The requirements of sec. 3, sub-sec. 7, are, 1st. That the creditor shall satisfy the judge by his own affidavit, or that of his agent, that *he* is a creditor for a sum of not less than $200. 2nd. He must shew by the affidavits of two credible persons, such facts and circumstances as satisfy such judge, that the debtor is insolvent within the meaning of the Act, and that his estate has become subject to compulsory liquidation.

The statements in the affidavits as to the facts and circumstances, must, I think, concur in relating to some one or more of the acts of insolvency, designated in the different classes of cases pointed out in the Act. As subjecting the estate of the debtor to compulsory liquidation, see sub sec. 8 of sec. 3.

It was admitted on the argument, as I understood, that the proceedings of the plaintiffs were founded on sub-sec. 6 of sec. 3, and that the act relied upon as subjecting the estate of the defendants to compulsory liquidation, rested upon the facts and circumstances of the defendants being possessed of a considerable quantity of grain in a warehouse in the Town of Woodstock, which they were immediately about to remove and dispose of with intent and design to defraud the plaintiffs. Now such being the case, the affidavit of Mr. Park to support the act of insolvency relied upon for these proceedings is, I think, insufficient, as his statement of the facts and circumstances has not been corroborated, as it seems to me the act requires, by the affidavit of another credible person. The evidence then being insufficient as to the act of insolvency relied upon, the adjudication cannot be sustained, and the attachment must be superseded. I cite as authorities upon this point, *In re Gillespie*, a bankrupt, 2 U. C. Jurist 2; *In re Rose*, a bankrupt, Ib. 14, in addition to the authorities quoted by Mr. Beard.

Various other objections have been raised as to the validity of the adjudication and the writ of attachment, and some of them are, I am constrained to say, very formidable. Entertaining the views I have endeavoured to express, as to the right of the defendants to have this attachment set aside, I need not I think allude to all of the objections urged, but there are some of them that call for particular observation, on account of the important interests involved in this case. The petitioners, besides disputing any act of insolvency committed by them, impeach the validity of the plaintiffs claim on several grounds, and some of those grounds are entitled to the most attentive consideration.

The objection that the plaintiffs cannot maintain this suit—1st. Because the defendants liability on the bills of exchange was merged in the mortgage given by the defendant Eaton 30th November, 1866, reciting these bills, 2nd. Because the proviso in the mortgage, with a covenant for payment, extends the time of payment of these bills. 3rd. Because the plaintiffs are creditors holding security and are only entitled to prove on the estate for the difference between the value of the security and the amount of their claim,—seems to me to be unanswered. Undoubtedly the plaintiffs in their corporate capacity may take mortgages on real and personal estate by way of further or additional security for debts contracted to the bank in the course of its dealings, but the enactments conferring upon banks such privileges, only places them on a footing, in these respects, with private persons, and do not, to favor them, abrogate that general rule of law which prohibits inconsistent remedies on distinct securities of different degrees for the same debt. The same principle of law governs all transactions.

The question then is, whether upon the facts appearing as stated, the taking of the mortgage from the defendant Eaton for the amount intended to be secured to the bank by the bills of the defendants attached to the mortgage security, does not extinguish the claim of the plaintiffs upon the bills; the debt in both cases being identical. I have not failed to notice that only two of the bills were due, when the mortgage was given.

The doctrine with regard to such questions appears to me to be pretty clear, and I think the authority cited, *Price* v. *Moulton*, 10 C. B. 573, and *Mattheson* v. *Brouse*, 1 U. C. Q. B. 272, govern this case. In the former, Maule, J., after remarking on the facts of the case before the court, says, "I think it is quite clear that a man cannot have a remedy by covenant and by assumpsit, for the same debt, the two are wholly incompatible and cannot co-exist. If the promise was made before the covenant, the latter must prevail. *The intention of the parties has nothing to do with that.* I entirely agree with the *dictum* of Park, B., in the case of the *Norfolk Railway Co.* v. *McNamara*, when he says, if the bond or covenant had been for the identical debt, the plea would have been a good answer without the additional allegation that the instrument was given in satisfaction." The policy of the law is that there shall not be two subsisting remedies, one upon the covenant and another upon the simple contract, by the same person against the same person for the same demand. And in the latter case, Robinson, C. J., in delivering the judgment of the court, says, "If B. on the 11th of November had made a note to M. for the sum due him, payable on the 14th February, and had afterwards given him a mortgage for the same debt, with a covenant to pay the money on the 4th of March, it is clear that the debt due on the simple contract would be merged in the higher security, and there would no longer remain a remedy to M. on the note. But I see no substantial difference between that case and the present."

And I may now remark that I can see no substantial difference between the case just cited and the present. Then, again, I think the plaintiffs are seeking too much. They, being creditors holding security, could only, according to the rules of law in England and which should prevail here, proceed and rank on the estate for the difference between the value of the security and the amount of the claim.

What that difference would be, would be rather difficult to determine upon the contradictory statements contained in the affidavits as to the value of the property. I may very possibly be wrong in the conclusions I have come to, and if so I shall only be too glad to be corrected by an appeal to a superior court.

As I do not know what has been done since the writ of attachment was issued that may effect this property, the order will be to set aside the *fiat* and the writ of attachment, see *Smalcoun* v. *Oliver*, 8 Jurist 606.