and upon application for discharge, of which they also had notice, examine insolvent if they desired to do so: that insolvent could not be prejudiced by the omission or neglect of the assignee who might possibly be one of the principal creditors, and so, naturally opposed to insolvent's being discharged.

The learned judge of the County Court held that both objections were good, and refused the discharge. Upon this the insolvent applied for leave to appeal, which was granted by Mr. Justice Adam Wilson. The case was subsequently heard in the Court of Chancery, by way of petition.

*J. C. Hamilton*, for the appellant, argued that the only grounds which any creditor could take on the application for discharge under section nine, sub-section ten, were those set forth in preceding sub-section six, which does not include the grounds acted on by the learned Judge. As to the second reason of the Judge, he argued that could not be valid under our law, which expressly applies in Ontario to all persons, whether traders or not, and that, consequently the decisions under the English bankruptcy law, prior to 1862, could not apply. It is stated that this was expressly so held by the late Judge of the County of York (The Hon. S. B. Harrison), in the case of Robert H. Brett, an Insolvent.

The following authorities were also cited: *Re Holt* and *Gray*, 13 Grant, 568; *Ex parte Glass* and *Elliott*; *Re Boswell*, 6 L T Rep. N. S 407; *Re Parr*, 17 U. C. C. P. 621; *Ex parte Mitchell*, 1 DeGex Bankruptcy Cases, 257; *Re Williams*, 9 L. T. N. S. 358.

VanKoughnet, C.—I think the County Court Judge wrong in the reasons assigned by his order refusing the certificate of discharge. The assignee's neglect of duty is no reason for depriving the debtor of his discharge. Any of the creditors could have applied to the Assignee, or to the Judge, to compel the Assignee to call a meeting for the examination of the Insolvent; and, I apprehend, this can yet be done, if the Assignee or Judge thinks it proper.

This want of assets does not appear to me to be, in itself, a sufficient reason for refusing the discharge.

Order of Judge reversed, and matter remitted to him to deal with in accordance herewith.*

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### Hillborn v. Mills et al.

(In the County Court of the County of Elgin—Before His Honor Judge Hughes.)

*Insolvency—Practice—Service of Papers—Irregularity, who may object to—Setting aside proceedings—Affirmation by Quaker—Taken before plaintiff's Attorney—Plaintiff, a surety and joint maker, taking up a note before due, so as to take proceedings in insolvency against joint maker.*

[St. Thomas, 6th October, 1868.]

The plaintiff was surety for the defendants upon a promissory note given to McPherson & Co., for $195, which was not yet payable. The defendants owed the plaintiff a debt of $50, and in order to make up a sufficient sum whereon to found an attachment against the defendants, who had absconded, the plaintiff paid the note to McPherson & Co, and then made affirmation to his debt amounting in the aggregate to a sufficient sum within the meaning of the 7th sub-section of the 3rd section. The plaintiff was a Quaker, and his affirmation commenced as follows:—"I, William Dillon Hillborn, of the township of Yarmouth, &c, do solemnly, sincerely and truly declare and affirm that I am one of the society called Quakers. I am the plaintiff in this cause. The defendants are indebted to me in a sum of $385, currency, which sum is made up as follows," &c. Then followed the detail, and the particular note of McPherson & Co. is thus described: "A promissory note for $195, including interest, dated 24th April last past, *and payable on the 1st November next*, to McPherson, Glasgow & Co., or order, which said note I signed as a joint and several maker with the said defendants, but only as a surety for them, the amount of which note I have paid to the said McPherson, Glasgow & Co.," &c., &c

The attachment issued in the usual way to the sheriff, who seized all the property of the defendants, which was already in the hands of the bailiff of the Division Court, under seizure upon executions issued upon judgments in that court against the defendants, at the suit of one Backhouse and others, judgment creditors.

Mr. Ellis, attorney for Jugurtha Backhouse, one of the judgment creditors, presented a petition to the judge of the court, setting forth, 1st, his judgment and execution; 2nd, that the affidavits upon which the fiat for the attachment was issued were insufficient, and the proceedings thereon irregular, because, 1st, the plaintiff, being a Quaker, had not complied with the 1st section of the Con. Stat. of U. C., cap. 32, in first affirming that he was a Quaker, and, 2ndly, in affirming to the contents of the affirmation in the form of words prescribed by the statute: "I, A. B, do solemnly, sincerely and truly declare and affirm that," &c.; and that, in the absence of observing the form prescribed, the affirmation could not have the force and effect under the Insolvent Act of an affidavit, as required in the 7th sub-section of the 3rd section; and because, 2nd, the affirmation, such as it was, was sworn before the plaintiff's attorney; and because, 3rd, the affidavits of the other witnesses, proving the fact of defendants' insolvency, bore date before the plaintiff's so-called affirmation; and because, 4th, there was no sufficient debt to constitute plaintiff a creditor, so as to justify the adoption of these proceedings, by which defendants' estate was sought to be placed in compulsory liquidation. There were other objections taken to the proceedings, which it is not necessary to enumerate.

A summons was granted in the usual way for plaintiff or his attorney to show cause why the proceedings should not be set aside. The summons and petition were served on Saturday, the 10th October, returnable on the next Tuesday forenoon, the 13th October.

On Tuesday, the 13th October, Mr. McLean, attorney for plaintiff, attended to show cause, and objected, 1st, that the service of summons was insufficient under section 11, sub-section 9, of the Insolvent Act, which requires one clear day's notice, and cited the case of *Leffur* v. *Pitcher*, 1 Dow. N. S. 767; *Francis* v. *Beach*, 9 U. C. L. J., 266. 2nd. That the copy served was not a true copy. 3rd. That the petitioner here cannot, and that none but defendants can object to any irregularity in the proceedings, and

* The case on appeal is reported in 15 U. C. Chan. Rep. 196.—Eds. L. J.