A summons was obtained by *VanNorman*, on 14th December, 1864, on reading the plaint in the declaration, and the writ of attachment issued under the Insolvent Act of 1864, and the sheriff's return thereto, calling on the sheriff of the county of Brant to shew cause why he should not amend his return, and why he should not execute said writ, and make a proper return thereto. On the return of the summons the sheriff appeared in person, and contended that under the writ of attachment against the defendant as an absconding debtor (at the suit of Gardham) he was compelled to seize and hold the property; and that as the plaintiff in this suit was one of those who, by his affidavit, procured the issuing of Gardam's attachment, he is now estopped from seeking to set aside Gardham's writ.

Totten on the part of the creditors holding *fi. fas.*—The attachment under the Absconding Debtors Act, the *fi. fas.*, and the attachment under the Insolvent Act, are all issued from the same court—that is, the county court, and consequently they must take precedence according to their priority in point of time. By sec. 2, sub-sec. 7, and sec. 3, sub-sec. 22 of the Insolvent Act, the writ in insolvency can only affect the estate of the insolvent as it stood at the time of the issuing of the attachment under the Insolvent Act, and at that time the Insolvent had no estate —it was in *custodia legis*.

Griffin, in support of summons.—Sec. 3 Insolvent Act of 1864, makes the act of absconding an act of insolvency, otherwise any creditor taking out an attachment against an absconding debtor would defeat the Insolvent Act (*Notley* v. *Buck*, 8 B. & C. 160; Arch. Bkp. Law 176). Here the sheriff has notice of the insolvency proceedings before he pays over the money. The assignee has power to investigate fraudulent claims and settle priorities. An attachment against an absconding debtor is only the taking and holding the defendant's goods as a security for the plaintiff's claim, and the claims of such other attaching creditors under the Absconding Debtors Act as shall attach in due course of law. As to how creditors shall be dealt with who have securities, see sec. 5 sub-sec. 5 Insolvent Act.

JONES, Co. J.—I will refer to those sections of the Insolvent Act relating to the matter in question. Sec. 2, sub-sec. 7 provides that the assignment shall vest in the assignee the books of account and all the estate, &c., of the insolvent, *which he has* or may become entitled to at any time before his discharge, &c. And by sec. 3, sub-sec. 22, it is enacted that (in cases of compulsory liquidation like the present) by the effect of the appointment of the official assignee the whole estate and effects of the insolvent, *as existing at the date of the issue of the writ*, and which may accrue to him up to the time of his discharge, shall vest in the said official assignee, in the same manner and to the same extent and with the same exceptions as if a voluntary assignment had at that date been executed in his favor by the insolvent. Sec. 4, sub-sec. 9 provides that the assignee may in his own name sue for the recovery of all debts due to the insolvent, and in the prosecution and defence of suits may take all proceedings the insolvent could, and may intervene and represent the insolvent in all suits by or against him *which are pending at the time of his appointment*, and may have his name inserted in place of that of the insolvent.

Sec. 5, sub-sec. 4 enacts that in the preparation of the dividend sheet due regard shall be had to the rank and privilege of every creditor, *which rank and privilege, upon whatever they may be legally founded, shall not be disturbed by the provisions of this act.* And the 9th sub-sec. of the same sec. provides "that the costs incurred in suits against the insolvent after due notice of an assignment or of the issue of a writ of attachment in compulsory liquidation has been given according to the provisions of said act, shall rank upon the estate of the insolvent."

I had delayed giving judgment in this matter in hopes that the rules and regulations to be framed by the judges of the superior courts, as provided by the 18th sec. of the act would throw some light on the point in question; but although a tariff has been made, no rules have been published. In the English Act special provision is made for cases like the present. There the o heriff is not the officer who executes the process issued out of the bankrupt court, and the whole procedure in bankruptcy is so different from ours as to afford but little assistance in construing our statute. It is to be hoped that the legislature will, by proper amendments of the Insolvent Act, place the law in question on a more satisfactory footing, and also provide some method by which a set of rules and regulations for working the act may be framed, that shall be applicable to the whole of Upper Canada, instead of leaving it, as it is at present, for every county judge to frame separate rules for his own guidance.

I have had great difficulty in arriving at a decision in this matter that is satisfactory to myself; but after carefully examining the act and the cases as far as I have been able, I have come to the conclusion that notwithstanding the writs at law in the sheriff's hands against the defendant's property, his whole estate is subject to liquidation under the Insolvent Act, and that the attaching and execution creditors must come into that court, where they could no doubt claim such priority as they would be entitled to, on account of the proceedings that they have taken at law. As far as the executions are concerned, there can be no doubt, if the judgments are regular, and the writs are properly in the sheriff's hands before the issue of the attachment from the insolvent court, that they would have a priority, and would require to be first satisfied out of the insolvent's estate. But as the whole property, real and personal, of the insolvent is held by these writs, and this property may, for aught we know, be far more than sufficient to satisfy these writs, and as it is impossible to separate as much as may be sufficient to satisfy these executions from the residue of the insolvent's estate, the only course in my opinion that can be adopted is, for the whole estate to pass into the hands of the assignee, who would be obliged to give the execution creditors that priority that they would be entitled to. This is also the course that I think would be suggested by sec. 5, sub-secs. 4 and 9, above cited, and the other clauses of the act above referred to are reconcilable with the assignee giving to these creditors their priority in the distribution of the assets of the estate.