

Clerk's table

New Jersey Court of Errors and Appeals.

JASPER GARRETSON, plaintiff in error,	}	<i>Writ of error to Supreme Court of New Jersey.</i>
vs.		
JOHN J. BROWN, assignee of THOMAS		
C. BROWN and HENRY DEMAREST, defendant in error.		

RANSOM & BROWN, *Attorneys for plaintiff in error.*

ABRAHAM O. ZABRISKIE, *Attorney for defendant in error.*

This case was removed into the Supreme Court of New Jersey by writ of error to Hudson County Circuit Court, returnable at the term of March, A. D. 1856.

The following is a statement of the case containing a copy of the bill of exceptions, taken on the trial in the Hudson Circuit Court, and the assignment of Errors in the Supreme Court.

SUPREME COURT OF NEW JERSEY

New Jersey Court of Errors and Appeals

John G. Garrison, Plaintiff in error,
vs.
J. Brown, assignee of Thomas
J. Brown, and Henry Johnson,
Defendants in error.

John G. Garrison, Plaintiff in error,
vs.
J. Brown, assignee of Thomas
J. Brown, and Henry Johnson,
Defendants in error.

The case was removed into the Supreme Court in
the year of our Lord one thousand eight hundred and
thirty and of our Independence the hundred and
thirty-ninth.

The following is a statement of the case containing a copy
of the bill of exceptions taken on the trial in the Circuit
Court, and the assignment of errors in the opinion of
the Court.

SUPREME COURT OF NEW JERSEY.

JASPER GARRETSON, plaintiff in error,

vs.

JOHN J. BROWN, assignee of THOMAS C. BROWN, and HENRY DEMAREST, defendants in error.

} Writ of error to Hud-
son County Circuit
Court.

STEPHEN B. RANSOM, *Attorney of plaintiff in error.*

ABRAHAM O. ZABRISKIE, *Attorney of defendant in error.*

This is an action of trespass brought by the defendant in error against the plaintiff in error, in the Hudson County Circuit Court. The action was commenced by summons, returnable the fourth day of December, A. D. 1854.

The declaration contains one count, which charges, that the said Jasper Garretson, on the thirtieth day of October, A. D., 1854, at Jersey City, in the county of Hudson, with force and arms, seized, took and carried away, certain goods and chattels of the said plaintiff, (the same being a stock of dry goods) enumerating and describing them as the entire stock of store goods in the store at number forty-one Montgomery street, in Jersey City, known as Brown and Demarest's store, of the value of \$10,000, and laying plaintiff's damages at \$10,000.

To this declaration the said Jasper Garretson filed four pleas in bar, viz :

1st Plea. The general issue.

2nd Plea. That the said Jasper Garretson, as sheriff of the county of Hudson, took the goods in question as the property of the said Thomas C. Brown and Henry Demarest, by virtue of an execution in his hands issued on a judgment in the Circuit Court of the County of Hudson, in favor of Richard Hilliard, William H. Hayes, Richard H. Hopkins, and Richard Hilliard, junior, partners, &c., against Thomas C. Brown and Henry

Demarest, entered on the 4th day of November, A. D., 1854, for \$554.27.

3d Plea. That he took the goods as such sheriff by virtue of another execution in his hands against the said Brown and Demarest, in favor of Lewis O. Wilson, George W. Gashein, and Samuel M. Waller, issued on a judgment in the Circuit Court of the county of Hudson, entered on the second day of November, A. D. 1854, for penalty of bond, \$6,670.84, and \$4.00 costs, on which was endorsed a direction to levy the sum
10 of \$3,335.97 of debt, the real sum due, and \$4.00 costs, and \$1.00 costs of said execution, the said goods and chattels then being the goods and chattels of the said Thomas C. Brown and Henry Demarest.

4th Plea. That he took the goods and chattels in question by virtue of another execution in his hands as such sheriff, in favor of the said Richard Hilliard, William H. Hayes, Richard Hopkins, and Richard Hilliard, junior, partners, trading under the name, style and firm of Hilliard, Hayes, Hopkins and Company, against the said Brown and Demarest, issued on another
20 judgment in favor of the said Hilliard, Hayes, Hopkins and Company, against the said Brown and Demarest, in the Circuit Court of the county of Hudson, for \$815.94 of debt, and four dollars of costs, which execution is endorsed with a direction to levy the real sum due, \$407.94 of debt, and \$4.00 of costs, the said goods and chattels then being the property of the said Brown and Demarest.

The replication joins issue on the first plea, and as to the second, third, and fourth pleas, denies that the goods and chattels in the said declaration mentioned and described were the
30 goods and chattels of the said Brown and Demarest, on which issue is joined.

The cause was tried at the term of January, A. D., 1856, of the Circuit Court of the county of Hudson, and a verdict rendered for the plaintiff on both issues, and his damages assessed at the sum of \$6,902.31, for which amount final judgment has been entered. Judgment was signed February 4th, A. D. 1856,

On the trial of this cause before his Honor, Elias B. D. Ogden, Judge of the Circuit Court of the county of Hudson, the following bills of exception were allowed and sealed.

Be it remembered, that at a Circuit Court, held at North Bergen, in and for the county of Hudson, on the tenth day of January, in the year of our Lord one thousand eight hundred and fifty-six, before his Honor, Elias B. D. Ogden, Judge of the said Court, according to the form of the statute in such case made and provided, came on to be tried the several issues joined by the pleadings in the above stated cause (*pro ut* the 10th said pleadings and issues) at which day, before the said judge, came as well the said John J. Brown as the said Jasper Garretson, by their respective attorneys aforesaid, and the jurors of the jury aforesaid being called likewise, came and were sworn to try the said several issues in manner aforesaid, respectfully joined, and therefor to maintain the said issues joined, the said plaintiff called as a witness, the said defendant—

Jasper Garretson, who being duly sworn, did testify as follows—

I levied upon and took possession of the goods formerly belonging to Brown and Demarest, in Jersey City, on the sixth day of November, 1854; I had a number of executions; I levied under all at the same time; I took all the goods in the store and made a regular inventory; I afterwards sold them; I was indemnified; I will not be positive; I was indemnified before I made the levies; I sold out the goods.

And being cross-examined, said—

Thomas C. Brown was in the store when I made the levy; there were several clerks there, cannot say how many; clerks were there same as before the levy; I saw no change in the 30th possession from what it had been before; I was in within two weeks before I made the levy; I usually saw Thomas C. Brown in the store. The goods were decreasing in quantity very rapidly; I cannot tell what proportion was gone; I should think half the goods had gone in a month. The goods were a great many remnants and old styles; principal part of the valuable

goods were gone; I should think they brought a fair price for such goods. I had them appraised by competent men; I took the precaution to get such men. They were appraised by James Gopsill, Alderman Samuel R. Tyrrell, and Samuel A. Hopkins. They were acquainted with dry goods. I was frequently past there before I levied, but not within ten days. There were a great many persons in there buying goods. They were running them off very fast.

The plaintiff offered in evidence the record of a deed of assignment from Thomas C. Brown and Henry Demarest to John J. Brown, dated October 18th, 1854, and recorded same day in Book 41 of deeds, in Hudson county clerk's office, page 461, together with the inventories and other papers annexed, (*pro ut* the said record.) (See Appendix, plaintiff's exhibits.)

The defendant, by his counsel, objected to the admission of this record in evidence on the ground that it appeared upon its face to be fraudulent and void, in that it referred to and sanctioned several illegal preferences.

And his Honor, the Judge, having delivered his opinion that the said deed upon its face was legal and in due form, and was good and admissible in law, upon the said issues admitted the said record to be read in evidence to the jury, expressly reserving his views upon its legal effect.

To which opinion of the said Judge the defendant, by his counsel, excepted, and prayed that this his bill of exceptions might be sealed, and it is sealed accordingly.

E. B. DAYTON OGDEN, Judge. [L. s.]

Jacob R. Wortendyke, another witness produced and sworn on the part of the plaintiff, did testify as follows:

I saw three advertisements of this assignment; they were all published before the first of November, 1854; one was published in "The Jersey City Sentinel," one in the "Hudson County Democrat," and one in the "New York Daily Times;" they were inserted three weeks; I saw the insertions at the end of that time.

The said notices were read in evidence to the jury (*pro ut* the same.)

Thomas C. Brown, another witness produced and sworn on the part of the plaintiff, did testify as follows—

I was a member of the firm of Brown and Demarest; *Thomas C. Brown* and *Henry Demarest* composed it; I was in the store when the sheriff took the goods; those were the goods that formerly belonged to *Brown* and *Demarest*; they were the same goods included in the assignment; there were no goods there that were not in the assignment, or that did not belong to *Brown* and *Demarest* at the time of the assignment; two hundred and fifty dollars were all the sales made after the assignment, till the sheriff levied; one hundred and fifty-one dollars and twenty-one cents is all that was sold; after the assignment *Mr. John J. Brown* came and told me to take charge of the goods and sell them; he came there and took possession; *Mr. Crowell* was there; I don't know whether *Demarest* was there or not; *John J. Brown* lives at *Paterson, New Jersey*; he is my brother; he lives in *Paterson*; he did not continue in the store after the assignment; he is a merchant; he told me to employ what assistance I wanted to dispose of the stock, which I did; *Demarest* did not continue there after the assignment; *John G. Crowell* and *Charles Trimmer* were employed; I know that he acted by advice of counsel in employing us to sell the goods; there was an account of the daily sales; the amount of the sales, not the items; the proceeds were handed over to the assignee. The assignee was there every week after the assignment till the levy; the levy was made the fourth or fifth of November. *Mr. Demarest* had continued in the store up to the assignment; after the assignment he took a situation in *New York*.

Before I made the assignment, and about that time, an inventory and appraisement of goods was made; it was made by *Mr. Demarest*, the clerks, and myself; the value by that inventory was six thousand six hundred and eighty dollars and seventy cents. All the goods were there at the levy, except the one hundred and fifty dollars sold.

I have been in the dry goods business since 1848. The goods were appraised below cost considerable; the majority of the goods were appraised below cost; none above cost. We bought the goods cheaper than merchants from a distance; we have that reputation. We appraised them on an average of 30 per cent. below cost. There were not many old goods, unmarketable; any thing like that was put in at a mere nominal value. The object of that was we obtained a settlement that was to be the basis of my proceeding in business again; I mean a settlement with my creditors. This appraisement was made with a view to making such a settlement; it was with a view that I could buy them and make something on them. It was with a view of my going on alone. The amount of that inventory was submitted to my creditors; I went to them individually. There was an offer to buy the goods at that price, and the creditors take the money and release me, and I go on in business again; I had the willingness and offer of responsible friends to endorse paper for that amount, and let me have the goods. I was to take all the assets, stock, notes and book accounts on this basis; I was to pay them so much on the dollar. I offered to take the assets, stock, book accounts, bills receivable, and pay the sum of thirty-five cents on the dollar. The goods at that time were worth to me the price put down in the appraisement to sell them. The thirty-five cents on the dollar would amount to just about the same as the assets. L. O. Wilson and company were consulted about making the assignment; also Hilliard, Hayes, Hopkins and company, before it was made. I spoke to them in reference to my brother being the assignee. L. O. Wilson and company said they would be happy to have him assignee, knowing him to be a business man; my brother spoke to Mr. Gashein about his being assignee; he approved of it. I don't remember that Mr. Gashein expressed any opinion about my making an assignment. This was a very few days before the assignment was made. Mr. Gashein knew how our affairs were situated at that time; he knew the amount of our assets and debts. A statement had been submitted to them; the value of the goods at the appraisement was mentioned to them; they knew that I and my friends

would take the goods at that price. I spoke to Hilliard, Hayes, Hopkins and company before the assignment; I told them that we were trying to get a settlement, and we would have to make an assignment; I told them who I intended should be the assignee; I don't know that they said any thing; they said nothing against it; they knew of the valuation of goods and my offer to take them at that price; they made no remarks about that valuation that I remember. The bond to L. O. Wilson and company, on which judgment was entered, was executed after the assignment. Hilliard, Hayes, Hopkins and company's 10 bond was executed after the assignment; they both knew of the assignment when the bonds were executed; those bonds were executed at their own request; they urged them; I objected to confessing the judgment; there was nothing said about the assignment when the bonds were executed; I told them I did not wish to do it, for I supposed they wanted to take some advantage; I told them this; they said they merely wanted it settled up and off their minds. The bonds and warrants were both executed at the same time; each one acted separately in getting the bonds; I do not know that they each 20 knew of the others getting a bond. Mr. Gashein and Hopkins, of the firm of L. O. Wilson and company, treated with me about the judgment. About Hilliard, Hayes, Hopkins and company's bond, I was negotiated with by Mr. Hopkins; I believe the sheriff levied the next day after the bonds were executed; I know the evidence of bad faith came very soon after I did it. The sheriff took the key and put his own men there, and put us all out.

And being cross-examined by Mr. Gilchrist, said—

I was sued about a month before I made the assignment; I 30 have been examined before on the subject of our failure; the claim of Hilliard, Hayes, Hopkins and company is the first claim that was sued; it was not immediately after they sued us that I talked with them about the assignment; I think the conversation of Hilliard, Hayes, Hopkins and company was between the 13th of September and the assignment. On the twenty-first of September, A. D., 1854, I made an inventory of stock; it amounted to the sum of nine thousand seven hundred

and sixty-five dollars and forty-two cents; that was exhibited to creditors about the time it was closed; it must have taken two or three days to make it; it was exhibited to L. O. Wilson and company, and to Hilliard, Hayes, Hopkins and company; it was taken for the purpose of ascertaining what we could pay; then the offer to our creditors was forty cents on the dollar; I went alone a part of the time; Mr. Demarest went a part of the time; I did not suggest at that time that my brother should be an assignee; nothing was said about an assignment

10 at that time; I don't know that we said any thing about our assignment from the start, unless we were compelled to; I suppose it was my intention that no creditor should have any advantage over another; this was our intention from the beginning. Pharo and Dolson were creditors at the time of our failure to the amount of six thousand dollars; I saw Mr. Gashlein frequently in our store; I think we were sued the very next day after our paper was dishonored. After the thirteenth of September we sold cheaper; we put placards in the windows, "selling below cost;" our sales were large; one or two

20 days as high as three hundred dollars; the name of Brown and Demarest was placed over the door; our individual names were in the windows; I think the old sign continued till Mr. Seuy's name was put up; Mr. Seuy went in on the ninth day of December, A. D. 1854; I can't say how long the placards were in the window after the assignment was made. After the assignment was made the sales fell off instantly; I account for that because I suppose there was not so much show made; we did not exert ourselves as much to get the goods off; we had in view to sell them in a lump, as I was trying to purchase the

30 goods and settle with our creditors; that is one reason why my exertions were not so much directed to sales; I was trying to sell them to Mr. Seuy. The inventory annexed to the assignment was commenced the eleventh day of October; that took three days. The assignees account of the sales follows the sales in the book before the assignment; I kept the book and entered what cash I received; the sales after the assignment amount to as follows:

20th of October, A. D., 1854, received	\$4.00	
24th " " " " "	34.00	
25th " " " " "	27.50	
26th " " " " "	24.64	
27th " " " " "	34.36	
28th " " " " "	27.78	
30th " " " " "	13.30	
31st " " " " "	15.30	
1st of November, " " "	15.00	
2nd " " " " "	13.40	10
3d " " " " "	33.00	
\$242.28		

This was the result of our efforts, the three of us; I very frequently advised with John J. Brown about our affairs; I consulted with him after our failure; neither spoke of an assignment; we were then trying to get a settlement; John J. Brown was asked to be assignee about this time, and before the inventory of October the eleventh; I think there was no assignment drawn before the eleventh; I called on Hilliard, Hayes, Hopkins and company; my object was to make something on the 20 goods. Between the inventories we had disposed of a large amount of goods.

The following question was then asked:—Have not you and Mr. Demarest, between the twenty-first day of September and the eleventh day of October, drawn out of the proceeds of sales between those times large amounts of money, each for his individual account? Answer—No sir. We drew out enough to pay our individual debts; that was we drew out four hundred or five hundred dollars in that time, (each of us;) the entry of October the third in cash book is, paid four hundred and 30 seventy eight dollars to me; I don't know the amount drawn out by Mr. Demarest. This book is the cash book of Brown and Demarest (*pro ut* the said cash book.) It contains all the cash transactions; it balances; by this book it appears, Brown and Demarest on the eighteenth day of October, had no money to hand over to the assignee. If we deposited money in the

bank we made an entry of it in this book, or charged it as if paid for our debts. I believe the bank paid a note to Williams, Bradford and company September nineteenth; paid Williams, Bradford and company five hundred and thirty-seven dollars; it was paid contrary to our orders; we had told the bank not to pay it; it is charged in the cash book as so much paid; Mr. Demarest made the charge; it is the same note the bank paid; I don't know why it was charged as paid out of the drawer. There is an entry in the cash book of October seventh "cash
 10 short" two hundred and forty dollars; I made that entry; I can't say when it was made, evening or morning; I can't tell how long before the deficit occurred; it may have been two weeks before, as I did not sometimes compare for that time; I discovered the loss. We kept the following books, viz: day book, ledger, invoice book, cash book, bank book, note book, receipt book, memorandum book of merchandize wanted, and stock book.

Between our failure and the assignment we sold a little over three thousand dollars worth of goods, and received^d considera-
 20 ble on old debts. The cash book shows what was done with it. There was some money received^d for old debts, but the whole, with proceeds of sales, would^d not amount to over \$3000. Between our failure and^d the assignment the firm borrowed and loaned a large amount of money; we were more lenders than borrowers; the money we loaned was paid back to us before the assignment; last payment in cash book is to Mr. Gilbert; that entry is October seventeenth. Paid to Mr. Gilbert, confi-
 30 dential, fifty-nine dollars and ninety-eight cents for money loaned to us by him confidentially; transferred to him also a note or notes; can't say what amount; our only object was to see that our confidential debts were paid for money loaned to us; that if we had to make an assignment they should not come in under it; we paid Erastus Randal; we paid Pharo and Dolson three thousand dollars; they were all confidential creditors; they were paid by Mr. Demarest. He owned a house; it was transferred to them, and with the house two notes as collateral; the two named in the assignment; they came in under the assignment for another three thousand dollars;

We paid a note endorsed by Ford, and held by Bonnell, Brown, Hall and company; it was paid October second; the amount of it was two hundred and eighty-eight dollars and fifty-five cents; our object was that Mr. Ford should not lose by us.

Both of us were book-keepers; Mr. Demarest kept the invoice book; I kept the sales book; he knew best the liabilities, and I best knew the assets; we both knew very well how the accounts stood. Mr. Demarest attended to the business in New York; the invoice book is the amount of goods bought in New York; if we bought a bill of Pharo and Dolson we credited it on the invoice book. I submitted a statement to creditors in which Pharo and Dolson were stated to be creditors to the amount of three thousand dollars before and after the assignment. In the first statement I submitted, Pharo and Dolson were stated to be creditors to the amount of three thousand dollars; the first statement was submitted a week after the inventory of the twenty-first of September, A. D., 1854; I judge it was not longer than a week; I should think about a week; I have stated that I did not think our indebtedness to Pharo and Dolson at the time the note was protested as much as six thousand dollars; they had told us they would not sell us beyond a certain sum unless we would consider it confidential; the subject of Pharo and Dolson's indebtedness was not so much in my knowledge as in Mr. Demarest's; this statement was made about the time we took the inventory of September twenty-first. The liabilities were not made up from the invoice book; Mr. Demarest went over and got the account current from the different firms; I don't think the invoice book was examined; we wanted to be accurate, and Mr. Demarest went and got the accounts current. The statement was made up as fairly and as honestly as it could be from those statements. The statement submitted in September put Pharo and Dolson at three thousand dollars: we owed them six thousand dollars; we had to make confidential all over three thousand dollars; it was understood at the time of furnishing the account current that we were to give them the house; the creditors were informed that we got the accounts current with a view to our in-

debtedness. When we made the exhibit we did not state to our creditors any confidential debts; Pharo and Dolson's whole account was for goods sold; I knew, at the time that the account current was presented the amount of the confidential. I did not say to Mr. Gashein and Samuel A. Hopkins that I did not know, when the first statement was submitted, that we owed Pharo and Dolson over three thousand dollars, and was surprised to learn that it was six thousand dollars. We were out trying to effect a settlement; we did not call upon any of the

10 creditors before the twenty-first of September; afterwards I called on Hilliard, Hayes, Hopkins and company; October fourteenth is a payment to E. Randal of six hundred and forty dollars and thirty-seven cents; that was for confidential; I think it was for an endorsed note. Brown and Demarest sold the store in Grove street in August, A. D., 1854; they then sold it to Anthony and Ford; it was not carried on in their name; we owned it; we sold it for six thousand dollars; we received notes from them; I assisted in taking the inventory. The book accounts of that firm were sold to them for fifty cents

20 on the dollar. The entry in cash book of September twenty-sixth, A. D., 1854, is, money received, by George, of Vandyke and company, twenty dollars and forty-cents. This may have been something overlooked; it was after the sale in August that the books were sold; it may have been a month after. That included the books and accounts; some of the notes received for the Grove street stock were given to our confidential creditors. We did return goods to Tracy, Irwin and company; goods bought of them the day before we had to stop. There were no sales of Brown and Demarest after October the

30 tenth, except a pair of gloves; I confessed the judgment to John J. Brown stated in assignment. We paid our individual debts out of our partnership property; there were no individual debts owing by us at the time of the assignment. I think no one advised us to that course; our good sense prompted us to that. Mr. Demarest, after the assignment, went to Pharo and Dolson as a clerk. Hatch and Yale were creditors of Demarest; they were paid out of the store. My brother was a great deal in the store, and knew what we intended to do; I pre-

sume he did know of the preference to Pharo and Dolson; I have no doubt he did. He early knew of our failure; I informed him how we stood; he approved the preference to Pharo and Dolson. We told my brother the arrangement with Pharo and Dolson; he approved of it. I don't think he knew of our other confidential debts, nor of the sale of the Vandyke store. The payment of Hatch and Yale was one of the last things done. My brother was one who offered to endorse my paper, and my brother-in-law, Mr. Seuy; he is conducting the store where I am.

10

And being again examined in chief, said:

The money I took out of the assets I paid my personal bills and family expenses with. What Demarest did with his share taken out is shown by the book; it is all through the book. The note of Williams, Bradford and company was paid by bank on the sixteenth of September; charged in our book on the nineteenth of September. The money was not in the bank when the note was paid; it was deposited on the nineteenth. The notes were passed to Pharo and Dolson because they thought the house would not realize the amount of their confidential. The only object of the assignment was to divide among our creditors all we had; I knew there is no deal I wished to cover up, or could cover up. We had tried every way to get a compromise; had offered them a little more than the thing would realize. We had called on Durant and company, Bliss and company, Pharo and Dolson. We did not determine to make an assignment until compelled by the unfair advantage that Hilliard, Hayes, Hopkins and company would get by a judgment. The inventory of the twenty-first of September was made to get a settlement with our creditors. We did not make up our minds to make an assignment till a day or two before it was done, unless we were compelled to prevent Hilliard, Hayes, Hopkins and company getting an unfair advantage.

20

30

And being again cross-examined, said:

I cannot say how long my brother was spoken to, to be an assignee, before that; not long; there was but one claim of one hundred and fifty-two dollars that came in under the assign-

ment; that was paid in full. The following entries are in the	
cash book; September 14th—cash over,	\$50.00
“ 19th “ “	72.39

\$122.39

The judgment to John J. Brown was confessed after our difficulties.

John Sutherland, another witness produced and sworn on the part of the plaintiff, did testify as follows:

I am an individual creditor of Brown and Demarest to the
 10 amount of two thousand and ten dollars; I was consulted about
 a settlement and the assignment; I did not come in. One rea-
 son was I did not understand the law of New Jersey, that it
 was limited to three months. Another reason was L. O. Wil-
 son had swept the whole by the sheriff. I never heard L. O.
 Wilson or any of the firm say any thing about the assignment,
 I have not put my claim in since because the law of New Jersey
 bars the claim, if I get only half a cent. I was at the sheriff's
 sale; I bought ninety or one hundred dollars worth of the goods;
 the goods did not fetch their value; they did not fetch half their
 20 value. I am acquainted with the dry goods trade; that is my
 business. They were saleable goods, dry goods; probably a
 few remnants, as there would be in every store; general as-
 sortment. They were put up in large quantities. At the com-
 mencement of the sale there was not over three or four pur-
 chasers; there was a man there by the name of Lane. Mr
 Hopkins was one of the principal purchasers; Mr. Tyrrell
 bought; they were near all the purchasers that were there at
 the first. My opinion applies to the whole stock throughout; I
 was at the sale both days.

30 And being cross-examined, said—

I was at the place of sale about half past nine; staid until it
 was over. I bought an assorted lot, 16½ dozen silk and lisle
 gloves; paid three and sixpence per dozen. I bought between
 forty and fifty yards of dress silk at three shillings per yard,
 in dress lengths. Cassimere for pantaloons, I paid about
 forty cents per yard. Some satin ribbons, two hundred yards
 or over, at four and four and-a-half cents, cut lengths, not

whole pieces. Some book muslin, in cut pieces, all sorts of lengths; two or three yard lengths. I gave my account to Mr. Brown after the failure and before the assignment.

John B. Crowell, another witness produced and sworn on the part of the plaintiff, did testify as follows, viz—

I was a clerk of Brown and Demarest; I was there two or three years before the assignment; I was there at the taking account of stock, just before the assignment; I assisted in taking the account of stock; I knew the cost and selling price of the goods in the store; the cost price was marked on the goods 10 when first bought; the inventory was taken at prices below cost. It was on all, most all of the goods; they were marked down. Muslins and some goods always worth their standard price were not marked down. There were very few remnants, very little old stock. Remnants and old goods were put a great deal below cost; full fifty per cent. below cost. Any man could have taken them at the prices we marked them, and sold them at the usual profit. We sold off before the inventory was made at about cost. We had cards in the window. I think they were sold at about the prices they were taken at in 20 the inventory. The things I saw sold at sheriff's sale were sold at great sacrifice. I continued there until the sheriff turned me out; on the day of the assignment I knew of the assignee being in there. Mr. Brown said they had made an assignment to Mr. John J. Brown, his brother; he said likely he would take the store and settle with his creditors and go on. After the assignment was made I and Charles Trimmer were employed; Henry Brinkerhoff and Oscar Van Houten had been in before; they got another situation; I was retained for John I. Brown. Thomas C. Brown was there. Mr. Demarest did 30 not remain. I slept in the store always, up to the sheriff's levy; Mr. Trimmer also slept there. After the sheriff took possession I left. There were no goods taken from the store to my knowledge, except those sold to customers in the night or day time. There was an account of sales kept; the money was put in the drawer, and at night was taken out of the drawer and put down upon the books. The goods taken back

to Tracy, Irwin and company were sent over the same day they stopped payment. Mr. Irwin came over and took the goods, himself; they had been unpacked and put upon the shelves; none sold; I did not see the bills. I would have missed goods if they had been taken away by day or night in any quantities; none were taken. The principal buyers at the sheriff's sale were Mr. Hopkins and Mr. Bramhall, on the hill. Mr. Van Dyke bought goods. The goods I saw sold did not bring half price.

10 And being cross-examined, said—

Trimmer and I were employed to sell goods; we did not sell many goods; Thomas C. Brown was engaged with us; there were three of us selling; the sales did not amount to as much as they did before the assignment, as we were out of the leading articles, such as muslins, &c. We did not have an assortment of the leading articles, prints, calicoes, &c; we had a quantity of calicoes and prints, but they were not saleable. I was never absent from the store one night after the failure; I would go in the store about a quarter past nine. I have never

20 said that goods were taken away by Brown and Demarest.

Question—Do you remember having a conversation with Mr. Miller, and saying to him that a lot of goods were taken away at night, and that nobody but Thomas Brown and yourself knew it?

Answer—No; not to my knowledge.

I told Brown if he opened I would come back again. I left Miller of my own accord, and went to Brown.

Question—When did the conversation with Brown about his buying the goods and going in business again, take place?

30 *Answer*—Before the sheriff's levy was made; between the assignment and the thirty days left to sell goods in. We were paid for our services after the assignment; the day after, or the day the sheriff took the keys. Thomas C. Brown paid me; he took the money out of his pocket; it was paid in Van Anglen's store; I cannot form any idea of the amount; Brown paid me; we were in the employ of John J. Brown two weeks; it was less than one hundred dollars he paid me; my salary went on as before. The New Yorkers tried to get me to tell

them something. I do not recollect saying to Mr. Miller the New Yorkers would like to have me tell them something. I told Mr. Miller that they wanted me to tell about goods taken away at night; I told Mr. Miller I knew nothing about it, and I was very glad of it. I slept in the store room on the counter; I cannot say how deep the store room is. Once and a while I was away from the store till ten o'clock, not later; I slept out of the store one month or six weeks. I missed goods after they were sold; some nights \$50; sometimes more; one day \$350; four clerks, and Brown and Demarest sold goods. If any quantity of goods had been taken I would have missed them; I sold from the whole stock. Taking a piece at a time no quantity could have been taken from the store without my knowing it; Trimmer never told me that goods had been taken away; no goods were taken from the store and sent to Hackensack.

And being again re-examined in chief, said—

I saw goods taken out of the store at night after the sale by the sheriff; it was between ten and eleven o'clock; they were taken by Mr. Bramhall; I was employed by Mr. Miller at that time; they were taken away in a market wagon; the wagon belonged to Mr. Bramhall; I don't know who delivered the goods; they were in large quantities; I saw men putting them in the wagon; the stores were all closed.

And being again cross-examined, said—

The stores were all closed at the time I saw Mr. Bramhall inside the door; I don't remember of Mr. Bramhall coming in and getting boxes; I believe he was most the last man that got the goods out; the wagon stood an hour and a half; he came there between nine and ten o'clock; it was two or three days before the store was opened by Mr. Seuy; the wagon had no cover.

Charles M. Trimmer, another witness produced and sworn in the part of the plaintiff, did testify as follows:

I came with Brown and Demarest on Monday, as they were tied on Saturday; I have been in the dry goods business three years; I helped make the first and last inventory; the price was marked down the last time below what they were before;

we considered them worth what they were marked. I was away five weeks; I went away the day the sheriff took the keys. I considered they were worth, to persons who buy to sell again, the prices put in the last inventory. I suppose I was there when the assignment was made; I was there in the thirty days; the assignment was made within thirty days after the suit was brought; I knew of John J. Brown's coming there; before that one clerk went away; after the assignment was made another went away; there were two of us left. I was
 10 employed and authorized to work by Mr. John J. Brown; Mr. Thomas C. Brown was retained. He did not retain Mr. Demarest; Henry Demarest was not there after the assignment, except as a visitor; I heard him talking about the old affairs. I slept in the store from that time until the sheriff took the keys; I was not out later than twelve o'clock any night; it was only one or two nights I was out at all; I had one key; the other clerk had a key. While I was there I knew of no goods taken away except what was sold at the counter; we never both went out at one time, and left the store alone. There was a
 20 printed circular sent to the debtors, with their bills, to pay to John J. Brown; they were sent out the first week after John J. Brown came there. There was no attempt to conceal the assignment, or to keep it still, that I know of.

And being cross examined, said—

I could not tell the day I went with Brown and Demarest; I went there some time about the twelfth of September; I think the summons was served afterwards; I commenced inventory after that; I think the next week. Brown and Demarest, after the suit was commenced, said they did not know whether they
 30 could get a settlement or not; they commenced taking account of stock within the thirty days; could not say how long we were taking inventory; about two and a half days; the inventory amounted to over nine thousand dollars (\$9000;) they offered to settle at forty cents on the dollar; after that they made an assignment; they took an inventory when they made an assignment; after they could not get a settlement they made an assignment.

Question—When did they commence to sell at cost?

Answer—I don't know ; within a week or two of the time of the judgment they talked of an assignment ; they talked of making an assignment for the benefit of creditors, after they could not make a settlement with their creditors. I heard Brown and Demarest say that they had thirty days grace ; they intended to get a settlement ; if they could not then they would make an assignment ; I don't know that they said that they would make an assignment before judgment matured ; they talked of an assignment for the benefit of their creditors.

The plaintiff having rested his cause, the defendant, by his ¹⁰ counsel, moved the court to over rule the deed of assignment executed by Thomas C. Brown and Henry Demarest, to the said plaintiff, and dated October 18th, 1854, and that the said plaintiff be called, on the ground that the said deed upon its face, and upon the evidence offered by the said plaintiff was in law fraudulent and void ; and on the ground that the plaintiff had not, by the evidence offered, established any legal right to recover.

And his Honor, the judge, having delivered his opinion that the said deed of assignment, upon its face and upon the evi- ²⁰ dence offered by the said plaintiff, was not in law fraudulent and void, and that the plaintiff had established a legal right to recover, refused to over rule the said deed of assignment, and refused to direct the said plaintiff to be called, to which said opinion of the court the defendant, by his counsel, excepted, and prayed that this his bill of exceptions might be sealed, and it is sealed accordingly.

E. B. DAYTON OGDEN, Judge. [L. s.]

The defendant in support of the issues on his part, offered and read to the jury,

³⁰

The record of a judgment in the Circuit Court of the county of Hudson, recovered by Richard Hilliard, William H. Hayes, Richard H. Hopkins, and Richard Hilliard, junior, partners, &c., against Thomas C. Brown and Henry Demarest, for \$528.94 of damages, and \$25.33 costs of suit. Judgment signed Nov. 4, 1854, (*pro ut* the said record.)

The original execution issued on the foregoing judgment, tested the fourth Tuesday of September, A. D., 1854, returnable the fourth Tuesday of December, 1854. Also sheriff's levy annexed to said writ. (*Pro ut the said execution and levy.*)

The record of a judgment in the Circuit Court of the county of Hudson, recovered by Lewis O. Wilson, George W. Gashlein, and Samuel M. Waller, partners, &c., against Thomas C. Brown and Henry Demarest, judgment signed November 2nd, 1854, for debt of \$6,670, and \$4.00 costs. (*Pro ut the said record.*)

The original execution issued on the said judgment, tested the fourth Tuesday of September, A. D., 1854, returnable the fourth Tuesday of December, A. D., 1854, endorsed with direction for the sheriff to levy real sum due on the said judgment, \$3,335.97, and four dollars costs. Also, levy made by the sheriff and annexed to the said execution. (*Pro ut the said execution and levy.*)

The record of a judgment in the Circuit Court of the county of Hudson, recovered by Richard Hilliard, William H. Hayes, 20 Richard H. Hopkins, and Richard Hilliard, junior, partners, &c., against Thomas C. Brown and Henry Demarest. Judgment signed November 3d, 1854, for \$815.94 of debt, and \$4.00 costs. (*Pro ut the said record.*)

The original execution issued on the said judgment, tested the fourth Tuesday of September, A. D., 1854, returnable the fourth Tuesday in December, A. D., 1854. Endorsed with direction to levy the sum of \$407.94 of debt, and five dollars costs. Also, sheriff's levy annexed to the said writ. (*Pro ut the said execution and levy.*)

) Robert R. Boyd, a witness produced and sworn on the part of the defendant, did testify as follows, viz—

On the eighth day of May, A. D., 1854, I was in the store

of Brown and Demarest; they made an exhibit of their affairs. There was a great many enquiries as to Brown and Demarest; a great many opinions as to their solvency.

Question—Was there a verbal statement made to you by Brown and Demarest of their affairs?

Answer—There was a verbal statement; it was this: Mr. Brown commenced business in 1848 with one thousand dollars (\$1,000) capital; at what time Demarest commenced with him I do not recollect; Mr. Demarest was somewhat embarrassed, so that his name could not appear, but in 1852 he was free from embarrassment, and his name was used. At one period Mr. Brown was worth six thousand dollars (\$6,000,) and Mr. Demarest three thousand dollars, (\$3,000.)

Their sales from September, A. D., 1852, to September, A. D., 1853, were fifty four thousand dollars, (\$54,000;) forty-seven thousand dollars (47,000) of this amount was for cash; they kept the sheet upon which this statement was made.

Question—Did they show the condition of their affairs in writing, and what was that condition?

Answer—They did. They showed me a statement of their sales in writing.

Question—What was the amount of their sales as shown to you by that statement?

This question was objected to, because it appears it was in writing.

“Objection sustained.”

Thomas C. Brown being recalled, said—
The statement he believed to be lost.

Robert R. Boyd being recalled, said—
I took no copy of the statement.

30

Question—What was the amount of the sales as stated to you?

Answer—That paper showed sales from September, A. D., 1852, to September, 1853, to be the sum of fifty-four thousand dollars (\$54,000;) sold for cash the sum of forty-seven thousand dollars (\$47,000;) in a branch store the sales were twenty-

one thousand dollars (\$21,000.) The gross profits were nine thousand three hundred dollars (\$9,300.) They stated they calculated they had added four thousand dollars (\$4,000) to their capital during that year. I understood that the four thousand dollars (\$4,000) was to be added to the nine thousand dollars (\$9,000,) making in all thirteen thousand dollars (13,000) capital.

And being cross-examined, said—

The impression on my mind is that the time when they were 10 worth six thousand dollars (\$6,000) and three thousand dollars (\$3,000) was in September, A. D., 1853. It must have been in September, A. D., 1852, that they made their capital, six thousand dollars (\$6,000) and three thousand dollars (\$3,000.) My impression was when I left the office of Brown and Demarest that they were worth thirteen thousand dollars (\$13,000.) I should recollect a great deal I have testified to without referring to that memorandum; it is my impression it was Mr. Brown I saw at the time the record was entered; I did not see it entered. I afterwards referred to the book and found the 20 entry according to my memorandum; my impression is I compared the book with my memorandum.

And being re-examined in chief, said—

I am satisfied it was in September, A. D., 1852, that he stated he was worth six thousand dollars, (\$6,000,) and Demarest three thousand dollars, (\$3,000,) and that the four thousand dollars (\$4,000) was to be added in 1853.

And being again cross-examined, said—

After looking at the paper this is an inference from the fact.

Samuel A. Hopkins, another witness produced and sworn on 30 the part of the said defendants, said—

I reside in Jersey City; I am in the employ of L. O. Wilson and company; I remember Mr. Brown came to the store of L. O. Wilson and company with a statement of their affairs just after they made an assignment; Mr. Brown said from September 1st, A. D., 1853, to October 18th, 1854, their sales had been fifty nine thousand nine hundred and four dollars and ninety-six cents, (\$59,904.96;) their profits on their sales were

seven thousand eight hundred and forty-four dollars and thirty-three cents, (\$7,844.33;) he exhibited a statement of losses, (*pro ut* the same.) Mr. Gashein urged them to give L. O. Wilson and company a judgment; I advised them to do it; my impression is the bond was executed at the store in New York; I saw placards in the windows, "selling off below cost." They wanted to convince their creditors that they had met with great losses, and were not able to pay; I think at this time Mr. Brown made an offer to compromise at thirty-five (35) cents on the dollar; this was after the assignment.¹⁰ After the sheriff levied I assisted in making sheriff's inventory; I examined the goods particularly. I, with James Gopsil and Mr. Samuel R. Tyrrell, made an appraisement; the amount was about three thousand dollars (\$3,000;) there was a copy of the inventory; it amounted to two thousand nine hundred and forty-seven dollars and fifteen cents, (\$2,947.15.) (*Pro ut* the said inventory.)

I have been acquainted with the dry goods business for twenty-years; they were like the tail end of all dry goods; some were remnants, others goods out of style, some very good²⁰ goods; the majority of them were not very desirable; there were both summer and winter goods; I considered that the full value; more than I would have given for them. There were some of the dress goods in the stock remnants, and of styles five or six years previous; such goods were not saleable. There were very few full pieces of any thing in the store. I remember after the assignment Brown said in L. O. Wilson's store Mr. Gashein asked him how it was the statement showed so great an indebtedness to Pharo and Dolson. He remarked that Mr. Brown had stated to him that that indebtedness was³⁰ three thousand dollars, (\$3,000;) he said he was disappointed himself; that previous to the statement he did not know that they did owe them so much. He said Mr. Demarest said so, and he presumed it must be so. At the previous statement Pharo and Dolson was put down at a little over three thousand, (\$3,000;) this was the only one I have ever seen. In the fall of 1854 I was in the Grove street store; it was the latter part of the fall. When we made the appraisement for

the sheriff every thing was measured, or weighed, or counted ; we made the inventory deliberately ; they brought as much as I ever knew such goods to bring ; I bought about one thousand dollars (\$1,000) worth of the goods ; got an advance of seventy-five dollars (\$75) when I sold them, or fifty dollars, (\$50.)

I remember the flannels ; we put them up in lots ; this remnant was put in a lot of coarse goods.

And being cross-examined, said—

I think Mr. Brown said their profits were twelve per cent.
 10 on the goods ; I think he had a statement of their assets in writing ; I have not got it ; this was previous to the levy ; it was between the assignment and the levy ; I did not make any calculation as to what the exhibit he made would pay ; I have the inventory I made of the goods ; we had no reference to the costs ; we did not know the cost marks ; no such goods were selling at wholesale in New York. The staple goods that have a uniform value we put down at the prices they were selling in New York at wholesale ; certain goods soiled we put down at about what they were worth ; we made up our value according
 20 to our best judgment as to what they were worth, regardless of the sheriff's sale ; I appraised the goods from my knowledge of the worth of them in New York. Wiggins vary from three to eighteen cents per yard ; after they are handled and the starch gets out they are good for nothing. There are a great many varieties of cotton drills ; I have bought a great many at six-and-a-quarter cents per yard. Satinets range from ten cents to one dollar per yard ; I have seen several cases of satinets sold for as low as eleven cents within a week or two. The sheriff's sales were three thousand four hundred and thirty-nine
 30 dollars and sixty-eight cents (\$3,439.68 ;) it includes some few things not on the list ; they would not have brought the amount of appraisal if I had not bid on the most of them. I have got a statement of losses and expenses shown by Brown and Demarest ; it amounts to nineteen thousand and ninety-seven dollars and twenty-four cents (\$19,097.24) from September first, 1853, to October eighteenth, A. D., 1854. Statement of losses read in evidence. (*Pro ut the same.*) See Appendix, defendant's exhibits, 2.

Richard H. Hopkins, a witness produced and sworn on the part of the defendant, did testify as follows, viz—

I am a member of the firm of Hilliard, Hayes, Hopkins and company; we obtained a judgment against Brown and Demarest by confession, but I cannot state the date; some time about the time of the assignment; we had obtained a judgment previously. I had an interview with Brown, and the matter was soon completed; I asked for a judgment from Brown and he raised no objection; I mentioned that he had given a judgment to our neighbors. Nothing was said about our getting an unfair advantage; they came to us with an exhibit after I had commenced suit; there was a statement made to us; I recollect their showing particulars; they offered us forty cents on the dollar; I don't recollect the amount of stock and inventory.

And being cross-examined, said—

I am one of the parties that have indemnified the sheriff; I take it I have a direct interest in the event of this suit: when I applied for the judgment I put it on the ground that he had given one to our neighbor; I did not tell him I wanted a judgment to let it lay, for I did not mean to let it lay.

By the Judge,

I did not tell him I meant to take out execution and attack the assignment; I think he never made but the one exhibit; I cannot say whether it was after the suit was commenced.

George W. Gashein, a witness produced and sworn on the part of the defendant, did testify as follows, viz:

I reside in Jersey City; I was a member of the firm of L. O. Wilson and Company, up to January 1st, 1856; have known the defendants some six years; I recollect Mr. Demarest telling me about the fore part of September in his store, that a suit was commenced; he said before they could get judgment, they would make an assignment; I called in regard to a debt they owed us; I had received a letter that on September first, they would make us a large payment; he said he had been to Paterson to see a friend, and that before Hilliard, Hays, Hopkins and Company got a judgment, they would make an assignment. I endeavored to find out about their affairs; he said they had

sold out their Grove street store, and they had notes to the amount of five thousand dollars, (\$5000,) book debts to the amount of three thousand dollars (\$3000,) of the Grove street store; he said he had in Montgomery street, stock to the amount of twenty thousand dollars (20,000); book debts in that store to about the amount of two thousand dollars (\$2000); I supposed he had from fifteen thousand to twenty thousand dollars of stock in Montgomery street. In latter part of September, or 1st of October, Mr. Brown called at our store, and offered forty cents on the dollar; they told me more than once, that they would make an assignment, before any one could get a judgment; we never advised as to the assignment; Mr. Brown once mentioned his brother as assignee; I did not object; I negotiated that judgment; I called on Mr. Brown about the judgment; I asked him if he would give it; he never made any objection; I told him I would sue if he did not give it. Mr. Demarest told me after the first interview, that they were running off their goods; that they had that day sold three hundred dollars, (\$300); that was Monday; Saturday previous they had sold five hundred dollars (\$500) worth of goods; Demarest told me that; both were present; I asked Mr. Brown how he accounted for his embarrassed situation; he said he did not know how to account for it; they had sold a great many goods for a fair profit, and he did not know of any leaky hole.

And being cross-examined said:

My impression is it was after the assignment, that John J. Brown and Thomas C. Brown were in my store; I don't recollect saying at the time judgment was confessed, that no undue advantage should be taken. I said it was our preferable course to get judgment by confession or by suit; he did not say, I think, that he had made an assignment, and it would interfere with it. Mr. Brown and Mr. Demarest went aside, and talked together before signing the bond; they said nothing to me about it interfering with the assignment; I knew the assignment was made; Mr. Brown agreed to meet with Mr. Demarest at a certain hour at our store. I sent for Mr. Demarest; he came, and it was done in a few minutes; we intended levying on the goods; they talked to me several times about making an assign-

ment ; they told me Hilliard, Hays, Hopkins and Company should not get an advantage ; I could tell whether there was ten thousand dollars (\$10,000,) or twenty thousand dollars (\$20,000) of goods in the store ; I think there was over twelve thousand dollars (\$12,000) worth of goods.

George A. Ford, another witness, produced and sworn on the part of the defendant, did testify as follows, viz :

I am one of the firm of "Anthony and Ford;" I purchased the goods in the Grove street store ; I purchased the goods between first and tenth of August, A. D. 1854 ; did not take possession till September fifteenth, A. D. 1854 ; the whole price paid for the goods was six thousand nine hundred and forty-three dollars and sixty-six cents (6,943.66) ; for book accounts the sum of four hundred and fifty dollars (\$450) ; the whole amount paid for the goods and book accounts were seven thousand three hundred and ninety-three dollars and sixty-six cents (\$7,393.66) ; there was nothing further bought ; there were some fixtures in item for goods ; this was all paid in notes, except fifteen hundred dollars (\$1500) ; the notes given were for five thousand eight hundred and ninety three dollars and sixty six cents 20 (\$5,893.66) ; three thousand nine hundred and forty-three dollars and sixty-six cents, were the notes of Anthony and Ford, and four hundred and fifty dollars (\$450) added for book accounts. Four thousand three hundred and ninety-three dollars and sixty-six cents (\$4,393.66) were the notes of Anthony and Ford ; the remaining fifteen hundred dollars (\$1500) in my individual notes, I understood, was due to Mr. Anthony for clerk hire. I purchased the books between the first of September, and the time the assignment was made ; between September tenth and the time of assignment. The notes were all made payable at the 30 Hudson County Bank ; we paid them there ; we paid one note to Erastus Randall of four hundred dollars (\$400) ; it was received before it was matured ; it was dated September the first ; it had either three or four months to run ; it was paid before it matured ; the notes were delivered after the first of September ; commenced taking inventory the first of September ; we were a week taking inventory ; the notes were delivered on the

eighth or tenth of September; two of my individual notes are unpaid; they are four hundred dollars each; they are in the hands of the assignee of Brown and Demarest; they have lain over by understanding; two notes went into hands of Pharo and Dolson, one of four hundred dollars, (\$400,) one of three hundred and forty-three dollars and sixty-six cents (\$343.66,) amounting in all to seven hundred and forty-three dollars and sixty-six cents (\$703.66); they are paid; they were paid to Pharo and Dolson at their store; those were my individual 10 notes; they were paid at the time they were due; one was due I think in August, 1855; the other, first of September, 1855; we paid Brown and Demarest before the notes were given, eight hundred dollars (\$800) in cash, while taking inventory, before the notes were given. Notes were given for that eight hundred dollars (\$800,) one at one month, and one at two months; this is included in the notes above stated. The eight hundred dollars (\$800) was paid between the first and tenth of September; the notes for this \$800 were canceled when given. These notes produced amount to four thousand three hundred 20 and ninety-three dollars and sixty-six cents (\$4,393.66.) (*Pro ut* the said notes.)

One note was for four hundred dollars at seven months, endorsed by Hiram Gilbert; one for four hundred dollars (\$400,) at six months, with Hiram Gilbert's endorsement; one for four hundred dollars at five months, endorsed by Hiram Gilbert, making the sum of twelve hundred dollars (\$1200,) having the endorsement of Hiram Gilbert.

The notes being produced the signatures of Anthony and Ford, and endorsements of Brown and Demarest are admitted 30 by plaintiff.

The note for four hundred dollars, dated Sept. 1st, and due in five months after date, was taken up before it was due, and I got it discounted for my own benefit; it was endorsed by Hiram Gilbert and Henry A. Green; the endorsement of H. A. Green is genuine; my individual notes are not here. I have no recollection where they are.

And being cross-examined said:

I can't tell the amount of debts on the books of the Grove

street store that were assigned to us; it was between nine hundred and ten hundred dollars; we realized a little more than we paid; not much; they were not worth more than we gave; we inventoried the goods at their cost mark on the goods, with some exceptions; I was frequently in the Montgomery street store; my opinion is that they were a stock of merchantable goods; they prided themselves considerably on keeping a clean stock; the notes for the book debts were given after those for the goods, a short time before the assignment was made.

Edward C. Bramhall, another witness produced, and sworn 10 on the part of the defendant, did testify as follows, viz:

I bought a portion of the goods sold by the sheriff; about eleven hundred dollars, (\$1100) worth. I paid Mr. Hopkins; they were various kinds of dry goods; they brought all I would give for them, for the purpose of opening a store; I took them away between the day of sale, and 13th of December. I took away the goods at two different times—the last time in the evening. I was loaded up, and on my way home at half past nine, it might have been later; the first were taken in the daytime; we had a market wagon; it was a market wagon; no cover on 20 it; I don't recollect what advance I paid on the goods; I think I paid ten per cent. advance. I have no cause to complain of my purchase.

And being cross-examined said—My first bill was about one hundred and seventy dollars; what I bought of Hopkins was \$1111; I have been in the dry goods business; a great many of the goods were in a tumbled condition and unsaleable, and brought nearly nothing; a good many old shop keepers. The lots Mr. Hopkins bought were full as low as any of the lots; I sold the goods on the thirteenth day of September; there were 30 forty or fifty persons present at the sale. It was a rainy day; the goods were tied up in parcels. Persons accustomed to buying, could tell as well as if they were unfolded; I would give more for them as they were; the goods were lotted, and the number of yards in the lot was marked, and the yards in each piece. (14)

Being re-examined in chief said:

They were not such goods as a person going to open a store would buy; they were old styles, a good many of them. The goods were put up in a very satisfactory way for a stock sale.

Isaac S. Miller, a witness, produced and sworn on the part of the defendant, did testify as follows, viz:

Mr. Crowell told me some of the New York men had sent for him, and asked him about Brown & Demarest's business. He said they would not find out anything by him; that he knew some things that were not right, and that Messrs. Brown and
 10 Demarest would not like to have him tell. It was a common conversation about a wagon being there late at night. He said he knew all about a wagon being there late at night. I asked him if he knew about the wagon; he said he knew all about that wagon, and that some things were wrong, and that nobody knew of it, but he and Mr. Brown. He said it was a country wagon. At the time Mr. Bramhall came, it was before I closed my store; we closed then at eight o'clock.

And being cross-examined said:

I asked the boy about the wagon; he began by telling me
 20 that the New York men had sent for him; I was at the sheriff's sale; I bought no goods; I afterwards bought of Mr. Bramhall from thirteen to fifteen hundred dollars worth; I paid him an advance of twenty per cent. The condition I received them in was very fair; a large amount of the invoice were saleable; I bought them less than I could get them in the city. I feel confident; I doubled my money at my retail price.

They were put up in such a way as is usual at such sales; a merchant could tell what they were. I should think they were put up as fair as such a stock could be.

The defendant read in evidence a record of a judgment in
 30 the Circuit Court of the county of Hudson, recovered by John J. Brown against Thomas C. Brown, judgment signed the twenty-fifth day of September, A. D. 1854, for \$536.25 of debt, and four dollars costs. (*Pro ut* the said record.) See appendix, Plffs. exhibits II.

Also the execution issued upon the said judgment together with the sheriff's levy by virtue of said execution. (*Pro ut* the said levy and execution.) See appendix, Plaintiffs exhibits II.

Also the original affidavit and judgment papers in the said case. (*Pro ut*, the said affidavit and judgment papers.) See appendix, plaintiffs exhibits II.

Also a deed from Henry Demarest and wife to Joseph W. Pharo, dated October 9th, 1854, conveying for the consideration of \$5,800, a house and lot in Jersey City. Acknowledged October 9th, 1854, and recorded October 18th, 1854, in Liber 41 of deeds, page 455. (*Pro ut* the said deed.)

Also a list of all the creditors of Thomas C. Brown and Henry Demarest, who presented their claims to the said John J. Brown, assignee; filed by the said assignee in the Clerk's office of the county of Hudson, pursuant to the statute in such case made and provided. (*Pro ut* the said list.) See Appendix, plaintiffs exhibits III.

Charles L. Krugler, another witness, produced and sworn on the part of the defendant, did testify as follows, viz:

I reside in Jersey City; I have lived there since April, A. D. 1853. In 1854, I resided in the Fourth Ward, between Erie and Jersey Avenue. I left my home September 13th, and went to Philadelphia, Baltimore, Washington and Richmond; I returned home about the twentieth of October, by the New Jersey Railroad; it was on Friday or Saturday; I arrived in the evening; I arrived home about nine o'clock. After that I went to New York one evening; the first Monday or the second Monday after my return; the twenty-third day of October, or the thirtieth day of October; I returned home by the eleven o'clock boat from the New York side; I passed up Montgomery street direct from the Ferry; I know where the store is of Brown and Demarest; when I was coming up from the ferry I was alone; I saw a large country wagon backed up to the store of Brown and Demarest, and two men carrying out goods and putting them in the wagon; a driver stood by the wagon and horses; I mean a country wagon with a canvass top on.

And being cross-examined said:

I have not been to the lodge since that night; my mother-in-law was at my house when I went to the lodge; I think it was one or two or three days after I went to the lodge, that my mo-

ther-in-law went to Troy; she staid away two or three or four weeks; she came back on the fifteenth of January; it might have been the twenty-third, or it might have been the thirtieth day of October; my mother-in-law was there in three or four days after we got home. I know this was the eleven o'clock boat, because when I got to the dock, the half-past ten o'clock boat was just out of the slip.

And being again re-examined in chief said:

It was a country wagon with a cover; I mentioned this to
 10 Charles M. Holmes, coal merchant, one, two or three weeks afterwards; it might have been the first, second or third Monday after I returned; this struck me as a thing we do not often see. In going down next day I noticed the store; the driver had on a Kossuth hat; it was white; I went to the Lodge before my mother-in-law went to Troy; I saw two men pass in and out two or three times; there was a light in the store; the goods were not in boxes, they were loose.

And being again cross-examined said:

To the best of my knowledge, I have not seen the store
 20 closed; the door was open; I could see the gas lights; I will not be positive the store was closed next day.

Samuel R. Tyrrell, a witness, produced and sworn on the part of the defendant, did testify as follows, viz:

I reside in Jersey City; I have been in the dry goods business over seven years; I was one of the appraisers selected by the sheriff; the appraisalment was nearly three thousand dollars (\$3000); it was two thousand nine hundred and forty-seven dollars and fifteen cents (\$2,947.15); we appraised as near as we could get at their value; they were sold as usual at such a
 30 stock sale; I appraised them at all I would have been willing to give for them; we were about three days in making the appraisalment; it was about such a stock as we expected to find after selling for a long time; they were half unseasonable goods; they were summer goods; they were not saleable goods at that season; if kept over, most of them would have been out of style; there were a great many remnants; they were not much damaged, but somewhat shop-worn.

And being cross-examined said :

We put the goods a good deal below cost prices, but I think we did not put the goods fifty per cent. below cost prices ; we made the inventory ; this paper is dated November, 16th, A. D. 1854 ; I think Mr. Gopsill came after Mr. Hopkins was there ; he did not lead off ; I bought in the neighborhood of one hundred and fifty dollars (\$150) worth at the sale ; I bought them cheap, but not cheaper than at stock sales in New York ; the majority I bought was about twenty per cent. less than I would have been required to pay in New York.

10

And being re-examined in chief said :

I bought no cheaper than at stock sales in New York ; the principal part of what I bought might have been twenty per cent. below cost ; we put on what we thought the goods would be worth as remnants ; lawns ranged from four to thirty cents a yard ; my experience is if I buy a large stock of summer goods that are left over the next season, I have to sell them at half price ; de laines range from eight to fifty cents per yard ; the stock of de laines was light summer de laines ; fair average coarse lot ; cut stock of de laines depreciate more than any 20 other stocks ; they were remnants.

James Gopsill, another witness, produced and sworn on the part of the defendant, did testify as follows, viz :

I reside in Jersey City ; was in the dry goods business over eighteen years ; I was one of the appraisers selected by the sheriff ; they were appraised at their value, for any merchant to buy and sell. Before we commenced, Mr. Hopkins wished us to fix the price ; we did so, and when we differed he would side with the highest ; there were a good many remnants ; I delivered to Mr. Bramhall the last goods that were delivered ; it 30 was between twenty second of November, and the fifth of December ; they were delivered at half-past seven or earlier ; I don't think it was much later ; I left the store at half-past nine ; the goods were then gone ; it was a country wagon that took them ; some were put in boxes ; I think both days there were from fifty to seventy-five persons present at the sale ; there were some eight or ten merchants who bid ; there was some

competition; it was quite spirited at times; I think the goods brought full as much as I have bought and knew goods sold for in New York; I delivered all the goods; there were none delivered in the night, except Mr. Bramhall's.

And being cross-examined said:

Mr. Hopkins, and I am not confident but the sheriff, too, spoke to me about appraising the goods. The sheriff was out and in frequently; I think the key was in charge of deputy sheriff, Mr. Farley. We made but one appraisement; I do not
 10 know in whose hand writing the inventory is; Hopkins put down the prices on the inventory.

William Gopsill, a witness produced and sworn on the part of the defendant, did testify as follows, viz:

I assisted in putting up the goods; it was an unsaleable stock; I was in the store at time of appraisement; I did not pay much attention to the sale; I think the stock was rather out of season.

And being cross-examined, said:

The inventory was made by Mr. Hopkins.

20 *Henry Demarest*, a witness produced and sworn on the part of the defendant, did testify as follows, viz:

The meaning of the privilege referred to, in the inventory, of selling the house conveyed to Pharo and Dolson, was that it was not a good time to sell; we had the privilege of selling it until May 1st, 1856; their confidential debt was a little over three thousand dollars (\$3000); they paid a note I owed to Cyrus Knapp, of five hundred or five hundred and fifty dollars; the house was to be sold for fifty-eight hundred dollars (\$5800) before the notes go to the assignee. If it brings less than that, it comes out of the notes. If the house bring less than the amount of notes, less than fifty-eight hundred dollars (\$5800,) they have to lose; the debts due to Brown and Demarest on the twenty-first day of September, A. D. 1854, were the sum of two thousand one hundred dollars and ninety cents (\$2, 100.90). The amount of confidential debts paid by Brown and Demarest were as follows: to Pharo and Dolson the sum of three thousand dollars (\$3000); to Hiram Gilbert, three no.

of twelve hundred dollars (\$1200); these were passed to Mr. Gilbert, between the thirteenth day of September, and the eighteenth day of October; October fourteenth, Hatch and Yale the sum of two hundred and thirty-five dollars and thirty-five cents (\$235.35); between the two dates, notes were passed to Slosson and Bosset, to the amount of two hundred and ten dollars and seventy-one cents (\$210.71); the notes endorsed John J. Brown, were passed to the assignee.

One of the four notes paid to Randall, was for four hundred dollars (\$400); it was paid between September 13th, and October 18th; Mr. Gilbert's claim was for endorsing Brown and Demarest's paper; four notes were paid in cash; the money received of Anthony and Ford was as follows: September twelfth, received of Anthony and Ford, the sum of three hundred and seventy-seven dollars and fifty cents (\$377.50); September fourteenth, received seventy-five dollars (\$75); September eighteenth, received one hundred and twenty-five dollars (\$125); received September nineteenth, fifty dollars (\$50); received September twenty-third, one hundred and seventy-two dollars and fifty cents (\$172.50); received October fourteenth, the sum of four hundred dollars; amount in all to twelve hundred dollars (\$1200). I do not know the amount of confidential debts we paid.

Referring to cash book September twenty-third, says: we loaned to Erastus Randall money as follows:

September 22d, we loaned him	\$215.00
" 25th, " "	300.00

Making in all, the sum of five hundred and fifteen dollars (\$515) that we loaned to Erastus Randall.

We loaned to Van Anglen and Company as follows, viz: 30

September 25th we loaned to Van Anglen and Co.	\$100.00
" " " " "	125.00
" 29th " " "	372.09
October 11th " " "	50.00

Making in all, the amount of six hundred and forty-seven dollars and nine cents (\$647.09) that we loaned to them.

We loaned to Joseph Skillmann as follows, viz:

September 16th	loaned to Joseph Skillmann	\$100.00
" 21st	" " "	10.00
" 23d	" " "	100.00
" 30th	" " "	30.00

Amounting in all to the sum of two hundred and forty dollars (\$240) that we loaned to Joseph Skillmann.

We loaned to Hiram Gilbert as follows, viz:

September 16th	we loaned to Hiram Gilbert	\$100.00
" 26th	" " "	300.00
10 October 14th	" " "	400.00

Amounting in all to the sum of eight hundred dollars, (\$800) that we loaned to Hiram Gilbert. Between September thirteenth and October eighteenth, we loaned to Van Anglen and Company.

I don't say the eight hundred dollars to Hiram Gilbert was all borrowed money.

My explanation is this: if we had borrowed money from Hiram Gilbert, or any other of these parties before September thirteenth, money paid out here is in payment, or it might be for money lent; it is a loan or a return of a loan; I can't say we lent to Hiram Gilbert eight hundred dollars (\$800) between those dates, September thirteenth and October eighteenth; we paid it to him if the books say so; we did lend Skillmann more than three hundred dollars; we loaned to Erastus Randall over two thousand dollars (\$2000) in that time; to Van Anglen and Company more; to Jacob Irwin the sum of six hundred and fifty dollars (\$650); to Robert B. Kershon we loaned over three hundred dollars (\$300); the same money was loaned over and over again; on the thirteenth of September we decided not to go on with our business; we paid Williams, Bradford and Company's note September nineteenth, A. D. 1854; paid Williams, Bradford and Company's note, due on the sixteenth, at the bank; it was paid against orders, by the bank; it was for five hundred and thirty-seven dollars and fifty-three cents (\$537.53); what I mean by against orders is, that we told the cashier not to pay it; but he did pay it; we had funds in the bank; he charged it; I gave the orders to the cashier personally.

Question.—If that note was paid by the bank out of the funds in the bank, belonging to Brown and Demarest, then why is it that it is charged in the cash book as so much money paid out of the drawer?

Answer.—It is an error in being charged to Williams and Bradford; it ought to have been, cash paid into the bank; the reason why the mistake is Williams and Bradford, I was in rather a confused state; I had given checks that were not paid; I went up to see why they were not paid; on the nineteenth of September, I deposited the sum of three hundred and seventy 10 dollars, (\$370), and at another time on the same day, I deposited the sum of one hundred and seventy-five dollars and ninety cents; making in all, the sum of five hundred and forty-five dollars and ninety cents (\$545.90,) that I deposited in the bank on the nineteenth of September; I made the entry myself.

Question.—Why does the cash balance, when you paid out more?

Answer.—There was so much less cash on hand than the book shows; on the seventeenth day of October, A. D. 1855, settled with Mrs. Gilbert; we have no reliance on our books; 20 the books were not added every night; on the fourteenth day of October, we paid Erastus Randall the sum of six hundred and forty dollars (\$640,) for a confidential debt; this is besides the note of four hundred dollars (\$400); we loaned to Hiram Gilbert the sum of five hundred dollars (\$500); he is charged with three hundred dollars (\$300) more; the book don't state it to be a loan.

There was loaned to Van Anglen and Company in that time, the sum of five hundred and forty-seven dollars and nine cents (\$547.09); it was either loaned or paid to him; I don't 30 know which.

We paid out cash as follows, viz:

September 18th,	paid cash to E. Randall,	\$640.00
"	" " " " Jacob Erwin,	400.00
"	" " " " Kershow,	300.00
"	" " " " How & Demarest,	300.00

Amounting in all to the sum of sixteen hundred and forty dollars (\$1640).

The money loaned to Van Anglen was repaid; I do not know how; September the nineteenth, Van Anglen and Company paid us forty dollars (\$40.00); September the twenty-third, Van Anglen and Company paid us one hundred dollars (\$100,) making in all the sum of one hundred and forty dollars paid by Van Anglen and Company; that is all I see paid by the books; I did not receive of him a check; I don't mean to say that I cannot say whether the three hundred and seventy-two dollars and nine cents (\$372.09) was loaned or not.

- 10 *Question*—Have you not sworn in another proceeding, that you loaned three hundred and seventy-two dollars and nine cents (\$372.09) to Van Anglen and Company, on the twenty-ninth day of September, A. D. 1854?

The plaintiff, by his counsel, objected to this question being answered by the witness, and insisted that the same being in a proceeding to which the assignee was a stranger, was not legal and competent evidence in this cause. And the court having delivered its opinion, that the said question was illegal, and that the answer would not be legal and competent evidence in
20 the cause, sustained the said objection, and overruled the said question; to which opinion of the said court the said defendant by his counsel, excepted, and prayed that this his bill of exceptions might be sealed, and it is sealed accordingly.

E. B. DAYTON OGDEN, Judge.

Henry Demarest being further examined, said—

I do not know how the money was refunded to Brown and Demarest by Van Anglen and Company.

Question—If it was paid to Brown and Demarest, would there not be a balance due Brown and Demarest on the cash book?

- 30 *Answer*—I cannot say he has paid; he might have settled it in some other transaction; I do not know that he paid it in another transaction; I do not know to what amount Randall was our confidential creditor.

The amount loaned Randall was six hundred and twenty dollars, and eighty-five dollars not loaned; I am only positive we loaned him two hundred and fifteen dollars (\$215). The books show that Randall received the sum of two thousand and thirty-

five dollars and thirty-seven cents (\$2,035.37); the books state two hundred and fifteen dollars as loaned, and six hundred and forty dollars (\$640), and eighty-five dollars (\$85) that is not loaned. On the twenty-second day of September, the sum of two hundred dollars was paid to Randall; I can't say it was loaned; it was hard cash loaned. September twenty-fifth there as an entry of one hundred dollars (\$100) lent to him; September eighteenth, there is an entry of cash lent to him of six hundred and twenty dollars (\$620); I do not know what it was for. On the sixteenth of September, we got a check of four hundred 10 and sixty dollars from Randall; the money loaned to Van Anglen, was paid by settling his account; this account was for four hundred and five dollars and seventeen cents; our account against him was September twenty-third; he has credit for four hundred and five dollars and seventeen cents received in cash and bills he had against us.

September twenty-third, Mr. Van Anglen has credit by bills, three hundred and seventeen dollars and ninety-five cents; cash fifty dollars; also cash the same day, thirty-seven dollars and twenty-two cents; amounting in all to the sum of four hundred 20 and five dollars and seventeen cents (\$405.17); there is no charge in the book of the money returned by Van Anglen; I think it was all returned. I may be able to explain that, if you will allow me time; I do not know how to do it now; our account against him was for merchandize. The account paid to Hatch and Yale was paid by a note for two hundred and thirty-five dollars (\$235.00); that note was handed over October fourteenth, a few days before the assignment; I don't remember when I gave the check; I don't remember to whom I gave it; September sixteenth there is an item of receipt; I then drew a 30 check to Mr. Gilbert for one hundred dollars; I also drew a check on the same date for Joe Skillman, for one hundred dollars; also on the eighteenth of September, I drew a check to E. Randall for three hundred and seventy dollars.

Question—Did you not on the nineteenth of September draw out of the Hudson County Bank, five hundred and ten dollars (\$510) on your check?

Answer—I owed the bank on the nineteenth of September,

all the money I deposited. I mean to say I had not money enough in the bank and in my pocket, to pay the note of Williams, Bradford and Company; I then told the cashier not to pay it; he afterwards found money enough, and paid it.

We deposited in the bank, in the Hudson County Bank as follows, viz:

	September 14th, we deposited	580.09
	“ 15th, “	89.40
	“ 16th, “	569.00
10	“ 17th, “	175.90

And at another time we deposited 370.00

Amounting in all to the sum of one thousand seven hundred and eighty-four dollars and thirty-nine cents (\$1,784.39), that we deposited in the Hudson County Bank. We drew out of the Hudson County Bank as follows, viz:

Sept.	th, to pay Williams, Bradford & Co.'s note	\$537.53
“	for Mrs. Gilbert,	100.00
“	“ for Joseph Skillmann,	100.00
“	“ for E. Randall,	370.00

20 Amounting in all to the sum of one thousand one hundred and seven dollars and fifty-three cents (\$1,107.53), that we drew out.

I can't tell who got checks for the rest of the money; I don't know how it was got out of the bank; it might have been drawn out on checks dated ahead; there was a check presented to the bank on the nineteenth of September which was not good, and then I made the bank account good. Mrs. Gilbert was a confidential creditor of me individually for two hundred dollars and more; she was paid by a note of the Baptist church, 30 between September thirteenth and October eighteenth. The sum of five hundred and twenty-one dollars and sixty-seven cents (\$501.67) was paid to George Bliss and Company; I went to George Bliss and Company, and they took Van Anglen and Company's check for that amount; we paid the check; Van Anglen did not; it was a kite; we paid the check on the seventh of October; it was dated September nineteenth; it was for five hundred and twenty-one dollars and sixty-seven cents (\$521.67); we paid to Bonnell, Brown, Hall and Company two

hundred and eighty-three dollars and fifty-eight cents (\$283.58); it was paid by Ford's note, two hundred and eighty-three dollars and fifty-eight cents (\$283.58), not by Gilbert's check, or by George Ford's endorsement on our note; we went to the bank when the note became due; we went to the bank and paid it; it was Ford's note or his endorsement on our note; I don't know whether that note is credited in cash book or not; I don't see on cash book Gilbert's check, dated twenty-ninth of September for three hundred dollars (\$300). There is in my private account, a bill of Erastus Randall's of one hundred and 10 thirty-two dollars and ninety-six cents (\$132.96); it means that I got credit at Randall's for so much, one hundred and thirty-six dollars and eighteen cents (\$136.18); we got credit for that on our firm books, and it was charged to me.

And being cross-examined, said:

In keeping cash book, it was usual to enter all the checks we drew against the bank; we did at the same time debit the other side with the cash paid. It is not necessarily so that every check should appear on both sides of the cash book the same day. If we drew a check to-day, and charged it on one side 20 of the cash account, and did not credit it on the other, the cash account would be wrong.

My habit was, when I gave a check, to charge it one side, and credit the same amount of money on the other side. If a check goes out, it is charged on both sides; if money paid, it goes on only one side. When we made a deposit, we entered it in the cash book, as cash paid out to the bank; the cash book will not show how much we had in the bank; the balance at the commencement of each day is the cash in the drawer; the loans were paid back, either in cash or settlement of ac- 30 count; I believe they were; not one cent of the loans went into my pocket; I think none went to Thomas C. Brown. There was no part of the property or assets that belonged to Brown & Demarest at the time of this assignment, that was not included in it; our object in making this assignment, was to have the creditors have an equal share, that were not confidential or borrowed money; our confidential creditors have been paid before the assignment was made; we would have paid our confi-

dential creditors, no matter what turn our affairs had taken, if we had compromised and got a settlement, or in any case.

There is not one of these confidential creditors to whom money was paid, but it was justly and honestly due ; there is no part of it to be paid back to me or Mr. Brown, in any way, or to our use ; the title to the house was in my name. Cyrus Knapp's five hundred dollars, which Pharo and Dolson paid, was for money loaned by Knapp to me, before I bought the house ; that five hundred dollars (\$500) was used to buy the
 10 house ; I made it the condition of conveying the house to Pharo and Dolson, that that debt should first be paid ; that debt was justly due to Cyrus Knapp ; he got his pay when they got the house ; they paid him when they got the house. The deed of Pharo was given to him at the time it bears date. I know I never said to Mr. Gasherie, the goods in the store were worth twenty thousand dollars (\$20,000.) I had conversations with Mr. Gasherie ; he wanted us to confess judgment to him in the first place ; it was after we had failed, and after he knew I had failed.

20 I heard his testimony ; I remember the conversation after we failed ; it was then my interest to make it as small as possible ; he wanted to know then how much we could pay ; we never had twenty thousand dollars worth of stock in the store ; the largest amount we ever had on taking an inventory, was about twelve thousand dollars ; our stock then was less than it had been before, because we had not bought our fall stock of goods ; we bought less than usual in August all together ; the amount of mortgages were to be assumed by Pharo, when he took the house ; I staid in the store until we made an assignment, and
 30 then left there ; after that I had nothing to do with the property. I had until the last day before the assignment, hoped to make a compromise with our creditors, and not make an assignment.

Our cash book would not at any time show the amount of funds in the banks ; we generally entered a check on both sides of the cash book ; not always ; it would make no difference in balancing cash account, whether entered or not. Both Mr. Brown and myself, deposited in the bank ; both drew checks,

in loaning out cash ; both of us made the loans between failure and assignment ; five hundred and ten dollars (\$510) was the check by which the balance was drawn out of the bank ; it is not entered in cash book ; it was given to E. Randall and Company ; it was given the fifteenth of September ; I don't know whether it was this or the following check that the bank declined to pay. I recollect a conversation with Mr. Gasherie about the Grove street store ; I did not state to him that there were two or three thousand dollars of debts due the Grove street store ; certain there were not at that time, or ever, that amount 10 of debts due the Grove street store ; about one thousand dollars was the amount due to the Grove street store at that time. I assisted at making the last inventory, upon which thirty-five cents on the dollar was offered ; the goods were put down at sixty or sixty-five cents below original cost ; this is the inventory in this book. (*Pro ut* the said book.)

The goods, in my judgment, were worth that amount ; they were cheap for any man to take them at that amount ; they would have paid more profit at those prices, than new goods at ordinary prices ; the prices of delaines in our inventory, are put 20 down at about half cost ; the silk umbrellas, four or eight in number, I can't say whether the noses, handles, &c., were off or not we put them at one dollar and fifty cents ; we usually kept the best class of drawer goods. Our inventory, when we came to crape shawls and light goods that had to lie over, we put them down below cost, at about sixty per cent ; the price put down in the sheriff's appraisalment is not half what the shawls cost. There were no goods taken away in quantities, while I remained there, except those sold over the counter ; I don't know of any wagon taking away goods, except Mr. Bramhall's wa- 30 gon ; I did not see the wagon ; I did not procure any goods to be sent away ; I know there was none sent away ; there were none sent away, except those sent back to New York the next day after we received them ; that was to Tracy, Irwin and Company ; when we made the assignment, the goods were in good order ; I did not see the goods after the sheriff took possession ; we had a rule : it was to sell remnants and old stock, to sell them at any price. We believed the last year we made very

little profit; the reason was a great depreciation in goods, more than ever before; we sold at a less advance than we ever had before; expenses that year proved to be decidedly the most; The statement of losses was made from the books; it does not all appear on the books; there were some matters outside; that account exhibits a true statement of losses.

Bombazines were put down in our inventory below their cost; the judgment to L. O. Wilson and Company was done hesitatingly; I was doing business as clerk in New York at the
10 time; I was invited to come to the store of L. O. Wilson and Company at a certain time; I met Mr. Brown, I objected to confessing it; he said his object was to let it lie, and it would not prevent him from settling it with us; I asked him if he had any other object, he said no. We were then trying to get a settlement; Mr. Gasherie said nothing about the assignment at the time it was made.

And being again examined in chief, said :

In that exhibit of losses four thousand five hundred and eighty-eight dollars (\$4588) was for private expenses of Henry De-
20 marest. This was the largest item of expenses. Besides that, five hundred dollars, was paid to Knapp; the personal expenses of Brown, were two thousand four hundred and twenty-six dollars (\$2426); that was the largest item.

Deficiency in cash account was three hundred and ninety-one dollars and ninety-seven cents; that was money we had lost in our business. In the evening, in the store we always counted over the cash taken in that day; after counting it, we put it in a pocket book or safe; then after a few days we balanced the book and counted the money; it could have been gone by
30 charging too much on the cash book; I mean to explain in this way, that if we had received so much money, and had paid out nothing, then it could not be accounted for, only by its being taken out of the pocket book; but if we had paid out, and not charged, the cash would be short in the pocket book; in the first place the cash might have been counted wrong; these discrepancies were at the time of our difficulties; we tried to keep our accounts nice, for we expected some of these savage men would like to look at them. September fourteenth, the cash

was over fifty dollars ; we counted it then ; I presume there was cash over previous. On September the nineteenth, cash over seventy-two dollars (\$72) ; October seventeenth cash counted.

October seventeenth we counted the whole cash ; between September nineteenth and October seventh, two hundred and forty dollars (\$240) was lost. I don't remember when that Belville store account was closed ; the books of the Belville store we called good ; this year they turned out bad. I don't know when that account was closed ; my impression is it was closed in 1852. We had always put these accounts down as good ; I 10 think we did not put those credits on the assignment ; we never sold them to anybody ; I presume we did own them. The meaning of depreciation of stock is, that September twenty-first, in our inventory, we put the goods at three thousand dollars below costs ; the inventory was over nine thousand dollars. This made a depreciation of three thousand dollars ; at the next inventory, we put them down still lower. Between my failure and the assignment, I paid all my private debts out of the assets of the firm. Mr. Brown did the same, except the judgment to John J. Brown ; I did not pay anything for my house out of the firm : 20 I borrowed the money ; this money was repaid out of the firm. August thirteenth, A. D. 1854, paid John J. Brown three hundred and fifty dollars (\$350) ; the money we had on hand, we presented to the assignee, we had none on hand whatsoever. I heard of goods being taken away at night ; I don't know that Mr. Brown ever said to me that goods were taken away at night ; I knew of goods going to Hackensack between September thirteenth and October eighteenth ; they went to Mrs. Knapp ; she bought them in our store ; they amounted to about one hundred dollars ; they were sent up by me. They are paid 30 for ; I don't know to whom they were paid ; I went to the bank this morning and ascertained to whom that five hundred and ten dollars (\$510) was paid.

There was only two checks of Brown and Demarest ; I had them in my hands ; I don't know whether on the twelfth of September, we and Randall were square or not. July eighteenth, A. D. 1854, there is an entry in the name of Erastus Randall ; it shows that we paid him in full for all cash borrow-

ed. August twenty-first, received from Erastus Randall; we received one hundred and fifty dollars (\$150) that he had borrowed of us. August twenty-third, paid Erastus Randall three hundred and forty dollars (\$340.) \$340.00

August 24th, received of E. Randall,	\$200.00
" " " "	300.00
" 25th, paid E. Randall,	160.00
" 26th, received of E. Randall,	50.00
" 28th, paid E. Randall	50.00
10 September 2nd, received of E. Randall,	\$45.00
" 1st, paid E. Randall	25.00
" 2nd, " "	20.00
" 5th, " "	12.00
" 6th, " "	150.00
" 7th, " "	100.00
" 9th, " "	16.00
" 12th, " "	150.00
" " received of E. Randall	\$250.00
" " " " "	178.00

20

\$1,023.00 \$1,023.00

The accounts balance on that day; September the twelfth, we were square; September eighteenth paid E. Randall \$620.00; September 23d, paid him in full \$85.00. After the twenty-third of September we received from Erastus Randall, as follows: October seventeenth, received four hundred and ninety dollars (\$490) for borrowed in full.

I don't remember that we paid any cash to confidential creditors that are not mentioned on that book; I have no means of ascertaining how much E. Randall was our confidential creditor. I have not been able to ascertain about that money paid to Van Anglen, why it was not entered on the cash book.

And being again cross-examined, said:

The four thousand five hundred dollars (\$4500) on the loss account does not include all that I drew out; it includes the money and all the bills charged to me; the last year in 1854, I did not spend two thousand dollars (\$2000); what is over, is for expenses previous to that time. The four thousand five hun-

dred dollars, included old losses for four years previous to that time.

Isaac S. Miller being recalled said :

Mr. Crowell left my employ on the morning of the twenty-fourth of November ; I bought the goods of Bramhall on six months credit, without interest.

I overhauled all the goods ; they were all soiled ; the difference between cash and six months, is from five to ten per cent.

And being cross-examined, said :

10

Mr. Crowell left me the day after Thanksgiving day ; the total amount of Bramhall's goods sold to me, was about thirteen hundred dollars (\$1300). I had no dissatisfaction with John ; he did something, not in the way I do business ; I told him it must not be done again ; he said if he could not do as he pleased, he would not stay.

Jasper Garretson being recalled on the part of the defendant said :

I appointed the appraisers ; the levy on Brown's property was made on the twenty-sixth day of September ; the appraisement was not made until I received the other executions ; I levied them all on the same goods. When I got the execution of John J. Brown, I was directed to let it lie till other executions came.

And being cross-examined said :

The amount of sales on John J. Brown's execution was one hundred and forty-five dollars and seventeen cents (\$145.17.) I informed Mr. Hopkins of the sale ; the nett amount of the sales was one hundred and twenty-eight dollars and ninety-five cents (\$128.95.)

30

Samuel A. Hopkins being recalled on the part of the defendant, said :

I have been in the crape shawl department for some time ; I think those shawls were fairly valued ; shawls were low and had been low.

And being cross-examined, said :

I had been that season engaged in crape shawls.

The defendant here offered in evidence the cash book of Brown and Demarest, referred to in the evidence of Thomas C. Brown and Henry Demarest. (*Pro ut* the said cash book.)

The defendant here read in evidence, the following described promissory notes cancelled, viz :

1. Note of \$400, given by Anthony and Ford to Brown and Demarest, dated Jersey City, Sept. 1st, 1854, payable one month
10 after date with interest, endorsed in blank by Brown and Demarest. (*Pro ut* the said note.)

2. Note of \$400, given by Anthony and Ford to Brown and Demarest, dated Jersey City, September 1st, 1854, payable two months after date with interest, and endorsed in blank by Brown and Demarest. (*Pro ut* the said note.)

3. Note of \$400, given by Anthony and Ford to Brown and Demarest, dated Jersey City, Sept. 1st, 1854, payable three months after date with interest, endorsed in blank by Brown and Demarest. (*Pra ut* the said note.)

20 4. Note of \$400, given by Anthony and Ford to Brown and Demarest, dated Sept. 1st, 1854, payable four months after date with interest, endorsed in blank by Brown and Demarest. (*Pro ut* the said note.)

5. Note of \$400, given by Anthony and Ford to Brown and Demarest, dated Jersey City, Sept. 1st, 1854, payable five months after date with interest, endorsed in blank by Brown and Demarest, Hiram Gilbert, H. A. Green, George Ford and John Pratt. (*Pro ut* the said note.)

30 6. Note of \$400, given by Anthony and Ford to Brown and Demarest, dated Jersey City, Sept. 1st, 1854, payable six months after date with interest, endorsed by Brown and Demarest and Hiram Gilbert. (*Pro ut* the said note.)

7. Note of \$400, given by Anthony and Ford to Brown and Demarest, dated September 1st, 1854, payable seven months after date with interest, endorsed in blank by Brown and Demarest, Hiram Gilbert, Cyrus Knapp and C. and W. Knapp, also by John V. H. Besthep cashier, to J. S. Fox cashier, or order. (*Pro ut* the said note.)

8. Note of \$189.29, given by Anthony and Ford to Brown and Demarest, dated Jersey City, Sept. 1st, 1854, payable eight months after date with interest, endorsed in blank, by Brown and Demarest, John J. Brown, assignee, and John J. Brown.—
(*Pro ut* the said note.)

9. Note of \$210.71, given by Anthony and Ford to Brown and Demarest, dated Jersey City, Sept. 1st, 1854, payable eight months after date with interest, endorsed in blank by Brown and Demarest, and Slosson and Bassett. (*Pro ut* the said note.)

10

10. Note of \$164.65, given by Anthony and Ford to Brown and Demarest, dated Jersey City, Sept. 1st, 1854, payable nine months after date with interest, endorsed in blank by Brown and Demarest, John J. Brown, assignee, and John J. Brown.

11. Note of \$235.35, given by Anthony and Ford to Brown and Demarest, dated Sept. 1st, 1854, payable nine months after date with interest, endorsed by Brown and Demarest, and Hatch and Yale, in blank, and by Hellyers, cashier, to A. T. Smith, cashier or order. (*Pro ut* the said note.)

12. Note of \$343.66, given by Anthony and Ford to Brown 20 and Demarest, dated Sept. 1st, 1854, payable ten months after date with interest, endorsed in blank by Brown and Demarest and John J. Brown. (*Pro ut* the said note.)

13. Note of \$225.00, given by Anthony and Ford to Brown and Demarest, dated Sept. 1st, 1854, payable eleven months after date with interest, endorsed by Brown and Demarest, John J. Brown, assignee, and John J. Brown. (*Pro ut* the said note.)

14. Note of \$225.00, payable twelve months after date with interest, given by Anthony and Ford to Brown and Demarest, dated Sept. 1st, 1854, endorsed by Brown and Demarest, John 30 J. Brown and John J. Brown. (*Pro ut* the said note.)

The defendant offered in evidence the written statement of Thomas C. Brown, made by him under oath, and signed by him, taken in a matter supplemental to execution in the case of Albert Journey, Jun. and Company, against the said Thomas C. Brown and Henry Demarest in the Circuit Court of the county of Hudson; also the written statement of the said Henry Demarest, taken in the same proceeding, which statements

were offered as evidence in the cause. (*Pro ut* the said statements.)

To the admission of these statements as evidence in the cause, the plaintiff, by his counsel, objected, and insisted that the same were not legal and competent evidence in the cause.

And the court having delivered its opinion, that the said statements were not legal and competent evidence in the cause, except so far as the same may show that the said Thomas C. Brown and Henry Demarest have made different statements on this trial from those made by them in the said examinations, refused to admit the said statements in evidence, except those parts which contradict their statements made on this trial.

To which said opinion of the court, the said defendant, by his counsel, excepted, and prayed that this his bill of exceptions might be sealed, and it is sealed accordingly.

E. B. DAYTON OGDEN. Judge. [L. s.]

Charles M. Holmes, a witness produced and sworn on the part of the defendant, did testify as follows :

20 I know Mr. Krugler ; he told me of seeing a wagon at the store of Brown and Demarest ; I told Mr. Hopkins soon after, three or four days ; I know he travels a considerable ; he stated it to me in my office in Barrow street, Jersey City.

And being cross-examined, said :

Mr. Krugler told me it was a large country farm wagon.

Samuel A. Hopkins being again recalled, said :

Mr. Holmes told me what Krugler had said about the wagon after Thanksgiving. Thanksgiving was on November twenty-
30 third ; Mr. Holmes said Mr. Krugler said, I saw it a few evenings ago.

Jasper Garretson being again recalled, said :

Mr. Farley, deputy sheriff, had the keys. No goods were taken away between the levy and the sale.

Samuel A. Hopkins being again recalled said :

The sale took place on the twenty-first and second days of November.

Thomas C. Brown being recalled on the part of the plaintiffs, did testify as follows :

There was no goods removed from the store between the assignment and sheriff's levy. My inventory of stock is of the goods that were in the store at the time; it seems to correspond with this inventory, except the prices. I should think there was enough difference in prices, to account for difference in the inventories. The first I heard of goods being removed, was when 10 I saw the affidavit of Mr. Krugler; I did not think they were beyond half what we inventoried them at; I was surprised that they brought so much. They were thrown together, and a string tied around them; I recollect the conversation with Mr. Boyd; I did not make such a statement as he said I made; he is mistaken; I have that very book; this is the book that was shown to him; it shows stock taken August thirty-first, A. D. 1853; it shows there was eight thousand four hundred and twenty-two dollars and eighty-one cents profits; I showed him the book; I had it drawn off on a piece of paper. We had not 20 at that time made more than that eight thousand four hundred and twenty-two dollars and eighty-one cents profits; that profit assumed the debts all good; that inventory is at cost prices; both inventories next year were below costs; amount of stock at that time, about twelve thousand dollars (\$12,000.) The average amount of stock was from ten thousand dollars (\$10,000) to fifteen thousand dollars (\$15,000.) I don't know as it ever averaged over thirteen thousand dollars (\$13,000); we never had twenty thousand dollars (\$20,000) of stock. I commenced with five hundred dollars (\$500); Mr. Demarest put 30 in five hundred dollars (\$500); I borrowed five hundred dollars (\$500) of Mr. Board; I gave him John J. Brown and my father as securities.

That is the debt for which I confessed the judgment to John J. Brown; that judgment was made out of the household property; it was not paid for out of the property of the firm or my individual money. It was bought in A. D. 1852; then I went

to housekeeping ; the cash was balanced every day ; the account was added up and balanced on the books, but the money was not counted.

And being cross-examined, said :

I have not compared the sheriff's inventory with ours, to see that they are the same amount of goods ; I recollect distinctly with having that conversation with Mr. Boyd ; I showed him the statement ; I don't think he took any memorandum from the statement ; I don't think I was with him over a quarter of an 10 hour, or under ten minutes.

The Bellville store was sold out in A. D. 1851 or 1852 ; I don't know what has become of that leaf in this book shown to Mr. Boyd ; it was a blank leaf I should think ; this book contains an account of stock for the years A. D. 1852 and 1853.

The Bellville account is in A. D. 1853 ; our stock runs up as high as thirteen thousand dollars (\$13,000) ; I don't know the time ; it might have been as high as that every year, between the time of taking the account of stock ; I may have told Mr. Boyd the amount of sales, and how much for cash ; I think I 20 did ; I don't think I told him the amount of our liabilities ; I think I did state that my proportion of stock was six thousand dollars (\$6000,) and Demarest's was three thousand dollars (\$3000,) for he had drawn more from the firm than I had ; that was my proportion of the nett capital in round numbers. At the close of A. D. 1852, we had assets in Van Dykes and Company's store, to the amount of four thousand four hundred and thirty-eight dollars and seventy-nine cents (\$4,438.79) ; in Sandford's store to the amount of three thousand one hundred and twenty-two dollars and ninety-four cents (\$3,122.94) ; amounting 30 in all to the sum of seven thousand five hundred and sixty-one dollars and seventy-three cents (\$7,561.73). This book does not contain the account of sales ; the sales from A. D. 1852 to A. D. 1853 could not have been much short of fifty-four thousand dollars (\$54,000.) Forty-seven thousand dollars (\$47,000) in cash would be a fair proportion of cash. As near as I can tell it was in April or May, A. D. 1854, when our stock amounted as high as thirteen thousand dollars (\$13,000) ; I cannot tell at this time when our confidential debts were paid ;

it was just before the assignment ; some of them might have been paid after the assignment ; I purchased things after the assignment and paid for them. As far as I know all our individual creditors were paid prior to the assignment, and after the thirteenth of September. Money received over the counter was counted every day ; what we sold to-day we would deposit to-morrow ; sometimes on the very same day, and sometimes a week after ; sometimes as much as nine days have elapsed.

And being again examined in chief, said :

I can't say I stated to Mr. Boyd the profits of the preceding 10 year. The last year of our business we did not make any profit ; I added to the statement twelve per cent ; we did not that year make twelve per cent. on sales ; we did not make enough to pay expenses. We owed Mr. Anthony at the time we settled with him, fifteen hundred dollars (\$1500).

And being again cross-examined, said :

I suppose our profits would amount to twelve per cent. on the sales of the year ; we have nothing to offset against the profits of that year, except the losses and expenses shown. The statement of Mr. Boyd is correct ; it is near sixty thousand dollars 20 (\$60,000) ; seven thousand two hundred dollars (\$7200,) would be my estimate of the profits.

I added the twelve per cent. supposed profits after the sales were made ; I don't think that we did make five per cent. on the whole sales ; I know we sold them at or near cost, because the market had fallen ; I made up the statement to show that if we had made that amount, we could not pay more.

By a juror.—The statement was made up carefully.

Charles G. Landon, another witness produced and sworn on the part of the plaintiff, did testify as follows, viz : 30

I am a member of the firm of George Bliss and Company ; we are creditors of Brown and Demarest to the amount of three thousand three hundred and sixty-eight dollars and sixty cents (\$3,368.60.)

Question—Did you present your account to the assignee ?

To this question the defendant, by his counsel, objected, and insisted that the same was not legal and competent, and that an

affirmative answer thereto, would not be admissable and legal evidence in the cause.

And the court having delivered its opinion that the said question was a legal and competent question, and that an affirmative answer thereto would be competent and legal evidence in the cause, in rebuttal of any inference to be drawn from the fact that the report of assignee only shewed a claim of about \$150, overruled the said objection, and admitted the said question to be answered.

- 10 To which opinion of the court, the said defendant, by his counsel, excepted, and prayed that this his bill of exception might be sealed, and it is sealed accordingly.

E. B. DAYTON OGDEN, Judge. [L. s.]

We did present a claim to the assignee of Brown and Demarest.

This is the account I presented. (*Pro ut* the said account.)

The plaintiff, by his counsel, offered to read the said account in evidence to the jury.

- 20 To which the defendant, by his counsel, objected, and insisted that the said account was not legal and competent evidence in the cause, and the court having delivered its opinion that the same was legal and competent evidence in the cause, overruled the said objection, and admitted the said account to be read in evidence to the jury.

To which opinion of the court the defendant, by his counsel, excepted and prayed that this his bill of exceptions, might be sealed, and it is sealed accordingly.

E. B. DAYTON OGDEN, Judge. [L. s.]

- 30 *Charles G. Landon* being further examined said:

It was not presented before, because the property had all been taken away by other creditors, and we supposed we had to wait. We presented the claim of Bliss and Company under the second assignment; the affidavit is June the eighth, A. D. 1855; I presume it was presented at that time or some subsequent day. I don't know of the presentation of the other accounts.

George W. Anthony being duly sworn on the part of the plaintiffs, said :

I lived in Jersey City in A. D. 1854; I know the store of Brown and Demarest; my wife and myself had been to New York; in coming home, we saw a wagon backed up at No. 41 Montgomery street; it was a country wagon; it was between nine and ten o'clock. As I went past the store, I saw a man going out with a bundle, and he put it in his wagon, and then he went back in the store; the door was partly open; it was just before, or just after Thanksgiving day.

10

And being cross-examined, said :

I can't say what day it was; I am positive it was after the sale by the sheriff.

The evidence being closed, His Honor, the Judge, charged the jury as follows, viz :

Gentlemen of the jury,

This is an action of trespass, in which the plaintiff seeks to recover in the way of damages, the value of certain goods and chattels, comprising a stock of dry goods, taken and converted into money by the defendant.

20

Three points must be affirmatively established before you, to entitle the plaintiff to a verdict as claimed.

1st. That the defendant took and converted and appropriated against the consent of the plaintiff, the stock of merchandize declared for.

2d. That the plaintiff, at the time of the alleged trespass, November 6th, 1854, was the legal owner of those goods, having or being entitled to have actual possession of the same.

3d. The value of the property at the time it is charged to have been unlawfully taken.

30

The defendant justifies, as sheriff of this county; he pleads that at the time he took and sold the goods in question, he had in his hands three executions, issued out of this court upon judgments, duly entered up against Thomas C. Brown and Henry Demarest, and that the property in question, was at the time, the proper goods and chattels of said Brown and Demarest, and subject to levies under said executions.

The property had undoubtedly belonged to them as partners,

and was liable to be taken in execution, in behalf of their creditors, unless it had been lawfully conveyed before such executions were lodged in the sheriff's hands.

The taking and disposing of the goods by the sheriff, is admitted by his counsel, which concession settles one of the cardinal points in the cause; but, in connection with such acknowledgment, it is contended that they belonged to Brown and Demarest, as traders, at the time of the taking.

The plaintiff does not come before you, claiming to have
10 been a *bona fide* purchaser of the property from Brown and Demarest, for his own individual benefit and purposes.

His title to the property in controversy, is derived through a conveyance made by Brown and Demarest to him, as a trustee, for the benefit of their creditors.

In support of the title, he has produced a deed of assignment, dated and executed, and delivered before the entry of either of the judgments, upon which executions have been issued, by virtue whereof the sheriff took the property.

He has also shown that he took possession of the stock of
20 goods on the delivery of the assignment, and entered on the discharge of his fiduciary duties. If the instrument is legal, the plaintiff has made out that part of his case, and should recover at your hands. But it is contended, on the part of the defendant, that the conveyance is void against the judgment creditors of Brown and Demarest, as having been made in violation of the provisions, and of the policy of an act of our Legislature, respecting assignments made for the equal benefit of creditors.

This, gentlemen, is the great question for us to settle. So far
30 as the law of the case is involved, I will endeavor to expound it, and to furnish you with that light, which it should evolve for your guidance. So far as the facts are to be determined and to be applied, I shall not interfere with your prerogative, which is to pass upon the evidence, and determine what the truth of the case is.

“To make a valid assignment under the influence of our statute, two things are essential.”

1. That it should be for the equal benefit of all the assignor's creditors.

2. That it seeks to create no preference; because if it does, the instrument attempting it must be fraudulent and void.

An assignment not made for the equal benefit of all creditors, but through which a preference is sought to be given to any one, not a mortgage or judgment creditor under the act, over another, is in contemplation of law, fraudulent and void. Although the transaction may be clear of actual fraud, yet if it be done in a manner prohibited or forbidden by law, it must be invalid, and cannot be successfully laid as the corner stone for a recovery in a court of justice.

10

The legal efficacy of this assignment is to be judged of in two ways. First by its face. Secondly by facts and circumstances and transactions, so intimately connected with its concoction, execution and delivery, as to be taken as parts and parcels of the instrument. If legal fraud is established against the assignment, through either of these means, it is gone and could not have conveyed any title in the goods to John J. Brown.— Upon inspecting the paper itself down to the signatures and seals of the assignors, I find that it purports to convey all their estate as partners and as individuals, for the benefit of their 20 joint and separate creditors, and that it does not profess to make any preferences whatever. It was made upon a lawful consideration, to wit: the payment of all such creditors as might choose to become partners to it, by exhibiting their claims. It is duly acknowledged and recorded. It was accepted by the assignee, as appears by an endorsement thereon by the surrogate of the filing and approval by him of the required bonds.

If this be the whole of the operative parts of the assignment, it is valid on its face, is not tainted by the taint of legal fraud, and at the time of the delivery thereof, it conveyed all the estate 30 which it professes to embrace.

But it is contended by the defendant's counsel, that the statute requires the debtor to annex to such assignment or conveyance an inventory, under oath, of his estate, real and personal, together with a list of his creditors, and the amount of their respective claims; the inventory, however, not to be conclusive as to the *quantum* of the estate. The assignors have done so in this case, and it is insisted that those schedules are parts

and parcels of the assignment, and that the whole are to be construed together.

In this aspect of the case, it has been urged that the inventory of property recognizes an unlawful preference in favor of the assignee, and one in favor of Pharo and Dolson, and hence that, on its face, the instrument, as a whole, is fraudulent in law and void.

The inventory of the stock of store goods, closes with the footing, in amount, of six thousand six hundred and eighty-five dollars and seventy cents (\$6,685.70). After the list of creditors, follows an inventory of the individual estate of Mr. Brown, amounting to five hundred and seventeen dollars (\$517,) noted as subject to a judgment and levy thereon, made by the sheriff, in favor of John J. Brown, for the sum of five hundred and forty-one dollars (\$541). The time when that judgment was entered, or whether by confession or by adverse proceedings does not there appear; therefore, the statement thus made on the inventory, does not *per se* impugn the *bona fides* in law of the assignment or conveyance. At the foot of the list of creditors 10 is a memorandum, that Pharo and Dolson had two notes given by Mr. Ford to the assignors, for the payment in gross of the sum of seven hundred dollars (\$700), held as collateral security for a debt, which they supposed would be satisfied by the sale of a house and lot, conveyed to them for the satisfaction of three thousand dollars (\$3000) confidential. The notes to revert to assignors or the assignee, if the debt should be realized or satisfied by a resale of the house and lot.

It is contended that *this memorandum* shows that an illegal preference was created at the time of making the assignment 30 or in contemplation of making it, and thus by becoming a component part of the transfer, vitiates the deed on its face; and that the acceptance by the assignee of the trust thus made *sub modo*, is a recognition on his part of a forbidden preference, whereby he became a party to the legal fraud.

As I ruled at a previous stage of the cause, so I repeat upon further reflection and examination, that the writings referred to, do not create preferences in favor of any particular creditors. They are merely items in the inventory of parts of the joint

and individual estates of the assignors, with statements of anterior liens, fastened upon those items, *apparently* made to give the assignee notice that there might be residuums from these items, after the antecedent leinors might be satisfied; which should enure to the benefit of parties, who might come in under the assignment. The assignee is not directed or authorized by the writings, taking the memorandum to be parts of the conveyance, to pay these leinors or preferred creditors in full. So far as the instrument is concerned, it does not appear when or how these incumbrances were created. If as the law 01 presumes, (because fraud must be proved) those liens were in favor of *bona fide* creditors and were lawful, provided an assignment had not been subsequently made, the mention of them in the inventory could not avoid these liens; but such creditors retained their priorities to the extent of the property bound by the liens. The subsequent act of the assignors did not benefit or prejudice their securities. If *not referred* to by the assignors in the general assignment, the liens would remain good, so far as the property bound will respond, and no farther. If *referred to* such reference, even to the extent of a preference, will not 20 entitle them to any rights beyond those antecedently secured to them. The instrument of assignment, is in form, a compliance with the provisions of our statute, and as this exposition of the law clears the assignment from the taint of the legal fraud, alleged to be apparent on its face, the plaintiff is entitled to your verdict, for such damages as under the evidence, you shall think it just to assess, unless the parol testimony has disclosed facts, intents and conduct, so connected in legal contemplation with the deed of assignment as to avoid it, from its contravention of the particular provisions of our statute or of the 30 policy of the law; or such actual intentional fraud has been proved against the assignors as in your judgment should vitiate the whole transaction for its wickedness and corruption.

Fraud will impair and destroy all contracts which it is permitted to contaminate. Honesty is the policy of human transactions, in contemplation of the laws of our land; and whenever a conveyance has been conceived and executed in fraud, either for the purpose of practising imposition upon cre-

ditors, or of cheating the Grantee, an honest jury, upon a full development of the corruption, will always view the act as void, and will give no effect to it.

It therefore, gentlemen, behooves you to look critically through the testimony, for the purpose of determining in the first place, whether facts have been proved, showing that the deed to Pharo and Dolson, and the transfer of Mr. Ford's notes to them, and the judgment confessed by Thomas C. Brown to John J. Brown, who subsequently became the assignee, or either of
 10 those acts should be treated by you, as constituting a part of the assignment for the benefit of creditors. If by the strength of the evidence, you shall be brought to that conclusion, you will apply to it the law which I directly shall give you.

It is a cardinal rule observed in legal proceedings, that a party, holding the affirmative of an issue, shall establish his propositions, to the satisfaction of the jury; and there also is another rule, that fraud cannot be inferred, but must be affirmatively proved. You, therefore, must look to the defendant for plenary proof of fraud in the particulars, upon which he has
 20 placed that part of his defence.

The questions involved in this inquiry are interesting and important. On the one hand it has been contended that the provisions and policy of our statute law are such, that when a tradesman, to his surprise, discovers that his affairs are in a critical state, and that thick shadows are gathering about him, he cannot make a binding transfer of his estate for the benefit of all his creditors; if, under the promptings of a conscientious sense of duty, when the subsequent storm was prefigured by an omen not larger than a man's hand, he had secured by judgment, a friend, who, relying upon commercial confidence and
 30 etiquette, without gain or the prospect thereof, had loaned him temporarily, the essence of his own financial success. While on the other hand, it is insisted that a debtor, floundering under embarrassments in protecting his confidential creditors, by transfers of property or payments of money, or confessions of judgments, does not violate the letter or policy of the law, nor preclude himself from subsequently or in connection therewith, making an assignment of his remaining estate, for the equal

benefit of his creditors at large, provided such assignment be not tainted by any actual fraud, covin or collusion. The question is new in this state, as it regards the protection of what are known in business parlance as confidential creditors; and from its importance to our trading community, it is not probable that it will be considered as finally settled by the rulings which now may be made. The one party or the other may desire that so important a matter in the construction of our statute, shall be more deliberately reviewed by an appellate tribunal, in which event, I shall cheerfully afford them any aid, 10 which the legal aspect of the case may justify.

You have heard the counsel on each side concur in the law which regulates the relative rights of joint and several debtors and their creditors. Partnership creditors are preferred out of joint property; individual creditors out of separate property. It is important for you to bear this rule in mind, when determining the effect of the reference to the judgment obtained by the assignee against one of the assignors. The testimony shows it to have been entered for an individual indebtedness of Thomas C. Brown, created long before the firm of Brown and De- 20 marest was formed. It is dated the twenty-sixth of September, some three weeks before the assignment, and the execution was levied solely upon the separate property of Thomas C. Brown.

How can that transaction injuriously affect the rights of the partnership creditors? They have no claim for distributive shares of that estate, until Thomas C. Brown's individual creditors be paid in full. The inventory and list of creditors show that John J. Brown was the only creditor of that class; and by the law as conceded, he was entitled to as much of the 30 avails of the individual estate of Thomas, as would satisfy his demand in full. It appears by the sheriff's return, that the property levied on under that execution, did not discharge a quarter part of the sum he was directed to raise. That amount John J. Brown was entitled to take. But nothing in any paper connected with the assignment, would permit him to draw any portion of the deficiency from the partnership estate, before all the joint creditors, who become parties to the assignment are

satisfied in full. Therefore, there was no legal fraud in that transaction, which can be taken advantage of here, admitting that it was a part and parcel of the act of assignment; nor is the fiduciary integrity of the assignee impaired in the eye of law or of morals, by his taking the trust under those circumstances.

The deed from Demarest and wife to Pharo and Dolson, was made for the conveyance of *his* separate property, is dated the 9th of October, and was intended to secure to them the payment of about \$3000 of their joint indebtedness of a confidential character.

He had no individual creditors, and hence by law, the creditors of the firm could look to that separate property, after the joint estate was exhausted. If I rightly understand the testimony, both of the assignors have said, that this and some other debts would have been paid or secured by them, whether they should afterwards have made an assignment or not. That they were of such a special character, as according to the usages of mercantile intercourse, were always first provided for, and would have been retired by them, independent of their success in the desired composition.

The two notes which Pharo and Dolson held, were given on the same account, and, upon the arrangement made by the parties at the time, were to be returned, if the real estate should prove sufficient to pay the debt. The fact that Pharo and Dolson have received payment of those notes from Ford, does not change the nature of the transaction. They hold that money in trust, and must account for it with the assignee, if it be not absorbed in discharging the particular indebtedness. The payments, by the assignors, of money to other creditors, between the 13th of September and the 18th of October, are to be viewed in the same light, as is the arrangement with Pharo and Dolson.

If the weight of the testimony satisfies you, that those transactions were so connected and interwoven with the assignment, as to be parts and parcels of it; and that such securities and payments would not have been given and made, except in contemplation of a general assignment of the residue of their

estates, and that the plan was resorted to in evasion of the statute, to effect indirectly what the law would not permit to be done by the instrument itself, the assignment was void in its conception and execution, and it conveyed to the assignee no estate in the property, and hence he has failed in establishing that part of his case.

I believe that there is no proof that Pharo and Dolson, when they received their deed and the notes, knew that a general assignment was to be made ; if so, they are not actually or constructively parties to the alleged fraud.

10

The defendant has attempted to make another point, which is, that the assignors have been guilty of substantive fraud which vitiates the assignment. If, gentlemen, you find upon the evidence, that they have intentionally done a fraudulent act—if they have secreted any portion of their estates, or intentionally concealed from the eyes of their creditors the true value of their assets, with a view of making a fraudulent compromise at 40 or 35 cents on the dollar ; if they have withheld from their creditors, for their own subsequent use, property which in justice, ought to be appropriated to the payment of their debts ; if they 20 have run off their goods, for the purpose of converting them unfairly into cash, to be secured for their own ultimate enjoyment, either by placing it in the hands of fictitious creditors, or salting it away for future enjoyment, all in contemplation of insolvency and a general assignment, such acts must be taken by you as permeating the instrument of transfer, as being done with a view of hindering and defrauding creditors, and consequently as sufficient to taint and avoid the conveyance. How these matters are, is left to you to determine upon your consciences, under the influence of the proofs.

30

Should your conclusions, upon a careful review of the whole case, be in favor of the plaintiff, the remaining question will be, what is the amount at which the damages shall be assessed ?

Gentlemen, that matter is entirely in your hands. Neither the inventory made by Brown and Demarest, nor that made by the assignee, nor the appraisement of the assistants whom the sheriff called in, nor the proceeds of the public sale should alone control your judgment on this point.

The plaintiff, as trustee for the creditors at large, is entitled if successful, to a verdict for the largest amount that you may think, under the evidence, he could have obtained for those goods. The estimates made by others, to which you have been referred, may be profitably used in directing your own judgments.

The assignee was bound in law to make the most of the estate that he fairly could, and as the defendant has taken from him the opportunity of exercising his discretion in the disposal
10 of the goods, he should respond to the amount of their full disposable value at the time he took them, with interest computed thereon from the sixth of November, 1854, to this date. Although the case will warrant an assessment up to the full value of the property, you should not add to that result any thing by way of smart money, or to remunerate for the expenses incident to the maintainance of the assignees rights in this court.

Whatever may be the result of your deliberations, I am assured that the verdict will not reflect upon the moral character of the assignee. When it was proposed to connect him with
20 the perpetration of actual fraud, I felt that it was due to him that I should open wide the door to his assailants, having a consciousness that unless his nature had been changed by his intercourse with the house of Brown and Demarest, he would come out from the ordeal bright and unsullied.

The defendant, by his counsel, excepted to those parts of the charge of the court, which ruled,

1st. That the deed of assignment executed by Brown and Demarest to the plaintiff, was valid on its face, and was not
30 tinged by the taint of legal fraud, and that at the time of the delivery thereof it conveyed all the estate which it professed to embrace.

2d. That the statement of the judgment of the plaintiff against Thomas C. Brown as made in the inventory annexed to the deed of assignment, does not *per se* impugn the *bona fides* in law of the assignment or conveyance.

3d. That the memorandum at the foot of the list of creditors that Pharo and Dolson held two notes given by Mr. Ford

to the assignors, for the payment in gross of the sum of \$700, held as collateral security for a debt which they supposed would be satisfied by the sale of a house and lot, conveyed to them for the satisfaction of \$3000, confidential debt; the notes to revert to the assignors or assignee if the debt should be realised or satisfied by a re-sale of the house and lot, does not create preferences in favor of any particular creditors, that they are merely items in the inventory of parts of the joint and individual estates of assignors, with statements of anterior liens fastened upon those items, apparently made to give the assignee notice that there might be residuums from those items, after the antecedent lienors might be satisfied, which should enure to the benefit of parties who might come in under the assignment.

4th. That the instrument of assignment is in form a compliance with the provisions of our statute, and as this exposition of the law clears the assignment from the taint of the legal fraud alleged to be apparent on its face, the plaintiff is entitled to your verdict for such damages as under the evidence you shall think it just to assess, unless the parole testimony has disclosed facts, intents and conduct so connected in legal contemplation with the deed of assignment as to avoid it from its contravention of the particular provisions of our statute, or of that policy of the law, or such actual intentional fraud has been found against the assignors as in your judgment should vitiate the whole transaction for its wickedness and corruption.

5th. That there is a rule of law that fraud cannot be inferred, but must be affirmatively proved, you must therefore look to the defendant for plenary proof of fraud in the particulars upon which he has placed that part of his defence. 30

6th That there was no legal fraud in the confession of judgment by Thomas C. Brown to the plaintiff, which can be taken advantage of here, admitting that it was a part and parcel of the assignment, nor is the fiduciary integrity of the assignee impaired in the eye of law or morals, by his taking the trust under such circumstances.

7th. That the two notes which Pharo and Dolson held were given on the same account, and upon the arrangement made

with the parties at the time were to be returned if the real estate should be sufficient to pay the debt. The fact that Pharo and Dolson have received payment from Ford of those notes, does not change the nature of the transaction. They hold that money in trust, and must account for it with the assignee, if it be not absorbed in discharging the particular indebtedness. The payments, by the assignors, of money to other creditors, between the thirteenth of September and the eighteenth of October, are to be viewed in the same light as is the arrangement
 10 with Pharo and Dolson. If the weight of the testimony satisfies you that those transactions were so connected and interwoven with the assignment as to be part and parcels of it, and that such securities and payments would not have been given and made, except in contemplation of a general assignment of the residue of their estate, and that the plan was resorted to in evasion of the statute, to effect indirectly what the law would not permit to be done by the instrument itself, the assignment was void in its conception and execution, and it conveyed to the assignee no estate in the property, and hence he has failed
 20 in that part of his case.

And the said defendant, by his counsel, prayed that this his bill of exceptions might be sealed, and it is sealed accordingly.

E. B. DAYTON OGDEN, Judge. [L. s.]

After the judge, during an adjournment of the court, had prepared a written charge, and had come before the jury to deliver the same, the defendant, by his counsel, handed a paper writing to the court, and therein asked the court to charge the jury as follows:

1st That the deed made by Henry Demarest and wife to
 30 Joseph W. Pharo, bearing date the ninth day of October, 1854, and the transfer of the notes of Ford, amounting to \$700, which accompanied the deed, constituted an unlawful preference, under the act to secure to creditors an equal and just division of the estates of debtors, who convey to assignees for the benefit of creditors. Pharo and Dolson by that deed, and the notes, having been preferred over other creditors to the amount of three thousand dollars, such preference having been sanc-

tioned by John J. Brown previous to the time that the same was consummated, and being recognized in the assignment, the assignment thereby became void, as against the creditors having levies under executions.

2d. That if the jury believe that the judgment confessed by Thomas C. Brown to John J. Brown on the 25th day of September, 1854, for the sum of \$541; the payment to Erastus Randall on the fourteenth day of October, of \$640.37; the payment to Hiram Gilbert on the seventeenth day of October, of \$1200; the security given to Pharo and Dolson to the amount of \$3000; the payment made to Bonnel, Brown, Hall and company, on the second day of October, of the sum of \$283; and the payment of \$247.82, between the thirteenth day of September, and the eighteenth day of October, 1854, were made with a view to or in contemplation of a subsequent assignment, they constituted such preferences as rendered the assignment of the eighteenth of October void as against creditors having levies under executions.

3d. That if the jury believe that the partners, Brown and Demarest, paid their private debts in full, out of the partnership property, at a time when the partnership was insolvent, and such payments were made in contemplation of an assignment, such payments were a fraud upon the act entitled "An Act to secure to creditors an equal and just division of the estates of debtors, who convey to assignees for the benefit of creditors," and rendered the assignment of the 18th of October void as against creditors having executions.

4th. That if the jury believe that Brown and Demarest, after the thirteenth of September, 1854, concealed the amount of their assets with a view of making a compromise at forty cents, or thirty-five cents on the dollar, and in case they failed to make a compromise contemplated an assignment, such concealment was a fraud, which would vitiate the assignment as against creditors having executions and levies on the property assigned.

5th. That if the jury from the evidence believe that Brown and Demarest did not make a full surrender of all their property to the assignee at the time of making the assignment, the as-

signment is fraudulent and void as against creditors having executions, whether the assignee was a party to the fraud or not.

6th. That the time for presenting claims by the creditors under this assignment having passed, the plaintiff cannot recover the full value of the goods, but only such sum as would be sufficient to pay the demands of creditors who have come in under the assignment, and the reasonable expenses of the assignee.

10 7th. That if the jury believe that the motive of making the assignment was to enable the debtors to obtain time to compromise their debts, the assignment then as a matter of law was made to delay and hinder creditors, and is fraudulent and void.

8th. That if the jury believe that Thomas C. Brown remained in possession of the property after the assignment, it is evidence of such fraud in the assignment as will vitiate it.

9th. That there is evidence that the deed to Pharo, the passing of the notes to Pharo and Dolson, the confession of judgment to the assignee, and other dispositions of property
20 proved, were parts of one system for the purpose of making a general assignment, and if the jury so believe, and that preferences were intended to be made by the above acts, the assignment is void.

10th. That there is some evidence to show that the assignment is fraudulent and void, and the weight of the evidence and credibility of the testimony is for the jury to determine.

11th. That the assignee is not a bona fide purchaser for a valuable consideration under the language of the statute of frauds.

30 The court therefore read the contents of the varied request, and made his charge to the jury as it had been previously prepared. The counsel for the defendant then called the attention of the judge to the paper writing, and asked for a charge upon the points. He declined to charge the jury expressly upon each of the specifications set out in the paper writing; and said to the jury that he was of opinion that his views of the law on those points were sufficiently embraced in the instructions already given to them. The court also said that it did

not deny the law to be as set forth in the written specifications, and in the progress of the trial that he had so declared it to the jury to be; it not having been contradicted by the counsel for the plaintiff. The defendant, by his counsel, excepted to the action of the court in the last above proceedings, and prayed that this his bill of exceptions thereto might be sealed, and it is sealed accordingly.

E. B. DAYTON OGDEN, Judge. [L. s.]

On the return of the writ of error the plaintiff in error assigned errors as follows, viz:

10

Afterwards, that is to say on the third day of June, in the year of our lord one thousand eight hundred and fifty-six, before the justices of the Supreme Court of judicature, of the state of New Jersey, at Trenton, comes the said Jasper Garretson by Stephen B. Ransom, his attorney, and says that in the record and proceedings aforesaid, and in giving the judgment aforesaid there is manifest error in this, to wit: that on the trial of the said cause the said judge, before whom the same was tried, admitted illegal evidence offered by the defendant in error, which was objected to by the said Jasper Garretson, whereas by the law of the land such evidence ought not to have been admitted, therefore in this there is manifest error. Also, there is error in this, to wit: that upon the trial of this cause in the said Circuit Court of the county of Hudson, the said judge before whom the same was tried, ruled that the evidence offered by the said John J. Brown was sufficient in law to enable the said John J. Brown to recover against the said Jasper Garretson, and refused to direct the said plaintiff to be called, when requested so to do by the said Jasper Garretson; whereas by the law of the land the said evidence offered by the said John J. Brown was not sufficient in law to make out a legal cause of action against the said Jasper Garretson, and the said John J. Brown ought to have been called, therefore in that there is manifest error. And also there is error in this, to wit: that on the trial of the said cause in the Circuit Court of the county of Hudson, the said judge before whom the said cause was tried, overruled and rejected legal and competent

evidence in the cause, which was offered by the said Jasper Garretson; whereas by the law of the land the evidence so offered was legal and competent evidence in the cause, and ought to have been admitted; therefore in that there is manifest error. And also there is error in this, to wit: that on the trial of the said cause in the said Circuit Court of the county of Hudson, the said judge charged the jury as follows, that is to say: "That the deed of assignment executed by Brown and Demarest to the plaintiff is valid on its face, and is not tainted by
10 the taint of legal fraud, and that at the time of the delivery thereof it conveyed all the estate which it professed to embrace;" whereas by the law of the land the said deed of assignment executed by Brown and Demarest to the plaintiff was not valid on its face, and *was* tainted by the taint of legal fraud, and at the time of the delivery thereof it did not convey all the estate which it professed to embrace, and the said court ought to have so charged the jury; therefore in that there is manifest error. And also there is error in this, to wit: that on the trial of the said cause the said court further charged the
20 jury, "that the statement of the judgment of the plaintiff against Thomas C. Brown, as made in the inventory annexed to the deed of assignment does not *per se* impugn the *bona fides* in law of the assignment or conveyance; whereas by the law of the land the said statement of the judgment of the plaintiff against Thomas C. Brown, as made in the inventory annexed to the deed of assignment, *does per se* impugn the *bona fides* in law of the said assignment or conveyance; therefore in that there is manifest error. And also there is error in this, to wit: That on the trial of the said cause, the said court further
30 charged the said jury, "that the memorandum at the foot of the list of creditors, that Pharo and Dolson held two notes given by Mr. Ford to the assignors, for the payment in gross of the sum of \$700, held as collateral security for a debt which they supposed would be satisfied by the sale of a house and lot conveyed to them for the satisfaction of \$3000, confidential debt, the notes to *revert* to the assignors or assignee, if the debt should be realised or satisfied by a re-sale of the house and lot, does not create preferences in favor of any particular creditor;

whereas by the law of the land the said memorandum at the foot of the list of creditors, that Pharo and Dolson held two notes given by Mr. Ford to the assignors, for the payment in gross of the sum of \$700, held as collateral security for the debt which they supposed would be satisfied by the sale of a house and lot, conveyed to them for the satisfaction of \$3000 confidential debt, the notes to revert to the assignors or assignee if the debt should be realised or satisfied by a re-sale of the house and lot, does create a preference in favor of the said creditors, Pharo and Dolson; therefore in that there is manifest 10 error. And also there is error in this, to wit: that on the trial of the said cause the said court charged the jury as follows, to wit: "That the instrument of assignment is in form a compliance with the provisions of our statute, and as this exposition of the law clears the assignment from the taint of the legal fraud, alleged to be apparent on its face, the plaintiff is entitled to your verdict for such damages as under the evidence you shall think it just to assess, unless the parole testimony has disclosed facts, intents, and conduct, so connected in legal con- 20 templation with the deed of assignment, as to avoid it from its contravention of the particular provisions of our statute, or of the policy of the law, or such actual intentional fraud has been found against the assignors, as in your judgment should vitiate the whole transaction for its wickedness and corruption;" whereas by the law of the land the said instrument of assignment is not in form a compliance with the provisions of our statute, and the said assignment is not cleared from the taint of legal fraud, apparent on its face; and whereas by the law of the land the said plaintiff was not entitled to a verdict; therefore in that there is manifest error. And also there is error in 30 this, to wit: that on the trial of the said cause the said court charged the jury as follows, viz: "There is a rule of law that fraud cannot be inferred, but must be affirmatively proved; you must therefore look to the defendant for plenary proof of fraud, in the particulars upon which he has placed that part of his defence;" whereas by the law of the land the said defendant was not required to produce plenary proof of fraud in the particulars upon which he had placed that part of his defence;

therefore in that there is manifest error. And also there is error in this, to wit: that on the said trial of the said cause the said court charged the jury "That there was no legal fraud in the confession of judgment by Thomas C. Brown to the plaintiff, which can be taken advantage of here, admitting that it was a part and parcel of the assignment, nor is the fiduciary integrity of the assignee impaired in the eye of the law or morals by his taking the trust under such circumstances;" whereas by the law of the land there is legal fraud in the confession of judgment by Thomas C. Brown, to the plaintiff,

10 which the said defendant had a right to take advantage of on the said trial; therefore in that there is manifest error. And also there is error in this, to wit: that on the trial of the said cause the court charged the jury "That the two notes which Pharo and Dolson held were given on the same account, and upon the arrangement made with the parties at the time, were to be returned if the real estate should be sufficient to pay the debt. The fact that Pharo and Dolson have received payment from Ford of those notes, does not change the nature of the

20 *transaction*. They held that money in trust, and must account for it with the assignee if it be not absorbed in discharging the particular indebtedness. The payment by the assignors of money to other creditors between the thirteenth of September and the eighteenth of October are to be viewed in the same light as the arrangement with Pharo and Dolson;" whereas by the law of the land the transfer of the notes to Pharo and Dolson as collateral security for the payment of their debt, and the payment by the assignors of money to other creditors between the thirteenth of September and the eighteenth of October in

30 discharge of their indebtedness to such creditors was a legal fraud, which rendered the said assignment void, and the court ought to have so charged the jury. And also there is error in this, to wit: that on the trial of the said cause the defendant, by his counsel, asked the court to charge the jury, "That the deed made by Henry Demarest and wife to Joseph W. Pharo, bearing date the ninth day of October, 1854, and the transfer of the notes of Ford, amounting to \$700, which accompanied the deed, constituted an unlawful preference under the act to

secure to creditors an equal and just division of the estate of debtors who convey to assignees for the benefit of creditors-Pharo and Dolson by that deed, and the notes, having been preferred over other creditors to the amount of \$3000, such preference having been sanctioned by John J. Brown previous to the time that the same was consummated, and being recognised in the assignment, the assignment thereby become void as against the creditors having levies under executions; and the said court refused so to charge the jury; whereas by the law of the land said deed to Pharo, and the said transfer of notes 10 to Pharo and Dolson did constitute an unlawful preference under the said act to secure to creditors an equal and just division of the estate of debtors who convey to assignees for the benefit of creditors; and the said court ought to have so charged the jury; therefore in that there is manifest error. And also there is error in this, to wit: that on the trial of this cause the defendant, by his counsel, asked the court to charge the jury "that if they believed that the judgment confessed by Thomas C. Brown to John J. Brown on the twenty-fifth day of September, 1854, for the sum of \$541, the payment to Erastus 20 Randall on the fourteenth day of October of \$640.37; the payment to Hiram Gilbert on the seventeenth day of October of \$1200; the security given to Pharo and Dolson to the amount of \$3000; the payment made to Bonnell, Brown, Hall and company on the second day of October of the sum of \$283; and the payment of \$247.83, between the thirteenth day of September and the eighteenth day of October, 1854, were made with a view to and in contemplation of a subsequent assignment, they constituted such preferences as rendered the assignment of the eighteenth of October void, as against creditors 30 having levies under executions, which the court refused to do; whereas by the law of the land the said several payments did constitute such preferences as rendered the said assignment fraudulent and void, and the said court ought to have so charged the jury. And also there is error in this, to wit: that on the trial of the said cause the said Jasper Garretson, by his counsel, asked the court to charge the jury that if they believed that the partners, Brown and Demarest, paid their private

debts in full out of the partnership property, at a time when the partnership was insolvent, and such payments were made in contemplation of an assignment, such payments were a fraud upon the act entitled "An Act to secure to creditors an equal and just division of the estates of debtors, who convey to assignees for the benefit of creditors, and rendered the assignment of the eighteenth of October void, as against creditors having executions. And the court declined so to charge the jury; whereas, by the law of the land, such payments by the

10 assignors of their private debts out of the partnership property, when the partnership was insolvent, and made in contemplation of an assignment, were a fraud upon the said act, and rendered the said assignment void, as against creditors having executions, and the said court ought to have so charged the jury; therefore in that there is manifest error. And also there is error in this, to wit: that on the trial of the said cause the said Jasper Garretson, by his counsel, asked the court to charge the jury that if they believed that Brown and Demarest, after the thirteenth of September, 1854, concealed the amount of

20 their assets with a view of making a compromise at forty cents or thirty-five cents on the dollar, and in case they failed to make a compromise contemplated an assignment, such concealment was a fraud which would vitiate the assignment, as against creditors having executions and levies on the property assigned. And the said court refused to so charge the jury; whereas, by the law of the land such concealment of the amount of their assets, with a view of making such compromise, and in case they failed to make such compromise to make an assignment, was a fraud which would vitiate the as-

30 signment as against creditors having executions and levies on the property assigned, and the said court ought to have so charged the jury; therefore in that there is manifest error. And also there is error in this, to wit: that on the trial of the said cause the said Jasper Garretson, by his counsel, asked the court to charge the jury that if, from the evidence, they believed that Brown and Demarest did not make a full surrender of all their property to the assignee at the time of making the assignment, the assignment was fraudulent and void, as against

creditors having executions, whether the assignee was a party to the fraud or not, which the said court declined to do; whereas, by the law of the land the said court ought to have so charged the jury; therefore in that there is manifest error. Also there is error in this, to wit: that on the said trial the said Jasper Garretson, by his counsel, asked the court to charge the jury, "That the time for presenting claims by the creditors under the assignment having passed, the plaintiff cannot recover the full value of the goods, but only such sum as would be sufficient to pay the demands of creditors who have come 10 in under the assignment, and the reasonable expenses of the assignee," which the said court declined to do; whereas, by the law of the land the said court ought to have so charged the jury; therefore in that there is manifest error. Also there is error in this, to wit: that on the trial of the said cause the said Jasper Garretson, by his counsel, asked the court to charge the jury "That if they believed that the motive of making the assignment was to enable the debtors to obtain time to compromise their debts, the assignment then, as a matter of law, was made to delay and hinder creditors, and is fraudulent and void," 20 which the court declined to do; whereas, by the law of the land, the said court ought to have so charged the jury; therefore in that there is manifest error. Also there is error in this, to wit: that on the trial of the said cause the said Jasper Garretson, by his counsel, asked the court to charge the jury, that there is evidence that the deed to Pharo, the passing of the notes to Pharo and Dolson, the confession of judgment to the assignee, and other dispositions of property proved, were parts of one system for the purpose of making a general assignment; and if the jury so believe, and that preferences were intended 30 to be made by the above acts, the assignment is void, which the said court declined doing; whereas, by the law of the land, the said court ought to have so charged the jury; therefore in that there is manifest error. Also there is error in this, to wit: that on the trial of the said cause the said Jasper Garretson, by his counsel, asked the court to charge the jury "That there is some evidence to show that the assignment is fraudulent and void, and the weight of the evidence and the credibility of the

testimony is for the jury to determine," which the court declined to do; whereas, by the law of the land, the said court ought to have so charged the jury; therefore in that there is manifest error. And also there is error in this, to wit: that on the trial of the said cause the said Jasper Garretson, by his counsel, asked the court to charge the jury that the assignee is not a *bona fide* purchaser, for a valuable consideration, under the language of the statute of frauds, which the said court declined to do; whereas, by the law of the land, the court ought
 10 to have so charged the jury; therefore in that there is manifest error. And also there is error in this, to wit: that the judgment aforesaid, by the record aforesaid, appears to have been given for the said John J. Brown, assignee of Thomas C. Brown and Henry Demarest, against the said Jasper Garretson; whereas, by the law of the land, the said judgment ought to have been given for the said Jasper Garretson against the said John J. Brown, assignee as aforesaid. And the said Jasper Garretson prays that the judgment aforesaid for the errors
 20 aforesaid, and for other errors in the said record and proceedings being, may be reversed, annulled, and altogether holden for nought, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

S. B. RANSOM,

Attorney for and of Counsel with plaintiff in error.

The defendant in error has filed the common joinder in error.

A P P E N D I X .

Exhibits on the part of the Defendant in error.

I.

Deed of assignment from Thomas C. Brown and Henry Demarest to John J. Brown, dated October 18th, 1854, and recorded the same day in Book 41 of Deeds, in the county of Hudson, page 461, together with the inventories, &c., annexed.

THIS INDENTURE, made this eighteenth day of October, in the year eighteen hundred and fifty-four, between Thomas C. Brown and Henry Demarest, both of Jersey City, in the county of Hudson and state of New Jersey, of the first part, and John J. Brown, of Paterson, in the county of Passaic, of said state, of the second part, *witnesseth*, that the said parties of the first 10 part, partners, trading under the name of Brown and Demarest, in order to secure to their creditors, both the creditors of the firm of Brown and Demarest, and the individual creditors of each of them, an equal and just division of their estate, and of the estate of each of them, according to law, and in consideration of the sum of one dollar, to each of them in hand paid by the said John J. Brown, do hereby, and each of them doth hereby grant, bargain, sell, assign, transfer, and set over to the said John J. Brown, and his heirs and assigns, forever, all the estate, real and personal, rights, credits and choses in action, 20 of whatsoever nature and kind, and whatsoever the same may be, of them, the said parties of the first part, and of each of them, whether specified in the inventory hereto annexed or not, excepting only so much as is by law exempted and reserved to each of them, as against their creditors, and as may legally be exempted and retained, as against an assignment made under the act hereinafter named, to have and to hold the same, to the said John J. Brown, his heirs and assigns, to his and their

own use forever. In trust nevertheless for the equal benefit of the creditors of the said parties of the first part, and of each of them respectively, the creditors of the said firm to be first paid, out of the said property of said firm, owned by said parties of the first part together, and the creditors of each of said parties of the first part to be first paid out of the individual and separate property of said parties, and then the residue of the individual property of such parties to be paid upon the debts of the firm, and not for the individual debts of the other partner; said
 10 debts to be paid in proportion to their respective amounts, out of the next amount that shall come to the hands of the said John J. Brown, for the payment thereof, and for distribution according to the force, form and effect of an act of the Legislature of New Jersey, entitled "An Act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors;" approved April sixteenth, A. D., 1846,—and of any supplement or supplements thereto. *In witness whereof*, the said parties of the first part have hereunto set their hands and seals the day and year first
 20 above written.

Signed, sealed and delivered in presence of,—the words "party to be," being first written over an erasure,—CHARLES N. VOORHIS.

THOMAS C. BROWN. [L. S.]

HENRY DEMAREST. [L. S.]

State of New Jersey, Hudson County, ss.—I, Jacob R. Wortendyke, one of the Masters in Chancery of New Jersey, do hereby certify that on the eighteenth day of October, A. D., eighteen hundred and fifty-four, before me personally appeared
 30 Thomas C. Brown and Henry Demarest, who are, I am satisfied, the grantors in the foregoing deed named, and who executed the same, and I having first made known to them the contents thereof, they did severally acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

J. R. WORTENDYKE,

Master in Chancery of New Jersey.

Hudson County, ss.—I, Edmund W. Kingsland, Surrogate of the county of Hudson, do hereby certify that the within named John J. Brown hath entered in three several bonds to the ordinary of this state, with Erastus Randall, sufficient security on each bond for the faithful performance of the trusts in the within assignment contained, dated the eighteenth day of October, A. D., eighteen hundred and fifty-four.

E. W. KINGSLAND, *Surrogate.*

Debts due Brown and Demarest, Partners, on Book Account.

	From Hugh McDemott, - - -	\$1.82	10
	“ Richard Brown, - - -	2.37	
	“ Jane Welsh,—doubtful, - -	28.44	
88,	“ Dot Curtis, - - -	60	
97,	“ H. W. Fryett, - - -	20.00	
99,	“ D. S. Gregory, jr., - - -	50	
111,	“ Tralauney, - - -	15.56	
117,	“ George Andun, - - -	1.75	
127,	“ N. Fowler,—lost, - - -	6.81	
128,	“ P. C. Dummer,—doubtful, -	21.13	
140,	“ Richard Brinkerhoff, - -	7.75	20
156,	“ Mr. Harkness,—lost, - - -	4.83	
156,	“ Mr. Cook, - - -	4.71	
158,	“ Thomas Martin, - - -	2.72	
176,	“ Abia Speer, - - -	14.00	
179,	“ J. D. Meeker, - - -	3.71	
188,	“ B. Many, - - -	58.98	
196,	“ N. Dorsy,—lost, - - -	1.96	
199,	“ Abraham Post, - - -	6.47	
220,	“ Benj. Champny,—doubtful, -	14.43	
230,	“ M. Lowell,—lost, - - -	13.89	30
230,	“ Thomas Springsteen, - - -	4.40	
233,	“ Mrs. Tice, - - -	3.00	
241,	“ Capt. Paradice, - - -	13.97	
248,	“ Mr. Robbins,—lost, - - -	16.65	
250,	“ John Tonley,—lost, - - -	61.68	
274,	“ Cath. Vreeland,—doubtful, -	14.65	

	278,	"	Mrs. Van Horn,	-	-	-	5.83
	280,	"	Mr. Shotwell,	-	-	-	13.85
	281,	"	J. Conley,	-	-	-	19.53
	288,	"	Mrs. Doct. Zabriskie,—doubtful,	-	-	-	12.00
	293,	"	Mrs. Devo,—lost,	-	-	-	8.00
	297,	"	County Hudson,	-	-	-	11.72
	302,	"	Thomas Griffith,—lost,	-	-	-	26.29
	312,	"	O. Hoghland,	-	-	-	37.12
	319,	"	Margaret Caughlin,—doubtful,	-	-	-	13.74
10	327,	"	Lizzie Beann,	-	-	-	10.00
	329,	"	Mrs. McCarty,—lost,	-	-	-	18.52
	332,	"	D. Rowel,—lost,	-	-	-	6.75
	333,	"	Mrs. Decker,—lost,	-	-	-	11.33
	337,	"	John Mandevill,	-	-	-	3.75
	348,	"	John Brinkerhoff, Hackensack,	-	-	-	9.00
	354,	"	Moffat & Moore,	-	-	-	3.01
	356,	"	Isaac Morrow,	-	-	-	5.87
	386,	"	Mrs. Costelle,—lost,	-	-	-	10.96
	403,	"	W. B. Ryder,	-	-	-	18.25
20	411,	"	Horton,—dbt.,	-	-	-	13.25
	413,	"	James B. Cox,	-	-	-	16.28
	416,	"	Mrs. Morris,—dbt.,	-	-	-	26.00
	417,	"	P. D. Vanclief,	-	-	-	94
	418,	"	Mary Bell,—probably lost,	-	-	-	6.32
	420,	"	Mr. Moke,—loss,	-	-	-	3.83
	424,	"	Mr. Capt. Ferry,	-	-	-	33.50
	442,	"	Scott Sinclair,	-	-	-	34.87
	445,	"	Miss Happing,—loss,	-	-	-	3.75
	446,	"	Mrs. Montgomery, 106 Water,	-	-	-	9.26
30	447,	"	Anna Anderson,	-	-	-	7.73
	449,	"	Mr. McBurn,	-	-	-	25.11
	455,	"	Martin Bunker,—loss,	-	-	-	10.33
	456,	"	Thomas Wilson,	-	-	-	30.78
	453,	"	H. B. Morel,—loss,	-	-	-	35.37
	461,	"	J. T. Kirby,	-	-	-	17.47
	461,	"	Miller,—lost,	-	-	-	32.83
	464,	"	J. B. Morfutt,	-	-	-	55
	468,	"	Mrs. Bacchus,	-	-	-	27.37

469,	"	Mr. John Terhune,—loss, \$25.88,	-	60.93	
473.	"	Mrs. Lum, -	-	11.50	
474,	"	Mrs. Jasper Britton, -	-	5.90	
474,	"	Rev. Mr. Varinder, -	-	16.43	
479.	"	J. M. Brown, -	-	16.90	
482,	"	Miss Burns, -	-	10.90	
484,	"	Gashner, -	-	88	
485,	"	Doct. Wilson, -	-	35.63	
485,	"	Mr. Craig, -	-	69.15	
488,	"	Miss Turner,—dbt.,	-	53.24	10
489,	"	Mr. Spencer, -	-	13.67	
492,	"	Mrs. Teelmayo, -	-	16.00	
494,	"	Mrs. Chivemoontell, -	-	10.37	
496,	"	Mr. Curry, -	-	14.21	
497,	"	Mr. Whiley, Bergen, -	-	71.15	
499,	"	William O. Pollard,—lost, -	-	9.48	
500,	"	S. M. Marsh, -	-	26.08	
503,	"	Benj. Gregory, -	-	153.58	
504,	"	Mr. Fitzgerald, -	-	14.08	
505,	"	P. W. Johnston, -	-	12.14	20
505.	"	Wm. Jacobus, -	-	20.02	
506,	"	J. H. Baluskie,—dbt., -	-	6.73	
511,	"	Thomas Thomas, -	-	15.55	
511,	"	S. H. Terry, -	-	{ 21.30	
				{ 7.16	
512,	"	J. Latterette, -	-	90.51	
514,	"	Lewis Colby, -	-	40.15	
517,	"	Philip Gordon, -	-	48.69	
520,	"	Charles Gregory, -	-	64.87	
522,	"	Cyrus Knapp, -	-	227.74	30
523,	"	Lewis Brooks, -	-	12.47	
524,	"	C. B. Vandyke, -	-	44.23	
526,	"	Meecker, -	-	15.75	
528,	"	Mr. Bailey, Warren st., -	-	3.32	
530,	"	E. P. Tarry, -	-	53.97	
531,	"	David Kimble, -	-	15.43	
536,	"	Hiram Gilbert,—settled, -	-	99.14	
537,	"	E. R. Western, -	-	11.56	

	538,	"	M. B. Bramhall,	-	-	-	19.22
	539,	"	Mrs. Haradin, about	-	-	-	11.00
	543,	"	Van Anglen & Co.,	-	-	-	5.43
		"	Sundry accounts,	-	-	-	100.00
		"	L. Hallick,	-	-	-	5.28
		"	E. C. Frazier,	-	-	-	3.76
		"	Wm. Bumstead,	-	-	-	48.32
		"	Gen. Wright,	-	-	-	34.09
		"	Mr. Van Dorn,	-	-	-	7.69
10		"	J. L. Buies,	-	-	-	17.25
							\$2620.69
			Bad debts,	-	-	-	568.83
			Balance,	-	-	-	2051.86
			D. A. Mason,	-	-	-	56.88
			David Scott,	-	-	-	75.00
							2183.74
			Deduct settled,	-	-	-	146.97
							2036.77
			Settled his account by due bill, (deduct D.				
20			S. Sinclair,)	-	-	-	34.87
							\$2001.90

Debts due Brown and Demarest on Notes.

	1	Note	Anthony & Ford,	Sept. 1st,	8 months,	\$189.29
	1	"	"	"	9 "	164.65
	1	"	"	"	10 "	343.66
	1	"	George Ford,	"	11 "	400.00
	1	"	Anthony & Ford,	"	11 "	225.00
	1	"	"	"	12 "	225.00
	1	"	George Ford,	"	12 "	400.00
30	1	"	Abram Gilbert,	due bill,	Oct. 14th,	48.92
	1	"	George Hilburn,	note,	Oct. 3d, 12 months,	51.83
	1	"	R. B. Earle & Co.,	Oct. 10th,	3 months,	150.80
	1	"	C. N. Buck,	Aug. 15,	6 days,	93.00

1	"	S. M. Chambers, Aug. 14,	19.34
1	"	M. Doct. Hayes, Oct. 9,	28.50
1	"	Wm. Howe. Oct. 5,	44.66
1	"	Miss Stagg, Oct. 10,	39.90
1	"	Andrew Ward, April 19th, 1853,	22.44
1	"	J. C. Cronham, Oct. 5, 1854,	13.73

2460.72

1 Due bill, Scot Sinclair, 33.86

\$2494.58

1 note of George Ford, dated September 1st, 1854, at 13 10 months, for four hundred dollars. One same day and date for 14 months, for \$300.00; held by Pharo and Dolson, as collateral security for a debt which is supposed will be satisfied by the sale of a house and lot to them for the satisfaction of \$3000.00 of confidential debt, upon the sale of which house and lot by Brown and Demarest for them, according to privilege of selling the same for said Pharo and Dolson before May 1st, 1856, if said \$3000.00 is netted to said Pharo and Dolson, the said notes are to revert to Brown and Demarest, or the assignee; otherwise any deficiency of said \$3000.00 is to be 20 made up out of said notes.

A List of the creditors of the firm of Brown and Demarest, composed of Thomas C. Brown and Henry Demarest, and of the amounts due to each upon their respective claims.

Messrs. Pharo & Dolson,	-	-	-	3056.83	
Ely Mygam, & Co.,	-	-	-	233.22	
Booth & Tuttle,	-	-	-	196.70	
Isaac Smith & Co.,	-	-	-	354.66	
A. A. Hopper,	-	-	-	405.43	
Williams, Bradford & Co.,	-	-	-	1072.07	30
George Bliss & Co.,	-	-	-	3368.61	
Smith O'Roque & Kinney,	-	-	-	176.09	
Henry Robinson,	-	-	-	154.89	
Tracy, Irving & Co.,	-	-	-	609.46	
Loder & Lockwood,	-	-	-	554.59	

	Hilliard, Hayes & Hopkins,	-	-	-	935.58
	John Lockwood,	-	-	-	217.26
	S. & S. Lawrence & Co.,	-	-	-	691.71*
	Loden & Co.,	-	-	-	512.45
	S. H. Terry,	-	-	-	383.95
	Tiller, Hutchinson & Lissell,	-	-	-	178.56
	Eastman, Shelden & Townsen,	-	-	-	170.14
	Richards & McHary,	-	-	-	242.61
	C. Durant & Co.,	-	-	-	3016.71
10	M. M. & C. C. Kuhn,	-	-	-	152.18
	A. Journey & Co.,	-	-	-	769.10
	Hatch & Vail,	-	-	-	1422.09
	L. O. Wilson & Co.,	-	-	-	3311.60
	Kellogg, Merritt & Nichols,	-	-	-	1043.77
	John Southerland,	-	-	-	2010.11
	Hall & Wilcox,	-	-	-	625.55
					\$25865.92
20	S. & S. Lawrence & Co.,	-	-	-	600.00m*
					\$26465.92

~~~~~

**Exhibits on the part of the Plaintiff in Error.**

**I.**

- 30 Bond and warrant of attorney and judgment thereon, in favor of John J. Brown, against Thomas C Brown, together with the affidavit of John J. Brown, made on entering up the said judgment.

*Know all men by these presents, That I, Thomas C. Brown, am held and firmly bound unto John J. Brown, in the sum of four hundred and thirty-six dollars and twenty-five cents, lawful money of the United States, to be paid to him, his executors, administrators or assigns, on the day of the date hereof; to which payment I do hereby bind myself, my heirs, executors and administrators. Sealed with my seal and dated the twen-*



ty-seventh day of September, Anno Domino, eighteen hundred and fifty-four.

THOMAS C. BROWN. [L. s.]

Sealed and delivered in the presence of A. O. Zabriskie.

*To Abraham O. Zabriskie, Attorney at Law, or to any other Attorney at Law of the State of New Jersey,*

*These are to authorize you to appear for me, Thomas C. Brown, in any Court of competent jurisdiction in the State of New Jersey, at the suit of John J. Brown, and confess a judgment against me unto him for five hundred and thirty-six dollars and twenty-five cents, the amount of the above bond, besides costs of suit, by nil dicit, or otherwise, with release of all errors, with full power at all times after the entering of said judgment, to consent to and authorize the plaintiff therein to issue execution for any sum that may remain due thereon, without a scire facias for that purpose, notwithstanding any time that shall have elapsed before such execution may be issued. And for so doing this shall be your warrant.*

*Witness, my hand and seal this twenty-seventh day of September, Anno Domino, eighteen hundred and fifty-five.*

THOMAS C. BROWN. [L. s.]

Signed, sealed and delivered in the presence of A. O. Zabriskie.

*Circuit Court of Hudson County, of the Term of May, in the year of our Lord one thousand eight hundred and fifty-four,*

JOHN J. BROWN,

against

THOMAS C. BROWN,

} In Debt on Bond and Warrant of Attorney.

The defendant's appearance to this action is entered and judgment confessed to the plaintiff for the sum mentioned in the above obligation, by virtue of the warrant of Attorney thereunto annexed, and pursuant to the directions of an act entitled "An act directing the mode of entering judgments on bonds with warrants of Attorney to confess judgments."—Whereupon it is considered that the said John J. Brown do re-

cover against the said Thomas C. Brown the sum of five hundred and thirty-six dollars and twenty-five cents debt, and four dollars costs of suit. Judgment signed this twenty-fifth day of September, in the year of our Lord one thousand eight hundred and fifty-four, and ordered to be entered.

JACOB WEART,  
*Supreme Court Commissioner.*

*The Circuit Court of the County of Hudson.*

JOHN J. BROWN

against

THOMAS C. BROWN.

} *In Debt on Bond and Warrant of  
Attorney.*

10

02

30

*Hudson County, ss.*—John J. Brown being duly sworn, on his oath saith, that he is the above named plaintiff; that the sum of five hundred and thirty-six dollars and twenty-five cents, the debt for which judgment is in this case confessed, is justly and honestly due and owing to the plaintiff above named; that this judgment is not confessed to answer any fraudulent intent or purpose, or to protect the property of the defendant from his other creditors; and that the true consideration of the bond for which judgment is in this case confessed, is that this deponent has by a written agreement with said defendant, assumed and agreed to pay as his own debt, a certain note given by said Thomas C. Brown, with this deponent and John Brown as sureties, and first vouchers to Joseph Brown, in July, in the year eighteen hundred and forty-eight, for the sum of five hundred dollars, and upon which this deponent is liable to said Joseph Brown, and upon which note there is due the said sum of five hundred dollars as principal, and the sum of twenty-six dollars and twenty-five cents interest; that said note was given for the debt of said Thomas C. Brown, and that this deponent and said John Brown signed it as his sureties only; the sum of five hundred dollars borrowed upon said note having been received by said Thomas C. Brown for his own use only.

JOHN J. BROWN.



Sworn to and subscribed this twenty-fifth day of September,  
A. D., 1856.

JACOB WEART,  
*Supreme Court Commissioner.*

## II.

List of all the creditors of Thomas C. Brown and Henry Demarest, who presented their claims to John J. Brown, assignee, as reported and filed by the said assignee in the clerks' office of the county of Hudson.

A true list of all the creditors of Thomas C. Brown and Henry Demarest, partners, trading under the name of Brown 10 and Demarest, and of said Thomas C. Brown and said Henry Demarest, individually, who have claimed to be such by rendering their claims to the undersigned, John J. Brown, assignee of said Thomas C. Brown and Henry Demarest, both as partners, and individually, according to the provisions of the act entitled "An act to secure to creditors an equal and just division of the estates of debtors, who convey to assignees for the benefit of creditors."

1. List of such creditors of the firm of Brown and Demarest, who have presented their claims to John J. Brown, assignee of 20 said Thomas C. Brown and Henry Demarest, partners.

W. M. Keeler and Charles C. Keeler, partners, {  
trading under the name of W. M. & C. C. Keeler. }

Amount due on book account, \$152.18

JOHN J. BROWN.

*State of New Jersey, Hudson County, ss.*—John J. Brown being duly sworn, on his oath saith, that the above statement is a true list of all the creditors of Thomas C. Brown and Henry Demarest, partners, trading under the name of Brown and Demarest, and of all the individual creditors of said Thomas 30 C. Brown and Henry Demarest, and of each of them, who have presented their claims under oath to this deponent within three months from the date of the assignment made by said Brown and Demarest, to this deponent,—and of the amount of said claims.

JOHN J. BROWN.

Sworn to and subscribed this first day of May, A. D., 1854,  
before me.

WILLIAM C. MORRIS,  
*Master in Chancery.*



*Household Furniture of Thomas C. Brown, Oct. 19, 1854.*

|                                      |   |   |   |   |          |          |
|--------------------------------------|---|---|---|---|----------|----------|
| 1 Piano Forte,                       | - | - | - | - | \$200.00 |          |
| 6 Rose Wood Chairs, 5.00,            | - | - | - | - | 30.00    |          |
| 3 Bedsteads and Bedding, 15.00,      | - | - | - | - | 45.00    |          |
| 3 Carpets, 20.00,                    | - | - | - | - | 60.00    |          |
| 2 Stair Carpets and Rods, 5.00,      | - | - | - | - | 10.00    |          |
| 1 Hall Oil Cloth,                    | - | - | - | - | 5.00     |          |
| 12 Pictures and Engravings, 2.00,    | - | - | - | - | 24.00    |          |
| 1 Hat Stand,                         | - | - | - | - | 5.00     |          |
| Kitchen Furniture,                   | - | - | - | - | 25.00    | 10       |
| 1 China Set,                         | - | - | - | - | 12.00    |          |
| 1 Common Dinner Set,                 | - | - | - | - | 5.00     |          |
| 5 Pair Curtains, 2.00,               | - | - | - | - | 10.00    |          |
| 6 Common Chairs, 50c,                | - | - | - | - | 3.00     |          |
| 2 Tables, 5.00,                      | - | - | - | - | 10.00    |          |
| 2 Bureaus, 5.00,                     | - | - | - | - | 10.00    |          |
| 2 Wash-stands, with crockery, 10.00, | - | - | - | - | 20.00    |          |
| 1 Sofa,                              | - | - | - | - | 20.00    |          |
| 1 Small Table,                       | - | - | - | - | 2.00     |          |
| 1 Glass,                             | - | - | - | - | 5.00     | 20       |
| 1 Pitcher,                           | - | - | - | - | 6.00     |          |
| <hr/>                                |   |   |   |   |          |          |
|                                      |   |   |   |   |          | \$507.00 |

Subject to a judgment of five hundred and thirty-six dollars, (\$536,) for which a levy has been made by the sheriff of Hudson upon all the above articles and property.

There are no debts owing by Thomas C. Brown individually, over and above the above mentioned judgment, on which there is due to John J. Brown, in whose favor such judgment is entered, the sum of five hundred and forty-one dollars, (\$541.)

*State of New Jersey, Hudson County, ss.*—Thomas C. Brown 30 being duly sworn, on his oath saith, that the foregoing is a true list of his estate, real and personal, and a true list of his creditors, and the amount of their respective claims, according to the best of his knowledge.

THOMAS C. BROWN.

Sworn to and subscribed by said Thomas C. Brown this eighteenth day of October, A. D., 1854, at Jersey City, before me.

JACOB WEART,

*Supreme Court Commissioner.*

An inventory of the estate of Henry Demarest, of Jersey City, assigned to John J. Brown, for the benefit of his creditors, together with a list of the creditors of said Henry Demarest, and the amount of their respective claims.

*Household Furniture, belonging to Henry Demarest, October*

10 16th, 1854.

|    |    |                                |   |   |         |
|----|----|--------------------------------|---|---|---------|
|    | 32 | Yards Carpet, ingrain, 62½c,   | - | - | \$24.00 |
|    | 34 | " " Brussels, 2 bed rooms, 40, | - | - | 13.60   |
|    | 1  | Hall Oil Cloth,                | - | - | 3.00    |
|    | 1  | Bedstead,                      | - | - | 20.00   |
|    | 1  | Bedstead, -                    | - | - | 3.00    |
|    | 2  | Bedsteads, ¾, 3.50,            | - | - | 7.00    |
|    | 4  | Bedding and Beds,              | - | - | 40.00   |
|    | 3  | Stoves and Pipe,               | - | - | 25.00   |
|    | 3  | Pair Curtains, 3.00,           | - | - | 9.00    |
| 20 | 6  | Cane Bottom Chairs, 1 00,      | - | - | 6.00    |
|    | 6  | Common Chairs, 50c,            | - | - | 3.00    |
|    | 2  | Tables,                        | - | - | 8.00    |
|    |    | Kitchen Furniture,             | - | - | 10.00   |
|    | 1  | Pair Shades, -                 | - | - | 1.50    |
|    | 1  | China Tea Set, -               | - | - | 3.00    |
|    | 1  | Common Dinner do., -           | - | - | 5.00    |
| 20 |    | Ingrain Carpet, 30,            | - | - | 6.00    |
| 15 | "  | " part cotton, 20,             | - | - | 3.00    |
|    | 3  | Wash Stands and Crockery,      | - | - | 8.00    |
| 30 | 1  | Sofa, -                        | - | - | 15.00   |
|    | 2  | Nest Tables, 1.00,             | - | - | 2.00    |
|    | 1  | Book Rack, 12,                 | - | - | 1.50    |
|    | 1  | Rocking Chair, -               | - | - | 3.00    |
|    | 1  | " "                            | - | - | 1.00    |
|    | 1  | " "                            | - | - | 50      |
|    | 1  | Bedstead, -                    | - | - | 2.00    |

---

\$204.10



There are no debts owing by Henry Demarest.

*State of New Jersey, Hudson County, ss.*—Henry Demarest being duly sworn, on his oath saith, that the foregoing is a true list of his estate, real and personal, and a true list of his creditors, and the amounts of their respective claims, according to the best of his knowledge.

HENRY DEMAREST.

Sworn to and subscribed by said Henry Demarest, this eighteenth day of October, A. D., 1854, at Jersey City, before me,

JACOB WEART.

10

*Supreme Court Commissioner.*





At the June Term, A. D., 1857, of the Supreme Court, the cause was argued, and at the November Term, A. D., 1857, the judgment of the Circuit Court was affirmed.

The following is a copy of the judgment of affirmance :

### NEW JERSEY SUPREME COURT.

November 3, 1857.

JOHN J. BROWN, } On Writ of Error to Hudson Circuit. 10  
                   ads.  
 JASPER GARRETSON,

This cause having been argued at the last Term of this Court, upon the errors assigned, and the Court being of opinion that there is no error in the judgment and proceedings of the Circuit Court, do order, that the judgment below be affirmed, with double the costs of the defendant in error, to be taxed; and that execution for the same do issue from this Court.

A. O. ZABRISKIE,  
*Att'y of Def't in Error.* 20

A true copy from the minutes.

CHAS. P. SMITH, *Clerk.*

On the return of the writ of error in the Court of Errors, the plaintiff in error assigned errors as follows, viz :

### NEW JERSEY COURT OF ERRORS AND APPEALS.

JASPER GARRETSON, Plaintiff in Error, } Assignment of Error. 30  
                   vs.  
 JOHN J. BROWN, Assignee of THOMAS  
 C. BROWN, and HENRY DEMAREST;  
 Defendant in Error.

Afterwards, that is to say, on the twenty-fourth day of November, in the year of our Lord one thousand eight hundred and fifty-seven, before the judges of the Court of Errors and Appeals, of the state of New Jersey, at Trenton, comes the said Jasper Garretson, by Ransom and Brown, his attorneys, and says, that in the record and proceedings

- aforesaid, and in giving and affirming the judgment aforesaid, there is manifest error in this, to wit: that on the trial of the said cause, the said judge, before whom the same was tried, admitted illegal evidence offered by the defendant in error which was objected to by the said Jasper Garretson, whereas by the law of the land such evidence ought not to have been admitted, therefore in this there is manifest error. Also, there is error in this, to wit: that upon the trial of this cause in the said Circuit Court of the county of Hudson, the said
- 10 judge before whom the same was tried, ruled that the evidence offered by the said John J. Brown was sufficient in law to enable the said John J. Brown to recover against the said Jasper Garretson, and refused to direct the said plaintiff to be called when requested so to do by the said Jasper Garretson; whereas by the law of the land the said evidence offered by the said John J. Brown was not sufficient in law to make out a legal cause of action against the said Jasper Garretson, and the said John J. Brown ought to have been called; therefore in that there is manifest error. And also, there is error in this,
- 20 to wit: that on the trial of the said cause in the Circuit Court of the county of Hudson, the said judge before whom the said cause was tried, overruled and rejected legal and competent evidence in the cause, which was offered by the said Jasper Garretson; whereas by the law of the land the evidence so offered was legal and competent evidence in the cause, and ought to have been admitted; therefore in that there is manifest error. And also, there is error in this, to wit: that on the trial of the said cause in the said Circuit Court of the county of Hudson, the said judge charged the jury as follows,
- 30 that is to say: "That the deed of assignment executed by Brown and Demarest to the plaintiff is valid on its face, and is not tainted by the taint of legal fraud, and that at the time of the delivery thereof it conveyed all the estate which it professed to embrace;" whereas by the law of the land the said deed of assignment executed by Brown and Demarest to the plaintiff was not valid on its face, and *was* tainted by the taint of legal fraud, and at the time of the delivery thereof it did not convey all the estate which it professed to embrace,



and the said court ought to have so charged the jury ; therefore in that there is manifest error. And also, there is error in this, to wit: that on the trial of the said cause the said court further charged the jury " that the statement of the judgment of the plaintiff against Thomas C. Brown, as made in the inventory annexed to the deed of assignment does not *per se* impugn the *bona fides* in law of the assignment or conveyance;" whereas, by the law of the land the said statement of the judgment of the plaintiff against Thomas C. Brown, as made in the inventory annexed to the deed of assignment, 10 *does per se* impugn the *bona fides* in law of the said assignment or conveyance ; therefore in that there is manifest error. And also, there is error in this, to wit : that on the trial of the said cause, the said court further charged the said jury, "that the memorandum at the foot of the list of creditors, that Pharo and Dolson held two notes given by Mr. Ford to the assignors, for the payment in gross of the sum of \$700, held as collateral security for a debt which they supposed would be satisfied by the sale of a house and lot conveyed to them for the satisfaction of \$3000, confidential debt, the notes to *revert to* the as- 20 signors or assignee, if the debt should be realised or satisfied by a re-sale of the house and lot, does not create preferences in favor of any particular creditor;" whereas by the law of the land the said memorandum at the foot of the list of creditors, that Pharo and Dolson held two notes given by Mr. Ford to the assignors, for the payment in gross of the sum of \$700, held as collateral security for the debt which they supposed would be satisfied by the sale of a house and lot, conveyed to them for the satisfaction of \$3000, confidential debt, the notes to revert to the assignors or assignee if the debt should be real- 30 ised or satisfied by a re-sale of the house and lot, does create a preference in favor of the said creditors, Pharo and Dolson; therefore in that there is manifest error. And also there is error in this, to wit: that on the trial of the said cause the said court charged the jury as follows, to wit: "That the instrument of assignment is in form a compliance with the provisions of our statute, and as this exposition of the law clears the assignment from the taint of the legal fraud alleged to be

apparent on its face, the plaintiff is entitled to your verdict for such damages as under the evidence you shall think it just to assess, unless the parole testimony has disclosed facts, intents, and conduct, so connected in legal contemplation with the deed of assignment, as to avoid it from its contravention of the particular provisions of our statute, or of the policy of the law, or such actual intentional fraud has been found against the assignors, as in your judgement should vitiate the whole transaction for its wickedness and corruption;" whereas by the law of the land the said instrument of assignment is not in form a compliance with the provisions of our statute, and the said assignment is not cleared from the taint of legal fraud, apparent on its face; and whereas by the law of the land the said plaintiff was not entitled to a verdict; therefore in that there is manifest error. And also there is error in this, to wit: that on the trial of the said cause the said court charged the jury as follows, viz: "There is a rule of law that fraud cannot be inferred, but must be affirmatively proved; you must therefore look to the defendant for

20 plenary proof of fraud, in the particulars upon which he has placed that part of his defence;" whereas by the law of the land the said defendant was not required to produce plenary proof of fraud in the particulars upon which he had placed that part of his defence; therefore in that there is manifest error. And also there is error in this, to wit: that on the said trial of the said cause the said court charged the jury "That there was no legal fraud in the confession of judgment by Thomas C. Brown to the plaintiff, which can be taken advantage of here, admitting that it was a part and parcel

30 of the assignment, nor is the fiduciary integrity of the assignee impaired in the eye of the law or morals by his taking the trust under such circumstances;" whereas by the law of the land there is legal fraud in the confession of judgment by Thomas C. Brown, to the plaintiff, which the said defendant had a right to take advantage of on the said trial; therefore in that there is manifest error. And also there is error in this, to wit: that] on the trial of the said cause the court charged the jury "That the two notes which Pharo and



Dolson held were given on the same account, and upon the arrangement made with the parties at the time, were to be returned if the real estate should be sufficient to pay the debt. The fact that Pharo and Dolson have received payment from Ford of those notes, does not change the nature of the *transaction*. They held that money in trust, and must account for it with the assignee if it be not absorbed in discharging the particular indebtedness. The payment by the assignors of money to other creditors between the thirteenth of September and the eighteenth of October are to be viewed in the same 10 light as the arrangement with Pharo and Dolson ;” whereas by the law of the land the transfer of the notes to Pharo and Dolson as collateral security for the payment of their debt, and the payment by the assignors of money to other creditors between the thirteenth of September and the eighteenth of October in discharge of their indebtedness to such creditors was a legal fraud, which rendered the said assignment void, and the court ought to have so charged the jury. And also there is error in this, to wit: that on the trial of the said cause the defendant, by his counsel, asked the court to charge 20 the jury, “That the deed made by Henry Demarest and wife to Joseph W. Pharo, bearing date the ninth day of October, 1854, and the transfer of the notes of Ford, amounting to \$700, which accompanied the deed, constituted an unlawful preference under the act to secure to creditors an equal and just division of the estate of debtors who convey to assignees for the benefit of creditors. Pharo and Dolson by that deed, and the notes, having been preferred over other creditors to the amount of \$3,000, such preference having been sanctioned by John J. Brown previous to the time that the same was 30 consummated, and being recognised in the assignment, the assignment thereby become void as against the creditors having levies under execution ;” and the said court refused so to charge the jury ; whereas by the law of the land said deed to Pharo, and the said transfer of notes to Pharo and Dolson did constitute an unlawful preference under the said act to secure to creditors an equal and just division of the estate of debtors who convey to assignees for the benefit of creditors ;

and the said court ought to have so charged the jury ; therefore in that there is manifest error. And also there is error in this, to wit : that on the trial of this cause the defendant, by his counsel, asked the court to charge the jury "that if they believed that the judgment confessed by Thomas C. Brown to John J. Brown on the twenty-fifth day of September, 1854, for the sum of \$541, the payment to Erastus Randall on the fourteenth day of October of \$640.37 ; the payment to Hiram Gilbert on the seventeenth day of October of \$1,200 ; the security given to Pharo and Dolson to the amount of \$3,000 ; the payment made to Bonnell, Brown, Hall and company on the second day of October of the sum of \$283 ; and the payment of \$247.83, between the thirteenth day of September and the eighteenth day of October, 1854, were made with a view to and in contemplation of a subsequent assignment, they constituted such preferences as rendered the assignment of the eighteenth of October void, as against creditors having levies under executions," which the court refused to do ; whereas by the law of the land the said several

20 payments did constitute such preferences as rendered the said assignment fraudulent and void, and the said court ought to have so charged the jury. And also there is error in this, to wit : that on the trial of the said cause the said Jasper Garretson, by his counsel, asked the court to charge the jury "that if they believed that the partners, Brown and Demarest, paid their private debts in full out of the partnership property, at a time when the partnership was insolvent, and such payments were made in contemplation of an assignment, such payments were a fraud upon the act entitled 'An Act to secure to

30 creditors an equal and just division of the estates of debtors, who convey to assignees for the benefit of creditors,' and rendered the assignment of the eighteenth of October void, as against creditors having executions;" and the court declined so to charge the jury ; whereas, by the law of the land, such payments by the assignors of their private debts out of the partnership property, when the partnership was insolvent, and made in contemplation of an assignment, were a fraud upon the said act, and rendered the said assignment void, as against



creditors having executions, and the said court ought to have so charged the jury; therefore in that there is manifest error. And also there is error in this, to wit: that on the trial of the said cause the said Jasper Garretson, by his counsel, asked the court to charge the jury "that if they believed that Brown and Demarest, after the thirteenth of September, 1854, concealed the amount of their assets with a view of making a compromise at forty cents or thirty-five cents on the dollar, and in case they failed to make a compromise contemplated an assignment, such concealment was a fraud which would vitiate the assignment, as against creditors having executions and levies on the property assigned;" and the said court refused to so charge the jury; whereas, by the law of the land such concealment of the amount of their assets, with a view of making such a compromise, and in case they failed to make such compromise to make an assignment, was a fraud which would vitiate the assignment as against creditors having executions and levies on the property assigned, and the said court ought to have so charged the jury; therefore in that there is manifest error. And also, there is error in this, to wit: that on the trial of the said cause, the said Jasper Garretson, by his counsel, asked the court to charge the jury "that if, from the evidence, they believed that Brown and Demarest did not make a full surrender of all their property to the assignee at the time of making the assignment, the assignment was fraudulent and void, as against creditors having executions, whether the assignee was a party to the fraud or not," which the said court declined to do; whereas, by the law of the land the said court ought to have so charged the jury; therefore in that there is manifest error. Also, there is error in this, to wit: that on the said trial the said Jasper Garretson, by his counsel, asked the court to charge the jury, "That the time for presenting claims by the creditors under the assignment having passed, the plaintiff cannot recover the full value of the goods, but only such sum as would be sufficient to pay the demands of creditors who have come in under the assignment, and the reasonable expenses of the assignee," which the said court declined to do; whereas, by

- the law of the land the said court ought to have so charged the jury; therefore in that there is manifest error. Also, there is error in this, to wit: that on the trial of the said cause the said Jasper Garretson, by his counsel, asked the court to charge the jury "That if they believed that the motive of making the assignment was to enable the debtors to obtain time to compromise their debts, the assignment then, as a matter of law, was made to delay and hinder creditors, and is fraudulent and void," which the court declined to do;
- 10 whereas, by the law of the land the said court ought to have so charged the jury; therefore in that there is manifest error. Also, there is error in this, to wit: that on the trial of the said cause, the said Jasper Garretson, by his counsel, asked the court to charge the jury, "that there is evidence that the deed to Pharo, the passing of the notes to Pharo and Dolson, the confession of judgment to the assignee, and other dispositions of property proved, were parts of one system for the purpose of making a general assignment; and if the jury so believe, and that preferences were intended to be made by the
- 20 above acts, the assignment is void," which the said court declined doing; whereas, by the law of the land, the said court ought to have so charged the jury; therefore in that there is manifest error. Also, there is error in this, to wit: that on the trial of the said cause the said Jasper Garretson, by his counsel, asked the court to charge the jury "That there is some evidence to show that the assignment is fraudulent and void, and the weight of the evidence and the credibility of the testimony is for the jury to determine," which the court declined to do; whereas, by the law of the land, the said
- 30 court ought to have so charged the jury; therefore in that there is manifest error. And also there is error in this, to wit: that on the trial of the said cause the said Jasper Garretson, by his counsel, asked the court to charge the jury "that the assignee is not a *bona fide* purchaser, for a valuable consideration, under the language of the statute of frauds," which the said court declined to do; whereas, by the law of the land, the court ought to have so charged the the jury; therefore in that there is manifest error. And also there is error



in this, to wit: that the judgment aforesaid of the said Circuit Court of the county of Hudson, by the record aforesaid, appears to have been given for the said John J. Brown, assignee, &c., against the said Jasper Garretson; whereas, by the law of the land, the said judgment ought to have been given for the said Jasper Garretson, against the said John J. Brown, assignee, &c., therefore in that there is manifest error. And also, there is error in this, to wit: that the judgment aforesaid was affirmed in the Supreme Court of judicature of the state of New Jersey; whereas, by the law of the land, the said judgment ought to have been reversed, therefore in that there is manifest error. And the said Jasper Garretson prays that the judgment and affirmance thereof, aforesaid, for the errors aforesaid, and for other errors in the record and proceedings aforesaid being, may be reversed, annulled, and altogether holden for nought, and that he may be restored to all things which he hath lost, by occasion of the said judgement, and the said affirmance thereof, &c.

RANSOM & BROWN,  
*Attorneys of plaintiff in error.* 20  
 S. B. RANSOM,  
*of counsel with plaintiff in error.*

The following is the opinion of the Supreme Court, affirming the judgment of the court below:

# SUPREME COURT,

June Term, 1857.

|                                                                     |   |                                   |    |
|---------------------------------------------------------------------|---|-----------------------------------|----|
| JASPER GARRETSON, Plaintiff in Error,                               | } | Error to Hudson<br>Circuit Court. | 30 |
| vs.                                                                 |   |                                   |    |
| JOHN J. BROWN, Assignee of BROWN &<br>DEMAREST, Defendant in Error. |   |                                   |    |

POTTS, J. The plaintiff below, John J. Brown, assignee of Brown & Demarest, obtained a judgment in the Hudson Circuit against Jasper Garretson, who was the sheriff of Hudson, for the sum of \$6,902 31, in an action of trespass.

The alleged trespass was the taking and carrying away of certain goods and chattels which the plaintiff, John J.

Brown, claimed title to under and by virtue of an assignment made and executed to him by Brown & Demarest, for the benefit of their creditors.

The sheriff justified the taking by virtue of sundry executions in his hands against said Brown & Demarest, upon judgment subsequent to the assignment.

The principal question in the case was as to the *validity of the assignment*, the plaintiff's title to the goods, and consequently his right of action depending upon this: and the  
10 defendant insisting it was fraudulent and void as against creditors.

The first section of the "act to secure to creditors an equal and just division of the estate of debtors, who convey to assignees for the benefit of creditors,"—*Nixon's Dig.* 27, provides, "That every conveyance or assignment, made by a debtor or debtors, of his, her, or their estate, real or personal, or both, in trust to the assignee or assignees, for the creditors of such debtor or debtors, *shall be made for their equal benefit*, in proportion to their several demands, to the nett amount that  
20 shall come to the hands of said assignee or assignees for distribution; and *all preference of one creditor over the other*, or whereby any one or more shall be first paid, or have a greater proportion in respect to his, her or their claim, than another, *shall be deemed fraudulent and void*, excepting mortgage and judgment creditors, when the judgment has not been by confession for the purpose of preferring creditors."

The deed of assignment of Brown & Demarest is dated the 18th of October, 1854. It purports to be for the equal benefit of all their creditors. It embraces not only the prop-  
30 erty held by them as a firm, but also the individual property of each of them. It is assigned in trust for the equal benefit of both their partnership and individual creditors; directs that the creditors of the firm be first paid out of the property of the firm, and the creditors of each of said parties to be first paid out of the individual and separate property of said parties; and then the residue of the individual property of said parties to be paid upon the debt of the firm, and not for the individual debt of the other parties; and that the debt be paid in pro-



portion to their respective amounts, and of the nett amount that shall come to the hands of the assignee, &c., according to the form of the statute, &c.

The assignment, therefore, appears to be unexceptionable upon its face; it is made in accordance with the provisions of the statute, covers in terms all the property of the assigners, is for the equal benefit of all their creditors, and directs distribution among them according to the well settled principles of law in such cases.

But it is contended that the assignment is fraudulent and void on several grounds, to wit: 1. That the said Thomas C. Brown, previous to the assignment confessed a judgment to John J. Brown, the assignee. 2. That Demarest had, previous to the said assignment, conveyed a house and lot to one Pharo, to secure a debt due Pharo and Dolson from the 'firm. 3. That the assigners had, shortly before the assignment, disposed of a large portion of their assets and applied the proceeds to the payment of certain favored creditors; and that all these acts were done in contemplation of the assignment, with full knowledge by the assigners of their insolvency, 20 and with the view to prefer certain of their creditors.

Assuming that the defendant below established all these facts upon the trial, are they sufficient to render the deed of assignment void in law?

The act does not say so. The first section of the act says the assignment shall be for the equal benefit of the creditors; and if it is not so, if it is made for the distribution of the assigner's property *unequally* among the creditors, that will render it inoperative and void under the statute; *Varnum v. Camp*, 1 *Green*, 326. The same section of the act declares 30 that all *preference* of one creditor over another, &c., shall be *fraudulent and void*; that is, as I apprehend, preferences made in and by the assignment. But whether it be so or not, is immaterial to the question here. It is at all events, clear, that it is only the preferences that are declared void, and not the *assignment*, unless they are incorporated in the instrument itself, in which case it is not such an assignment as the law permits.

I do not understand the court, in the case of *Varnum v. Camp*, to hold that preferences made in *contemplation* of an assignment, will avoid the deed. What the court says is, That to make a valid assignment under the statute, it is necessary: 1. "That it," (the *assignment*,) "should be for the equal benefit of the creditors, for the statute directs that it shall be so made." 2. "That it," (the *assignment*,) creates no preferences, for all preferences are declared fraudulent and void; and consequently the *instrument whereby* they are  
 10 attempted must be of the like character." In answer to the argument that a preference given *in and by* the assignment, did not make void the *instrument*, but only the *preference*, the court said "an assignment made in a manner prohibited and forbidden must be invalid. The express denial of preference, is in truth but an amplification of the antecedent clause of the statute, and without really adding anything to its extent, or perhaps its force, serves to express in distinct terms the legal effect and operation of that prior clause." And "it follows then, that where an *assignment* is not made for the equal  
 20 benefit of the creditors, but *whereby*, that is by the *assignment*, a preference is sought to be given to any one, not a creditor by mortgage or judgment; over another, it, the assignment, is in contemplation of law, fraudulent and void." This was the case of a preference given in the assignment itself.

The other question, as to what would be the effect of preference made before the assignment, and not incorporated in the instrument, but made in view of the assignment, was not before the court at all.

A careful examination of the statute, must, I think, result  
 30 in the following conclusions:

1. That if the deed of assignment contain upon its face a preference or preferences of one creditor over another, except as hereafter mentioned, the deed itself is void and inoperative, as being in contravention of the statute, and the preferences of course fall with the deed.

2. That the phraseology "and all preferences of one creditor over the other," &c., found in the first section of the statute, means all preferences made in and by the deed of assignment.



It was not intended to abridge or take away the common law right of every man, even when in failing circumstances, to dispose of his property provided he does it honestly; or to pay one honest creditor in preference to another. In this respect the statute has no analogy to the English bankrupt act. But the statute does intend that, if a failing debtor seeks its benefit, his assignment must conform to its provisions; and any attempt to elude them it declares shall be deemed fraudulent and shall vitiate the instrument itself. 4. *Griff. Reg.* 1235. Until the debtor divests himself of his title to his property by 10 assignment, his dominion over it is perfect, and he may use it for any honest and lawful purpose. The object to be gained by an assignment under the act is to get the benefit of the release which it provides. But while it is purely voluntary on the debtor's part, it is also optional with the creditors to come in or not: if they do come in and take a dividend, they release all claim against the debtor for any balance. But if they do not choose to come in, if they are dissatisfied with the conduct of the debtor in any way, they may refuse to accept of the benefit offered them, and all their rights and 20 remedies remain unimpaired. And even if they come in and take a dividend, they may avoid the effect of the release if they can, subsequently, show that the debtor has been guilty of fraud. The debtor, it is true, will have stripped himself of his property. The assignment, as to that, will operate as a preference of such creditors as do come in; but it is to be remembered that if the debtor had not chosen to make an assignment, he might still have paid his last dollar to favored creditors, and no exception could have been taken to it.

30

3. An assignment is not void because it gives a preference to mortgage creditors, or to judgment creditors when the judgment has not been by confession for the purpose of preferring creditors. But the statute was not to be evaded by the artifice of confessing judgment with a view to an assignment, and giving it a preference in the deed. The inference from the language of the act, is not, that a *judgment* confessed for the purpose of preferring a creditor is to be deemed

fraudulent and void, but that the preference of such a judgment in the deed shall be deemed a fraud, and shall be void.

It may be remarked, in this connection, that when an assignment is once made, it operates to convey *all* the assigner's property, real and personal, whether embraced in the inventory attached to the deed or not. *Sec. 2.* The provision of the statute that the debtor shall make and annex an inventory to the assignment is directory merely; and no errors or omissions or statements in the inventory will affect  
 10 the deed. They are in no way binding or conclusive. If the debtor has *fraudulently* conveyed away part of his property, the assignee may sue for and recover it for the use of the creditors who present their claims. *Sec. 13.* And any *fraudulent* conduct of the assigner touching the disposition of his property with reference to the assignment, will enable the creditors who come in under the assignment, to avoid the operation of the release. *Sec. 14.* And by the provisions of the *9th Sec.* the creditors who come in under the assignment have the means to compel the assignee to do his duty by  
 20 citation and attachment.

The argument of the defendant's counsel that all preferences made by an insolvent debtor, anterior to his assignment, but with a view to, or in contemplation of such assignment, are intended to be declared fraudulent and void, by the statute, cannot be sound.

At common law the right to prefer creditors is undoubted. If the statute meant to abridge so important a right, it would have said so in plain terms. It says indeed, that "all preferences," &c., shall be deemed fraudulent and void; but the  
 30 words are referable, it seems to me, to the subject matter of which the statute was speaking, to wit: conveyance or assignment by debtors to trustees, for creditors, and therefore may be properly construed as meaning only all preferences made in and by such assignment. This appears to have been Chief Justice Ewing's reading of the section in *Varnum v. Camp*, and of Chief Justice Hornblower in *Vanderveer v. Conover*, 1. *Har.* 490; as it was of Mr. Griffith in the *Register* above cited, if I understand him rightly.



Should we not get afloat on a sea of difficulty by adopting the defendant's construction? What is to be understood by the phraseology "in view," or "in contemplation" of an assignment? Suppose it can be proved, or the debtor admits, that he contemplated making an assignment six months before he did it, are all his transactions for these six months to be ripped up? All the creditors who have been honestly paid or arranged with, to be prosecuted, and the amounts they received to be recovered back, although they had known nothing of the debtor's insolvency, or of his ultimate designs, and 10 dealt with him honestly and fairly? Clearly all such settlements and dealings, if honest and bona fide, were lawful when they were made.

Did the statute intend that the debtor should have the power, at any time afterward to annul, and make them all constructively *fraudulent* and void, by the single act of carrying into effect a purpose, contemplated before, but concealed from them, of making an assignment?

The debtor confesses a judgment for the purpose of preferring an honest creditor over other creditors, a thing done every 20 day in fact. If the judgment was confessed for an honest debt, it is good and valid in law. But it was confessed for the purpose of preferring the creditor. Can the debtor make it constructively fraudulent and void by subsequently executing an assignment?

The doctrine, it appears to me, would violate the clearest principles of common justice, and open a door for litigation, which was never contemplated by the framers of the law. The statute, as I understand it, makes the *preference* of such a judgment in the deed fraudulent, and void, and not the 30 *judgment* itself. It refers to preferences made in the assignment, and not to such as are made by the debtor antecedent to it, though he contemplated an assignment at the time. It did not mean to leave the validity of these transactions to depend upon the arbitrary will of the debtor, who, up to the moment of executing the deed was at perfect liberty to complete the act he previously contemplated or not.

The question whether any of the transactions of the debtors

antecedent to their assignment, are liable to be avoided, upon the doctrine of the statute of fraud, is not now before us. Recently, in the case of *Owen v. Orvis*, ante p. 22, the court went over the general subject, and it is unnecessary to advert to it here.

Then, if this construction of the statute is correct, it disposes of all that class of exceptions on the part of the defendant, which relate to the question of the validity of the assignment. That instrument is not affected by any of the acts  
 10 complained of. If there was a fraudulent confession of judgment, or a fraudulent conveyance of property, such judgment or conveyance is liable to be avoided by the assignee, and if he has neglected his duty it is in the power of the creditors to compel him to its performance; and so of *any* disposition the debtor may have made of his property. If fraudulent the remedy is in the hands of the assignee, and he is but the trustee for the creditors who can compel him to perform his duty. But the *deed* is good nevertheless, and vested all the debtor's estate in the assignee. If the acts complained of amounted  
 20 to nothing more than the payment or satisfaction of honest claims of actual creditors, they neither affect the assignment, nor are they fraudulent in themselves.

And so it is unimportant, in this view of the case, whether the exception taken by the defendant's counsel to the ruling of the court below, in the rejection or admission of evidence was correct or not. For, no part of the evidence excepted to and admitted, or offered and rejected, was material to the issue, which was whether the legal title to the property, taken by the defendant, was in the assignee at the time. Nor was it ma-  
 30 terial how many creditors had presented their claims to the assignee, for the title to the property did not depend on that. Nor, whether the inventory annexed to the assignment was correct or not, for the inventory was no part of the deed, and the assignee was not bound by it, either as to the property assigned, or the rights of the creditors.

A number of errors are assigned upon what the court charged, and what it declined to charge. But I find no error in these which can be made the foundation of a reversal.



The court charged the jury, in effect, that the value of the property taken by the defendant, was the true measure of damages. This is assigned for error. The defendant's counsel insists that the plaintiff, if entitled to recover at all, could only recover sufficient to pay the creditors who had presented their claims within the time limited by the statute. But this involves the proposition that the trust terminates immediately on the expiration of the time limited for the presentation of claims, as to so much of the trust property as is not required for their payment. The proposition cannot be conceded. The legal title to all the property of the debtor, and its proceeds, remains in the trustee, where the deed has vested it, until by some proper judicial proceeding it is disposed of. It cannot be seized and taken as the property of the assigner while the legal title to it is not in him.

Upon the whole the judgment should in my opinion be affirmed.

