cited section 3, sub-sections 3 and 4, and Arch. Prac. 12th edition, 1472; *Parker* v. *Howell*, 7 U. C. L. J., 209. 4th. That the informality or insufficiency complained of should be clearly set out on the affidavits, petition and summons, and cited section 11, sub-section 13, of the Insolvent Act, and Arch. Prac. 12 ed. 1476 and 1475. 5th. That the mode whereby a creditor is to obtain rights under his execution are provided for by the Insolvency amendment Act of 1865, section 16, by petition, signified to the assignee and others interested. And lastly, as to the debt which constituted the plaintiff a creditor, in so far as the note of McPherson & Glasgow was concerned, that there is an implied promise to pay the plaintiff on the part of the defendants, so soon as an act of insolvency was committed.

Ellis, in reply, insisted that there was an implied authority for the petitioner to move to set aside the proceedings under sub-section 10 of section 3, the words "*any petition*," &c., also under the amended act, 1865, section 16, and cited *Parker* v. *McCrae*, 7 U. C. C. P. 124; and as to the liability of defendants for money paid by plaintiff, as their surety, cited *Andrew* v. *Hancock*, 5 E. C. L. R. 490; *Sprague* v. *Hammond*, 6 E. C. L. R. 37; *Gibson* v. *Bruce*, 44 E. C. L. R 214; *Howlby* v. *Bell*, 54 E. C. L. R. 284.

On the same day the following judgment was delivered by

HUGHES, Co.J.—As to the service of the petition upon plaintiff's attorney, I consider it was quite sufficient to give the plaintiff one clear day's notice of it, to serve it as it was alleged to have been served on the evening of Saturday, returnable on Tuesday morning, within the meaning of the 9th sub-section of the 11th section, in the absence of any rule of court requiring papers in insolvency to be served before a particular hour. I do not know, and it was not shown, at what hour the petition and summons were served, nor is it shown by any affidavit that the copy served was not a true copy. The affidavit put in for the petitioner shews that Mr. Charles Ermatinger served them on Saturday, the 10th October, instant. Mr. McLean pointed out, in the copy of the petition he produced, some trifling and unimportant verbal defects and clerical errors, (just such as a clerk recently articled, and unaccustomed to copy legal documents, often makes.) but which in this case were not calculated to mislead; it was a sufficiently perfected copy to enable the plaintiff's attorney fully to understand what the purport of the petition and application were. I therefore overrule that objection, for he received all the notice that was necessary.

As to the 3rd objection to the petition, I have met with some difficulty in satisfying myself, in view of there being no provision authorising the setting aside proceedings for irregularity at the instance of any other than the defendant. I know that it was at one time doubted whether a judge of a District Court, in vacation, had authority to set aside an interlocutory judgment, or give time to plead, because the District Court Act then existing, which constituted the court, and its practice did not specially prescribe such authority, and therefore the defect was subsequently supplied by the passing of 9th Vic. cap. 2, of the statutes of Canada. The judge of an inferior court is always held by the superior courts to be confined to the powers and jurisdiction conferred upon him by statute.

There is no doubt whatever that were this a proceeding which I could amend, I have full power conferred upon me by the 14th sub-section of the 11th section of the Act of 1864. On the other hand, it has been urged that the proceeding is so manifestly without foundation, because there is not a sufficient compliance with the requirements of the 7th sub-section of section 3 (Act 1864), that any court must be held to have such an inherent jurisdiction as to require the law and practice of the court to be substantially complied with.

The judge of an inferior court cannot grant a new trial on the merits unless the statute gives him the power to do so: 1 Mosely on Inf. Courts, 283, but it has been held that if a judgment had been obtained by a fraudulent surprise, the judge may grant a new trial, *Bayley* v. *Bourne*, 1 Str. 392; so it has been held that the judge of an inferior court may grant a new trial for matters of irregularity, as where proceedings have been contrary to the practice and rules of the court; *Ib.*; and *vide Jewell* v. *Hill*, 1 Str. 499.

I find it laid down in Archbold's Bankruptcy Practice, 10 Ed. 378, for certain irregularities the court will annul the fiat, as for a misdescription of a place of residence of the petitioning creditor, but this was done by the Court of Review in Bankruptcy (see same Vol., p. 376). There is no Court of Review for Insolvency proceedings here, (as there used to be under the Bankrupt Act,) excepting in the way of an appeal from the decision of the judge, so that unless the judge has the power to set aside proceedings for irregularity it cannot be done at all, no matter how irregular they may be.

The strict wording of the 12th sub-section of the 3rd section gives no more right to the defendant than to this petitioner to move the judge, nor power to the judge to set aside proceedings for irregularity; the sole ground upon which defendant can petition to have the proceedings set aside is on the ground that his estate has not become subject to compulsory liquidation, which involves merely in strictness an enquiry upon the merits.

I apprehend, however, that the power to control and enforce the practice of the court must exist somewhere, and must be primarily in the judge, subject to an appeal: that is what I must, therefore, hold at present, until I am better advised, and that the 7th section of the amended Act of 1865, with reference to the "*contesting of proceedings*," applies to the different modes by which proceedings in Insolvency might be contested, as they are in England, by actions of trespass and trover, and the like, notwithstanding proceedings of adjudication in the Court of Bankruptcy there—and which, but for that 7th section, might be instituted here for the same purpose. Here, that section makes all such proceedings conclusive for all purposes after a certain time, which, to my mind, argues in favor of, instead of against the application of this petitioner, and of all such applications by those who may be interested in the proceedings or in the defendants' estate.