petition in appeal was filed there was no cause in the Court of Error and Appeal. He cited *Weir* v. *Matheson*, 1 Cooper's Chan. Cham. R. p. 81, and *Harvey* v. *Smith*, 2 E. & A. Reports.

Holmested in reply stated that the notice of filing the bond was entitled in the same way, and the style of cause had been copied from it, and therefore, he contended, the plaintiff was estopped from raising the objection.

The Judges' Secretary.—I think the objection to the entitling of the affidavits and notice of motion is fatal. The fact that the notice of filing the bond is styled in the Court of Error and Appeal, is no answer. The motion must be refused with costs.

INSOLVENCY CASE.

(Before His Honor Alexander Macdonald, Esq., Judge of the County of Wellington.)

Simpson v. Newton.

Insolvent Act 1864, *sec.* 5, *sub-sec.* 10—*Action against assignee for dividend.*

Held, that an action may be brought against an assignee in insolvency for a dividend on a duly collocated and advertised claim which has not been objected to.

[Guelph, January, 1868.]

This was an action brought in the Division Court at Guelph, against the defendant as official assignee of the estate of Hockin & Hockin.

The particulars of the plaintiff's claim were for $100 (abandoning the excess of $117.50 over the sum of $100) proved before the assignee in due form of law, for three months arrears of wages due from the insolvents to him, for money payable by the defendant, as such assignee, to the plaintiff, for money received by the defendant as assignee for the use of the plaintiff, &c.

From the evidence it appeared that the plaintiff had made and filed an affidavit on the 2nd of March, 1867, with the defendant, official assignee of Hockin & Hockin, in which he stated that the insolvents were indebted to him in the sum of $117.50, for work done by him as their hired servant.

The plaintiff's claim was collocated in the dividend sheet as a privileged claim for $117.50 for wages under the 10th sub-section of section 5 of the Insolvent Act, 1864. This dividend sheet was duly advertised. No objection was made by any creditor under the Insolvent Act.

The assignee objected to the claim, but he did nothing further than to inform the plaintiffs that it was objected to, until the plaintiffs applied for the amount of his claim, which was after the expiration of six days from the last publication of the advertisement, when the assignee required further particulars respecting the claim. A second affidavit was then furnished by the plaintiff, sworn on the 3rd of October. The assignee made an appointment in writing dated the 19th October, for the 21st October, to hear and examine the parties, and hear evidence as to the claim of the plaintiff. The plaintiff's solicitor, upon whom the appointment was served, attended and acted for him; but without further notice to the assignee this action was commenced.

It was objected for the defendant at the trial, that the defendant, as assignee, could not be sued for a dividend.

But it was held by the learned judge that such an action could be maintained, as the plaintiff had complied with the Act in proving his claim before the assignee, who collocated it on the dividend sheet as a privileged claim, and it having been duly advertised, and unobjected to by any creditor.

Evidence was taken to shew that the plaintiff was not entitled to hold his claim, subject to the plaintiff's objection that the assignee could not dispute it under the circumstances.

Macdonald, Co. J., having taken time to consider, delivered the following judgment:—

Sub-section 10 of section 5 of the Insolvent Act provides "that clerks and other persons in the employ of the insolvent, in and about his business or trade, shall be collocated in the dividend sheet by special privilege for any arrears of salary or wages due and unpaid to them at the time of the execution of the deeds of assignment, &c., not exceeding three months of such arrears."

Sub-section 11 provides that "as soon as a dividend sheet has been prepared, notice thereof shall be given by advertisement, and after the expiry of six judicial days from the day of the last publication of such advertisement, *all dividends* which have not been objected to within that period *shall be paid.*"

By the 16th sub-section of section 4, assignees are made subject to the summary jurisdiction of the court or judge in the same manner as other officers of the court are made subject to its jurisdiction, but a creditor's remedy by action is not taken away, as under the Bankruptcy Acts in England, wherein the remedy by petition for redress against an assignee who refuses to pay a dividend is substituted for the former remedy by action. It is there expressly provided that no action for any dividend shall be brought against assignees by a creditor who has proved under a commission.

By the interpretation clause the word "collocated" means ranked or placed in the dividend sheet for some dividend or sum of money, so that the amount for which the plaintiff was collocated for wages is included in the term dividend, and is subject to objection like any other dividend, and if not objected to by a creditor in the words of the Act "must be paid."

As there is nothing in our Insolvent Act to deprive a creditor of his action of debt for a dividend, in the face of the positive enactment that all dividends not objected to shall be paid, my opinion is that an assignee cannot resist the payment of a dividend on the ground that the debt was not due or entitled to rank as collocated on the dividend sheet.

In *Ex p. Hodges*, Buck. 524, it was held that an application by petition against an assignee could only be resisted by the assignee, on the same grounds that he might have availed himself of, as a defence to an action before the remedy by petition was instituted for the former remedy by action. On such a petition the assignee cannot dispute the debt, but he might under the Bankruptcy Acts make it the subject