

Insolvency Case.]

ROWAN V. HARRISON.

[New Bruns. Rep.]

not become due at the date of such meeting ; the particulars of any negotiable paper bearing his name, the holders of which the interim assignee shall be unable to ascertain, the amount due to each creditor, *and also any contingent liabilities, describing the same.*" The insolvent is to assist in the preparation of this statement, and to make a declaration, under oath, stating whether such statement and schedule are correct, and, if incorrect, in what particulars.

The 56th section declares what claims shall rank on the estate of an insolvent, viz.: "All debts due and payable by the insolvent at the time of the execution of the deed of assignment, or of the issue of the writ of attachment, and all debts due, but not then actually payable, subject to rebate of interest, shall have the right to rank upon the estate of the insolvent."

By section 57, "If any creditor of the insolvent claims upon a contract dependent upon a condition or contingency which does not happen previous to the declaration of the first dividend, a dividend shall be reserved upon the amount of such conditional or contingent claim, until the condition or contingency is determined ; but if it be made to appear to the judge that such reserve will probably retain the estate open for an undue length of time, he may, unless an estimate of the value thereof be agreed to between the claimant and the assignee, order the assignee to make an award upon the value of such contingent or conditional claim ; and thereupon the assignee shall make an award, &c., and in every such case, the value so established or agreed to, shall be ranked upon as a debt payable absolutely."

By the 69th section, the assignee is authorised, if it appears to him that the insolvent has creditors who have not taken the proceedings requisite to entitle them to be collocated, to reserve dividends for such creditors according to the nature of their claims, and to notify them of such reserve ; and if they do not file their claims and apply for such dividends before the declaration of the last dividend of the estate, the dividends reserved shall form part of such last dividend.

The 98th section declares what liabilities the insolvent shall be discharged from by the deed of composition. It shall absolutely free and discharge him "from all liabilities whatsoever (except such as are hereinafter specially excepted), existing against him and provable against his estate, which are mentioned or set forth in the statement of his affairs exhibited at the first meeting of his creditors, or which are shown by any supplementary list of creditors

furnished by the insolvent previous to such discharge, and in time to permit of the creditors therein mentioned obtaining the same dividend as other creditors upon his estate, or which appear by any claim subsequently furnished to the assignee, whether such debts be exigible or not at the time of his insolvency, and whether the liability for them be direct or indirect." The liabilities referred to in this section as being specially excepted, are those mentioned in the 100th section, and do not affect the present case.

The question is, whether the liability of an underwriter, before a loss takes place, is such a contingent liability as is contemplated by the Act ; whether it is such a liability as the assignee was bound to include in the statement which he exhibited to the creditors. It certainly does not come within the description of a debt due, but not actually payable, which, by the 56th section, is entitled to rank on the estate of the insolvent. Neither does it come within the 57th section, for, until a loss happens, there is no person entitled to claim anything—it is uncertain whether there ever will be any liability ; and therefore it would be impossible for the assignee to estimate the value of such a contingent liability under that section. For the same reason, the 69th section is inapplicable ; because, until there is a loss, there cannot be a creditor, and consequently nothing on which the assignee can base the reservation of a dividend.

The cases arising under the English Bankrupt Acts, as to the discharge of a bankrupt from contingent liabilities, are numerous ; and they all go to establish the point contended for by the plaintiff here, namely, that a liability which may perhaps never attach, cannot be proved under a commission of bankruptcy, and, of course, is not discharged by the certificate ; because debts provable under the commission and debts to be discharged by the certificate are convertible terms : *Bamford v. Burrell*, 2 B. & P. 1.

In *Alsop v. Price*, 1 Doug. 160, which was an action against a surety on a bond, which was not forfeited till after the bankruptcy of the defendant, Lord MANSFIELD, delivering the judgment of the Court, said : "We think this was not a debt which could have been proved under the commission ; for the defendant was not originally the debtor. It was not a debt to be paid by him *in futuro*, at all events, but depended on the acts of the principal, viz., whether he did or did not comply with the stipulations in the condition of the bond."