in *Atkinson* v. *Grindall*, in which case Williams, J., told the jury that to entitle the plaintiff to recover, the debtor must have had a bankruptcy in contemplation at the time of the payment; that it was not enough that he was in insolvent circumstances and contemplated insolvency, and the direction was held to have been correct. But, in addition to the support of the defendants' position derived from these authorities, here the debtor actually swore that he did not contemplate going into the Court. (Ritchie, C. J., referred to *Smith* v. *Cannan*; 2 E. & B.35. *Allen* v. *Bonnett*; L. R. 5 Ch. App. 577. In this case the defendants have subtracted so much of the insolvent's property as to make him more insolvent and giving no advantage to the bulk of the creditors. Where, as in the present case, the insolvent said to the defendants' agent, "If you take the goods, I must close my business," and the defendants take them, must they not both be held to contemplate bankruptcy?) If a transfer, no matter at what time given, may be set aside on the debtor going into the court, in every case where the assignment may be traced to the transfer, creditors would have no security. The burthen, it is submitted, is on the creditors to show that the transfer was made in contemplation of going into the court. [Ritchie, C. J., referred to *Stewart* v. *Moody*, 1 C. M. & R. 777; *Johnson* v. *Fesenmeyer*, 25 Beav. 88; *Stanger* v. *Wilkins*, 19 Beav. 626.]

Cur. adv. vult.

The judgment of the court was now delivered by:

Ritchie, C. J.—The first question in this case is, whether the plaintiff proved his appointment as assignee of the insolvent's estate. It was admitted that he was the Official, or Interim Assignee; and it therefore becomes immaterial whether there was any proper appointment by creditors or not; because by the 6th Section of "The Insolvent Act of 1869," it is declared that, "if no assignee be appointed at the meeting of the creditors; or if the assignee named refuses to act; or if no creditor attends at such meeting, the interim assignee shall be the assignee of the estate of the insolvent." If the creditors were not duly represented at the meeting, and no one was authorized to vote in the choice of an assignee, the plaintiff became assignee by virtue of the Act, and had a right to maintain the action.

The other question is, whether the Judge misdirected the jury in telling them that, under the 89th section of the Insolvent Act, the transfer of the goods by McGuiness to the defendant, would be void, if at that time McGuiness believed that the necessary result of making the transfer would be to close up his business, and prevent him from paying his other creditors; and that the words of the Act, "in contemplation of insolvency," did not necessarily mean contemplation of an assignment under the Insolvent Act.

The words of the section are:—"If any sale, deposit, pledge or transfer be made of any property, real or personal, by any person in contemplation of insolvency, by way of security for payment to any creditor; or if any property, real or personal, goods, effects, or valuable security, be given by way of payment by such person to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, &c., shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the assignee, in any court of competent jurisdiction; and if the same be made within thirty days next before the execution of a deed of assignment, or the issue of a writ of attachment under the Act, it shall be presumed to have been so made in contemplation of insolvency."

In this case the transfer of the goods was made more than thirty days before McGuiness executed the deed of assignment under the Act; therefore the onus was upon the plaintiff to prove that it was made in contemplation of insolvency; and we think he did prove it by the evidence of McGuiness, who told the defendants' clerk, at the time he took the goods, that he (McGuiness) would have to close his shop, as half his stock was gone. It was undisputed that McGuiness could not pay the defendants, who were pressing him, and required an immediate arrangement, either by payment, or return of the goods; and as McGuiness had then no means of payment, his only alternative was, to give up the goods to the defendants, the consequence of which was, that he had not property enough to pay his other creditors, and was obliged to close his business a few days afterwards. He said that he knew at that time that he could not pay his debts, but thought that if he had been allowed time till the summer, he could have paid them, or made arrangements which would have been satisfactory to all parties. He admitted, that a short time before he gave up the goods to the defendants, he had stated that unless business improved, he would be obliged to close; but he said that before he arranged to give up the goods to the defendants, he did not contemplate going into insol-