at that time (1848–'9) to be as follows:

The States which had determined against the validity of the releasing clause were stated to be New York, Ohio, North Carolina, Mississippi, Missouri, Alabama, Connecticut, and Illinois.

In favor of the validity, Pennsylvania, Virginia, South Carolina, Massachusetts, New Hampshire, and Maine.

Virginia: 8 Grattan, 457.

Since the decision in Abbert *v.* Winn, New Jersey has acceded to the States holding such assignments void.

Varnum *v.* Campbell, 1 Green, 326.

Rhode Island should be added to the States sustaining the clause. At the present time, the States whose systems of jurisprudence forbid such clauses are New York, Ohio, North Carolina, Mississippi, Missouri, Alabama, Connecticut, Illinois,

Pennsylvania, New Hampshire, Maine, Maryland, and New Jersey.

On the other side stand Rhode Island and South Carolina, side by side. Virginia is bound, contrary to the opinions of her jurist, to an erroneous course of decision, and thus, on a question of authority, throws her weight against, rather than in favor of, the Rhode Island and South Carolina doctrine.]

SECOND POINT.—The assignment to J. & F. being void by the laws of the State of New York, the appellants were entitled to a decree in the court below for an account of the property, or the proceeds thereof, which came into the assignee's hands from the State of New York, such being the remedy allowed by the State of New York, and, consequently, the appropriate remedy to be allowed under their bill.

First. In a case arising exclusively under the laws of the States, and where the Circuit Court obtains jurisdiction solely through the residence of the parties to the controversy, the *lex fori* is carried into the Circuit Court with the case, and the same remedy is to be allowed, which, by the *lex fori*, is appropriate to the case.

Second. Had this case been carried to a decree in the New York courts, the appellants would have been entitled to an account against the assignees, as above stated. There are two remedies allowed in the courts of equity of that State to a judgment creditor, for the purpose of reaching the estate of his debtor, and applying it in satisfaction of his judgment.

[The other subdivisions are necessarily omitted.]

IV. The conveyance of the proceeds of this sale into the State of Rhode Island does not relieve the assignees from liability to the New York creditors.

The removal of the assigned estate beyond the jurisdiction of the courts of the State of New York was in itself an act of bad faith. If the act of Waterman in assigning was an illegal act, that of the assignees in carrying the assets of the estate to Rhode Island was equally illegal. How, then, can the assignees shelter themselves behind an act of wrong? They say that the claims of other creditors have attached to the fund; if so, it is through their wrong that the complainants have lost their remedy.

It is quite clear that this would have been no justification, had the assignees been citizens of the State of New York; nor can their citizenship of Rhode Island protect them in New York for an act of wrongful intermeddling with the estate of an insolvent in New York, in fraud of New York creditors.

It is not alleged by the respondents, that, previous to the filing of the bill, they had received of Hill, Carpenter, & Co., more than the notes representing 33½ per cent. of the appraised value of the property appertaining to the mill. The presumption is, that the balance had not been paid. The presumption is, also, that the property transferred to Hill, Carpenter, & Co., consisting of the machinery, goods, and stock, at the Owasco Mills, Auburn, New York, remained in that State until the filing of the bill. These presumptions are not repelled by either allegation or proof to the contrary.

The sale to Hill, Carpenter, & Co., being, as we have seen, colorable, the property remained in the assignees, and must be presumed so to have remained at the filing of the appellant's bill.

V. The supposed equities of Rhode Island creditors, arising from the pretended transfer to that State, offer no proper answer to the appellant's demand of a decree.

The counsel for the appellees made the following points, which the reporter is obliged to give, without the arguments to sustain them.

Point First.—The assignment was valid *inter partes*, and the assignees legally acquired, and legally translated to Rhode Island, the property covered by it.

1. The assignment was valid *lege loci*. (See Point IV, 2, *b*.)

2. It was also valid by the law of the State of New York, until its invalidity had been judicially declared.

3. The action of the assignees in reducing the property to their possession, and removing it prior to such judicial declaration, cannot be impeached.

Henriques *v.* Hone, 2 Edwards Ch. R., 120.

Mills *v.* Argall, 6 Paige, 577.

Porter *v.* Williams, 5 Selden, 149, and cases there cited.

Averill *v.* Loucks, 6 Barb. S. C. R., 477.

POINT SECOND.—The appellants had not, at the time of filing their bill, acquired that lien upon the estate which is an indispensable prerequisite to the granting of the relief sought.

POINT THIRD.—The relief sought by the appellants cannot be granted consistently with the rights of other creditors of Waterman, who are not now before the court.

POINT FOURTH.—A conflict between the *lex fori* and the *lex loci* does not necessarily or properly arise. The important element of a *conflict of lien* is wanting. The *lex fori* can operate upon the persons only of the defendants; the property, the subject-matter of the controversy, is not within its jurisdiction.

It is only in cases of rival claimants to property within the jurisdiction of the *lex fori* that such a conflict can arise.

But if the question of the construction of the assignment is necessarily before the court, then, both upon principle and authority, it should sustain the assignment.

I. The question is one of law, and not of fact. By the Revised Statutes of the State of New York, (2 R. S., 138, sec. 4,) the question of fraud in an assignment is a question of fact, and, as such, is to be decided, first upon the evidence, and secondly by the language of the instrument.

a. The question of fraud in fact does not arise. The bill is verified, and calls for an answer under oath. The answers are fully responsive to all the charges of fraud alleged in the bill, and, so far as they are responsive, are evidence for the defendants, to be taken as absolutely true, because not disproved.

Hough *v.* Richardson, 3 Story, 692.

Landon *v.* Goddard, 2 ib., 267.

b. When the question to be decided arises upon the language of the assignment, the question becomes one of law rather than of fact. Its answer determines the legal construction or effect of the instrument.

Cunningham *v.* Freeborn, 3 Paige, 557.

Sheldon *v.* Dodge, 4 Denio, 217.

Goodrich *v.* Downs, 6 Hill, 438.

II. The single question then presented for the decision of the court is: Is this assignment, upon its face, valid or fraudulent, within the State of New York? It must be borne in mind—

1. That the assignor and the assignees were neither citizens of nor residents in New York. They were citizens of Rhode Island, and residents of Providence.

2. That the assignment was not executed in New York, but was executed in Rhode Island, the domicil of the parties.

3. That by the laws of Rhode Island it is valid.

4. That it operated upon personal property only in the State of New York.

5. That the personal property is not within the jurisdiction of the *lex fori*.

6. That the parties proposing the question have no lien upon the property.

a. Personal property has no locality. It follows the law of the person. The disposition and transmission of it, either by succession or the act of the owner, are subject to that law. It cannot be legally acquired by another without the actual or constructive assent of its owner—actual, if he voluntarily surrenders it; constructive, when the law deprives him of it by a proceeding to which he is an indispensable party. Unless he is thus made a party, his title to his property cannot be divested. The law, therefore, can only reach his property through him.

Sill *v.* Worswick, 1 H. Bl., 690.

Pipon *v.* Pipon, Amb., 25.

Hence it follows that a transfer of property by its owner, whether *inter vivos* or *post mortem*, valid by the law of his domicil, will, if made before the law of another country has actually attached upon the property by a proceeding against its owner, be esteemed valid within every other jurisdiction where the property may be. (Story on Conflict of Laws, secs. 380, 383, 384.) The law of the domicil regulates the succession to and the distribution of the personal property of the intestate. (Ib.; Holmes *v.* Remsen, 20 Johns., 267.) He has a right to make a valid distribution of it *ante mortem*, and the same right to rely upon the law of the domicil as sanctioning that distribution, that his administrator would have as sanctioning a distribution *post mortem*. The right to the protection of the law of the domicil arises from the *residence* of the

owner of the property, not from his decease. If, then, the assignment is valid by the *lex domicilii* and by the *lex loci contractus*, it operated to pass a legal title to the assignees to the personal property in the State of New York.

b. The assignment is valid in Rhode Island. This is proved by the answer of the assignees, and by the decisions of the courts of that State.

Stewart *v.* Spencer, 1 Curtis R., 157.

Dockerry *v.* Dockerry, 2 R. I. Rep., 547.

Haydock *v.* Stanhope, 1 Curtis R., 471.

c. This court should interpret the assignment as it would be interpreted by the courts of Rhode Island, not only in compliance with authority, nor upon principles of comity only, but upon principles of justice. Contracts are to be interpreted by the *lex loci* to which the parties had reference when the contract was made. The integrity of the instrument where, as here, there is no fraud in fact, is to be tried by the law of the place of its execution. The universality of this rule, and its every-day application, render, in the case of an ordinary instrument, citations of authority unnecessary. Authority, however, is not wanting to show that the rule is equally applicable to the construction of voluntary assignments. In Brashear *v.* West, 7 Peters, 608, the assignment was made in Pennsylvania, and was attached in Kentucky, because it contained, among other things, a stipulation for a release by the creditors. Marshall, C. J., in his opinion, said: "But whatever may be the intrinsic weight of the objection, it seems not to have prevailed in the courts of Pennsylvania. The construction which the courts of that State have put upon the Pennsylvania statute of frauds must be received in the courts of the United States." So, also, in the case of Dundas *v.* Bowler, 3 McLean, 397, Mr. Justice McLean says: "The assignment, having been made in Pennsylvania, is governed by the laws of that State." And so this point is not open for discussion. The rule is too well established to be now shaken or disturbed.

Speed *v.* May, 17 Penn. St. Rep., 5 Harris, 91.

Adams *v.* Storey, 1 Paine's C. C. Rep., 100.

Bank of Augusta *v.* Earle, 13 Peters, 519.

Rainsdyke *v.* Kane, 1 Gall., 371.

Leroy *v.* Crowninshield, 2 Mason, 151.

d. If, therefore, this court shall construe the assignment as it would be interpreted in Rhode Island, it should affirm its validity, and protect the assignees in their possession of the property against the claims of the plaintiffs in this suit. The question of the construction of the assignment is not embarrassed by the presence of fraud in fact in its execution. The evidence and the decision of the court below are conclusive upon this point. The only remaining question, therefore, is upon the interpretation of the instrument itself, without reference to evidence, either of the acts of the parties or to the statute of Elizabeth as re-enacted in New York. That re-enactment makes the question of fraud in an assignment a question of fact; and, inasmuch as that fact is, upon the evidence, and upon the decision of the court below, eliminated from the case, the only possible question remaining is, by what law shall the assignment be interpreted?

1. In England, effect is given to the claims of foreign assignees as against creditors resident there, and this, whether the assignment be involuntary or *in invitum*.

Locke on Foreign Attachments, 36.

Sill *v.* Worswick, 1 H. Bl., 390.

Story on Conflict of Laws, secs. 408, 409.

2. The rule is not recognised to an equal extent in the United States. A distinction obtains here between bankruptcy *in invitum* and a voluntary assignment. Any extra-territorial effect is almost universally denied to an assignment made compulsorily under foreign bankrupt laws, while, to an assignment voluntarily made, *ex mero motu*, by a failing debtor, effect is or is not given, as the authorities of each particular State may require. These authorities are of course numerous, and, it is to be admitted, conflicting. Numerically, they uphold the assignment, and, in so doing, support the elementary principle already stated, and affirm the justness of the law which accords to a failing debtor the right to make such legal disposition of his property among his creditors as he may elect.

The rule sustaining the *lex domicilii* and the assignment, to which all the authorities refer, is thus stated by *Story* in his *Conflict of Laws*, sec. 111: "It is therefore admitted that a voluntary assignment by a party, made according to the law of his domicil, will pass the personal estate, whatever may be its locality, abroad as well as at home." The distinction is also alluded to in the case of *The Watchman*, Ware, 240: "The law separates that which is derived from the public power from that which comes from the will of the party. Tried by this principle, if the assignment of the debtor in the present case is valid in Massachusetts, it is valid everywhere, and operated a transfer of his property wherever situated, for the transfer was made by the simple will of the owner, and not by virtue of the public power, as in the case of bankruptcy."

The counsel then cited the following authorities:

New Hampshire: Sanders *v.* Williams, 5 N. H. Rep., 213; Sanderson *v.* Berford, 10 N. H., 260.

New Jersey: Frazier *v.* Fredericks, 4 Zab., 162.

Massachusetts: 19 Pick., 105, where an assignment was held valid, notwithstanding the courts of Maine, in Fox *v.* Adams, (5 Greenleaf, 245,) had decided that an assignment in Massachusetts did not debar a Maine creditor from attaching property of the estate in Maine.

Connecticut: Atwood *v.* Protection Insurance Company, 14 Conn., 555.

New York: Holmes *v.* Remsen, 4 John. Ch. Rep., 460; Same *v.* Same, 20 John. Rep., 266; 3 Wend., 566; 23 Wend., 87, following Judge Platt's decision, but recognising the distinction between voluntary and involuntary bankruptcy; 3 Sandford S. C. R., 316; 1 Selden, 353; unreported case of Carnley *v.* Tuckerman, N. Y. Sp. Tr. 1 Judicial District.

Pennsylvania: Milne *v.* Morton, 6 Binney, 353; Speed *v.* May, 17 Penn. St. Rep., 5 Harris, 91; Law *v.* Mills, 6 Harris, 186.

South Carolina: Green *v.* Mowry, 2 Bailey, 163.

Louisiana: The U. S. *v.* Bank U. S., 8 Rob. L. Rep., 262, 413; Richardson *v.* Leavitt, 1 Lou. Am. Rep., 430.

Wisconsin: 6 Law Register, 737.

Courts of the United States: The Watchman, Ware, 232, the court felt constrained to carry out the doctrine in Fox *v.* Adams, 5 Greenleaf, 245; 3 McLean, 397; Caskie *v.* Webster, 2 Wallace, 132.

Supreme Court of the U. S.: 12 Wheat., 213, where the court recognises the doctrine in 5 Cranch, 298; 7 Peters, 608; 13 Peters, 519; 3 Howard, 483.

None of the authorities cited by the appellants authorize the granting of the relief prayed for by them. Ingraham *v.* Geyer (13 Mass., 146) turned upon the point that the attaching "creditor had actually seized the debt before it was paid over to the assignees." As the complainants here have no lien, the principle of this decision, if there be any in it, does not apply. Blake *v.* Williams, 6 Pick., 285, reaffirmed the distinction between voluntary assignments and those made *in invitum*, and decided nothing beyond such reaffirmance. The court, commenting upon Ingraham *v.* Geyer, says that a decision against the operation of an assignment *in invitum* does not draw after it the inference that an assignment made by the debtor himself, lawful in the place where made, would be unavailing. And the case of Le Chevalier *v.* Lynch (Doug., 161) affirms the necessity of an attachment before the assignees have acquired possession. The Fall River Works *v.* Croade (15 Pick., 11) decides, that if creditors elect to become parties to the assignment, and their debts amount to as much as the assigned property, this will complete the intended consideration, render the conveyance effectual even against other creditors, and vest in the assignees the whole property. This rests upon the principle that an insolvent debtor has a legal right to convey his estate to whom he pleases for a valuable consideration, although it may benefit some and prejudice others of his creditors. The answer of the assignees states that, with one exception, all the creditors of Waterman residing in Rhode Island, and many of the creditors residing out of that State and in New York and elsewhere, have complied with the conditions of said assignment, and become parties thereto by releasing Waterman; and that the claims of such releasing cred-

itors, and the dividends to which they are entitled, far exceed in amount the sum which the said assignees now hold, and the claims also exceed the value of all the assets of the assigned estate.

Varnum *v.* Camp (1 Green, 326) recognises the necessity of a positive law to defeat the assignment, and relies upon the statute of New Jersey, which declares an assignment like the one in that case to be absolutely void. The statute of New York vitiates an assignment for fraud only, and leaves the instrument valid *inter partes* until declared void. There is no fraud in fact in this case, and no "positive statute law" like that of New Jersey, and so the assignment is good, unless avoided for fraud in law, necessarily to be presumed from its language. This cannot be presumed in this case, because the instrument is to be interpreted *lege loci*, and by that law it is valid.

In the case of Fox *v.* Adams, (5 Greenleaf, 245,) the first point decided by the court is, that the debt sought to be trusteed had not passed to the assignees under the assignment, and all the law of the case adverse to the defendants here is disposed of in a paragraph of a dozen lines, and solely upon the authority of Ingraham *v.* Geyer.

Brown *v.* Knox (6 Mo., 302) decides nothing upon principle, and refers to no previous authority. The case is eminently unsatisfactory, from the absence of any reason for the decision of the court. In this case, also, the property was in Missouri, and was attached by the plaintiff.

Breine *v.* Patten, (17 La. Rep.,) as explained by the case of the United States *v.* The Bank U. S., (supra,) turned upon two points: First. It did not appear that the assignment was valid *lege loci*. Second. It was not clear that the property was in the possession of the assignees.

The examination of all these cases discloses:

First. That in no case have the claims of the assignees been disregarded, when the property covered by the assignment has become vested in them, and they have transmitted it beyond the jurisdiction of the court whose aid is invoked by the attaching creditor, before he has acquired any lien upon it.

Second. That when the assignment is proved to be valid by the *lex loci*, principle and the weight of authority require that it should be sustained; the cases refusing to sustain it proceeding rather upon the ability of the court to make the decision, than upon the general principle before cited, or in conformity with the weight of previous adjudication.

POINT FIFTH.—Our argument has thus far proceeded upon the ground that the presence of the stipulation for a release in the assignment *ipso facto* rendered the instrument void. But it is not intended to be conceded that such is the effect of that stipulation.

1. The English cases do not hold such an assignment void.

Jackson *v.* Lomas, 4 T. R., 166.

The King *v.* Watson, 3 Price, 6.

2. There is a conflict in the decisions of the local courts of the several States, as to the effect upon an assignment of a clause requiring a release.

In Massachusetts, New Hampshire, (Hawes *v.* Richardson, 5 N. H., 113, before the statute of that State,) Pennsylvania, Virginia, South Carolina, Alabama, and Rhode Island, the assignment is held valid; and in New York, Ohio, Missouri, Connecticut, Maine, and Illinois, it is held to be void. (1 Am. Lead. Cas., 94, 95, and cases there cited.)

In Pierrepont *v.* Graham, (4 Wash. C. C. R., 232,) the assignment was upheld, and the decision in this case was followed by Judge Story in Halsey *v.* Whitney, (4 Mason, 206;) and in the case of Brashear *v.* West, (7 Peters, 608,) where the assignment excluded from the benefit of its provisions all creditors who should not within ninety days execute a release, the court, after stating the many reasons why such a stipulation is not *per se* evidence of an intent to hinder, delay, and defraud creditors, and how inefficacious it would be if such were the intent, decide, as we have already shown, that the construction which the courts of the State in which the assignment was made have given to the instrument must govern the construction to be given to it by the courts of the United States.

3. If, therefore, looking at it as an original question, the court is satisfied that the assignment is not upon its face void,

it must, in the absence of evidence of fraud in fact, affirm its validity; but if, on the other hand, the court is of opinion that the question of the construction of the assignment is not an open question, but is to be decided by reference to local law, the court then must follow the decision in Brashear *v.* West, and adopt the construction given by the courts of Rhode Island, and thus, also, the assignment must be sustained.

Mr. Justice WAYNE delivered the opinion of the court.

This bill was filed by the appellants in the Circuit Court of the United States for the southern district of New York, as judgment creditors of the respondents, Waterman & Samuel Harris, to avoid an assignment made by Waterman to the respondents, Jenckes & Farnum, in trust for the payment of the creditors of Harris & Waterman, and of Waterman individually.

The appellants seek to avoid the assignment, on the ground that it was voidable, from its tending to hinder, delay, and defraud creditors; because there is a reservation in it to the assignee of the dividends of such creditors as should refuse to become parties to it, and to release their demands in consideration of the dividends they might receive. It appears that a large amount of the property conveyed was in the State of New York; that the appellants resided there, and that they were then creditors of Harris & Waterman. The trusts in the deed were, first, to pay the expenses of the assignment; secondly, to pay the debts of several preferred creditors of Harris & Waterman, and of Waterman individually; and, thirdly, to pay all the residue of the debts of Waterman individually, and as a member of the firm of Harris & Waterman. The assignment contained the following proviso: "Provided, That none of my said creditors named in the third class of this assignment shall be entitled to receive any dividend or benefit under the deed of assignment, unless they shall execute and deliver to my said assignee, within six months from the date hereof, a full release and discharge, under seal, of all their claims and demands against me, the assignor; but the dividends on the claims and demands of the creditors who shall not execute

such release shall be paid over to me, the said assignor, or to such person as I shall appoint."

It appears that Harris, the copartner of Waterman, had given to the latter a bill of sale of all their partnership property; that the firm was then dissolved; that Waterman had the possession of it, and that he afterwards made the deed of assignment to Jenckes & Farnum. Now, Jenckes & Farnum received and held the property under the assignment, as well that which was in New York as all that was elsewhere. A part of the copartnership property was the Owasca Lake mill, situated at Auburn, Cayuga county, State of New York, and it is admitted that it exceeded in value the debt due by Harris & Waterman to the complainants. As to that property, James Fitton was a copartner; but it appears that he joined with Harris & Waterman in dissolving the copartnership, and in authorizing Waterman to "settle up" its business, having on the same day agreed that Harris should convey to Waterman the bond and mortgage which he had given to Harris & Waterman for the purchase-money due by him for an undivided fourth part of the Owasca Lake mill. Thus Waterman was made the sole owner of it. He supposed himself at that time to be solvent, and that he could carry on the business of the mill, and worked it for some time; but finding himself unable to do so, he conveyed it to Jenckes & Farnum, with all the other property of the late concern which had become his, with the intention that they should, as his assignees, make an equitable distribution of it among his creditors; and, in his answer to the bill of the complainants, he declares he did so without any fraudulent intent to hinder, delay, or defraud creditors. Waterman had been, was then, and was when he made the assignment, a citizen of the State of Rhode Island. The property assigned was in different States. Jenckes & Farnum accepted the trusts of the assignment. Waterman ceased to have any control over it, and, for aught that appears, the assignees have executed their trust unimpeachably. After the assignment was made, the complainants obtained, in the Supreme Court of New York, a judgment upon their demand against Harris & Waterman.

They have now brought their bill as judgment creditors

against Waterman and Jenckes & Farnum, the assignees, to avoid the assignment; alleging that they have a lien upon the property in New York, or its proceeds, as creditors of Harris & Waterman, because Waterman's assignment to Jenckes & Farnum contained a reservation to the assignor, which, by the laws of New York, was fraudulent. And so it would have been, had the assignment been made in that State, by persons residing there. But the assignment was made in the State of Rhode Island, by a person and to persons residing there, and is in every particular just such a one as, by the laws of that State, merchants and others in failing circumstances, residing there, are allowed to make in favor of creditors within that State and those residing elsewhere, wherever the property of the assignor may be. We see no cause for thinking it was fraudulently made. The respondents deny it upon their oaths, as responsively to the charge made by the complainants as that can be done. The latter have not sustained their charge by any proof whatever. For that cause alone, if there was no other, we should concur with the circuit judge in the decree given by him in this case. And we also concur with him, that the complainants never acquired nor ever had any lien upon the property in New York, so as to subject it legally or equitably to their demand against Harris & Waterman, either before or after it was carried into judgment in the Supreme Court of New York. Deeming the grounds stated decisive of this controversy, we abstain from a discussion of other points learnedly and ably argued by the counsel in the cause in their respective printed briefs. They were appropriate to the cause, but we do not deem them necessary for the decision of it.

We direct the affirmance of the decree given in the court below.

FREDERICK L. BARREDA AND PHILIP BARREDA, PLAINTIFFS IN ERROR, *v.* BENJAMIN H. SILSBEE, JOHN H. SILSBEE, BENJAMIN W. STONE, WILLIAM STONE, GEORGE T. SANDERS, AND WILLIAM D. PICKMAN.

Where a vessel was chartered to bring a cargo of guano from the Chincha Islands to the United States, at the rate of twenty-five dollars per ton freight, with a