court below excluding the publication declared upon as a libel from going to the jury in connection with other evidence to establish the existence of malice. We forbear any remark upon the intrinsic character of the injury complained of, or upon the extent to which it may have been made out. These are matters not properly before us. But if the publication declared upon was to be regarded as an instance of privileged publications, malice was an indispensable characteristic which the plaintiff would have been bound to establish in relation to it. The jury, and the jury alone, were to determine whether this malice did or did not mark the publication. It would appear difficult *à priori* to imagine how it would be possible to appreciate a fact whilst that fact was kept entirely concealed and out of view. This question, however, need not at the present time be reasoned by the court; it has, by numerous adjudications, been placed beyond doubt or controversy. Indeed, in the very many cases that are applicable to this question, they almost without an exception concur in the rule, that the question of malice is to be submitted to the jury upon the face of the libel or publication itself. We refer for this position to Wright *v.* Woodgate, 2 Crompton, Mees. & Ros. 573; to Fairman *v.* Ives, 5 Barn. & Ald. 642; Robinson *v.* May, 2 Smith, 3; Flint *v.* Pike, 4 Barn. & Cres. 484, per Littledale, J.; Ib. 247, Bromage *v.* Prosser; Blake *v.* Pilford, 1 Mood. & Rob. 198; Parmeter *v.* Coupland, 6 Mees. & Welby, 105; Thomson *v.* Shackell, 1 Moo. & Mal. 187. Other cases might be adduced to the same point.

Upon the whole we consider the opinion of the Circuit Court, in the several instructions given by it in these cases, to be erroneous. We therefore adjudge that its decision be reversed; that these causes be remanded to the said court, and that a *venire facias de novo* be awarded to try them in conformity with the principles herein laid down.

Ex Parte, The City Bank of New Orleans in the matter of William Christy, Assignee of Daniel T. Walden, a Bankrupt.

This court has no revising power over the decrees of the District Court sitting in bankruptcy; nor is it authorized to issue a writ of prohibition to it in any case except where the District Court is proceeding as a court of admiralty and maritime jurisdiction.

The District Court, when sitting in bankruptcy, has jurisdiction over liens and mortgages existing upon the property of a bankrupt, so as to inquire into their validity and extent, and grant the same relief which the state courts might or ought to grant.

The control of the District Court over proceedings in the state courts upon such liens, is exercised, not over the state courts themselves, but upon the parties, through an injunction or other appropriate proceeding in equity.

The design of the Bankrupt Act was to secure a prompt and effectual administration of the estate of all bankrupts, worked out by the courts of the United States, without the assistance of state tribunals.

The phrase in the 6th section, "any creditor or creditors who shall claim any debt or demand under the bankruptcy," does not mean only such creditors who come in and prove their debts, but all creditors who have a present subsisting claim upon the bankrupt's estate, whether they have a security or mortgage therefor or not.

Such creditors have a right to ask that the property mortgaged shall be sold, and the proceeds applied towards the payment of their debts; and the assignee, on the other hand, may contest their claims.

In the case of a contested claim, the District Court has jurisdiction, if resort be had to a formal bill in equity or other plenary proceeding; and also jurisdiction to proceed summarily.

THIS was a motion on behalf of the City Bank of New Orleans, for a prohibition, to be issued to the District Court of the United States for the district of Louisiana.

The suggestion for the prohibition stated the following as facts in the case:

First. That Daniel T. Walden, of the city of New Orleans, on the 27th July, 1839, and on the 17th day of August, 1839, executed two several mortgages to the City Bank of New Orleans, on a certain plantation, and on lots of land in said state, to secure payment of $200,000 borrowed of said bank; which mortgages were duly recorded, and in all respects good and valid, and created a good, legal, and equitable lien on the property mortgaged for payment of said debt. That, on or about 20th October, 1840, Walden instituted suit in the state District Court, to set aside said mortgages, for the same causes, substantially, as William Christy (Walden's subsequent assignee in bankruptcy) has presented by his petition and amended petition in the District Court of the United States at New Orleans, exercising summary jurisdiction in bankruptcy, to set aside the same mortgages, as per certified copy of the proceedings in the District Court of the United States herewith annexed; and the state court, on appeal, decided finally against Walden's complaint, and sustained the mortgages.

Second. That, afterward, the bank proceeded to foreclose its mortgages in the state court; and thereupon, on 17th May, 1842, an order of seizure and sale was made, and an actual seizure of the property executed on 19th May, 1842.

Third. That, on 18th June, 1842, the said Walden filed his petition for the benefit of the bankrupt act, in the District Court of the United States at New Orleans, and on the 18th July, 1842, said court decreed him to be a bankrupt.

Fourth. That, after Walden filed his petition, and before decreed a bankrupt, viz., on 27th June, 1842, he applied to the said District Court of the United States for its injunction to stay the sale ordered in the state court of the mortgaged premises; setting forth, as grounds therefor, the same facts, substantially, as subsequently again

set forth by Christy, his assignee, in his petitions aforesaid. After full hearing of said bill, the court refused the injunction; and thereafter the premises seized were duly sold, with every legal requisite and formality, in execution of the previous orders of the state court, and the City Bank became the purchasers.

Fifth. That the said bank has, in no wise, presented or proved its claim against Walden, in the bankrupt court, but pursued the said mortgage claim adversely in the state court, relying on its lien by the state law, and the proviso in the bankrupt act, saving such lien from its operation.

Sixth. That the matter in dispute exceeds two thousand dollars in value.

Seventh. That the said Christy, assignee, &c., knowing all the premises, but contriving to impair the lien of the bank by the mortgages aforesaid, contrary to the saving clause of the bankrupt act, is endeavouring, by his petition and supplemental petition, to subject all the previous proceedings of the state court upon the mortgages to review and révision in the District Court of the United States, by its summary process in bankruptcy. And the said Christy and Walden, and the Hon. Theodore H. McCaleb, judge of the said District Court of the United States, have wrongfully and vexatiously forced the said bank to appear in said court, upon its summary process, to answer said Christy's petition. And though the bank has objected, by plea, to the summary jurisdiction of the court over the matters aforesaid, yet the court adheres—hath overruled the plea—and persists, by its summary process, to proceed with the cause, to the embarrassment of the bank, and to the deprivation of all redress by appeal.

In addition to the foregoing statement filed by the counsel in support of the motion for a prohibition, it may be proper to state that,

On the 8th of October, 1842, Christy filed the petition mentioned in the seventh proposition just quoted. It recited that Walden, the bankrupt, was, at the time of filing his schedule and surrender, the owner of a large amount of real estate; that the bank claimed to have a mortgage upon it; that the bank caused it to be sold and possession delivered; that the sale was void, because the application of Walden operates as a stay of proceeding; that the property was offered for sale in block, though composed of twenty different stores or buildings, and for cash; that the mortgage debt was not justly due, but void on account of usury; and prayed that the sale might be declared void, or if adjudged valid, that the amount thereof should be paid over to the petitioner, to be distributed according to law.

On the 31st of October, 1842, the bank filed a plea to the jurisdiction of the court, with other matters in defence.

On the 17th of February, 1843, the questions raised by the answer of the bank were adjourned to the Circuit Court of the United States.

At April term, 1843, the Circuit Court returned the following answers:—

"In answer to the questions adjourned into this court by the District Court for the said district, it is ordered that the following answers be certified to the District Court in bankruptcy, as the opinion of the court thereupon:

"First. That the said District Court has, under the statute of bankruptcy, full and ample jurisdiction of all questions arising under the petition of William Christy, assignee of Walden, to try, adjudge, decree, and determine the same between the parties thereto.

"Secondly. That the sale made of the mortgaged property, under the seizure and sale ordered by the District Court of the state of Louisiana, is void, and that the District Court of the United States should by its decree declare it void in the suit; and that said last-mentioned court has full power and authority to try and determine the validity of said mortgages, and if proved upon the trial void according to the laws of Louisiana, to make a decree accordingly, and order a sale of the property therein contained for the benefit of the several creditors of the bankrupt; but if upon proof said mortgages shall be sustained and adjudged valid, a decree should be rendered in favour of the mortgagees, condemning to sale all their interests, rights, and title therein, and all the interest, right, and title of the bankrupt and all the general creditors, in the hands of the assignee, and the rights and title of the assignee also; and by the order of sale the marshal be directed to pay over to the mortgagees, after deducting the per cent. for his commissions and all the legal costs of the suit, the amount of their claim, if the proceeds of the sale amount to so much, and the balance, if any, to pay over to the assignee; and that by such decree the assignee be ordered to make proper title and conveyance to the purchaser or purchasers, upon the full payment of the purchase money and a reasonable compensation to the assignee for making such conveyance, to be determined and settled by the judge of the District Court, should the purchaser or purchasers and the assignee disagree as to the amount.

"Thirdly. The second and alternative prayer in the petition of the assignee, asking the payment to him of the whole amount of the proceeds of the former sale of the mortgaged property, being inconsistent with the opinion of the court in the second point, will therefore be disregarded on the trial by the District Court.

"J. McKinley,

"Associate Justice of the Supreme Court U. S."

Afterwards, in 1843, an amended petition was filed by Christy, alleging, amongst other things, that the bank claimed to be a creditor of Walden, and "in that capacity had become a party to the said proceedings in bankruptcy," &c., &c.

In December, 1843, the bank prayed oyer of the time, place,

manner, and form, where, how, and when it became a party to the proceedings in bankruptcy.

The court having granted the prayer for oyer, Christy, on the 23d of January, 1844, filed the following:

"That the said City Bank became parties to the proceedings in bankruptcy of the said Walden, first, by the operation of law, they being at the time of his bankruptcy mortgage creditors of the said Walden, and placed upon his schedule as such; second, by their own act, having filed a petition in this honourable court on the 5th September, 1842, praying that the demand of the assignee for the postponement of the sale of certain properties be disregarded, that their privileges be recognised, and that said properties be sold under an order of this court for cash; third, that an attempt was made by the said bank to withdraw said petition and prayer of 5th September, 1842, but a discontinuance of the same was opposed by M. W. Hoffman and L. C. Duncan, creditors of said bankrupt, and parties interested, by reason of which said opposition the legal effects of said application, made by the City Bank as aforesaid, to this honourable court remain in full force.

"In consideration of all which and the documents herewith filed, your petitioner prays, that said City Bank be compelled to answer to the merits of the original and supplemental petition in this case filed, without further delay."

On the 10th of February, 1844, the bank filed its answer, denying that it had ever proved its debt, or otherwise subjected itself in any manner to the summary jurisdiction of the District Court sitting as a court of bankruptcy; but, on the contrary, that it had prosecuted its remedy in the state courts of Louisiana, and adding the following:

"And so these respondents and defendants say and insist, that this honourable court, sitting as a bankrupt court, and holding summary jurisdiction in matters of bankruptcy under and by virtue of said act, ought not to have and to take cognisance of the several matters and things in the said petition and supplemental petition contained: forasmuch as all jurisdiction over the same is by law vested in and does of right belong to the Circuit Court of the United States for the eastern district of Louisiana, holding jurisdiction in equity, and proceeding according to the principles and forms of courts of chancery as prescribed by law and by rules and orders of the Supreme Court of the United States, or to the District Court of the United States for the said district, proceeding in the same manner, and vested with concurrent jurisdiction over all suits at law or in equity which may be brought by the assignee of any bankrupt against any person claiming an adverse interest; which said courts are competent to entertain the suit of the petitioner and grant him the relief of prayer for, if by law he is entitled to the same, and not this court; and forasmuch as this honourable court, sitting as a bankrupt court, and deciding in a summary manner in matters of bankruptcy, is wholly

without jurisdiction in the premises, these respondents and defendants submit to the judgment of this honourable court, whether they shall be held to make any further or other answer to the several matters and things in the said petition and supplemental petition contained, and pray to be hence dismissed, with their reasonable costs, &c."

An agreement of counsel was filed in the court below relative to the petition of the bank and its discontinuance spoken of in the oyer of Christy, as above set forth. The agreement stated that the discontinuance was ordered in open court by the counsel of the bank, and the proceedings of the court showed that a rule to show cause why the discontinuance should not be set aside was dismissed.

This was the position of the case in the court below.

The motion for a prohibition was sustained by *Wilde* and *Henderson*, and opposed by *Crittenden*. The Reporter has no notes of the arguments of *Henderson* and *Crittenden*, and from that of *Wilde* only extracts can be given.

Wilde referred to the seven facts stated in the beginning of this report, and then said, the questions of law insisted on by the suggestion are,

1. That the Bankrupt Act contemplates two kinds of jurisdiction: one over parties claiming under the bankruptcy, the other over parties claiming adversely to it; the one summary, the other formal; the one exclusive in the District Court exercising summary jurisdiction in matters of bankruptcy, without appeal, as defined by section 6th; the other a concurrent jurisdiction in both District and Circuit Courts for or against parties claiming an adverse interest, according to the provisions of section 8th, which is not summary, but formal, to be exercised according to the rules and forms of chancery or common law, and subject to review in this court by appeal or writ of error under the general provisions of the laws heretofore passed regulating writs of error and appeals.

2. That the rules of said bankrupt court regulating its summary process, in pursuance of which this proceeding by Christy is assumed to be instituted and entertained, are in violation of the Bankrupt Act—which rules are herewith exhibited.

The reasons why this court should interpose to restrain the District Court from further proceedings in the matter are two:

1. Because said court, proceeding summarily on petition, as in a matter of bankruptcy, has no lawful cognisance and jurisdiction of the matter.

2. Because by permitting said court so to proceed and decide, (from which decision no appeal would lie,) would be to permit said district and inferior court to impair the legitimate powers of this

court in its appellate jurisdiction, and to deprive the bank of its right to invoke the supervisory powers of this court by appeal.

After stating the general principles on which prohibitions issue, which were cases where an appeal does not lie, and citing a number of authorities, Mr. *Wilde* continued—

For the present, then, we are to consider whether the District Court, sitting as a bankrupt court of exclusive and summary jurisdiction of all matters arising under the bankruptcy, and deciding without appeal, has rightful and lawful cognisance of the matters it is proceeding to investigate and adjudicate upon in this case.

Here are lawful mortgages, made and recorded according to the laws of Louisiana, bearing date three years before petition of the mortgagor to be declared a voluntary bankrupt.

Here is a mortgagee who has not proved his debt under the bankruptcy, but has rested on this state lien; prosecuting that lien to judgment of foreclosure upon his said mortgages in the state court, before the petition in bankruptcy.

Here is an order of seizure and sale, and an actual levy on the mortgaged premises by the sheriff one month before the petition of the mortgagor for the benefit of the Bankrupt Act.

Under this levy or seizure the mortgagee proceeded to sell the mortgaged premises, after appraisement, advertisement, and all other legal pre-requisites, in several distinct lots, according to their separate enumeration in the mortgages and appraisement, and in as minute divisions as the nature of the property would admit or the law allow.

And the substantial question before this court is, whether he who has never proved his debt, never come in under the bankruptcy, can be dragged into the District Court, sitting as a bankrupt court, and exercising summary jurisdiction, without appeal; his writ of seizure and sale annulled, the judgment of the state court vacated, the sale set aside, and his mortgages declared null and void, though the Supreme Court of the state have declared them good and valid.

The mere statement of such a question would seem to be enough to decide it; but its very simplicity leads to the suspicion of error, and therefore we will verify it step by step.

First then, the proceedings in bankruptcy, of which we produce an authenticated copy, and the clerk's certificate, show exclusively that the City Bank has never proved its debt against Walden, See transcript of the petition, schedule, &c., in bankruptcy—clerk's certificate, last page.

We hold it to be clear law, that a party holding a mortgage cannot be compelled to prove his debt, or come in under the commission; and we hold that unless he does so, the District Court, exercising the powers of a bankrupt court, and proceeding summarily without appeal, has no jurisdiction over him.

"If a creditor has a security or lien, he is not compellable to

come in under the commission; he may elect to stand out, and rely on his security or lien."

"But if he does prove, he relinquishes his security for the benefit of all." Cullen on Bankruptcy, 145, 149.

If this be the case in England, *à fortiori*, it is so under our late bankrupt act, which contains a clause saving state liens. Section 2, p. 16, Bankrupt Act:—

"Nothing in this act contained shall be construed to annul, destroy, or impair any liens, mortgages, or other securities or properties, real or personal, which may be valid by the laws of the states respectively."

In the decisions under this law, although there has been a diversity of opinion as to what constituted a lien, there has been none that a mortgage was one.

There has been no diversity of opinion on the point whether a mortgaged creditor could be compelled to prove or not.

There has been some difference of opinion how, and in what court, and by what process or form of proceeding, the state lien is to be saved; but all agree that saved it must be.

On the score of authority, it cannot be expected we should do more than produce the decisions of circuit or district judges. These questions have not yet been adjudicated in this court.

We rely on the following cases, decided by judges of this court on their circuits, or by district judges, respectable for learning and ability.

The decision of Mr. Justice Baldwin in the matter of Kerlin, a bankrupt, reported in the United States Gazette, of Philadelphia, of 26th October, 1843.

The decision of Mr. Justice Story, in the case of Mitchell, assignee of Roper, *v.* Winslow and others, in the Circuit Court of Maine, reported in the Law Reporter of Boston, for December, 1843, pp. 347, 360.

Mr. Justice McLean's decision in the case of N. C. McLean, assignee in bankruptcy, *v.* The Lafayette Bank, J. S. Buckingham and others; to be found in the Western Law Journal for October, 1843, p. 15.

Mr. Justice McLean's decision in the case of N. C. McLean, assignee, *v.* James F. Meline; Western Law Journal for November, 1843, p. 51.

Mr. Justice Story's decision in the case of Muggridge, 5 Law Rep. 357; in Ex parte Cook, 5 Law Rep. 444; Ex parte Newhall, 5 Law Rep. 308; in Dutton *v.* Freeman, 5 Law Rep. 452.

Mr. Justice Thompson's decision in Houghton *v.* Eustis, 5 Law Rep. 506.

Judge Prentiss's (of Vermont) opinion in Ex parte Spear, 5 Law Rep. 399; and Ex parte Comstock, 5 Law Rep. 165.

Judge Conkling's (of New York) opinion in Ex parte Allen, 5 Law Rep. 368.

Judge Monroe's (of Kentucky) opinion in Niles's Register, 5th November, 1842; and those of Irwin, Randall, and Gilchrist, ib.

These cases, it is humbly submitted, establish the doctrine for which the defendants contend, namely: that the state lien in this case was properly and rightfully enforced under the state law and process. Penn. Law Journal for November, 1842, p. 302, Ex parte Dudley, Judge Randall and the late Judge Baldwin's decisions; Penn. Law Journal, April, 1844, p. 246, Large *v.* Bosler, District Court of Philadelphia; Law Reporter for October, 1844, p. 281, Judge Conkling's decision on Briggs *v.* Stephens, (proving surrenders lien;) Western Law Journal, April, 1844, Judge McLean's decision in McLean *v.* Rockey, p. 302; Law Reporter, July, 1844, Mr. Justice Story's decision in Bellows and Peck, United States Circuit Court of New Hampshire, pp. 125, 127; Law Reporter, June, 1844, Superior Court of New Hampshire, Kitteridge *v.* Warren, p. 87; Penn. Law Journal, October 15th, 1842, p. 223, Judge Randall's decision (distress;) Penn. Law Journal, October 15, 1842, p. 245, Judge Randall, (proof withdrawn;) Ex parte Lafeley, Report of Kitteridge & Emerson, Sup. Court, New Hampshire.

The decision of Judge Gilchrist in the case of McDowall's assignee *v.* Planters' and Mechanics' Bank; of which an authenticated copy is produced.

But this court very properly holds itself entirely uncommitted by Circuit Court decisions. They are merely cases at *nisi prius*, and the matters there determined are as open to discussion as ever.

(Mr. *Wilde* then went on to argue that a mortgaged creditor could not be compelled to prove his debt, and that if he did so, he would only come in for a share of the assets *pro rata;* and then investigated the jurisdiction of the District and Circuit Courts in bankruptcy, and the revisory powers of this court by appeal or prohibition, as follows:)

In considering the authority of the District Court exercising summary jurisdiction in cases of bankruptcy, it will be most convenient and perspicuous to examine—

First. Its exclusive jurisdiction.

Secondly. Its jurisdiction concurrently with the Circuit Court.

Its exclusive jurisdiction is granted by the 6th section, which is as follows:

(Mr. *Wilde* here quoted it at length.)

To obtain a distinct idea of the extent and boundaries of the jurisdiction thus granted, it is requisite to examine them under three different aspects:

First. As to the persons over whom—that is, for or against whom—jurisdiction is given.

Secondly. As to the objects, rights, or claims, subjected to such jurisdiction.

Thirdly. As to the modes and forms of proceeding.

A careful analysis of this section will show—

First, as to persons:

That the jurisdiction granted extends—

To the bankrupt;

To the creditors claiming any debt under the bankruptcy;

To the assignee, whether in office or removed.

These parties and each of them are authorized to sue each other in the District Court, and to litigate their respective claims or pretensions there. But the court will remark, there is no jurisdiction whatever granted by this section, so far as persons are concerned, to a creditor who does not claim under the bankruptcy. No jurisdiction over such a creditor is granted: none is given for him or against him. This distinction has always been recognised by the courts of the United States wherever the point has been brought to their attention. Briggs *v.* Stephens, Law Rep., Oct. 1844, p. 282, per Conkling, J.; Ex parte Dudley, Pem. Law Journal, Nov. 19, 1842, pp. 320, 321, per Justice Baldwin; Assignees of McDowall *v.* Planters' and Mechanics' Bank, per Judge Gilchrist.

Secondly. As to objects, rights, claims, and controversies, subjected to the summary jurisdiction of the District Court sitting in bankruptcy.

The jurisdiction granted by this section extends—

To all controversies between the bankrupt and any creditor claiming any debt or demand under the bankruptcy;

To all controversies between such creditor and the assignee of the estate;

To all controversies between the assignee and the bankrupt; and—

To all acts, matters, and things, to be done under and by virtue of the bankruptcy.

But your honours will observe, that under this section, so far as objects, rights, claims, or controversies are concerned, no jurisdiction is granted in controversies between the assignee and a creditor not claiming under the bankruptcy, but claiming adversely to it.

No jurisdiction is granted in controversies between such a creditor and other creditors claiming under the bankruptcy.

None in cases between a creditor claiming adversely to the bankruptcy and the bankrupt himself.

None where the acts, matters, and things are not done, or be done under and in virtue of the bankruptcy, but before it, independent of it, and adversely to it.

So far, then, as the objects of the District Court's summary jurisdiction in bankruptcy are concerned, no such jurisdiction is granted by this section over the rights or demands of a creditor who claims adversely to the bankruptcy, and not under it.

In relation to such a creditor, so claiming such rights, he is not authorized to sue in that court either the assignee or the bankrupt, or the creditors claiming under the bankruptcy; neither, in regard to such a creditor and such rights, is the assignee or the bankrupt, or the other creditors claiming under the bankruptcy, empowered to sue him there.

Thirdly. In reference to the modes and forms of proceeding, it is indisputable that in the District Court, sitting as a bankrupt court, and holding jurisdiction in bankruptcy under the 6th and 7th sections, the proceedings are summary, and in general without appeal.

But however clearly it may appear that by the letter of the 6th section no such jurisdiction is granted for, against, or over a creditor claiming adversely to the bankruptcy, it may be said cognisance of such claims somewhere is indispensable to the full execution of a uniform system, and therefore, *ex necessitate*, it must be vested in some court of the United States.

He who objects to the jurisdiction of a court (it will be said) must show that some other court has jurisdiction. We assume that obligation and this brings us to a like analysis of the 8th section.

That section is as follows:

"Sect. 8. And be it further enacted, That the Circuit Court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the District Court of the same district of all suits at law and in equity, which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in, such assignee; and no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued."

With respect to the jurisdiction granted by this section, the court will observe it is concurrent in the District and Circuit Courts. But as some complexity and confusion are likely to arise in considering the variety of jurisdictions possessed by the same tribunal, though sitting on different sides, and proceeding by different forms, we will analyze this section as to the jurisdiction thereby granted to the Circuit Courts, with reference to the persons for or against whom it is granted, the subject-matters over which it is extended, and the modes and forms of proceeding required to be adopted.

As soon as we shall have ascertained what the jurisdiction of the Circuit Court is, under the 8th section, it will be easy to apply it to the District Court, for as the two courts under the 8th section have concurrent jurisdiction, it follows that whatever jurisdiction is

granted by that section to the one is granted to the other. When the Circuit Court's jurisdiction under it is known, the District Court's jurisdiction under it is known to be the same, and we thus arrive at a clear and precise conception of the two district jurisdictions, which we allege exist in the District Court, namely:

1. Its summary jurisdiction as to parties claiming under the bankruptcy.

2. Its jurisdiction as a court of law and equity, for or agains parties claiming adversely to the bankruptcy; a jurisdiction not summary, but to be exercised according to the usual modes and forms of courts of chancery or common law, according as the nature of the case made, or the relief sought, belongs to the one or the other forum.

Let us examine, then, the jurisdiction granted by the 8th section to the Circuit Court.

1. It extends to all suits at law or in equity brought by an assignee against any person claiming an adverse interest.

2. To all suits at law or in equity by such person, against such assignee, touching any property or rights of the bankrupt.

Thus we see that the very jurisdiction over persons claiming an adverse interest and rights, not arising under the bankruptcy, but in opposition to it, which the 6th section did not grant to the District Court exercising summary jurisdiction, has been granted to the Circuit Court by the 8th section, as a court of common law and equity, proceeding according to its ordinary jurisdiction in such suits, and according to the usual modes and forms of proceeding in chancery, where a chancery remedy is sought, and of common law, where a common law remedy is adequate.

The District Court, then, as a court of summary jurisdiction, has no cognisance of cases for or against persons claiming an adverse interest, but the Circuit Court has; and the Circuit Court, as to such cases, proceeds not summarily, but according to the usual modes and forms of courts of common law or chancery.

Now the jurisdiction granted to the District Court by the 8th section is concurrent with that given to the Circuit Court by the 8th section—that is to say, it is neither more nor less, but precisely the same; to be exercised over the same parties, in the same way, and by the same rules and forms of proceeding.

There are then two distinct jurisdictions given to the District Courts; as we undertook to prove.

The one a summary jurisdiction, to be exercised over all claiming under the bankruptcy, and this jurisdiction is exclusive. The other a formal jurisdiction, coextensive with that given to the Circuit Court, for and against persons claiming adversely to the bankruptcy, which jurisdiction is not summary, but to be exercised according to the usual forms of common law or chancery.

The summary jurisdiction of the Bankrupt Court may be admit-

ted for the purposes of this argument, to be exclusive and without appeal.

But the jurisdiction granted to the Circuit Court over persons claiming an adverse interest, is not summary, but is the ordinary jurisdiction of that court as a court of common law and chancery, extended over a new class of cases, and a new description of suitors, it is true, but to be exercised according to long-established forms; and as the only jurisdiction possessed by the District Court over persons, not parties to the bankruptcy, but claiming adversely to it, is precisely the same as that given by the 8th section to the Circuit Court, it follows that, when the District Court takes cognisance of that class of cases, its jurisdiction is to be exercised according to the usual forms of chancery and common law, by bill or suit, precisely as the Circuit Court would exercise it.

The Circuit Court in such cases cannot decide summarily, and as the jurisdiction of the District Court is the same, and no more, as to that description of persons and controversies, the District Court cannot decide summarily.

To maintain the opposite doctrine, is to assert that a concurrent jurisdiction may be different, and greater in the one court than the other, and that the formal and summary jurisdictions of a court may be adopted and intermingled at its pleasure. It is indisputable, and conviction results from a mere inspection of the proceedings, that William Christy, the assignee, is proceeding in the District Court, sitting in bankruptcy, and according to the course of its summary jurisdiction as a bankrupt court.

The petition is so addressed, [p. 7 of the printed papers attached to the suggestion.] All the pleadings and orders in the cause are uniformly so entitled. They are "in the United States District Court, sitting in bankruptcy," pp. 7, 12, 14, 23, 24, 25, 26, 27, and 28.

Now, where the relief sought belongs to the chancery jurisdiction, it must be sought in Louisiana, as well as elsewhere, in the courts of the United States, according to the course and forms of chancery practice. McCullum *v.* Eager, 2 Howard, 63.

The proceeding of the assignee is by petition, not by bill in chancery.

The motive of his so proceeding is sufficiently obvious. If he can maintain the jurisdiction of the District Court, exercising summary jurisdiction in bankruptcy, he cuts off all appeal. He has succeeded in persuading the District Court, that the case comes under, and belongs to its summary cognisance. A plea to the jurisdiction upon the very ground we are arguing, has been submitted to that court and overruled. *Vide* the plea to the jurisdiction, p. 25, 26, of the printed record annexed to the suggestion, and order overruling it, p. 26.

In fine, therefore, it is manifest that William Christy, the assignee,

is proceeding in the bankrupt court, according to the course of its summary jurisdiction.

The plea so expressly alleges, pp. 25, 26.

By demurring *ore tenus* to the plea, which he is held to have done, by praying judgment of the court upon it, although no formal demurrer is allowed by the law or practice of Louisiana, he admits the fact.

And the court, by overruling the plea, decide, that he is proceeding in the court of bankruptcy, according to the course of its summary jurisdiction, but that he is rightfully and lawfully proceeding there.

This is the precise point we have attempted to disprove, and upon which we seek the judgment of this court, in the form of an order for a prohibition.

Thus, then, we think we have sustained the first branch of our argument, namely, that the District Court of the United States for the eastern district of Louisiana is proceeding in the case of William Christy, assignee, against the City Bank of New Orleans, without jurisdiction, and contrary to law, and in such manner as to deprive the City Bank of an important legal right.

This view is sustained by the decision of the late Mr. Justice Baldwin, Ex parte Dudley, Penn. Law Jour., Nov. 19, 1842, p. 297; by Briggs *v.* Stephens, per Conkling, J., Law Reporter, Oct. 1844, p. 282.

The decision of Mr. Justice Baldwin, in the matter of John Kerlin, reported for the United States Gazette, 26 October, 1843.

The dissenting opinion of Judge Bullard, in the case of The State *v.* Rosanda, p. 23 of the Printed Documents, in which it is understood Chief Justice Martin agrees, although he did not sit in the cause; and the dissenting opinion of the same judge in Bank's case, p. 7 of the same documents.

Assuming, therefore, that the true jurisdiction, in a case like the present, is not in the District Court proceeding summarily by petition and order, but in the United States Circuit Court for the eastern district of Louisiana sitting in chancery, or the District Court of that district having concurrent chancery jurisdiction, in cases for or against a creditor claiming adversely, under and by virtue of the 8th section of the bankrupt act, in which suit the proceeding must be by bill and answer, according to the usual chancery rules and forms.

We are next to show that in such a case an appeal would lie.

(Mr. *Wilde* went on to maintain this proposition, citing many authorities.)

We regard it, then, as established, that from the summary jurisdiction of the bankrupt court no appeal lies.

That from the chancery jurisdiction, granted by the 8th section concurrently to the Circuit and District Courts, an appeal does lie.

That the summary jurisdiction does not extend to a party claiming adversely.

That the chancery does.

And that Christy, in resorting to the summary jurisdiction, does so because he has an evident interest to deprive the bank of the right of appeal; and to oust this court of its ultimate appellate jurisdiction.

All this may be true, and yet we may have no redress.

Let us now inquire if this court be competent to grant us any remedy, and whether we have sought the proper one.

We have seen, in the early part of this argument, from the English authorities, that in the King's Bench this would be clearly a case for a prohibition.

But this court, it has already been admitted, does not possess, in such cases, an authority coextensive with that of the King's Bench.

We are to show—

1st. That the exercise of such an authority is delegated to it by the Constitution and laws of the United States; and

2d. That its exercise is necessary to protect its appellate jurisdiction.

First, then:

Has the Supreme Court power to issue writs of prohibition to the lower courts of the United States generally, wherever they exceed their jurisdiction?

The 13th section of the Judiciary Act of 1789, 1 Laws U. S. 59, gives this court power to issue writs of prohibition to the District Courts, proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus* in cases warranted by law, to any courts, or persons holding office under the United States.

The 14th section gives power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, and which may be necessary for the exercise of their jurisdiction.

Now the writ of prohibition, in civil cases of common law and equity jurisdiction, is a writ not specially provided for by statute; and we undertake to show hereafter that it is necessary for the exercise of the Supreme Court's appellate powers.

The first objection we must meet is, that express authority being given to issue prohibitions in admiralty and maritime cases, it must be presumed there is no such authority in any other cases: "*expressio unius est exclusio alterius.*"

But besides the argument already used in anticipation, that the writ in common law cases is not specially provided for by statute, and therefore within the general powers granted by the 14th section, it may be remarked:—

That it would be singular, indeed, if it did not lie by our law, in all that large class of cases in which it does lie by the law of England, and *vice versa*, that in the only case where it has been sometimes held not to lie by the law of England, it does lie by our law.

Such an anomaly would be contrary to the spirit of our whole legislation, whose tendency is to extend justice, not to barricade jurisdictions.

But why, then, was the express grant of power made to issue prohibitions in admiralty cases? Considered historically, the answer is obvious: out of abundant caution.

At that period the jealousy of a part, and a large part, of the people towards the courts of the United States, especially those not proceeding according to the course of the common law, was excessive.

The amendments made to the Constitution, and the debates of the time, are conclusive proofs of the fact.

The decisions of Lord Mansfield in Lecaux *v.* Eden, and Lindo *v.* Rodney, were made in 1781 and 1782, and in 1789 must have been well known in the United States.

They declared that a writ of prohibition did not lie from the courts of common law to a court of exclusive jurisdiction—as the Court of Prize—although it was alleged the goods belonged to a British subject, and were seized on land.

This was certainly quite enough to alarm a sensitive jealousy; and though the enactment may not have covered the whole ground of apprehension, the fair inference under all the circumstances is, that the clause in our act was adopted to extend the remedy, by prohibition, to cases which it was supposed it could not reach by the common law—to enlarge the remedy, not to contract it.

The general power to issue all other writs necessary to the exercise of their jurisdiction, is broad enough to cover prohibitions, when used as an appellate or revisory process.

(Mr. *Wilde* then went on to review and criticise the cases of Marbury *v.* Madison, Weston *v.* City Council of Charleston, 2 Peters, 464; Cohens *v.* Virginia, 6 Wheat. 397; and contended that the authority to issue a writ of prohibition rested upon the same ground as writs of *mandamus* and *procedendo*, viz., the necessity of protecting the appellate jurisdiction of the Supreme Court.)

If our distinction between the summary bankrupt jurisdiction and the formal chancery jurisdiction of the District Court be well taken, it follows, that when the district judge, sitting in the summary court of bankruptcy, usurps the authority of the formal chancery court, and subjects to the power persons and things belonging to the cognisance of the latter, he commits an excess of jurisdiction.

If the associate justice presiding in the Circuit Court of that district, sustains the District Court in that excess, and says, as he is supposed to have done, that it is proceeding regularly and lawfully, when in truth its proceedings are irregular and unlawful, then either this court must have power to issue a prohibition, or its authority to revise the proceedings of inferior tribunals, to confine them within the limits of their jurisdiction, and to protect their own, is so far completely nullified.

If the application for a prohibition, therefore, must first be made to the Circuit Court, and when refused there cannot be brought here by appeal, or writ of error, it follows, that although this court would have ultimate appellate jurisdiction of this cause, if regularly brought and prosecuted according to law, on the chancery side of that court, yet, if irregularly and unlawfully prosecuted on the bankrupt side, and the district judge and circuit judge erroneously sustain it there, we have no redress, and this tribunal is impotent to preserve its own ultimate appellate jurisdiction. In the language of Chief Justice Marshall, "It can neither revise the judgment of the inferior court nor suspend its proceedings." 6 Wheat. 397.

For the general practice in prohibition, we refer the court to Croucher *v.* Collins, 1 Saund. 136, 140, notes 1, 2, 3, 4, and 5; 2 Chitty's General Practice, 355; 3 Black. Com. 355; 2 Sell. Pract. 425. Cases in Prohibition: 14 Petersdorf Abr. verbo *Prohibition;* 2 Salk. 547; 3 Mod. 244; 6 Mod. 79; 11 Mod. 30. Leading Cases: Leman *v.* Goulty, 3 Term R. 3; Dutens *v.* Robson, 1 H. Black. 100; 2 H. Black. 100, 107; Lecaux *v.* Eden, Douglass, 594; Lindo *v.* Rodney, Ibid. 613. Pleadings and Forms: 6 Wentworth's Pleadings, 242, 304; 1 Saund. 136, 142.

Mr. Justice STORY delivered the opinion of the court.

This is the case of an application on behalf of the City Bank of New Orleans to this court for a prohibition to be issued to the District Court of the United States for the district of Louisiana, to prohibit it from further proceedings in a certain case in bankruptcy pending in the said court upon the petition of William Christy, assignee of Daniel T. Walden, a bankrupt. The suggestions for the writ state at large the whole proceedings before the District Court, and contain allegations of some other facts, which either do not appear at all upon the face of those proceedings, or qualify or contradict some of the statements contained therein. So far as respects these allegations of facts, not so found in the proceedings of the District Court, we are not upon the present occasion at liberty to entertain any consideration thereof for the purpose of examination or decision, as it would be an exercise of original jurisdiction on the part of this court not confided to us by law. The application for the prohibition is made upon the ground that the District Court has transcended its jurisdiction in entertaining those proceedings; and whether it has or not must depend, not upon facts stated dehors the record, but upon those stated in the record, upon which the District Court was called to act, and by which alone it could regulate its judgment. Other matters, whether going to oust the jurisdiction of the court, or to establish the want of merits in the case of the plaintiff, constitute properly a defence to the suit, to be propounded for the consideration of the District Court by suitable pleadings, supported by suit-

able proofs, and cannot be admitted here to displace the right of the District Court to entertain the suit.

Let us then see what is the nature of the case originally presented to the District Court. It is founded upon a petition of William Christy, as assignee of Daniel T. Walden, a bankrupt, in which he states, that the bankrupt, at the time of his filing his schedule of property and surrendering it to his creditors, was in possession of a large amount of real estate, described in the petition, situate in the city of New Orleans, which was to be administered and disposed of in bankruptcy; the bankrupt having applied to the court for the benefit of the Bankrupt Act. It further states, that the City Bank of New Orleans, claiming to be a creditor of the bankrupt and to have a mortgage on the aforesaid property, the said corporation being a schedule creditor, being a party to the proceedings in bankruptcy, and being fully aware of the pendency of the same proceedings, did proceed to the seizure of the said property, and did prosecute the said seizure to a sale of the same property, the same being put up and offered for sale at public auction by the sheriff of the state District Court, on or about the 27th of June, 1842; and it was by the said sheriff declared to be struck off to the said City Bank, notwithstanding the remonstrances of the said assignee and his demands to have the same delivered up to him for the benefit of all the creditors of the bankrupt. It further avers, that the same property was illegally offered for sale, and that it is itself a nullity, and conferred no title on the said City Bank; that the sale was a fraud upon the Bankrupt Act; that the City Bank attempted thereby to obtain an illegal preference and priority over the other creditors of the bankrupt, and that the property was sold at two-thirds only of its estimated value; that the City Bank had never delegated to any person the authority to bid off the same to the said bank at the sale; and that the previous formalities required by law for the sale were not complied with, and that the property had been illegally advertised and appraised. It further avers, that the bankrupt, long prior to his bankruptcy, was contesting the debt claimed by the said bank; and contending that the said debt was not owing by him, and the said property was not bound thereby. It further avers, that the said debt is void for usury on the part of the said bank in making the loan, the same not having been made in money, but that it was received as at par in bonds of the Municipality No. 2, which were then at depreciation at from twenty to twenty-five per cent., at their real current market value; and that the said bank had no authority to make the said contract or to accept or execute the mortgage given by the bankrupt, and that the contract and mortgage are utterly void, and should be so decreed by the court.

The prayer of the petition is, that the sheriff's adjudication of the said property may be declared null and void, and that the said property may be adjudged to form part of the bankruptcy and given up

to the petitioner to be by him administered and disposed of in the said bankruptcy and according to law; that the said debt and mortgage may be decreed to be null and void, and the estate of the said bankrupt discharged from the payment thereof; and that if the said adjudication shall be held valid, and the debt and mortgage maintained by the court, then that the amount of the said adjudication may be ordered to be paid over by the said bank to the petitioner, to be accounted for and distributed by him according to law in the course of the settlement of the bankrupt's estate, and for all general and equitable relief in the premises.

To this petition the bank, by way of answer, pleaded various pleas—(1) That the District Court had no jurisdiction to decide upon the premises in the petition; (2) That the subject bad already become *res judicata* in two suits of D. T. Walden *v.* The City Bank, and The City Bank *v.* D. T. Walden, in the state courts, and by the District Court upon the petition of D. T. Walden for an injunction, (not stating the nature or subject-matters of such suits, so as to ascertain the exact matters therein in controversy;) (3) That the petition contained inconsistent demands, viz.: that the sale be set aside, and that the proceeds of the sale be decreed to the petitioner; and (4) That the mortgages to the bank were valid upon adequate considerations; that the order of seizure and sale were duly granted, and the sale duly made with all legal formalities, and the property adjudicated to the bank; that the price of the adjudication was retained by the bank to satisfy the said mortgages, and that the bank became and were the lawful owners of the property. The pleas concluded with a denial of all the allegations in the petition, and prayed that the issues in fact involved in the petition be tried by a jury. It is unnecessary for us to consider whether such a mode of leading is allowable in any proceedings in equity, whether they are mmary or plenary.

Upon this state of the pleadings the petitioner took exceptions to the answer of the bank, and three questions were adjourned into the Circuit Court for its decision. To these questions the Circuit Court returned the following answers. (See them quoted in the statement of the Reporter.)

Subsequently the assignee filed a supplemental or amended petition in the District Court, stating the matters contained in the original petition more fully and at large, with more precise averments, and mainly relying thereon; and alleging, among other things, that the City Bank became a party to the proceedings in bankruptcy; and by a subsequent amendment or supplemental allegation the assignee averred, that the bank became a party to the proceedings in bankruptcy, first, by operation of law, the bank being at the time of the bankruptcy mortgage creditors of the bankrupt and named in his schedule; secondly, by their own act, having filed a petition in the court, in September, 1842, praying that the demand of the assignee

for the postponement of the sale of certain property be disregarded, that their privileges be recognised, and that the property be sold under an order of the court for cash; and that the court had since refused leave to the bank to withdraw and discontinue the latter application and petition.

To the supplemental and amended petition the bank put in an answer or plea, denying the jurisdiction of the District Court to take cognisance thereof, and insisting that they had never proved their debt in bankruptcy, but had prosecuted their remedy in the state courts against the mortgaged property, relying upon their mortgage as a lien wholly exempted from the operation of the bankruptcy by the express terms of the Bankrupt Act; that the District Court, sitting as a bankrupt court, and holding summary jurisdiction in matters of bankruptcy under the act of Congress, ought not to take cognisance of the petition and supplemental petition, inasmuch as all jurisdiction over the premises is by law vested in and of right belongs to the Circuit Court of the United States for the eastern district of Louisiana, holding jurisdiction in equity, and proceeding according to the forms and principles of chancery as prescribed by law, or to the District Court of the United States, proceeding in the same manner, and vested with concurrent jurisdiction over all suits at law or in equity brought by an assignee against any person claiming an adverse interest, which courts are competent to entertain the suit of the petitioner and grant him the relief prayed for, if by law entitled to the same, and not this court; and the bank, therefore, prayed the said petition and supplemental petition to be dismissed for want of jurisdiction.

The District Court affirmed its jurisdiction, considering that the matters of the plea had been already determined by the decree of the Circuit Court already referred to, and overruled the plea; and ordered the bank to answer to the merits of the cause.

It is at this stage of the proceedings, so far as the record before us enables us to see, that the motion for the prohibition has been brought before this court for consideration and decision. Upon the argument the principal questions which have been discussed are, first, what is the true nature and extent of the jurisdiction of the District Court sitting in bankruptcy? secondly, whether if the District Court has exceeded its jurisdiction in the present case, a writ of prohibition lies from this court to that court to stay farther proceedings? Each of these questions is of great importance, and the first in an especial manner having given rise to some diversity of opinion in the different circuits, and lying at the foundation of all the proceedings in bankruptcy, is essential to be decided in order to a safe and just administration of justice under the Bankrupt Act.

In the first place, then, as to the jurisdiction of the District Court in matters of bankruptcy. Independent of the Bankrupt Act of 1841, chap. 9, the District Courts of the United States possess no

equity jurisdiction whatsoever; for the previous legislation of Congress conferred no such authority upon them. Whatever jurisdiction, therefore, they now possess is wholly derived from that act. And, as we shall presently see, the jurisdiction thus conferred is to be exercised by that court summarily in the nature of summary proceedings in equity.

The obvious design of the Bankrupt Act of 1841, chap. 9, was to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period. For this purpose it was indispensable that an entire system adequate to that end should be provided by Congress, capable of being worked out through the instrumentality of its own courts, independently of all aid and assistance from any other tribunals over which it could exercise no effectual control. The 10th section of the act declares, that in order to ensure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof at as early periods as practicable, consistently with a due regard to the interests of the creditors, and that such distribution of the assets, so far as can be done consistently with the rights of third persons having adverse claims thereto, shall be made as often as once in six months; and that all the proceedings in bankruptcy in each case, if practicable, shall be finally adjusted, settled, and brought to a close by the court, within two years after the decree declaring the bankruptcy. By another section of the act, (§ 3,) the assignee is vested with all the rights, titles, powers, and authorities, to sell, manage, and dispose of the estate and property of the bankrupt, of every name and nature, and to sue for and defend the same, subject to the orders and directions of the court, as fully as the bankrupt might before his bankruptcy. By another section, (§ 9,) all sales, transfers, and other conveyances of the bankrupt's property, and rights of property, are required to be made by the assignee at such times and in such manner as shall be ordered and appointed by the court in bankruptcy. By another section, (§ 11,) the assignee is clothed with full authority, by and under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage, or other pledge, or deposit, or lien upon any property, real or personal, and to tender a due performance thereof, and to compound any debts or other claims or securities due or belonging to the estate of the bankrupt.

From this brief review of these enactments it is manifest that the purposes so essential to the just operation of the bankrupt system, could scarcely be accomplished except by clothing the courts of the United States sitting in bankruptcy with the most ample powers and jurisdiction to accomplish them; and it would be a matter of extreme surprise if, when Congress had thus required the end,

they should at the same time have withheld the means by which alone it could be successfully reached. Accordingly we find that by the 6th section of the act it is expressly provided, "that the District Court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act, and any other act which may hereafter be passed on the subject of bankruptcy, the said jurisdiction to be exercised summarily in the nature of summary proceedings in equity; and for this purpose the said District Court shall be deemed always open. And the district judge may adjourn any point or question arising in any case in bankruptcy into the Circuit Court for the district, in his discretion, to be there heard and determined; and for this purpose the Circuit Court of such district shall also be deemed always open." If the section had stopped here, there could have been no reasonable ground to doubt that it reached all cases where the rights, claims, and property of the bankrupt, or those of his assignee, are concerned, since they are matters arising under the act, and are necessarily involved in the due administration and settlement of the bankrupt's estate. In this respect the language of the act seems to have been borrowed from the language of the Constitution, in which the judicial power is declared to extend to cases arising under the Constitution, laws, or treaties of the United States. But the section does not stop here, but in order to avoid all doubt it goes on to enumerate certain specific classes of cases to which the jurisdiction shall be deemed to extend, not by way of limitation, but in explanation and illustration of the generality of the preceding language. The section further declares: "And the jurisdiction hereby conferred on the District Court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors, who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed; and to all acts, matters, and things, to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." This last clause is manifestly added in order to prevent the force of any argument that the specific enumeration of the particular classes of cases ought to be construed as excluding all others not enumerated, upon the known maxim, often incorrectly applied, *expressio unius est exclusio alterius*. The 8th section of the act further illustrates this subject. It is there provided, "that the Circuit Court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the District Court of the same district, of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee touching any property or rights of property of such bankrupt transferrable to or vested in such

assignee." Now, this clause certainly supposes either that the District Court, in virtue of the 6th section above cited, is already in full possession of the jurisdiction, in the class of cases here mentioned, at least so far as they are of an equitable nature, and then confers the like concurrent jurisdiction on the Circuit Court, or it intends to confer on both courts a coextensive authority over that very class of cases, and thereby demonstrates that Congress did not intend to limit the jurisdiction of the District Court to the classes of cases specifically enumerated in the 6th section, but to bring within its reach all adverse claims. Of course, in whichever court such adverse suit should be first brought, that would give such court full jurisdiction thereof, to the exclusion of the other, but in no shape whatsoever can this clause be construed otherwise to abridge the exclusive jurisdiction of the District Court over all other "matters and proceedings in bankruptcy arising under the act," or over "all acts, and matters and things to be done under and in virtue of the bankruptcy."

One ground urged in the declinatory plea of the bank to the supplemental petition, and also in the argument here, is, that the District Court would have had jurisdiction in equity over the present case, if the suit had been by a formal bill and other plenary proceedings according to the common course of such suits in the Circuit Court, but that it has no right to sustain the suit in its present form of a summary proceeding in equity. Now, without stopping to consider whether the petition of the assignee in the present case is not in substance, and for all useful purposes, a bill in equity, it is clear that the suggestion has no foundation whatsoever in the language or objects of the 6th or 8th sections of the Bankrupt Act. There is no provision in the former section authorizing or requiring the District Court to proceed in equity otherwise than "summarily in the nature of summary proceedings in equity;" and that court is by the same section clothed with full power and authority, and indeed it is made its duty, "from time to time to prescribe suitable rules, and regulations, and forms of proceedings, in all matters in bankruptcy," subject to the revision of the Circuit Court; and it is added: "And in all such rules, and regulations, and forms, it shall be the duty of the said courts to make them as simple and brief as practicable, to the end to avoid all unnecessary expenses, and to facilitate the use thereof by "the public at large." If any inference is to be drawn from this language, it is, not that the District Court should in any case proceed by plenary proceedings in equity in cases of bankruptcy, but that the Circuit Court should, by the interposition of its revising power, aid in the suppression of any such plenary proceedings if they should be attempted therein. The manifest object of the act was to provide speedy proceedings, and the ascertainment and adjustment of all claims and rights in favour of or against the bankrupt's estate, in the most expeditious manner,

consistent with justice and equity, without being retarded or obstructed by formal proceedings, according to the general course of equity practice, which had nothing to do with the merits.

Another ground of objection insisted on in the argument is, that the language of the 6th section, where it refers to "any creditor, or creditors, who shall claim any debt or demand under the bankruptcy," is exclusively limited to such creditors as come in and prove their debts under the bankruptcy, and does not apply to creditors who claim adversely thereto. If this argument were well founded, it would be sufficient to say, that the case would then fall within the concurrent jurisdiction given by the 8th section already cited, and therefore not avail for the City Bank. But we do not so interpret the language. When creditors are spoken of "who claim a debt or demand under the bankruptcy;" we understand the meaning to be that they are creditors of the bankrupt, and that their debts constitute present subsisting claims upon the bankrupt's estate, unextinguished in fact or in law, and capable of being asserted under the bankruptcy in any manner and form which the creditors might elect, whether they have a security by way of pledge or mortgage therefor or not. If they have a pledge or mortgage therefor, they may apply to the court to have the same sold, and the proceeds thereof applied towards the payment of their debts *pro tanto*, and to prove for the residue; or, on the other hand, the assignee may contest their claims in the court, or seek to ascertain the true amount thereof, and have the residue of the property, after satisfying their claims, applied for the benefit of the other creditors. Still, the debts or demands are in either view debts or demands under the bankruptcy, and they are required by the Bankrupt Act to be included by the bankrupt in the list of the debts due to his creditors when he applies for the benefit of the act; so that there is nothing in the language or intent of the 6th section to justify the conclusion which the argument seeks to arrive at. The 5th section of the Bankrupt Act is framed *diverso intuitu*. It does not speak of creditors who shall claim any debt or demand under the bankruptcy, but it uses other qualifying language. The words are: "All creditors coming in and proving their debts under such bankruptcy in the manner hereinafter prescribed, the same being *bona fide* debts, shall be entitled to share in the bankrupt's property and effects *pro rata*, &c.; and no creditor or other person coming in or proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt." But this provision by no means interferes with the right of any creditor to proceed against the assignee under the bankruptcy to have the benefit of any mortgage, pledge, or other security, *pro tanto* for his debt, if he elects so to do, or with the rights of the assignee to redeem the

same, or otherwise to contest the validity of the debt or security under the bankruptcy.

It is also suggested that the proviso of the 2d section of the act declares, "That nothing in this act shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the states respectively, and which may not be inconsistent with the provisions of the 2d and 5th sections of this act;" and that thereby such liens, mortgages, and other securities are saved from the operation of the Bankrupt Act, and by inference from the jurisdiction of the District Court. But we are of opinion that the inference thus attempted to be drawn, is not justified by the premises. There is no doubt that the liens, mortgages, and other securities within the purview of this proviso, so far as they are valid by the state laws, are not to be annulled, destroyed, or impaired under the proceedings in bankruptcy; but they are to be held of equal obligation and validity in the courts of the United States as they would be in the state courts. The District Court, sitting in bankruptcy, is bound to respect and protect them. But this does not and cannot interfere with the jurisdiction and right of the District Court to inquire into and ascertain the validity and extent of such liens, mortgages, and other securities, and to grant the same remedial justice and relief to all the parties interested therein as the state courts might or ought to grant. If the argument has any force, it would go equally to establish, that no court of the United States, neither the Circuit Court, nor the District Court, could entertain any jurisdiction over any such cases, but that they exclusively belong to the jurisdiction of the state courts. Such a conclusion would be at war with the whole theory and practice under the judicial power given by the Constitution and laws of the United States. The rights and the remedies in such cases are entirely distinct. While the former are to be fully recognised in all courts, the latter belong to the *lex fori*, and are within the competency of the national courts equally with the state courts.

Let us sift this argument a little more in detail. The 8th section of the Bankrupt Act (as we have already seen) confers on the Circuit Court concurrent jurisdiction with the District Court of all suits at law and in equity brought by the assignee against any person claiming an adverse interest, and *e converso* by such person against the assignee. Now, the argument at the bar supposes, that a creditor having any lien, mortgage, or other security, falls within the category here described as having an adverse interest. Assuming this to be true, (on which we give no opinion; and the clause certainly does include persons claiming by titles paramount and not under the bankrupt,) still it must be admitted that, under the 8th section, a bill in equity may be brought by or against such creditor in the Circuit Court to redeem or foreclose, or to enforce, or to set

aside such a lien, mortgage, or other security? If it can be, then the lien, mortgage, or other security, is not saved from the cognisance of the Circuit Court having jurisdiction in bankruptcy, but the most ample remedies lie there; and although the rights of such creditors are to be protected, they are subject to the entire examination and decision of the court as much as they would be, if brought before the court in the exercise of its ordinary jurisdiction. If, then, the jurisdiction over such liens, mortgages, and securities exists in the Circuit Court, it follows from the very words of the Bankrupt Act, that the District Court has a concurrent jurisdiction to the same extent and with the same powers.

But it is objected, that the jurisdiction of the District Court is summary in equity and without appeal to any higher court. This we readily admit. But this was a matter for the consideration of Congress in framing the act. Congress possess the sole right to say what shall be the forms of proceedings, either in equity or at law, in the courts of the United States; and in what cases an appeal shall be allowed or not. It is a matter of sound discretion, and to be exercised by Congress in such a manner as shall in their judgment best promote the public convenience and the true interests of the citizens. Because the proceedings are to be in the nature of summary proceedings in equity, it by no means follows, that they are not entirely consistent with the principles of justice and adapted to promote the interest as well as the convenience of all suitors. Because there is no appeal given, it by no means follows, that the jurisdiction is either oppressive or dangerous. No appeal lies from the judgments either of the District or Circuit Court in criminal cases; and yet within the cognisance of one or both of those courts are all crimes and offences against the United States, from those which are capital down to the lowest misdemeanors, affecting the liberty and the property of the citizens. And yet there can be no doubt that this denial of appellate jurisdiction is founded in a wise protective public policy. The same reasoning would apply to the appellate jurisdiction from the decrees and judgments of the Circuit Court, which are limited to cases above $2000, and cases below that sum embrace a large proportion of the business of that court.

But, in the present instance, the public policy of confiding the whole jurisdiction to the District Court without appeal in ordinary cases requires no elaborate argument for its vindication. The district judges are presumed to be entirely competent to all the duties imposed upon them by the Bankrupt Act. In cases of doubt or difficulty, the judges have full authority given to them to adjourn any questions into the Circuit Court for a final decision. That very course was adopted in the present case. In the next place, in one class of cases, that of adverse interests between the assignee and third persons, either party is at liberty to institute original proceedings in the Circuit Court, if a prior suit has not been brought there-

for, in the District Court. So that here the act has afforded effectual means to have the aid and assistance of the judge of the Circuit Court, wherever it may seem to be either expedient or necessary to resolve any questions of importance or difficulty, and it has also secured to parties having an adverse interest a right at their election to proceed in the District or the Circuit Court for any remedial justice which their case may require. On the other hand, the avowed policy of the Bankrupt Act, that of ensuring a speedy administration and distribution of the bankrupt's effects, would (as has been already suggested) be greatly retarded, if not utterly defeated by the delays necessarily incident to regular and plenary proceedings in equity in the District Court, or by allowing appeals from the District Court to the Circuit Court in all matters arising under the Bankruptcy.

It is farther objected that, if the jurisdiction of the District Court is as broad and comprehensive as the terms of the act justify according to the interpretation here insisted on, it operates or may operate to suspend or control all proceedings in the state courts either then pending or thereafter to be brought by any creditor or person having any adverse interest to enforce his rights or obtain remedial redress against the bankrupt or his assets after the bankruptcy. We entertain no doubt that, under the provisions of the 6th section of the act, the District Court does possess full jurisdiction to suspend or control such proceedings in the state courts, not by acting on the courts, over which it possesses no authority; but by acting on the parties through the instrumentality of an injunction or other remedial proceedings in equity upon due application made by the assignee and a proper case being laid before the court requiring such interference. Such a course is very familiar in courts of chancery, in cases where a creditors' bill is filed for the administration of the estate of a deceased person, and it becomes necessary or proper to take the whole assets into the hands of the courts for the purpose of collecting and marshalling the assets, ascertaining and adjusting conflicting priorities and claims, and accomplishing a due and equitable distribution among all the parties in interest in the estate. Similar proceedings have been instituted in England in cases of bankruptcy; and they were without doubt in the contemplation of Congress as indispensable to the practical working of the bankrupt system. But because the District Court does possess such a jurisdiction under the act, there is nothing in the act which requires that it should in all cases be absolutely exercised. On the contrary, where suits are pending in the state courts, and there is nothing in them which requires the equitable interference of the District Court to prevent any mischief or wrong to other creditors under the bankruptcy, or any waste or misapplication of the assets, the parties may well be permitted to proceed in such suits and consummate them by proper decrees and judgments, especially where there is no suggestion of any fraud or injustice on the part of the plaintiffs in those

suits. The act itself contemplates that such suits may be prosecuted and further proceedings had in the state courts; for the assignee is by the 3d section authorized to sue for and defend the property vested in him under the bankruptcy, "subject to the orders and directions of the District Court," "and all suits at law and in equity then pending in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion in the same way and manner and with the same effect as they might have been by the bankrupt." So that here the prosecution or defence of any such suits in the state courts is obviously intended to be placed under the discretionary authority of the District Court. And in point of fact, as we all know, very few, comparatively speaking, of the numerous suits pending in the state courts at the time of the bankruptcy ever have been interfered with, and never, unless some equity intervened which required the interposition of the District Court to sustain or protect it.

It would be easy to put cases in which the exercise of this authority may be indispensable on the part of the District Court, to prevent irreparable injury, or loss, or waste, of the assets, without adverting to the case at bar, where, upon the allegations in the petition and supplemental petition, the creditors of the bankrupt are attempting to enforce a mortgage asserted to be illegal and invalid, and to procure a forced sale of the property by the sheriff, in an illegal and irregular manner, thereby sacrificing the interest of the other creditors under the bankruptcy. Let us put the case of numerous suits pending, or to be brought in the state courts, upon different mortgages, by the mortgagees, upon various tracts of land and other property, some of the mortgages being upon the whole of the tracts of land or other property; some upon a part only thereof; some of them involving a conflict of independent titles; some of them involving questions as to the extinguishment, or satisfaction, or validity, of the debts; and some of them involving very doubtful questions as to the construction of the terms and extent of the conveyances. If all such suits may be brought by the separate mortgagees, in the different state tribunals, and the mortgagees cannot be compelled to join in, or to be made parties defendant to one single bill, (as is certainly the case in those states where general equity jurisdiction is not given to the state courts,) it is most obvious that, as each of the state tribunals may or must proceed upon the single case only before it, the most conflicting decisions may be made, and gross and irreparable injustice may be done to the other mortgagees, as well as to the general creditors under the bankruptcy. All this, however, is completely avoided, by bringing the whole matters in controversy between all the mortgagees before the District or Circuit Court, making them all parties to the summary proceedings in equity, and thus enabling the court to marshal the rights, and priorities, and claims, of all the parties, and by a sale and other proper proceedings, after satisfying

the just claims of all the mortgagees, applying the residue of the assets, if any, for the benefit of the general creditors. Similar considerations would apply to other liens and securities, held by different parties in the same property, or furnishing grounds of conflict and controversy as to their respective rights and claims.

Besides, how is the bankrupt court or the assignee, in a great variety of cases of liens, mortgages, and other securities, to ascertain the just and full amount thereof after the deduction of all payments and equitable set-offs, unless it can entertain a suit in equity, for a discovery of the debts, and payments, and set-offs, and grant suitable relief in the premises? The bankrupt is not, in his schedule, bound to specify them; and if he did, *non constat* that the other parties would admit their correctness, or that the general creditors would admit their validity and amount. The 11th section of the act gives the assignee full power and authority, by and under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage or other pledge, or deposit, or lien, upon any property, and to tender a due performance of the conditions thereof. But how can this be effectually done, unless the bankrupt court and assignee can, by proceedings in that very court, ascertain what is the amount of such mortgage, or pledge, or deposit, or lien, and what acts are to be done as a performance of the mortgage, or pledge, or deposit, through the instrumentality of a suit in the nature of a summary proceeding in equity for a discovery and relief? If we are told that resort may be had to the state courts for redress, one answer is, that in some of the states no adequate jurisdiction exists in the state courts, since they are not clothed with general jurisdiction in equity. But a stronger and more conclusive answer is, that Congress did not intend to trust the working of the bankrupt system solely to the state courts of twenty-six states, which were independent of any control by the general government, and were under no obligations to carry the system into effect. The judicial power of the United States is, by the Constitution, competent to all such purposes; and Congress, by the act, intended to secure the complete administration of the whole system in its own courts, as it constitutionally might do.

Let us look at another provision of the act already referred to, which declares, "that in order to insure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof, at as early periods as practicable." Now here again, it may be repeated, that the end is required, and can it be doubted that adequate means to accomplish the end are intended to be given? Construing the language of the 6th section as we construe it, adequate means are given; construing it the other way, and it excludes the jurisdiction, if not of the whole subject, at least of the most important parts of

the system, and they are left solely to the cognisance of the tribunals of twenty-six different states, no one of which is bound by the acts of the others, or is under the control of the national courts. If it be admitted, (what cannot well be denied,) that the District Court may order a sale of the property of the bankrupt, under this section, how can that sale be made safe to the purchasers, until all claims thereon have been ascertained and adjusted? How can any distribution of the assets be made, until all such claims are definitively liquidated? How can the proceedings be brought to a close at all, far less within the two years, unless all parties claiming an interest, adverse or otherwise, can be brought before the bankrupt court, to assert and maintain them? Besides, independently of the delays which must necessarily be incident to a resort to state tribunals to adjust the matters and rights affected by or arising in bankruptcy, considering the vast number of cases pending in those courts, in the due administration of their own jurisprudence and laws, there could hardly fail to be a conflict in the decisions, as to the priority and extent of the various claims of the creditors, pursuing their remedies therein in distinct and independent suits, and perhaps, also, in different state tribunals of co-ordinate jurisdiction. These are but a few of the cases which may be put to show the propriety, nay, the necessity, of the jurisdiction of the District Court to the full extent of reaching all cases arising out of the bankrupt act.

The truth is, (as has been already asserted,) that in no other way could the bankrupt system be put into operation, without interminable doubts, controversies, embarrassments, and difficulties, or in such a manner as to achieve the true end and design thereof. Its success was dependent upon the national machinery being made adequate to all the exigencies of the act. Prompt and ready action, without heavy charges or expenses, could be safely relied on, when the whole jurisdiction was confided to a single court, in the collection of the assets; in the ascertainment and liquidation of the liens and other specific claims thereon; in adjusting the various priorities and conflicting interests; in marshalling the different funds and assets; in directing the sales at such times and in such a manner as should best subserve the interests of all concerned; in preventing, by injunction or otherwise, any particular creditor or person, having an adverse interest, from obtaining an unjust and inequitable preference over the general creditors, by an improper use of his rights or his remedies in the state tribunals; and finally, in making a due distribution of the assets, and bringing to a close, within a reasonable time, the whole proceedings in bankruptcy. Sound policy, therefore, and a just regard to public as well as private interests, manifestly dictated to Congress the propriety of vesting in the District Court full and complete jurisdiction over all cases arising, or acts done, or matters involved, in the due administration and final settlement of the bankrupt's estate; and it is accordingly, in our judgment,

designedly given by the 6th section of the act. In this view of the matter, the District Court has not exceeded its jurisdiction in entertaining the present suit, but it has full power and authority to proceed to the due adjudication thereof upon its merits.

This view of the subject disposes also of the other question made at the bar, whether this court has jurisdiction to issue a writ of prohibition to the District Court in cases in bankruptcy, if it has exceeded its proper jurisdiction. As the District Court has not exceeded its jurisdiction in the present case, the question is not absolutely necessary to be decided. But it may be proper to say, as the point has been fully argued, that we possess no revising power over the decrees of the District Court sitting in bankruptcy; that the District Court, in the present case, has not interfered with, or in any manner evaded or obstructed, the appellate authority of this court, by entertaining the present writ; and that we know of no case where this court is authorized to issue a writ of prohibition to the District Court, except in the cases expressly provided for by the 13th section of the Judiciary Act of 1789, chap. 20, that is to say, where the District Courts are "proceeding as courts of admiralty and maritime jurisdiction."

Upon the whole, the motion for a writ of prohibition is overruled.

Mr. Justice CATRON.

By the 14th section of the Judiciary Act this court has power to issue writs proper and necessary for the exercise of its jurisdiction; having no jurisdiction in any given case, it can issue no writ: that it has none to revise the proceedings of a bankrupt court is our unanimous opinion. So far we adjudge; and in this I concur. For further views why the prohibition cannot issue, I refer to the conclusion of the principal opinion. But a majority of my brethren see proper to go further, and express their views at large on the jurisdiction of the bankrupt court. In this course I cannot concur; perhaps it is the result of timidity growing out of long established judicial habits in courts of error elsewhere, never to hazard an opinion where no case was before the court, and when that opinion might be justly arraigned as extra-judicial, and a mere dictum by courts and lawyers; be partly disregarded while I was living, and almost certainly be denounced as undue assumption when I was no more. A measure of disregard awarded with an unsparing hand, here and elsewhere, to the dicta of state judges under similar circumstances: and it is due to the occasion and to myself to say, that I have no doubt the dicta of this court will only be treated with becoming respect before the court itself, so long as some of the judges who concurred in them are present on the bench; and afterwards be openly rejected as no authority—as they are not.

The case standing in the District Court of Louisiana will test it as well as another. The application for a prohibition was brought

before us at last term; then the late Mr. Justice Baldwin was here, and one other of the judges now present was then absent; had the matter not then been laid over on advisement, and a decision been had adverse to our jurisdiction to award the writ; and an opinion been expressed by the majority of the judges then present, against the legality of the proceeding in the bankrupt court, declaring it void, and that in the state court valid; would the bankrupt court be bound to conform to such opinion; would it overrule the instructions given in the particular case by the Circuit Court on the questions adjourned, dismiss the petition of Christy, the assignee, and let the decree and sale foreclosing the mortgage made by the state courts stand? Will the bankrupt court of Pennsylvania be bound, either judicially or in comity, by the opinion now given by a majority of the judges present, to overthrow that of Mr. Justice Baldwin in the case hereto appended; or is it bound to conform? Are the bankrupt courts in all the districts that have held the state proceedings on liens to be valid, and not subject to their supervision, now bound to suppress such proceedings on the suggestion of assignees that they were erroneous or inconvenient, regardless of proof, as was done in Louisiana, and thereby overhaul cases in great numbers supposed to be settled? Certainly not. This court has no power over the bankrupt courts, more than they have over this court; the bankrupt law has made them altogether independent, and their decrees as binding as ours, and as final. We have as little power to control them as the state courts have; they may concur with the reasoning of either, or neither, at discretion. I therefore think we should refrain from expressing any extra-judicial opinion on the present occasion; we did so in Nelson *v.* Carland, 1 How. 265, a case involving the constitutionality of the bankrupt law, and I then supposed most properly, by the majority of the court, who thought we had no jurisdiction: a more imposing application, requiring an opinion, could not have been presented, as twelve hundred cases depended on the decision of the District Court of Missouri, which was opposed to the constitutionality of the law; and to revise it the case was brought here. So in Dorr's application, at the present term, for a writ of *habeas corpus*, the same course was pursued. That application and this are not distinguishable in principle: in neither had this court power to bring a case for judgment into it; there, and here, we held nothing was before us, or could be brought before us. With this course I would now content myself, was it not that by acquiescing in silence with the opinion of my brethren I might be supposed to have agreed with them in the course pursued; and also in the views expressed in the affirmance of the jurisdiction exercised under the bankrupt law by the Circuit Court of Eastern Louisiana; to both of which my opinion is adverse, and that most decidedly. The case presented to that court was this:—

In 1839, Walden gave to the City Bank a mortgage to secure the payment of $200,000 loaned him, on a plantation and town lots.

In 1840, he instituted a suit in the District Court of the state, in New Orleans, to set the mortgage aside as void; a trial was had, and the court adjudged the mortgage valid; from this Walden appealed to the Supreme Court of Louisiana, and that court affirmed the judgment.

The bank then proceeded in the District Court of the state to foreclose the mortgage, and on the 17th of May, 1842, an order of seizure and sale was made; and an actual seizure of the property was executed on the 19th of May. The sale took place on the 27th of June.

The property was sold by lots, after appraisement, in conformity to the laws of Louisiana, and the bank became the purchaser at the price of $160,000.

That the sale was made in regular and due form, according to the modes of proceeding in the state courts, cannot be controverted.

On the 18th of June, 1842, Walden filed his petition for the benefit of the bankrupt law; and on the 18th of July was declared a bankrupt, and an assignee appointed. The $200,000 was on Walden's creditor list, but the bank refused to prove its debt, and relied on the decree of foreclosure, and the force of its lien, by the mortgage.

Christy, the assignee, filed his petition in the bankrupt court, and as part of the proceeding in bankruptcy, to have the sale declared void: 1. Because it was made after Walden applied for the benefit of the bankrupt law. 2. Because the sale had been unfairly conducted. 3. Because the proceeding in the state court was erroneous. 4. Because the debt was affected with usury, and therefore the mortgage void originally; and should be so decreed by the bankrupt court.

The bank appeared, and pleaded to the jurisdiction of the bankrupt court; and relied on the proceedings of the state court as valid by answer. Exceptions were taken to this plea and answer, which were adjourned to the Circuit Court; there it was adjudged, and the District Court instructed:

1. That it had full and ample jurisdiction to try all the questions set forth in the petition of the assignee; and to try, adjudge, and determine the same between the parties.

2. That the seizure and sale of the state court were void; and that the District Court of the United States do declare it void.

3. That the District Court has full power and authority to try and determine the validity of the mortgage; and if proved on the trial void, to declare it so, and to make a decree ordering the property to be sold for the benefit of the creditors generally; but if found valid, the bank to have the benefit of its lien.

This decree pronounced void the judgment of the Supreme Court

of Louisiana, affirming that of the inferior court declaring the mortgage valid, and not affected with usury; which was conclusive between Walden and the bank before the bankrupt law existed. 2. It declared void the decree and order of seizure made before Walden applied for the benefit of the act—and it declared void the sale: In short, it annulled all the judgments of the state courts, and assumed to extinguish the title acquired under them; and has extinguished in form and fact, if the views of a majority of my present brethren be correct, a title indisputable according to the laws of Louisiana standing alone; this is manifest from the slightest examination of the facts, and laws applicable to them. On the 18th of July the decree declaring Walden a bankrupt was passed; up to this date he might or might not be declared a bankrupt, either at his own instance, or that of the court; therefore he was a proper party before the state court until that time; afterwards he was represented by his assignee; his property was under execution when he was declared a bankrupt; if he had then died, still the duty of the officer would have been to sell; the execution having commenced, a natural or civil death could not defeat it, as the property was in the custody of the law.

If it be true that this title is void, it follows every other is void where a sale has taken place after the defendant to the execution (issued by a state court) had applied for the benefit of the bankrupt law; and this whether the execution was awarded in the form usual to courts of law, or by decree in a court of chancery, ordering a seizure and sale by force of the decree. Every sheriff, or commissioner in chancery, executing such writ or decree, must have been a trespasser; and all persons taking under such sales deluded purchasers. In the eighth circuit there are very many such cases beyond doubt; they are founded on my opinion acting with the district judges, who fully concurred with me, that such sales were lawful, and the titles acquired under them valid. In two other circuits at least, similar views have been entertained, and no doubt similar consequences have followed. It is therefore due to interests so extensive, affecting so many titles, that they should not be overthrown until a case calling for the authoritative adjudication of this court is presented involving them, and therefore these brief views have been expressed; not on the jurisdiction of the bankrupt courts generally; but on the precise facts presented as the grounds on which the prohibition was demanded.

On the force of the lien, and the remedy to enforce it, as a right excepted from the bankrupt law, I have said nothing, because my late brother Baldwin was called on to follow the decision given in Louisiana and refused. As he decided under the responsibility of passing on men's rights, and from whose judgment there was no appeal, his opinion is judicial, and authoritative throughout his late circuit, whereas mine on the present occasion would be extra-judi-

cial, and therefore I append his instead of any I may entertain individually.

In the aforegoing opinion of Mr. Justice CATRON. Mr. Justice DANIEL concurs.

Opinion of Mr. Justice BALDWIN, adopted by Mr. Justice CATRON as a part of his dissenting opinion.

In the matter of John Kerlin, a Bankrupt. Oct. 26, 1843.

On the 13th of May, 1843, the assignees of John Kerlin, a bankrupt, presented their petition to the judge of the District Court for the eastern district of Pennsylvania, praying for an order, authorizing them to sell certain real estate of the bankrupt, in Delaware county. On the face of the petition it appeared that at the time of the decree of bankruptcy, the property was subjected to encumbrances amounting to $14,800; that it had been sold by the sheriff of Delaware county on the 11th of May, 1843, for the sum of $8000, by virtue of proceedings issued by the Court of Common Pleas of Delaware county, under one of the mortgages recorded before the decree of bankruptcy, but the purchaser had not complied with the terms of the sale. The assignee in bankruptcy contended that the sheriff could not make title to the premises, and under a decision of the Circuit Court in Louisiana, claimed the right to sell. The district judge (Randall) refused to grant the order, but at request of the parties adjourned the question to the Circuit Court, where the following opinion was delivered by Baldwin, J.

The following questions have been certified by the district judge for the opinion of this court:

"1st. Does a sale by a sheriff after a decree of bankruptcy, by virtue of process issued on a judgment or mortgage, which was a lien on the property of the bankrupt before and at the time of the decree, divest the title of the assignee in bankruptcy?"

"2d. In case of a sale made by the assignee under an order of the court, if the whole of the purchase money is not sufficient to discharge the liens existing at the time of the decree, are the liens divested by such sale?"

The leading principle which has governed this court in the construction of the Bankrupt Act of 1841 has been to consider it as establishing a uniform law on the subject of bankruptcies, in the most comprehensive sense of the words as used in the Constitution, in which there is no other restriction on the power of Congress than that the laws shall be uniform throughout the United States. To make it so in its practical operation, it must be taken as it reads, its words must receive their appropriate meaning, with reference to the whole law, and the policy developed in its various provisions.

These constitute that system which it was intended to establish,

not by assuming that the design of the law was to adopt any pre-existing rules and principles found only in the former legislation of Congress, or in other countries, and then to so apply it as to effectuate a supposed policy not apparent in the law itself, nor consistent with its language, the insertion of which into the system must make it operate according to the intention of other legislatures, and require a mode of construction which will do violence to the plainest terms used to denote and declare the policy and general principles which Congress have actually established.

That the act of 1841 is anomalous in its provisions, unlike any other known in any legislation here or elsewhere, cannot be doubted. In the great outlines as well as in the details of the system, we feel the exercise of an express plenary power, competent to act at its own unlimited discretion, (so that the action be uniform,) either by adopting or modifying some old system on the subject of bankruptcy or prescribing a new one; the latter mode has seemed the better in the eye of the legislature, and the duty of the judicial department is to consider its intention and to carry it into effect.

In applying this principle to the solution of the first question now submitted, there seems no difficulty as to the policy and intentions of the law from its unequivocal language, which, as we have heretofore held, contains an express prohibition to the judicial power, not to so construe any provision as to annul, destroy, or impair any lien, mortgage, or other security, on property which is valid by the laws of the states respectively, and not inconsistent with the 2d or 5th sections.

The validity of a mortgage or judgment is submitted to no other test than these—the laws of the states and these two sections; if they stand this scrutiny, the duty of the courts is imperative. The Bankrupt Act protects all valid judgments or mortgages against any construction which shall impair them, to the same extent as the Constitution guards the obligation of contracts when attempted to be impaired by state laws. Having heretofore given this as, not the construction merely, but the inevitable result of language incapable of being mistaken in any fair reading of the last proviso in the 2d section, and stated the reasons therefor at large, it is not deemed either necessary or useful to now resume the investigation of that provision of the law, as no doubt was then or is now entertained of its meaning; vide Ex parte Dudley et al., Pennsylvania Law Journal, 302. If additional reasons could be requisite to elucidate this view of that proviso, they will be found in the 11th section, which is framed to meet its provisions—by authorizing the assignee with the order of the court, to redeem and discharge any mortgage or lien upon any property of the bankrupt, though payable at a future day, and to tender performance of its conditions.

This authority to redeem and discharge a lien presupposes its validity, that it cannot be impaired by any power of the court, and

that the assignee of the bankrupt could not take the property so bound before the lien was discharged, on any other terms than those on which it was held by the bankrupt himself, before any decree of bankruptcy had vested his rights in the assignee, else why should it have been deemed necessary to authorize him to redeem or discharge the lien, if it was not in full force as well after as before the petition or decree. Neither the proviso to the 2d or the 11th section discriminate between a lien existing before the petition filed or after it; both comprehend all liens existing at the time of the decree as burdens on the property, and contemplate the necessity of their payment in full before any other creditor can come in upon it. The only fund for their payment being the assets of the bankrupt in the hands of the assignee, it is clear that the rights of those creditors who have liens, are, and must be, paramount to any which accrue under the bankruptcy to the assignee or general creditor. When liens are paid, then the property which they bound becomes distributable by the assignee; if not paid, the rights of the lien creditor remaining incapable of being impaired by any authority conferred by the Bankrupt Act, stands perfect as if that act had not been passed; so that, if valid by the law of the state, and not inconsistent with the 2d or 5th sections of that law, they may consequently be enforced by a sale or other process conformably to the existing laws of the state for enforcing liens, which no court can annul, destroy, or impair, by any proceeding in bankruptcy. On this subject, the principles established by the Supreme Court, in the case of Bronson *v.* Kenzie, are replete with the soundest rules of jurisprudence and constitutional law, and directly applicable to the question now under consideration, which is, in all respects, analagous to the one then before that court on the nature of the obligation, of the extent of the mortgage and the rights of the mortgagee; and the validity of the state law, which impaired his rights to enforce the payment of the mortgage money. In that case, the court declared, that the obligation of the contract, the rights which the mortgagee acquired in the mortgage premises, depended on the then existing laws of the state, which "created and defined the legal and equitable obligation of the mortgage contract." 1 How. 315. That the Constitution equally prohibits the impairing them by a state law, acting on the remedy or directly on the contract itself, "if it so changes the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests in it." 1 How. 316. "That it may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing." 1 How. 307. "That the rights and remedies of mortgagor and mortgagee by the law then in force, were a part of the law of the contract without any express agreement of the parties—they were annexed to the

contract at the time it was made and formed a part of it, and any subsequent law impairing the rights thus acquired, impairs the obligations which the contract imposed." 1 How. 319. And on these principles a state law which encumbered the remedy of the mortgagee by conditions imposed after its obligation had attached was null and void. In this case the question presented is, whether a court of the United States, sitting in bankruptcy, can, by any rule, order, or decree, impair the right of a creditor by mortgage or judgment, to enforce the payment of his debts by a sale of the property mortgaged or encumbered by the lien of a judgment, according to the provisions of the state laws. If the right and power to sell can be taken from the creditors and conferred on the assignee of a bankrupt, who is a debtor by a mortgage or judgment existing at the time of the decree of bankruptcy; if the validity of the liens, the time, and terms of sale, and the distribution of the proceeds, can, under the bankrupt law, be determined and regulated by a judge in a proceeding in bankruptcy, from which there can be no appeal, then the remedy for enforcing a mortgage or judgment is no longer annexed to the contract or a part of it. The empty right still remains in the mortgagee, yet the remedy is taken from him by the assignee of his debtor. The final adjudication, and even his ultimate rights, and the mode of administering the remedy, is made dependent on the discretion of a judge, exercised by the summary proceedings prescribed by the Bankrupt Act, instead of the regular course of the law as administered in the courts of a state. For such a course, there is not only no warrant in the law, but it is a direct violation of the prohibition in the section, by so construing the law as to negative its express language, and taking from lien creditors, by mere judicial power, those very rights and remedies which are placed beyond its exercise, in terms positively forbidding it, in as plain and emphatic language as that in which the Constitution declares that "no state shall pass any law impairing the obligation of contracts." The principles of the Supreme Court in the case of Bronson, must be repudiated before a judge can exercise a power under the Bankrupt Act which is forbidden to a state by the Constitution. If either the obligation or the remedy is impaired, it matters not by whom it is done; no state has any power to do it; Congress can only do it by a "uniform law on the subject of bankruptcy;" nor when the law is silent can the courts do it without the usurpation of legislative power. But the law is not silent; it speaks to the judge; it forbids him to do any act which impairs any lien then existing, and, in deciding the first question submitted in this case, I answer in the affirmative, and repeat the language of the Supreme Court: "and it would ill become this court under any circumstances to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy which would render this provision illusive and nugatory; mere

words of form, affording no protection and producing no practical result." Howard, 318.

But were the Bankrupt Act open to construction, and the proviso of the 2d section left out of view, the result would be the same. There is no provision in the act that interferes with the laws of a state, which create and defend the obligation of a contract which is a lien on property; there is nothing which professes to effect the remedies attached to such contract, one incident of which is the power of the creditor to sell or extend as the laws of the respective states have prescribed; it requires the plenary and unlimited power of Congress over the whole subject of bankruptcies to abrogate state laws relating to liens, or to take from state courts the administration of remedies to enforce them, and above all to prohibit the creditor from resorting for his remedy to that law which prescribed it, and substituting the assignee of a bankrupt, the mere creature and servant of a judge of the District Court, in his place, without and against the will of the creditor. Congress may delegate such power to a judge or a court, but it must be in plain terms, leaving no doubt of their intention to do so; but the proposition is a bold one indeed, that judicial power is competent to do it, when the legislature has not given its sanction to its exercise; it would give the Constitution a construction which would authorize the courts to exercise the power granted to the Congress, without the passage of a law delegating it to the judicial department. So far as the Bankrupt Act, by express words, or necessary implication, affects state laws, state rights, the power of state courts, or the rights and remedies of suitors therein, it must be paramount, yet too much caution cannot be observed on this subject by the courts of the United States.

The settled course of jurisprudence in the state is to be overlooked only when such is the intention of the law; no intention to do so is to be presumed, no policy is to be assumed as the basis of the law, other than what its words indicate, and nothing is to be borrowed from any other system which is not consistent with that which Congress has thought proper to create. A leading feature of that system is the protection of all liens existing at the time of the decree of bankruptcy; they are created by contracts which by their own force create a remedy to enforce them; this remedy is the right of the creditor, the rule for its exercise is the law of the state, the power to sell in this state is the essence of both right and remedy. Congress has not impaired either, and forbidden it to be done by any construction of the Bankrupt Act; a sale made pursuant to the laws of the state must therefore divest the title of the assignee in bankruptcy.

If the foregoing views are sound, they dispose of the two questions; an order of the court in bankruptcy can confer on the assignee no power which Congress has not conferred on the court; its powers are what the law has delegated, and none other; the law

may and must be construed where it is open to construction, but where the law itself forbids construction it must be taken and followed as it reads. If, therefore, an order of court is made that would, in its execution by an assignee, impair a lien protected by the proviso in the 2d section, it is an excess of authority, and therefore void; *à fortiori* the divesting of a lien in the case put in this question is a much higher act of power than merely impairing it by affecting the remedy. The property bound by the lien is taken from the creditor, his whole right is extinguished, and his debt is lost entirely, unless he comes in for his dividend of the assets of the bankrupt's estate.

Every principle established by the Supreme Court in the case of Bronson, as well as the protection given to liens by the Bankrupt Act, would be utterly prostrated, if a sale by an assignee would disencumber property mortgaged or bound by a judgment; such a doctrine would equally militate with other plain provisions of the law, which clearly point out what passes by the decree of Bankruptcy to the assignee, when it passes, the extent of his, and the power of the court, and the nature of a purchaser's title. The 3d section vests all the property and the rights of property of the bankrupt in the assignee "from the time of the decree of bankruptcy;" he then stands in the position of the bankrupt "before and at the time of his bankruptcy declared;" standing in the place of the bankrupt, the measure of his rights of property is necessarily that of the assignee, who can take nothing which did not belong to the bankrupt when the law made the conveyance of all his rights of property. To the property which was mortgaged, the only right of the assignee was to redeem it; if it was bound by judgment or other lien, the bankrupt held it subject to its payment; he could sell the equity of redemption on the land itself, subject to the lien, but the purchaser could not hold without paying it. The assignee can have no other rights by force of the decree, which is a conveyance by operation of law, than he could acquire by the deed to the bankrupt; nor could the assignee convey a greater interest than the law devolved on him; or the court by their order make his or the estate of a purchaser under him, an absolute one discharged of the lien without payment. The 11th section is framed to meet this view of the 3d; by giving power to the court to authorize the assignee to redeem, and omitting any power to order a sale, it is manifestly intended merely to put the assignee in the place of the bankrupt, but in no other respect than enabling the assignee to appropriate the assets in his hands to disencumber the property by payment. Following the proviso in the 2d section, the 11th withholds the power of sale, as that might impair the lien; we thus find that it was deemed necessary to provide for the power of the assignee to redeem; it cannot have been intended that there should be by implication alone the higher power of sale, that in its exercise would take from the

creditor the protection given so carefully by the 2d section; the words of the 11th admit of no such construction, and even if they did, the court could not give it without overlooking the plain language of the 15th section. "And be it further enacted, that a copy of any decree of bankruptcy, and the appointment of assignee, as directed by the 3d section of this act, shall be recited in every deed of lands belonging to the bankrupt, sold and conveyed by any assignee under and by virtue of this act; and that such recital, together with a certified copy of such order, shall be full and complete evidence both of the bankruptcy and assignment therein recited, and supersede the necessity of every other proof of such bankruptcy and assignment to validate the said deed; and all deeds containing such recital, and supported by such proof, shall be as effectual to pass the title of the bankrupt of, in, and to the lands therein mentioned and described to the purchaser, as fully to all intents and purposes as if made by such bankrupt himself immediately before such order." Here is as precise and perfect a definition of the title which passes to the purchaser by a sale by the assignee under an order of court, or otherwise by virtue of the bankrupt act, with the effect thereof; "it is the same to all intents and purposes as if made by such bankrupt himself immediately before such order," in the words of the 15th section, with or without an order of sale. There is no express provision giving the court power to order a sale. The 3d section authorizes the assignee "to sell, manage, and dispose of the property, to sue for and defend the same, subject to the orders and directions of the court, as fully to all intents and purposes as if the same were vested in or might be exercised by such bankrupt before or at the time of his bankruptcy, declared as aforesaid." Connecting this with the 15th section, declaring the effect of a sale by an assignee, the answer to the second question is most obvious. Such sale has the same effect as if made by the bankrupt, and no other. It can divest no lien existing at the time of the decree or order declaring him a bankrupt. The word "order" in the 15th section refers either to that or to the order of sale; it is not material to which. If to the decree, then the deed of the assignee conveys only such title and estate as the bankrupt then had; if to the order of sale, then that is the time to which his right is referred. But in neither case can a sale divest a lien "existing before or at the time," or "immediately" before such order. Thus taken, the Bankrupt Act is an affirmance of the universal principle as laid down by the Supreme Court in Rankin *v.* Scott, 12 Wheaton, 179, "that a prior lien gives a prior claim, which is entitled to a prior satisfaction out of the subject it binds," unless it be defective, or the party holding it has done some act to postpone him; and that a purchaser is bound by the lien unless there is a prior act of the legislature to protect him from it. 12 Wheat. 80. The second question therefore is answered in the negative.